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Supreme Court, U.S.
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No. _____

In the
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,

v.

JOSE GOMEZ,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claim.

2. Whether the answer to the first question is any different when the plaintiff has asserted a class claim under Federal Rule of Civil Procedure 23, but receives an offer of complete relief before any class is certified.

3. Whether the doctrine of derivative sovereign immunity recognized in *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), for government contractors is restricted to claims arising out of property damage caused by public works projects.

RULE 29.6 STATEMENT

Petitioner Campbell-Ewald Company is a wholly-owned subsidiary of The Interpublic Group of Companies, Inc. No other person or publicly held corporation owns 10% or more of the stock of Campbell-Ewald Company.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED	i
RULE 29.6 STATEMENT.....	ii
TABLE OF AUTHORITIES	vi
OPINIONS BELOW	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED	1
INTRODUCTION	1
STATEMENT OF THE CASE.....	3
A. Plaintiff's Lawsuit	3
B. Campbell-Ewald's Unaccepted Offers Of Full Relief And District Court Proceedings	5
C. Campbell-Ewald's Motion To Dismiss Plaintiff's Appeal For Lack Of Jurisdiction	7
D. The Ninth Circuit's Decision.....	11
REASONS FOR GRANTING THE WRIT.....	12
I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTIONS	13
A. As This Court Has Recognized, The Circuits Are Split On Whether An Offer Of Full Relief Moots A Plaintiff's Individual Claim	13

TABLE OF CONTENTS—Continued

	Page
B. The Ninth Circuit's Holding That The Class Claim Is Not Moot Conflicts With <i>Genesis Healthcare</i> And Decisions Of Other Courts	18
II. CERTIORARI IS WARRANTED ON THE DERIVATIVE IMMUNITY QUESTION	23
III. THIS COURT'S REVIEW IS NEEDED	27
CONCLUSION	30

APPENDIX

Opinion of the United States Court of Appeals for the Ninth Circuit, <i>Gomez v. Campbell-Ewald Co.</i> , 768 F.3d 871 (9th Cir. 2014).....	1a
Order of the United States District Court for the Central District of California Regarding Defendant's Motion for Summary Judgment and Motion for Summary Judgment on the Pleadings, <i>Gomez v. Campbell-Ewald Co.</i> , No. CV 10-02007 DMG (CWx), 2013 WL 655237 (C.D. Cal. Feb. 22, 2013).....	22a
Order of the United States District Court for the Central District of California Regarding (1) Plaintiff's Motion To Strike [Doc. # 32]; (2) Plaintiff's Motion For Class Certification [Doc. # 33]; and (3) Defendant's Motion To Dismiss [Doc. # 47], <i>Gomez v. Campbell-Ewald Co.</i> , 805 F. Supp. 2d 923 (C.D. Cal. Apr. 8, 2011)	35a

TABLE OF CONTENTS—Continued

Page

Offer of Judgment Pursuant to Federal Rule of Civil Procedure 68, <i>Gomez v. Campbell-Ewald Co.</i> , No. CV 10-2007 DMG (CWx) (C.D. Cal. Jan. 5, 2011), ECF No. 31 (with Exhibit 1).....	52a
Settlement Offer, <i>Gomez v. Campbell-Ewald Co.</i> , No. CV 10-2007 DMG (CWx), dated Jan. 5, 2011 (C.D. Cal. Mar. 11, 2011), ECF No. 45-8 (with enclosure)	57a
Order of the United States Court of Appeals for the Ninth Circuit for Stay of the Issuance of the Mandate, <i>Gomez v. Campbell-Ewald Co.</i> , No. 13-55486 (9th Cir. Oct. 24, 2014).....	62a
United States Constitution art. III, § 2	64a
47 U.S.C. § 227(b)(1), (3).....	65a
Federal Rule of Civil Procedure 68(a)	68a

TABLE OF AUTHORITIES

Page(s)

CASES

<i>Anderson v. CNH U.S. Pension Plan</i> , 515 F.3d 823 (8th Cir. 2008)	22
<i>Boyle v. United Technologies Corp.</i> , 487 U.S. 500 (1988)	25
<i>Burgess v. Colorado Serum Co.</i> , 772 F.2d 844 (11th Cir. 1985)	26
<i>Butters v. Vance International</i> , 225 F.3d 462 (4th Cir. 2000)	26
<i>Cabala v. Crowley</i> , 736 F.3d 226 (2d Cir. 2013)	16
<i>DaimlerChrysler Corp. v. Cuno</i> , 547 U.S. 332 (2006)	13, 29
<i>Damasco v. Clearwire Corp.</i> , 662 F.3d 891 (7th Cir. 2011)	15, 22, 28
<i>Deposit Guaranty National Bank v. Roper</i> , 445 U.S. 326 (1980)	20
<i>Diaz v. First American Home Buyers Protection Corp.</i> , 732 F.3d 948 (9th Cir. 2013)	9, 10, 11, 16
<i>Filarsky v. Delia</i> , 132 S. Ct. 1657 (2012)	25

TABLE OF AUTHORITIES—Continued

Page(s)

<i>Genesis Healthcare Corp. v. Symczyk</i> , 133 S. Ct. 1523 (2013)	<i>passim</i>
<i>Greisz v. Household Bank (Ill.), N.A.</i> , 176 F.3d 1012 (7th Cir. 1999)	14
<i>Koutsoubos v. Boeing Vertol</i> , 755 F.2d 352 (3d Cir. 1985)	26
<i>Krim v. pcOrder.com, Inc.</i> , 402 F.3d 489 (5th Cir. 2005)	14
<i>Lucero v. Bureau of Collection Recovery, Inc.</i> , 639 F.3d 1239 (10th Cir. 2011)	22
<i>Mabary v. Home Town Bank, N.A.</i> , 771 F.3d 820 (5th Cir. 2014)	23
<i>McCauley v. Trans Union, L.L.C.</i> , 402 F.3d 340 (2d Cir. 2005)	16
<i>O'Brien v. Ed Donnelly Enterprises, Inc.</i> , 575 F.3d 567 (6th Cir. 2009)	14, 17
<i>Pitts v. Terrible Herbst, Inc.</i> , 653 F.3d 1081 (9th Cir. 2011)	9, 19
<i>Rand v. Monsanto Co.</i> , 926 F.2d 596 (7th Cir. 1991)	10, 15, 17
<i>Rhodes v. E.I. du Pont de Nemours & Co.</i> , 636 F.3d 88 (4th Cir. 2011)	22

TABLE OF AUTHORITIES—Continued

Page(s)

