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

## REPLY BRIEF FOR PETITIONER


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## ARGUMENT

### I. THIS CASE IS MOOT

When all is said and done, even Plaintiff and the United States admit that a case must come to an end when further litigation is pointless. Resp. Br. 32; U.S. Br. 8. They say the test is whether a plaintiff's refusal to accept an offer of capitulation is based on "obstinacy or vindictiveness." *Id.* But Article III jurisdiction does not turn on a plaintiff's subjective intent in refusing an offer; it turns on whether a plaintiff retains a *personal stake* in the outcome of the litigation. Here, that determination turns on an objective inquiry into whether the defendant's offer is for complete relief, *i.e.*, everything the plaintiff could secure through a judgment in his favor. Plaintiff says he cannot be "forced" to accept full relief. But the real question is whether a plaintiff can force *a court* to adjudicate a case—and expound on the law in doing so—when the defendant has already capitulated. Article III answers that question with an emphatic no. Courts have "no business" adjudicating such a case. *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006).

As the case reaches this Court, it is established that Campbell-Ewald's offer was for complete relief. The district court so found (Pet. App. 40a), and the Ninth Circuit decided the case based on that premise (*id.* at 5a). Based on *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), Plaintiff and the government argue that a plaintiff's potential interest—before any class is certified—in the financial benefits of class litigation is sufficient to keep a case alive. But *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1532 (2013), expressly limited *Roper* to its facts, *i.e.*, appeals from the denial of class certification. Plaintiff

and the government are asking the Court to extend *Roper* well beyond its facts, and to recognize a new, substantive right to class litigation that arises as soon as a complaint is filed. There is no basis for creating that right, and the Rules Enabling Act prevents it.

The only remaining question is how to dispose of the case. The Court should remand with instructions to dismiss the case as moot, as it would do if a case settled. That would not leave Plaintiff "empty handed." Resp. Br. 10. If a defendant withdraws its tender after dismissal, a plaintiff can reinitiate litigation based on a change in circumstances negating mootness. *Infra* at 10. Alternatively, the Court should direct the district court to enter a judgment for plaintiff based on the terms of the offer. Mootness divests a court of power to adjudicate a case *on the merits*, but not from taking non-merits-based steps to dispose of a case in a manner "consonant to justice." *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 24 (1994) (citation omitted). Such a judgment unquestionably would satisfy, and thus moot, the claim.

### A. Plaintiff's Position Contravenes Basic Article III Principles

1. As Campbell-Ewald has explained (Pet. Br. 13-16), Article III limits the jurisdiction of the federal courts to cases that present "an actual controversy, and adverse interests," *Lord v. Veazie*, 49 U.S. (8 How.) 251, 255 (1850), maintained by a plaintiff who, at all times, "possesses a legally cognizable interest, or 'personal stake' in the outcome of the action," *Genesis Healthcare*, 133 S. Ct. at 1528 (citations omitted). Plaintiff ignores the "personal stake" requirement and, astoundingly, argues that Article III imposes no adversity requirement. Resp. Br. 10-11, 19-23.

But this Court's cases make clear that a plaintiff must show that he has a "personal stake" in the outcome of the action at all times (Pet. Br. 14-15), and adversity has been recognized as a fundamental requirement of Article III since the founding. *See, e.g.*, *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 240-41 (1937); *Chicago & Grand Trunk Ry. Co. v. Wellman*, 143 U.S. 339, 345 (1892). The exceptional cases cited by Plaintiff (at 21-22) do not override that requirement, or excuse the lack of adversity as a matter of "common practice in ordinary cases." *United States v. Windsor*, 133 S. Ct. 2675, 2688 (2013). In each of these cases, individual plaintiffs, who petitioned the government to "assert, register, or claim a legal interest under federal law," retained a concrete, personal stake in the outcome of the case. James E. Pfander & Daniel D. Birk, *Article III Judicial Power; the Adverse-Party Requirement, and Non-Contentious Jurisdiction*, 124 Yale L.J. 1346, 1355 (2015). A plaintiff who has been handed everything he could obtain through a favorable judgment no longer has such a personal stake.

