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IN THE SUPREME COURT OF THE UNITED STATES

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CAMPBELL-EWALD COMPANY, :

Petitioner : No. 14-857

v. :

JOSE GOMEZ. :

- - - - - x

Washington, D.C.

Wednesday, October 14, 2015

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:04 a.m.

APPEARANCES:

GREGORY G. GARRE, ESQ., Bethesda, Md.; on behalf of Petitioner.

JONATHAN F. MITCHELL, ESQ., Stanford, Cal.; on behalf of Respondent.

ANTHONY A. YANG, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States, as amicus curiae, supporting Respondent.

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P R O C E E D I N G S

(10:04 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 14-857, Campbell-Ewald Company v. Gomez.

Mr. Garre.

ORAL ARGUMENT OF GREGORY G. GARRE

ON BEHALF OF THE PETITIONER

MR. GARRE: Thank you, Mr. Chief Justice, and may it please the Court:

To affirm the Ninth Circuit on the first two questions presented, this Court must accept the following two propositions:

First, a plaintiff can force a court to adjudicate the merits of his claim simply by refusing the defendant's offer of capitulation and complete relief.

And, second, that a plaintiff has what amounts to a substantive right to class litigation that applies as soon as the complaint is filed and that entitles the case to proceed even if his individual claim drops out before --

JUSTICE SCALIA: Is there any controversy over whether the -- the -- the offer is complete relief?

MR. GARRE: I don't think so, Your Honor.

1 The district court found that it was at page 40 of the
2 Petition Appendix. The Ninth Circuit decided this case
3 based on that premise. That's at page 5a of the
4 Petition Appendix.

5 So I think as the case comes --

6 JUSTICE SCALIA: Do we take it on that
7 assumption, too?

8 MR. GARRE: I think you should, Your Honor.

9 Now -- now, they have argued below that the
10 only reason that it wasn't for complete relief was that
11 -- because it didn't provide for attorneys' fees. But
12 the TCPA, the underlying statute here, does not provide
13 for attorneys' fees.

14 JUSTICE KAGAN: But that's a merits question
15 as to whether they're entitled to attorneys' fees. If
16 the question is complete -- you know, "complete relief"
17 means what the plaintiff has asked for. The plaintiff
18 has asked for attorneys' fees here.

19 MR. GARRE: I don't think that's what
20 "complete relief" means, Your Honor. I think it means
21 that the plaintiff has received everything that he
22 could -- that he could if he received a judgment in this
23 -- in --

24 JUSTICE SOTOMAYOR: Well, he would -- he
25 would receive a finding of liability, which you didn't

1 admit in your offer.

2 MR. GARRE: He -- I --

3 JUSTICE SOTOMAYOR: He would -- he would be
4 entitled to an injunction against that activity, the
5 activity that caused this particular situation, and if
6 others were shown, to an injunction in other ways.

7 So I don't see how this could be -- putting
8 aside the class action, putting aside the attorneys'
9 fees, those appear to me to be fairly critical liability
10 determinations that were not made by the court below.

11 MR. GARRE: Okay. First, as the case comes
12 to the Court, I think it is accepted that the offer was
13 for complete relief.

14 Now let me try to answer the points that you
15 raise.

16 First, he's not entitled to a finding of
17 liability. If a litigant was always entitled to a
18 finding of liability, then essentially no case could
19 become moot. If you take the voluntary cessation
20 context, a litigant could always insist that he's still
21 entitled to the finding of liability.

22 JUSTICE KENNEDY: It -- it seems that you
23 want us to write an -- an opinion saying that a
24 settlement offer is equivalent to a judgment. And we've
25 had cases, like the Kokkonen case, in which there was a

1 settlement approved by the court, case dismissed, then
2 the settlement was not performed. They went to court
3 seeking an injunction. The court said, no, no. You
4 have a contract. You have to file again. You have to
5 go into a different court. You have to start all over
6 again.

7 A settlement offer and a settlement contract
8 and a settlement agreement are different from a
9 judgment, and you do not have a judgment.

10 MR. GARRE: Well, Your Honor, I think that
11 the accepted principle is that a settlement moots the
12 case and requires the court to dispose of the case. I
13 mean, I think that's the accepted principle. And --

14 JUSTICE KENNEDY: But you didn't pursue
15 that. You didn't apply under the rules for a judgment.

16 MR. GARRE: Well --

17 JUSTICE KENNEDY: And -- and -- and if you
18 want us to write an opinion and say, oh, well, a
19 settlement offer is the same as a judgment, that just
20 doesn't equate with the Federal Rules of Civil Procedure
21 or with our cases like the Kokkonen case.

22 MR. GARRE: Well, Your Honor, I think -- I
23 think this case is consistent with the Kokkonen case.
24 What the Kokkonen case recognized is that, once a case
25 has come to an end, the Court has ancillary jurisdiction

1 to dispose of it. In that case it dealt with the
2 enforcement of a consent decree.

3 Here our fundamental --

4 JUSTICE GINSBURG: But the Federal rule in
5 point, Mr. Garre -- and it says -- Rule 68 says an offer
6 of judgment expires automatically after 14 days if it's
7 not accepted. It is deemed withdrawn, and it cannot be
8 used for any purpose other than to saddle the plaintiff
9 with costs if she doesn't get more than the offer.

10 So we have a Federal rule directly in point,
11 and that instructs litigants what an offer of judgment
12 means. Why do we look any further than that?

13 MR. GARRE: Well, first, Your Honor, this
14 case, there was not only the Rule 68 offer of judgment,
15 but a freestanding settlement offer. So we think that
16 the mechanics of Rule 68 don't apply here. It's --

17 JUSTICE GINSBURG: Well, isn't that rather
18 an end run around the offer of judgment?

19 MR. GARRE: Well, I don't -- I don't think
20 so. I mean, it still presents the question of whether
21 the controversy still exists given that the defendant
22 has offered the plaintiff everything that he -- he could
23 secure through a Federal judgment.

24 JUSTICE GINSBURG: The plaintiff -- the
25 plaintiff asks for class action, didn't get that because

1 they weren't far -- far along enough for the plaintiff
2 even to move for certification.

3 MR. GARRE: And the plaintiff in Genesis
4 Healthcare asked for a collective action. The Court
5 found that that allegation did not --

6 JUSTICE GINSBURG: But the collective action
7 is simply a device for permissive joinder. It's quite
8 different, as Genesis recognized.

9 Class action -- I don't remember Justice
10 Thomas' exact words, but it's a whole different kettle
11 of fish.

12 MR. GARRE: Well, I mean, here's how I think
13 it's different, Your Honor.

14 You're right. It is different. But it's
15 different in that this Court has repeatedly said that
16 the class has no independent legal status until it's
17 certified. And it's different in that, in Genesis
18 Healthcare, you had a statutory right to a collective
19 action, but the Court said that that didn't trump
20 Article III.

21 And here you just --

22 JUSTICE GINSBURG: All it -- all it is --
23 it's an invitation to people to join you. That's all --
24 all that -- it's a permissive joinder.

25 MR. GARRE: Well, it was still pretty

1 important to the plaintiff in that case, and it was a
2 statutory right.

3 And here the question is: When the
4 individual claim drops out, is there any basis for the
5 action to proceed simply so that, on the -- on the
6 potential that a class could be certified?

7 JUSTICE GINSBURG: One -- one is -- is that
8 potential.

9 The other is, it's not that I would be
10 entitled to attorneys' fees from the loser, but if
11 there's a class, then there are a lot of other people
12 who will share in the attorneys' fees and I'll have to
13 pay less.

14 MR. GARRE: And that -- that's the
15 cost-sharing argument that was made in Roper.

16 And if I could say a couple things about
17 that.

18 First, the plaintiff in this case, unlike
19 the plaintiff in Roper, never made that argument below.
20 He never argued in favor of cost sharing. In fact, the
21 complaint, if you look on page 21 of the Joint Appendix,
22 touts that he has all the financial resources necessary
23 to bring this action.

24 Second of all, in Roper the Court relied on
25 that interest solely for the purpose of allowing the

1 appeal from the denial of certification when the mootings
2 event occurred after the denial of certification.

3 So there you had a real relation back issue.
4 If the Court had been wrong in denying certification,
5 then the case never would have become moot in the first
6 place.

7 Here, the mootings event takes place before
8 certification. There's nothing to relate back to.

9 JUSTICE KAGAN: But if I could go back a
10 little bit, Mr. Garre. And this is, I think, the
11 question that Justice Scalia started with.

12 There are a number of things that you've
13 said, well, he asked for it, but he's not entitled to
14 it. He asked for attorneys' fees, but he's not entitled
15 to attorneys' fees. And he asked for an injunction or
16 declaratory relief, and he's not entitled to that. And
17 he asked for class certification, but he's not entitled
18 to that, and so the case is moot.

19 And the "so the case is moot" seems to me to
20 be a non sequitur. In other words, he's asked for these
21 things, you haven't offered these things, and there's a
22 dispute about whether he's entitled to these things.

23 Now, you might be completely right as to the
24 "He's not entitled to attorneys' fees." But that has to
25 be adjudicated. You can't -- a court can't just say,

1 Oh, you've offered complete relief, because in his view
2 you haven't offered complete relief, and that's what the
3 litigation is all about.

4 MR. GARRE: And a court can make that
5 determination just like a court can determine whether or
6 not a defendant who says he's going to stop his action
7 has truly voluntarily ceased his action.

8 JUSTICE KAGAN: A court can absolutely make
9 that determination. But the question is does the Court
10 make that determination in the guise of a mootness
11 motion?

