No. 14-857

In The
Supreme Court of the United States

CAMPBELL-EWALD COMPANY,

Petitioner,

v.

JOSE GOMEZ,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF DRI—THE VOICE OF THE DEFENSE BAR & PSC—THE VOICE OF THE GOVERNMENT SERVICES INDUSTRY AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF THE *AMICI CURIAE*[1]

DRI—The Voice of the Defense Bar ("DRI") is an organization of more than 22,000 attorneys involved in the defense of civil litigation. DRI is committed to enhancing the skills, effectiveness, and professionalism of civil litigation defense attorneys, addressing substantive, procedural, and policy issues germane to the defense of civil litigation, and improving the civil justice system. To help accomplish these objectives, DRI participates as *amicus curiae* in carefully selected appeals concerning subjects that are particularly important to civil defense attorneys, their clients, and the conduct of civil litigation. Achieving fairness in class-action litigation is one of DRI's most important objectives. For this reason, DRI has filed *amicus* briefs in many Supreme Court cases involving the justiciability, certification, conduct, or reviewability of class-action suits or other types of representative or collective litigation, including in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013), and *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541

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[1] In accordance with Supreme Court Rule 37.6, *amici* certify that no counsel for a party authored this brief in whole or part, and that no party's counsel, no party, and no person other than *amici*, their members, and their counsel, made a monetary contribution intended to fund preparation or submission of this brief. Petitioner's and Respondent's counsel have lodged with the Clerk letters granting blanket consent to the submission of *amicus* briefs.

(2011). Preserving immunities and other pretrial defenses that are available to defendants in federal or state-law damages litigation is another subject of critical importance to DRI and its members.

The Professional Services Council—The Voice of the Government Services Industry ("PSC")—is the national trade association for the government professional and technology services industry. PSC's more than 380 member companies represent small, medium, and large businesses that provide federal departments and agencies with a wide range of professional and technology services, including information technology, engineering, logistics, facilities management, operations and maintenance, consulting, international development, scientific, social, and environmental services. Together, the association's members employ hundreds of thousands of Americans in all 50 states. Many PSC member companies directly support the U.S. Government through contracts with the Department of Defense and other national security or humanitarian-related federal agencies, both domestically and abroad. The federal government's ability to rely upon PSC's members for many types of essential military and non-military-related services would be seriously impaired if derivative sovereign immunity and other dispositive pretrial defenses were unavailable to protect contractors from liability suits in connection with performance of government-authorized work.

* * *

Amici and their members have a substantial interest in the class-action mootness and derivative

sovereign immunity questions presented by this appeal.

1. Despite efforts at class-action reform, the ongoing proliferation of class-action suits—and the multi-million dollar, pretrial settlements that class counsel frequently exact from corporate defendants—threaten the economic well-being, stability, and reputation of virtually every American business, and in turn, the nation's economy. The attorney-fee bonanza that class counsel seek includes putative "no-injury" class actions alleging widespread, but as here, inadvertent violations of federal privacy or financial protection statutes such as the Telephone Consumer Protection Act ("TCPA"), which make statutory damages available to individual claimants without requiring proof of actual harm. *See generally The State of Class Actions Ten Years After the Enactment of the Class Action Fairness Act*: *Hearing Before the Subcomm. on the Constitution and Civil Justice of the H. Comm. on the Judiciary,* 114th Cong. (2015) (Statement of John Parker Sweeney, President, DRI—The Voice of the Defense Bar).[2]

The question of whether a no-injury or other class action can be certified under Federal Rule of Civil Procedure 23—and thus proceed to settlement or trial—where an individual named plaintiff has received a pre-certification offer of complete relief not

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[2] *Available at* http://tinyurl.com/kvmjm5v (last visited July 13, 2015).

only implicates the Article III case-or-controversy requirement, but also goes to the heart of class-action fairness. This is particularly true where putative class actions arise under statutes which, like the TCPA, are intended to redress individual claims by providing modest, statutorily specified damages.

2. As this appeal illustrates, government contractors that provide services for the Department of Defense or other federal departments or agencies are among the class-action litigation industry's targets. Subjecting a federal government contractor to the often astronomical cost of settling class-action litigation, or to the very substantial burdens, risks, and expense of defending such suits, is particularly unjust where, as here, the litigation relates to performance of contractual services for the federal government—services that not only were requested, authorized, directed, accepted, and paid for by the government, but also, if performed by government rather than contractor personnel, would be insulated from suit by sovereign immunity.

Derivative sovereign immunity is predicated on the principle that a federal government contractor should not be subjected to private party damages litigation, much less liability, for "executing [the] will" of the government. *Yearsley v. Ross Constr. Co.*, 309 U.S. 18, 21 (1940). As this Court more recently explained in an analogous context, government contactors should not be "left holding the bag." *Filarsky v. Delia*, 132 S. Ct. 1657, 1666 (2012). Allowing private parties to pursue damages claims against government contractors arising out of the services that they perform for the U.S. military and

numerous other federal departments and agencies—damages claims that sovereign immunity bars from being brought against the government itself—would undermine the federal procurement process. Permitting such litigation would deter contractors from participating in the expanding universe of government work and/or increase the government's costs of using contractors for such work. For these reasons, *amici* urge the Court to reaffirm a broad and robust derivative sovereign immunity doctrine.

