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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 his favor --

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 accord 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
24 that, "He's not entitled to attorneys' fees." But that
25 has to be adjudicated. You can't -- a court can't just

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

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

8 JUSTICE KAGAN: A court can absolutely make
9 that determination. But the question is: Does the
10 court 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 the -- offer says, "Offer of judgment pursuant to
22 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 a
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 of
18 certification. Here the plaintiff's position is 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 In 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 -- if we have
12 cases that say when a case has become moot in the middle
13 of the 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
2 exception doesn't apply because this case doesn't
3 involve an appeal from the denial of class
4 certification, and it's clear that the second case
5 exception doesn't apply, "inherently transitory,"
6 because in Genesis, this Court made clear that the
7 concern of the so-called picking off wasn't a sufficient
8 basis to say that a claim was inherently transitory.
9 That exception doesn't deal with the defendant's
10 litigation conduct; it deals with whether the claimant's
11 conduct is going to recur, like a pretrial temporary
12 detention situation. This case doesn't fit into this --
13 that exception at all. What --

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

16 MR. GARRE: Yes, Your Honor.

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

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

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

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

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

23 MR. GARRE: I don't think -- it certainly
24 wouldn't be a classic certification decision factor,
25 Your Honor. And I think --- I mean, one of the reasons

1 why the court insists on an Article III case or
2 controversy is that it wants to insist that it doesn't
3 expound on the law, but --

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

7 MR. GARRE: Well, it's a -- it's certainly a
8 very unusual situation where the personal representative
9 has been made whole. Now -- now, there's some 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 terms of the person represented, but the real question
15 is: Why would you want a court to expound on the law
16 difficult questions about certification, as this Court
17 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 have --

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

1 claims had already been done and dispensed with,
2 distinguished, extinguished. So it wasn't a case of a
3 class certification not yet ruled on; it was ruled on.
4 The 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 position 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 if -- 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 an 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
3 the rule, then it's a little bit odd that the court
4 didn't 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. It
11 involved 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 -- 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.

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

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

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

1 JUSTICE KAGAN: Well, but I -- I said that
2 mootness is not the appropriate remedy in that case.

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

13 MR. GARRE: And -- and I think here -- I
14 mean, once we're at the point where we realize this case
15 can't -- can't go on any further because he's been
16 offered everything as the case comes to this Court, then
17 the -- then the question for the Court is, well, how do
18 we dispose of it? Do we tell the lower court to dismiss
19 it as moot, or do we tell the lower court to enter
20 judgment for plaintiff based on the terms of the offer,
21 at which 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 is
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 is 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 or winner, and it
12 resolves all of 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. And no one
16 can argue that there's an Article III interest in -- in
17 proceeding with the litigation once they have a judgment
18 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 the -- 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 -- have a personal stake, a live
7 personal stake in the outcome of the case at all stages
8 of the 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 can still file his own claim. He can settle
23 that claim. He can provide -- he can file his own class
24 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: How could he file a class
7 action on your theory? That's what he wanted to do, and
8 he was 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 when we're talking about absent
15 people. As a practical matter in these sorts of class
16 actions, what they get is pennies on the dollars of
17 their claim. The big money goes to the class action
18 lawyers here.

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

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,
7 you're not entitled to attorneys' fees. Plaintiff says,
8 no, I think I am. I'll -- I think I -- I'm going to
9 reject your settlement offer.

10 So you say at that point the court can come
11 in and say, oh, the case is moot.

12 Now, how is that 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: Well, I suppose he could
25 ask for 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. The point --

6 JUSTICE SCALIA: He could ask for a unicorn.

7 JUSTICE KAGAN: Well, then you would reject
8 the case --

9 JUSTICE SCALIA: Certainly --

10 JUSTICE KAGAN: -- on the merits.

11 JUSTICE SCALIA: Don't you -- don't you
12 think the court --

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

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

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

1 initially --

2 MR. GARRE: They can dispose of it --

3 JUSTICE SCALIA: -- in connection with the
4 mootness --

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

10 If I could return -- reserve the remainder
11 of my time.

12 CHIEF JUSTICE ROBERTS: Thank you, counsel.
13 Mr. Mitchell.

14 ORAL ARGUMENT OF JONATHAN F. MITCHELL

15 ON BEHALF OF THE RESPONDENT

16 MR. MITCHELL: Mr. Chief Justice, and may it
17 please the Court:

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

22 Even though --

23 CHIEF JUSTICE ROBERTS: If there's no -- if
24 you're getting everything you want, what is the case or
25 controversy? What is the live dispute in which you have

1 a personal stake toward the terms we use under
2 Article III?

3 MR. MITCHELL: The live dispute is in
4 obtaining a court judgment that incorporates that relief
5 that's been offered.

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

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

16 JUSTICE ALITO: Suppose Mr. Garre right now
17 were to take a big stack of cash out of his briefcase,
18 or a certified check, and present that to you. Would
19 there be any case left then?

20 MR. MITCHELL: There might be a defense on
21 the merits if Mr. Garre's client can say, we've paid the
22 debt. But that's not something that goes to whether
23 the --

24 JUSTICE ALITO: That would be -- there would
25 be a case or controversy? If this were an individual

1 action and the plaintiff had received from -- and -- and
2 the damages are -- the -- the amount of potential
3 damages are undisputed, and the -- the plaintiff has
4 received that amount from the defendant, no dispute
5 about it, there wouldn't be a live case or controversy.