<i>Sandoz v. Cingular Wireless LLC</i> , 553 F.3d 913 (5th Cir. 2008)	15, 21
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975)	20
<i>Stein v. Buccaneers Limited Partnership</i> , 772 F.3d 698 (11th Cir. 2014)	16, 22, 23, 28
<i>Tillett v. J.I. Case Co.</i> , 756 F.2d 591 (7th Cir. 1985)	26
<i>Tozer v. LTV Corp.</i> , 792 F.2d 403 (4th Cir. 1986)	26
<i>United States Parole Commission v.</i> <i>Geraghty</i> , 445 U.S. 388 (1980)	8, 20
<i>Warren v. Sessions & Rogers, P.A.</i> , 676 F.3d 365 (4th Cir. 2012)	14
<i>Weiss v. Regal Collections</i> , 385 F.3d 337 (3d Cir. 2004)	14, 15, 21
<i>Yearsley v. W.A. Ross Construction Co.</i> , 309 U.S. 18 (1940)	3, 24

**CONSTITUTIONAL AND STATUTORY
PROVISIONS AND RULE**

United States Constitution art. III, § 2	1
28 U.S.C. § 1254(1)	1

TABLE OF AUTHORITIES—Continued

Page(s)

47 U.S.C. § 227	1
47 U.S.C. § 227(b)(3)	5
Federal Rule of Civil Procedure 68(a)	1

OTHER AUTHORITIES

Paul F. Corcoran <i>et al.</i> , <i>The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?</i> , 10 <i>Intell. Prop. & Tech. L.J.</i> 9 (2014)	27
Monica Desai <i>et al.</i> , <i>A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What the FCC Should Do About It</i> , 1 <i>Int'l J. Mobile Mktg.</i> , 75 (2013)	27
Allison Grande, <i>TCPA Class Action Surge Shows No Signs Of Abating</i> (May 24, 2013), available at http://www.law360.com/articles/444874/tcp-a-class-action-surge-shows-no-signs-of-abating	27
1 Joseph M. McLaughlin, <i>McLaughlin on Class Actions: Law and Practice</i> § 4:28 (9th ed. 2012)	15
1 William B. Rubenstein <i>et al.</i> , <i>Newberg on Class Actions</i> § 2:15 (5th ed. 2013)	15

TABLE OF AUTHORITIES—Continued

Page(s)

U.S. Chamber Institute for Legal Reform, <i>The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages</i> (Oct. 2013)	28
13B Charles Alan Wright <i>et al.</i> , <i>Federal Practice and Procedure</i> § 3533.2 (3d ed. 2008)	15

PETITION FOR A WRIT OF CERTIORARI

Petitioner Campbell-Ewald Company (Campbell-Ewald) respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-21a) is reported at 768 F.3d 871. The order of the district court denying Campbell-Ewald's motion to dismiss (*id.* at 35a-51a) is reported at 805 F. Supp. 2d 923. The order of the district court granting summary judgment in favor of Campbell-Ewald (*id.* at 22a-34a) is unreported, but available at 2013 WL 655237.

JURISDICTION

The court of appeals entered judgment on September 19, 2014. App. 1a-2a. On October 24, 2014, the court of appeals granted Campbell-Ewald's motion to stay the mandate pending this Court's review. *Id.* at 62a-63a. On December 8, 2014, Justice Kennedy granted a timely application to extend the time within which to petition for certiorari to January 19, 2015. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS AND RULE INVOLVED

Article III, Section 2 of the U.S. Constitution, pertinent provisions of the Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227, and Federal Rule of Civil Procedure 68(a) are set forth in the Appendix hereto at 64a-68a.

INTRODUCTION

This case presents the jurisdictional question that this Court granted certiorari to decide in *Genesis*

Healthcare Corp. v. Symczyk, 133 S. Ct. 1523 (2013)—whether a case becomes moot, and thus beyond the judicial power of Article III, when the plaintiff receives an offer of complete relief on his claims. In *Genesis Healthcare*, the Court was unable to decide whether an offer of complete relief moots a plaintiff's individual claim because it concluded that the issue was not properly presented in that case. *Id.* at 1528-29. The acknowledged circuit conflict on that issue persists. This case presents an ideal vehicle for this Court to decide that issue, along with the equally important question whether an offer of complete relief before class certification moots a named plaintiff's class claim under Federal Rule of Civil Procedure 23.

This case underscores the need for the Court's resolution of these issues. It involves a class action brought under the Telephone Consumer Protection Act (TCPA) against a national marketing firm (petitioner Campbell-Ewald) over a text message that Campbell-Ewald sent on behalf of the U.S. Navy to recruit new sailors. The TCPA provides for small statutory damages—\$500 per violation—for unauthorized messages. But the Act has become an extortionist weapon in the hands of class action attorneys seeking to extract lucrative attorneys' fees for class-wide settlements. In response, many defendants, including Campbell-Ewald here, have offered plaintiffs complete relief on their individual claims at the outset—before any class is certified—agreeing to make plaintiffs whole for any TCPA violations, while sparing all the costs of protracted litigation. In the decision below, the Ninth Circuit held that an offer of complete relief fails to moot either the plaintiff's individual claim or his class claim. That decision contravenes basic Article III

principles, directly conflicts with the decisions of other circuits, and warrants this Court's review.

The Ninth Circuit's decision in this case also raises an additional question that merits this Court's review. After concluding that this case was not moot despite Campbell-Ewald's offer of complete relief, the Ninth Circuit reversed the district court's holding that, under *Yearsley v. W.A. Ross Construction Co.*, 309 U.S. 18 (1940), Campbell-Ewald was entitled to derivative sovereign immunity from liability for recruiting activities carried out under a valid contract with the Navy. The Ninth Circuit's immunity ruling rests on the remarkable and unsupported proposition that *Yearsley* applies "only in the context of property damage resulting from public works projects." App. 16a. That ruling not only is at odds with *Yearsley* and the decisions of other courts of appeals, but also seriously erodes a bedrock protection for those who carry out valid government contracts for the public good. The Ninth Circuit's categorical and illogical limit on the scope of the derivative sovereign immunity doctrine independently warrants this Court's review.

STATEMENT OF THE CASE

A. Plaintiff's Lawsuit

Recruiting is one of the armed services' most important missions. In undertaking this critical mission, the U.S. Navy contracts with outside advertising agencies, including (for the last dozen years) Campbell-Ewald. C.A.E.R. 2, 503, 520.¹ In 2006, as part of an ongoing contract, the Navy directed

¹ C.A.E.R. refers to the court of appeals excerpts of record. C.A.S.E.R refers to the supplemental excerpts.

Campbell-Ewald to develop a mobile marketing campaign using emerging forms of technology. *See id.* at 557-67, 671-72 678-803. The contract expressly provided for oversight of Campbell-Ewald's work and required the Navy to approve all deliverables provided by Campbell-Ewald. *Id.* at 696, 699-704, 718-19. During the course of the contract, the Navy was "in constant contact with Campbell-Ewald on a daily basis" for input or approval. C.A.S.E.R. 83.