SUMMARY OF ARGUMENT

This appeal affords the Court the opportunity to reaffirm important Article III case-or-controversy principles that undergird the nation's civil justice system and derivative sovereign immunity principles that are essential to the operation of the federal government, including the U.S. military.

Class-action litigation has become rampant against American business. The increasing number of federal privacy and financial protection statutes, such as the TCPA, which provide individuals with statutorily specified damages for inadvertent violations and require no showing of actual harm, has fueled the class-action plaintiff bar's onslaught. The present litigation illustrates what TCPA litigation has become—a big-time, multi-million dollar, putative class action encompassing 100,000 individuals who allegedly received from a U.S. Navy contractor, without their consent, a single, inadvertent, entirely harmless, 29-word recruitment-related text message (among *billions* of text messages sent and received within the United States every day).

Well-settled mootness principles, derived from the Article III case-or-controversy requirement, should apply where, as here, the sole-named plaintiff in a putative class action has been offered complete relief prior to class certification, but for some reason attempts to proceed with the litigation. Such a putative class action should be treated as moot for the same reasons that this Court in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013), held that a Fair Labor Standards Act ("FLSA") collective-action suit was mooted where the plaintiff received (and declined to accept) an offer of complete relief. The case for mootness is even stronger in the context of class actions. This is because class-certification requirements, such as the adequacy-of-representation prerequisite established by Federal Rule of Civil Procedure 23(a)(4), cannot be satisfied by a plaintiff who has received an offer of complete relief, and thus, no longer has a personal stake in his own litigation. Because mootness is a constitutional, not contractual, principle, failure to accept such an offer does not alter the case-or-controversy analysis.

The unfairness of allowing a multi-million dollar class action to proceed without a named plaintiff who has a personal stake in the litigation is exacerbated where, as here, the defendant is a federal government contractor whose alleged violation of a federal privacy protection statute arose entirely out of services that the U.S. military requested and supervised. If the Navy had performed those services itself (i.e., utilized uniformed personnel to send out the exact same text message to the same individuals), Respondent Gomez could not have successfully pursued a TCPA suit, either on behalf of

himself or a putative class. Such a suit would be barred by sovereign immunity. The same federal interests that underlie sovereign immunity, such as enabling the Department of Defense and other federal departments and agencies to get their work done without the fear, burden, or cost of damages litigation, justify derivative sovereign immunity for federal contractors that help the government carry out its work. Indeed, the need for derivative sovereign immunity is crucial in view of the federal government's extensive reliance upon contractors both in foreign combat theaters and throughout the homeland. Limiting derivative sovereign immunity to the domestic public works scenario involved in the seminal but 75 year-old *Yearsley* opinion would not come close to serving the federal government's procurement-related interests in the Twenty-First Century.

Insofar as the Court addresses derivative sovereign immunity in this appeal, it should hold that derivative sovereign immunity applies where, as here, a damages claim arises out of services performed by a federal government contractor, and a similar claim, if filed directly against the United States, would be barred by sovereign immunity. The derivative sovereign immunity afforded to contractors under this standard is coextensive with—no broader or narrower than—the federal government's own sovereign immunity.

ARGUMENT

I. The Court Should Hold That A Putative Class Action Becomes Moot If The Named Plaintiff's Individual Claim Becomes Moot Prior To Class Certification

A. Well-Settled Principles Govern The Class-Action Mootness Question Presented By This Appeal

As was the case with the FLSA collective-action mootness issue that this Court addressed in *Genesis Healthcare*, "[a] straightforward application of well-settled mootness principles compels [the] answer" to the class-action mootness question presented here. 133 S. Ct. at 1529. In short, the putative TCPA class-action suit filed by Respondent Gomez should be dismissed as moot because having received Petitioner Campbell-Ewald Company's pre-certification offers of complete relief, his individual claim for relief is moot.

"Article III, § 2, of the Constitution limits the jurisdiction of federal courts to 'Cases' and 'Controversies.'" *Id.* at 1528. "To enforce this limitation, [the Court] demand[s] that litigants demonstrate a 'personal stake' in the suit." *Camreta v. Greene*, 131 S. Ct. 2020, 2028 (2011) (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009)). The "personal stake" requirement is continuous: "To qualify as a case fit for federal-court adjudication, 'an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 67 (1997) (quoting *Preiser v.*

Newkirk, 422 U.S. 395, 401 (1975)); *see also Genesis Healthcare*, 133 S. Ct. at 1528 (same). Thus, "the critical question under Article III is whether the litigant *retains* the necessary personal stake." *Camreta*, 131 S. Ct. at 2029 (emphasis added). Under the Court's well-established conditions for mootness, a personal stake no longer exists where, as here, the plaintiff cannot continue to demonstrate that his alleged injury "'will be redressed by a favorable decision.'" *Id.* at 2028 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