2. Plaintiff says (at 23) there is "[n]o [a]uthority" supporting Campbell-Ewald's position. But whereas Plaintiff relies almost exclusively on the *dissent* in *Genesis Healthcare*, Campbell-Ewald has pointed to several cases, including *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308 (1893), showing that the tender of complete relief moots a case—regardless of whether it is accepted. Pet. Br. 16-19. Plaintiff tries (at 11, 24-26) to dismiss *San Pablo* as old or irrelevant. But *San Pablo* is clearly valid precedent (*cf. id.* at 26 n.6) and it unmistakably speaks to the "power," *i.e.*, jurisdiction, of the courts. 149 U.S. at 314 (court is "not

empowered to decide moot questions"); *see id.* (refusing to "enlarge the power" of the court).

Nor is this precedent an aberration. It is consistent with a long line of English authorities holding that "it is the bounden duty of this Court to put a stop to any further proceedings" once a defendant offers to fully satisfy a claim, even if the defendant's offer "was not accepted." *Holden v. Kynaston*, 2 Beav. 204, 206, 205, 48 Eng. Rep. 1158, 1159, 1158 (1840); *see also, e.g.*, *Damer v. Earl of Portarlington*, 2 PH 30, 35, 41 Eng. Rep. 852, 854 (1846) ("Upon the general principle, there can be no doubt, that where a suit is instituted, and the Defendant comes and tenders all that the Plaintiff asks, there is jurisdiction in the Court to prevent the Plaintiff from going on."); *Field v. Robinson*, 7 Beav. 66, 67, 49 Eng. Rep. 987, 988 (1844) (same).

Plaintiff's "acceptance" theory is also at odds with modern Article III precedents, including *Clapper v. Amnesty International USA*, 133 S. Ct. 1138, 1151 (2013), in which the Court stressed that parties cannot "manufacture" Article III jurisdiction "merely by inflicting harm on themselves." *See* Pet. Br. 22-23. Yet that is the essence of Plaintiff's theory—a plaintiff can manufacture jurisdiction simply by refusing to accept everything that he could secure through a judgment, the judicial equivalent of a hunger strike.

Likewise, under the "voluntary cessation" doctrine, a defendant's unilateral decision to cease the challenged conduct moots a claim for *prospective* relief if it is clear that the defendant will not engage in the conduct again, regardless of whether the plaintiff consents to the defendant's actions or agrees that they moot his claim. *See, e.g.*, *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 727 (2013). It follows that a defendant's

unilateral act (the offer) moots a claim for *retrospective* relief if it is clear that the offer is for complete relief. In both situations, a court must determine if the defendant's unilateral act gives the plaintiff all the relief he could secure from a favorable judgment. And in both, the case is moot if the answer is yes.

Plaintiff points (at 19) to a criminal defendant's guilty plea. But while a guilty plea may certainly moot particular issues (such as a pre-trial ruling or the guilt/innocence determination), the criminal context is fundamentally different. Among other things, the government retains a concrete interest in the case until a conviction has been entered and the sentence served. And of course, the government cannot force a court to conduct a trial on the merits once a plea is entered. Presumably this all explains why the United States itself has not embraced this analogy.

3. Falling back, Plaintiff argues (at 12, 32-33) that Campbell-Ewald's offer was not for complete relief. This argument asks the Court to overturn a finding made by the district court, Pet. App. 40a, and relied upon by the Ninth Circuit, *id.* at 5a. *See United States v. Ceccolini*, 435 U.S. 268, 273 (1978) (discussing the "traditional deference to the 'two court rule'" (citation omitted)). Moreover, the Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta v. Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). In any event, this argument fails.

In opposing certiorari, the only reason Plaintiff gave in claiming that the offer was not for "full relief" (as the question presented stated) was that it did not provide for attorney's fees. Opp. 23. But a plaintiff is not entitled to attorney's fees unless Congress

authorizes them, *Key Tronic Corp. v. United States*, 511 U.S. 809, 814 (1994), which the TCPA does not. Because Plaintiff has no right to recover attorney's fees if he wins, the absence of such fees does not make the offer for anything less than complete relief.

Plaintiff's new arguments (at 32-33) that Campbell-Ewald's offer was not for complete relief are waived. Sup. Ct. R. 15.2. In any event, as the government's own question presented recognizes (at I), Campbell-Ewald offered Plaintiff an amount "greater than the maximum damages that [he] could have obtained by litigating th[e] individual claim to judgment."

