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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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1 P R O C E E D I N G S

2 (10:04 a.m.)

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

6 Mr. Garre.

7 ORAL ARGUMENT OF GREGORY G. GARRE

8 ON BEHALF OF THE PETITIONER

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

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

14 First, the plaintiff can force the Court to
15 adjudicate the merits of his claim simply by refusing
16 the defendant's offer of capitulation and complete
17 relief.

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

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

25 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 on 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 the
12 TCPA, the underlying statute here, does not provide for
13 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.

23 JUSTICE SOTOMAYOR: Well, he would -- he
24 would receive a finding of liability, which you didn't
25 admit in your offer.

1 MR. GARRE: He -- I --

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

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

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

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

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

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

1 settlement was not performed.

2 They went to court seeking an injunction.

3 The Court says, no, no. You have a contract. You have
4 to file again. You have to go into a different court.
5 You have to start all over again.

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

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

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

15 MR. GARRE: Well --

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

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

1 enforcement of a dissent decree.

2 Here our fundamental --

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

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

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

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

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

23 JUSTICE GINSBURG: The plaintiff -- the
24 plaintiff asks for class action, didn't get that because
25 they weren't far -- far along enough for the plaintiff

1 even to move for certification.

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

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

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

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

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

20 And here --

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

24 MR. GARRE: Well, it was still pretty
25 important to the plaintiff in that case, and it was a

1 statutory right.

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

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

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

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

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

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

23 Second of all, in Roper the Court relied on
24 that interest solely for the purpose of allowing the
25 appeal from the denial of certification when the mooting

1 event occurred after the denial of certification.

2 So there you had a real relation back issue.

3 If the Court had been wrong in denying certification,
4 then the case never would have become moot in the first
5 place.

6 Here the mooting event takes place before
7 certification. There's nothing to relate back to.

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

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

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

22 Now, you might be completely right as to the
23 "He's not entitled to attorneys' fees." But that has to
24 be adjudicated. You can't -- a court can't just say,
25 Oh, you've offered complete relief, because in his view

1 you haven't offered complete relief, and that's what the
2 litigation is all about.

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

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

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

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

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

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

25 Here the question is whether there's an

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

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

10 MR. GARRE: And functionally --

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

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

17 It's just --

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

22 This was your client's submission.

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

1 settlement offer, which isn't a Rule 68 offer.

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

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

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

25 Now, this Court has repeatedly said, when

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

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

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

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

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

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

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

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

9 MR. GARRE: Well.

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

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

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

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

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

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

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

14 MR. GARRE: Yes, Your Honor.

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

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

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

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

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

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

1 expound on the law, but --

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

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

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

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

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

1 extinguished. So it wasn't a case of a class
2 certification not yet ruled on; it was ruled on. The
3 class action was out of the case. It was only the
4 individual.

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

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

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

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

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

25 JUSTICE SOTOMAYOR: I -- I -- you know, I

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

9 MR. GARRE: No, but --

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

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

17 Second of all --

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

25 MR. GARRE: That's -- that's, of course,

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

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

16 JUSTICE KAGAN: But Mr. Garre --

17 MR. GARRE: -- plaintiff was seeking.

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

1 history at all of -- of saying that a tender offer moots
2 a case, as opposed to the classic understanding, the
3 common law understanding, of tender offers was that it
4 created an incentive for parties, and that that was
5 their purpose and that was their effect, was to
6 incentivize parties to do something, but not to --
7 for -- not to provide a mechanism for a court just to
8 throw out a case when a party decided that, for whatever
9 reason, he thought that the tender offer was not good
10 enough.

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

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

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

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

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

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

21 I mean this Court --

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

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

1 JUSTICE KAGAN: There's nothing to dismiss.

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

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

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

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

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

1 has come to an end.

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

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

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

18 And we're back to --

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

22 MR. GARRE: Your Honor, those are -- those
23 are accord and satisfaction, for example, is a
24 contract-based doctrine. It happens where -- where
25 payment is made before the case gets to litigation.