Campbell-Ewald offered Gomez complete monetary and injunctive relief in the form of *both* an offer of judgment under Federal Rule of Civil Procedure 68 and a separate, parallel settlement offer. *See* Pet. App. 52a-61a. Although Gomez did not accept either of those offers, they were an "intervening circumstance [that] deprive[d] the plaintiff of [the] 'personal stake in the outcome of the lawsuit'" needed to satisfy the Article III case-or-controversy requirement. *Genesis Healthcare*, 133 S. Ct. at 1528 (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477-78 (1990)). More specifically, the offers of complete relief entirely extinguished Gomez's dispute with Campbell-Ewald, and consequently, his ability to show that his alleged "injury" under the TCPA needs to be redressed by a favorable judicial decision. As a result, "the action no longer can proceed and must be dismissed as moot." *Ibid.*

According to Justice Kagan's dissenting opinion in *Genesis Healthcare*, "[a]n unaccepted settlement offer—like any unaccepted *contract* offer—is a legal nullity, with no operative effect." 133 S. Ct. at 1533

(Kagan, J., dissenting) (emphasis added). But this Court's case-or-controversy jurisprudence makes it clear that mootness is a matter of constitutional law, not contract law. The Article III case-or-controversy requirement "ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Id.* at 1528 (citing *Summers*, 555 U.S. at 493). "Under Article III of the Constitution, federal courts may adjudicate only actual, ongoing cases or controversies. . . . [I]t is not enough that a dispute was very much alive when suit was filed . . . ." *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990).

A plaintiff who has been offered all of the relief that his complaint demands (or that he is statutorily entitled to receive) no longer can demonstrate that he has an "actual," "concrete," or "ongoing" dispute (i.e., a "case or controversy") with the defendant. Regardless of whether an offer of complete relief is accepted, the *tendering* of the offer transforms a case into a proceeding where "the issues presented are no longer 'live' [and] the parties lack a legally cognizable interest in the outcome." *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388, 396 (1980) (quoting *Powell v. McCormack*, 395 U.S. 486, 496 (1969)); *see also Genesis Healthcare*, 133 S. Ct. at 1529 n.4 (noting that courts of appeals on both sides of the Rule 68 offer-of-complete relief mootness issue "have recognized that a plaintiff's claim may be satisfied even without the plaintiff's consent").

Indeed, the process of "adjudicating" Respondent Gomez's claim against Campbell-Ewald despite that company's offers of complete relief no longer would

involve "'questions presented in an adversary context . . . .'" *U.S. Parole Comm'n,* 445 U.S. at 396. Such a mock proceeding would violate the case-or-controversy requirement by producing what would be tantamount to an advisory opinion. *See generally Summers v. Earth Island Inst.*, 555 U.S. 488, 492 (2009) (the Article III case-or-controversy requirement restricts judicial power "to the traditional role of Anglo-American courts, which is to redress . . . actual . . . injury . . . caused by . . . violation of law"); *Lewis*, 494 U.S. at 477 ("Article III denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them . . . and confines them to resolving real [questions] . . . as distinguished from an opinion advising what the law would be . . . .") (internal quotation marks omitted).

The fact that Respondent's Complaint contained class allegations, *see* Pet. App. 3a, does not alter this result. "[R]espondent's suit became moot when [his] individual claim became moot, because [he] lacked any personal interest in representing others in this action." *Genesis Healthcare*, 133 S. Ct. at 1529. "[T]he mere presence of [class-action] allegations in the complaint cannot save the suit from mootness once the individual claim is satisfied." *Ibid.* And since Campbell-Ewald's settlement offers were made prior to a motion for class certification, *see* Pet. at 5, this is not a case where "a putative class acquires an independent legal status once it is certified under Rule 23." *Genesis Healthcare*, 133 S. Ct. at 1530 (distinguishing *Sosna v. Iowa*, 419 U.S. 393 (1975) and *U.S. Parole Comm'n v. Geraghty*, 445 U.S. 388). As in *Genesis Healthcare*, the offers of complete relief

not only mooted Gomez's individual claim, but also left him with "no personal interest in representing putative, unnamed claimants, nor any other continuing interest that would preserve [his] suit from mootness." *Id.* at 1532.

B. Mootness Is Even More Compelling Here Than It Was In *Genesis Healthcare*

Genesis Healthcare involved a plaintiff's wage-and-hour suit for FLSA damages filed "on behalf of herself and 'all other persons similarly situated.'" 133 S. Ct. at 1527. The plaintiff failed to accept a Rule 68 offer of judgment that "afforded [her] complete relief." *Id.* at 1528. Assuming, without deciding, that the Rule 68 offer mooted the plaintiff's individual claim, the Court held that the plaintiff's putative FLSA "collective-action" suit was mooted too. *Id.* at 1529.

