No. 14-857

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

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an unaccepted offer of judgment, which has no legal effect if not accepted and which provides the plaintiff with no relief, renders it impossible for a court to provide effectual relief and thus moots the plaintiff's claims.

2. Whether an unaccepted offer of judgment to the named plaintiff in a class action, which would have provided relief to the named plaintiff but left the class's damages claims unredressed if it had been accepted, moots the named plaintiff's effort to assert claims on behalf of the class.

3. Whether a private company that violates the Telephone Consumer Protection Act by causing texts to be sent to mobile phones without the consent of the recipients is immunized against liability because it has a contract to perform services for the federal government or one of its agencies, where the violation was outside the scope of any authority or approval conferred by the government.

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INTRODUCTION

Petitioner Campbell-Ewald Company asks this Court to consider whether its unaccepted offer of judgment to the named plaintiff in a proposed class action moots both the plaintiff's individual claims and his effort to represent a class, though his claims remain unredressed. This Court's consideration of those questions now would be unnecessary and premature because the courts of appeals have not disagreed about their resolution in the wake of this Court's recent decision in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013). The federal appellate courts' continued consideration of the impact of the opinions in *Genesis* is likely to foster reasoned development of the law and to better inform this Court's decisionmaking if conflict rather than consensus eventually emerges and review becomes warranted.

In *Genesis*, this Court considered whether a plaintiff whose individual claims were moot could pursue an opt-in collective action under the Fair Labor Standards Act (FLSA). The Court held that the FLSA action was moot because no plaintiff with a live claim had opted in. The Court emphasized that decisions holding that putative class actions survive the mootness of claims of named plaintiffs were "inapposite" "because Rule 23 actions are fundamentally different from collective actions under the FLSA." 133 S. Ct. at 1529.

The *Genesis* majority did not address whether an unaccepted offer of judgment can moot a plaintiff's individual claims, because it held the issue was not presented by the petition, had not been raised in a cross-petition, and had been waived by the respondent below. Thus, the Court assumed, without deciding,

that the plaintiff's individual claim was moot. 133 S. Ct. at 1529. Justice Kagan, joined by three other Justices in dissent, addressed the issue and explained why an unaccepted offer of judgment, which, like any other rejected settlement offer, is a legal nullity, cannot moot a plaintiff's claims: Such an offer leaves the plaintiff's interest in the lawsuit "just what it was before" and does not make it "impossible for a court to grant any effectual relief." *Id*. at 1533–34 (Kagan, J., dissenting). Justice Kagan's reasoning "conflicts with nothing in the Court's opinion," which declined to address the issue. *Id*. at 1534.

Since *Genesis*, two circuits, the Eleventh and Ninth, have adopted Justice Kagan's analysis and held that an offer of judgment does not moot a claim. *Stein v. Buccaneers Ltd. P'ship*, 772 F.3d 698 (11th Cir. 2014); *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948 (9th Cir. 2013); *accord* Pet. App. 5a. Others have recognized that the issue is open. No court of appeals has considered and rejected Justice Kagan's reasoning.

Likewise, since *Genesis*, courts of appeals have agreed that, regardless of whether an offer of judgment moots a plaintiff's individual claims, it does not bar him from representing a class merely because it precedes class certification. *See, e.g., Stein*, 772 F.3d at 709; *accord* Pet. App. 5a–7a.

Review of the mootness issues here is unwarranted given the absence of appellate disagreement in the aftermath of *Genesis*, the force of Justice Kagan's reasoning with respect to whether an unaccepted offer can moot an individual's claim, and the *Genesis* majority's express recognition that class actions and FLSA actions are fundamentally different from the

standpoint of mootness. Cases presenting these issues continue to percolate through the courts of appeals, and if a post-*Genesis* conflict emerges, this Court will have ample opportunity to address it.

Campbell-Ewald also asks this Court to consider whether it is immune from liability for its Telephone Consumer Protection Act (TCPA) violations because its client was the U.S. Navy. Campbell-Ewald relies primarily on a 1940 decision of this Court holding that a federal public works contractor was not liable for the taking of property destroyed by the project where a takings remedy against the government was available. *Yearsley v. W.A. Ross Constr. Co.*, 309 U.S. 18. Campbell-Ewald also invokes cases such as *Boyle v. United Technologies Corp.*, 487 U.S. 500 (1988), holding that *state* common law claims against federal contractors are *preempted* when a federal contract requires actions that are the basis for the claimed liability under state law.

No authority Campbell-Ewald cites addresses whether a private entity may be immunized from liability for conduct that violates a federal statute merely because it has contracted to perform services for the federal government, especially when, as here, its conduct was contrary to the government's directives and policies. Absent a conflict over that issue, Campbell-Ewald's novel request for immunity on the particular facts of this case does not merit review.

STATEMENT

This case arose when Campbell-Ewald caused text messages to be sent using automated dialing equipment to the cell phones of approximately 100,000 people who had not consented to receive those messages, in violation of the TCPA, 47 U.S.C. § 227(b)(1)(A)(iii).

Campbell-Ewald devised the messages under a contract to provide marketing services for the Navy, but the contract did not require it to send text messages and gave Campbell-Ewald substantial discretion as to how to perform its services. ER 88, 101–04, 400–02.[1] The contract required Campbell-Ewald to comply with all applicable laws, ER 299, 708, and the Navy specifically insisted that no messages could be sent to cell phones without the recipients' consent. ER 129–29; ER 136–37. The Navy relied on Campbell-Ewald's representations that it would not send texts to recipients absent consent. ER 109–11, 127–32, 381, 393.

Respondent Jose Gomez received multiple messages sent at Campbell-Ewald's behest. ER 60. He brought this action on behalf of a proposed class of recipients of unauthorized texts seeking statutory damages for each violation under the TCPA. 47 U.S.C. § 227(b)(3). Before the time established by court-approved stipulation of the parties for filing a motion for class certification, *see* SER 24–26, 32–33, Campbell-Ewald served him with an offer of judgment under Federal Rule of Civil Procedure 68.[2] The offer did not specify the amount Campbell-Ewald would pay, but offered $1503 (representing the maximum statutory damages under the TCPA) for each message as to which Mr. Gomez had "a reasonable belief satisfying

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[1] "ER" and "SER" respectively refer to the Excerpts of Record and Supplemental Excerpts of Record in the Ninth Circuit.

