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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 mooting  
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 mooting 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  
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 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: And 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 --

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 this 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 adjudicated the  
20 claim on the merits, whether it's -- it's deciding  
21 difficult questions on certification, whether it's going  
22 ahead and making law in TCPA, whether it's going ahead  
23 and making 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: What is the controversy?

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

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

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

21 When a court --

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

25 MR. MITCHELL: Yes.



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

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

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

8 MR. MITCHELL: Right.

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

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

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

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

24 CHIEF JUSTICE ROBERTS: Voluntary cessation  
25 can moot a case whether the plaintiff likes it or not,

1 right?

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

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

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

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

14 JUSTICE KENNEDY: But there has to --

15 MR. MITCHELL: -- even if --

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

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

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

25 MR. MITCHELL: If the plaintiff comes into

1 court demanding more and the defendant says, no, you're  
2 not entitled to that, there is adversity, Justice  
3 Kennedy.

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

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

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

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

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

1 even though there's no -- there's nothing more that they  
2 can give you.

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

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

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

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

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

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

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

17 CHIEF JUSTICE ROBERTS: Page 40a?

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

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

25 CHIEF JUSTICE ROBERTS: No. Sorry. Sorry,

1 counselor. That's not what it says. It's not "we  
2 assume for the sake of argument."

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

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

7 MR. MITCHELL: The end --

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

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

13 If you look at docket entry --

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

17 MR. MITCHELL: No, it -- we disputed in the  
18 Ninth. We said in the Ninth Circuit that the district  
19 court was wrong to say that on page 40a of the Petition  
20 Appendix. It's in Docket Entry 13 in the Ninth Circuit  
21 record on --

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

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

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

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

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

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

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

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

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

1 JUSTICE SCALIA: No.

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

5 JUSTICE SCALIA: I don't --

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

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

10 MR. MITCHELL: It can. And that's exactly  
11 why settlement --

12 JUSTICE SCALIA: Even though the case is  
13 moot --

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

15 JUSTICE SCALIA: -- because of the  
16 settlement.

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

21 So for Campbell-Ewald to come into this  
22 Court and say that the district court retained the  
23 prerogative to enter a judgment on the merits after the  
24 offer of complete relief has been tendered is a  
25 confession that the offer of complete relief on this

1 case --

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

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

7 JUSTICE SCALIA: It doesn't go to the merits  
8 of the claim.

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

15 Mootness and forced entry of judgment are  
16 mutually exclusive.

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

21 MR. MITCHELL: Yes.

22 CHIEF JUSTICE ROBERTS: Not a question of  
23 what you think they're entitled to or what they think;  
24 everything you've asked for, including all attorneys'  
25 fees, so there's no question of cost-shifting or



1 anything like that. All injunctive relief.

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

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

9 It's hard to imagine --

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

12 MR. MITCHELL: The controversy is --

13 CHIEF JUSTICE ROBERTS: -- what is the  
14 controversy?

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

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

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

24 MR. MITCHELL: Enter a judgment, not -- not  
25 dismiss for mootness.

1 CHIEF JUSTICE ROBERTS: And what would the  
2 judgment say?

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

7 JUSTICE KENNEDY: But I thought that's  
8 what --

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

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

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

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

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

20 MR. MITCHELL: Yes.

21 JUSTICE KAGAN: -- and -- and now the thing  
22 is dismissed.

23 MR. MITCHELL: Right. And now it's backed  
24 up with the force of the court. It can be enforced with  
25 contempt citations, which a mere offer of complete

1 relief can't.

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

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

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

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

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

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

23 MR. MITCHELL: If we actually had the money  
24 in hand, we're not entitled to an additional judgment,  
25 because the defendant in that case would have a defense

1 on the merits. It still doesn't justify throwing us out  
2 of court on mootness.

3 JUSTICE SCALIA: Okay. But it wouldn't be  
4 moot --

5 MR. MITCHELL: It's not jurisdictional --

6 JUSTICE SCALIA: Sorry.

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

8 JUSTICE SCALIA: My goodness.

9 So every case has to be tried even when  
10 you've --

11 MR. MITCHELL: No.

12 JUSTICE SCALIA: -- been paid.

13 MR. MITCHELL: Not tried.

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

15 MR. MITCHELL: No.

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

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

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

24 A jurisdictional dismissal sends the  
25 plaintiff home empty-handed, with nothing. No judicial

1 relief at all. This unaccepted offer is just out there.  
2 It hasn't been accepted. It can't be enforced in any  
3 way.

4 CHIEF JUSTICE ROBERTS: So if --

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

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

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

15 CHIEF JUSTICE ROBERTS: Would it be over?

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

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

23 MR. MITCHELL: Right. Right.

24 CHIEF JUSTICE ROBERTS: This is all about  
25 class certification.

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

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

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

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

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

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

16 MR. MITCHELL: -- question is no.

17 CHIEF JUSTICE ROBERTS: Excuse me.

18 MR. MITCHELL: I'm sorry.

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

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

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

25 MR. MITCHELL: Yes.

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Of course not.