4. The government's focus (at 13) on the mechanics of Rule 68 is misplaced. Campbell-Ewald made a separate tender that remains outstanding (which, to be clear, did *not* expire by its terms, *cf.* U.S. Br. 5). Pet. App. 57a-59a. In any event, Rule 68 was not designed for the situation in which a defendant makes an offer of *complete* relief. *Cf. Delta Air Lines, Inc. v. August*, 450 U.S. 346, 352 (1981) (Rule 68 applies where "amount of recovery is uncertain"). At that point, Article III, not Rule 68, controls. Fed. R. Civ. P. 82.

### B. An Interest In The Potential Benefits Of Class Litigation Is Insufficient

Plaintiff appears to have abandoned the "inherently transitory" and "relation-back" rationale relied on by the Ninth Circuit. Pet. Br. 29-30. Instead, Plaintiff (at 36-43) and the government (at 20-22) argue that a potential interest in the "cost-sharing" benefits of class litigation—before any class is certified—is sufficient to keep a case alive. Plaintiff did not make this argument in his opposition brief or the Ninth Circuit, so it is waived. In any event, this new argument fails.

1. This cost-sharing argument is grounded on *Roper*. But *Roper* involved only whether a plaintiff could appeal a ruling denying class certification—an issue that was "collateral to the merits of a litigation." 445 U.S. at 336. In answering that question, the Court held that a court "had jurisdiction to entertain the appeal only to review the asserted procedural error, not for the purpose of passing on the merits of the substantive controversy." *Id.*; *accord United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 404 (1980). Here, there is no class-certification ruling, and Plaintiff is arguing that the case is live for *all* purposes, including "the merits of the substantive controversy."

Moreover, *Genesis Healthcare* explicitly limited *Roper* to its "particular circumstances." 133 S. Ct. at 1532. Because *Roper* was "distinguishable on the facts," the Court had no need to reconsider the "continuing validity" of *Roper*'s view that the potential benefits of class certification justified an appeal from a ruling denying certification. *Id.* at 1532 n.5. Because *Roper* is likewise distinguishable here, there is again no need "to overrule *Roper*" (Resp. Br. 38). But Plaintiff and the government do not seek an application of *Roper*; they seek a vast *extension* of it to create a right to class litigation as soon as a complaint is filed. That would fly in the face of *Genesis Healthcare*.

Not to mention *Lewis v. Continental Bank Corp.*, 494 U.S. 472 (1990). In *Lewis*, the Court held that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim." *Id.* at 480. Likewise, the Court has repeatedly confirmed that "an interest that is merely a 'byproduct' of the suit itself cannot give rise to a cognizable injury in fact for

Article III standing purposes." *Vermont Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 773 (2000); *see Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107 (1998). The government used to recognize the force of *Lewis*, but here it attempts an unacknowledged, below-the-margin flip on *Lewis*'s direct bearing on this issue. *Compare* U.S. Brief 27 n.4, *Genesis Healthcare*, 133 S. Ct. 1523 (2013) (No. 11-1059), 2012 WL 4960359, *with* U.S. Br. 22 n.7.[1]

Plaintiff's argument (at 33) that a mere demand of "class-wide relief" can keep a case alive also fails. If that were enough, then *Roper* would have been decided on that broader ground. In any event, because a class lacks any separate "legal status" before certification, there is no cognizable interest in class relief before certification. *Sosna v. Iowa*, 419 U.S. 393, 399 (1975); *see Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430 (1976); *Board of Sch. Comm'rs v. Jacobs*, 420 U.S. 128, 129-30 (1975). As Judge Friendly put it, "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 v. Interco, Inc.*, 719 F.2d 23, 33 n.9 (2d Cir. 1983).

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[1] Plaintiff's "incentive award" argument (at 35) likewise fails. At best, this is just a "byproduct of the suit" too. *Espenscheid v. DirectSat USA, LLC*, 688 F.3d 872, 874-75 (7th Cir. 2012), the lone case Plaintiff cites, is distinguishable because the plaintiffs there (unlike Plaintiff here) pointed to a specific "provision of [a] settlement agreement," and the court held only that this interest was sufficient to permit an appeal of the denial of class certification. In any event, this argument is new, and thus waived.

