No. 14-857

In the Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,
v.
JOSE GOMEZ,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR PETITIONER

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Petitioner Campbell-Ewald Company is a wholly-owned subsidiary of The Interpublic Group of Companies, Inc. No other person or publicly held corporation owns 10% or more of the stock of Campbell-Ewald Company.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 768 F.3d 871. The order of the district court denying Campbell-Ewald Company's motion to dismiss (*id.* at 35a-51a) is reported at 805 F. Supp. 2d 923. The order of the district court granting summary judgment for Campbell-Ewald (*id.* at 22a-34a) is unreported, but available at 2013 WL 655237.

JURISDICTION

The court of appeals entered judgment on September 19, 2014. Pet. App. 1a-2a. On December 8, 2014, Justice Kennedy granted a timely application to extend the time within which to file a petition for certiorari to January 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, Section 2, of the U.S. Constitution and pertinent provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, are set forth in the Petition Appendix at 64a-68a.

INTRODUCTION

The armed services are one of government's most vital assets, and recruiting is one of the armed services' most important missions. The U.S. Navy engaged the petitioner in this case, Campbell-Ewald, to assist the Navy in harnessing 21st century communications technology, including mobile marketing and text messaging, to advance the Navy's critical recruiting mission. The Navy engaged Campbell Ewald to act on its behalf, and the Navy, in turn, oversaw and approved Campbell-Ewald's work. As the Navy's

representative put it, "Campbell-Ewald doesn't do anything without the approval of the United States Navy Recruiting Command or somebody in it." JA 47.

As part of this campaign, the Navy sent the following text message to thousands of individuals on an "opt-in" list prepared by a third party (MindMatics LLC), whose hiring the Navy also approved:

> Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [number].

Pet. App. 2a. Plaintiff claims he never consented to receive the message. Instead of brushing it off, he filed a class action lawsuit under the Telephone Consumer Protection Act of 1991 (TCPA), seeking hundreds of millions of dollars on behalf of himself and a putative nationwide class of "other unconsenting recipients of the Navy's recruiting text messages." *Id.* at 3a. But since the Navy itself indisputably is not amenable to such an action, he sued Campbell-Ewald instead.

Before any class was certified, and before Plaintiff had even moved for class certification, Campbell-Ewald sought to resolve the matter by simply making Plaintiff an offer of complete relief on his TCPA claim—including an offer of "prompt payment" of $1503, more than three times the statutory damages for an unsolicited text. Pet. App. 58a-59a. Plaintiff refused to accept Campbell-Ewald's tender and, instead, insisted that he was entitled to litigate the class action.

This case presents two overarching issues. First, whether Campbell-Ewald's offer to give Plaintiff all the relief he could secure from a judgment in his favor before any class was certified eliminates any justiciable controversy as to both Plaintiff's individual claim and

his class claim. And second, if this case is justiciable, whether Campbell-Ewald enjoys derivative sovereign immunity from suit, since it is undisputed that Plaintiff could not have sued the Navy if it had carried out the text messaging campaign itself and the Navy directly oversaw and approved Campbell-Ewald's work. The Ninth Circuit answered both questions in the negative and ordered that the action should proceed.

STATEMENT OF THE CASE

A. Statutory Background

The TCPA prohibits any "person" from making a "call" using an automated dialing system to any mobile telephone number, except in cases of emergency or with the consent of the "called party." 47 U.S.C. § 227(b)(1). "Person" includes any "individual, partnership, association, joint-stock company, trust, or corporation." *Id.* § 153(39). The Act provides such persons with a right of action to recover $500 per violation, which may be trebled for knowing or willful violations. *See id.* § 227(b)(3)(B).

Congress passed the TCPA in response to consumers' complaints concerning the "'proliferation of . . . [telemarketing] calls.'" *Mims v. Arrow Fin. Servs., LLC*, 132 S. Ct. 740, 745 (2012) (quotation omitted)). Senator Hollings, the TCPA's sponsor, sought to provide consumers with a right of action "'in State court . . . , preferably in small claims court.'" *Id.* at 752 (quoting 137 Cong. Rec. 30,821 (1991)). He hoped that the bill would "'allow the consumer to appear before the court without an attorney. The amount of damages in this legislation is set to be fair to both the consumer and the telemarketer. However, it would defeat the purpose of the bill if the attorneys' costs to consumers

of bringing an action were greater than the potential damages.'" *Id.* (quoting 137 Cong. Rec. at 30,821-22). In the years since, the TCPA has mushroomed into a litigation juggernaut that scarcely could have been foreseen by the Congress that passed it.

Today a "cottage industry of attorneys" is responsible for a rising tide of class action suits under the TCPA, turning an unwanted message into the potential for an attorney's fee or settlement bonanza.[1] TCPA class actions have extracted multi-million dollar settlements from banks, credit agencies, universities, and other leading companies, but more often than not the winners are the class action lawyers instead of the recipients of unwanted messages. In 2014, for example, the average consumer received about $4 from a TCPA class-action settlement, while plaintiffs' lawyers averaged about $2.4 million. *See* Adonis Hoffman, *Sorry, Wrong Number, Now Pay Up*, Wall St. J., June 15, 2015; *see also* U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 4 (2013).

B. Plaintiff's Lawsuit

Founded in 1911, Campbell-Ewald is one of the nation's leading communications and marketing

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[1] Yuri R. Linetsky, *Protection of "Innocent Lawbreakers": Striking the Right Balance in the Private Enforcement of the Anti "Junk Fax" Provisions of the Telephone Consumer Protection Act*, 90 Neb. L. Rev. 70, 74 (2011); *see also* Paul F. Corcoran et al., *The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9, 9, (2014) (noting dramatic increase of TCPA class actions in recent years).

companies. In 2006, as part of an ongoing contract with the Navy, the Navy directed Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology to increase awareness of the Navy and to encourage potential recruits to contact the Navy or visit its websites. *See* JA 84-88, 169-75; *see also* C.A.E.R. 557, 561-67, 671-72, 722-66. The contract expressly provided for the Navy's oversight of Campbell-Ewald's work and required the Navy to approve all deliverables provided by Campbell-Ewald. JA 91; *see also* C.A.E.R. 696, 699-704, 718-19. The contract also provided that Campbell-Ewald could use subcontractors to execute its responsibilities. JA 87-88, 116-17. During the performance of the contract, the Navy was "in constant contact with Campbell-Ewald on a daily basis" for input or approval. *Id.* at 47.

After the Navy authorized funding to explore new media opportunities for the campaign, including text messaging, Campbell-Ewald submitted a proposed media plan that included an effort to expand the Navy's outreach via text messaging. JA 176-82, 232-34; *see also* C.A.E.R. 400-04, 625, 759-64, 766. The Navy "liked the idea of contacting people via text message" and approved the plan. JA 34. To execute this plan, Campbell-Ewald contracted with a separate company, MindMatics LLC, to deliver the "'Navy branded SMS (text) direct mobile "push" program to the cell phones of 150,000 Adults 18–24 from an opt-in list of over 3 million.'" Pet. App. 25a (citation omitted); *see* JA 182, 186; C.A.E.R. 408. MindMatics was responsible for compiling the opt-in list of recipients and actually sending the text messages. JA 183-89.

Together, Campbell-Ewald and the Navy developed the "Destined for something big?" text message—

quoted above—that led to this lawsuit. *See id.* at 226, 232-33. The Navy revised and specifically approved the content of the message. *Id.* at 41, 72. MindMatics "handled the deployment, transmission and delivery of the text messages" based on an opt-in list for mobile numbers that MindMatics (alone) developed. Pet. App. 26a; *see* JA 227; C.A.E.R. 412. The Navy was specifically informed that MindMatics was responsible for the opt-in list, JA 179, 182, 185, 226, 232-33, and the Navy authorized MindMatics to send the text messages. *Id.* at 72-74, 51-52, 232-33.

Plaintiff claims that he received this text message in May 2006 as part of the Navy's recruitment campaign, and that he never consented to receive it. Pet. App. 3a, 36a. Three years and ten months later, Plaintiff filed an action under the TCPA against Campbell-Ewald—but not the Navy or MindMatics. *Id.* at 2a-3a; *see* JA 16-24. In addition, Plaintiff sought to represent a putative nationwide class of "other unconsenting recipients of the Navy's recruiting messages" under Federal Rule of Civil Procedure 23. Pet. App. 3a. Plaintiff's complaint sought damages for the alleged TCPA violation on an individual and class-wide basis, all told seeking hundreds of millions of dollars. *Id.* at 2a, 22a; *see* JA 16-24.