6 MR. MITCHELL: The defendant would have a
7 defense on the merits. He could plead accord and
8 satisfaction. He could plead res judicata. He --

9 JUSTICE ALITO: Well, why is there a live
10 case or controversy? What is the controversy?

11 MR. MITCHELL: Because there's -- there's a
12 past injury that's been alleged caused by the defendant
13 that could be redressed, in theory, with judicial
14 relief. That --

15 JUSTICE ALITO: Which would give the -- the
16 defendant -- which would give the plaintiff what in
17 addition to the money, under my hypothetical?

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

22 When a court --

23 JUSTICE KENNEDY: You're saying the
24 defendant has -- has an interest -- pardon me -- that
25 the plaintiff has an interest in the judgment --

1 MR. MITCHELL: Yes.

2 JUSTICE KENNEDY: -- quite separate from
3 obtaining all the relief that he requests.

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

5 JUSTICE KENNEDY: Again -- again, why --
6 well, let -- let's assume the case in which they asked
7 for \$10,000 and \$10,000 is deposited in a bank with
8 irrevocable instructions to pay it.

9 MR. MITCHELL: Right.

10 JUSTICE KENNEDY: What -- what -- what is --
11 is the concrete injury, as the Chief Justice said, that
12 results in adversity?

13 MR. MITCHELL: The concrete injury is the
14 past injury that he's already suffered. That the injury
15 has already been remedied is a defense that goes to the
16 merits. It doesn't go to Article III. Everyone
17 agrees --

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

19 MR. MITCHELL: Everyone agrees, Justice
20 Kennedy, that under your hypothetical, the case should
21 be thrown out of court. The only dispute is whether
22 it's thrown out of court on jurisdictional grounds under
23 Article III or whether it's bounced on the merits
24 because the defendant has an affirmative defense.

25 CHIEF JUSTICE ROBERTS: Voluntary cessation

1 can moot a case whether the plaintiff likes it or not,
2 right?

3 MR. MITCHELL: If -- if it's certain that
4 the conduct won't reoccur.

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

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

12 MR. MITCHELL: When you're dealing with past
13 injury, Mr. Chief Justice, there's always a past injury
14 that remains --

15 JUSTICE KENNEDY: But there has to --

16 MR. MITCHELL: -- even if --

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

22 MR. MITCHELL: There is adversity if the
23 plaintiff comes into court --

24 JUSTICE KENNEDY: Other -- other than the --
25 the -- the stigma of a judgment.

1 MR. MITCHELL: If the plaintiff comes into
2 court demanding more and the defendant says, no, you're
3 not entitled to that, there is adversity, Justice
4 Kennedy.

5 Now, the plaintiff is not legally entitled
6 to additional damages on the merits if he's already been
7 paid. But, again, that goes to the merits. That's not
8 part of the Article III inquiry.

9 Redressability under Article III does not
10 ask whether the plaintiff is legally entitled to the
11 relief he demands. He could be making an utterly
12 meritless claim for relief.

13 But that's not the Article III question.
14 Article III assumes the plaintiff would have a legal
15 entitlement to the relief demanded and asks whether that
16 relief, if granted by the court, would redress the
17 injury that he --

18 CHIEF JUSTICE ROBERTS: You put a lot of
19 weight on what the plaintiffs -- but there's another
20 interest here, which is the -- the court's interest.

21 You're being given everything you want. You
22 say, well, we've had a past injury. Well, you asked for
23 relief on that, and that is what you're being given.
24 And yet you say, nonetheless, we're entitled to enlist
25 the court and the court's time. And not only that,

1 under Article III, we're entitled to get a legal ruling,
2 even though there's no -- there's nothing more that they
3 can give you.

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

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

7 MR. MITCHELL: Mr. Chief Justice, we have
8 not been offered everything we've demanded. We have --
9 we have --

10 CHIEF JUSTICE ROBERTS: Well, that's a --
11 that's a -- that's a factual question.

12 MR. MITCHELL: That's a different question.
13 Right.

14 CHIEF JUSTICE ROBERTS: The district court
15 said you were --

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

18 CHIEF JUSTICE ROBERTS: Page 40a?

19 MR. MITCHELL: Page 40a in the Petition
20 Appendix. The district court does not say, as a matter
21 of law or as a finding of fact, that we were offered
22 complete relief.

23 What the district court said on page 40a is
24 that it assumes, for the sake of argument, that the
25 offer constituted complete relief only -- only --

1 CHIEF JUSTICE ROBERTS: No. Sorry. Sorry,
2 counselor. That's not what it says. It's not "we
3 assume for the sake of argument."

4 MR. MITCHELL: Right. Not -- we say --

5 CHIEF JUSTICE ROBERTS: "The parties do not
6 dispute that defendant's Rule 68 offer would have fully
7 satisfied the individual claims asserted" --

8 MR. MITCHELL: The end --

9 CHIEF JUSTICE ROBERTS: -- "or that could
10 have been asserted by plaintiff in this action."

11 MR. MITCHELL: Only the individual claims.
12 And the district court was wrong to say that we did not
13 dispute that.

14 If you look at docket entry --

15 CHIEF JUSTICE ROBERTS: Well, did the Ninth
16 Circuit proceed to decide the case on the basis of that
17 factual finding?