12 MR. GARRE: Well, I think it absolutely
13 does, just like it would in the voluntary cessation
14 context.

15 I -- I want to be clear because I think we
16 have a little bit of a --

17 JUSTICE SOTOMAYOR: Why can't it -- why
18 can't it do that in the context of a summary judgment
19 motion? I mean, why does it have to moot the case?
20 Wouldn't the appropriate vehicle be a summary judgment
21 motion in which you admit the facts that make you
22 liable, or you concede the facts that make you liable?
23 And then you fight about the legal questions?

24 MR. GARRE: The -- the reason is, when --
25 when one party throws in the towel, the match is over.

1 Here the question is whether there's an
2 Article III case or controversy when the defendant is no
3 longer fighting over the result as to the thing at
4 issue. That's -- those are the words that the Court
5 used in the San Pablo case. That's an Article III
6 determination.

7 JUSTICE SOTOMAYOR: But I -- but what's an
8 Article III determination is whether he or it or she is
9 entitled to the relief that they asked for. May well be
10 they're not.

11 MR. GARRE: And functionally --

12 JUSTICE SOTOMAYOR: But they're entitled to
13 have the Court say it, not you.

14 MR. GARRE: A -- a court can certainly make
15 the determination of whether or not they have provided
16 complete relief. In a case like this where you're
17 dealing with liquidated damages, that's easy.

18 It's just --

19 JUSTICE SOTOMAYOR: By the way, you called
20 this a "freestanding offer," but I have it right here,
21 and it's the -- offer says, "Offer of judgment pursuant
22 to Federal Rule of Civil Procedure 68."

23 This was your client's submission.

24 MR. GARRE: No -- well, you're right, Your
25 Honor. That's the Rule 68 offer. If you go on page 57a

1 of the petition appendix, there's the freestanding
2 settlement offer, which isn't a Rule 68 offer.

3 The other thing about Rule 68 is it's really
4 not designed for the situation of complete relief. It's
5 designed for the situation where the defendant and
6 plaintiff have to gamble, essentially, over whether or
7 not an offer for less than complete relief is
8 sufficient. They -- they want to settle on that basis.

9 In this case you had a freestanding
10 settlement offer. It provided for complete relief, and
11 so the question is whether or not the -- the plaintiff
12 had a personal stake in the case sufficient -- in the
13 outcome of the case sufficient to keep this case alive.

14 Justice Kennedy, to get back to your point
15 about settlement. And I think what's important to
16 recognize here is -- here's our position: When the
17 offer of complete relief is made and when a court has
18 determined that it is, indeed, for complete relief, then
19 the case has to come to an end. Now, whether you say
20 it's -- it's moot at that precise moment or whether you
21 say it starts the ball rolling down the hill towards a
22 dismissal or entry of judgment for the plaintiff based
23 on the terms of the offer, the point is -- is that when
24 the defendant has offered everything, the courts can't
25 go ahead and expound on the law.

1 Now, this Court has repeatedly said, when
2 it's not necessary to decide, it's necessary not to
3 decide. And that's the fundamental principle at stake
4 here. Defendant has offered everything, and the
5 plaintiff --

6 JUSTICE KENNEDY: Suppose one day after the
7 offer the defendant defaulted. Would a case that's now
8 -- was once moot now become non-moot?

9 MR. GARRE: Well, and that would be an
10 unusual situation if it did, Your Honor. I think --

11 JUSTICE KENNEDY: It happened in Kokkonen.
12 We had a case on it here in the Court.

13 MR. GARRE: And -- and -- you know, Roper's
14 another case where there was an offer that the Court
15 never -- it didn't really question in that case whether
16 the offer mooted the claim on the merits. The only
17 question was whether they could appeal the denial
18 certification. Here the plaintiff's position asking
19 this Court to go far beyond what the Court recognized in
20 Roper and really to recognize a substantive right to
21 class adjudication. At the end of the day, that's what
22 they're insisting on. As soon as they filed their class
23 complaint --

24 JUSTICE GINSBURG: A substantive -- how
25 about a procedural right to litigate entitlement to

1 class status?

2 MR. GARRE: I -- I don't think you can
3 describe it as a procedural right. This Court has said
4 that Rule 23 is a procedural mechanism. When the
5 requirements are met, it said that there's no separate
6 legal status for the class until the class is certified.
7 The Jacobs --

8 JUSTICE SOTOMAYOR: So why is it that we
9 permit relation back at all?

10 MR. GARRE: Well.

11 JUSTICE SOTOMAYOR: If -- we have cases that
12 say when a case has become moot in the middle of the
13 litigation, it can relate back to the beginning.

14 MR. GARRE: Okay. Well, first of all --

15 JUSTICE SOTOMAYOR: If mootness is mootness,
16 mootness is mootness, right?

17 MR. GARRE: Yes. First of all, the Court
18 has recognized two narrow exceptions, Your Honor. First
19 is an appeal from the denial of class certification when
20 the mooting event happens while a case is on appeal.
21 That's the Roper case. And the second is the inherently
22 transitory exception.

23 Now, it's not even clear that the
24 respondents are asking for either exception, because I
25 don't see "relation back" or "inherently transitory" in

1 their red brief, but it's clear that the first exception
2 doesn't apply because this case doesn't involve an
3 appeal from the denial of class certification, and it's
4 clear that the second case exception doesn't apply,
5 "inherently transitory," because in Genesis, this Court
6 made clear that the concern of the so-called picking off
7 wasn't a sufficient basis to say that a claim was
8 inherently transitory. That exception doesn't deal with
9 the defendant's litigation conduct; it deals with
10 whether the claimant's conduct is going to recur, like a
11 pretrial temporary detention situation. This case
12 doesn't fit into this -- that exception at all. If --

13 JUSTICE ALITO: What if the -- what if the
14 defendant -- I -- did you finish your answer?

15 MR. GARRE: Yes, Your Honor.

16 JUSTICE ALITO: What if the defendant has
17 very shaky finances, maybe on the verge of bankruptcy,
18 or has a history of reneging on promises, and -- but the
19 -- the offer to provide full relief moots the case, even
20 in that situation?

21 MR. GARRE: A -- a couple answers to that,
22 Your Honor. First, that's not an issue in this case.
23 They've never disputed Campbell-Ewald's ability to pay.
24 Second of all, I think a court can determine that the
25 plaintiff -- the defendant is ready and able to pay.

1 And third of all, in the situation where the case is
2 dismissed for mootness based on the terms of the offer
3 and then it turns out that they can't execute the offer
4 -- I mean, that's a situation where the court -- the
5 plaintiff can go back to the court and say, you based --
6 you -- you dismissed the case on an erroneous factual
7 premise. That's like the Judge Friendly decision that
8 we cite in our reply brief. So that situation is not
9 going to happen.

10 And all of these practical concerns are
11 going to go away if this Court recognizes in this case
12 that a defendant's offer of complete relief ends any
13 case or controversy over the individual claim. The case
14 goes away. The plaintiffs are going to accept the
15 offer.

16 JUSTICE KENNEDY: And the offer of complete
17 relief from a solvent defendant where it looks like the
18 relief will be forthcoming, if -- if you lose this case
19 and so the case is not moot, could still be considered
20 as a factor in the court's decision whether or not to
21 certify the class?

22 MR. GARRE: I don't think -- it certainly
23 wouldn't be a classic certification decision factor,
24 Your Honor. And I think --- I mean, one of the reasons
25 why the Court insists on an Article III case or

1 controversy is that it wants to insist that it doesn't
2 expound on the law, but --

3 JUSTICE KENNEDY: In other words, the class
4 certification goes along without reference to whether
5 the lead plaintiff has any injury any longer?

6 MR. GARRE: Well, it's -- it's certainly a
7 very unusual situation where the personal representative
8 has been made whole. Now -- now, there is some
9 claims --

10 JUSTICE KENNEDY: That's why I asked if the
11 trial judge could, in his discretion, consider that as a
12 factor in certifying or not certifying --

13 MR. GARRE: Well, I suppose that he could in
14 the terms of the person represented, but the real
15 question is: Why would you want a court to expound on
16 the law difficult questions about certification, as this
17 Court knows as well as anyone, when there's no case or
18 controversy to begin with, when the defendant has
19 offered the plaintiff everything? And then the question
20 is: If his individual claim drops out, what
21 interests -- to put it in Judge Friendly's terms, what
22 interest does a -- does a plaintiff --

23 JUSTICE GINSBURG: You keep referring,
24 multiple times in your brief and now twice -- but in the
25 case that Judge Friendly dealt with, the class claims

1 had already been done and dispensed with, distinguished,
2 extinguished. So it wasn't a case of a class
3 certification not yet ruled on; it was ruled on. The
4 class action was out of the case. It was only the
5 individual.

6 MR. GARRE: Well, you're right, Your Honor,
7 about that distinction, but I think what Judge Friendly
8 said applies equally here, which is that when a
9 plaintiff loses his individual interests in the case, he
10 has no -- no right to -- to litigate on a class action
11 because it might benefit others.

12 He also pointed out that the offer of
13 complete relief in this case, in this kind of situation,
14 puts the plaintiff in a better situation than a default
15 judgment. The plaintiff has everything that he asks
16 for. He's walking away with the money.

17 And to your point earlier, Justice
18 Sotomayor, just to be clear, the offer in this case
19 included a stipulation to an injunction as well. So
20 that --

21 JUSTICE SOTOMAYOR: But that's for future
22 conduct, not -- not directed to the conduct -- the
23 direct conduct at issue here. But I --

24 MR. GARRE: Well, you can't undo past
25 conduct.

1 JUSTICE SOTOMAYOR: I -- I -- you know, I
2 looked at the three railroad cases that you cited as
3 proof that this has always been the case, but do you
4 have anything besides those things? In the common law,
5 I can't find any situation in which a court accepted a
6 offer that wasn't accepted by the party. In the
7 railroad cases, what they found was that an offer was
8 made and the other side, by taking money, accepted the
9 offer.