The reasons why a putative (i.e., not-yet-certified), Rule 23 class action should be deemed moot where, as here, the named plaintiff's claim is moot, are even more convincing:

1. The FLSA provision at issue in *Genesis Healthcare* "gives employees the right to bring a private cause of action on their own behalf *and on behalf of 'other employees similarly situated*' for specified violations of the FLSA." *Id.* at 1527 (quoting 29 U.S.C. § 216(b)) (emphasis added); *see also id.* at 1527 n.1, 1528, 1530, 1532 (referring to the "conditional certification" procedure employed by some courts in connection with § 216(b) collective actions). Despite the plaintiff's statutory right under

the FLSA to bring a "collective action" on behalf of herself and other employees, the Court held that her collective-action suit was moot because her individual claim was moot. *Id.* at 1529, 1532.

The case for mootness of Respondent Gomez's suit is even more compelling because unlike an FLSA collective-action plaintiff, Gomez has no statutory right to bring a representative action. The TCPA's private-right-of-action provision merely authorizes "[a] person or entity" to bring an individual action for statutorily specified damages. 47 U.S.C. § 227(b)(3); *compare id.* § 227(g)(1) (authorizing "the attorney general of a State . . . [to] bring a civil action on behalf of its residents"). To proceed as a class action, Gomez's suit would have to satisfy the class-action prerequisites and additional certification requirements established by Federal Rule of Civil Procedure 23. Because a class action is "an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979), Rule 23 "imposes stringent requirements for certification." *Am. Express Co. v. Italian Colors Rest.*, 133 S. Ct. 2304, 2310 (2013); *see also Genesis Healthcare*, 133 S. Ct. at 1532 ("Whatever significance 'conditional certification' may have in § 216(b) [FLSA] proceedings, it is not tantamount to class certification under Rule 23."). If an offer of complete relief to the named plaintiff moots an FLSA suit despite the statutory right to bring a collective action, an offer of complete relief moots a putative class action, where there is no analogous statutory right and Rule 23 certification prerequisites must be met.

One of those class-certification prerequisites is that the named plaintiff "will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(4). *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-26 (1997) ("[A] class representative must be part of the class and possess the same interest . . . as the class members.") (internal quotation marks omitted). A plaintiff who has received an offer of complete relief—and thus whose individual claim is moot because he no longer has a personal stake in the litigation—does not "possess the same interest" as the class, and therefore, cannot satisfy the Rule 23(a)(4) prerequisite for certification. Further, "[c]lass counsel must fairly and adequately represent the interests of the class." Fed. R. Civ. P. 23(g)(4) ("Duty of Class Counsel"). Fulfilling that duty would be problematic where the prospective class counsel's named plaintiff client—unlike members of the putative class—has received an offer of complete relief.

"The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Amchem Prods.,* 521 U.S. at 625. The conflicting interests between a plaintiff whose individual claim is mooted by an offer of complete relief and the interests of putative class members (who have received no such offer)—as well as the conflicting ethical duties that a prospective class counsel encounters in such a situation—are important reasons why a putative class action should be treated as moot where the named plaintiff's individual claim is moot.

2. There should be even less concern here that a holding of mootness would frustrate "efficient resolution of common claims" than there was in *Genesis Healthcare*, 133 S. Ct. at 1531. Unlike the FLSA's explicit authorization for collective actions, *see* 29 U.S.C. § 216(b), the "procedural device of a Rule 23 class action," *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 331 (1980), does not create or expand any substantive right of action; instead, it merely "regulates . . . . how . . . claims are processed." *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010) (discussing the limitations imposed by the Rules Enabling Act, 28 U.S.C. § 2072(b)).

Moreover, as discussed above, the TCPA's private-right-of-action provision, 47 U.S.C. § 227(b)(3), contains no substantive right to file a collective or representative action. Indeed, although the TCPA "has become the statute du jour for the plaintiffs' class action bar," that is "far from [the] original congressional vision." Lesli C. Esposito & Brian J. Boyle, *TCPA Enforcement and Compliance*, For the Defense 65 (June 2015). When the TCPA's private-right-of-action provision was being considered by the Senate in 1991, the bill's sponsor, Senator Hollings, expressed his "hope that States will make it as easy as possible for consumers to bring such actions, *preferably in small claims court*." 137 Cong. Rec. S16204-01 (Nov. 7, 1991) (emphasis added). Senator Hollings added that "[s]mall claims court or a similar court would allow the consumer to appear before the court *without an attorney*. The amount of damages in this legislation is set to be fair

to both the consumer and the telemarketer." *Ibid.* (emphasis added).

Respondent's class-action suit represents an effort to transmogrify the individual, modest, attorney-less, small claims-court proceeding contemplated by § 227(b)(3) into a gargantuan money-making machine for creative class-action lawyers who hope to cash-in on inadvertent mistakes made by companies trapped by the every-increasing challenges of complying with the TCPA and other federal privacy and financial protection statutes.[3] Rather than filing a small claim seeking the maximum, statutorily specified award of $500 for the obviously inadvertent, innocuous, one-time, U.S. Navy recruitment-related text message that Respondent Gomez alleges he received (at the age of 40) without his consent, he filed in federal court—through prospective class counsel—litigation seeking potentially hundreds of millions of dollars in collective damages on behalf of a putative class of 100,000 individuals who allegedly received the same message without prior consent. *See* Pet. at 5. There is no reason to be concerned, therefore, that holding this type of misguided class–action suit moot would

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[3] *See, e.g.*, Federal Communications Commission, FCC Strengthens Consumer Protections Against Unwanted Calls and Texts (June 18, 2015), *available at* https://www.fcc.gov/document/fcc-strengthens-consumer-protections-against-unwanted-calls-and-texts (last visited July 20, 2015) (discussing FCC 15-72, TCPA Omnibus Declaratory Ruling & Order (July 10, 2015), *available at* https://www.fcc.gov/document/tcpa-omnibus-declaratory-ruling-and-order (last visited July 20, 2015)).

undermine either the TCPA or the class-action procedural mechanism.