2. Plaintiff's and amici's objections to Campbell-Ewald's position boil down to policy arguments that not only are better reserved for Congress but overlook that Congress actually intended that TCPA claims would be brought on an individual basis (Pet. Br. 3-4). These arguments lose considerable steam when Plaintiff acknowledges (at 42) that what is really at stake in this kind of case is "'pennies on the dollar'" for the unnamed individuals who allegedly received unsolicited recruiting text messages. In any event, such policy arguments cannot override Article III's fundamental limits. Nor can they transform Rule 23's procedural rule into a font of substantive rights.

And, in the end, respecting Article III's limits will not spell the end of class actions. In many, if not most cases, an offer of complete relief will be infeasible because the defendant is unwilling to pay, damages are uncertain, or there are too many others lining up for relief. By contrast, allowing a plaintiff with a moot claim to proceed on behalf of a putative class serves only the interests of attorneys seeking a windfall in fees by leveraging the threat of certification into a lucrative settlement. One can see the allure of that approach from the class action bar's perspective. But Article III demands the existence of an actual "case or controversy," not the possibility of a pot of gold.[2]

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[2] Plaintiff's suggestion (at 38 n.12) that Campbell-Ewald somehow "induced" experienced counsel to delay a class-certification motion is false. Pet. CA9 Reply in Supp. of Mot. to Dismiss 7-8, ECF No. 16-1.

### C. This Case Should Come To An End

1. Once a court determines that a defendant has tendered full relief, the court should dismiss the case as moot, just as a court would do after finding that a case settled. Pet. Br. 19-22. Remarkably, Plaintiff asks (at 31 n.9) the Court to "clarify" (*i.e.*, rewrite) its many decisions recognizing that settlement moots a case and thus triggers dismissal. But instead of unsettling this caselaw and common practice, the Court should *follow* this example and hold that dismissal is required here.

That result will not leave plaintiffs "empty-handed." Resp. Br. 10. If there is a change in circumstances negating the reasons for finding mootness, a plaintiff can reinitiate litigation. *See, e.g.*, *Mills v. Richardson*, 464 F.2d 995, 1000 (2d Cir. 1972) (Friendly, J.) (case dismissed as moot based on government's representation that it would pay benefits at issue was "no longer moot" after government notified plaintiff that it would seek recoupment of such benefits); *Society for Good Will to Retarded Children, Inc. v. Cuomo*, 832 F.2d 245, 246 (2d Cir. 1987) (similar).

2. At a minimum, the district court should dispose of the case by entering judgment for Plaintiff according to the terms of the offer, as the Sixth Circuit has instructed. Pet. Br. 10, 21. And that alternative argument is neither a "concession" (Resp. Br. 14) that the case is *not* moot nor a "self-contradict[ion]" (U.S. Br. 7-8) in light of the fact that it *is* moot.[3]

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[3] Nor is this argument waived. U.S. Br. 15. Campbell-Ewald raised it in its certiorari petition (at 14 n.3, 17; *see* Cert. Reply 7), Plaintiff has never argued waiver, and it is fairly included in the first question presented. *See* U.S. Br.

Mootness deprives a court of the power to adjudicate the case on the merits, *i.e.*, "to decide" the case. *Iron Arrow Honor Soc'y v. Heckler*, 464 U.S. 67, 70 (1983). But mootness does not render a court powerless to take non-merits steps to dispose of the case "consonant to justice." *U.S. Bancorp Mortg. Co.*, 513 U.S. at 24 (citation omitted); *see Sinochem Int'l. Co. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 431 (2007) ("[J]urisdiction is vital only if the court proposes to issue a judgment on the merits." (citation omitted)). There is no basis for limiting this principle to appellate courts, who have no more Article III power than district courts. *Cf.* Resp. Br. 15-16.[4]

Entry of judgment for plaintiff in accordance with a defendant's offer of full relief simply recognizes the circumstances by which it became moot. This approach is not novel. Pet. Br. 21. And it accords with how courts have commonly dealt with the analogous situation of settlements and consent decrees. *See, e.g.*, *Gould v. Control Laser Corp.*, 866 F.2d 1391, 1392 (Fed. Cir. 1989) ("Settlement moots an action, although jurisdiction remains with the district court to enter a consent judgment." (citations omitted)). Like a consent decree, a judgment in accordance with the terms of an offer of complete relief is "enforceable as[] a judicial decree . . . subject to the rules generally applicable to

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18 n.6 (acknowledging that courts have discussed the "entry of judgment" argument in "moot[ness]" terms).