[2] Campbell-Ewald also made a settlement offer with the same terms. Although the settlement offer, unlike the Rule 68 offer, did not expire by operation of law after 14 days, Campbell-Ewald's assertion that it remains open by its terms is incorrect: The offer, like any other contract offer, became a nullity when rejected. *See Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting).

[Rule 11] that such messages were sent by or on behalf of C-E." SER 14. The offer thus required additional factual development to determine the amount Campbell-Ewald consented to pay, and left open possible disputes over whether Mr. Gomez had a sufficient basis for alleging liability. The offer did not include attorney fees, although the complaint requested fees.

Mr. Gomez moved to quash and strike the offer of judgment and moved for class certification as soon as permitted under the district court's local rules requiring parties to confer over any such motion. Campbell-Ewald moved to dismiss the complaint for lack of jurisdiction on the theory that its offer mooted the case.

The district court denied the motion to dismiss and granted the motion to strike the offer, eliminating it from the record. Later, however, the court granted summary judgment to Campbell-Ewald on the ground that it was immune from liability under *Yearsley* because it was a Navy contractor.

Mr. Gomez appealed the summary judgment ruling. Campbell-Ewald took no cross-appeal from the court's order striking the offer of judgment, but nonetheless argued that the district court lacked subject-matter jurisdiction based on the offer. Campbell-Ewald also defended the district court's immunity ruling and urged affirmance on the alternative grounds that it was not liable because it had used another company to send the messages and that the TCPA violates the First Amendment.

The court of appeals vacated and remanded. Relying on its recent decision in *Diaz,* 732 F.3d at 955, which held that an unaccepted offer of judgment cannot moot a plaintiff's claims because it does not make

it impossible for a court to grant effectual relief, the court held that Mr. Gomez's individual claim was not moot. Alternatively, the court held that even if his individual claim were moot, the class claims would remain justiciable under the court's ruling in *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081 (9th Cir. 2011). The court rejected Campbell-Ewald's contention that *Genesis* implicitly overruled *Pitts* and similar decisions of other circuits.

The court also rejected Campbell-Ewald's various claims of entitlement to summary judgment. With respect to immunity, the court held that *Yearsley*, on which Campbell-Ewald principally relied, did not broadly immunize federal contractors against federal statutory claims. The court found immunity particularly unwarranted because "[t]he record contains sufficient evidence that the text messages were contrary to the Navy's policy permitting texts only to persons who had opted in to receive them." Pet. App. 20a. As the court observed, "In the seventy-year history of the *Yearsley* doctrine, it has apparently never been invoked to preclude litigation of a dispute like the one before us." Pet. App. 16a. The court further noted that the federal contractor defense recognized in *Boyle* is inapplicable because *Boyle* is based on preemption and this case involves federal claims. *Id.* at 18a.

REASONS FOR DENYING THE WRIT

I. There is no present need for review of the mootness issues.

Campbell-Ewald's claim that this case is moot would require acceptance of two distinct propositions: first, that an offer of judgment to an individual plaintiff moots his individual claims even while providing

him no relief; and second, that if the offer moots the plaintiff's individual claims, it also moots his effort to represent a class if the class has not yet been certified. Because the class claims in this case would only be nonjusticiable if the Court were to rule in favor of Campbell-Ewald on *both* points, the Court should deny certiorari on both issues unless both now merit resolution by this Court.

Neither issue now requires resolution by this Court. As Campbell-Ewald acknowledges, since Justice Kagan's unrebutted demonstration in *Genesis* that an unaccepted offer of judgment does not moot an individual plaintiff's claims, courts of appeals that have considered her analysis have either adopted it or found it unnecessary to address the issue; no court of appeals has rejected Justice Kagan's reasoning. *See* Pet. 17. Appellate courts that have addressed the class-action issue since *Genesis* have agreed that *Genesis*'s recognition of the differences between class actions and FLSA actions supports a holding that a putative class action is not mooted by an unaccepted offer to the named plaintiff just because the class has not yet been certified. Unless and until *Genesis* elicits significant disagreement among the courts of appeals, review by this Court is unwarranted.

A. This Court should not now consider whether an unaccepted offer of judgment moots a plaintiff's individual claims.

1. This Court has not already decided that the issue merits review.

Campbell-Ewald asserts that this Court has "already concluded that the threshold jurisdictional question presented by this case warrants certiorari"

because it "granted certiorari [in *Genesis*] to decide … whether a case becomes moot … when the plaintiff receives an offer of complete relief on his claims." Pet. 12, 1–2. As *Genesis* explains, that assertion is wrong: Although the issue might have fallen within the literal wording of the question presented in *Genesis*, the Court did not consider it properly presented because the respondent had not cross-petitioned and had not disputed, in the lower courts or the brief in opposition, that an offer of judgment of complete relief moots an individual's claim. 133 S. Ct. at 1528–29.

The Court's holding that the individual mootness question was not presented by the petition in *Genesis* leaves no doubt that, as the Court expressly said, "We granted certiorari to resolve whether [an FLSA collective action] is justiciable when the lone plaintiff's individual claim becomes moot." *Id*. at 1526. The mootness of the individual's claim, which was uncontested when certiorari was granted, was an assumption on which the Court granted review and decided the case, not the issue it granted certiorari to decide.

Genesis thus by no means indicates that this Court has already decided that the question whether an offer of judgment moots an individual claim warrants review. But even if that issue might have appeared to merit resolution by this Court before *Genesis*, the impact of the *Genesis* opinions and the lower courts' reactions to them obviate any present need for review.

2. There is no post-*Genesis* circuit-split.

As both *Genesis* and the petition point out, before *Genesis* some federal courts of appeals had held or assumed that an offer of judgment for complete relief mooted an individual plaintiff's claim. *See* 133 S. Ct. at 1528–29 & nn. 3–4; Pet. 14–15. Their discussions of

the issue, as the petition illustrates, tended to be conclusory, and when they attempted to explain how an unaccepted offer pursuant to which the plaintiff received no relief could moot a claim, their reasoning was illogical and self-contradictory.