C. Campbell-Ewald's Offers Of Complete Relief And District Court Proceedings

Before any class was certified and before Plaintiff even moved for certification, Campbell-Ewald made an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (Pet. App. 52a-56a) as well as a separate tender (*id.* at 57a-61a) that afforded Plaintiff complete relief on his TCPA claim. The offers provided for (1) the payment of $1503 for each unsolicited text message

that Plaintiff allegedly received (more than three times the statutory amount of $500 per violation); (2) the payment of all reasonable costs that Plaintiff would recover if he were to prevail; and (3) the stipulation to an injunction prohibiting Campbell-Ewald from engaging in the alleged wrongs. The offers made explicit that Campbell-Ewald would "arrange for prompt payment." *Id.* at 38a-39a, 52a-61a.

Plaintiff did not accept these offers. *Id.* at 3a. Instead, he filed a motion to strike the Rule 68 offer and a motion for class certification. *Id.* at 39a. Campbell-Ewald moved to dismiss the action for lack of jurisdiction, arguing that its offers of complete relief mooted both Plaintiff's individual and class claims under basic Article III principles. *Id.* at 39a-41a.

The district court denied Campbell-Ewald's motion. *Id.* at 35a. The court found that Campbell-Ewald's offers would have "fully satisfied" Plaintiff's claim. *Id.* at 40a. But the court believed that Plaintiff's motion for class certification (filed after Campbell-Ewald's offers of full relief) could "relat[e] back" to the filing of the class complaint (before Campbell-Ewald had made its offers of complete relief). *Id.* at 47a-49a.

After a period of discovery, Campbell-Ewald moved for summary judgment, arguing, *inter alia*, that it was entitled to derivative sovereign immunity. Campbell-Ewald explained that, under this Court's decision in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), it could not be held liable for an alleged TCPA violation for which the Navy itself could not be held liable, given that Campbell-Ewald was simply carrying out validly conferred authority under a contract with the Navy and that the Navy closely supervised and approved Campbell-Ewald's actions in carrying out the

contract. Pet. App. 30a. The district court granted Campbell-Ewald's motion. *Id.* at 33a-34a.

The district court explained that it is undisputed that "the Navy cannot be sued for violation of the TCPA" because the United States has not waived its sovereign immunity from suit under the TCPA. *Id.* at 30a. In addition, the court found that Plaintiff "points to no evidence indicating that [Campbell-Ewald] exceeded the scope of its authority to send the text message at issue." *Id.* at 32a. To the contrary, the court explained, the "undisputed" facts show that "[Campbell-Ewald] acted at the Navy's direction to effectuate [the] text message recruitment campaign." *Id.* at 33a. Accordingly, the court concluded that, "[a]cting as a Navy contractor, [Campbell-Ewald] is immune from liability under the doctrine of derivative sovereign immunity." *Id.* at 33a-34a.

D. Ninth Circuit Proceedings

A month after Plaintiff appealed the grant of summary judgment, this Court decided *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), in which it held that an unaccepted offer of full relief mooted a collective action under the Fair Labor Standards Act (FLSA). The Court held that, under the "straightforward application of well-settled mootness principles," a collective FLSA action becomes moot when the plaintiff's individual claim becomes moot "because [the plaintiff] lack[s] any personal interest in representing others in this action." *Id.* at 1529.

Campbell-Ewald then moved to dismiss Plaintiff's appeal for lack of jurisdiction. C-E Mot. 2 (9th Cir. June 24, 2013), ECF No. 8. As Campbell-Ewald explained (*id.* at 14), *Genesis Healthcare* corrected the

reasoning of prior Ninth Circuit precedent—such as *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011)—holding that an offer of complete relief did not moot a class claim. The Ninth Circuit denied Campbell-Ewald's motion without prejudice to renewing the arguments in its answering brief. Order (Aug. 20, 2013), ECF No. 17.

In September 2014, the Ninth Circuit reversed the district court's grant of summary judgment for Campbell-Ewald. Starting with Campbell-Ewald's jurisdictional arguments, the court held that neither Plaintiff's individual claim nor the class claim was mooted by Campbell-Ewald's offers of complete relief. Pet. App. 4a-7a. Following the dissent in *Genesis Healthcare* and the Ninth Circuit's own decisions in *Pitts* and *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013), the court reasoned that an *unaccepted* offer that would fully satisfy a plaintiff's claim is insufficient to render either an individual or class claim moot. Pet. App. 5a.

On the merits, the Ninth Circuit held that this Court's decision in *Yearsley* is "not applicable." *Id.* at 15a. The court reasoned that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." *Id.* In addition, the court observed that "[the Ninth Circuit], in particular, has rarely allowed use of the defense, and only in the context of property damage resulting from public works projects." *Id.* at 16a. According to the court, there was thus no basis for applying "the [derivative sovereign immunity] doctrine to the present dispute." *Id.* at 16a-17a. The court disposed of Campbell-Ewald's remaining arguments and remanded for further proceedings. *Id.* at 20a.

This Court granted certiorari.

SUMMARY OF ARGUMENT

I. The Ninth Circuit's holding that this lawsuit should proceed despite Campbell-Ewald's offer of complete relief contravenes Article III of the Constitution and this Court's precedents. Article III's case-or-controversy requirement demands adversity between the parties and a plaintiff with a personal stake in the outcome of the case at all times. In this case, Plaintiff's complaint sought relief for an alleged violation of the TCPA based on receipt of a text message. Campbell-Ewald responded by making an offer of judgment and a separate offer that—as the district court found—would have "fully satisfied" Plaintiff's individual claim. Pet. App. 40a. That offer and tender ended a justiciable controversy.

Offering a plaintiff everything he could secure through a judgment in his favor eliminates both the requisite adversity and personal stake, and thus eliminates an Article III case and controversy. As this Court long ago recognized, a plaintiff's refusal to accept such a tender does not compel a different conclusion. *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 313-14 (1893). Article III is neither enlarged nor limited by contract law principles, and courts are not empowered to expound on the law when a defendant has already offered a plaintiff the result he seeks. Once a court has determined that a defendant's tender is for complete relief—as the district court did here—the case should be dismissed as moot. But a court also has authority to dispose of the case by entering judgment according to the defendant's offer of complete relief.

The presence of a class claim does not remedy that jurisdictional defect. A class only acquires a separate legal status if and when the class has been certified by the district court. Because Campbell-Ewald made its tender of complete relief before any class was certified and, indeed, before Plaintiff had even moved for certification, Plaintiff's class claim became moot when his individual claim did. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1531 (2013), repudiates the Ninth Circuit's rationale that policy concerns about purportedly "picking off" named plaintiffs before a class is certified justify an exception to this rule. And *Genesis Healthcare*'s reasoning applies equally here: a named plaintiff who asserts potential claims of an uncertified class under Rule 23 occupies no better position than an FLSA plaintiff who asserts a collective action before other claimants have opted in.

II. If this case is nevertheless justiciable, Campbell-Ewald is entitled to derivative sovereign immunity. This Court long ago recognized that where the government authorizes a contractor to act on its behalf and under its supervision, there is no liability on the part of the contractor for executing the government's will. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18, 22 (1940). That rule accords with this Court's repeated recognition that those acting on behalf of the government are entitled to common law immunity regardless of whether they are full-time employees or private contractors. *See, e.g.*, *Filarsky v. Delia*, 132 S. Ct. 1657, 1663-65 (2012). Denying immunity to those who carry out the government's work—whether individuals or entities, or contractors or employees—would frustrate the important principles that compel granting immunity to the sovereign itself.

The Ninth Circuit erred in holding that the availability of such immunity is limited only to "claims arising out of property damage caused by public works projects." Pet. App. 15a. *Yearsley* did not limit immunity to "public works projects," and any such limitation would be entirely artificial. As this Court has repeatedly held, immunity principles should be applied consistent with the policies that inform them. Limiting immunity to "public works projects" would frustrate those policy interests, including the interest in not shifting the costs of liability to the United States.

The district court properly held that Campbell-Ewald is entitled to derivative sovereign immunity. Campbell-Ewald indisputably was acting on behalf of the Navy in undertaking the recruiting campaign giving rise to the text message at issue. It did so in pursuit of a vital government objective—military recruiting. And the text message campaign targeted by Plaintiff was developed by Campbell-Ewald, working closely with and under the direct supervision of Naval Recruiting Command, and was specifically approved by Naval officers. If a Naval officer had done everything that Campbell-Ewald is alleged to have done, he would enjoy immunity from this suit. There is no basis to reach any different conclusion with respect to the private communications expert that the Navy engaged to carry out the same actions.

The Ninth Circuit's decision should be reversed.

ARGUMENT

I. A CASE OR CONTROVERSY BECOMES ACADEMIC, AND THUS BEYOND THE SCOPE OF ARTICLE III, WHEN A DEFENDANT OFFERS A PLAINTIFF COMPLETE RELIEF ON HIS CLAIM

As this Court has stressed, "'no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.'" *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). The Ninth Circuit contravened that fundamental limitation when it held that this case should proceed notwithstanding that Campbell-Ewald had offered Plaintiff all the relief he could secure through a judgment in his favor.