[4] Rule 12(h)(3) does not prevent a court from taking non-merits steps to dispose of a case. *Cf.* Resp. Br. 18. Indeed, Rule 58 calls for entry of a separate judgment in all cases, even if it just executes a dismissal. Fed. R. Civ. P. 58(a).

other judgments and decrees." *Rufo v. Inmates of the Suffolk Cty. Jail*, 502 U.S. 367, 378 (1992); *see also Pope v. United States*, 323 U.S. 1, 12 (1944).

Regardless of the precise moment that mootness occurs once a defendant has made an offer of complete relief, the entry of such a judgment unquestionably "satisf[ies]," and thus "moot[s]," the plaintiff's claim. *Genesis Healthcare*, 133 S. Ct. at 1529 n.4.

## II. CAMPBELL-EWALD IS ENTITLED TO IMMUNITY

Neither Plaintiff nor the government tries to defend the Ninth Circuit's rule that the immunity recognized by *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), is confined to "public works projects." Pet. App. 15a. Nor do they seriously dispute that "[government] contractors might assert qualified immunity for reasonable mistakes." Resp. Br. 51; *see* U.S. Br. 27 n.9. Instead, they respond that *derivative* immunity can only mean *absolute* immunity. But that is incorrect. As courts have recognized, "*Yearsley* immunity" is a form of "qualified immunity" for those acting within the scope of a government contract. *Adkisson v. Jacobs Eng'g Grp., Inc.*, 790 F.3d 641, 647 (6th Cir. 2015). And neither Plaintiff nor the government provides any reason to deny Campbell-Ewald immunity for what boils down to a mistake by a sub-contractor hired with the Navy's approval to execute a recruiting campaign explicitly authorized and closely supervised by the Navy. Pet. App. 33a.

### A. All Agree The Ninth Circuit Erred

As the government acknowledges, the Ninth Circuit based its immunity ruling on its view that *Yearsley* is "'not applicable'" to this case because

*Yearsley* is limited to "'public works projects.'" U.S. Br. 7 (quoting Pet. App. 15a); *see* Pet. Br. 41-43. Neither Plaintiff nor the government defends that arbitrary limit. This error alone warrants reversal.

### B. Contractors, Just Like Individuals, Enjoy Immunity For Acts Within The Scope Of Their Duties

Neither Plaintiff nor the government offers a sound reason for denying contractors like Campbell-Ewald immunity for carrying out the government's work.

1. Plaintiff and the government base their opposition on the premise that derivative immunity is "absolute" (Resp. Br. 13, 48-51) or "categorical" (U.S. Br. 30, 31 n.12). Not true. As courts have recognized, derivative immunity is qualified. *See, e.g.*, *Adkisson*, 790 F.3d at 647 ("*Yearsley* immunity is, in our opinion, closer in nature to qualified immunity for private individuals under government contract . . . ."); *Al Shimari v. CACI Int'l, Inc.*, 679 F.3d 205, 221 (4th Cir. 2012) (en banc) (categorizing derivative sovereign immunity among "immunities that are not absolute"); *In re KBR, Inc.*, 925 F. Supp. 2d 752, 757 (D. Md. 2013) ("derivative sovereign immunity is a qualified immunity"), *vacated on other grounds sub nom. Metzgar v .KBR, Inc. (In re KBR, Inc.)*, 744 F.3d 326 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 1153 (2015).[5]

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[5] Plaintiff's attempt to argue that Campbell-Ewald has waived any claim to less-than-absolute immunity should be rejected. As Plaintiff acknowledges, "throughout its brief" Campbell-Ewald "invoke[s] *qualified*-immunity arguments." Resp. Br. 48. Campbell-Ewald did so as well in its certiorari petition (Pet. 25-26) and in the Ninth Circuit. *See, e.g.*, Pet.