The Seventh Circuit, for example, asserted that a plaintiff who rejects an offer of complete relief "loses outright … because he has no remaining stake," *Damasco v. Clearwire Corp.*, 662 F.3d 891 895 (7th Cir. 2011), and because "[y]ou cannot persist in suing after you've won." *Greisz v. Household Bank (Ill.), N.A.*, 176 F.3d 1012, 1015 (7th Cir. 1999). To say a plaintiff who has received nothing "has no remaining stake" and "loses" because he already "won" is nonsensical. Other courts embraced equally self-contradictory propositions by saying an offer mooted a plaintiff's claims but then directing entry of judgment in his favor—despite the supposed absence of Article III jurisdiction. *O'Brien v. Ed Donnelly Ents., Inc.,* 575 F.3d 567, 574–75 (6th Cir. 2009).

In *Genesis*, Justice Kagan disagreed that the underlying mootness question should be treated as waived, and her dissent therefore addressed the issue that the majority did not decide. *See* 133 S. Ct. at 1533–35 (Kagan, J., dissenting). Her opinion was the first major opinion at any level to subject the proposition that an unaccepted offer of judgment for complete relief moots a plaintiff's claim to critical analysis under this Court's decisions defining mootness.

As the opinion explains, this Court has held that a case is moot only when it has become "impossible for a court to grant any effectual relief whatever to the prevailing party" and the parties have no "concrete interest … in the outcome of the litigation." *Chafin v.*

Chafin, 133 S. Ct. 1017, 1023 (2013); *accord Knox v. Serv. Employees Int'l Union*, 132 S. Ct. 2277, 2287 (2012). An unaccepted offer of judgment, no matter how extensive the relief it offers, does not meet these criteria. Under Rule 68, an unaccepted offer is deemed withdrawn and is a "legal nullity," as is any other rejected settlement offer. *Genesis*, 133 S. Ct. at 1533 (Kagan, J., dissenting). An unaccepted offer neither provides relief to the plaintiff nor authorizes the court to do so. Its only ongoing effect is that it may support an award of costs to the defendant if a judgment later won by the plaintiff is not more favorable than the offer. *See id*. at 1536; *Delta Air Lines, Inc. v. August*, 450 U.S. 346, 350–52 (1981).

An unaccepted offer thus "cannot moot a case," because the interest of the plaintiff who rejected it "remains just what it was before," "[a]nd so too does the court's ability to grant her relief." *Genesis*, 133 S. Ct. at 1533.

> After the offer lapsed, just as before, [the plaintiff] possessed an unsatisfied claim, which the court could redress by awarding her damages. As long as that remained true, [the plaintiff's] claim was not moot, and the District Court could not send her away empty-handed.

Id. at 1533–34.

As Justice Kagan stated, and the majority did not contest, her analysis of the mootness issue "conflicts with nothing in the Court's opinion." *Id*. at 1534. The majority opinion said repeatedly that it was not deciding the issue, *see id*. at 1528–29 & n.4, and cited *Baldwin v. Reese*, 541 U.S. 27, 34 (2004), which says that in such circumstances the Court's opinion does not "express[] any view on the merits of the issue."

Moreover, nothing in the majority's analysis implies that an unsatisfied claim for monetary damages can be called moot.

Justice Kagan's opinion therefore invited lower courts to "[r]ethink" the "mootness-by-unaccepted-offer theory" and refrain from adopting it if they had not yet endorsed it. 133 S. Ct. at 1534 (Kagan, J., dissenting). So far, no court of appeals has rejected Justice Kagan's analysis and signaled that it will adhere to or adopt the view that an unaccepted offer can moot a claim notwithstanding her demonstration that that view is untenable.

Two courts have thoroughly discussed and expressly adopted Justice Kagan's view: the Eleventh Circuit in *Stein*, 772 F.3d at 702–04, and the Ninth in *Diaz*, 732 F.3d at 954–55, which that court followed in this case. Three circuits, the Second, Fifth, and Seventh, have recognized that Justice Kagan's opinion throws open the issue whether an offer of judgment can moot a claim, but those courts did not have to resolve the issue in the cases before them because they found that the offers of judgment did not offer complete relief and thus could not moot the plaintiffs' claims even if Justice Kagan's view were rejected. *See Cabala v. Crowley*, 736 F.3d 226, 228 n.2 (2d Cir. 2013); *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 608 n.1 (5th Cir. 2014); *Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 450 (7th Cir. 2014); *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126 n.1 (7th Cir. 2014); *Swanigan v. City of Chicago*, 775 F.3d 953, 960 n.3 (7th Cir. 2015).

Moreover, courts that have noted but not resolved the issue in the wake of *Genesis* have indicated that they are receptive to Justice Kagan's logic. The Sec-

ond Circuit in *Cabala*, for example, observed that only after entry of judgment in a plaintiff's favor is "the controversy resolved such that the court lacks further jurisdiction." 736 F.3d at 228. The Seventh Circuit has recognized three times that Justice Kagan's opinion provides "reasons to question our approach to the problem," *Scott*, 704 F.3d at 1126 n.1, but deferred consideration of the issue until presented with a case that requires its resolution. *See also Swanigan*, 775 F.3d at 960 n.3; *Smith*, 772 F.3d at 450. That court has also acknowledged the correctness of Justice Kagan's point that "[a] suit is moot when relief is impossible, … and there's no doubt that a court could provide [a plaintiff who rejected an offer] with relief in the form of money damages." *Id*. at 449.[3]

Importantly, no court of appeals has rejected Justice Kagan's analysis.[4] Other courts of appeals have not yet addressed the issue after *Genesis*, but the is-

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[3] The court went on to say that the issue, "if any," posed by an offer is whether it vitiates the existence of a "controversy," *id*., but did not explain how that issue differs from mootness or why there might be no "controversy" between a plaintiff who has received no relief and a defendant who refuses to provide relief until a court finally orders it. This Court held in *United States v. Windsor*, 133 S. Ct. 2675, 2686 (2013), that there is "a controversy sufficient for Article III jurisdiction" in such circumstances.