10 MR. GARRE: No, but --

11 JUSTICE SOTOMAYOR: Have you found any case
12 in the common law that -- where there was an offer that
13 was unaccepted, was entered by the Court?

14 MR. GARRE: Well, three responses to that.
15 First, in the San Pablo case, for example, the Court's
16 decision specifically makes clear that the plaintiff
17 refused that offer.

18 Second of all --

19 JUSTICE GINSBURG: But you've had to -- you
20 had to deposit the money in an account in the name of
21 the plaintiff. And San Pablo turned on a provision of
22 the California Civil Code that said an obligation for
23 payment is extinguished, is extinguished by offer of
24 payment, if the money is immediately deposited in a
25 reputable bank in the name of a creditor.

1 MR. GARRE: That's -- that's, of course,
2 right, Your Honor, but of course, if acceptance was the
3 rule, then it's a little bit odd that the Court didn't
4 mention the fact that he didn't accept it at all.

5 The other point I wanted to make in response
6 to Justice Sotomayor's question is: We cited a long
7 footnote in our opening brief that has many cases
8 recognizing this principle, and in our reply brief, we
9 cite the holding case out of the English courts. It's
10 an 1840 case, and that case is exactly on point,
11 involving a situation where a claim was brought for a
12 debt, the defendant came in and said, here's your money,
13 and the court in that case -- the plaintiff refused to
14 accept it. And the court in that case said it had a
15 beholden duty to end the case, given that the -- the
16 defendant had offered everything that the --

17 JUSTICE KAGAN: But Mr. Garre --

18 MR. GARRE: -- plaintiff was seeking.

19 JUSTICE KAGAN: -- and this is very much
20 along the same lines -- you know, you have an old
21 English case. You have these three cases in the '90s,
22 1890s, which were really about liabilities had -- that
23 had already been satisfied, and the court said, it's
24 already been satisfied, payment has already been made.
25 But there's really no history at all -- and tender

1 offers have existed for a long, long time. There's no
2 history at all of -- of saying that a tender offer moots
3 a case, as opposed to the classic understanding, the
4 common law understanding, of tender offers was that it
5 created an incentive for parties, and that that was
6 their purpose and that was their effect, was to
7 incentivize parties to do something, but not to --
8 for -- not to provide a mechanism for a court just to
9 throw out a case when a party decided that, for whatever
10 reason, he thought that the tender offer was not good
11 enough.

12 MR. GARRE: So I think first -- just a
13 quibble -- I do think there's a long-standing practice
14 of recognizing that when the defendant has been offered
15 everything he could secure, the case goes away.

16 Second of all, and I think maybe more
17 important: I mean, I would say that your dissent in
18 Genesis Healthcare itself recognizes that acceptance
19 can't be the rule in all cases. I mean, you recognize
20 in the situation where the plaintiff doesn't accept for
21 obstinacy or madness, but once you're there, you
22 recognize that acceptance can't be the rule. And that's
23 got to be right, because in the voluntary cessation
24 context, we don't require the plaintiff to accept that.

25 JUSTICE KAGAN: Well, but I -- I said that

1 mootness is not the appropriate remedy in that case.

2 The appropriate remedy in a case where it's
3 absolutely clear that -- that the -- that the defendant
4 has given -- has offered the plaintiff everything the
5 plaintiff has asked for, which it's not in this case,
6 but where it's absolutely clear where the defendant has
7 offered everything that the plaintiff himself has asked
8 for, the appropriate thing to do, in order to prevent
9 wasteful litigation, is not to dismiss the case for
10 mootness but to grant judgment in favor of the
11 plaintiff.

12 MR. GARRE: And -- and I think here -- I
13 mean once we're at the point where we realize this case
14 can't -- can't go on any further because he's been
15 offered everything as the case comes to this Court, then
16 the -- then the question for the Court is, well, how do
17 we dispose of it?

18 Do we tell the lower Court to dismiss it as
19 moot, or do we tell the lower Court to enter judgment
20 for plaintiff based on the terms of the offer, at which
21 point it clearly becomes moot.

22 I mean this Court --

23 JUSTICE KAGAN: Well, it doesn't become
24 moot, it's just been decided. It's -- there's been an
25 adjudication at that point.

1 MR. GARRE: No, there hasn't been --

2 JUSTICE KAGAN: There's nothing to dismiss.

3 MR. GARRE: There hasn't been an
4 adjudication, Your Honor. It's judgment entered based
5 on the terms of the offer. It's not a judgment
6 adjudicating the claim on the merits. It's not a
7 judgment where the Court is picking a winner or loser.
8 The Court is simply recognizing the fact that the
9 defendant has offered everything and a judgment
10 entered --

11 JUSTICE SOTOMAYOR: Mr. Garre, the only way
12 that I see a Court entering judgment in the Federal
13 Rules of Civil Procedure is a Rule 56 judgment.

14 Someone moves and says, you got everything
15 you're entitled to. The other side comes back and says,
16 no, I'm entitled to attorneys' fees, I'm entitled to
17 whatever. And the Court says, no, you're not, this is a
18 full satisfaction, I enter judgment.

19 I don't know why we have to make a merits
20 determination based solely on an unaccepted offer of
21 judgment.

22 MR. GARRE: Well, first of all, a judgment
23 is just technically an order disposing of the case. I
24 mean, we went back and looked, and you yourself as a
25 district court judge issued judgments in cases where you

1 dismissed it as moot. It just reflects that the case
2 has come to an end.

3 Second of all, what we've recognized as an
4 alternative position as the Sixth Circuit position here,
5 which is that -- that in this situation you can dispose
6 of the case by entering judgment for plaintiff based on
7 the terms of the offer. That's not a judgment on the
8 merits because it's not adjudicating the claim on the
9 merits.

10 It's not picking a winner, not involving the
11 Court picking a winner -- a loser -- winner, and it
12 resolves all the hypothetical concerns that they've
13 raised about eliminating the case before they actually
14 have the check in hand. And that's -- that's an
15 appropriate way of disposing of this case.

16 And no one can argue that there's an Article
17 III interest in -- in proceeding with the litigation
18 once they have a judgment disposing of the case.

19 And we're back to --

20 JUSTICE GINSBURG: What do you do with the
21 pleading rules that say, payment and accord and
22 satisfaction are affirmative defenses?

23 MR. GARRE: Your Honor, those are -- those
24 are accord and satisfaction, for example, is a
25 contract-based doctrine. It happens where -- where

1 payment is made before the case gets to litigation.

2 There's -- there's no principle.

3 Once -- once the litigation begins, the
4 principle that controls is Article III. Article III's
5 case and controversy requirement requires that the
6 plaintiff had a -- had a personal stake, a live personal
7 stake in the outcome of the case at all stages of the
8 proceeding.

9 And on the first question, our point is that
10 once you've been offered everything you could receive --
11 and again, that's how the case comes here, and he has
12 been offered everything that he could get through a
13 favorable judgment on his individual claim -- there's no
14 longer a personal stake in litigating that case to the
15 outcome --

16 JUSTICE GINSBURG: What about the personal
17 stake that a would-be class representative has in
18 getting a bonus or an --

19 MR. GARRE: Just as was true in Genesis
20 Healthcare, the would-be class representative is in the
21 same exact position he was before this case goes away
22 because he could still file his own claim. He can
23 settle that claim, he can provide -- he can file his own
24 class action.

25 And you know, here, what we're arguing about

1 is policy arguments about whether or not the Court ought
2 to find some basis to keep the class action alive.

3 JUSTICE GINSBURG: That's --

4 MR. GARRE: That's not an appropriate
5 determination of Article III.

6 JUSTICE GINSBURG: He filed a class action
7 on your theory. That's what he wanted to do, and he was
8 stopped very early on by this offer of judgment.

9 MR. GARRE: Well, this -- this gets to the
10 concern of these sorts of class actions are going to go
11 away.

12 First of all, it's -- it's hard to feel too
13 sorry about the plaintiffs who have everything that they
14 could possibly ask for.

15 What we're talking about asking people, as a
16 practical matter in these sorts of class actions, what
17 they get is pennies on the dollars of their claim. The
18 big money goes to the class action lawyers here.

19 All of this can be addressed if Congress
20 wants to address it by addressing these --

21 JUSTICE KAGAN: Mr. Garre, both sides have
22 these class action policy arguments, but it's important
23 not to let those drive this pretty technical mootness
24 question. So if we could just take the class action
25 arguments out of it.

1 Just let's say that there's a plaintiff, and
2 he claims 10,000 -- he wants \$10,000 plus attorneys'
3 fees, okay? And the defendant says, I'll give you
4 \$10,000.

5 And the plaintiff says, no, I really want
6 attorneys' fees too. And the defendant says, no, you're
7 not entitled to attorneys fees. Plaintiff says, no, I
8 think I am. I'll -- I think I -- I'm going to reject
9 your settlement offer.

10 So you say at that point the Court can come
11 in and say, oh, the case is moot. Now, how is that
12 possible?

13 MR. GARRE: Well, in the same --

14 JUSTICE KAGAN: There's a -- there's a
15 contested question as to what one person owes another.
16 The -- the defendant has said he doesn't want to accept
17 this offer because he doesn't think it gives him
18 everything that's entitled -- he's entitled to. And the
19 measure of complete relief has to be, at this stage,
20 about what his complaint asks for.