In 2005, the Navy authorized funds for Campbell-Ewald to explore new media opportunities, including text messaging. C.A.E.R. 400-02, 766. Campbell-Ewald submitted a proposed media plan that included an option for mobile marketing to expand the Navy's efforts via text messaging. *Id.* at 625, 759-64. The Navy "liked the idea of contacting people via text message" and approved the plan. C.A.S.E.R. 72. To execute this plan, Campbell-Ewald contracted with a separate entity, MindMatics LLC, to deliver the "Navy branded SMS (text) direct mobile "push" program to the cell phones of 150,000 Adults 18-24 from an opt-in list of over 3 million." App. 25a (citation omitted); *see* C.A.E.R. 406-16. MindMatics was responsible for the actual execution of the text messaging campaign. C.A.E.R. 531-50.

Together, Campbell-Ewald and the Navy developed the text message that is the subject of this lawsuit. *Id.* at 523, 601; C.A.S.E.R. 54. The message read:

Destined for something big? Do it in the Navy.
Get a career. An education. And a chance to
serve a greater cause. For a FREE Navy video
call [number].

App. 2a. The copy of the message was revised and approved by the Navy. *Id.* MindMatics "handled the

deployment, transmission and delivery of the text messages.” *Id.* at 26a. Campbell-Ewald had no involvement in transmitting the messages. C.A.E.R. 523-24.

Plaintiff claims to have received this text message in May 2006, along with approximately 100,000 other individuals. He claims that he did not consent to receive the message. App. 3a, 36a. Three years and ten months after receiving the message, Plaintiff filed an action under the TCPA, naming Campbell-Ewald—but not the Navy or Mindmatics—as the defendant. *Id.* at 2a-3a. In addition to bringing an individual claim against Campbell-Ewald, Plaintiff sought to represent a putative nationwide class of “other unconsenting recipients of the Navy’s recruiting messages,” pursuant to Federal Rule of Civil Procedure 23. *Id.* at 3a. Plaintiff sought damages for the alleged TCPA violation on an individual and class-wide basis, seeking hundreds of millions of dollars on behalf of the class. App. 2a, 22a; *see also* C.A.E.R. 57-63 (complaint).²

B. Campbell-Ewald’s Unaccepted Offers Of Full Relief And District Court Proceedings

Before any class was certified and before Plaintiff had even moved for certification, Campbell-Ewald attempted to resolve the case by offering Plaintiff complete relief on his claim. App. 52a-61a. Campbell-Ewald tendered an offer of judgment pursuant to Federal Rule of Civil Procedure 68 (*id.* at 52a-56a) as well as a separate settlement offer (*id.* at 57a-61a) that

² The TCPA provides statutory damages of \$500 per violation, which can be trebled for willful and knowing violations. 47 U.S.C. § 227(b)(3).

would have fully satisfied Plaintiff's claim. In each, Campbell-Ewald offered to (1) pay Plaintiff \$1503 for each unsolicited text message that Plaintiff allegedly received from or on behalf of Campbell-Ewald (over three times the statutory amount of \$500 per violation set by Congress); (2) pay all reasonable costs that Plaintiff would recover if he were to prevail; and (3) stipulate to an injunction prohibiting it from the alleged wrongs. *Id.* at 38a-39a; 52a-61a.

Plaintiff did not accept these offers. *Id.* at 3a. Instead, he filed a motion to strike the Rule 68 offer and a motion for class certification pursuant to the deadline to which the parties stipulated. *Id.* at 39a. Campbell-Ewald moved to dismiss the action for lack of jurisdiction, arguing that its offers of complete relief mooted both Plaintiff's individual and class claims under basic Article III principles. *Id.* at 39a-40a.

The district court denied Campbell-Ewald's motion. *Id.* at 35a. The court acknowledged that Campbell-Ewald's offers "would have fully satisfied the individual claims asserted ... by Plaintiff in this action." *Id.* at 40a. But the court held that the offers mooted neither Plaintiff's individual claim nor his class claim. As to the class claim, the court held that Plaintiff's class certification motion (filed after Campbell-Ewald made its offers of full relief) could relate back to the filing of the class complaint (before Campbell-Ewald had made its offers). *Id.* at 49a-50a. The court then granted Plaintiff's motion to strike the Rule 68 offer, reasoning that "because Plaintiff did not accept Defendant's offer of judgment, Defendant was not entitled under Rule 68 to file the offer of judgment." *Id.* at 49a. The court held that Campbell-Ewald's separate settlement offer—which remained

(and remains) open by its terms—did not moot Plaintiff’s claim for the same reasons. *Id.*

After a period of discovery, Campbell-Ewald moved for summary judgment, arguing, *inter alia*, that it was entitled to derivative sovereign immunity. Campbell-Ewald explained that, under this Court’s decision in *Yearsley*, it could not be held liable for an alleged TCPA violation for which the Navy itself could not held liable, given that Campbell-Ewald was simply carrying out validly conferred authority under a contract with the Navy. *Id.* at 30a. The district court granted Campbell-Ewald’s motion, holding that it is entitled to derivate sovereign immunity. *Id.* at 33a-34a.

The district court explained that it is undisputed that “the Navy cannot be sued for violation of the TCPA” because the United States has not waived its sovereign immunity from suit under the TCPA. *Id.* at 30a. In addition, the court found that Plaintiff “points to no evidence indicating that [Campbell-Ewald] exceeded the scope of its authority to send the text message at issue.” *Id.* at 32a. Indeed, the court explained, the “undisputed” facts show that “[Campbell-Ewald] acted at the Navy’s direction to effectuate [the] text message recruitment campaign.” *Id.* at 33a. Accordingly, the court concluded that, “[a]cting as a Navy contractor, [Campbell-Ewald] is immune from liability under the doctrine of derivate sovereign immunity.” *Id.* at 33a-34a.

Plaintiff appealed.

C. Campbell-Ewald’s Motion To Dismiss Plaintiff’s Appeal For Lack Of Jurisdiction

A month after Plaintiff appealed, this Court decided *Genesis Healthcare*, which held that an unaccepted

offer of full relief under Rule 68 mooted a collective action under the Fair Labor Standards Act (FLSA). The Court first considered whether the offer mooted plaintiff's individual claim—an issue on which the Court acknowledged the circuits are “split.” 133 S. Ct. at 1528 & n.3. But the Court concluded that it could not “reach this question, or resolve the split, because the issue is not properly before us” (due to the “absence of a cross-petition from respondent” on the issue). *Id.* at 1528-29. Accordingly, the Court “assume[d], without deciding, that petitioners’ Rule 68 offer mooted [plaintiff]’s individual claim.” *Id.* at 1529.