A. Article III Jurisdiction Is Limited To Genuine "Cases" And "Controversies"

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies." U.S. Const. art. III, § 2. This Court has long viewed these "complementary" terms as "limit[ing] the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process." *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968). That limitation requires "an actual controversy, and adverse interests." *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850); *see Muskrat v. United States*, 219 U.S. 346, 357 (1911) (quoting *In re Pacific Ry. Comm'n*, 32 F. 241, 255 (C.C.N.D. Cal. 1887) (Field, J.)); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892).

"A justiciable controversy is . . . distinguished from a difference or dispute of a hypothetical or abstract character, from one that is academic or moot." *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240 (1937). Thus, as the Court has held, federal courts are "not empowered to decide moot questions or abstract propositions, or to declare . . . principles or rules of law which cannot affect the *result* as to the thing in issue in the case before it." *California v. San Pablo & Tulare R.R. Co.*, 149 U.S. 308, 314 (1893) (emphasis added).[2]

The adversity requirement demands that a plaintiff personally "possess[] a legally cognizable interest, or 'personal stake' in the outcome of the action." *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013) (citations omitted); *see Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 39 (1976) ("[T]he plaintiff who seeks to invoke judicial power" under Article III must "stand to profit in some personal interest . . . ."). This "personal stake in the outcome of the controversy" is necessary "'to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends.'" *Flast*, 392 U.S. at 99 (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). Moreover, this requirement ensures that there

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[2] The Court's focus on whether the courts are empowered to adjudicate issues that "cannot affect *the result* as to the thing in issue" (*San Pablo*, 149 U.S. at 314 (emphasis added)) squares with Article III's "case" requirement. A "case," after all, is "a formal cause of action demanding *a remedy* for the claimed violation of a legal right." Robert J. Pushaw Jr., *Article III's Case/Controversy Distinction and the Dual Functions of Federal Courts*, 69 Notre Dame L. Rev. 447, 472-73 & n.134 (1994) (emphasis added).

is "'a *real need* to exercise the power of judicial review in order to protect the interests of the complaining party.'" *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (emphasis added) (citation omitted).

When the requisite adversity and personal stake are lacking, a dispute is academic and any decision purporting to resolve it would amount to an advisory opinion. *See, e.g.*, *Flast*, 392 U.S. at 96-97 ("[T]he rule against advisory opinions . . . recognizes that such suits often 'are not pressed before the Court with that clear concreteness provided when a question emerges precisely framed and necessary for decision from a clash of adversary argument exploring every aspect of a multifaced situation embracing conflicting and demanding interests.'" (quoting *United States v. Fruehauf*, 365 U.S. 146, 157 (1961)). Accordingly, this Court has been emphatic that, "[i]f a dispute is not a proper case or controversy, the courts have no business deciding it, or expounding the law in the course of doing so." *DaimlerChrysler*, 547 U.S. at 341.

As the Court reiterated in *Genesis Healthcare*, "[a] corollary to this case-or-controversy requirement is that an actual controversy must be extant at *all stages* of review, not merely at the time the complaint is filed." 133 S. Ct. at 1528 (emphasis added) (internal quotation marks and citations omitted). Thus, a "plaintiff's personal stake in the litigation [must] continue throughout the entirety of the litigation," *Sosna v. Iowa*, 419 U.S. 393, 402 (1975), or else the action becomes moot. "If an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed . . . ." *Genesis Healthcare*, 133 S. Ct. at 1528 (citations omitted).

B. When, As Here, A Plaintiff Has Been Offered Everything He Could Obtain Through A Judgment In His Favor, The Requisite Adversity And Personal Stake Are Lacking

When a plaintiff has been offered all the relief that he has sought, the requisite case or controversy is lacking, no matter how badly a plaintiff might wish to proceed with the litigation and have the courts expound on the law or any underlying issue.

1. As this Court's precedents have reiterated, the very purpose of an Article III case or controversy is to secure a *remedy* for the claimed violation of a legal right; it is not to obtain a legal ruling for its own sake. *E.g.*, *Muskrat*, 219 U.S. at 357; note 2, *supra*. When a defendant has effectively "thrown in the towel" (*Chathas v. Local 134 Int'l Bhd. of Elec. Workers*, 233 F.3d 508, 512 (7th Cir. 2000)) by offering the plaintiff everything that he could obtain through a favorable judgment, proceeding with the adjudication of the case "cannot affect the result as to the thing in issue in the case before [the court]" (*San Pablo*, 149 U.S. at 314), and any dispute thus becomes "academic" (*Aetna*, 300 U.S. at 240). Likewise, a plaintiff lacks a sufficient personal stake in the action once the defendant already has offered him everything that he could obtain through adjudication of the case. Where the plaintiff already has been offered complete relief, there is no "'real need'" (*Summers*, 555 U.S. at 493 (citation omitted)) for the court to exercise its judicial power.

2. This Court's precedents have long recognized that a defendant's tender of the relief sought eliminates an Article III controversy. In *San Pablo*, for example, California sued to recover unpaid taxes against a railroad company. 149 U.S. at 308 (statement of facts

by Justice Gray). While the case was pending, "the defendant offered and tendered to the plaintiff a sum of money equal to the taxes, penalties, interest, and attorney's fee, to recover which this action was brought, and costs of suit." *Id.* at 311-12 (same). The plaintiff rejected the "offer and tender," but the defendant nevertheless deposited the offered sum in a bank account in the plaintiff's name. *Id.* at 312 (same).[3]

The Court held that "there can be no doubt that this writ of error must be dismissed, because the cause of action has ceased to exist." *Id.* at 313. The Court explained:

> The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property which are actually controverted in the particular case before it. . . . But the court is not empowered to decide moot questions or abstract propositions or to declare, for the government of future cases, principles or rules of law which *cannot affect the result as to the thing in issue in the case before it.* No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power, or affect the duty, of the court in this regard.

Id. at 314 (emphasis added).

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[3] The money was deposited in accordance with California Civil Code section 1500, which provides that "[a]n obligation for the payment of money is extinguished by a due offer of payment, if the amount is immediately deposited in the name of the creditor, with some bank or savings and loan association within this state, of good repute, and notice thereof is given to the creditor." Cal. Civ. Code § 1500; *see San Pablo*, 149 U.S. at 313-14.

In a similar case, *San Mateo County v. Southern-Pacific Railroad Co.*, 116 U.S. 138, 142 (1885), the Court held that there was "no longer an existing cause of action" after the defendant made offers of payment that would fully satisfy its tax liabilities. The Court so held even though one of two offers of payment sent to the plaintiff's counsel contained the express condition that it was only to be "credited upon any judgment that may be obtained by the plaintiff in the . . . action." *Id.* at 139; *see also Little v. Bowers*, 134 U.S. 547, 555 (1890) (finding no controversy between the parties where defendant had "paid in full everything that was charged against it," even though, along with the payment, the defendant had specifically made "a general protest against the legality of the charges"). And, in line with this Court's decisions, numerous lower courts have applied the rule that a defendant's tender of complete relief moots an individual claim.[4]

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[4] *See, e.g.*, *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1243 (10th Cir. 2011) ("[I]f an offer is made for a plaintiff's maximum recovery, his action may be rendered moot."); *Damasco v. Clearwire Corp.*, 662 F.3d 891, 897 (7th Cir. 2011) (upholding dismissal of case where defendant offered full relief); *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574 (6th Cir. 2009) ("[A]n offer of judgment that satisfies a plaintiff's entire demand moots the case . . . ."); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (plaintiff's "individual claims were rendered moot" when defendant offered "a settlement equal to the statutory limit on his damages"); *Weiss v. Regal Collections*, 385 F.3d 337, 342 (3d Cir. 2004) ("[U]nder traditional mootness principles, an offer for the entirety of a plaintiff's claim will generally moot the claim."); *Holstein v. City of Chicago*, 29 F.3d 1145, 1147 (7th Cir. 1994) (where defendant

These precedents not only heed Article III's limits, but give effect to what the United States has aptly called the "legitimate impulse" to refuse to "expend judicial and litigation resources resolving the merits of a claim that the defendant informs the court it will fully satisfy." U.S. Br. 13, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059), 2012 WL 4960359. Article III effectuates that same impulse by barring the federal courts from attempting to adjudicate the merits of such academic claims or controversies.

