Article III of the Constitution limits the jurisdiction of the federal courts to "cases" and "controversies." The Supreme Court has held that "'an actual controversy … 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). Accordingly, "[i]f an intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot." *Genesis HealthCare Corp. v. Symczyk*, 133 S. Ct. 1523, 1528 (2013). In *Genesis*, the Court recognized that one "intervening circumstance" may arise under Rule 68 of the Federal Rules of Civil Procedure, which permits a party to offer to allow judgment in favor of its adversary on specified terms. A party who rejects a Rule 68 offer, but obtains a judgment "not more favorable than the unaccepted offer," must pay the costs accrued by the offering party between the offer and judgment.

Today, the Court granted certiorari in *Campbell-Ewald Company v. Gomez*, No. 14-857, to determine whether a defendant's unaccepted offer of judgment, made before a class is certified, that would fully satisfy the claim of a would-be class representative renders the plaintiff's individual and class claims moot. The Court also granted certiorari to decide whether the derivative sovereign immunity doctrine recognized in *Yearsley v. W.A. Ross Construction Co*., 309 U.S. 18 (1940), applies only to claims for property damage caused by public works projects.

In this case, respondent Gomez filed a class action alleging that he and other individuals had received unsolicited text messages recruiting for the U.S. Navy without their consent, in violation of the Telephone Consumer Protection Act (TCPA). The Navy had hired petitioner Campbell-Ewald Company to develop a mobile marketing campaign to attract new recruits; the text message Gomez received was part of that campaign. Before a class had been certified, Campbell-Ewald tendered a Rule 68 offer to Gomez, offering to pay him $1503 per violation (slightly more than the full statutory damages available under the TCPA) in addition to certain costs, and to stipulate to an injunction. When Gomez rejected the offer, Campbell-Ewald moved to dismiss his individual and class claims as moot. The district court denied the motion, but granted Campbell-Ewald's later motion for summary judgment on the ground that, as a government contractor, Campbell-Ewald was entitled to derivative sovereign immunity. The Ninth Circuit reversed, agreeing with the district court that Gomez's claims were not moot but holding that *Yearsley* applied "only in the context of property damage resulting from public works projects."

The Supreme Court addressed a similar mootness issue in *Genesis*, which concerned whether a defendant's offer of judgment to the named plaintiff in a collective action under the Fair Labor Standards Act mooted the entire action. *Id.* at 1532. The Court recognized that the circuits are divided over whether an unaccepted offer that fully satisfies a plaintiff's claim is sufficient to render the individual claim moot. *Id.* at 1528-29. The Third, Fourth, Fifth, Sixth, and Seventh Circuits have held that such an offer of judgment moots an individual plaintiff's claims, while the Second, Ninth and Eleventh Circuits have held to the contrary. But because the plaintiff in *Genesis* had not contested the mootness of her own claims in the court of appeals, the majority assumed without deciding that an unaccepted offer that fully satisfies a plaintiff's claim renders the claim moot. *Id.* at 1528-29. The Court explained that once the offer of judgment had mooted the named plaintiff's individual claims, the entire action "became moot, because [the plaintiff] lacked any personal stake in representing" other employees. *Id.* at 1529. The Court did not decide whether the same logic applied in the context of a class action, observing only (in the course of distinguishing earlier cases) that "Rule 23 actions are fundamentally different from collective actions under the FLSA." *Id.*

Justice Kagan's dissent in *Genesis* criticized the majority's assumption that the individual claims were moot, maintaining that an unaccepted offer of judgment is a "legal nullity" with "no operative effect." *Id.* at 1533 (Kagan, J., dissenting). Justice Kagan further contended that an offer that addresses only the named plaintiff's individual claim is insufficient to moot either a FLSA collective action or a class action under Rule 23. *Id.* at 1536.

The lower courts have been divided over the application of *Genesis* in the context of offers of judgments made to named plaintiffs in putative class actions. Notably, the Ninth Circuit—in a case prior to *Campbell-Ewald*—rested its reasoning on the dissent in *Genesis*, stating: "We are persuaded that Justice Kagan has articulated the correct approach." *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 955 (9th Cir. 2013). The Court will now resolve the questions left open in *Genesis* regarding the effect of an unaccepted Rule 68 offer has any legal effect on both individual and class claims.

If the Court holds that Gomez's action is not moot, it will decide whether a government contractor may invoke derivative sovereign immunity outside of the context of damage caused by public works projects. *Yearsley* involved property damages claimed to result from Mississippi River dikes constructed by a government contractor. The Court held that the contractor was immune from suit, however, explaining that, "if th[e] authority to carry out the project was validly conferred, that is, if what was done was within the constitutional power of Congress, there is no liability on the part of the contractor for executing its will." 309 U.S.at 20-21. While the Ninth Circuit limited *Yearsley* to property damage from public works projects, at least four other circuits have applied the derivative sovereign immunity doctrine outside that context.

This case is of fundamental interest to all businesses. The Court's resolution of the mootness issue is important for all potential class-action defendants. As the petition indicates, the question has two important components: (1) the effect under Article III of

an unaccepted Rule 68 offer that would fully satisfy the plaintiff's claims, and (2) the significance for Article III purposes of the individual plaintiff's desire to represent a putative class that has not been certified. In addition, if the Court were to reach the scope of the derivative sovereign immunity doctrine, its decision will determine the liability of a wide range of government contractors.

Absent extensions, amicus briefs in support of the petitioner will be due on July 2, 2015, and amicus briefs in support of the respondent will be due on August 3, 2015. Any questions about this case should be directed to Archis A. Parasharami (+1 202-263-3328) in our Washington office or to Donald M. Falk (+1 650 331 2030) in our Palo Alto office.