Next, the Court considered whether the “collective-action allegations” in the complaint were justiciable where the lone plaintiff’s individual claim had become moot because of the offer of full relief. *Id.* The Court held that, under “straightforward application of well-settled mootness principles,” the entire suit became moot when the plaintiff’s individual claim became moot “because she lacked any personal interest in representing others in this action.” *Id.* The Court rejected the argument that an “inherently transitory” class-action claim” could render the collective-action claim justiciable under the “relation-back rationale” of *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), and related cases. 133 S. Ct. at 1530-32. As the Court explained, the relation-back doctrine is based “on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant’s litigation strategy,” and there was nothing “fleeting” about plaintiff’s claims. *Id.* at 1531.

Justice Kagan—joined by Justices Ginsburg, Breyer, and Sotomayor—dissented. Justice Kagan explained that she would have reached and resolved

the undecided question and held that an unaccepted offer of full relief “will *never*” moot the plaintiff’s individual claim, and therefore can never moot the collective claim either. *Id.* at 1536 (Kagan, J., dissenting). In her view, the Court should “have resolved this case (along with a circuit split) by correcting the Third Circuit’s view that an unaccepted offer mooted [plaintiff’s] individual claim.” *Id.* at 1537.

After *Genesis Healthcare*, Campbell-Ewald moved to dismiss Plaintiff’s appeal for lack of jurisdiction, arguing that *Genesis Healthcare* makes clear that “the relation-back doctrine does not permit a plaintiff to pursue an action on behalf of others when offered full individual relief before seeking class certification.” C-E Mot. 2, ECF No. 8 (9th Cir. June 24, 2013). As Campbell-Ewald explained (*id.* at 14), *Genesis Healthcare* corrected the reasoning of prior Ninth Circuit precedent—such as *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091-92 (9th Cir. 2011)—that invoked the relation-back doctrine in holding that a plaintiff was not barred from pursuing a class claim even though a settlement offer fully satisfied his individual claim. The Ninth Circuit denied Campbell-Ewald’s motion without prejudice to Campbell-Ewald renewing the arguments in its answering brief. Order, ECF No. 17 (9th Cir. Aug. 20, 2013).

Two months later, the Ninth Circuit decided *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948 (9th Cir. 2013). In *Diaz*, the Ninth Circuit considered “whether an unaccepted Rule 68 offer that would have fully satisfied a plaintiff’s claim is sufficient to render the claim moot.” *Id.* at 952. The court acknowledged that “[o]ther circuits are divided on the question” and that the majority view is “that an

unaccepted offer will moot a plaintiff's claim." *Id.* at 952-53 (citing *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991)). But the court rejected the majority view because "four justices of the United States Supreme Court ... embraced a contrary position in *Genesis Healthcare*." *Id.* at 953. The court explained that it was "persuaded that Justice Kagan has articulated the correct approach," quoted at length from Justice Kagan's dissenting opinion in *Genesis Healthcare*, and ultimately held "that an unaccepted Rule 68 offer that would have fully satisfied a plaintiff's claim does not render that claim moot." *Id.* at 954-55.

Several months later, Campbell-Ewald filed its answering brief on appeal, along with a petition for an initial en banc hearing on the jurisdictional issue. In both its brief and en banc petition, Campbell-Ewald explained that the majority in *Genesis Healthcare* rejected the very reasoning employed by *Pitts*. C-E CA9 Br. 3-4, 16; C-E En Banc Pet. 11-12. Campbell-Ewald also explained that *Diaz* had erred in basing its holding on the dissenting opinion in *Genesis Healthcare*, and that *Diaz* conflicted with the majority of the courts of appeals to have addressed the jurisdictional question. C-E En Banc Pet. 7-9. The Ninth Circuit declined to grant Campbell-Ewald's en banc petition. CA9 Docket Entry 40 (denying request).

In response to Campbell-Ewald's motion to dismiss the appeal and answering brief, Plaintiff defended the Ninth Circuit's decision in *Diaz* and asserted various arguments for why the Court should not reach the jurisdictional issue, including (1) that the offer did fully satisfy Plaintiff's claim because it did not include attorney's fees (even though not available under the TCPA), (2) the Rule 68 offer was "stricken from the

record,” and (3) Campbell-Ewald had agreed to extend the date for seeking class certification while its motion to dismiss was pending. Pl. CA9 Reply 2-6 & nn.3-4.

D. The Ninth Circuit’s Decision

The Ninth Circuit held that the case was not moot despite Campbell-Ewald’s offers of complete relief and reversed the district court’s ruling that Campbell-Ewald was entitled to derivative sovereign immunity.

On jurisdiction, the Ninth Circuit squarely reached the issue (declining to accept Plaintiff’s various procedural objections) and held that neither Plaintiff’s individual claim nor the class claim was mooted by Campbell-Ewald’s offers of full relief. App. 4a-7a. First, the court held that “[a]n unaccepted Rule 68 offer that would fully satisfy a plaintiff’s claim is insufficient to render the claim moot.” *Id.* at 5a (quoting *Diaz*, 732 F.3d at 950). Next, the court held that, “the putative class claims are not moot.” *Id.* Although the court observed that “*Genesis* undermined some of the reasoning employed in *Pitts* and *Diaz*,” the court concluded that *Genesis Healthcare* “is not ‘clearly irreconcilable’ with *Pitts* or *Diaz*” because the collective claims in *Genesis Healthcare* arose under the FLSA, not Rule 23. *Id.* at 6a-7a (citation omitted).

On immunity, the Ninth Circuit held that this Court’s decision in *Yearsley*—on which the district court had relied in finding derivative immunity—is “not applicable” to this dispute. *Id.* at 15a. The court explained that *Yearsley* established only “a narrow rule regarding claims arising out of property damage caused by public works projects.” *Id.* In addition, the court declared that “[the Ninth Circuit], in particular, has rarely allowed use of the defense, and only in the

context of property damage resulting from public works projects.” *Id.* at 16a. According to the court, there was thus no basis for applying “the [derivative sovereign immunity] doctrine to the present dispute.” *Id.* at 16a-17a. The court disposed of Campbell-Ewald’s remaining arguments and remanded for further proceedings. *Id.* at 20a.

The Ninth Circuit stayed its mandate pending this Court’s review on certiorari. *Id.* at 62a-63a.

REASONS FOR GRANTING THE WRIT

This Court has already concluded that the threshold jurisdictional question presented by this case warrants certiorari. In *Genesis Healthcare*, the Court granted certiorari to decide that same issue—and resolve the acknowledged circuit split underlying it. But the Court was unable to decide whether an offer of complete relief moots a plaintiff’s individual claim because it concluded the issue was not properly presented. *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013). The circuit split over this issue persists, and the resolution of that split is needed even more urgently now. Lower courts have been emboldened by the dissenting opinion in *Genesis Healthcare* to dismiss jurisdictional defects with respect to both individual and class claims when, as here, a defendant makes an offer that would fully satisfy the plaintiff’s claim. Certiorari is warranted to resolve the jurisdictional issues presented, as well as the important derivative sovereign immunity question raised by the Ninth Circuit’s ruling on the merits.