18 MR. MITCHELL: No, it didn't -- we disputed
19 in the Ninth. We said in the Ninth Circuit that the
20 district court was wrong to say that on page 40a of the
21 Petition Appendix. It's in Docket Entry 13 in the Ninth
22 Circuit record on --

23 CHIEF JUSTICE ROBERTS: Did the Ninth
24 Circuit proceed to decide the case on the basis of the
25 assumption that the district court factual determination

1 was correct?

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

4 CHIEF JUSTICE ROBERTS: I think that is the
5 same as proceed to decide for --

6 MR. MITCHELL: No. I don't -- I don't -- I
7 don't agree, Mr. Chief Justice.

8 There was binding precedent in the Ninth
9 Circuit already before we got there, in Diaz and Pitts,
10 that said even an offer of complete relief from the
11 defendant does not moot the case.

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

17 And that's the problem that Mr. Garre cannot
18 get around, because Campbell-Ewald insists in this case
19 that the district court --

20 JUSTICE SCALIA: Well, you're -- you're --
21 you're contrasting a forced entry of judgment on the one
22 hand with mootness on the other. But a forced entry of
23 judgment is one of the remedies for mootness.

24 MR. MITCHELL: No. Those are mutually
25 exclusive. If the case is moot, a court cannot enter a

1 judgment ever, under any circumstance.

2 JUSTICE SCALIA: No.

3 MR. MITCHELL: The only proper response in
4 that situation is to dismiss for lack of subject matter
5 jurisdiction under Rule 12(b)(1).

6 JUSTICE SCALIA: I don't --

7 MR. MITCHELL: There can never be a
8 judgment.

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

12 MR. MITCHELL: It can. And that's exactly
13 why settlement --

14 JUSTICE SCALIA: Even though the case is
15 moot --

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

17 JUSTICE SCALIA: -- because of the
18 settlement.

19 MR. MITCHELL: The case is not moot. If the
20 court is entering a judgment, by definition the case is
21 not moot. Mootness requires a jurisdictional dismissal.
22 Mootness forbids the entry of any type of judgment.

23 So for Campbell-Ewald to come into this
24 Court and say that the district court retained the
25 prerogative to enter a judgment on the merits after the

1 offer of complete relief has been tendered is a
2 confession that the offer of complete relief on this
3 case --

4 JUSTICE SCALIA: It isn't a judgment on the
5 merits. It's -- it's -- it's a judgment affirming the
6 settlement, affirming what the parties themselves have
7 agreed to.

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

9 JUSTICE SCALIA: It doesn't go to the merits
10 of the claim.

11 MR. MITCHELL: It -- oh, it may not -- it
12 may not resolve the merits for purposes of issue
13 preclusion. That's correct, Justice Scalia, but it's
14 still a judgment under Rule 58. It is court-ordered
15 relief. And a court cannot do that in a case when it
16 lacks subject-matter jurisdiction.

17 Mootness and forced entry of judgment are
18 mutually exclusive.

19 CHIEF JUSTICE ROBERTS: -- so just to be
20 clear on the facts without getting into a dispute, let's
21 say that the offer is for the -- all relief that you
22 have asked for.

23 MR. MITCHELL: Yes.

24 CHIEF JUSTICE ROBERTS: Not a question of
25 what you think they're entitled to or what they think;

1 everything you've asked for, including all attorneys'
2 fees, so there's no question of cost-shifting or
3 anything like that. All injunctive relief.

4 They come to you and say, you write the
5 injunction. You say there is still a case or
6 controversy that could proceed to litigation.

7 MR. MITCHELL: There is a case or
8 controversy that might lead to a forced entry of
9 judgment if the plaintiff, for obstinacy or other types
10 of reasons, wants to decline this offer.

11 It's hard to imagine --

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

14 MR. MITCHELL: The controversy is --

15 CHIEF JUSTICE ROBERTS: -- what is the
16 controversy?

17 MR. MITCHELL: The controversy is the
18 plaintiff wants a judgment of the court that
19 incorporates that relief.

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

22 CHIEF JUSTICE ROBERTS: Well, I thought you
23 said if the plaintiff is being obstreperous or whatever,
24 you know, the -- just refusing to take it for spite or
25 some reason. In that case?

1 MR. MITCHELL: Enter a judgment, not -- not
2 dismiss for mootness.

3 CHIEF JUSTICE ROBERTS: And what would the
4 judgment say?

5 MR. MITCHELL: The judgment would say: You
6 asked for X. The defendant offered X. This case is
7 over. Both sides agree on what the proper legal relief
8 should be. And I think --

9 JUSTICE KENNEDY: But I thought that's
10 what --

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

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

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

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

18 JUSTICE KAGAN: And I take it that this
19 judgment that you're talking about would be: He offered
20 this. It's everything that you asked for. We are
21 ordering that he pay it. And --

22 MR. MITCHELL: Yes.

23 JUSTICE KAGAN: -- and -- and now the thing
24 is dismissed.

25 MR. MITCHELL: Right. And now it's backed

1 up with the force of the court. It can be enforced with
2 contempt citations, which a mere offer of complete
3 relief can't.

4 In fact, an unaccepted offer has no legal
5 effect at all on the judgment.

6 JUSTICE ALITO: If the case is dead when
7 there's -- when the judgment is entered, it seems to me
8 it's even more dead when you've actually got the case in
9 hand. If you have the judgment, you're going to -- you
10 may have to enforce the judgment. You don't actually
11 have anything of value. You have a piece of paper.