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

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

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

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

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

24 And you know, here, what we're arguing about
25 is policy arguments about whether or not the Court ought

1 to find some basis to keep the class action alive.

2 JUSTICE GINSBURG: That's --

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

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

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

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

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

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

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

25 Just let's say that there's a plaintiff, and

1 he claims 10,000 -- he wants \$10,000 plus attorneys'
2 fees, okay? And the defendant says, I'll give you
3 \$10,000.

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

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

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

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

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

22 In that case --

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

25 MR. GARRE: He --

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

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

5 JUSTICE SCALIA: He could ask for a unicorn.

6 JUSTICE KAGAN: Then you submit the case --

7 JUSTICE SCALIA: Don't you --

8 JUSTICE KAGAN: -- on the merits.

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

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

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

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

24 MR. GARRE: He can dispose --

25 JUSTICE SCALIA: -- in connection with the

1 mootness --

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

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

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
10 Mr. Mitchell.

11 ORAL ARGUMENT OF JONATHAN F. MITCHELL
12 ON BEHALF OF THE RESPONDENT

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

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

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

23 MR. MITCHELL: The live dispute is in
24 obtaining a court judgment that incorporates that relief
25 that's been offered.

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

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

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

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

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

25 MR. MITCHELL: The defendant would have a

1 defense on the merits. He could plead accord and
2 satisfaction, he could plead res judicata.

3 JUSTICE ALITO: What is the controversy?

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

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

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

15 When a Court --

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

19 MR. MITCHELL: Yes.

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

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

23 JUSTICE KENNEDY: -- again -- again, why --
24 well, let's assume the case in which they asked for
25 \$10,000 and \$10,000 is deposited in a bank with

1 irrevocable instructions to pay it.

2 MR. MITCHELL: Right.

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

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

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

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

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

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

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

25 In other words, why is it not simply what

1 the plaintiff wants? He doesn't want the money he's
2 asking for, he wants a judgment that he will give him
3 the money. As far as I can tell, that's your argument.

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

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

12 MR. YANG: There is adversity if the
13 plaintiff comes into court --

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

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

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

23 Redressability under Article III does not
24 ask whether the plaintiff is legally entitled to the
25 relief he demands. He could be making an utterly

1 meritless claim for relief.

2 But that's not the Article III question.

3 Article III assumes the plaintiff would have a legal
4 entitlement for the relief demanded and asks whether
5 that relief, if granted by the Court, would redress the
6 injury that he --

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

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

18 MR. YANG: Just -- just to be clear --

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

21 MR. YANG: Mr. Chief Justice, we have not
22 been offered everything we've demanded. We have -- we
23 have --

24 CHIEF JUSTICE ROBERTS: Well, that's a --
25 that's a factual question.

1 MR. YANG: Right.

2 CHIEF JUSTICE ROBERTS: The district court
3 said you were --

4 MR. YANG: No, no. I'm sorry. The district
5 court did not say that. There's no --

6 CHIEF JUSTICE ROBERTS: Page 40a?

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

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

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

17 MR. YANG: Right.

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

21 MR. YANG: The end --

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

24 MR. YANG: Only the individual claims.
25 And the district court was wrong to say that

1 we did not dispute that.

2 If you look at docket entry --

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

6 MR. YANG: No, it didn't.

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

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

15 MR. YANG: No. The Ninth Circuit assumed,
16 for the sake of argument --

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

19 MR. YANG: No. I don't -- I don't -- I
20 don't agree, Mr. Chief Justice.

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

25 So if the defendant throws up his hands and

1 unconditionally surrenders, whether it's a class action
2 or not, that has nothing to do with mootness. It may
3 justify a forced entry of judgment, but it does not moot
4 the case.