3. Application of these foundational principles compels the conclusion that Plaintiff's individual claim is moot. Plaintiff's complaint sought relief for an alleged violation of the TCPA based on receipt of a text message. JA 17-18. Campbell-Ewald responded by tendering an offer that—as the district court found—"would have fully satisfied the individual claims asserted . . . by Plaintiff in this action." Pet. App. 40a. Campbell-Ewald offered to pay Plaintiff not only $1503 for "each and every unsolicited text message that was allegedly sent by or on behalf of C-E to the cell phone

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offered full damages, plaintiff "may not spurn this offer of all the damages he is owed and proceed to trial"); *Zimmerman v. Bell*, 800 F.2d 386, 390 (4th Cir. 1986) (no case or controversy where defendants offered the full amount in damages because "federal courts do not sit simply to bestow vindication in a vacuum"); *Abrams v. Interco, Inc.*, 719 F.2d 23, 32 (2d Cir. 1983) (affirming dismissal where defendant offered full judgment); *see also, e.g., Drs. Hill & Thomas Co. v. United States*, 392 F.2d 204 (6th Cir. 1968) (per curiam); *Lamb v. Commissioner*, 390 F.2d 157 (2d Cir. 1968) (per curiam); *A.A. Allen Revivals, Inc. v. Campbell*, 353 F.2d 89 (5th Cir. 1965) (per curiam).

owned by [Plaintiff]" (the maximum statutory damages authorized by the TCPA), but all reasonable costs Plaintiff "would recover were he to prevail in his suit." *Id.* at 38a-39a, 52a-61a. Campbell-Ewald also offered to stipulate to an injunction prohibiting it from engaging in the challenged conduct. *Id.* at 53a.[5]

Campbell-Ewald's offer eliminated any justiciable controversy between the parties because once Campbell-Ewald offered Plaintiff all the relief he could secure through a favorable judgment, the adjudication of Plaintiff's claims would no longer "affect the result as to the thing in issue in the case." *San Pablo*, 149 U.S. at 314. The best case scenario was that, after litigating the case, Plaintiff would have secured the same relief that Campbell-Ewald had offered up front. Likewise, having been offered everything he could obtain from a judgment in his favor, Plaintiff no longer possessed an adequate "personal stake" in the outcome to authorize the adjudication of his claim.

As *San Pablo* teaches, the fact that Plaintiff rejected Campbell-Ewald's offer does not mean that the requisite adversity and personal stake still existed. The question is whether the tender would afford the plaintiff complete relief. Here, as in *San Pablo*, the answer is yes. *Supra* at 19. In *San Pablo*, the defendant deposited a check in the amount of the

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[5] Although the complaint identified only a single unauthorized text message (JA 20 ¶¶ 15-16), Campbell-Ewald's tender even offered to pay Plaintiff $1503 for any additional text message that Plaintiff, in good faith, alleged he received (though discovery confirmed that there were no other text messages). *See* Pet. App. 58a.

tender in a bank account. Here, Campbell-Ewald's offer specifically provided that it would "arrange for prompt payment" of the monetary relief. Pet. App. 59a; *see, e.g.*, 28 Williston on Contracts § 72:27 (4th online ed. 2015) ("Tender is an offer to perform a condition or obligation coupled with the present ability of immediate performance, so that were it not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied." (citing cases)). There was no basis to question either Campbell-Ewald's intent to fulfill the offer or the company's "present ability of immediate performance" (*id.*)—and Plaintiff never has.

Once a court has determined that the defendant's offer is for complete relief—as the district court did here—the case should end. When a court determines that a case is moot, the typical course is to order dismissal of the case. *See, e.g.*, *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); Pet. 14 (citing cases). But a court may also dispose of the case by entering judgment according to the terms of the offer of complete relief. *See, e.g.*, *O'Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009); Pet. 14 n.3, 17. As this Court has observed, "[f]rom the beginning we have disposed of moot cases in the manner "'most consonant to justice" . . . in view of the nature and character of the conditions which have caused the case to become moot.'" *U.S. Bancorp Mort. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (alterations in original) (quoting *United States v. Hamburg-Amerikanische Packetfahrt-Actien*

Gesellschaft, 239 U.S. 466, 477-78 (1916)). The entry of such a judgment itself ends any "live" controversy.[6]

C. The Ninth Circuit's Contrary Holding Defies These Well-Settled Principles

Drawing heavily from the dissent in *Genesis Healthcare* and its prior decision embracing that dissent, the Ninth Circuit held that Campbell-Ewald's "unaccepted offer alone is 'insufficient' to moot Gomez's claim" for two principal reasons. Pet. App. 5a (quoting *v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 950 (9th Cir. 2013)). Neither withstands scrutiny.

1. Like the dissent in *Genesis Healthcare*, the Ninth Circuit focused on the fact that Plaintiff did not accept Campbell-Ewald's offer, adopting the reasoning that "'[a]n unaccepted settlement offer—like any unaccepted contract offer—is a legal nullity, with no operative effect.'" *Diaz*, 732 F.3d at 954 (quoting *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan, J., dissenting)); *see* Pet. App. 5a. But as discussed, this Court has long recognized that a plaintiff's *acceptance* is not required to moot a claim in these circumstances. Instead, this Court looks to whether the defendant's tender would provide the plaintiff complete relief—*regardless* of whether the plaintiff has accepted the offer. *See San Pablo*, 149 U.S. at 313-14; *supra* p. 16.

The Court's refusal to adopt such an "acceptance rule" squares with the fact that courts have an independent obligation to assure that jurisdiction

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[6] Regardless of whether such a judgment is entered, Campbell-Ewald has made clear its intent "to fully satisfy [Plaintiff's] individual claims." Pet. App. 59a.

exists. *E.g.*, *Great S. Fire Proof Hotel Co. v. Jones*, 177 U.S. 449, 453 (1900). Article III does not give the litigants themselves the power to unilaterally confer jurisdiction on a federal court. *See, e.g., Kimball v. Kimball,* 174 U.S. 158, 163 (1899) ("No consent of parties can authorize this court to exercise jurisdiction over a case in which it is powerless to grant relief."); *Town of Elgin v. Marshall*, 106 U.S. 578 (1883) (same).

As Justice Scalia has observed, "'[n]o stipulation of parties or counsel . . . can enlarge the *power*, or affect the duty, of the court'" to expound on "moot questions." *Honig v. Doe*, 484 U.S. 305, 339 (1988) (Scalia, J., dissenting) (alterations and emphasis in original) (quoting *San Pablo*, 149 U.S. at 314)). Just as a party's "consent does not confer jurisdiction," *Little*, 134 U.S. at 559, a party's *refusal* to consent to an offer of complete relief does not confer jurisdiction. In both situations, it is incumbent on the court to assess the circumstances and determine whether the requisite adversity and personal stake is present.

This Court has emphasized that "any attempt, by a mere colorable dispute, to obtain the opinion of the court upon a question of law which a party desires to know for his own interest or his own purposes, when there is no real and substantial controversy between those who appear as adverse parties to the suit, is an abuse which courts of justice have always reprehended, and treated as a punishable contempt of court." *Veazie*, 49 U.S. (8 How.) at 255; *see, e.g.*, *Poe v. Ullman*, 367 U.S. 497, 505 (1961) ("This principle was given early application and has been recurringly enforced in the Court's refusal to entertain cases which disclosed a want of a truly adversary contest, of a collision of actively asserted and differing claims."). In other

words, parties cannot contract around the jurisdictional requirements of Article III; nor does contract law impose any limitations on a court in recognizing that the requisite adversity is lacking under Article III.

There is also nothing new, or untoward, about a defendant "forcing" the resolution of a case by effectively "throw[ing] in the towel." *Chathas*, 233 F.3d at 512. Indeed, "[i]t is always open to a defendant to default and suffer judgment to be entered against him without his admitting anything—if he wants, without even appearing in the case." *Id.* And an offer of complete relief puts the plaintiff in a far better position than a default. It grants him all the relief he seeks without having to worry about spending time and resources chasing after a defendant that has defaulted in order to secure any meaningful relief at all.

As Judge Friendly put it, a defendant's offer of complete relief is "no different (except in being more favorable to the plaintiffs) than if it had submitted to a default judgment on the individual claims." *Abrams v. Interco, Inc.*, 719 F.2d 23, 32 (2d Cir. 1983). Like a defendant's decision to suffer a default judgment, a defendant's decision to put the plaintiff in a *better* position by offering the plaintiff all the relief he could obtain through a judgment in his favor eliminates any genuine controversy. At that point, "there is no justification for taking the time of the court and the defendant in the pursuit of minuscule individual claims which defendant has more than satisfied." *Id.*

2. The Ninth Circuit has also pointed to this Court's statement that "'[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party.'" *Diaz*, 732 F.3d at 950 (quoting *Genesis Healthcare*, 133 S. Ct. at

1533-34 (Kagan, J., dissenting)); *see Chafin v. Chafin*, 133 S. Ct. 1017, 1023 (2012)). But that standard is no impediment here. Any relief that a court could grant would have no practical effect because it would give Plaintiff nothing more than that which Campbell-Ewald already has tendered. In *Mills v. Green*, 159 U.S. 651, 653 (1895), apparently the Court's first use of the "effectual relief" language, the Court observed that "when . . . an event occurs which renders it impossible for this court . . . to grant [the plaintiff] any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal." Here, that "event" was the offer of complete relief.