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

17 MR. MITCHELL: Yes.

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

19 MR. MITCHELL: Yes.

20 JUSTICE BREYER: Do you agree with it?

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

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

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

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

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

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

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

17 JUSTICE BREYER: Why --

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

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

24 MR. MITCHELL: Right.

25 JUSTICE BREYER: The judge at that point



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

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

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

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

11 JUSTICE BREYER: Why?

12 MR. MITCHELL: Because many reasons.

13 JUSTICE BREYER: Well, give me one.

14 (Laughter.)

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

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

21 (Laughter.)

22 MR. MITCHELL: All right. It may very well  
23 be that if the defendant in that case comes into court  
24 and says the case is over, the district court would have  
25 the prerogative to enter a judgment on the merits for

1 the defendant because the plaintiff has already been  
2 paid, and the plaintiff can't double-dip. That goes to  
3 the merits.

4 But Campbell-Ewald never asked the district  
5 court for judgement on the merits.

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

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

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

12 MR. MITCHELL: Fine.

13 JUSTICE BREYER: What I want -- I'm being  
14 practical.

15 MR. MITCHELL: Okay.

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

19 MR. MITCHELL: Yes. We agree --

20 JUSTICE BREYER: Is there a way to do it?  
21 What they say is, yes, the way to do it is you tender  
22 the money in a certified check, and if he won't take it,  
23 pay the money into court. And the -- the judge then  
24 enters a judgment in favor of the plaintiff, who has  
25 gotten everything he asked for.

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

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

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

7 JUSTICE BREYER: No, it's not a more  
8 complicated question.

9 MR. MITCHELL: Well, it is --

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

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

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

24 MR. MITCHELL: That was the situation in  
25 Roper. There was a forced entry of judgment imposed on

1 the representative plaintiffs. And this Court allowed  
2 the representative to continue litigating the class  
3 certification issue because he had a financial stake in  
4 the class certification decision.

5 And Mr. Gomez, likewise, has a financial  
6 stake --

7 CHIEF JUSTICE ROBERTS: What is -- what is  
8 the financial stake here?

9 MR. MITCHELL: There are two of them. One  
10 is the cost sharing of the lawyers.

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

14 MR. MITCHELL: Yes. Of course, this -- this  
15 offer does not.

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

17 MR. MITCHELL: Yes.

18 CHIEF JUSTICE ROBERTS: Right.

19 MR. MITCHELL: Right.

20 CHIEF JUSTICE ROBERTS: What was the other  
21 one?

22 MR. MITCHELL: The other one would be the  
23 incentive reward that he would recover if the class is  
24 certified and the case proceeds either to settlement or  
25 victory. And that's another --

1 CHIEF JUSTICE ROBERTS: The incentive award?

2 MR. MITCHELL: The incentive award.

3 Normally, a representative plaintiff after a  
4 class gets certified and the settlement gets --

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

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

16 And this Court's upheld qui tam litigation,  
17 where --

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

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

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

1 MR. MITCHELL: That's correct.

2 CHIEF JUSTICE ROBERTS: Okay.

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

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

15 MR. MITCHELL: No.

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

20 MR. MITCHELL: That -- that's correct. And  
21 it went beyond --

22 JUSTICE ALITO: How would you do that? How  
23 would you be able to -- how can you prove that  
24 somebody -- some member of the class at some point when  
25 they were agreeing to something on the internet didn't

1 click a box that said, I agree to receive messages from  
2 all of, you know, a big class of senders?

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

7 JUSTICE ALITO: What do you think the class  
8 members would get?

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

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

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

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

16 MR. MITCHELL: If it settles.

17 JUSTICE ALITO: What if it's not?

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

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

24 MR. MITCHELL: It would be based on whether  
25 they appeared on the opt-in list, whether they had

1 appeared on some type of opt-in list from which --

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

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

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

16 MR. MITCHELL: Yes, MindMatics.

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

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

21 JUSTICE GINSBURG: So you're relying on  
22 vicarious liability?

23 MR. MITCHELL: Yes. The Ninth Circuit found  
24 that -- may I answer?

25 CHIEF JUSTICE ROBERTS: Sure.



1 MR. MITCHELL: Thank you.

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

6 CHIEF JUSTICE ROBERTS: Thank you, Mr.  
7 Mitchell.

8 Mr. Yang.

9 ORAL ARGUMENT OF ANTHONY A. YANG  
10 ON BEHALF OF THE UNITED STATES, AS AMICUS CURIAE,  
11 SUPPORTING RESPONDENTS

12 MR. YANG: Mr. Chief Justice, and may it  
13 please the Court:

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

21 First, there is a distinction that this  
22 Court has established between prospective relief and  
23 retrospective relief. When you seek prospective relief,  
24 you need to show an ongoing or imminent injury.