5 And that's the problem that Mr. Garre cannot
6 get around, because Campbell-Ewald insists in this case
7 that the court -- --

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

12 MR. YANG: -- no. Those are mutually
13 exclusive. If the case is moot, a court cannot enter a
14 judgment ever, under any circumstance.

15 JUSTICE SCALIA: No.

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

19 JUSTICE SCALIA: I don't --

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

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

24 MR. YANG: It can. And that's exactly why
25 settlement --

1 JUSTICE SCALIA: Even though the case is
2 moot --

3 MR. YANG: No, the case is not --

4 JUSTICE SCALIA: -- because of the
5 settlement.

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

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

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

20 MR. YANG: That's still a judgment.

21 JUSTICE SCALIA: It doesn't go to the merits
22 of the claim.

23 MR. YANG: It -- oh, it may not -- it may
24 not resolve the merits for purposes of issue preclusion.
25 That's correct, Justice Scalia, but it's still a

1 judgment under Rule 58. It is court-ordered relief.
2 And a court cannot do that in a case when it lacks
3 subject-matter jurisdiction.

4 Mootness and forced entry of judgment are
5 mutually exclusive.

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

10 MR. YANG: Yes.

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

16 They come to you and say, you write the
17 injunction.

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

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

24 It's hard to imagine.

25 CHIEF JUSTICE ROBERTS: What's -- what is

1 the controversy? In the case I've hypothesized --

2 MR. YANG: The controversy is --

3 CHIEF JUSTICE ROBERTS: -- what is the
4 controversy?

5 MR. YANG: The controversy is the plaintiff
6 wants a judgment of the court that incorporates that
7 relief.

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

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

14 MR. YANG: Enter a judgment, not -- not
15 dismiss for mootness.

16 CHIEF JUSTICE ROBERTS: And what would the
17 judgment say?

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

22 JUSTICE KENNEDY: But I thought that's
23 what --

24 MR. YANG: -- and enter a judgment.

25 JUSTICE KENNEDY: -- Mr. Garre was arguing.

1 He said he'd need a judgment.

2 MR. YANG: No. He's saying it's moot.

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

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

10 MR. YANG: Yes.

11 JUSTICE KAGAN: -- and -- and now the thing
12 is dismissed.

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

17 In fact, an unaccepted offer has no legal
18 effect at all.

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

25 MR. YANG: You still have -- you -- you may

1 still have to enforce the judgment, but that's much
2 easier than enforcing an -- an offer.

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

8 MR. YANG: We don't have the money in our
9 hand. It's been offered.

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

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

18 JUSTICE SCALIA: Okay. But it wouldn't be
19 moot --

20 MR. YANG: It's jurisdictional --

21 JUSTICE SCALIA: Sorry.

22 MR. YANG: I'm sorry. Go ahead.

23 JUSTICE SCALIA: My goodness.

24 So every case has to be tried even when
25 you've --

1 MR. YANG: No.

2 JUSTICE SCALIA: -- been paid.

3 MR. YANG: Not tried.

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

5 MR. YANG: No.

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

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

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

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

19 CHIEF JUSTICE ROBERTS: So if --

20 MR. YANG: Not by contract; not by any
21 remedy.

22 CHIEF JUSTICE ROBERTS: If, Mr. Garre, as
23 you're leaving the court -- courtroom today says, here,
24 we will accept an entry of judgment. One, we'll make
25 sure you get whatever attorneys' fees you want and we

1 will accept an entry of judgment. Then the -- then the
2 case would be over?

3 MR. YANG: Well, it certainly would not be
4 moot.

5 CHIEF JUSTICE ROBERTS: Would it be over?

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

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

13 MR. YANG: Right. Right.

14 CHIEF JUSTICE ROBERTS: This is all about
15 class certification.

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

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

25 MR. YANG: But it comes -- the question

1 presented asked whether the offer of complete relief
2 moots the case.