[4] The Sixth Circuit avoided the need to decide the issue in the wake of *Genesis* by finding that an offer did not provide complete relief. *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567–70 (6th Cir. 2013). The Second Circuit, in *Doyle v. Midland Credit Mgmt., Inc.*, 722 F.3d 78 (2d Cir. 2013), found a case moot based on an offer of judgment, but did not consider Justice Kagan's analysis because the plaintiff did not contest that a Rule 68 offer of complete relief can moot a claim, but argued only that the offer in that case did not meet Rule 68's requirements.

sue is pending in (at least) the First, Second, Third, Fifth, Sixth, and Tenth Circuits.[5] The pending cases offer those courts the opportunity to consider the issue with the benefit of Justice Kagan's reasoning for the first time. Until a court presented with that reasoning articulates some basis for rejecting it, there is no need for this Court's intervention.

Campbell-Ewald insists, however, that an "acknowledged circuit conflict … persists" and that the Ninth Circuit "recognized" the conflict in *Diaz*. Pet. 2, 16. But every case cited by Campbell-Ewald on its side of the issue (and by the Ninth Circuit in *Diaz*) *predated Genesis*. Those decisions offer little reason to conclude that a conflict will "persist" in light of the power of Justice Kagan's reasoning and the recognition by every court of appeals to weigh in so far that her reasoning either is correct or at least leaves the issue open to further consideration. Campbell-Ewald itself acknowledges that the post-*Genesis* appellate decisions have "followed Justice Kagan's dissent." Pet. 17. If that "trend" (*id*.) continues, and the ongoing appellate consideration of the issue yields consensus in favor of Justice Kagan's approach, there will be no reason for this Court to step in. If the process eventually produces disagreement, review by this Court may become warranted, but the Court would then have the benefit of the reasoned views of more

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[5] *Bais Yaakov v. ACT, Inc.*, No. 14-1789 (1st Cir.); *Tanasi v. New Alliance Bank*, No. 14-1389 (2d Cir.); *Franco v. Allied Interstate LLC*, No. 14-1464 (2d Cir.); *Weitzner v. Sanofi Pasteur, Inc.*, No. 14-3423 (3d Cir.); *Hooks v. Landmark Indus., Inc.*, No. 14-20496 (5th Cir.); *Mey v. N. Am. Bancard, LLC*, No. 14-2574 (6th Cir.); *Jacobson v. Credit Control Servs.*, No. 14-1425 (10th Cir.).

courts of appeals in determining whether and how to resolve the issue.

3. The lower courts' post-*Genesis* decisions are correct.

Campbell-Ewald characterizes the lower courts' ongoing, reasoned consideration of the issue in light of Justice Kagan's opinion as "unrest," Pet. 17, and hints darkly that there is something improper about resolving the issue in a way that implies that *Genesis* was decided on a "faulty premise." *Id*. But the *Genesis* majority itself said that it decided the case on the "assumption" that the individual claims were moot and that it expressed *no view* on the correctness of that premise. *Genesis*, 133 S. Ct. at 1528–29 & n.4. Contesting a premise that the Court said it was not endorsing is neither improper nor disrespectful. Campbell-Ewald's invocation of the truism that "[c]ourts of appeals are bound to follow the majority decisions of this Court—not statements of dissenting opinions," Pet. 17–18, is beside the point, because no court has claimed to be "bound" by Justice Kagan's reasoning, only to find it *persuasive* on issues *not controlled* by a majority decision of this Court.

Campbell-Ewald's implication that courts are precluded from following Justice Kagan's opinion by "the Article III principles discussed by the majority" in *Genesis*, Pet. 18, founders on Campbell-Ewald's failure to point to any "Article III principle" discussed by the majority that suggests that a contested and wholly unredressed claim, for which a court could provide an effectual remedy, is moot. Campbell-Ewald's citation of a footnote in which the majority states that "*satisfaction*" of a claim would eliminate a case or controversy, 133 S. Ct. 1529 n.4 (emphasis added), does not

contradict Justice Kagan's point that an *unsatisfied* claim is not mooted by an unaccepted offer, and the footnote expressly states that the Court is not addressing that point.[6] More pertinent is the *Genesis* majority's recognition that a claim for statutory damages "remains live until it is settled, judicially resolved, or barred by a statute of limitations." *Id*. at 1531. *That* Article III principle necessarily implies that a mere offer that by itself provides no satisfaction does not moot a damages claim.

Indeed, Campbell-Ewald makes virtually no effort to refute Justice Kagan's demonstration that unsatisfied claims cannot be moot. Campbell-Ewald is content to rely on the conclusory and internally contradictory statements of courts and commentators before *Genesis* and on vague invocation of Article III principles. Campbell-Ewald's failure to offer a substantive response to Justice Kagan's analysis provides further reason to doubt that there will be any persistent circuit conflict once courts have the opportunity to address the issue, and it obviates any concern that allowing the issue to continue percolating through the circuits will perpetuate error—particularly when the issue is currently pending in no less than six circuits.

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[6] The footnote took issue with Justice Kagan's suggestion that the collective-action mootness point would never arise again. It pointed out that regardless of whether an unaccepted offer could moot an individual's claim, nothing in the FLSA "precludes *satisfaction*—and thus the mooting—of the individual's claim before the collective-action component of the suit has run its course." 133 S. Ct. at 1529 n.4 (emphasis added). The footnote merely recognized that a plaintiff who actually settled her own FLSA claim would have no further case or controversy with the defendant.

B. Campbell-Ewald's contention that a pre-certification offer of individual relief to a named plaintiff moots a class action does not merit review.

Campbell-Ewald also seeks review of the court of appeals' alternative holding that the offer of judgment did not render class claims nonjusticiable even if it could be said to have mooted the named plaintiff's individual claim. There is no need to reach that issue unless the court of appeals erred in concluding that the offer did not moot the named plaintiff's claim. Because, as shown above, the court's resolution of that antecedent question does not merit review, the Court also should deny review of the question whether the class claims survive the supposed mootness of the named plaintiff's claim.

In any event, the issue concerning the class claims is no more worthy of review than the question whether the plaintiff's individual claims are moot. No court of appeals, before or after *Genesis*, has accepted Campbell-Ewald's position that an offer of judgment to a named plaintiff moots his effort to represent a class as long as it is made before the class is certified.

1. The courts of appeals have rejected the argument that an offer of judgment before a class is certified moots class claims.