21 MR. GARRE: It's just like the voluntary
22 cessation context, Your Honor.

23 In that case --

24 JUSTICE SCALIA: I suppose he could ask for
25 the key to Fort Knox, right?

1 MR. GARRE: He --

2 JUSTICE SCALIA: And then -- and then no --
3 no settlement offer would -- would suffice, right?

4 MR. GARRE: He could ask for a unicorn, Your
5 Honor.

6 JUSTICE SCALIA: He could ask for a unicorn.

7 JUSTICE KAGAN: Then you submit the case --

8 JUSTICE SCALIA: Don't you --

9 JUSTICE KAGAN: -- on the merits.

10 JUSTICE SCALIA: Don't you -- don't you
11 think this Court --

12 JUSTICE KAGAN: There's a very -- there's a
13 very easy response to this, which is if it's frivolous,
14 if it's trivial, you dismiss the case on the merits.

15 MR. GARRE: The Court can make that
16 determination. And you'd want it to make that
17 determination before it went ahead and adjudicated the
18 claim on the merits, whether it's -- it's deciding
19 difficult questions on certification, whether it's going
20 ahead and making law in TCPA, whether it's going ahead
21 and making law in --

22 JUSTICE SCALIA: If it's a frivolous claim,
23 I don't see why the Court can't dispose of that
24 initially --

25 MR. GARRE: He can dispose --

1 JUSTICE SCALIA: -- in connection with the
2 mootness --

3 MR. GARRE: The Court can make that mootness
4 determination. It does in every other context in which
5 mootness arise. And Article III wants the Court to make
6 that determination before the Court goes on and expounds
7 on the law.

8 If I could return -- reserve the remainder
9 of my time.

10 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

11 Mr. Mitchell.

12 ORAL ARGUMENT OF JONATHAN F. MITCHELL

13 ON BEHALF OF THE RESPONDENT

14 MR. MITCHELL: Mr. Chief Justice, and may it
15 please the Court:

16 Campbell-Ewald's mootness argument fails
17 because an offer of complete relief cannot render a case
18 moot. At most, the offer might justify a forced entry
19 of judgment, but not a jurisdictional dismissal.

20 CHIEF JUSTICE ROBERTS: If there's no -- if
21 you're getting everything you want, what is the case or
22 controversy? What is the live dispute in which you have
23 a personal stake to the terms we use under Article III?

24 MR. MITCHELL: The live dispute is in
25 obtaining a court judgment that incorporates that relief

1 that's been offered.

2 CHIEF JUSTICE ROBERTS: So -- well, what is
3 it you're worried about, that they won't make good on
4 the offer, or --

5 MR. MITCHELL: The mere offer of complete
6 relief does not have anything to do with mootness. Even
7 if the plaintiff and the defendant agree on what the
8 proper judicial relief should be, the only question in
9 that situation is whether the Court should enter
10 judgment for the plaintiff, not dismiss the case for
11 lack of jurisdiction.

12 JUSTICE ALITO: Suppose Mr. Garre right now
13 were to take a big stash of cash out of his briefcase,
14 or a certified check and present that to you. Would
15 there be any case left then?

16 MR. MITCHELL: There might be a defense on
17 the merits if Mr. Garre's client can say we've paid the
18 debt. But that's not something that goes --

19 JUSTICE ALITO: That would be -- there would
20 be a case or controversy? If this were an individual
21 action and the plaintiff had received from, and -- and
22 the damages are -- the -- the amount of potential
23 damages are undisputed, and the plaintiff has received
24 that amount from the defendant, no dispute about it,
25 there wouldn't be a live case or controversy?

1 MR. MITCHELL: The defendant would have a
2 defense on the merits. He could plead accord and
3 satisfaction, he could plead res judicata.

4 JUSTICE ALITO: What is the controversy?

5 MR. MITCHELL: Because there's -- there's a
6 past injury that's been alleged caused by the defendant
7 that could be redressed, in theory, with judicial
8 relief. That --

9 JUSTICE ALITO: Which would give the -- the
10 defendant -- which would give the plaintiff what in
11 addition to the money under my hypothetical?

12 MR. MITCHELL: He shouldn't get anything in
13 addition to what he's already received, but that goes to
14 the merits not to whether an Article III case or
15 controversy exists.

16 When a Court --

17 JUSTICE KENNEDY: You're saying the
18 defendant has -- has an interest -- pardon me -- that
19 the plaintiff has an interest in the judgment --

20 MR. MITCHELL: Yes.

21 JUSTICE KENNEDY: -- quite separate from
22 obtaining all the relief that he requests --

23 MR. MITCHELL: Well, he hasn't obtained --

24 JUSTICE KENNEDY: -- again -- again, why --
25 well, let's assume the case in which they asked for

1 \$10,000 and \$10,000 is deposited in a bank with
2 irrevocable instructions to pay it.

3 MR. MITCHELL: Right.

4 JUSTICE KENNEDY: What -- what is -- is the
5 concrete injury, as the Chief Justice said, that results
6 in adversity?

7 MR. MITCHELL: The concrete injury is the
8 past injury that he's already suffered. That the injury
9 has already been remedied is a defense that goes to the
10 merits. It doesn't go to Article III.

11 JUSTICE KENNEDY: I'm sorry. Go ahead.

12 MR. MITCHELL: Everyone agrees, Justice
13 Kennedy, that under your hypothetical the case should be
14 thrown out of court. The only dispute is whether it's
15 thrown out of court on jurisdictional grounds under
16 Article III or whether it's bounced on the merits
17 because the defendant has an affirmative defense.

18 CHIEF JUSTICE ROBERTS: Voluntary cessation
19 can moot a case whether the plaintiff likes it or not,
20 right?

21 MR. MITCHELL: If it's certain that the
22 conduct won't reoccur.

23 CHIEF JUSTICE ROBERTS: Well, if it's
24 certain that they're going to give you the money that
25 you asked for, why isn't the same result applied?

1 In other words, why is it not simply what
2 the plaintiff wants? He doesn't want the money he's
3 asking for, he wants a judgment that he will give him
4 the money. As far as I can tell, that's your argument.

5 MR. MITCHELL: When you're dealing with past
6 injury, Mr. Chief Justice, there's always a past injury
7 that remains. Even if --

8 JUSTICE KENNEDY: But there has to
9 be adversity, as the Chief Justice mentioned in his
10 first question. And if \$10,000 is in the bank and he's
11 been injured in the -- in the sum of \$10,000, there's no
12 adversity.

13 MR. MITCHELL: There is adversity if the
14 plaintiff comes into court --

15 JUSTICE KENNEDY: Other -- other than the --
16 the -- the stigma of a judgment.

17 MR. MITCHELL: If the plaintiff comes into
18 court demanding more and the defendant says, no, you're
19 not entitled to that, there is adversity, Justice
20 Kennedy.

21 Now, the plaintiff is not legally entitled
22 to additional damages on the merits if he's already been
23 paid. But, again, that goes to the merit. That's not
24 part of the Article III inquiry.

25 Redressability under Article III does not

1 ask whether the plaintiff is legally entitled to the
2 relief he demands. He could be making an utterly
3 meritless claim for relief.

4 But that's not the Article III question.
5 Article III assumes the plaintiff would have a legal
6 entitlement for the relief demanded and asks whether
7 that relief, if granted by the Court, would redress the
8 injury that he --

9 CHIEF JUSTICE ROBERTS: You put a lot of
10 weight on what the plaintiffs -- but there's another
11 interest here, which is the -- the Court's interest.
12 You're being given everything you want. You say, well,
13 we've had a past injury.

14 Well, you asked for relief on that, and that
15 is what you're being given. And yet you say,
16 nonetheless, we're entitled to enlist the Court and the
17 Court's time. And not only that, under Article III,
18 we're entitled to get a legal ruling even though there's
19 no -- there's nothing more that they can give you.

20 MR. MITCHELL: Just -- just to be clear --

21 CHIEF JUSTICE ROBERTS: You won't -- you
22 won't take "yes" for an answer.

23 MR. MITCHELL: Mr. Chief Justice, we have
24 not been offered everything we've demanded. We have --
25 we have --

1 CHIEF JUSTICE ROBERTS: Well, that's a --
2 that's a factual question.

3 MR. MITCHELL: Right.

4 CHIEF JUSTICE ROBERTS: The district court
5 said you were --

6 MR. MITCHELL: No, no. I'm sorry. The
7 district court did not say that. There's no --

8 CHIEF JUSTICE ROBERTS: Page 40a?

9 MR. MITCHELL: Page 40a in the Petition
10 Appendix. The district court does not say, as a matter
11 of law or as a finding of fact, that we were offered
12 complete relief.

13 What the district court said on page 40a, it
14 said it assumes, for the sake of argument, that the
15 offer constituted complete relief only -- only --

16 CHIEF JUSTICE ROBERTS: No. Sorry. Sorry,
17 Counsel. That's not what it says. It's not we assume
18 for the sake of argument.

19 MR. MITCHELL: Right.

20 CHIEF JUSTICE ROBERTS: Say the parties do
21 not dispute that defendant's Rule 68 offer would have
22 fully satisfied the individual claims asserted --

23 MR. MITCHELL: The end --

24 CHIEF JUSTICE ROBERTS: -- or that could
25 have asserted by plaintiff in this action.

1 MR. MITCHELL: Only the individual claims.

2 And the district court was wrong to say that
3 we did not dispute that.

4 If you look at docket entry --

5 CHIEF JUSTICE ROBERTS: Well, did the Ninth
6 Circuit proceed to decide the case on the basis of that
7 finding?

8 MR. MITCHELL: No, it didn't.

9 We disputed in the Ninth. We said in the
10 Ninth Circuit that the district court was wrong to say
11 that, on page 40a of the Petition Appendix. It's in
12 Docket Entry 13 in the Ninth Circuit record --

13 CHIEF JUSTICE ROBERTS: Did the Ninth
14 Circuit proceed to decide the case on the basis of the
15 assumption that the district court factual determination
16 was correct?