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

4 MR. YANG: And the answer to that --

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

6 MR. YANG: -- question is no.

7 CHIEF JUSTICE ROBERTS: Excuse me.

8 MR. YANG: I'm sorry.

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

12 MR. YANG: Well, that's one --

13 CHIEF JUSTICE ROBERTS: My hypothesis is you
14 get everything else. Okay?

15 MR. YANG: Yes.

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

22 But you say still not because you might be
23 able to be the representative plaintiff in a class
24 action?

25 MR. YANG: That's -- that's one of the many

1 reasons why it's not --

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

3 CHIEF JUSTICE ROBERTS: Of course not.

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

7 MR. YANG: Yes.

8 JUSTICE BREYER: Which is on your side.

9 MR. YANG: Yes.

10 JUSTICE BREYER: Do you agree with it.

11 MR. YANG: I wouldn't say that we agree with
12 all --

13 JUSTICE BREYER: I want to know: Do you
14 agree with it.

15 MR. YANG: No, we don't.

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

22 And when he tenders the money, if the
23 plaintiff won't accept it, he goes to the court and he
24 deposits the money in the court. And the court then
25 issues a judgment saying, this case is over.

1 That's what I read here in the pages 9 to
2 11, and they have lots of authority, and that gets rid
3 of the problem. And there's no -- it seems to me if it
4 isn't right, why isn't it?

5 MR. MITCHELL: It may be over, but it's not
6 moot.

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

11 MR. MITCHELL: Right.

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

17 MR. MITCHELL: He gets judgment on the
18 merits in those situation.

19 JUSTICE BREYER: Fine. Give him judgment on
20 the merits. Who cares?

21 MR. MITCHELL: It's actually a very
22 important distinction.

23 JUSTICE BREYER: Why?

24 MR. MITCHELL: Because many reasons.

25 JUSTICE BREYER: Well, give me one.

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

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

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

14 But Campbell-Ewald never asked the district
15 court for judgement on the merits.

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

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

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

22 MR. MITCHELL: Fine.

23 JUSTICE BREYER: What I want -- I'm being
24 practical.

25 MR. MITCHELL: Okay.

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

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

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

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

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

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

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

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

11 And Mr. Gomez, likewise, has a financial
12 stake --

13 CHIEF JUSTICE ROBERTS: What is -- what is
14 the financial stake here?

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

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

20 MR. MITCHELL: Yes. Of course, this -- this
21 offer does not.

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

23 MR. MITCHELL: Yes.

24 CHIEF JUSTICE ROBERTS: Right.

25 MR. MITCHELL: Right.

1 CHIEF JUSTICE ROBERTS: What was the other
2 one?

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

7 CHIEF JUSTICE ROBERTS: The incentive award?

8 MR. MITCHELL: The incentive award.

9 Normally, a representative plaintiff after a
10 class gets certified and the settlement gets --

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

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

22 And this Court's upheld qui tam litigation
23 where --

24 CHIEF JUSTICE ROBERTS: So the argument is
25 that an individual plaintiff who has gotten everything

1 that he has asked for -- and I realize you argue that
2 isn't the case here.

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

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

7 MR. MITCHELL: That's correct.

8 CHIEF JUSTICE ROBERTS: Okay.

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

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

21 MR. MITCHELL: No.

22 JUSTICE ALITO: You would have to prove that
23 at the -- to establish damages, would you not, that the
24 members of the class did not consent to receive these
25 messages, right?

1 MR. MITCHELL: That's correct. And it went
2 beyond --

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

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

13 JUSTICE ALITO: What do you think the class
14 members would get?

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

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

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

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

21 MR. MITCHELL: If it settles.

22 JUSTICE ALITO: What if it's not?

23 MR. MITCHELL: They're entitled to \$500 a
24 piece in statutory damages that could be trebled to
25 \$1,500, if we can show there was a violation.