Following *Genesis*, both the Eleventh Circuit, in *Stein*, and the Ninth Circuit, in this case, have held that even if an offer of judgment of complete individual relief mooted a named plaintiff's individual claims, it would not bar him from representing a class. *See Stein*, 722 F.3d at 704–09; Pet. App. 5a–7a. Both courts reasoned that *Genesis*'s holding that a plaintiff

whose personal claims are moot cannot pursue an FLSA collective action does not require a similar holding with respect to a class action, because *Genesis* expressly stated that the fundamental differences between FLSA collective actions and class actions rendered decisions concerning one inapposite to the other. Both courts determined that a plaintiff who seeks to represent a class has the necessary personal stake to proceed, and that the ultimate certification of the class may relate back to the filing of the complaint, so that the interests of the nascent class also support the existence of a case or controversy.

Two other circuits also issued opinions after *Genesis* concluding that its collective-action mootness analysis did not apply to class actions, and that an offer of judgment to a named plaintiff therefore would not moot class claims. *See Schlaud v. Snyder*, 717 F.3d 451, 456 n.3 (6th Cir. 2013); *Mabary v. Home Town Bank, N.A.*, 771 F.3d 820, 824 (5th Cir. 2014). In both cases, subsequent events unrelated to the mootness issue deprived the opinions of precedential effect. This Court vacated and remanded *Schlaud* in light of *Harris v. Quinn*, 134 S. Ct. 2618 (2014), because the putative class's substantive claim was similar to the one decided in *Harris*. *Schlaud v. Snyder*, 134 S. Ct. 2899 (2014). In *Mabary*, the Fifth Circuit withdrew its opinion when the parties jointly moved to dismiss the appeal while a rehearing petition was pending. Thus, neither opinion is precedential, but they signal the courts' views with respect to the issue.

By contrast, no court of appeals since *Genesis* has accepted Campbell-Ewald's argument that the decision requires dismissal of a proposed class action if the named plaintiff receives an offer of complete indi-

vidual relief before a class is certified.[7] Again, as with the antecedent question whether an offer can moot the named plaintiff's individual claims, the issue is pending in a number of circuits,[8] so there will be ample opportunity for review should a conflict arise over the implications of *Genesis* in this context. No such disagreement has yet arisen.

Pre-*Genesis* appellate opinions likewise rejected the view that a named plaintiff who had received an offer of judgment of complete individual relief was disabled from seeking to represent a class, even assuming that the offer mooted his individual claims. *See Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081; *Lucero v. Bur. of Collection Recovery, Inc.*, 639 F.3d 1239 (10th Cir. 2011); *Weiss v. Regal Collections*, 385 F.3d 337 (3d Cir. 2004); *Zeidman v. J. Ray McDermott & Co.,* 651 F.2d 1030 (5th Cir. 1981); *see also Alpern v. UtiliCorp United, Inc.*, 84 F.3d 1525, 1539 (8th Cir. 1996) (offer of judgment of complete individual relief does not justify terminating putative class action unless class certification has been properly denied).

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[7] In *Fontenot v. McCraw*, 777 F.3d 741 (5th Cir. 2015), the Fifth Circuit discussed *Genesis* in the course of holding that a plaintiff whose injunctive claims against a particular defendant were moot could not avoid dismissal by invoking class claims when she had failed to seek certification of a class against that defendant (even while seeking certification as to others). *See id.* at 750–51. While recognizing that *Genesis* did not foreclose the approach of its prior case law holding that individual offers of judgment do not moot class claims, the court declined to "extend" those holdings to such different circumstances. *Id.*

[8] All the cases cited above, at n.5, involve the class-action issue as well as the individual issue, except for the Tenth Circuit appeal in *Jacobson*.

2. The pre-*Genesis* decisions Campbell-Ewald cites do not support its position.

Campbell-Ewald's claim of conflict over the issue rests in part on the Seventh Circuit's decision in *Damasco v. Clearwire Corp.*, 662 F.3d 891. But *Damasco rejected* the argument, pressed by Campbell-Ewald here, that class claims are nonjusticiable whenever the named plaintiff receives an offer of complete individual relief before a class is certified. It held instead that such claims may proceed as long as the plaintiff has filed a motion for class certification—even a pro forma motion filed with the complaint—before receiving the offer, regardless of whether the court has acted upon the motion. *See id*. at 896.

After *Genesis*, the Seventh Circuit again held that a pre-certification offer does not moot a plaintiff's class claims if the plaintiff has been "diligent" in seeking certification before receiving the offer. *McMahon v. LVNV Funding, LLC*, 744 F.3d 1010, 1019 (7th Cir. 2014). In so holding, the court, like other post-*Genesis* appellate courts, emphasized the distinction *Genesis* drew between FLSA collective actions and class actions. *See id*. at 1017.

The Seventh Circuit's position expressed in *Damasco* is less "flexible" than the rulings of other circuits, *id*. at 1018, which have not required that a certification motion be on file, but only that a named plaintiff seek certification without undue delay. *See*, *e.g.*, *Stein*, 772 F.3d at 707–08. But that difference does not justify review here. Campbell-Ewald does not argue for the *Damasco* position, but rather for a much broader rule accepted by no circuit: that an offer of judgment makes class claims nonjusticiable if it is

made before *certification*. Because no party here advocates the *Damasco* view, this case provides no occasion to resolve the narrow issue whether the diligence required for a class representative to avoid mootness is the filing of a certification motion before an offer is received or within a reasonable time thereafter.

That issue does not currently require resolution anyway. First, the Seventh Circuit is the only circuit to suggest that whether a certification motion is on file is determinative, and parties have adapted to *Damasco*'s outlier position by filing complaints and certification motions simultaneously, limiting the practical consequences of the circuit's unique view. Second, in *McMahon*, the Seventh Circuit observed that it "need not resolve this difference" between *Damasco* and the "more flexible rule" of other circuits "in the present case," suggesting that the court, in an appropriate case, would be open to bringing its position in line with the consensus of the other circuits. 744 F.3d at 1018. Third, should the Seventh Circuit reconsider the antecedent question whether an offer of judgment moots the named plaintiff's individual claims—as it has three times said it may—the *Damasco* issue would disappear altogether: The timing of an offer in relation to a certification motion has no importance if the offer does not moot the plaintiff's individual claims in the first place.