In any event, the Court's use of the "effectual relief" language in other circumstances does not override the Court's application of Article III principles in analogous circumstances, such as in *San Pablo*. In addition, the "effectual relief" language is just one way to gauge mootness—it is not the only way. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 732 (2013) (declaring the case moot without reference to "effectual relief," even though the plaintiff could have theoretically received some relief—invalidation of Nike's trademark). In other words, the "effectual relief" language is not a *limitation* on mootness.

Accordingly, the Ninth Circuit erred in concluding that the courts were empowered to adjudicate Plaintiff's individual claim notwithstanding that defendant had already tendered Plaintiff all the relief he could possibly secure through this action.[7]

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[7] For the reasons discussed next, Plaintiff's asserted interest in bringing a claim on behalf of a class of unnamed

II. THE MERE EXISTENCE OF CLASS CLAIMS BEFORE ANY CLASS CERTIFICATION IS INSUFFICIENT TO CONFER ARTICLE III JURISDICTION

The Ninth Circuit also erred in concluding that it was empowered to adjudicate Plaintiff's class claim notwithstanding Campbell-Ewald's offer of complete relief. In *Genesis Healthcare*, this Court recently held that the plaintiff's representative action "became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action" at that time. 133 S. Ct. at 1529. The plaintiff's nascent hope of representing others did not "preserve her suit from mootness" in *Genesis Healthcare* (*id.* at 1530), and the same goes here.

A. As The Court Has Held, The Mooting Of A Named Plaintiff's Claim Before Certification Generally Moots Any Class Claim As Well

Rule 23 of the Federal Rules of Civil Procedure does not confer any substantive rights or enlarge the jurisdiction of the courts. *See* 28 U.S.C. § 2072(b); Fed. R. Civ. P. 82. Instead, Rule 23 provides a procedural mechanism for aggregating certain similar claims. As this Court has recognized, "the right of a litigant to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). At least before any class is certified, when the underlying substantive claims have become moot—and the court

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others was also insufficient to keep his individual claim alive after he had been offered complete relief. *See* Part II, *infra*.

loses jurisdiction over the controversy of the individual plaintiff—the plaintiff's "ancillary" procedural right to bring a Rule 23 class action is extinguished as well.

Genesis Healthcare underscores the point. There, the Court considered whether an action brought under the FLSA "remained justiciable" after the plaintiff's own claims became moot "based on the collective-action allegations in her complaint." 133 S. Ct. at 1529. The Court held that, "[i]n the absence of any claimant's opting in"—that is, before any other unnamed claimants had become parties to the suit—"[plaintiff]'s suit became moot when her individual claim become moot, because she lacked any personal interest in representing others in this action." *Id.* Indeed, even though the plaintiff had a statutory right under the FLSA to bring an action on behalf of others, the Court held, "the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Id.*

The same conclusion follows here. It is well-settled that a Rule 23 class only acquires a separate legal status when the class is certified. *See, e.g.*, *id.* at 1530; *Sosna*, 419 U.S. at 399. "Without such certification and identification of the class, the action is not properly a class action." *Baxter v. Palmigiano*, 425 U.S. 308, 310 n.1 (1976). Thus, "only a 'properly certified' class . . . may succeed to the adversary position of a named representative whose claim becomes moot." *Kremens v. Bartley*, 431 U.S. 119, 132-33 (1977) (quoting *Board of School Commissioners v. Jacobs*, 420 U.S. 128, 130 (1975)). A plaintiff who asserts *potential* claims of an *uncertified* class under Rule 23 occupies no better position than the FLSA plaintiff who asserts a collective action before any other claimants have opted

in. Both plaintiffs "lack[] any personal interest in representing others in this action" because those others have not been identified through the certification process or been made parties to the litigation. *Genesis Healthcare*, 133 S. Ct. at 1529.

No class had been certified when Campbell-Ewald made its offer of complete relief; indeed, Plaintiff had not even moved for certification. Thus, when Plaintiff's individual claim became moot, the absent class members were not parties to the lawsuit and had no legal status. There was no plaintiff that could "succeed to the [requisite] adversary position" at that time. *Kremens*, 431 U.S. at 133; *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class.").

Board of School Commissioners v. Jacobs is instructive. That case involved a class action brought by six named students challenging the constitutionality of certain rules promulgated by a board of school commissioners. 420 U.S. at 128. After being informed that the named plaintiffs had graduated, the Court held that it was "clear that a case or controversy no longer exists between the named plaintiffs and the [board of school commissioners]." *Id.* at 129. The fact that the named plaintiffs had brought a class action was not sufficient to keep the case alive, because no class had been "duly certified" at the time that the plaintiffs' individual claims became moot. *Id.* Thus, the Court ordered that the complaint be dismissed. *Id.* at 130; *see also Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976) (holding that plaintiffs' counsel's "wish

to represent a class of unnamed individuals" was insufficient to keep an action alive, where the named plaintiffs' claims had become moot and "there has been no certification of any such class") (Rehnquist, J.).

In short, "the mere presence of [class]-action allegations in [Plaintiff's] complaint cannot save the suit from mootness once [his] individual claim is satisfied." *Genesis Healthcare*, 133 S. Ct. at 1529. As Judge Friendly observed in a similar vein, "we know of no principle that a plaintiff must be allowed to pursue litigation in which he no longer has an interest merely because this could benefit others." *Abrams*, 719 F.2d at 33 n.9. Just like the plaintiff in *Genesis Healthcare*, Plaintiff here had "no personal interest in representing putative, unnamed [class members], nor any other continuing interest that would preserve h[is] suit from mootness," after his individual claim became moot and before any class had been certified. 133 S. Ct. at 1532.

B. As In *Genesis Healthcare*, None Of The Limited Exceptions That This Court Has Recognized Can Save This Case

This Court has recognized only limited exceptions to the rule that a class claim cannot save a case from mootness when the named plaintiff's claim becomes moot before any class is certified. As in *Genesis Healthcare*, none of those exceptions applies here.

1. This Court has held that "where a named plaintiff's claim is 'inherently transitory,' and becomes moot prior to certification, a motion for certification may 'relate back' to the filing of the complaint." *Genesis Healthcare*, 133 S. Ct. at 1528 n.2 (citing *County of Riverside v. McLaughlin*, 500 U.S. 44, 51-52 (1991)). The Ninth Circuit invoked this exception in holding that Plaintiff's class claim was not moot. *See*

Pet. App. 5a (citing *Pitts*, 653 F.3d at 1091-92). But as *Genesis Healthcare* makes clear, that was error.

As the Court explained in *Genesis Healthcare*, "[t]he 'inherently transitory' rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable, because no plaintiff possessed a personal stake in the suit long enough for litigation to run its course." 133 S. Ct. at 1531. The Court explained that "this doctrine has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy," such as where a plaintiff seeks "to bring a class action challenging the constitutionality of temporary pretrial detentions." *Id.* Because "pretrial custody likely would end prior to the resolution of his claim," the relation-back doctrine is necessary to prevent the defendant's conduct from being "insulate[d] . . . from review." *Id.*

In *Genesis Healthcare*, the Court recognized that the plaintiff's claim for alleged violations of the FLSA based on the defendant's pay practice for meal breaks was not "inherently transitory" under this rationale. The Court explained that, unlike a challenge to "temporary pretrial detentions," the plaintiff's FLSA claim "cannot evade review" and would "remain[] live until it is settled, judicially resolved, or barred by a statute of limitations." *Id.* The same is true for Plaintiff's TCPA claim here, which has no "fleeting nature" about it. *Id.* In *Genesis Healthcare*, the Court also noted that the termination of the plaintiff's FLSA collective action (due to the offer of complete relief) did not prevent other putative plaintiffs from seeking "to vindicate their rights in their own suits." *Id.* Once again, the same goes here. Holding that this class

action is moot would leave other putative plaintiffs "free" to pursue their own TCPA claims. *Id.*

The Ninth Circuit has reasoned that "inherently transitory claims" include class claims "'"acutely susceptible to mootness" in light of [the defendant's] tactic of "*picking off*" lead plaintiffs with a Rule 68 offer to avoid a class action.'" *Pitts*, 653 F.3d at 1091 (alteration in original) (emphasis added) (citation omitted). But *Genesis Healthcare* rejected the argument that the risk that "defendants can strategically use Rule 68 offers to 'pick off' named plaintiffs before the collective-action process is complete, render[s] collective actions 'inherently transitory' in effect." 133 S. Ct. at 1531. As the Court explained, the Court's relation-back doctrine "has invariably focused on the *fleeting nature* of the challenged conduct giving rise to the claim, not on the defendants' litigation strategy." *Id.* (emphasis added). Accordingly, the Ninth Circuit's policy concerns about defendants purportedly "picking off" plaintiffs provides no basis for saving Plaintiff's class claim.