C. A Ruling That Respondent's Suit Is Moot Would Help To Maintain the Integrity Of The Class-Action Procedure

The TCPA is one of many federal privacy or financial protection statutes that enable an individual to obtain damages (often an amount specified by statute) for inadvertent violations without any requirement to demonstrate that actual harm was suffered. *See* Petition For a Writ of Certiorari, *Spokeo, Inc. v. Robins*, No. 13-1339, at 16-18 & 18 n.17 (May 2014) (listing statutes); Statement of John Parker Sweeney, President, DRI—The Voice of the Defense Bar, *supra* at 3 (same).

Class-action lawyers have seized upon these statutes as a lucrative source of legal fees (typically 25%-30% of class damages). As is the case here, "while few if any of the putative class members have suffered any actual harm, the sheer number of potential class members" in such a "no-injury" class action can cause the corporate defendant—here a federal government contractor—to "face catastrophic liability for inadvertent and technical violations." *Sweeney Statement*, *supra* at 3, 4, 5. If the class is certified, the pressure upon the defendant to settle is enormous. *See Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1206 (2013) (Scalia, J., dissenting) ("Certification of the class is often, if not usually, the prelude to a substantial settlement by the defendant because the costs and risks of litigating further are so high."); *id.* at 1212 n.9 (2013)

(Thomas, J., dissenting) (referring to "*in terrorem* settlement pressures" following class certification); Fed. R. Civ. P. 23(f) advisory comm. note (1998) ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability."); *see also Eubank v. Pella Corp.*, 753 F.3d 718, 720 (7th Cir. 2014) (discussing the reasons why almost all class actions are settled prior to trial).

The defendant in a putative, no-injury, statutory damages class action has every reason to settle with the named party plaintiff or plaintiffs as early in the case as possible, and thereby avoid the risk of having to pay millions of dollars to settle the suit after the putative class is certified. In fact, the more modest the amount of damages specified by a statute (e.g., $500 per violation specified by the TCPA), the more sense it makes to settle with the named plaintiff. While prospective class counsel are apt to criticize this so-called "pick-off" strategy, the Court indicated in *Genesis Healthcare* that it is has no general concern about a defendant that wishes to settle with the named plaintiff in a putative class action prior to class certification and thereby avoid the risks and costs of class litigation. *See* 133 S. Ct. at 1531-32.

The putative class at issue here purports to satisfy the class-certification criteria of Federal Rule of Civil Procedure 23(b)(3). *See* Pet. App. 49a. That Rule is intended to "'achieve economies of time, effort, and expense . . . without sacrificing procedural fairness or bringing about other undesirable results.'" *Amchem Prods.*, 521 U.S. at 615 (quoting Rule 23(b) advisory comm. note (1966)). Allowing a class-action

to proceed where the sole named plaintiff has received offers of complete relief not only would offend the Article III case-or-controversy requirement and this Court's mootness principles, but also would bring about undesirable results for both the plaintiff (who would have to endure the risks and burdens of litigation in an attempt to win what he already has been offered vountarily) and the defendant (which would encounter the risk of a massive settlement or judgment). This Court, therefore, should hold that a putative class action is moot, where, as here, the plaintiff's individual claim is mooted by an offer of complete relief prior to class certification.

II. Derivative Sovereign Immunity Should Bar Any Contract Performance-Related Claim Against A Government Contractor If Sovereign Immunity Would Bar A Similar Claim Against The United States

A. Derivative Sovereign Immunity Serves The Same Important Federal Interests As Sovereign Immunity

"It is elementary that '[t]he United States, as sovereign, is immune from suit save as it consents to be sued.'" *United States v. Mitchell*, 445 U.S. 535, 538 (1980) (quoting *United States v. Sherwood*, 312 U.S. 584, 586 (1941)). This is not a matter of "the king can do no wrong." Instead, "[s]overeign immunity exists because it is in the public interest to protect the exercise of certain governmental functions." *Butters v. Vance Int'l, Inc.*, 225 F.3d 462, 466 (4th Cir. 2000); *see, e.g.*, 28 U.S.C. § 2680(a) ("discretionary function" exception to Federal Tort Claims Act ("FTCA") waiver of sovereign immunity);

Boyle v. United Technologies Corp., 487 U.S. 500, 505 n.1 (1988) ("[T]he liability of independent contractors performing work for the Federal Government, like the liability of federal officials, is an area of uniquely federal interest.").