Derivative immunity protects contractors for actions taken on the government's behalf, and under its supervision, within the scope of their contracts. Pet. Br. 37-38; KBR Amicus Br. 27-31. That is consistent with qualified-immunity principles. *See, e.g.*, *Simons v. Bellinger*, 643 F.2d 774, 777 (D.C. Cir. 1980) (government "officers . . . are only entitled to qualified immunity for acts performed within the scope of their authority"). The official, or contractor, "acts beyond the scope of his authority only if the injury occurred during the performance of an act clearly established to be outside of the limits of that authority." *Better Gov't Bureau, Inc. v. McGraw (In re Allen)*, 106 F.3d 582, 594 (4th Cir. 1997), *cert. denied*, 522 U.S. 1047 (1998).

*Yearsley* simply recognized what should be an uncontroversial principle after *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)—private contractors who "perform the same functions as government employees . . . should receive immunity from suit when they perform these functions." *Metzgar v. KBR, Inc.* (*In re KBR, Inc.*), 744 F.3d 326, 344 (4th Cir. 2014) (citing *Yearsley* and *Filarsky*), *cert. denied*, 135 S. Ct. 1153 (2015). That is also consistent with *Boyle* preemption. *Cf.* Resp. Br. 51-52; U.S. Br. 30. Here, as in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 505 (1988), protection is not categorical but instead turns on a case-specific inquiry into whether the contractor's actions were

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CA9 Br. 26-27, ECF No. 29 (relying on *Filarsky v. Delia*, 132 S. Ct. 1657 (2012)). And the Ninth Circuit recognized Campbell-Ewald's reliance on *Filarsky* and addressed the argument. Pet. App. 18a-19a; *cf.* U.S. Br. 27 n.9.

within the scope of the contract. It is therefore not surprising that *Boyle* cites *Yearsley*. *Id.* at 506.[6]

This does not mean that all immunity defenses are "fungible." Resp. Br. 48. But certainly they are shaped by similar guiding principles and overlap in important respects. Pet. Br. 38-41. What has become known as "derivative sovereign immunity" adapts those principles to government contractors.

2. Plaintiff also emphasizes that "government agents or contractors" cannot be authorized to "violate federal law," suggesting that this case is about sanctioning rogue entities to engage in "torture." Resp. Br. 43-44; *see id.* at 43-54. That is plainly wrong.

Immunity protects even government officials that violate the Constitution, let alone statutes regulating text messaging. *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982); Pet. Br. 37. That is not because such officials have "permission" (Resp. Br. 50) to violate federal law, but because immunity protects reasonable mistakes by those acting within the scope of their authority. Thus, in determining "whether a police officer may assert qualified immunity against a Fourth Amendment claim, [courts] do not ask whether he has the right to engage in unconstitutional searches and seizures, but whether engaging in searches and

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[6] The immunity recognized by *Yearsley* is not tied solely to the government's. In *Yearsley* itself the government did not enjoy immunity from the underlying takings claim. And *Yearsley* relied in part on *The Paquete Habana*, which held that, "when the act of a public officer is authorized or has been adopted by the sovereign power, *whatever the immunities of the sovereign*, the agent thereafter cannot be pursued." 189 U.S. 453, 465 (1903) (emphasis added).

seizures in general is a part of his job-related powers and responsibilities." *Holloman v. Harland*, 370 F.3d 1252, 1266 (11th Cir. 2004). Similarly, immunity does not turn on a *post hoc* inquiry into whether the illegal act was explicitly sanctioned. *Cf.* Resp. Br. 55.

Immunity would be essentially meaningless—for government employees as well as agents or contractors—if it only existed when the government ex ante (or ex post) explicitly authorizes the violation of law. But that is not the inquiry. *See Barr v. Matteo*, 360 U.S. 564, 572 (1959) ("What is meant by saying that the officer must be acting within his power cannot be more than that the occasion must be such as would have justified the act, if he had been using his power for any of the purposes on whose account it was vested in him"; otherwise, it would "defeat[] the whole doctrine" (quoting *Gregoire v. Biddle*, 177 F.2d 579 (2d Cir. 1949) (Hand, J.)). Rather, it is settled that government employees and agents *do* enjoy immunity as long as they do not violate clearly established rights in acting within the scope of their duties. *See Pearson v. Callahan*, 555 U.S. 223, 231 (2009).