The Ninth Circuit's application of the relation-back doctrine cannot be reconciled with *Genesis Healthcare*. The Ninth Circuit admitted that "*Genesis* undermined some of the reasoning employed in [its prior decisions in] *Pitts* and *Diaz*." Pet. App. 6a. (That was an understatement.) But the court found that "*Genesis* is not 'clearly irreconcilable' with" either case because of the differences between collective actions under the FLSA and Rule 23 class actions. *Id.* at 6a-7a. The Ninth Circuit did not identify which differences make the difference. But any conceivable distinction between FLSA collective actions and Rule 23 class actions emerges after, not before, certification. Before

a class is certified, the interests of the named plaintiff and the absent class members or claimants are identical. Neither the putative FLSA claimants nor absent Rule 23 class members have any legal status and a putative class or collective action representative has no personal stake in representing those unnamed and unidentified class members or claimants.

What *is* different between a collective action under the FLSA and a class action under Rule 23 is that Congress created a statutory right to the former, whereas Rule 23 simply provides a "procedural device" (*Roper*, 445 U.S. at 331) for aggregating claims—that does not create any substantive rights. 28 U.S.C. § 2072(b). If anything, that distinction makes this an easier case than *Genesis Healthcare* when it comes to recognizing that Plaintiff's class claim became moot at the same time his individual claim became moot.

2. The Court has also held "that where a certification motion is denied and a named plaintiff's claim subsequently becomes moot, an appellate reversal of the certification decision may relate back to the time of the denial." *Genesis Healthcare*, 133 S. Ct. at 1528 n.2 (citing *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980)). This holding also flows from the principle that unnamed class members have no separate "legal status" until a class is actually certified. *Id.* at 1530 (discussing *Sosna*, 419 U.S. at 399-402); *see Geraghty*, 445 U.S. at 415 n.8 (Powell, J., joined by Burger, C.J., and Stewart and Rehnquist, JJ., dissenting) (explaining that "[c]ertification is no mere formality"). The Court's holding in *Geraghty*, however, was "limited to the appeal of the denial of the class certification motion." 445 U.S. at 404.

That "relation back" principle is inapplicable here, for the same reasons that it was inapplicable in *Genesis Healthcare*. In *Genesis Healthcare*, the Court held that *Geraghty* did not apply because the plaintiff's claim became moot before "the district court denie[d] class certification." 133 S. Ct. at 1530. Accordingly, there was "simply no certification decision to which [plaintiff]'s claim could have related back." *Id.* So too here. Plaintiff's claim became moot before any class was certified (or class certification was denied), thus "foreclosing any recourse to *Geraghty*." *Id.*

In *Roper*, the Court likewise allowed the appeal of the denial of class certification where "the named plaintiffs' individual claims became moot after the District Court denied their motion for class certification under Rule 23." *Genesis Healthcare*, 133 S. Ct. at 1531. This Court has made clear that *Roper* is limited to its facts and "the unique significance of certification decisions in class-action proceedings," and, indeed, has cast doubt on its "continuing vitality" on its own terms. *Id.* at 1532 & n.5. Because this case does not involve an appeal from any certification decision, *Roper*—no matter its "continuing validity" in the circumstances it addressed—is inapplicable.

C. Respecting Existing Mootness Principles Furthers The Purposes Of Rule 23

Policy concerns about class action practice cannot expand the scope of Article III. But in any event, the Ninth Circuit overlooked the interests in encouraging defendants to grant complete and prompt relief to named plaintiffs, and, if anything, it is the dismissal of this case that would better serve the interests of Rule 23 and any other potential claimants.

One of the central requirements of a class action under Rule 23 is an adequate representative who is a member of the class. A putative class representative must show that he will "fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), and that "the claims . . . of the representative parties are typical of the claims . . . of the class," Fed. R. Civ. P. 23(a)(3). Rule 23's threshold conditions derive from the Article III requirement that putative class representatives "possess the same interest and suffer the same injury" as members of the putative class. *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 216 (1974); *see Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26; *General Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 156 (1982).

A named plaintiff who already has secured complete relief on his claims, and therefore lacks a personal stake in the outcome, occupies a fundamentally different position than putative class members. Although Plaintiff himself could do no better than Campbell-Ewald's offer of complete relief, the absent members of the putative class likely could do no worse than to be yoked to the binding class certification sought by him. As noted, the typical TCPA settlement offers absent class members a small fraction of the statutory damages they might recover, deprives them of individual remedies, and saddles them with unnecessary attorney's fees. *Supra* at 4. One might charitably view this as a method of "spreading litigation costs"; if so, it is one that comes at considerable expense to the absent class members.

Such litigation hardly advances the objectives of Rule 23, much less the interests of justice. Nor would it advance the interests of the TCPA, which, as

discussed, was enacted with an entirely different litigation model in mind than class actions driving mass settlements that result in lucrative attorney's fees for class action lawyers and pennies on the dollar for the recipients of unwanted texts or calls. *Supra* at 4. Neither Plaintiff nor his attorneys have a right to crusade for such an award or settlement here.[8]

III. CAMPBELL-EWALD IS ENTITLED TO DERIVATIVE SOVEREIGN IMMUNITY ON PLAINTIFF'S TCPA CLAIM

If this action is nevertheless justiciable, then Campbell-Ewald is entitled to derivative sovereign immunity, as the district court held. Pet. App. 28a-34a. This Court has long recognized that "government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." *Brady v. Roosevelt S.S. Co.*, 317 U.S. 575, 583 (1943) (citing *Yearsley*). That understanding squares with this Court's recognition that those who are retained by the government to work on its behalf are entitled to traditional immunity from suit—regardless of "the nature of their particular relationship with the

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[8] *See, e.g.*, *Wilkins v. HSBC Bank Nevada, N.A.*, No. 14 C 190, 2015 WL 890566, at *3, *11 (N.D. Ill. Feb. 27, 2015) (approving a settlement that allocated $2.95 per class member, while awarding class counsel $9.5 million in fees); *Amadeck v. Capital One Fin. Corp. (In re Capital One Tel. Consumer Prot. Act Litig.)*, MDL Nos. 2416 et al., 2015 WL 605203, at *5, *19 (N.D. Ill. Feb. 12, 2015) (approving a settlement that allocated $2.72 per class member, while awarding class counsel $15.6 million in fees).

government. *Filarsky v. Delia*, 132 S. Ct. 1657, 1665-66 (2012). The Ninth Circuit erred in reversing the district court's decision recognizing that Campbell-Ewald is entitled to derivative sovereign immunity.

A. As This Court Has Recognized, Those Whom The United States Authorizes To Act On Its Behalf Are Generally Immune From Suit

1. The United States enjoys default immunity from suit. *See United States v. Sherwood*, 312 U.S. 584, 586 (1941). The United States is not subject to damages actions unless Congress waives the United States' immunity through "'unequivocally expressed'" statutory language. *United States v. White Mt. Apache Tribe*, 537 U.S. 465, 472 (2003) (citation omitted). "In the absence of clear congressional consent," courts lack jurisdiction "'to entertain suits against the United States.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *Sherwood*, 312 U.S. at 587).

Because the government cannot function without the assistance of those who do its work, this Court has long recognized that immunity from suit extends "not only to public employees but also to others acting on behalf of the government." *Filarsky*, 132 S. Ct. at 1665. As the Court has explained, "the common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities." *Id.* at 1663. Rather, "those who carr[y] out the work of government enjoy[] various protections from liability when doing so," regardless of whether they are full-time employees or private parties temporarily engaged "by the government to assist in carrying out its work." *Id.* at 1660, 1667.

Such immunity extends to suits under both state and federal law. *See, e.g.*, *Howard v. Lyons*, 360 U.S. 593, 594-98 (1959) (holding that Naval officer was immune from defamation suit under Massachusetts law); *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) ("[G]overnment officials performing discretionary functions, generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known."); *Butz v. Economou*, 438 U.S. 478, 504 (1978) (concluding that it is "untenable to draw a distinction for purposes of immunity law between suits brought against state officials under § 1983 and suits brought directly under the Constitution against federal officials"); *see also Tapley v. Collins*, 211 F.3d 1210, 1214-15 & n.9 (11th Cir. 2000) (collecting numerous court of appeals cases finding qualified immunity available as a defense to claims arising under various federal statutes).