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

15 JUSTICE ALITO: That's better - it's better
16 to be -- if somebody gave you the choice between a
17 judgment that says you're entitled to a certain amount
18 of money and the money itself in your hand, you would
19 rather have the judgment?

20 MR. MITCHELL: We don't have the money in
21 our hand. It's been offered --

22 JUSTICE ALITO: But if you did. That was my
23 first hypothetical. If you did, if you actually had the
24 money in hand.

25 MR. MITCHELL: If we actually had the money

1 in hand, we're not entitled to an additional judgment,
2 because the defendant in that case would have a defense
3 on the merits. It still doesn't justify throwing us out
4 of court on mootness.

5 JUSTICE SCALIA: Okay. But it wouldn't be
6 moot --

7 MR. MITCHELL: It's not jurisdictional --
8 I'm sorry. Go ahead.

9 JUSTICE SCALIA: My goodness.
10 So every case has to be tried even when
11 you've --

12 MR. MITCHELL: No.

13 JUSTICE SCALIA: -- been paid.

14 MR. MITCHELL: Not tried.

15 JUSTICE SCALIA: He's -- I want a judgment.

16 MR. MITCHELL: No.

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

18 MR. MITCHELL: The court can say, we're
19 terminating the litigation and entering judgment for
20 you, Mr. Plaintiff, because you're not accepting an
21 unconditional surrender from the defendant.

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

25 A jurisdictional dismissal sends the

1 plaintiff home empty-handed, with nothing. No judicial
2 relief at all. This unaccepted offer is just out there.
3 It hasn't been accepted. It can't be enforced in any
4 way.

5 CHIEF JUSTICE ROBERTS: So if --

6 MR. MITCHELL: Not by contract; not by any
7 remedy.

8 CHIEF JUSTICE ROBERTS: If, Mr. Garre, as
9 you're leaving the courtroom today says, here, we will
10 accept an entry of judgment; one, we'll make sure you
11 get whatever attorneys' fees you want, and we will
12 accept an entry of judgment, then the -- then the case
13 would be over?

14 MR. MITCHELL: Well, it certainly would not
15 be moot.

16 CHIEF JUSTICE ROBERTS: Would it be over?

17 MR. MITCHELL: If he wants to accept an
18 entry of judgment on everything that we've asked for,
19 which includes: The attorneys' fees; a real injunction,
20 not a vague, "obey the law" injunction that's in his
21 offer; and class certification and class relief --

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

24 MR. MITCHELL: Right. Right.

25 CHIEF JUSTICE ROBERTS: This is all about

1 class certification.

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

6 CHIEF JUSTICE ROBERTS: So the case comes
7 down to, once we put away -- hypothesize that you're
8 getting everything you, as the plaintiff in this case,
9 has asked for, it all comes down to whether or not you
10 can get the class certified.

11 MR. MITCHELL: But it comes -- the question
12 presented asked whether the offer of complete relief
13 moots the case.

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

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

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

17 MR. MITCHELL: -- question is no.

18 CHIEF JUSTICE ROBERTS: Excuse me.

19 MR. MITCHELL: I'm sorry.

20 CHIEF JUSTICE ROBERTS: And you're saying
21 that it's not because of the possibility that you could
22 get a class certified.

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

24 CHIEF JUSTICE ROBERTS: My hypothesis is you
25 get everything else. Okay?

1 MR. MITCHELL: Yes.

2 CHIEF JUSTICE ROBERTS: The only thing they
3 don't say -- they enter a judgment. You want a
4 judgment? Here's your judgment. You want all the
5 attorneys' fees? Here's all your attorneys' fees. You
6 want an injunction? You know, go ahead and write your
7 injunction.

8 But you say still not, because you might be
9 able to be the representative plaintiff in a class
10 action?

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

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

14 CHIEF JUSTICE ROBERTS: Of course not.

15 JUSTICE BREYER: -- would be a good -- the
16 thing I thought was interesting here, and I wanted to
17 know your position, is the AFL-CIO brief --

18 MR. MITCHELL: Yes.

19 JUSTICE BREYER: -- which is on your side.

20 MR. MITCHELL: Yes.

21 JUSTICE BREYER: Do you agree with it?

22 MR. MITCHELL: I wouldn't say that we agree
23 with all --

24 JUSTICE BREYER: I want to know: Do you
25 agree with it?

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

2 JUSTICE BREYER: Fine. But why not? What
3 they say is that the right way to go about this is --
4 and they cite cases and so forth in the nineteenth
5 century -- is that the defendant should not -- you're
6 right. It's not an offer of relief. What they say is
7 the defendant is supposed to tender the money.

8 And when he tenders the money, if the
9 plaintiff won't accept it, he goes to the court and he
10 deposits the money in the court. And the court then
11 issues a judgment saying, this case is over.

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

16 MR. MITCHELL: It may be over, but it's not
17 moot.

18 JUSTICE BREYER: Why --

19 MR. MITCHELL: This has nothing to do with
20 what moot is.

21 JUSTICE BREYER: Who -- what the judge does
22 is say, they want \$10,000. What the defendant does is
23 he says, they won't take my check, which should be
24 certified. So he deposits it in court.

25 MR. MITCHELL: Right.

1 JUSTICE BREYER: The judge at that point
2 should say, the defendant has all he wants. The case is
3 over. Goodbye. And, of course, if that person now has
4 all he wants, he can't certify this is a class because
5 he isn't harmed.