Beyond *Damasco*, Campbell-Ewald also asserts that the decision below conflicts with decisions of the Fourth and Eighth Circuits. But the decisions Campbell-Ewald cites do not, as the petition asserts, hold that a class action becomes moot "when … the defendant makes an offer of full relief before class certification." Pet. 22. Those decisions had nothing to do

with offers of full relief. Rather, they held that plaintiffs who had *dismissed or settled* their individual claims could not appeal the denial of class certification under the circumstances of the cases. *See Rhodes v. E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 100 (4th Cir. 2011); *Anderson v. CNH U.S. Pension Plan,* 515 F.3d 823, 826–27 (8th Cir. 2008). As the Eighth Circuit has recognized, whether a plaintiff's acceptance of a settlement in satisfaction of his claims eliminates any remaining interest he may have in pursuing class claims is a different question from whether a defendant may pick off a class representative merely by making an offer. *See Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 612–13 (8th Cir. 2003); *see also Alpern*, 84 F.3d at 1539 (holding that offer of individual relief did not moot class claims). *Rhodes* and *Anderson*, which address a wholly different issue, do not suggest any conflict over the issue in this case.

3. The appellate consensus that a pre-certification offer does not moot class claims is not in conflict with *Genesis*.

Absent a genuine circuit conflict, Campbell-Ewald's petition rests on its assertion that the appellate decisions holding that class claims may proceed in these circumstances are contrary to *Genesis*. That argument, too, falls short of a claim of actual conflict. *Genesis* expressly distinguished class actions from the FLSA action before it and left open the issue resolved below and in the other appellate decisions rejecting Campbell-Ewald's position. *See* 133 S. Ct. at 1529. Campbell-Ewald's argument is thus reduced to the claim that the courts of appeals have not properly applied some of *Genesis*'s reasoning.

This Court rarely grants certiorari based on such claims of error, *see* S. Ct. R. 10, and there are powerful reasons not to do so here. If Campbell-Ewald were correct that allowing a plaintiff who declines an offer of individual relief to pursue class claims is inconsistent with *Genesis*'s reasoning, some court of appeals in one of the cases raising the issue would likely agree. The absence of such a decision to date not only undermines Campbell-Ewald's assertion that the decision below conflicts with *Genesis*, but also underscores that a decision now is unnecessary. If and when some court of appeals accepts Campbell-Ewald's argument, there will be ample opportunity for review by this Court.

Campbell-Ewald's assertion that the decision below and others like it are clearly wrong under *Genesis* is in any event unpersuasive. As *Genesis* held, an FLSA collective action is no more than a vehicle to which individuals opt in to litigate individual claims; unlike a class action, it does not create a class with "an independent legal status" represented by the named plaintiff. 133 S. Ct. at 1530. While a plaintiff in an FLSA action "has no claim that he is entitled to represent other plaintiffs," *Cameron-Grant v. Maxim Healthcare Servs., Inc.*, 347 F.3d 1240, 1249 (11th Cir. 2003), a putative class representative has a cognizable interest in his asserted claim to represent a class. *See id*. at 1244–47 (citing *U.S. Parole Comm'n v. Geraghty,* 445 U.S. 388 (1980), and *Deposit Guar. Nat'l Bank v. Roper,* 445 U.S. 326 (1980)).

Moreover, the FLSA expressly provides that when an individual opts into a collective action, his claims do not relate back to the filing of the complaint. *See* 29 U.S.C. § 256. Thus, the addition of an opt-in plain-

tiff does not, by virtue of relation back, supply a case or controversy at some earlier point in the case. By contrast, when a class is certified, the court recognizes the existence of the independent entity whose claims are set forth in the class action complaint filed at the outset of the case. As the courts of appeals have recognized, in such cases there is an earlier event—the filing of the complaint asserting claims on behalf of the class—to which the formal recognition of the class may relate back, supplying the requisite case or controversy throughout the existence of the case. *See Stein*, 722 F.3d at 705–07.

II. This case is not an appropriate vehicle for addressing the mootness issues.

Particularly in light of the other opportunities this Court is likely to have to address the mootness questions Campbell-Ewald raises should a true post-*Genesis* conflict arise, this case would be a poor vehicle for review of the issues, for a number of reasons.

First, Campbell-Ewald's offer was not genuinely an offer of full relief: It offered to pay statutory damages for each message the plaintiff could allege he had received consistent with Rule 11, without specifying how many there were, and it failed to offer attorney fees, though the complaint had specifically requested them. The courts are in complete agreement that an offer that does not provide everything the plaintiff seeks—whether the claims are meritorious or not—cannot moot a claim. *See*, *e.g.*, *Hrivnak*, 719 F.3d at 567–70.

An offer that seeks to sidestep that requirement by saying the defendant will pay whatever it is liable to pay (contingent on its satisfaction that the plaintiff's allegations satisfy Rule 11) cannot eliminate a case or

controversy because it carries with it the prospect of disagreement over the extent of the defendant's liability and "leaves work to be done to get the case to the finish line." *Keim v. ADF Midatlantic, LLC*, 586 F. App. 573 (11th Cir. 2014); *see also Scott*, 740 F.3d at 1126; *Payne*, 748 F.3d at 608. Thus, the premise of all Campbell-Ewald's arguments—that it offered the plaintiff full relief—is subject to substantial disagreement that could prevent the Court from reaching the questions presented.

Second, the case has the unusual feature that the district court ordered Campbell-Ewald's Rule 68 offer stricken—an element not present in other appellate decisions on the subject. To reach the questions presented, the Court would first have to address the propriety and impact of that order, including whether it negated any effect of the Rule 68 offer as well as whether Campbell-Ewald waived any challenge to the order by not appealing it.

Third, the plaintiff in this case sought class certification as soon as possible under the local rules following the offer, and within the schedule to which both parties stipulated at the outset of the case. Should the Court consider the timing of the motion to certify relevant to whether the plaintiff diligently sought class treatment (as did the Seventh Circuit in *Damasco* and *McMahon*), it would necessarily have to consider the potential impact of this procedural wrinkle, which is specific to this particular case. This aspect of the case further obviates the possibility that it would provide a vehicle for announcing a generally applicable answer to the class mootness issue.