This Court likewise has explained that private contractors doing the work of the government are protected from suit whether they are individuals or corporations. *See Filarsky*, 132 S. Ct. at 1667 (private attorney retained by the City); *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. at 19 (construction company acting "pursuant to a contract with the United States Government"). In both situations, this Court has recognized that government contractors are entitled to immunity for actions taken on the government's behalf and under its supervision, pursuant to a constitutionally valid authorization, within the scope of their contractual relationship with the government.

In *Yearsley*, the United States contracted with a construction company to build two dikes on the

Missouri River, which the company did under the direction and supervision of the Army. 309 U.S. at 19-20. A property owner, Yearsley, brought suit against the company in state court, seeking damages under a takings theory for the loss of land allegedly caused by erosion as a result of the dikes. *Id.* at 20. This Court held that the company could not be found liable for the work it performed pursuant to the contract under the supervision of the government. *Id.* at 20-21. So long as the government constitutionally authorizes a private contractor to act on its behalf, the Court explained, "there is no liability on the part of the contractor for executing its will." *Id.*; *see also Brady*, 317 U.S. at 583 (recognizing *Yearsley*'s derivative immunity rule); *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000) (Wilkinson, J.) (explaining that it is "well-settled law that contractors and common law agents acting within the scope of their employment for the United States have derivative sovereign immunity").

In *Boyle v. United Technologies Corp.*, this Court recognized that certain state law claims against federal government contractors are outright preempted because of the significant conflict between imposing liability on federal officials or contractors operating in the course of their duties and the important federal "interest in getting the Government's work done." 487 U.S. 500, 505 (1988). Although this case does not involve preemption of state law claims, *Boyle* underscores the important federal interest in protecting those who do the government's work from civil liability—especially those who work with the United States military to further its mission.

2. The immunity principles recognized in *Yearsley*, *Filarsky*, and *Boyle* are designed to protect

interrelated and essential public interests. *See Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326, 344 (4th Cir. 2014) ("*Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*."), *cert. denied*, 135 S. Ct. 1153 (2015).

First, immunity facilitates the government's ability to draw on the expertise of those outside its workforce. Because it would be inefficient and infeasible for the government to hire full-time employees with the "specialized knowledge or expertise" to execute every government objective, the government frequently "must look outside its permanent work force" to achieve its ends. *Filarsky*, 132 S. Ct. at 1665-66. In addition, "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts." *Id.* at 1666. Similarly, shielding contractors from liability ensures that they may "serve the government . . . 'with the decisiveness and the judgment required by the public good'"—*i.e.*, that they may concentrate on performing the government's will without "the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.* at 1665 (citation omitted).

Second, immunity ameliorates the risk that contractors might decline to carry out the work of a principal—the government—that is itself immune from suit. Unlike other circumstances, in which a contractor shares any risk of liability with its principal, the government and its "employees will often be protected from suit by some form of immunity," leaving "those working alongside them . . . holding the bag—facing full liability for actions taken in conjunction with government employees who enjoy immunity for the

same activity." *Id.* at 1666. Thus, unless private contractors are themselves shielded from liability, those "with a choice might think twice before accepting a government assignment," *id.*, frustrating the government's important interest in engaging outside expert contractors to accomplish its myriad objectives.

Third, granting immunity to others vindicates the United States' own immunity. If government contractors were not entitled to immunity, "[t]he financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself, since . . . contractors will predictably raise their prices to cover, or to insure against, contingent liability," as well as the cost of associated litigation. *Boyle*, 487 U.S. at 511-12. That would force the United States to bear indirectly the very costs it retained its sovereign immunity to avoid. As the *Boyle* Court recognized, "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline to [work for] the Government, or it will raise its price." *Id.* at 507. For that reason, it correctly observed that "[i]t makes little sense to insulate the Government against financial liability . . . when the Government [acts] itself, but not when it contracts [for the act in question]." *Id.* at 512.

Consistent with the exceedingly important federal interests implicated by the imposition of civil liability upon those working on the government's behalf, the government itself has consistently recognized the derivative sovereign immunity doctrine. In *Yearsley*, for example, the government not only acknowledged and advocated the "general rule" that "an agent of the Government cannot be held accountable for actions

lawfully authorized or ratified by the Government," but argued that this rule was "obvious as a matter of principle." U.S. Brief 19-21, *Yearsley v. W.A. Constr. Co.*, 309 U.S. 18 (1940) (No. 156), 2939 WL 48388 (*Yearsley* U.S. Br.). This past year, the government again recognized the derivative sovereign immunity doctrine and the fact that "derivative sovereign immunity . . . 'protects agents of the sovereign from liability for carrying out the sovereign's will.'" U.S. Brief 4, *KBR v. Metzgar*, No. 13-1241 (Dec. 16, 2014), 2014 WL 7185601 (*KBR* U.S. Br.) (citation omitted).

B. The Ninth Circuit Erroneously Held That Derivative Sovereign Immunity Is Limited To "Public Works Projects"

The Ninth Circuit held that the doctrine of derivative sovereign immunity was categorically unavailable in this case on the ground that *Yearsley*'s holding is limited to the "public works" context in which that case arose. Pet. App. 15a. That is incorrect.

Yearsley reaffirmed the general rule that so long as the government acts constitutionally in authorizing a government actor to take action—whether within or outside of the public works context—"there is no liability on the part of the contractor for executing its will." 309 U.S. at 20-21. That longstanding principle follows naturally from the immunity principles this Court has recognized in other situations. *See supra*, Part A. It is not limited to "public works projects."

According to the Ninth Circuit, *Yearsley* merely articulated "a narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a. It is true that the underlying contract in *Yearsley* involved a "public works project"—the construction of dikes on the Mississippi River to

prevent erosion. But nothing in *Yearsley* purported to limit its immunity holding to the particular type of contract at issue in that case, and there is no justification for drawing such an artificial limit.

As this Court has observed, "examples of individuals receiving immunity for actions taken while engaged in public service on a temporary or occasional basis are as varied as the reach of government itself." *Filarsky*, 132 S. Ct. at 1665. This Court has never suggested that such immunity is, or should be, limited to actions taken by those working for the government on public works projects—however that category is formally defined. And in contrast to the Ninth Circuit, numerous other circuit courts have recognized the availability of derivative sovereign immunity outside the public works context. *See* Pet. 26 (collecting cases invoking *Yearsley* in wide range of contexts).

This Court has declined to carve up immunity on a contract-by-contract basis. In *Boyle*, for example, the Court recognized that "[t]he federal interest justifying [*Yearsley*'s] holding surely exists as much in procurement contracts as in performance contracts." 487 U.S. at 506. The Court found "no basis for a distinction" between the federal interests served by shielding government contractors from liability in *Yearsley* and *Boyle*, even though the latter involved the procurement of military equipment entirely unrelated to "public works." And the strong policy reasons favoring immunity are not limited to those who engage in public works projects. Limiting the availability of immunity to the narrow facts of *Yearsley* would therefore seriously undermine the government's interest in being able to efficiently and cost-effectively

engage private contractors to assist it in doing the varied and important work of the federal government.

The Ninth Circuit also erred in suggesting that *Yearsley* is limited to situations that "implicate a constitutional 'promise to compensate' injured plaintiffs such that an alternate remedy exists." Pet. App. 15a. The Court did not adopt a compensation requirement as a limitation on the availability of immunity. Nor would such a compensation requirement make sense. Among other things, if an alternative remedy were always required, then the costs of that remedy would invariably be passed on to the government, defeating an important policy underlying common law immunity. *Supra* at 38-40. Not surprisingly, therefore, this Court has relied on *Yearsley*'s reasoning even in cases where the plaintiff lacked an alternative form of relief. *See, e.g.*, *Boyle*, 487 U.S. at 505-06, 511-12.

The Ninth Circuit erred in holding that contractors working on the government's behalf are entitled to immunity only with respect to "property damage caused by public works products." Pet. App. 15a. Its decision must be set aside for that reason alone.

C. The District Court Properly Concluded That Campbell-Ewald Is Entitled To Derivative Sovereign Immunity

The district court properly held that Campbell-Ewald is entitled to immunity from Plaintiff's suit.

1. This Court presumes that "common-law principles of . . . immunity were incorporated into our judicial system and that they should not be abrogated absent clear legislative intent to do so." *Pulliam v. Allen*, 466 U.S. 522, 529 (1984); *see Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (Congress is

presumed to be aware of existing law, including judicial decisions). Congress legislated against those background principles, including *Yearsley*, when it enacted the TCPA. There is no evidence—much less a "clear legislative intent"— that Congress intended the TCPA to abrogate the immunity typically available for those working on behalf of the government. Finding that Campbell-Ewald is immune from suit in the circumstances here is therefore consistent with the TCPA. *See Filarsky*, 132 S. Ct. at 1665 (reading § 1983 in light of common law immunity principles).