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

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

7 JUSTICE GINSBURG: What do you -- do you get
8 on that opt-in list?

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

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

21 MR. MITCHELL: Yes, MindMatics.

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

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

1 JUSTICE GINSBURG: So you're relying on
2 vicarious liability?

3 MR. MITCHELL: Yes. The Ninth circuit found
4 that -- may I answer?

5 CHIEF JUSTICE ROBERTS: Sure.

6 MR. MITCHELL: Thank you.

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

11 CHIEF JUSTICE ROBERTS: Thank you, Mr.
12 Mitchell.

13 Mr. Yang.

14 ORAL ARGUMENT OF ANTHONY A. YANG

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

16 SUPPORTING RESPONDENTS

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

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

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

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

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

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

24 Second --

25 JUSTICE SCALIA: I'm sorry. Those are the

1 three requirements for Article III standing, but there's
2 an additional requirement of adverseness. None of those
3 three requirements that are -- that are set forth in
4 our -- in our opinions deal with adverseness. That's a
5 separate -- separate issue.

6 MR. MITCHELL: Well --

7 JUSTICE SCALIA: And that's what's being
8 challenged here.

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

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

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

22 MR. MITCHELL: I believe it's embedded in --

23 JUSTICE SCALIA: If somebody comes in and
24 says, yes, you've been injured, the Court could provide
25 relief, but I agree with all of that, and here is the

1 money.

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

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

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

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

23 That's your argument.

24 MR. MITCHELL: In part, I believe that's
25 right.

1 JUSTICE SOTOMAYOR: All right.

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

6 MR. MITCHELL: The -- and the parties when
7 they agree.

8 JUSTICE SOTOMAYOR: Right.

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

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

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

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

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

25 Two, the courts can --

1 JUSTICE SCALIA: Excuse me.

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

4 MR. MITCHELL: No. It --

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

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

13 JUSTICE SCALIA: Oh --

14 MR. MITCHELL: -- to settle the case.

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

20 MR. MITCHELL: What --

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

23 MR. MITCHELL: This is not a remarkable
24 proposition. Courts all the time --

25 JUSTICE SCALIA: I think it's remarkable.

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

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

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

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

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

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

19 No jurisdiction for another reason besides
20 mootness?

21 MR. MITCHELL: Right.

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

24 CHIEF JUSTICE ROBERTS: Well, what if the --
25 the plaintiff comes in and says, well, I want -- I want

1 a judgment? Or because what other --

2 MR. MITCHELL: But --

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

8 MR. MITCHELL: Our point is that --

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

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

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

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

24 JUSTICE SCALIA: Indeed. So -- so the fact
25 that the court issues judgment has nothing to do with

1 whether there's Article III standing, whether there's
2 mootness or not. You can enter the judgment even though
3 there's no Article III standing.

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

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

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

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

25 CHIEF JUSTICE ROBERTS: So even if a -- even

1 if the plaintiff is given all the relief to which he is
2 entitled, you say the plaintiff still has a right to
3 involve the Federal court in that --

4 MR. MITCHELL: The --

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

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

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

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

25 CHIEF JUSTICE ROBERTS: Is a -- is a

1 plaintiff who has been given all the relief that he's
2 requested in the view of the United States an adequate
3 class representative?

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

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

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

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

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

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

23 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

24 Mr. Garre, you have four minutes remaining.

25 REBUTTAL ARGUMENT OF GREGORY G. GARRE

1 ON BEHALF OF THE PETITIONER

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

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

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

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

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

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

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

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

25 MR. GARRE: Your Honor --

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

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

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

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

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

14 MR. GARRE: Okay. Thank you.

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

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

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

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

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

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

2 MR. GARRE: Yes.

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

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

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

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

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

21 JUSTICE SOTOMAYOR: That's just --

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

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

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

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

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

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

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

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

16 MR. GARRE: No.

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

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

1 judgment.

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

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

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

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

1 CHIEF JUSTICE ROBERTS: Thank you, Counsel.

2 The case is submitted.

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

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