I. CERTIORARI IS WARRANTED ON THE JURISDICTIONAL QUESTIONS

As this Court has stressed, “[n]o principle is more fundamental to the judiciary’s proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies.” *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) (citation omitted). The Ninth Circuit’s decision in this case contravenes that limitation by disregarding the “well-settled mootness principles” recognized in *Genesis Healthcare*: (1) a plaintiff “must demonstrate that he possesses a legally cognizable interest, or personal stake in the outcome of the action,” (2) “an actual controversy must be extant at all stages of review,” and (3) “[i]f an intervening circumstance deprives the plaintiff of a personal stake in the outcome of the lawsuit, at any point during litigation, the action can no longer proceed and must be dismissed as moot.” 133 S. Ct. at 1528-29 (citation and internal quotation marks omitted). Ignoring these bedrock principles, the Ninth Circuit permitted Plaintiff’s lawsuit to proceed despite the absence of a dispute to litigate or a plaintiff with a personal stake in the outcome of the lawsuit—in direct conflict with the decisions of this Court and those of other circuits.

A. As This Court Has Recognized, The Circuits Are Split On Whether An Offer Of Full Relief Moots A Plaintiff’s Individual Claim

This Court recognized in *Genesis Healthcare* that “the Courts of Appeals disagree whether an unaccepted offer that fully satisfies a plaintiff’s claim is sufficient to render the claim moot.” 133 S. Ct. at 1528.

That conflict—which the Court was unable to resolve in *Genesis Healthcare*—warrants this Court’s review.

1. The majority of the courts of appeals—including the Third, Fourth, Fifth, Sixth, and Seventh Circuits—hold that an offer that fully satisfies a plaintiff’s claim moots a plaintiff’s individual claim. *See, e.g., Weiss v. Regal Collections*, 385 F.3d 337, 340 (3d Cir. 2004); *Warren v. Sessions & Rogers, P.A.*, 676 F.3d 365, 371 (4th Cir. 2012) (“When a Rule 68 offer unequivocally offers a plaintiff all of the relief ‘she sought to obtain,’ the offer renders the plaintiff’s action moot.” (citation omitted)); *Krim v. pcOrder.com, Inc.*, 402 F.3d 489, 502 (5th Cir. 2005) (plaintiff’s “individual claims were rendered moot” where defendant offered “a settlement equal to the statutory limit on his damages”); *O’Brien v. Ed Donnelly Enters., Inc.*, 575 F.3d 567, 574-75 (6th Cir. 2009) (“[A]n offer of judgment that satisfies a plaintiff’s entire demand moots the case”)³; *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999) (offer of complete relief “eliminates a legal dispute upon which federal jurisdiction can be based”).

In addition, the Third and Seventh Circuits have held, in circumstances identical to this case, that an offer of complete relief to the plaintiff before it moves for class certification “will generally moot the plaintiff’s

³ The Sixth Circuit has further held that, although an offer that fully satisfies a plaintiff’s claim moots the plaintiff’s claim, a plaintiff should not “lose[] outright when he refuses an offer of judgment that would satisfy his entire demand.” *O’Brien*, 575 F.3d at 575. Accordingly, the Sixth Circuit advises district courts that the “better approach” is to “enter judgment in favor of the plaintiffs in accordance with the defendants’ Rule 68 offer of judgment.” *Id.* at 574-75.

[individual] claim, as at that point the plaintiff retains no personal interest in the outcome of the litigation.” *Weiss*, 385 F.3d at 340; see *Damasco v. Clearwire Corp.*, 662 F.3d 891, 895 (7th Cir. 2011) (“Once the defendant offers to satisfy the plaintiff’s entire demand, there is no dispute over which to litigate, and a plaintiff who refuses to acknowledge this loses outright ... because he has no remaining stake.” (quoting *Rand v. Monsanto Co.*, 926 F.2d 596, 598 (7th Cir. 1991))); see also *Genesis Healthcare*, 656 F.3d at 195 (holding that a plaintiff’s individual FLSA claim was mooted by a Rule 68 offer); *Sandoz v. Cingular Wireless LLC*, 553 F.3d 913, 919 (5th Cir. 2008) (same).⁴

2. The Ninth Circuit’s decision in this case directly conflicts with these decisions. The court below squarely held that Plaintiff’s “individual claim is not moot,” notwithstanding Campbell-Ewald’s offers of complete relief. App. 4a. The court explained that, in its view, “[a]n unaccepted Rule 68 offer that would

⁴ Leading commentators have adopted this position too. See, e.g., 13B Charles Alan Wright *et al.*, *Federal Practice and Procedure* § 3533.2 (3d ed. 2008) (“Even when one party wishes to persist to judgment, an offer to accord all of the relief demanded may moot the case.”); 1 Joseph M. McLaughlin, *McLaughlin on Class Actions: Law and Practice* § 4:28 (9th ed. 2012) (“Traditional mootness principles provide that an offer of judgment under Federal Rule of Civil Procedure 68 that satisfies a plaintiff’s entire demand moots the claim.” (footnote omitted)); 1 William B. Rubenstein *et al.*, *Newberg on Class Actions* § 2:15 (5th ed. 2013) (“If the defendant makes a full offer of judgment pursuant to Rule 68, completely satisfying all of the named plaintiff’s individual claims, then the named plaintiff’s individual case necessarily becomes moot.”).

fully satisfy a plaintiff's claim is insufficient to render the claim moot.” App. 5a (quoting *Diaz*, 732 F.3d at 950). The conflict is square and undeniable. Indeed, in *Diaz*—on which the court explicitly relied below—the Ninth Circuit recognized that its position was at odds with “the majority of courts.” 732 F.3d at 950.

The Eleventh Circuit recently sided with the Ninth Circuit in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), and held that an unaccepted Rule 68 offer of judgment does not moot a plaintiff's individual claim, *id.* at 703. Following Justice Kagan's dissent—and the Ninth Circuit's decision in *Diaz* embracing “the position set out in [that] dissent,” *id.*—the Eleventh Circuit reasoned that the Rule 68 offer could not have mooted plaintiff's individual claim where the offer was not accepted. *Id.* at 703-04; *see also id.* at 703 (“At least one circuit has explicitly adopted the position set out in the [*Genesis Healthcare*] dissent.” (citing *Diaz*, 732 F.3d at 954-55)).