17 MR. MITCHELL: No. The Ninth Circuit
18 assumed, for the sake of argument --

19 CHIEF JUSTICE ROBERTS: I think that is the
20 same as proceed to decide for question --

21 MR. MITCHELL: No. I don't -- I don't -- I
22 don't agree, Mr. Chief Justice.

23 There was binding precedent in the Ninth
24 Circuit already before we got there, in Diaz and Pitts,
25 that said even an offer of complete relief from the

1 defendant does not moot the case.

2 So if the defendant throws up his hands and
3 unconditionally surrenders, whether it's a class action
4 or not, that has nothing to do with mootness. It may
5 justify a forced entry of judgment, but it does not moot
6 the case.

7 And that's the problem that Mr. Garre cannot
8 get around, because Campbell-Ewald insists in this case
9 that the Court --

10 JUSTICE SCALIA: Well, you're -- you're --
11 you're contrasting a forced entry of judgment on the one
12 hand with mootness on the other. But a forced entry of
13 judgment is one of the remedies for mootness.

14 MR. MITCHELL: No. Those are mutually
15 exclusive. If the case is moot, a court cannot enter a
16 judgment ever, under any circumstance.

17 JUSTICE SCALIA: No.

18 MR. YANG: The only proper response in that
19 situation is to dismiss for lack of subject matter
20 jurisdiction under Rule 12(b)(1).

21 JUSTICE SCALIA: I don't --

22 MR. YANG: There can never be a judgment.

23 JUSTICE SCALIA: I think -- I think when
24 there has been a settlement and the parties have agreed
25 to a settlement, the court can enter a judgment.

1 MR. MITCHELL: It can. And that's exactly
2 why settlement --

3 JUSTICE SCALIA: Even though the case is
4 moot --

5 MR. MITCHELL: No, the case is not --

6 JUSTICE SCALIA: -- because of the
7 settlement.

8 MR. MITCHELL: The case is not moot. If the
9 court is entering a judgment, by definition the case is
10 not moot. Mootness requires a jurisdictional dismissal.
11 Mootness forbids the entry of any type of judgment.

12 So for Campbell-Ewald to come into this
13 Court and say that the district court retained the
14 prerogative to enter judgment on the merits after the
15 offer of complete relief has been tendered is a
16 confession that the offer of complete relief on this
17 case --

18 JUSTICE SCALIA: It is a judgment on the
19 merits. It's -- it's -- it's a judgment affirming the
20 settlement, affirming what the parties themselves have
21 agreed to.

22 MR. MITCHELL: That's still a judgment.

23 JUSTICE SCALIA: It doesn't go to the merits
24 of the claim.

25 MR. MITCHELL: It -- oh, it may not -- it

1 may not resolve the merits for purposes of issue
2 preclusion. That's correct, Justice Scalia, but it's
3 still a judgment under Rule 58. It is court-ordered
4 relief. And a court cannot do that in a case when it
5 lacks subject-matter jurisdiction.

6 Mootness and forced entry of judgment are
7 mutually exclusive.

8 CHIEF JUSTICE ROBERTS: -- so just to be
9 clear on the facts without getting into dispute, let's
10 say that the offer is for the -- all relief that you
11 have asked for.

12 MR. MITCHELL: Yes.

13 CHIEF JUSTICE ROBERTS: Not a question of
14 what you think you're entitled to or what they think.
15 Everything you've asked for, including all attorneys'
16 fees. So there's no question of cost shifting or
17 anything like that. All injunctive relief.

18 They come to you and say, you write the
19 injunction.

20 You say, there is still a case or
21 controversy that could proceed to litigation.

22 MR. MITCHELL: There is a case or
23 controversy that might lead to a forced entry of
24 judgment if the plaintiff, for obstinacy or other types
25 of reasons, wants to decline this offer.

1 It's hard to imagine.

2 CHIEF JUSTICE ROBERTS: What's -- what is
3 the controversy? In the case I've hypothesized --

4 MR. MITCHELL: The controversy is --

5 CHIEF JUSTICE ROBERTS: -- what is the
6 controversy?

7 MR. MITCHELL: The controversy is the
8 plaintiff wants a judgment of the court that
9 incorporates that relief.

10 A mere offer from the defendant is a legal
11 nullity. He's not getting the money.

12 CHIEF JUSTICE ROBERTS: You said if the
13 plaintiff is being obstreperous or whatever, you know,
14 the -- just refusing to take it for spite or some
15 reason. In that case?

16 MR. MITCHELL: Enter a judgment, not -- not
17 dismiss for mootness.

18 CHIEF JUSTICE ROBERTS: And what would the
19 judgment say?

20 MR. MITCHELL: The judgment would say: You
21 asked for X. The defendant offered X. This case is
22 over. Both sides agree on what the proper legal relief
23 should be --

24 JUSTICE KENNEDY: But I thought that's
25 what --

1 MR. MITCHELL: -- and enter a judgment.

2 JUSTICE KENNEDY: -- Mr. Garre was arguing.
3 He said he'd need a judgment.

4 MR. MITCHELL: No. He's saying it's moot.

5 Now, he's trying to say that mootness allows
6 the court also to enter a judgment, but that's a
7 contradiction in terms if it's moot.

8 JUSTICE KAGAN: And I take it that this
9 judgment that you're talking about would be: He offered
10 this. It's everything that you asked for. We are
11 ordering that he pay it. And --

12 MR. MITCHELL: Yes.

13 JUSTICE KAGAN: -- and -- and now the thing
14 is dismissed.

15 MR. MITCHELL: Right. And now it's backed
16 up with the force of the court. It can be enforced with
17 contempt citations, which a meek offer of complete
18 relief can't.

19 In fact, an unaccepted offer has no legal
20 effect at all.

21 JUSTICE ALITO: If the case is dead when
22 there's -- when the judgment is entered, it seems to me
23 it's even more dead when you've actually got the case in
24 hand. If you have the judgment, you're going to -- you
25 may have to enforce the judgment. You don't actually

1 have anything of value. You have a piece of paper.

2 MR. MITCHELL: You still have -- you -- you
3 may still have to enforce the judgment, but that's much
4 easier than enforcing an -- an offer.

5 JUSTICE ALITO: That's better - it's better
6 to be -- if somebody gave you the choice between a
7 judgment that says you're entitled to a certain amount
8 of money and the money itself in your hand, you would
9 rather have the judgment?

10 MR. MITCHELL: We don't have the money in
11 our hand. It's been offered.

12 JUSTICE ALITO: But if you did. That was my
13 first hypothetical. If you did, if you actually had the
14 money in hand.

15 MR. MITCHELL: If we actually had the money
16 in hand, we're not entitled to an additional judgment
17 because the defendant in that case would have a defense
18 on the merits. It still doesn't justify throwing us out
19 of court on mootness.

20 JUSTICE SCALIA: Okay. But it wouldn't be
21 moot --

22 MR. MITCHELL: It's jurisdictional --

23 JUSTICE SCALIA: Sorry.

24 MR. MITCHELL: I'm sorry. Go ahead.

25 JUSTICE SCALIA: My goodness.

1 So every case has to be tried even when
2 you've --

3 MR. MITCHELL: No.

4 JUSTICE SCALIA: -- been paid.

5 MR. MITCHELL: Not tried.

6 JUSTICE SCALIA: He's, I want a judgment.

7 MR. MITCHELL: No.

8 JUSTICE SCALIA: And you say it's not moot.

9 MR. MITCHELL: The court can say, we're
10 terminating the litigation and entering judgment for
11 you, Mr. Plaintiff, because you're not accepting an
12 unconditional surrender from the defendant.

13 You don't go go trial in that situation.
14 You enter judgment for the plaintiff. It's not to be
15 thrown out for lack of jurisdiction.

16 A jurisdictional dismissal sends the
17 plaintiff home empty-handed. With nothing. No judicial
18 relief at all. This unaccepted offer is just out there.
19 It hasn't been accepted. It can't be enforced in any
20 way.

21 CHIEF JUSTICE ROBERTS: So if --

22 MR. MITCHELL: Not by contract; not by any
23 remedy.

24 CHIEF JUSTICE ROBERTS: If, Mr. Garre, as
25 you're leaving the court -- courtroom today says, here,

1 we will accept an entry of judgment. One, we'll make
2 sure you get whatever attorneys' fees you want and we
3 will accept an entry of judgment. Then the -- then the
4 case would be over?

5 MR. MITCHELL: Well, it certainly would not
6 be moot.

7 CHIEF JUSTICE ROBERTS: Would it be over?

8 MR. MITCHELL: If he wants to accept an
9 entry of judgment on everything that we've asked for,
10 which includes the attorneys' fees; a real injunction,
11 not a vague, "obey the law" injunction that's in his
12 offer; and class certification and class relief.

13 CHIEF JUSTICE ROBERTS: Oh, well, that's the
14 whole thing; right?

15 MR. MITCHELL: Right. Right.

16 CHIEF JUSTICE ROBERTS: This is all about
17 class certification.

18 MR. MITCHELL: But we -- one does not get to
19 class certification until the court first concludes that
20 the individual claims have become moot. And there's no
21 way the claims can be mooted out simply by an offer --

22 CHIEF JUSTICE ROBERTS: So the case comes
23 down to once we put away -- hypothesize that you're
24 getting everything you, as the plaintiff in this case
25 has asked for, it comes down to whether or not you can

1 get the class certified.