6 MR. MITCHELL: He gets judgment on the
7 merits in that situation.

8 JUSTICE BREYER: Fine. Give him judgment on
9 the merits. Who cares?

10 MR. MITCHELL: It's actually a very
11 important distinction.

12 JUSTICE BREYER: Why?

13 MR. MITCHELL: Because many reasons.

14 JUSTICE BREYER: Well, give me one.

15 (Laughter.)

16 MR. MITCHELL: All right. I'll start with
17 one. The question presented -- the question presented
18 asks whether an offer of complete relief renders the
19 case --

20 JUSTICE BREYER: I'm not interested at the
21 moment in the question asked. I am interested in the
22 question I am asking.

23 (Laughter.)

24 MR. MITCHELL: All right. It may very well
25 be that if the defendant in that case comes into court

1 and says the case is over, the district court would have
2 the prerogative to enter a judgment on the merits for
3 the defendant because the plaintiff has already been
4 paid, and the plaintiff can't double-dip. That goes to
5 the merits.

6 But Campbell-Ewald never asked the district
7 court for judgment on the merits.

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

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

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

14 MR. MITCHELL: Fine.

15 JUSTICE BREYER: What I want -- I'm being
16 practical.

17 MR. MITCHELL: Okay.

18 JUSTICE BREYER: And the practical thing is
19 that the defendant wants to pay off the plaintiff by
20 giving him everything he wants.

21 MR. MITCHELL: Yes. We agree --

22 JUSTICE BREYER: Is there a way to do it?
23 What they say is, yes, the way to do it is you tender
24 the money in a certified check, and if he won't take it,
25 pay the money into court. And the -- the judge then

1 enters a judgment in favor of the plaintiff, who has
2 gotten everything he asked for.

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

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

7 MR. MITCHELL: Yes, apart from class action,
8 which is a more complicated question. But --

9 JUSTICE BREYER: No, it's not a more
10 complicated question.

11 MR. MITCHELL: Well, it is --

12 JUSTICE BREYER: In my hypothetical, I'm
13 saying, in those circumstances, do you agree -- do you
14 or do you not agree, and if not, why not? The only
15 thing that's left is, you'd like, says the plaintiff,
16 class certification, or at least the lawyer would.

17 MR. MITCHELL: The case is not over if
18 you're talking about class certification, because Roper
19 holds specifically that the representative plaintiff can
20 continue litigating the class certification if
21 there's -- even after --

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

1 MR. MITCHELL: That was the situation in
2 Roper. There was a forced entry of judgment imposed on
3 the representative plaintiffs. And this Court allowed
4 the representative to continue litigating the class
5 certification issue because he had a financial stake in
6 the class certification decision.

7 And Mr. Gomez, likewise, has a financial
8 stake. That's undisputed --

9 CHIEF JUSTICE ROBERTS: What is -- what is
10 the financial stake here?

11 MR. MITCHELL: There are two of them. One
12 is the cost sharing of the lawyers.

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

16 MR. MITCHELL: Yes. Of course, this -- this
17 offer does not.

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

19 MR. MITCHELL: Yes.

20 CHIEF JUSTICE ROBERTS: Right.

21 MR. MITCHELL: Right.

22 CHIEF JUSTICE ROBERTS: What was the other
23 one?

24 MR. MITCHELL: The other one would be the
25 incentive award that he would recover if the class is

1 certified and the case proceeds either to settlement or
2 to victory. And that's another --

3 CHIEF JUSTICE ROBERTS: The incentive award?

4 MR. MITCHELL: The incentive award.

5 Normally, a representative plaintiff after a
6 class gets certified and the settlement gets --

7 CHIEF JUSTICE ROBERTS: You -- is there any
8 concern that a plaintiff who has received or has been
9 offered all relief that he could receive is an
10 appropriate representative plaintiff of parties who have
11 not gotten all the relief?

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

18 And this Court's upheld qui tam litigation,
19 where --

20 CHIEF JUSTICE ROBERTS: So the argument is
21 that an individual plaintiff who has gotten everything
22 that he has asked for -- and I realize you argue that
23 isn't the case here.

24 MR. MITCHELL: Yes, not even close, yes.

25 CHIEF JUSTICE ROBERTS: -- is -- is entitled

1 to proceed with the litigation because he might get a
2 bonus from a class action that he would like to lead?

3 MR. MITCHELL: That's correct.

4 CHIEF JUSTICE ROBERTS: Okay.

5 MR. MITCHELL: But, again, that's only one
6 of many reasons why we win on the mootness question.
7 And, you know, there's still the problem of the mutual
8 exclusivity between a mootness finding and a forced
9 entry of judgment.

10 JUSTICE ALITO: Can I ask you just a
11 practical question? Is Mr. Garre right that this is a
12 case, if he were to proceed, if it were -- the class
13 were certified and you get a judgment, this is a case
14 where the class action attorneys are going to get a lot
15 and the members of the class are going to get virtually
16 nothing?

17 MR. MITCHELL: No.

18 JUSTICE ALITO: You would have to -- you
19 would have to prove that at the -- to establish damages,
20 would you not, that the members of the class did not
21 consent to receive these messages, right?

22 MR. MITCHELL: That -- that's correct. And
23 it went beyond --

24 JUSTICE ALITO: How would you do that? How
25 would you be able to -- how can you prove that

1 somebody -- some member of the class at some point when
2 they were agreeing to something on the internet didn't
3 click a box that said, I agree to receive messages from
4 all of, you know, a big class of senders?