The Second Circuit has adopted an intermediate approach—though one that, at least in practical effect, aligns more closely with the majority view. Like the Ninth and Eleventh Circuits, the Second Circuit holds that where a plaintiff has not accepted a defendant's offer of full relief, the case is not moot because “the controversy . . . is still alive.” *McCauley v. Trans Union, L.L.C.*, 402 F.3d 340, 342 (2d Cir. 2005). But unlike the Ninth and Eleventh Circuits, the Second Circuit has held that the “better resolution” of the case in those circumstances is to enter a default judgment against the defendant for the amount offered in the offer of complete relief. *Id.*; *see also Cabala v. Crowley*, 736 F.3d 226, 228-29 & n.2 (2d Cir. 2013) (discussing *McCauley* and recognizing circuit conflict).

As this case illustrates, the Ninth Circuit's position on the effect of an offer of full relief contravenes fundamental mootness principles. Plaintiff sought relief for an alleged violation of the TCPA based on receipt of a single text message. Campbell-Ewald responded by making an offer of judgment and a separate settlement offer that—as the district court found—“would have fully satisfied the individual claims asserted . . . by Plaintiff in this action.” App. 40a. At that point, there was no remaining dispute over which to litigate and Plaintiff had no continuing stake in the litigation and nothing more to gain from its continuing pursuit. *See, e.g., Rand*, 926 F.2d at 597-98. Accordingly, the action should have been dismissed as moot. At a minimum, the district court should have entered judgment in accordance with the defendant's offer of judgment. *O'Brien*, 575 F.3d at 575. Instead, the Ninth Circuit permitted the action to proceed.

This Court's intervention is needed to resolve this clear circuit conflict. That was true when the Court granted certiorari in *Genesis Healthcare*. But it is even more true today given the doubt that the dissenting opinion in *Genesis Healthcare* has created over whether the Court's threshold assumption in *Genesis Healthcare*—that the plaintiff's individual claims were moot—was correct. As illustrated by the Ninth Circuit's decisions in this case and *Diaz* and the Eleventh Circuit's decision in *Stein*, courts of appeals have followed Justice Kagan's dissent in *Genesis Healthcare* and essentially dismissed the Court's decision in *Genesis Healthcare* on the ground that it was decided on a faulty premise (as Justice Kagan argued). That trend has created more unrest. Courts

of appeals are bound to follow the majority decisions of this Court—not statements in dissenting opinions.

The circuits that have followed Justice Kagan’s dissent may believe that the majority in *Genesis Healthcare* simply felt compelled to accept the premise that the offer of complete relief mooted the plaintiff’s individual claims because of the way the case was litigated, but did not actually believe that mootness principles supported that result. That view, however, is belied not only by the Article III principles discussed by the majority (133 S. Ct. at 1528-29), but also by the Court’s response to Justice Kagan’s dissent (*id.* at 1529 n.4). In any event, this Court should grant certiorari and finally resolve this important issue.

B. The Ninth Circuit’s Holding That The Class Claim Is Not Moot Conflicts With *Genesis Healthcare* And Decisions Of Other Courts

The Ninth Circuit’s holding that Campbell-Ewald’s offer of full relief does not moot Plaintiff’s class claim presents its own conflict of authority and independently warrants this Court’s review.

1. To begin, the Ninth Circuit’s decision is at odds with *Genesis Healthcare*, which held that plaintiff’s representative action “became moot when her individual claim became moot, because she lacked any personal interest in representing others in this action” at that time. 133 S. Ct. at 1529. The plaintiff argued that she had “a sufficient personal stake in [the] case based on a statutorily created collective-action interest in representing other similarly situated employees” to keep her collective claims alive despite the fact that her individual claims were moot. *Id.* at 1530. This Court disagreed, explaining that the plaintiff’s nascent hope of representing others did not “preserve her suit from

mootness.” *Id.* The Court explained that “the mere presence of collective-action allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied.” *Id.* at 1529. Once her individual claim became moot, the plaintiff had “no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve her suit from mootness.” *Id.* at 1532.

Genesis Healthcare rejects the rationale that the Ninth Circuit relied on in *Pitts* in concluding that the class claims were *not* mooted. The key to the Ninth Circuit’s position that the mooting of a plaintiff’s individual claim does not moot his class claim is the purportedly “inherently transitory” nature of class claims. *Pitts*, 653 F.3d at 1091. According to the Ninth Circuit, “inherently transitory claims” include class claims “‘acutely susceptible to mootness’ in light of [the defendant’s] tactic of ‘*picking off*’ lead plaintiffs with a Rule 68 offer to avoid a class action.” *Id.* (alteration in original) (emphasis added) (citation omitted). But *Genesis Healthcare* rejected the argument that the risk that “defendants can strategically use Rule 68 to ‘pick off’ named plaintiffs before the collective-action process is complete, render[s] collective actions ‘inherently transitory’ in effect.” 133 S. Ct. at 1531. As the Court explained, the Court’s relation-back doctrine “has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendants’ litigation strategy.” *Id.*⁵

⁵ As *Genesis Healthcare* reiterated, “[t]he ‘inherently transitory’ rationale was developed to address circumstances in which the challenged conduct was effectively unreviewable,” such as where a plaintiff seeks

In the decision below, the Ninth Circuit conceded that *Genesis Healthcare* “undermined some of the reasoning employed in *Pitts* and *Diaz*.” App. 6a. But the court reasoned that this precedent survived *Genesis Healthcare* because of differences between Rule 23 class actions and FLSA collective actions. See App. 6a-7a. Not so. In a Rule 23 class action, “a putative class acquires an independent legal status once it is certified under Rule 23,” whereas “conditional certification [under the FLSA] does not produce a class with an independent legal status.” 133 S. Ct. at 1530. But before a district court rules on class certification, a plaintiff bringing representative claims under Rule 23 is in the same position as a plaintiff bringing representative claims under the FLSA. In a Rule 23 class action, no less than in a FLSA collective action, a putative class representative has no “personal stake” in representing unnamed class members that would “preserve [the] suit from mootness.” *Id.* Any relevant difference between FLSA collective actions and Rule 23 class actions emerges after, not before, certification.