2 MR. MITCHELL: But it comes -- the question
3 presented asked whether the offer of complete relief
4 moots the case.

5 CHIEF JUSTICE ROBERTS: And you're saying --

6 MR. MITCHELL: And the answer to that --

7 CHIEF JUSTICE ROBERTS: And you're saying --

8 MR. MITCHELL: -- question is no.

9 CHIEF JUSTICE ROBERTS: Excuse me.

10 MR. MITCHELL: I'm sorry.

11 CHIEF JUSTICE ROBERTS: And you're saying
12 that it's not because of the possibility that you could
13 get a class certified.

14 MR. MITCHELL: Well, that's one --

15 CHIEF JUSTICE ROBERTS: My hypothesis is you
16 get everything else. Okay?

17 MR. MITCHELL: Yes.

18 CHIEF JUSTICE ROBERTS: The only thing they
19 don't say -- they enter a judgment. You want a
20 judgment? Here's your judgment. You want all the
21 attorneys' fees? Here's all your attorneys' fees. You
22 want an injunction? You know, go ahead and write your
23 injunction.

24 But you say still not because you might be
25 able to be the representative plaintiff in a class

1 action?

2 MR. MITCHELL: That's -- that's one of the
3 many reasons why it's not --

4 JUSTICE BREYER: I don't see why that one --

5 CHIEF JUSTICE ROBERTS: Of course not.

6 JUSTICE BREYER: -- would be a good -- the
7 thing I thought was interesting here, and I wanted to
8 know your position, is the AFL-CIO brief.

9 MR. MITCHELL: Yes.

10 JUSTICE BREYER: Which is on your side.

11 MR. MITCHELL: Yes.

12 JUSTICE BREYER: Do you agree with it.

13 MR. MITCHELL: I wouldn't say that we agree
14 with all --

15 JUSTICE BREYER: I want to know: Do you
16 agree with it.

17 MR. MITCHELL: No, we don't.

18 JUSTICE BREYER: Fine. But why not? What
19 they say is that the right way to go about this is --
20 and they cite cases and so forth in the 19th century --
21 is that the defendant should not -- you're right. It's
22 not an offer of relief. What they say is the defendant
23 is supposed to tender the money.

24 And when he tenders the money, if the
25 plaintiff won't accept it, he goes to the court and he

1 deposits the money in the court. And the court then
2 issues a judgment saying, this case is over.

3 That's what I read here in the pages 9 to
4 11, and they have lots of authority, and that gets rid
5 of the problem. And there's no -- it seems to me if it
6 isn't right, why isn't it?

7 MR. MITCHELL: It may be over, but it's not
8 moot.

9 JUSTICE BREYER: Why -- who -- what the
10 judge does is say they want \$10,000. What the defendant
11 does is he says they won't take my check, which should
12 be certified. So he deposits it in court.

13 MR. MITCHELL: Right.

14 JUSTICE BREYER: The judge at that point
15 should say, the defendant has all he wants. The case is
16 over. Good-bye. And, of course, if that person now has
17 all he wants, he can't certify this is a class because
18 he isn't harmed.

19 MR. MITCHELL: He gets judgment on the
20 merits in those situation.

21 JUSTICE BREYER: Fine. Give him judgment on
22 the merits. Who cares?

23 MR. MITCHELL: It's actually a very
24 important distinction.

25 JUSTICE BREYER: Why?

1 MR. MITCHELL: Because many reasons.

2 JUSTICE BREYER: Well, give me one.

3 MR. MITCHELL: All right. I'll start with
4 one. The question presented asks whether an offer of
5 complete relief renders the case --

6 JUSTICE BREYER: I'm not interested in the
7 question asked. I am interested in the question I am
8 asking.

9 MR. MITCHELL: All right. It may very well
10 be if the defendant in that case comes into court and
11 says the case is over, the district court would have the
12 prerogative to enter a judgment on the merits for the
13 defendant because the plaintiff has already been paid,
14 and the plaintiff can't double dip. That goes to the
15 merits.

16 But Campbell-Ewald never asked the district
17 court for judgement on the merits.

18 JUSTICE BREYER: And that isn't what I said.
19 You now sound as if you are agreeing with the AFL-CIO.

20 MR. MITCHELL: I don't agree with it because
21 they are implying that that would moot the case.

22 JUSTICE BREYER: No, they don't say what the
23 effect of it would be.

24 MR. MITCHELL: Fine.

25 JUSTICE BREYER: What I want -- I'm being

1 practical.

2 MR. MITCHELL: Okay.

3 JUSTICE BREYER: And the practical thing is
4 that the defendant wants to pay off the plaintiff by
5 giving him everything he wants. Is there a way to do
6 it? What they say is, yes, the way to do it is you
7 tender the money in a certified check, and if he won't
8 take it, pay the money into court. And the -- the judge
9 then enters a judgment in favor of the plaintiff who has
10 gotten everything he asked for.

11 MR. MITCHELL: If he's gotten everything
12 he's asked for, that goes --

13 JUSTICE BREYER: Not the class
14 certification. There's nothing in there that says --

15 MR. MITCHELL: Yeah, apart from class action
16 which is a more complicated question.

17 JUSTICE BREYER: No, it's not a more
18 complicated question. In my hypothetical, I'm saying in
19 those circumstances do you agree -- do you or do you not
20 agree, and if not, why not. The only thing that's left
21 is you'd like, says the plaintiff, class certification,
22 or at least the lawyer would.

23 MR. MITCHELL: The case is not over if
24 you're talking about class certification, because Roper
25 holds specifically that the representative plaintiff can

1 continue litigating the class certification if
2 there's --

3 JUSTICE BREYER: Even though there's been a
4 certified check tendered to the plaintiff and a judgment
5 has been entered giving -- saying the case is over
6 because he's got everything he wants.

7 MR. MITCHELL: That was the situation in
8 Roper. There was a forced entry of judgment imposed on
9 the representative plaintiffs. And this Court allowed
10 the representative to continue litigating the class
11 certification issue because he had a financial stake in
12 the class certification decision.

13 And Mr. Gomez, likewise, has a financial
14 stake --

15 CHIEF JUSTICE ROBERTS: What is -- what is
16 the financial stake here?

17 MR. MITCHELL: There's two of them. One is
18 the cost sharing of the lawyers.

19 CHIEF JUSTICE ROBERTS: Okay. Well, the
20 cost -- so then that's fully satisfied if the offer
21 covers attorneys' fees?

22 MR. MITCHELL: Yes. Of course, this -- this
23 offer does not.

24 CHIEF JUSTICE ROBERTS: Okay. Now, if --

25 MR. MITCHELL: Yes.

1 CHIEF JUSTICE ROBERTS: Right.

2 MR. MITCHELL: Right.

3 CHIEF JUSTICE ROBERTS: What was the other
4 one?

5 MR. MITCHELL: The other one would be the
6 incentive award that he would recover if the class is
7 certified and the case proceeds either to settlement or
8 victory. And that's another --

9 CHIEF JUSTICE ROBERTS: The incentive award?

10 MR. MITCHELL: The incentive award.

11 Normally, a representative plaintiff after a
12 class gets certified and the settlement gets --

13 CHIEF JUSTICE ROBERTS: Is -- is there any
14 concern that a plaintiff who has received or has been
15 offered all relief that he could receive is an
16 appropriate representative plaintiff of parties who have
17 not gotten all the relief?

18 MR. MITCHELL: That -- that might be
19 something for a court to consider under Rule 23, whether
20 this person is an adequate representative. But we don't
21 think there is much of a difference there because the
22 incentive award still gives him incentives to press for
23 the fellow class members.

24 And this Court's upheld qui tam litigation
25 where --

1 CHIEF JUSTICE ROBERTS: So the argument is
2 that an individual plaintiff who has gotten everything
3 that he has asked for -- and I realize you argue that
4 isn't the case here.

5 MR. MITCHELL: Yeah, not even close, yeah.

6 CHIEF JUSTICE ROBERTS: -- is -- is entitled
7 to proceed with the litigation because he might get a
8 bonus from a class action that he would like to lead?

9 MR. MITCHELL: That's correct.

10 CHIEF JUSTICE ROBERTS: Okay.

11 MR. MITCHELL: But, again, that's only one
12 of many reasons why we win on the mootness question.
13 And, you know, there's still the problem of the mutual
14 exclusivity between a mootness finding and a forced
15 entry of judgment.

16 JUSTICE ALITO: Can I ask you just a
17 practical question? Is Mr. Garre right that this is a
18 case, if he were to proceed, if it were -- the class
19 were certified and you get a judgment, this is a case
20 where the class action attorneys are going to get a lot
21 and the members of the class are going to get virtually
22 nothing?

23 MR. MITCHELL: No.

24 JUSTICE ALITO: You would have to prove that
25 at the -- to establish damages, would you not, that the

1 members of the class did not consent to receive these
2 messages, right?

3 MR. MITCHELL: That's correct. And it went
4 beyond --

5 JUSTICE ALITO: How would you do that? How
6 would you be able to -- how can you prove that
7 somebody -- some member of the class at some point when
8 they were agreeing to something on the Internet didn't
9 click a box that said I agree to receive messages from
10 all of, you know, a big class of senders?

11 MR. MITCHELL: There are opt-in lists that
12 are maintained by companies like MindMatics and
13 Campbell-Ewald that can be discovered, and that's how we
14 would go about proving it.