The federal government's (and the public's) interests also are served by recognizing *derivative* sovereign immunity. Indeed, in view of the government's extensive reliance on private sector contractors for an enormous variety of services, derivative sovereign immunity is an essential adjunct to sovereign immunity. "[C]ourts have extended derivative immunity to private contractors," because "[i]mposing liability on private agents of the government would directly impede the significant governmental interest in the completion of its work." *Butters*, 225 F.3d at 466. "If absolute immunity protects a particular governmental function . . . it is a small step to protect that function when delegated to private contractors, particularly in light of the government's unquestioned need to delegate governmental functions." *Mangold v. Analytic Servs., Inc.*, 77 F.3d 1442, 1447-48 (4th Cir. 1996).

The relationship between the federal government and its contractors is so intertwined, it often can be described as symbiotic. *See generally Dobyns v. E-Sys., Inc.*, 667 F.2d 1219, 1222 (5th Cir. 1982) (discussing a "'symbiotic relationship' . . . . in which the government has 'so far insinuated itself into a position of interdependence (with a private entity) that it must be recognized as a joint participant in the challenged activity . . . .'") (quoting *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961)).

That certainly is the case with the Department of Defense, where "the military finds the use of civilian contractors in support roles to be an essential component of a successful war-time mission." *Lane v. Halliburton*, 529 F.3d 548, 554 (5th Cir. 2008); *see also Moshe Schwartz & Jennifer Church* Cong. *Research Serv.*, R43074, *Dept. of Defense's Use of Contractors to Support Military Operations: Background, Analysis, and Issues for Congress* (May 2013) (indicating that contractor personnel accounted for at least half of the U.S. total force in Iraq and Afghanistan). In addition to the U.S. military's reliance on contractors for war-zone logistical support, Defense Department contractors provide crucial, national security-related services such as information technology and data analytics for the Defense Intelligence Agency and project management and oversight for the Defense Threat Reduction Agency. "[R]eliance on contractor expertise will become only more necessary as warfare becomes more technologically demanding." *Al Shimari v. CACI Int'l Corp.*, 679 F.3d 205, 240 (4th Cir. 2012) (en banc) (Wilkinson, J., dissenting).[4]

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[4] The Defense Department's prevalent use of cost-reimbursement contracts, which generally require the government to reimburse a contractor for third-party liabilities not compensated by insurance, fuses the government/contractor identity of interests even more. *See* Br. of the Professional Services Council as *Amicus Curiae* In Support of Petitioner, *Kellogg Brown & Root Servs., Inc. v. Harris*, No. 13-817 (Feb. 2014) (discussing procurement regulations requiring the United States to indemnify cost-reimbursement contractors for third-party liability costs).

A multitude of additional federal departments and agencies also rely on contractors for a vast array of professional and technology services. For example, federal contractors provide personal security and program management services for the Department of Homeland Security, technical advisory services for the Department of State and the Agency for International Development, medical services for the Department of Veterans Affairs, response and recovery services for the Federal Emergency Management Agency, and emergency preparedness and response services for the Department of Health and Human Services.

Without derivative sovereign immunity, performance of many federal government contractor services, including but not limited to combat-theater support, would leave contractors vulnerable to private damages suits—*especially* since sovereign immunity would protect the government from being sued for authorizing those services. For example, in the event of a cybersecurity breach, a contractor that performs information technology and consulting work at the direction of the Department of Homeland Security, Central Intelligence Agency, or National Security Agency could find itself the target of damages litigation under federal privacy protection statutes even though the government cannot be sued due to sovereign immunity. Or a contractor that provides seized property services, such as storage of explosives or other hazardous materials, at the direction of the Department of the Treasury or the Department of Homeland Security, could be sued for personal injury or death stemming from an accident, even though the government cannot be sued.

Assuming that the contractor acted within the scope of its contract, derivative sovereign immunity should apply since sovereign immunity would bar a similar suit against the government.

Because the working relationship between the federal government and its most vital contractors is virtually seamless, derivative sovereign immunity essentially functions as a shared immunity with the United States. As a result, if sovereign immunity bars a particular type of suit against the federal government (e.g., a state-law personal injury suit arising out of a governmental discretionary function; a statutory damages suit alleging a violation of the TCPA or other federal privacy or financial protection statute), derivative sovereign immunity should bar the same type of suit against a government contractor that acts within its federally delegated, contractual authority.

B. Derivative Sovereign Immunity Is Rooted In, Not Limited By, *Yearsley*

"The concept of derivative sovereign immunity stems from the Supreme Court's decision in *Yearsley v. W.A. Ross Construction Co. . . . .*" *In re KBR, Inc., Burn Pit Litig.*, 744 F.3d 326, 342 (4th Cir. 2014), *cert. denied sub nom. KBR, Inc. v. Metzgar*, 135 S. Ct. 1153 (2015) (citing *Yearsley*, 309 U.S. 18 (1940)); *see also McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1343 (11th Cir. 2007) (same). In *Yearsley* the Court "rejected an attempt by a landowner to hold a construction contractor liable under state law for the erosion of 95 acres caused by the contractor's work in constructing dikes for the Government." *Boyle*, 487 U.S. at 506. The Court held 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." *Yearsley*, 309 U.S. at 20-21.