As in *Genesis Healthcare*, the Court’s decisions in *United States Parole Commission v. Geraghty*, 445 U.S. 388 (1980), *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980), and *Sosna v. Iowa*, 419 U.S. 393 (1975), “are, by their own terms, inapplicable.” 133

“to bring a class action challenging the constitutionality of temporary pretrial detentions.” 133 S. Ct. at 1530. Because “pretrial custody likely would end prior to the resolution of his claim,” the relation-back doctrine is necessary to prevent the defendant’s conduct from being “insulate[d] . . . from review.” *Id.* at 1531. The claim in *Genesis Healthcare*, like the claims here, did not challenge conduct, like a temporary pretrial detention, that is “fleeting.” *Id.*

S. Ct. at 1529. *Geraghty* is inapplicable here because no class was certified at the time of the offers of full relief (indeed, Plaintiff had yet to move for certification) and, accordingly, there is “simply no certification decision to which [his] claim could have related back.” *Genesis Healthcare*, 133 S. Ct. at 1530. *Sosna*’s “inherently transitory” exception is inapplicable because, as explained, there is nothing “fleeting” about the challenged conduct here that could cause it to evade review. *Id.* at 1531. And *Roper* is inapplicable because “*Roper*’s holding turned on a specific factual finding that the plaintiffs possessed a continuing personal economic stake in the litigation, even after the defendants’ offer of judgment.” *Id.* That personal stake is missing where, as here, the defendant’s Rule 68 or settlement offer “provide[s] complete relief on [the plaintiffs] individual claims.” *Id.*

2. The Ninth Circuit’s decision also exacerbates a circuit split on whether and how an offer of full relief that moots an individual claim moots class claims under Rule 23 as well. The Third, Fifth, Ninth, Tenth, and Eleventh Circuits have held that the relation-back doctrine may be invoked to keep a class action alive even where the plaintiff’s individual claim becomes moot. *See, e.g., Weiss*, 385 F.3d at 348 (“Absent undue delay in filing a motion for class certification, therefore, where a defendant makes a Rule 68 offer to an individual claim that has the effect of mooting possible class relief asserted in the complaint, the appropriate course is to relate the certification motion back to the filing of the class complaint.”); *Sandoz*, 553 F.3d at 920 (“The proper course . . . is to hold that when a FLSA plaintiff files a timely motion for certification of a collective action, that motion relates back to the date

the plaintiff filed the initial complaint”); *Lucero v. Bureau of Collection Recovery, Inc.*, 639 F.3d 1239, 1247-50 (10th Cir. 2011) (“[A] nascent interest attaches to the proposed class upon the filing of a class complaint such that a rejected offer of judgment . . . does not render the case moot under Article III.”); *Stein*, 772 F.3d at 704-09 (same).

By contrast, the Fourth, Seventh, and Eighth Circuits have held that the entire class action suit becomes moot along with the named plaintiff’s individual claim when, as here, the defendant makes an offer of full relief before class certification. *See, e.g., Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011) (“[W]hen a putative class plaintiff voluntarily dismisses the individual claims underlying a request for class certification, as happened in this case, there is no longer a ‘self-interested party advocating’ for class treatment in the manner necessary to satisfy Article III standing requirements.”); *Damasco*, 662 F.3d at 896 (“To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.”); *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826-27 (8th Cir. 2008) (“[T]he voluntary settlement reached by the named plaintiffs with both defendants leads us to conclude that the entire case is now moot.”).

As discussed above, the principles set forth in *Genesis Healthcare* should apply equally to Rule 23 class actions and should settle the split in favor of the Fourth, Seventh, and Eighth Circuits. But as the Ninth Circuit’s decision below demonstrates, until this Court says so in the Rule 23 context, courts will persist

in applying their erroneous view of the relation-back doctrine in contravention of *Genesis Healthcare*. Indeed, the Ninth Circuit is not the only court of appeals to continue to apply its erroneous rule despite *Genesis Healthcare*. Both the Fifth and Eleventh Circuits have done so as well, holding that *Genesis Healthcare* is inapplicable to Rule 23 class actions. See *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824-25 (5th Cir. 2014); *Stein*, 772 F.3d at 708. Nevertheless, in *Stein* the Eleventh Circuit acknowledged that the circuits are split on this issue. 772 F.3d at 708.

Certiorari is warranted to resolve this conflict. *Genesis Healthcare* should have clarified the law in this area. But the fact that the Court could not decide whether an offer of full relief moots an individual claim coupled with Justice Kagan's dissenting opinion have created further conflict and confusion on this issue. So far, the only message that has influenced the lower courts is Justice Kagan's admonition in dissent, "Don't try this at home." 133 S. Ct. at 1534.

II. CERTIORARI IS WARRANTED ON THE DERIVATIVE IMMUNITY QUESTION

The jurisdictional issues should have ended this case. But when it reached the merits, the Ninth Circuit made another ruling that independently warrants this Court's review. The court held that the derivative sovereign immunity doctrine grounded in *Yearsley*, is "not applicable" to this dispute on the ground that *Yearsley* established only "a narrow rule regarding claims arising out of property damage caused by public works projects." App. 15a; see *id.* at 16a ("This Court, in particular, has rarely allowed use of this defense, and only in the context of property damage resulting from public works projects."). That

ruling fundamentally misconstrues and unduly limits the doctrine of derivative sovereign immunity.

1. In *Yearsley*, the Court held that the doctrine of derivative sovereign immunity foreclosed tort claims brought against a private contractor that performed services on behalf of the U.S. government. The contractor was hired by the government to improve navigation on the Missouri river and, in that capacity, built several dikes along the river. 309 U.S. at 19. The plaintiff alleged that dikes had damaged its land. In holding that the contractor was entitled to derivative immunity, the Court explained: “[I]f th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.” *Id.* at 20-21. Because the contractor’s work was “authorized and directed by the Government of the United States,” the contractor could not be held liable for its actions. *Id.* at 20.

Yearsley established a general rule that government contractors are immune from liability for performing duties within the scope of their lawfully delegated authority. As the Court put it, there is “no ground for holding [the government’s] agent liable who is simply acting under the authority thus validly conferred.” *Id.* at 21-22. Nothing in the Court’s opinion restricts the derivative immunity doctrine to “the context of property damage resulting from public works projects” (App. 16a). And such a limitation would be illogical. The important interests served by the derivative immunity doctrine do not turn on either the type of project being carried out (public works or otherwise), or the type of injury asserted (property damage or otherwise). What matters is whether the

contractor was acting within the scope of validly conferred authority in undertaking the project.

This Court's precedents confirm the Ninth Circuit's misreading of *Yearsley*. For example, in *Boyle v. United Technologies Corp.*, 487 U.S. 500, 506 (1988)—a products liability case not involving a public works project or property damages—the Court favorably recounted its holding in *Yearsley* that “if [the] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will.” The Court in no way suggested that the derivative immunity doctrine is limited to the particular facts of *Yearsley*. Indeed, although the decision in *Boyle* was ultimately grounded in principles of preemption rather than immunity, the Court unequivocally relied on *Yearsley*'s rationale and specifically noted that it saw “no basis” to limit “the federal interest justifying [the *Yearsley*] holding” only to performance contracts. *Id.*

The Ninth Circuit's restriction of the derivative immunity doctrine is also belied by the Court's discussion of basic immunity principles in *Filarsky v. Delia*, 132 S. Ct. 1657, 1662 (2012). In *Filarsky*, the Court reiterated that “the most important special government immunity-producing concern” is “the government interest in avoiding ‘unwarranted timidity’ on the part of those engaged in the public's business.” *Id.* at 1665 (citation omitted). In addition, the Court emphasized that “[e]nsuring that those who serve the government do so ‘with the decisiveness and the judgment required by the public good,’ is of vital importance regardless whether the individual sued as a state actor works full-time or on some other basis.” *Id.*

So too, ensuring such decisiveness is of “vital importance” regardless of whether a contract is for a “public works project” (App. 15a-16a) or some other aspect of the public’s business—like recruiting applicants for the nation’s armed services.