15 JUSTICE ALITO: What do you think the class
16 members would get?

17 MR. MITCHELL: They're entitled to --

18 JUSTICE ALITO: Individual class members, as
19 a practical matter, what would they get at the end of --

20 MR. MITCHELL: What would they get in a
21 settlement? I would imagine they would probably get --

22 JUSTICE ALITO: A settlement? You're --

23 MR. MITCHELL: If it settles.

24 JUSTICE ALITO: What if it's not?

25 MR. MITCHELL: They're entitled to \$500 a

1 piece in statutory damages that could be trebled to
2 \$1,500, if we can show there was a violation.

3 JUSTICE ALITO: And you're going to be able
4 to determine who did not -- prove that certain people
5 did not consent?

6 MR. MITCHELL: It would be based on whether
7 they appeared on the opt-in list, whether they had
8 appeared on some type of opt-in list from which --

9 JUSTICE GINSBURG: What do you -- do you get
10 on that opt-in list?

11 MR. MITCHELL: You have to check a box or
12 submit a form that says you're interested in receiving
13 e-mails or text messages about certain topics. And in
14 this case, the Navy instructed Campbell-Ewald to send
15 text messages only to people who had opted in to receive
16 information about money for college, travel and
17 adventure, something related to the Navy. And this list
18 was not assembled properly.

19 JUSTICE GINSBURG: We haven't talked about
20 the second issue that you raise, and one curiosity is
21 the -- the actor that did something wrong was -- what is
22 it? MindMatics.

23 MR. MITCHELL: Yes, MindMatics.

24 JUSTICE GINSBURG: But you didn't sue. What
25 is the reason that you went after the contractor only?

1 MR. MITCHELL: Campbell-Ewald is vicariously
2 liable, and they were the ones that were sued. But...

3 JUSTICE GINSBURG: So you're relying on
4 vicarious liability?

5 MR. MITCHELL: Yes. The Ninth circuit found
6 that -- may I answer?

7 CHIEF JUSTICE ROBERTS: Sure.

8 MR. MITCHELL: Thank you.

9 The Ninth Circuit found that the TCPA
10 incorporates vicarious liability and that Campbell-Ewald
11 is vicariously liable for MindMatics' actions. And they
12 did not appeal that. That is the law of the case.

13 CHIEF JUSTICE ROBERTS: Thank you, Mr.
14 Mitchell.

15 Mr. Yang.

16 ORAL ARGUMENT OF ANTHONY A. YANG

17 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,

18 SUPPORTING RESPONDENTS

19 MR. YANG: Mr. Chief Justice, and may it
20 please the Court:

21 I'd like to take the opportunity to clarify
22 the Article III question by addressing the elements of
23 an Article III case or controversy and established
24 Federal practice that I believe shows that an offer --
25 an unaccepted offer, in particular, cannot moot a case.

1 And if there's time, I'd like to address the derivative
2 sovereign immunity argument.

3 First, there is a distinction that this
4 Court has established between prospective relief and
5 retrospective relief. When you seek prospective relief,
6 you need to show an ongoing or imminent injury.

7 In that context, a defendant can actually
8 halt the injury that's necessary, by stopping as long as
9 you meet the voluntary cessation doctrine or so long as
10 you show that it's not capable of repetition you're
11 going to be in review.

12 So the injury with respect to prospective
13 relief, that is, the injury that's occurring now or in
14 the future, can end. When we're talking about
15 retrospective relief, damages, the injury is in the
16 past. It's not undone. An offer of money may be
17 compensation for that injury, but the injury continues
18 to exist.

19 For purposes of Article III, the question is
20 there has to be an injury. It has to be fairly
21 traceable. That's established by the past injury
22 that -- caused by the defendant. And the requested
23 judicial relief would likely redress the injury. Now,
24 the requested relief, even when there's been an offer,
25 is I want money.

1 Second --

2 JUSTICE SCALIA: I'm sorry. Those are the
3 three requirements for Article III standing, but there's
4 an additional requirement of adverseness. None of those
5 three requirements that are -- that are set forth in
6 our -- in our opinions deal with adverseness. That's a
7 separate -- separate issue.

8 MR. YANG: Well --

9 JUSTICE SCALIA: And that's what's being
10 challenged here.

11 MR. YANG: I don't believe so. It's
12 embedded in the request for relief. The plaintiff comes
13 to the Court and says, I want relief from the Court.
14 The defendant says, no, no, don't grant the relief.
15 I've either -- the case is moot.

16 I think that's what's going on here. There
17 is a distinction between --

18 JUSTICE SCALIA: There has to be injury, in
19 fact, okay. It has to be attributable to the -- to the
20 defendant, okay. And the Court must be able to remedy
21 it. None of those three requirements, which are the
22 classic requirements, deals with the quite separate
23 point of adverseness.

24 MR. YANG: I believe it's embedded in --

25 JUSTICE SCALIA: If somebody comes in and

1 says, yes, you've been injured, the Court could provide
2 relief, but I agree with all of that, and here is the
3 money.

4 MR. YANG: Well, then the case is not moot.
5 The court can grant relief. The court enters a judgment
6 ordering relief, which is enforceable with all the
7 court's powers, which is quite distinct from a judgment
8 of dismissal for one of jurisdiction.

9 That -- that's a -- you need to have -- a
10 court needs Article III power to direct a remedy against
11 the defendant. It's quite unlike a dismissal for one of
12 jurisdiction. It's also quite unlike the remedy of
13 vacatur, which undoes a court judgment.

14 So Mr. Garre's, you know, attempt to kind of
15 frame this either as, you know, a -- a prospective
16 relief case or a case where you're getting a judgment, a
17 judgment of dismissal for one of jurisdiction is not an
18 enforceable judgment in the way that is relevant for
19 purposes of Article III jurisdiction.

20 JUSTICE SOTOMAYOR: Mr. Yang, I -- I -- I do
21 understand what you and Petitioner -- Respondent's
22 counsel are arguing, which is someone, a judge, has to
23 say, at some point, this is in fact complete relief and
24 enter a judgment for complete relief.

25 That's your argument.

1 MR. YANG: In part, I believe that's right.

2 JUSTICE SOTOMAYOR: All right.

3 Parties could stipulate. If they -- if they
4 accept an offer of settlement, that's like a stipulation
5 saying, this is complete relief for us. There's no
6 adversity.

7 MR. YANG: The -- and the parties when they
8 agree.

9 JUSTICE SOTOMAYOR: Right.

10 MR. YANG: When they say, we've agreed and
11 we -- we give up, the case will normally be thought of
12 as moot.

13 But there is -- there is several
14 longstanding Federal practices, both in Federal courts,
15 actually, as well as the State courts, that I think
16 reflects this point.

17 A party -- parties can agree to settle a
18 case, but a court retains jurisdiction to enter a
19 consent decree. This is an enforceable judgment.

20 Justice Kennedy, you talked about Kokkonen.
21 This is the distinction between a settlement offer and a
22 judgment.

23 The court has authority to enter a consent
24 decree even after the parties have settled. That's more
25 than an offer. It's actual -- a settlement.

1 Two, the courts can --

2 JUSTICE SCALIA: Excuse me.

3 It -- it has authority to enter that even
4 though the case is moot; right?

5 MR. YANG: No. It --

6 JUSTICE SCALIA: But when there's a
7 settlement offer which has been accepted, the court can
8 nonetheless issue a judgment enforcing that settlement,
9 no?

10 MR. YANG: The case is not moot because the
11 parties are -- are saying, we are agreeing on the entry
12 of a judgment, not we're agreeing in the abstract to
13 just --

14 JUSTICE SCALIA: Oh --

15 MR. YANG: -- to settle the case.

16 JUSTICE SCALIA: So -- so even though the
17 parties have no adverseness at all and they all agree on
18 what the outcome should be, but we want a court to go
19 into this matter which we've all agreed on because we
20 want a judgment? Is -- is -- is that --

21 MR. YANG: What --

22 JUSTICE SCALIA: -- the Article III
23 adverseness requirement?

24 MR. YANG: This is not a remarkable
25 proposition. Courts all the time --

1 JUSTICE SCALIA: I think it's remarkable.

2 MR. YANG: -- all the time enter consent
3 decrees. These are enforceable with the power of the
4 court.

5 Two, they also dismiss with prejudice. That
6 is not a dismissal for one of jurisdiction. It's a
7 resolution of the claim.

8 Three, they enter judgment in a Rule 68
9 offer.

10 Also, you look at the affirmative defenses,
11 which are all waivable, in Rule 8(c), according
12 satisfaction, payment, res judicata.

13 CHIEF JUSTICE ROBERTS: What happens on
14 other grounds of lack of jurisdiction? What if the
15 plaintiff has no injury?

16 There is no injury. The court -- in other
17 words, the -- the requirements for Article III
18 jurisdiction that you rehearsed, what happens in that
19 case?

20 No jurisdiction for another reason besides
21 mootness?

22 MR. YANG: Right.

23 The court would dismiss the case for one of
24 jurisdiction, saying that there is no injury.

25 CHIEF JUSTICE ROBERTS: Well, what if the --

1 the plaintiff comes in and says, well, I want -- I want
2 a judgment? Or because what other --

3 MR. YANG: But --

4 CHIEF JUSTICE ROBERTS: -- bases, or I
5 want -- I want -- whatever reason. I mean, they're --
6 we're insisting on a judgment even though, arguably,
7 depending upon the scope of the offered relief, the case
8 is moot.