Although *Yearsley* does not explicitly refer to derivative sovereign immunity, courts have "recognized, based on *Yearsley*, 'that contractors . . . acting within the scope of their employment for the United States have derivative sovereign immunity.'" *In re KBR, Inc.*, 744 F.3d at 343 (quoting *Butters*, 225 F.3d at 466)); *see also Adkisson v. Jacobs Eng'g Grp., Inc.*, No. 14-6207, 2015 WL 3463032, at *4 (6th Cir. June 2, 2015), *pet. for reh'g denied* (July 7, 2015) ("Over the years . . . circuits have recognized the concept of immunity for government contractors based on *Yearsley*."); *Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 204 (5th Cir. 2009) (holding that contractor defendants "are entitled to government contractor immunity under *Yearsley*"); *In re World Trade Center Disaster Site Litig.*, 521 F.3d 169, 196 (2d Cir. 2008) ("Derivative immunity was first extended to private contractors in *Yearsley*, where the contractor was working pursuant to the authorization and direction of the federal government and the acts of which the plaintiff complained fell within the scope of those government directives."); *McMahon*, 502 F.3d at 1343 ("Since *Yearsley*, courts have recognized claims of derivative sovereign immunity in a variety of contexts."); *Myers v. United States*, 323 F.2d 580 (9th Cir. 1963) (citing and applying *Yearsley*)); *see also Mangold*, 77 F.3d at 1448 (citing *Boyle*) ("Extending immunity to private

contractors to protect an important government interest is not novel.").

In *Boyle* this Court "relied on [its] discussion of derivative sovereign immunity in *Yearsley*," Brief for the United States as Amicus Curiae, *KBR, Inc. v. Metzgar*, No. 13-1241, at 19 (Dec. 2014), and explained that the "federal interest justifying" *Yearsley* is the "interest in getting the Government's work done." *Boyle*, 487 U.S. at 505, 506. That compelling, federal procurement-related interest "is implicated . . . even though [a] dispute is one between private parties." *Id.* at 506. This is because "[t]he imposition of liability on Government contractors will directly affect the terms of Government contracts: either the contractor will decline [the government-specified contract] . . . or it will raise its price. Either way, the interests of the United States will be directly affected." *Id.* at 507; *see also id.* at 511-12 ("The financial burden of judgments against the contractors would ultimately be passed through, substantially if not totally, to the United States itself . . . .").[5]

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[5] *Boyle*, a state-law wrongful death suit involving design and procurement of military equipment, established what is commonly referred to as the "government contractor defense." Although the *Boyle* government contractor defense draws upon the FTCA discretionary function exception, *see Boyle*, 487 U.S. at 511 (discussing 28 U.S.C. § 2680(a)), the Ninth Circuit correctly noted here that *Boyle* established what "is fundamentally a pre-emption" defense applicable to state-tort claims. Pet. App. 17a; *see Boyle*, 487 U.S. at 507 ("Displacement will occur only where . . . a significant conflict exists between an identifiable federal policy or interest and the [operation] of

In its opinion below, the Ninth Circuit too recognized "the seventy-year history of the *Yearsley* doctrine," but erroneously indicated that it is a "narrow rule regarding claims arising out of property damage caused by public works projects." Pet. App. 15a–16a. Restricting derivative sovereign immunity to property damage claims against public works contractors would frustrate the critical federal interests served by extending immunity to the full spectrum of contractors that help the federal government carry out its work.

This Court articulated several of those interests in *Filarsky v. Delia*, 132 S. Ct. at 1665-66, in the context of an independent contractor's qualified immunity claim at the local government level; the significance of those immunity-related interests is amplified by orders of magnitude where the operation of the federal government is involved. *See In re KBR, Inc.*, 744 F.3d at 344 ("interpret[ing] *Filarksy* as reaffirming the principles undergirding

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state law.") (internal quotation marks omitted); *Boyle*, 487 U.S. at 511 (the discretionary function exception "demonstrates the potential for, and suggests the outlines of, 'significant conflict' between federal interests and state law in the context of Government procurement"). While derivative sovereign immunity and the *Boyle* government contractor defense often are complementary in connection with preclusion of state-tort claims, *Boyle* did not address the subject of extending federal government immunity-from-suit to government contractors for either state-law or federal damages claims. *See Boyle*, 487 U.S. at 505 n.1.; *see also In re KBR, Inc.*, 744 F.3d at 342 n.6 (discussing same).

the *Yearsley* rule"). As the Fourth Circuit explained in *In re KBR, Inc.* (multidistrict litigation composed of numerous putative class actions against a military logistical support contractor),

> *Yearsley* furthers the same policy goals that the Supreme Court emphasized in *Filarsky*. By rendering government contractors immune from suit when they act within the scope of their validly conferred authority, the *Yearsley* rule combats the "unwarranted timidity" that can arise if employees fear that their actions will result in lawsuits. *Filarsky,* 132 S. Ct. at 1665. Similarly, affording immunity to government contractors "ensur[es] that talented candidates are not deterred from public service" by minimizing the likelihood that their government work will expose their employer to litigation. *Id.* Finally, by extending sovereign immunity to government contractors, the *Yearsley* rule "prevent[s] the harmful distractions from carrying out the work of government that can often accompany damages suits." *Id.*

In re KBR, Inc., 744 F.3d at 344; *see also Al Shimari*, 679 F.3d at 263 (Niemeyer, J., dissenting) ("The Supreme Court has made clear that immunity attaches to the *function* being performed, and private actors who are hired by the government to perform public functions are entitled to the same immunities to which public officials performing those duties would be entitled.").