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

9 JUSTICE ALITO: What do you think the class
10 members would get?

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

12 JUSTICE ALITO: Individual class members.
13 As a practical matter, what would they get at the end
14 of --

15 MR. MITCHELL: What would they get in the
16 settlement? I would imagine they would probably get --

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

18 MR. MITCHELL: If it settles.

19 JUSTICE ALITO: What if it's not?

20 MR. MITCHELL: They're entitled to \$500
21 apiece in statutory damages that could be trebled to
22 \$1,500 if we can show there was a -- violation.

23 JUSTICE ALITO: And you're going to be able
24 to determine who did not -- prove that certain people
25 did not consent?

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

4 JUSTICE GINSBURG: What do you -- what do
5 you do to get on that opt-in list?

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

14 JUSTICE GINSBURG: We -- we haven't talked
15 about the second issue that you raise, and one curiosity
16 is the -- the actor that did something wrong was -- what
17 is it? MindMatics?

18 MR. MITCHELL: Yes, MindMatics.

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

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

23 JUSTICE GINSBURG: So you're relying on
24 vicarious liability?

25 MR. MITCHELL: Yes. The Ninth Circuit found

1 that -- may I answer?

2 CHIEF JUSTICE ROBERTS: Sure.

3 MR. MITCHELL: Thank you.

4 The Ninth Circuit found that the TCPA
5 incorporates vicarious liability and that Campbell-Ewald
6 is vicariously liable for MindMatics' actions. And they
7 did not appeal that. That is the law of the case.

8 CHIEF JUSTICE ROBERTS: Thank you, Mr.
9 Mitchell.

10 Mr. Yang.

11 ORAL ARGUMENT OF ANTHONY A. YANG

12 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,
13 SUPPORTING RESPONDENTS

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

16 I'd like to take the opportunity to clarify
17 the Article III question by addressing the elements of
18 an Article III case or controversy, an established
19 Federal practice that I believe shows that an offer --
20 an unaccepted offer, in particular, cannot moot a case.
21 And if there's time, I'd like to address the derivative
22 sovereign immunity argument.

23 First, there is a distinction that this
24 Court has established between prospective relief and
25 retrospective relief. When you seek prospective relief,

1 you need to show an ongoing or imminent injury.

2 In that context, a defendant can actually
3 halt the injury that's necessary by stopping, so long as
4 you meet the voluntary cessation doctrine or -- so long
5 as you show that it's not capable of repetition you're
6 going to be in review. So the injury with respect to
7 prospective relief, that is, the injury that's occurring
8 now or in the future, can end.

9 When we're talking about retrospective
10 relief, damages, the injury is in the past. It's not
11 undone. An offer of money may be compensation for that
12 injury, but the injury continues to exist.

13 For purposes of Article III, the question
14 is, there has to be an injury. It has to be fairly
15 traceable. That's established by the past injury
16 that -- caused by the defendant. And the requested
17 judicial relief would likely redress the injury. Now,
18 the requested relief, even when there's been an offer,
19 is: I want money.

20 Second --

21 JUSTICE SCALIA: I'm sorry. Those are --
22 those are the three requirements for Article III
23 standing, but there's an additional requirement of
24 adverseness. None of those three requirements that
25 are -- that are set forth in our -- in our opinions deal

1 with adverseness. That's a separate -- separate issue.

2 MR. YANG: Well --

3 JUSTICE SCALIA: And that's what's being
4 challenged here.

5 MR. YANG: I don't believe so. It's
6 embedded in the request for relief. The plaintiff comes
7 to the court and says, I want relief from the court.
8 The defendant says, no, no, don't grant the relief.
9 I've either -- the case is moot.

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

12 JUSTICE SCALIA: There has to be injury, in
13 fact, okay? It has to be attributable to the -- to the
14 defendant, okay. And the court must be able to remedy
15 it. None of those three requirements, which are the
16 classic requirements, deals with the quite separate
17 point of adverseness.

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

19 JUSTICE SCALIA: If somebody comes in and
20 says, yes, you've been injured, the court could provide
21 relief, but I -- I agree with all of that, and here is
22 the money.

23 MR. YANG: Well, then the case is not moot.
24 The court can grant relief. The court enters a judgment
25 ordering relief, which is enforceable with all the

1 court's powers, which is quite distinct from a judgment
2 of dismissal for one of jurisdiction.

3 That -- that's a -- you need to have -- a
4 court needs Article III power to direct a remedy against
5 the defendant. It's quite unlike a dismissal for one of
6 jurisdiction. It's also quite unlike the remedy of
7 vacatur, which undoes a court judgment.

8 So Mr. Garre's, you know, attempt to kind of
9 frame this either as, you know, a -- a prospective
10 relief case or a case where you're getting a judgment, a
11 judgment of dismissal for one of jurisdiction is not an
12 enforceable judgment in the way that is relevant for
13 purposes of Article III jurisdiction.

14 JUSTICE SOTOMAYOR: Mr. Yang, I -- I -- I do
15 understand what you and Petitioner -- Respondent's
16 counsel are arguing, which is someone, a judge, has to
17 say, at some point, this is in fact complete relief and
18 enter a judgment for that complete relief.

19 That's your argument.

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

21 JUSTICE SOTOMAYOR: All right.

22 Parties could stipulate. If they -- if they
23 accept an offer of settlement, that's like a stipulation
24 saying, this is complete relief for us. There's no
25 adversity.