25 In that context, a defendant can actually

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

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

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

18           Second --

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

25           MR. YANG: Well --

1 JUSTICE SCALIA: And that's what's being  
2 challenged here.

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

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

10 JUSTICE SCALIA: Well, doesn't there --  
11 there has to be injury, in fact, okay? It has to be  
12 attributable to the -- to the defendant, okay. And the  
13 court must be able to remedy it. None of those three  
14 requirements, which are the classic requirements, deals  
15 with the quite separate point of adverseness.

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

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

21 MR. YANG: Well, then the case is not moot.  
22 The court can grant relief. The court enters a judgment  
23 ordering relief, which is enforceable with all the  
24 court's powers, which is quite distinct from a judgment  
25 of dismissal for one of jurisdiction.

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

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

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

17                   That's your argument.

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

19                   JUSTICE SOTOMAYOR: All right.

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

24                   MR. YANG: The -- and the parties when they  
25 agree.

1 JUSTICE SOTOMAYOR: Right.

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

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

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

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

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

18 Two, courts can --

19 JUSTICE SCALIA: Excuse me.

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

22 MR. YANG: No. It --

23 JUSTICE SCALIA: But when there's a  
24 settlement offer which has been accepted, the court can  
25 nonetheless issue a judgment enforcing that settlement,

1 no?

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

6 JUSTICE SCALIA: Oh --

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

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

13 MR. YANG: What --

14 JUSTICE SCALIA: -- the Article III  
15 adverseness requirement?

16 MR. YANG: This is not a remarkable  
17 proposition. Courts all the time --

18 JUSTICE SCALIA: I think it's remarkable.

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

22 Two, they also dismiss with prejudice. That  
23 is not a dismissal for one of jurisdiction. It's a  
24 resolution of the claim.

25 Three, they enter judgment in a Rule 68

1 offer.

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

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

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

13 MR. YANG: Right.

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

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

19 MR. YANG: But --

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

25 MR. YANG: Our point is that --

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

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

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

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

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

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

25 In a judgment where the court says, I have



1 power to -- to enter relief that is enforceable through  
2 collateral proceedings through all the -- the -- the  
3 great power of a Federal court, that is a big  
4 difference.

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

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

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

21 MR. YANG: The --

22 CHIEF JUSTICE ROBERTS: And I was -- I -- I  
23 can't say "that controversy," because you still have to  
24 right to call -- go into Federal court and say, I know,  
25 Federal court, you're busy with a lot of things, but I

1 still want you to hear my case even though I've gotten  
2 everything I could get.

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

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

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Well, of course it

1 can. I want to know what the position is.

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

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

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

15 CHIEF JUSTICE ROBERTS: Thank you, counsel.

16 Mr. Garre, you have four minutes remaining.

17 REBUTTAL ARGUMENT OF GREGORY G. GARRE

18 ON BEHALF OF THE PETITIONER

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

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

23 The court said the court is not empowered to  
24 decide moot questions or declare rules of law which  
25 cannot affect the result as to the thing in issue in the

1 case before it.

2 And that's exactly what's at issue before  
3 the case -- the Court today.

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

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

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

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

17 MR. GARRE: Your Honor --

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

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

23 JUSTICE SOTOMAYOR: That a complete offer  
24 has been made?

25 MR. GARRE: A court makes the determination

1 that the offer is complete, just as it would make a  
2 determination that the defendant had in fact  
3 voluntarily ceased his conduct.

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

6 MR. GARRE: Okay. Thank you.

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

8 MR. GARRE: And -- and the Court did it in  
9 this case.

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

13 MR. GARRE: As it always would for a  
14 mootness determination. Of course.

15 JUSTICE SOTOMAYOR: All right. So you  
16 offered and they wanted an injunction. The Court can  
17 enter that injunction.

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

19 MR. GARRE: Yes.

20 JUSTICE SOTOMAYOR: The Court can't -- all  
21 right.

22 MR. GARRE: Because it could -- in this --  
23 the case is settled.

24 JUSTICE SOTOMAYOR: But it can't just say  
25 the case is moot and not enter the injunction. The

1 terms of the settlement, the terms of the lawsuit, were  
2 that an injunction would be issued and you'd pay \$1,500;  
3 correct?

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

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

13 JUSTICE SOTOMAYOR: That's just --

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

15 JUSTICE SOTOMAYOR: -- tortious use of  
16 words, counselor. It can't enter a judgment --

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

18 JUSTICE SOTOMAYOR: -- unless there is  
19 jurisdiction.

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

25 JUSTICE GINSBURG: Accepted. Accept --

1 accepted settlements.

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

6 JUSTICE GINSBURG: Not settlement of the  
7 law. Justice --

8 MR. GARRE: No.

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

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

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

24 There's two options for this Court. One,  
25 you hold that the case should be dismissed as moot, and

1 two -- if you don't agree with that, then two, you hold  
2 that the case should be disposed of by entering judgment  
3 for the plaintiff based on the terms of the -- of the  
4 offer of complete relief.

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

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

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.  
19 The case is submitted.

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

22  
23  
24  
25



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