9 MR. YANG: Our point is that --

10 CHIEF JUSTICE ROBERTS: Other cases you say
11 they dismiss it as -- why -- why doesn't that go to
12 trial? Or -- or you get the benefit of the court
13 determination?

14 MR. YANG: The standing inquiry has to, of
15 course, be addressed at the relevant stage of the case.
16 So, for instance, at the pleading stage, if you failed
17 to allege an injury sufficient --

18 JUSTICE SCALIA: I think you're wrong. I
19 think if there's no standing, I don't think you get
20 dismissed as moot. I think you get a judgment for the
21 defendant because the plaintiff has no standing.

22 MR. YANG: It's not a -- it's a judgment
23 that there is lack of standing. That you have no
24 injury. It's not a resolution of the claim itself.

25 JUSTICE SCALIA: Indeed. So -- so the fact

1 that the court issues judgment has nothing to do with
2 whether there's Article III standing, whether there's
3 mootness or not. You can enter the judgment even though
4 there's no Article III standing.

5 MR. YANG: There is a -- there is a
6 difference between a judgment for want of jurisdiction
7 that the court is just, I don't have the power to
8 address this.

9 In a judgment where the court says, I have
10 power to -- to enter relief that is enforceable through
11 collateral proceedings through all the -- the -- the
12 great power of a Federal court. That is a big
13 difference.

14 A court requires Article III jurisdiction to
15 exercise that power over the litigants. And that's what
16 normally happens with consent decrees, with dismissals
17 with prejudice, with a judgment under Rule 68 offer.
18 And it also, conversely, even when a party has been
19 fully paid.

20 The fact that the defense of payment --
21 accord and satisfaction can all be waived. So at the
22 end of the case, if the defendant hasn't actually raised
23 these and then belatedly says, I forgot. I paid the
24 guy, and the claim was for a thousand dollars, the court
25 says, sorry. Forfeited. Judgment for another \$1000.

1 CHIEF JUSTICE ROBERTS: So even if a -- even
2 if the plaintiff is given all the relief to which he is
3 entitled, you say the plaintiff still has a right to
4 involve the Federal court in that --

5 MR. YANG: The --

6 CHIEF JUSTICE ROBERTS: And I was -- I -- I
7 can't say that controversy because you still have to
8 right to call -- go into Federal court and say, I know,
9 Federal court, you're busy with a lot of things, but I
10 still want you to hear my case even though I've gotten
11 everything I could get.

12 MR. YANG: And I don't want to mislead the
13 Court into thinking that we're advocating protracted
14 litigation on claims where there is a powerful defense
15 like payment. That is a merits defense: We've paid the
16 claim. You don't -- you can't get anymore money from
17 me.

18 But for -- the question of the court's power
19 to entertain that merit defense is what we're saying
20 is -- like the fact that we have affirmative defenses
21 that may be waived. Even a res judicata, the court has
22 already adjudicated the very claim, and yet if the
23 defendant does not raise it, this Court has held it
24 doesn't go to the court's jurisdiction.

25 And so the -- you could get relief twice.

1 CHIEF JUSTICE ROBERTS: Is a -- is a
2 plaintiff who has been given all the relief that he's
3 requested in the view of the United States an adequate
4 class representative?

5 MR. YANG: This is, again, not an Article
6 III question but a Rule 23 question.

7 I think that could be considered by the
8 Court in exercising its discretion under Rule 23.

9 CHIEF JUSTICE ROBERTS: Well, of course it
10 can. I want to know what the position is.

11 MR. YANG: I think if the -- I -- I think
12 that's hard, and let me tell you why. To be an adequate
13 represented -- representative of the class, you can't
14 simply be looking out for your own interests. You have
15 to be looking out for the interests of the class. And
16 that's part of the requirement.

17 A defendant who says, I'll just accept my
18 money and drop the interests of the class, you know,
19 it's not -- you wonder whether that defendant is -- or
20 plaintiff is actually a good adequate representative.

21 Rule 23 -- and, again, now we're stepping
22 away from the Article III question. We're getting into
23 questions of discretion.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 Mr. Garre, you have four minutes remaining.

1 REBUTTAL ARGUMENT OF GREGORY G. GARRE

2 ON BEHALF OF THE PETITIONER

3 MR. GARRE: Thank you, Mr. Chief Justice.

4 First, the Article III principle that should
5 control the resolution of this case was stated in the
6 San Pablo case on page 314.

7 The Court said the Court is not empowered to
8 decide moot questions or declare rules of law which
9 cannot affect the result as to the thing in issue in the
10 case before it.

11 And that's exactly what's at issue before
12 the case -- the Court today.

13 JUSTICE GINSBURG: Relying on the provision
14 of the California Civil Code, which was quite different
15 from Rule 68.

16 MR. GARRE: I'm -- I'm not talking about the
17 technical distinction of the cases. I'm talking about
18 the Article III principle that controls here.

19 JUSTICE SOTOMAYOR: Mr. Garre, I am so
20 confused by your argument. You get to say on your own,
21 unilaterally, I offered you complete relief. Even
22 though, right or wrong, the plaintiff is asking for a
23 particular injunction and a particular attorney's fee.

24 You, without any judicial interpretation,
25 intervention, get to moot the case on your terms.

1 MR. GARRE: Your Honor --

2 JUSTICE SOTOMAYOR: What happens if you
3 hadn't done that? Let's assume that he was entitled to
4 attorneys' fees. Who's -- when does that decision get
5 made and by whom?

6 MR. GARRE: Your Honor, a court --

7 JUSTICE SOTOMAYOR: That a complete offer
8 has been made?

9 MR. GARRE: A court makes the determination
10 that the offer is complete just as it would make a
11 determination that the defendant had in fact
12 voluntarily --

13 JUSTICE SOTOMAYOR: That -- that is --
14 that's all I needed for you to say.

15 MR. GARRE: Okay. Thank you.

16 JUSTICE SOTOMAYOR: Okay? Let's stop there.

17 MR. GARRE: And -- and the Court did it in
18 this case.

19 JUSTICE SOTOMAYOR: So a court gets
20 involved -- a court gets involved no matter what.
21 Right?

22 MR. GARRE: As it always would for a
23 mootness determination. Of course.

24 JUSTICE SOTOMAYOR: All right. So you
25 offered and they wanted an injunction. The Court can

1 enter that injunction.

2 I'm putting aside the class action. I'm --

3 MR. GARRE: Yes.

4 JUSTICE SOTOMAYOR: The Court can't -- all
5 right.

6 MR. GARRE: You could -- but it could,
7 because the case is settled.

8 JUSTICE SOTOMAYOR: But it can't just say
9 that the case is moot and not enter the injunction. The
10 terms of the settlement, the terms of the lawsuit, were
11 that an injunction would be issued and you'd pay \$1,500;
12 correct?

13 MR. GARRE: Your Honor, I think
14 Justice Scalia had exactly the right answer on this,
15 which is that there's -- there's decades if not
16 centuries of practice dealing with this situation, and
17 it's a settlement context.

18 Everyone agrees this Court has repeatedly
19 said that the settlement moots the case. That doesn't
20 mean that courts don't have afforded ancillary
21 jurisdiction --

22 JUSTICE SOTOMAYOR: That's just --

23 MR. GARRE: -- to dispose of the case.

24 JUSTICE SOTOMAYOR: -- four distinctive
25 words, counselor. It can't enter a judgment --

1 MR. GARRE: Well, I don't think --

2 JUSTICE SOTOMAYOR: -- unless there is
3 jurisdiction.

4 MR. GARRE: I -- I think we're in a -- a
5 little bit of a chicken and the egg situation, Your
6 Honor. This Court has repeatedly said settlements --
7 moot cases, and yet courts have authority to enter
8 relief.

9 JUSTICE GINSBURG: Accepted. Accept --
10 accepted settlements.

11 MR. GARRE: Well, We're back to whether or
12 not the plaintiff can force the Court to proceed ahead
13 and expound on the law. And on that, I think my
14 friend's presentation --

15 JUSTICE GINSBURG: Not settlement of the
16 law. Justice --

17 MR. GARRE: No.

18 JUSTICE GINSBURG: -- Sotomayor suggested,
19 move this affirmative defense of payment to summary
20 judgment.

21 MR. GARRE: The case can go forward, in
22 their view, and the courts will have to expound on the
23 law. There's no independent interest in receiving a
24 judgment. If that's the rule, then mootness is off the
25 table. In almost any case can the defendant -- can

1 always -- the plaintiff can always say, I want a
2 judgment.

3 We're -- we're down to the question, really,
4 of: How do we get rid of this case? Because I think
5 that even they recognize that the -- if the offer is for
6 complete relief, then the courts below held the case has
7 to come to an end.

8 There's two options for this Court. One,
9 you hold that the case should be dismissed as moot, and
10 two -- if you don't agree with that, then two, you hold
11 that the case should be disposed of by entering judgment
12 for the plaintiff based on the terms of the -- of the
13 offer of complete relief.

14 That's the Sixth Circuit rule. You can go
15 and look, as we did. There are plenty of judgments
16 where the courts have implemented that rule. There's no
17 evidence of any difficulty in applying that, and what
18 that does is it disposes of cases in a common-sense
19 fashion. It prevents courts from -- courts from going
20 ahead and expounding on the law in cases in which they
21 have no business doing so.

22 If I could make one point on the immunity
23 issue: Justice Ginsburg, you're exactly right. They
24 sued the wrong party. MindMatics did everything in this
25 case, and we're at least entitled to immunity from

1 vicarious liability.

2 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

3 The case is submitted.

4 (Whereupon, at 11:05 a.m., the case in the
5 above-entitled matter was submitted.)

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