1 MR. YANG: The -- and the parties when they
2 agree.

3 JUSTICE SOTOMAYOR: Right.

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

7 But there is -- there are several
8 longstanding Federal practices, both in Federal courts,
9 actually, as well as in State courts, that I think
10 reflects this point.

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

14 Justice Kennedy, you talked about Kokkonen.
15 This is the great distinction between a settlement offer
16 and a judgment.

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

20 Two, courts can --

21 JUSTICE SCALIA: Excuse me.

22 It -- it has authority to enter that even
23 though the case is moot; right.

24 MR. YANG: No. It --

25 JUSTICE SCALIA: But when there's a

1 settlement offer which has been accepted, the court can
2 nonetheless issue a judgment enforcing that settlement,
3 no?

4 MR. YANG: The case is not moot because the
5 parties are -- are saying, we are agreeing on the entry
6 of a judgment, not we're agreeing in the abstract to
7 just --

8 JUSTICE SCALIA: Oh --

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

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

15 MR. YANG: What --

16 JUSTICE SCALIA: -- the Article III
17 adverseness requirement?

18 MR. YANG: This is not a remarkable
19 proposition. Courts all the time --

20 JUSTICE SCALIA: I think it's remarkable.

21 MR. YANG: -- all the time enter consent
22 decrees. These are enforceable with the power of the
23 court.

24 Two, they also dismiss with prejudice. That
25 is not a dismissal for one of jurisdiction. It's a

1 resolution of the claim.

2 Three, they enter judgment in a Rule 68
3 offer.

4 Also, you look at the affirmative defenses,
5 which are all waivable, in Rule 8(c), accord and
6 satisfaction, payment, res judicata.

7 CHIEF JUSTICE ROBERTS: What happens on
8 other grounds of lack of jurisdiction? What if the
9 plaintiff has no injury?

10 There is no injury. The court -- in other
11 words, the -- the requirements for Article III
12 jurisdiction that you rehearsed. What happens in that
13 case? No jurisdiction for another reason besides
14 mootness?

15 MR. YANG: Right.

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

18 CHIEF JUSTICE ROBERTS: Well, what if the --
19 the plaintiff comes in and says, well, I want -- I want
20 a judgment? Or because what other --

21 MR. YANG: But --

22 CHIEF JUSTICE ROBERTS: -- bases, or I
23 want -- I want -- whatever reason. I mean, they're --
24 we're insisting on a judgment even though, arguably,
25 depending upon the scope of the offered relief, the case

1 is moot.

2 MR. YANG: Our point is that --

3 CHIEF JUSTICE ROBERTS: Other cases, you say
4 they dismiss it as -- why -- why doesn't that go to
5 trial? Or -- or you get the benefit of the court
6 determination?

7 MR. YANG: The standing inquiry has to, of
8 course, be addressed at the relevant stage of the case.
9 So, for instance, at the pleading stage, if you failed
10 to allege an injury sufficient --

11 JUSTICE SCALIA: I think you're wrong. I
12 think if there's no standing, I don't think you get
13 dismissed as moot. I think you get a judgment for the
14 defendant because the plaintiff has no standing.

15 MR. YANG: It's not a -- it's a judgment
16 that there is lack of standing, that you have no injury.
17 It's not a resolution of the claim itself.

18 JUSTICE SCALIA: Indeed. So -- so the fact
19 that the court issues judgment has nothing to do with
20 whether there's Article III standing, whether there's
21 mootness or not. You can enter the judgment even though
22 there's no Article III standing.

23 MR. YANG: There is a -- there is a
24 difference between a judgment for want of jurisdiction
25 that the court is just -- I don't have the power to

1 address this.

2 In a judgment where the court says, I have
3 power to -- to enter relief that is enforceable through
4 collateral proceedings through all the -- the -- the
5 great power of a Federal court, that is a big
6 difference.

7 A court requires Article III jurisdiction to
8 exercise that power over the litigants. And that's what
9 normally happens with consent decrees, with dismissals
10 with prejudice, with a judgment under Rule 68 offer.
11 And it also, conversely, even when a party's been fully
12 paid.

13 The fact that the defense of payment --
14 accord and satisfaction can all be waived. So at the
15 end of the case, if the defendant hasn't actually raised
16 these and then belatedly says, I forgot. I paid the
17 guy, and the claim was for a thousand dollars, the court
18 says, sorry. Forfeited. Judgment for another \$1,000.

19 CHIEF JUSTICE ROBERTS: So even if a -- even
20 if the plaintiff is given all the relief to which he is
21 entitled, you say the plaintiff still has a right to
22 involve the Federal court in that --

23 MR. YANG: The --

24 CHIEF JUSTICE ROBERTS: And I was -- I -- I
25 can't say "that controversy," because you still have to

1 right to call -- go into Federal court and say, I know,
2 Federal court, you're busy with a lot of things, but I
3 still want you to hear my case even though I've gotten
4 everything I could get.

5 MR. YANG: And I don't want to mislead the
6 Court into thinking that we're advocating protracted
7 litigation on claims where there is a powerful defense
8 like payment. That is a merits defense: We've paid the
9 claim. You don't -- you can't get any more money from
10 me.