There is no reason why contractors acting on behalf of the government should not enjoy that protection. That is true even though their contracts invariably include boiler-plate language saying that they shall comply with federal law. JA 220. Government employees agree to comply with federal law as well. But that does not mean they are deprived of immunity when their missteps happen to result in the violation of federal law. Had Naval officers themselves executed the recruitment campaign, there is no question that they would be entitled to immunity if a wrong number ended up on an opt-in list of hundreds of thousands of

recipients—even if that mistake resulted in a violation of federal law. A contractor hired by the Navy to undertake the same campaign, under the Navy's direct supervision, enjoys no less protection.[7]

3. The government acknowledges that its employees can act with confidence that their mistakes will not expose them to liability for violating federal law, but claims that the companies it contracts with to carry out the same functions on its behalf are out of luck. U.S. Br. 23-25. That argument—a clear departure from its prior positions—should be rejected.

The government argues (at 27-29) that *Yearsley* had nothing to do with immunity but just held that the government may "privilege" a contractor to take actions the government itself could take. In other words, according to the government, *Yearsley* applied a derivative *privilege* doctrine, not a derivative *immunity* doctrine. But that reading of *Yearsley* does not hold up. For starters, as the government admits (at 28), "*Yearsley* did not discuss the distinction between 'privileges' and 'immunities,'" an odd omission, to say the least, if the government were right.

Moreover, just a few years after *Yearsley*, this Court stated that *Yearsley* established 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) (emphasis added). Oops. The government's only

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[7] The Westfall Act is not an "obstacle" (Resp. Br. 47) because it has not been interpreted to preclude employee immunity for the kind of mistakes at issue here.

response is to suggest (at 29 n.11) that this Court *meant* to say "privilege," not "immunity." But then why did *Brady* point to *Yearsley*'s "immunity" holding immediately after teeing up whether respondent could obtain "[i]mmunity from suit" (317 U.S. at 583)?

The government's position represents an abrupt about-face from its prior representations to this Court. In *Yearsley*, for example, it said it was "obvious" that "a government agent acting under authority validly conferred by the government cannot be *subjected to suit* on account thereof." U.S. Br. 20, *Yearsley*, 309 U.S. 18 (1940) (No. 156), 1939 WL 48388 (emphasis added). Likewise, just last term, the government referred to *Yearsley* as a "derivative sovereign immunity" case. *See* U.S. Br. 18-19, *KBR, Inc. v. Metzgar*, No. 13-1241 (Dec. 16, 2014), 2014 WL 7185601. The government tries to spin that now (U.S. Br. 30-31 n.12), but it points to nothing that would account for the new doctrinal approach the government asks the Court to embark on today—an analysis, as far as we can tell, no lower court has ever applied before.

The government's new position is simply an attempt to protect its own employees (who it acknowledges could not be sued for sending the texts at issue, U.S. Br. 32), while leaving contractors "holding the bag" (*Filarsky*, 132 S. Ct. at 1666) for the same acts. The government is of course free to change positions when it wishes. But it is the government's prior position, not its new one, that serves the Nation's interests in ensuring that the government is able to attract and harness the "specialized knowledge or expertise" (*id.* at 1665) of private individuals and, yes, corporations too, to carry out vital government objectives, like recruiting for the Nation's defense.

4. This Court has made clear that "immunity analysis rests on functional categories, not on the status of the defendant." *Briscoe v. LaHue*, 460 U.S. 325, 342 (1983). Affording immunity to contractors doing the government's work advances the same vital public interests as granting immunity to individuals doing the government's work. Pet. Br. 38-41, 48-50; *see Metzgar v. KBR, Inc. (In re KBR, Inc.)*, 744 F.3d at 344 ("*Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*."); *see also Sherman v. Four Cty. Counseling Ctr.*, 987 F.2d 397, 403 n.4 (7th Cir. 1993) (finding "no persuasive reason to distinguish between a private corporation and a private individual" for purposes of qualified immunity); *DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 723 (10th Cir. 1988) (same).