2. The TCPA expressly applies to phone calls or texts made by "*any person* within the United States." 47 U.S.C. § 227(b)(1) (emphasis added). Federal employees, including the officers of the Navy Recruiting Command, are equally "person[s]" within the meaning of 47 U.S.C. § 153(39). Had Naval officers devised the recruiting campaign at issue in this case or sent the challenged text message, the government almost certainly would argue, correctly, that they are entitled to immunity from suit and that Plaintiff could not recover for any mistaken inclusion of a particular phone number on an opt-in list of thousands, whether the Naval officers devised the list themselves or relied on another unit, with expertise in such matters, to compile the list. *See*, *e.g.*, *Butz*, 438 U.S. at 507 ("Federal officials will not be liable for mere mistakes in judgment, whether the mistake is one of fact or one of law."); *Pearson v. Callahan*, 555 U.S. 223, 231 (2009) ("The protection of qualified immunity applies regardless of whether the government official's error is 'a mistake of law, mistake of fact, or a mistake based on mixed questions of law and fact.'" (citation omitted)).

3. The result is no different simply because the Navy sought to take advantage of the added communications expertise of Campbell-Ewald and contracted with that company to act on the Navy's behalf and under its direct supervision.

As its contract specifies, the Navy hired Campbell-Ewald to work "in coordination with the Navy" to develop a "Strategic Communications Plan (Strategic Plan) for Navy approval," as well as an annual plan "for approval by senior level Navy management that achieves the strategic goals for that year [and] meets Navy's recruiting goals . . . and any special goals or needs the Navy may specify." JA 87. The Navy directed Campbell-Ewald to develop a recruiting campaign utilizing 21st century media. Campbell-Ewald proposed a text-message campaign, as well as engaging a third-party, MindMatics, to execute the campaign by sending messages to recipients sharing certain demographic characteristics who had opted in to receive such communications. *Id.* at 59-60, 179, 182, 180-81, 228-34; *see* C.A.E.R. 393-94. The Navy expressly approved the mobile marketing campaign, the text message itself, and the engagement of MindMatics and use of its opt-in list. JA 232-34, 51-52.

Plaintiff has not contested that the Navy validly authorized Campbell-Ewald to develop a recruiting campaign using 21st century media, to prepare a particular message, and to engage a subcontractor to execute the campaign. In fact, Plaintiff conceded that Campbell-Ewald was acting "on behalf of the U.S. Navy." *Id.* at 19-20. And the record makes clear that the Navy closely supervised Campbell-Ewald and approved all aspects of the recruiting campaign. *Id.* at 51-52, 60-61, 232-34. As the Navy's own Rule 30(b)(6)

witness testified, "Campbell-Ewald doesn't do anything without the approval of the United States Navy Recruiting Command or somebody in it." *Id.* at 47; *see id.* at 91 (contract specifying that "Navy Recruiting Command (CNRC) holds the ultimate right of approval for all deliverables under this contractor"); *id.* at 47 ("We [Navy Recruiting Command] were in constant contact with Campbell-Ewald on a daily basis."). Nor has Plaintiff ever alleged that Campbell-Ewald had unique knowledge of any risk involved in engaging MindMatics or using its opt-in list that Campbell-Ewald withheld from the government.

Particularly given the Navy's close supervision and approval of Campbell-Ewald's actions in executing the contract, the case for immunity here is at least as strong as, if not stronger than, in *Yearsley*.

4. Plaintiff's real complaint is with the actions of MindMatics, not Campbell-Ewald. As discussed, MindMatics was responsible for the opt-in list, and MindMatics sent the text message. But Plaintiff did not name MindMatics as a defendant. And any alleged mistake by MindMatics cannot deprive Campbell-Ewald of derivative sovereign immunity.

First, whatever the reach of the TCPA, a vicarious liability theory cannot deprive Campbell-Ewald of derivative sovereign immunity. It is well-settled that vicarious liability does not abrogate the immunity of those acting on behalf of the government. *See, e.g.*, *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888) ("A public officer *or agent* is not responsible for the misfeasances or positive wrongs, or for the nonfeasances, or negligences, or omissions of duty, of the *sub-agents* or servants or other persons properly employed by or under him, in the discharge of his

official duties." (emphases added)); *Ashcroft v. Iqbal*, 556 U.S. 662, 676 (2009) ("[V]icarious liability is inapplicable to *Bivens* and § 1983 suits . . . . .").[9]

Second, even if Campbell-Ewald had sent the text message at issue itself and violated a provision of its contract with the Navy (instead of subcontracting for MindMatics to carry out this task, in accordance with the contract and with the Navy's approval), that would not abrogate Campbell-Ewald's immunity either. As the United States recently recognized in an analogous context, a contractor generally should not be subject to liability "even if an employee of a contractor allegedly violated the terms of the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." *KBR* U.S. Br. 16; *see also id.* at 18-19. Here, there is no question that Campbell-Ewald acted within the "general scope" of its contract. And even assuming that individuals were mistakenly included in the opt-in list, such a mistake is protected by immunity. *E.g.*, *Pearson*, 555 U.S. at 231.

Third, it would make little sense to reserve immunity only for those who do not commit any errors while acting on the government's behalf. Such a rule would defeat the very function of immunity—to shield a party from liability *for alleged wrongdoing*. It also

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[9] The FCC has interpreted the TCPA to impose vicarious liability even though Congress did not specify such liability. *In re DISH Network, LLC*, 28 FCC Rcd. 6574, 6574-75 (2013). But the salient point here is that there is no evidence, much less any clear statement, that Congress intended to override the common law rule that vicarious liability cannot abrogate immunity that otherwise exists.

would contravene the longstanding principle that even those working on the government's behalf who violate the laws or even the *Constitution* of the United States—something all government officers swear to uphold—may be entitled to the protection of immunity. *See, e.g. Filarsky*, 132 S. Ct. at 1661, 1667-68 (holding that contractor was entitled to qualified immunity from suit alleging Fourth Amendment violation). And such a limitation would defeat the important interests served by the immunity doctrine by rendering immunity virtually meaningless in this context.

5. Finally, affording Campbell-Ewald immunity advances the same vital public interests that justify shielding from liability others working on the government's behalf. The Navy engaged Campbell-Ewald because of its specialized expertise in communications, including emerging communications technologies. Outsourcing such work is increasingly common and beneficial for the government. *See* Stan Soloway & Alan Chvotkin, *Federal Contracting in Context, in Government By Contract* 192, 210 (Jody Freeman & Martha Minow eds., 2009) (noting that government agencies, "locked in a competition for talent with the global economy at large," have difficulty retaining technologically creative workers and "increasingly have little choice but to . . . turn[] to private sector partners" for such matters). Subjecting contractors like Campbell-Ewald to liability that the government itself would not incur for carrying out the government's work would discourage outside experts from undertaking such projects for the government.

Depriving contractors like Campbell-Ewald of derivative immunity also ultimately would cause contractors to pass through to the government the risk

of liability and litigation through higher prices. *See Boyle*, 487 U.S. at 511-12 (observing that "[t]he financial burden of judgments against contractors would ultimately be passed through, substantially if not totally, to the United States itself"). Even still, the risk that contractors like Campbell-Ewald could be left "holding the bag," in whole or part, for carrying out the government's work will undermine the effectiveness of the services that the government receives and make outside experts "think twice before accepting a government assignment," *Filarsky*, 132 S. Ct. at 1666, including military recruiting campaigns that seek to harness modern communications technology.

The government routinely relies on—and benefits from—the specialized knowledge and experience of contractors to pursue and achieve its important public objectives. Affording immunity to those like Campbell-Ewald for actions taken on the government's behalf, under its close, daily supervision and with its explicit approval, to achieve core government objectives—like recruiting for the Nation's Armed Forces—not only is compelled by this Court's precedents, but is crucial both to advancing the important public "interest in getting the Government's work done," *Boyle*, 487 U.S. at 505, and vindicating Congress' decision to retain the government's own sovereign immunity from suit.

That does not mean, of course, that contractors are free to violate government contracts at will. Far from it. The United States has ample tools at its disposal to penalize contractors who do not comply with contract terms. As the government recently observed in a related context, "[d]etermination of the appropriate recourse for [a] contractor's failure to adhere to contract terms and related directives under its

exclusively federal relationship with the United States" should be "the responsibility of the United States, through contractual, criminal, or other remedies—not private . . . suits." *KBR* U.S. Br. 16.

* * * * *

One of the fundamental purposes of Article III is that it prevents courts from "expounding the law" when "a proper case or controversy" is not before them. *DaimlerChrysler*, 547 U.S. at 341. In this case, that limitation should have prevented the Ninth Circuit from expounding on derivative sovereign immunity at all. But if this Court concludes that the Ninth Circuit had jurisdiction to address the immunity issue, it should reverse the Ninth Circuit's ruling that Campbell-Ewald was not entitled to immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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