11 But for -- the question of the court's power
12 to entertain that merits defense is what we're saying
13 is -- like the fact that we have affirmative defenses
14 that may be waived. Even a res judicata, the court has
15 already adjudicated the very claim, and yet if the
16 defendant does not raise it, this Court has held it
17 doesn't go to the court's jurisdiction.

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

19 CHIEF JUSTICE ROBERTS: So is a -- is a
20 plaintiff who has been given all the relief that he's
21 requested, in the view of the United States, an adequate
22 class representative?

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

25 I think that could be considered by the

1 Court in exercising its discretion under Rule 23.

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

4 MR. YANG: I think if the -- I -- I think
5 that's hard, and let me tell you why. To be an adequate
6 represented -- representative of the class, you can't
7 simply be looking out for your own interests. You have
8 to be looking out for the interests of the class. And
9 that's part of the requirement.

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

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

17 CHIEF JUSTICE ROBERTS: Thank you, counsel.

18 Mr. Garre, you have four minutes remaining.

19 REBUTTAL ARGUMENT OF GREGORY G. GARRE

20 ON BEHALF OF THE PETITIONER

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

22 First, the Article III principle that should
23 control the resolution of this case was stated in the
24 San Pablo case on page 314.

25 The court said the court is not empowered to

1 decide moot questions or declare rules of law which
2 cannot affect the result as to the thing in issue in the
3 case before it.

4 And that's exactly what's at issue before
5 the case -- the Court today.

6 JUSTICE GINSBURG: Relying on a provision of
7 the California Civil Code, which was quite different
8 from Rule 68.

9 MR. GARRE: I'm -- I'm not talking about the
10 technical distinction of the cases. I'm talking about
11 the Article III principle that controls here.

12 JUSTICE SOTOMAYOR: Mr. Garre, I am so
13 confused by your argument. You get to say, on your own,
14 unilaterally, I offered you complete relief, even
15 though, right or wrong, the plaintiff is asking for a
16 particular injunction and a particular attorney's fee.

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

19 MR. GARRE: Your Honor --

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

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

25 JUSTICE SOTOMAYOR: That a complete offer

1 has been made?

2 MR. GARRE: A court makes the determination
3 that the offer is complete, just as it would make a
4 determination that the defendant had in fact
5 voluntarily ceased his conduct.

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

8 MR. GARRE: Okay. Thank you.

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

10 MR. GARRE: And -- and the Court did it in
11 this case.

12 JUSTICE SOTOMAYOR: So a court gets
13 involved -- a court gets involved no matter what.
14 Right?

15 MR. GARRE: As it always would for a
16 mootness determination. Of course.

17 JUSTICE SOTOMAYOR: All right. So you
18 offered and they wanted an injunction. The court can
19 enter that injunction.

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

21 MR. GARRE: Yes.

22 JUSTICE SOTOMAYOR: The court can't -- all
23 right.

24 MR. GARRE: Because it could -- in this --
25 the case is settled.

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

6 MR. GARRE: Your Honor, I think
7 Justice Scalia had exactly the right answer on this,
8 which is that there's -- there's decades, if not
9 centuries, of practice dealing with this situation, and
10 it's a settlement context.

11 Everyone agrees this Court has repeatedly
12 said that the settlement moots the case. That doesn't
13 mean that courts don't have authority ancillary
14 jurisdiction --

15 JUSTICE SOTOMAYOR: That's just --

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

17 JUSTICE SOTOMAYOR: -- poor usage of words,
18 counselor. It can't enter a judgment --

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

20 JUSTICE SOTOMAYOR: -- unless there is
21 jurisdiction.

22 MR. GARRE: I -- I think we're in a -- a
23 little bit of a chicken-and-the-egg situation here, Your
24 Honor. This Court has repeatedly said settlements moot
25 cases, and yet courts have authority to enter relief to

1 --

2 JUSTICE GINSBURG: Accepted. Accept --
3 accepted settlements.

4 MR. GARRE: Well, we're back to whether or
5 not the plaintiff can force the court to proceed ahead
6 and expound on the law. And on that, I think my
7 friend's presentation --

8 JUSTICE GINSBURG: Not settlement of the
9 law. Justice --

10 MR. GARRE: No.

11 JUSTICE GINSBURG: -- Sotomayor suggested,
12 move this affirmative defense of payment to summary
13 judgment.

14 MR. GARRE: The case can go forward, in
15 their view, and the courts will have to expound on the
16 law. There's no independent interest in receiving a
17 judgment. If that's the rule, then mootness is off the
18 table. In almost any case can the defendant -- can
19 always -- the plaintiff can always say, I want a
20 judgment.

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

1 There's two options for this Court. One,
2 you hold that the case should be dismissed as moot, and
3 two -- if you don't agree with that, then two, you hold
4 that the case should be disposed of by entering judgment
5 for the plaintiff based on the terms of the -- of the
6 offer of complete relief.

7 That's the Sixth Circuit rule. You can go
8 and look, as we did. There are plenty of judgments
9 where the courts have implemented that rule. There's no
10 evidence of any difficulty in applying that, and what
11 that does is it disposes of cases in a common-sense
12 fashion. It prevents court from -- courts from going
13 ahead and expounding on the law in cases in which they
14 have no business doing so.

15 If I could make one point on the immunity
16 issue: Justice Ginsburg, you're exactly right. They
17 sued the wrong party. MindMatics did everything in this
18 case, and we're at least entitled to immunity from
19 vicarious liability.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.
21 The case is submitted.

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

24
25

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