If the Navy had hired a private individual (or team of individuals) to fulfill Campbell-Ewald's role, that individual or team would enjoy immunity on the facts here, just as the Navy's own employees would. *See Filarsky*, 132 S. Ct. at 1665. The result cannot be different simply because Campbell-Ewald is "a corporation (as distinct from an individual)." U.S. Br. 27. As Justice Holmes explained in *Sloan Shipyards Corp. v. United States Shipping Board Emergency Fleet Corp.*, 258 U.S. 549, 567 (1922), in evaluating whether a government agent is entitled to immunity, "it cannot matter that the agent is a corporation rather than a single man." *Yearsley*, in which the defendant was a corporation, illustrates the point.

*Richardson v. McKnight*, 521 U.S. 399, 409 (1997), is not to the contrary. *Cf.* Resp. Br. 51 n.16. As this Court has explained, *Richardson* was a "narrow[]" decision that turned on its unique facts—the

management of a lengthy administrative task with "limited direct supervision" by the government. *Filarsky*, 132 S. Ct. at 1667 (citation omitted). Here, the Navy was "in constant contact with Campbell-Ewald on a daily basis," and closely supervised every deliverable. JA 46-47; *see* Pet. Br. 45-46; Pet. App. 33a.

Likewise, the government's reliance (at 26) on isolated language in *Sloan Shipyards* and *Brady* is misplaced. Those cases involved the distinct question whether the United States or an agent thereof was the proper defendant in certain actions under the Suits in Admiralty Act. *See Sloan Shipyards*, 258 U.S. at 564; *Brady*, 317 U.S. at 577, 584. As for the question here, *Brady* reaffirmed that "[i]t is, of course, *true* that government contractors obtain certain immunity in connection with work which they do pursuant to their contractual undertaking with the United States." 317 U.S. at 583 (emphasis added) (citing *Yearsley*).[8]

Ultimately, whatever label this Court chooses to put on the doctrine, this case offers an opportunity for the Court to clarify that contractors, no less than individuals, are entitled to immunity when they are acting on behalf of the government, under its close supervision, and within the scope of their contract—just as Campbell-Ewald was here. Pet. Br. 45-46.

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[8] To the extent the government suggests (at 26 (quoting *Sloan Shipyards*, 258 U.S. at 567-68)) that these cases stand for the broader principle that a government agent is always "'answerable for his acts,'" that proposition is contradicted by *Yearsley* too—not to mention *Filarsky* and other cases recognizing that government agents enjoy immunity.

### C. At A Minimum, Campbell-Ewald Is Immune From Vicarious Liability

This Court has long recognized that "[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 subagents or servants or other persons properly employed by or under him*, in the discharge of his official duties." *Robertson v. Sichel*, 127 U.S. 507, 515-16 (1888) (emphases added); *see* Joseph Story, *Commentaries on the Law of Agency* § 321 (4th ed. 1851) (same); Pet. Br. 46-47. The government—which has embraced this principle in prior cases (*e.g.*, Pet. Br. 44, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) (No. 07-1015), 2008 WL 4063957)—ignores this principle here and pretends that Campbell-Ewald, not MindMatics, prepared the opt-in list and sent the text message at issue.[9]

Plaintiff argues (at 57 n.17) that "the TCPA incorporates vicarious liability." But that is beside the point. This immunity operates *against* vicarious liability—just like the immunity of the Naval officer who authorized the text message campaign protects him. Moreover, as Campbell-Ewald has explained (at 43-44), the TCPA, like all statutes, was enacted against the backdrop of this immunity. Even if the TCPA generally provides for vicarious liability, it also incorporates the immunity against vicarious liability

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[9] There can be no question that Campbell-Ewald qualifies as the Navy's agent. Restatement (Third) of Agency § 1.01 (2006). Indeed, Plaintiff's complaint admits that Campbell-Ewald was acting "on behalf of the U.S. Navy" (JA 19-20).

long recognized by this Court in the circumstances here. *Robertson*, 127 U.S. at 515-16.

It is undeniable that (1) the contract authorized Campbell-Ewald to hire subcontractors; (2) the Navy approved Campbell-Ewald's hiring of MindMatics to prepare the opt-in list and send text messages to those on the list, after Campbell-Ewald advised the Navy that MindMatics would do that; and (3) MindMatics, not Campbell-Ewald, compiled the opt-in list and sent the text messages. Pet. Br. 5-6, 45-46; *see* JA 52, 182, 232-34. Those facts not only establish that everything that Campbell-Ewald did was authorized by the Navy, but also entitle Campbell-Ewald to immunity.

## CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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