Insofar as the *Yearsley* defense "[i]n its original form . . . covered only construction projects . . . [i]ts application to military contractors . . . advances the separation of powers and safeguards the process of military procurement." *Tozer v. LTV Corp.*, 792 F.2d 403, 405 (4th Cir. 1986). Regardless of whether a contractor provides assistance to the U.S. military, as is the case here, or provides multifarious professional or technology services to other federal departments and agencies, this Court should not allow contractors to "be left holding the bag"—facing litigation and potential liability arising out of contractual services where sovereign immunity bars similar litigation against the United States. *Filarksy*, 132 S. Ct. at 1666.

C. Derivative Sovereign Immunity Should Apply Wherever Sovereign Immunity Would Apply

The Ninth Circuit's view of derivative sovereign immunity is short-sighted. There is no principled reason why a contractor's derivative sovereign immunity should be limited to public works projects or property damage claims. Instead, derivative sovereign immunity should bar any state or federal claim against a federal government contractor where (i) a similar claim, if filed against the United States, would be barred by sovereign immunity, and (ii) the contractor was acting within the scope of its contractual relationship with the federal government when the claim arose.

This two-prong test adapts and builds upon the preemption test that the United States proposed to

this Court late last year in connection with state-tort claims against war-zone contractors arising out of U.S. military combatant activities. *See* U.S. Br., *KBR, Inc. v. Metzgar*, *supra* at 15. The Solicitor General indicated that the government's proposed preemption test is needed to "sufficiently safeguard the significant national interests at stake." *Id.* at 7. Important national interests also warrant a derivative sovereign immunity doctrine encompassing the broad range of contractual services, including but not limited to combat-zone services, that federal government contractors provide. In fact, the Solicitor General's *amicus* brief in *Metzgar* explained that "the principle of derivative sovereign immunity informs the preemption analysis," which enables "contractor personnel in performing critical functions" to avoid "fear of tort liability." *Id.* at 16, 18, 19.

Amici agree with the Solicitor General that derivative sovereign immunity would apply even if "a contractor allegedly violated the terms of the contract, as long as the alleged conduct at issue was within the general scope of the contractual relationship between the contractor and the federal government." *Id.* at 16. This is because "the appropriate recourse for the contractor's failure to adhere to contract terms and related directives . . . would be the responsibility of the United States, through contractual, criminal, or other remedies." *Ibid.* This does not mean, however, that contractors would have blanket immunity from damages suits simply by acting within the scope of their contracts. Instead, as indicated above, for derivative sovereign immunity to apply, a similar claim filed against the

United States would have to be barred by sovereign immunity. *See, e.g.,* 28 U.S.C. § 2680(a) (FTCA discretionary function exception); *id.* § 2680(j) (FTCA combatant activities exception). In other words, the derivative sovereign immunity afforded to contractors would be coincident with, and neither broader nor narrower than, the federal government's own sovereign immunity.

Holding (or clarifying) that derivative sovereign immunity can apply to the full range of contractual functions that would be protected by sovereign immunity if performed by federal government personnel—including but not limited to public works projects and combat-zone logistical support—would serve the interests of the United States in the same way as sovereign immunity itself. Lower courts have recognized this principle, and applied it (or declined to apply it) on a case-specific basis, primarily, but not only, in personal injury cases involving contractual work for the U.S. military. *See, e.g.*, *In re KBR, Inc.*, 744 F.3d at 341 (war-zone logistical support); *In re World Trade Center Disaster Site Litig.*, 521 F.3d at 196 (domestic disaster relief); *McMahon*, 502 F.3d at 1343 (war-zone logistical support); *Mangold*, 77 F.3d at 1447-48 (engineering and analysis services for the military); *Brown v. Fort Benning Family Communities, LLC*, No. 4:14-CV-279 (CDL), 2015 WL 3505944 (M.D. Ga. June 3, 2015) (housing for military families); *Green v. ICI Am., Inc.*, 362 F. Supp. 1263 (E.D. Tenn. 1973) (operation of U.S. Army-owned TNT plant); *see also Butters*, 225 F.3d at 466 (derivative sovereign immunity under the Foreign Sovereign Immunity Act).

This Court should reaffirm that the derivative sovereign immunity doctrine sweeps broadly because of the important federal government interests that it serves.

CONCLUSION

The Ninth Circuit's judgment should be reversed. The Court should hold that Respondent's putative class-action suit is moot and must be dismissed. In addition, or alternatively, the Court should hold that the suit is barred by derivative sovereign immunity.

Respectfully submitted,

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