III. Campbell-Ewald's immunity argument does not merit review.

Campbell-Ewald offers no convincing reasons for this Court to review its contention that it has immunity from claims under the TCPA because it was acting under a government contract when it developed the text message campaign and caused transmissions to cell phones without the consent of their owners. Campbell-Ewald cites no authority that supports its broad claim that government contractors have "derivative sovereign immunity" from any claim based on violation of a federal statute in the course of carrying out a contract with the federal government.

A. *Yearsley* created no broad rule of derivative sovereign immunity.

Campbell-Ewald relies primarily on *Yearsley v. W.A. Ross Construction Company*, which provided that a government contractor was not liable for an alleged taking of property caused by its authorized work on a federal public works project, where a remedy for the taking was available directly against the federal government. 309 U.S. at 20–22. *Yearsley*'s narrow holding was that "as the Government in such a case promises just compensation and provides a complete remedy, action which constitutes the taking of property is within its constitutional power and there is no ground for holding its agent liable who is simply acting under the authority thus validly conferred." *Id*. at 21–22.

Campbell-Ewald's claim that the court of appeals was wrong not to extend *Yearsley* to the different circumstances of this case is, again, a claim of error of the type this Court rarely entertains. Moreover, *Yearsley* did not, as Campbell-Ewald asserts, "h[o]ld

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." Pet. 24. *Yearsley* nowhere describes its holding as one concerning "immunity." The word does not even appear in the opinion. And the case in no sense involved "derivative sovereign immunity": It rested largely on the premise that the United States was *not* immune. 309 U.S. at 21. Indeed, neither *Yearsley* nor any other decision of this Court has recognized "derivative sovereign immunity."

Yearsley's holding provides no support for Campbell-Ewald here, as nothing in the opinion suggests a broad immunity for contractors against claims of federal statutory violations committed by federal contractors, for which there is, unlike in *Yearsley*, no "complete remedy" against the government. Moreover, the Ninth Circuit has not disregarded *Yearsley*, but, like other circuits, has applied it principally in cases where federal public works projects have caused property damage for which plaintiffs have sought to hold the contractor liable. *See Myers v. United States*, 323 F.2d 580 (9th Cir. 1963); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204–07 (5th Cir. 2009).

B. *Boyle* offers Campbell-Ewald no support.

Boyle v. United Technologies Corp. undermines rather than supports Campbell-Ewald's claim that *Yearsley* establishes a sweeping immunity doctrine. *Boyle*, which established the "federal contractor defense" against state tort liability for federal procurement contractors, cited *Yearsley* only once, as an instance in which the Court had "come close" to recognizing a federal government interest in protecting contractors against liability. 497 U.S. at 506. *Boyle*

went on to hold that that interest could support *conflict preemption* of *state-law* claims against federal procurement contractors, but only in narrowly defined circumstances where there was "significant conflict" between the duty imposed by state tort law and the contractor's federal-law contractual duties. *Id*. at 507. Neither *Boyle*'s holding nor its passing statement that *Yearsley* came "close" to supporting a contractor defense suggests that *Yearsley* is a font of broad, derivative sovereign immunity.

Furthermore, *Boyle* itself creates no such immunity: Its premise is conflict between federal and state law, which, as the court of appeals pointed out, is not implicated here. *Boyle* expressly declined to hold that federal immunity doctrines extend to government contractors. *Id*. at 505 n.1. Moreover, *Boyle* permits a defense only in highly circumscribed conditions, which Campbell-Ewald does not contend are applicable here.[9] And there is no basis whatsoever for suggesting that the decision in this case reveals any failure by the Ninth Circuit to follow *Boyle*. Rather, the court has properly applied the federal contractor defense to cases within its scope. *See*, *e.g.*, *Leite v. Crane Co.*, 749 F.3d 1117, 1123 (9th Cir. 2014).

Invocation of *Boyle* is particularly inapt because, as this Court recently explained, whether a federal

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[9] Those circumstances exist where "(1) the United States approved reasonably precise specifications; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in the use of the equipment that were known to the supplier but not to the United States." *Id.* at 512. Campbell-Ewald's contract did not specify that it must commit TCPA violations; indeed, it prohibited Campbell-Ewald from doing so.

statutory claim is precluded is a different matter from whether a state-law claim is preempted. *POM Wonderful LLC v. Coca-Cola Co*., 134 S. Ct. 2228, 2236 (2014). Preemption may result from implied conflict with a federal statute or even (as in *Boyle*), federal interests reflected in "a federal agency action." *Id*. Displacement of liability under a federal statute, by contrast, generally requires a conflicting federal statute, and even then the question is a matter of "statutory interpretation" guided by such principles as the presumption against implied repeal and the reconciliation of general and specific statutory commands. *Id*. at 2236–37. Absent a countervailing statutory command, the creation of an exemption from liability based merely on the asssertion that a federal statutory claim would run counter to the kind of nonstatutory "federal interest" that supports the *Boyle* preemption defense would be unusual, at best. Campbell-Ewald cites no authority for such a defense and advances no argument grounded in statutory interpretation for excusing it from TCPA liability.

C. There is no intercircuit conflict.

Lacking genuine support in either *Yearsley* or *Boyle*, Campbell-Ewald contends that decisions of other circuits have given *Yearsley* a broader scope than did the Ninth Circuit below and have extended it to cases outside public works projects. With one exception, however, each of the cases Campbell-Ewald cites is a pre-*Boyle* case in which a court of appeals briefly cited *Yearsley* by analogy on the way to anticipating *Boyle*'s holding that a federal contractor can claim a preemption defense to a state-law tort claim that conflicts with the contractor's federal-law contract duties. *See Tozer v. LTV Corp.,* 792 F.2d 403 (4th

Cir. 1986); *Koutsoubos v. Boeing Vertol,* 755 F.2d 352 (3d Cir. 1985); *Tillett v. J.I. Case Co.,* 756 F.2d 591 (7th Cir. 1985); *Burgess v. Colo. Serum Co.,* 772 F.2d 844 (11th Cir. 1985). The Ninth Circuit's pre-*Boyle* precedent likewise recognized a preemption defense for government procurement contractors and similarly cited *Yearsley* as part of the background for recognizing the defense. *McKay v. Rockwell Int'l Corp*., 704 F.2d 444 (9th Cir. 1983).