2. The Ninth Circuit’s decision confining derivative immunity to “public works projects” also is at odds with the opinions of other courts of appeals that have recognized the continuing vitality of *Yearsley* and its application outside those confines. See, e.g., *Butters v. Vance International*, 225 F.3d 462, 466 (4th Cir. 2000) (applying *Yearsley* to private agents of foreign governments); *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986) (recognizing that *Yearsley* is not confined to “construction projects”); *Koutsoubos v. Boeing Vertol*, 755 F.2d 352, 354-55 (3d Cir. 1985) (citing *Yearsley* in products liability case and noting that “federal common law provides a defense to liabilities incurred in the performance of government contracts”); *Tillett v. J.I. Case Co.*, 756 F.2d 591, 596 (7th Cir. 1985) (disapproved on other grounds) (recognizing that “[c]ountless recent cases have examined the reasoning in *Yearsley* . . . in the context of government contracts for weaponry, military hardware and general military equipment”); *Burgess v. Colorado Serum Co.*, 772 F.2d 844, 846 (11th Cir. 1985) (citing *Yearsley* and holding that vaccine manufacturer was entitled to derivative immunity).

This case presents a paradigmatic situation in which the derivative sovereign immunity doctrine was designed to apply. It is undisputed that the Navy is immune from suit under the TCPA (because the United States has not waived its sovereign immunity from suit under that Act). It is undisputed that the

Navy is authorized to contract with firms to help it carry out its vital recruiting mission. And, as the district court explained, the “undisputed” facts show that Campbell-Ewald “acted at the Navy’s direction to effectuate [the] text message recruitment campaign” at issue. App. 33a. Certiorari is warranted to review the Ninth Circuit’s mistaken ruling that derivative immunity is categorically barred here. And there is no basis to expose government contractors to suits in the Ninth Circuit for activities for which they would be entitled to immunity outside the Ninth Circuit.

III. THIS COURT’S REVIEW IS NEEDED

The jurisdictional issues concern the constitutional authority of the courts. They are critically important to defendants facing an increasingly common form of litigation—class actions seeking statutory damages that, while small on an individualized basis, are staggering on a class-wide basis. The TCPA has been a magnet for such class actions. *See, e.g., Allison Grande, TCPA Class Action Surge Shows No Signs Of Abating*, Law360 (May 24, 2013), available at <http://www.law360.com/articles/444874/tcpa-class-action-surge-shows-no-signs-of-abating>.⁶ Not surpris-

⁶ *See also, e.g., Paul F. Corcoran et al., The Telephone Consumer Protection Act: Privacy Legislation Gone Awry?*, 10 Intell. Prop. & Tech. L.J. 9, 9 (2014) (“Class action litigation under the TCPA has swelled into a rising tide, with TCPA class action cases increasing by 63 percent through most of 2012 according to one study, and the number of TCPA cases in general rising by approximately 70 percent in 2013 and again by over 32 percent in the first half of 2014.”); Monica Desai et al., *A TCPA for the 21st Century: Why TCPA Lawsuits Are on the Rise and What*

ingly, the jurisdictional issues presented by this case have arisen in other TCPA actions, as defendants have sought to avoid the costs of protracted litigation while offering to make named plaintiffs whole for any possible individualized harm. *See, e.g., Stein*, 772 F.3d 698 (11th Cir.); *Damasco*, 662 F.3d 891 (7th Cir.).

This case presents an ideal vehicle to decide these issues. Unlike *Genesis Healthcare*, the issue of whether an offer of complete relief moots an individual claim is squarely presented here; Campbell-Ewald presented both a Rule 68 offer of complete relief and a separate settlement offer of complete relief, eliminating any argument that the terms of Rule 68 eliminate a finding of mootness, *cf. Stein*, 772 F.3d at 702-03; and both the Ninth Circuit (App. 4a-7a) and the district court (*id.* at 40a) recognized that Campbell-Ewald's offers would fully satisfy Plaintiff's claim. Moreover, the Ninth Circuit's conclusion in this case—

the FCC Should Do About It, 1 Int'l J. Mobile Mktg., 75, 75-76 (2013) ("The TCPA has become fertile ground for nuisance lawsuits because class action lawyers are often rewarded with quick settlements, even in cases without any merit, simply because litigation uncertainty and the potential financial exposure resulting from a bad decision are too great a risk for a company to bear."); U.S. Chamber Institute for Legal Reform, *The Juggernaut of TCPA Litigation: The Problems with Uncapped Statutory Damages* 1 (Oct. 2013) ("[E]ssentially every American business, from large to small, now finds itself at risk of having to defend against a TCPA lawsuit alleging statutory damages thousands of times in excess of any conceivable actual 'damage' associated with the mere receipt of a phone call (even if the call was not answered, and no voicemail left)."

building on the court's prior decisions in *Diaz* and *Pitts*—that Campbell-Ewald's offers of complete relief moot neither an individual nor class claim not only contravenes bedrock Article III principles, but devalues the benefits of settlement and deprives defendants of a critical, and sensible, mechanism for avoiding costly litigation while making plaintiffs whole.

This case also underscores the significant practical consequences of the jurisdictional issues presented for both litigants and the judiciary. Based on the receipt of a single text message designed to recruit for the Navy, Plaintiff filed suit under the TCPA more than three years later for non-recurring conduct. Campbell-Ewald offered to make him whole for any TCPA violation by giving him more than the maximum \$1500 he could receive under the Act if he proved a willful violation, plus other relief. Yet Plaintiff declined to accept that offer. As a result, the parties have been forced to spend hundreds of thousands of dollars continuing to litigate this case, even before the issue of class certification has been adjudicated. And, perhaps more to the point, the courts have been forced to superintend that litigation—and “expound[] the law in the course of doing so.” *Cuno*, 126 S. Ct. at 1861.

The derivative sovereign immunity question is also indisputably important and independently merits this Court's review. The Ninth Circuit has categorically eliminated a core component of sovereign immunity, placing any government contractor at risk for liability in that circuit for performing valid government contracts servicing critical public needs—including recruiting for our armed forces. This categorical bar is not supported by *Yearsley* and runs counter to longstanding immunity principles. Even if Campbell-

Ewald's authorized efforts to recruit for the good of the Navy and the nation's defense somehow contributed to a TCPA violation, there is no reason Campbell-Ewald should not enjoy the same immunity that the Navy unquestionably would if Plaintiff had aimed his class action demands at the government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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