These decades-old decisions are now subsumed within, and superseded by, the government contractor preemption defense as defined by this Court in *Boyle*. To the extent they might have recognized the existence of such a defense in broader circumstances than *Boyle*, *Boyle*'s limits displace their holdings. *See*, *e.g.*, *Boyle*, 497 U.S. at 510 (disapproving *Tozer*, *Tillett*, and *McKay* as "too broad" to the extent they would prohibit suit against a contractor whenever the Federal Tort Claims Act barred suit against the government). The holdings of these cases are principally of historical interest as wayposts in the development of the *Boyle* government contractor defense. They have no continuing vitality as establishing a broader "derivative sovereign immunity" doctrine, and they cannot implicate any current conflict over the existence or scope of such immunity.

The one appellate decision Campbell-Ewald cites that is not a precursor to *Boyle*'s federal contractor preemption defense is *Butters v. Vance International, Inc.,* 225 F.3d 462 (4th Cir. 2000), but that case is even further afield: It held that a contractor of a foreign government acting at that government's orders was entitled to immunity under the Foreign Sovereign Immunities Act. Although it cited *Yearsley* at one

point as an *example* of circumstances where a contractor has a defense for actions taken on behalf of a government, *see id*. at 466,[10] it did not hold that a federal contractor has immunity for claims based on federal statutory violations, and it has no bearing on that issue. Whatever the correctness of *Butters*'s construction of the Foreign Sovereign Immunities Act, its holding does not remotely conflict with that of the court in this case.

Any assertion that the result below conflicts with Fourth Circuit case law is negated by that court's subsequent decision in *In re KBR, Inc., Burn Pit Litigation*, 744 F.3d 326 (4th Cir. 2014), which Campbell-Ewald does not mention, though it was cited below. *KBR* holds, consistent with the court of appeals in this case, that any immunity *Yearsley* might otherwise confer on a contractor is negated if the contractor "exceeded its authority under the contract," and that it is not enough for a contractor to "stay[] within the thematic umbrella of the work that the government authorized" if, as here, it failed to "adhere to the government's instructions." *Id*. at 345; *see* Pet. App. 20a (pointing to evidence that Campbell-Ewald acted contrary to Navy policy). *KBR*, in turn, relied on Ninth Circuit precedent, underscoring the absence of conflict. 744 F.3d at 345.[11]

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[10] The court in *Butters* mischaracterized *Yearsley* as being based on derivative sovereign immunity, but that mistake in nomenclature does not evidence a circuit split.

[11] In addition, *KBR* involved only state tort claims, and its recognition that a contractor has a defense against such claims if its actions are confined to those specifically authorized by contract does little more than replicate *Boyle*'s preemption doctrine.

Campbell-Ewald has thus adduced nothing to contradict the court of appeals' observation that *Yearsley* has "never been invoked to preclude litigation of a dispute like [this] one." Pet. App. 16a. Absent any disagreement among the lower courts, there is no reason for this Court to consider creating a new doctrine that allows federal contracts to confer broad immunity on private actors against claims based on federal statutory violations.

D. *Filarsky* has no bearing on this case.

Campbell-Ewald's reliance on *Filarsky v. Delia*, 132 S. Ct. 1657 (2012), as additional support for immunity is misplaced. *Filarsky* concerns official immunity under 42 U.S.C. § 1983, which protects government officials, not corporate contractors. *Filarsky* extended such immunity to individuals who, though not regular government employees, perform "government duties" otherwise executed by public officials. *Id*. at 1666. *Filarsky* reflects concerns about protecting the "decisiveness" of such officers, preventing "unwarranted timidity," and ensuring that candidates are not "deterred from public service" by the threat of distinctive liabilities based on actions under color of law. *Id.* at 1665. Those concerns are absent where, as here, a profit-making corporation faces potential liability under generally applicable laws that create no greater exposure to, or liability for, claims based on work for the government than for identical work on behalf of private clients. *Filarsky* recognized that official immunity is unwarranted where such "incentives characteristic of the private market" hold sway. *Id.* at 1667.

IV. Campbell-Ewald's policy arguments offer no reason to grant review.

Campbell-Ewald attempts to bolster its arguments for review by attacking TCPA class actions as an "extortionate weapon." Pet. 2. Campbell-Ewald's argument is with Congress, which it acknowledges provided statutory damages of "$500 per violation … for unauthorized messages." *Id.*; *see* 47 U.S.C. § 227(b)(3) (providing for actual damages or $500 statutory damages, whichever is greater, and allowing treble damages for willful or knowing violations). There is nothing extortionate about seeking to hold a company alleged to be responsible for tens of thousands of violations liable for the damages authorized by Congress. Campbell-Ewald's claim that "every American business" is at risk of ruinous TCPA liability, Pet. 28 n.6, not only "assumes 'a shocking decree of noncompliance' with the Act," *Mims v. Arrow Fin. Servs., LLC*, 13 S. Ct. 740, 752 (2012), but is wildly implausible to boot. Most American business do not deluge consumers with unwanted text messages and cell-phone calls using automated dialers, make robocalls to home telephones, send junk faxes, or make calls to numbers on the do-not-call list, the principal actions prohibited by the TCPA. *See* 47 U.S.C. §§ 227(b)(1), (c)(5).

If the liabilities imposed by the TCPA were excessive, Congress could change them, which it has declined to do.[12] Absent such action, this Court should not allow serial violators to escape suits claiming damages authorized by law for thousands of violations

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[12] The Mobile Informational Call Act of 2011, H.R. 3035, which was strongly supported by amicus U.S. Chamber of Commerce, would have limited the TCPA but was not enacted.

by merely *offering* to pay a nominal sum for a handful of violations, or to avoid liability altogether by invoking an "immunity" unintended by Congress. To the extent policy considerations are relevant, they weigh strongly against allowing defendants to opt out of substantial damages liability by offering trifling amounts to pick off class plaintiffs, *see Roper*, 445 U.S. 338; *see also id.* at 341–42 (Rehnquist, J., concurring), or permitting government agencies unwittingly to grant contractors immunities against statutory claims that Congress did not intend to confer.

The Article III jurisdictional principles and immunity doctrines Campbell-Ewald asks this Court to distort would not be limited to TCPA cases. Judicial decisions about these matters of broad application should be driven by legal principles, not differences of opinion about whether particular substantive claims created by Congress reflect good policy.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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