No. 14-1194

IN THE

Supreme Court of the United States

THE HARVARD DRUG GROUP, LLC,
Petitioner,

v.

SCOTT BARR, D.D.S.,
Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

SCOTT D. OWENS
PATRICK CROTTY
SCOTT D. OWENS, P.A.
3800 S Ocean Drive
Suite 235
Hollywood, FL 33019
(954) 589-0588

STEVEN R. JAFFE
SETH M. LEHRMAN
MARK S. FISTOS
GABRIEL F. ZAMBRANO
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS &
LEHRMAN, P.L.
425 N Andrews Avenue
Suite 2
Fort Lauderdale, FL 33301
(954) 524-2820

Attorneys for Respondent

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QUESTION 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.

PARTIES TO THE PROCEEDING

The parties to this case are the Harvard Drug Group, LLC, petitioner, and Scott Barr, D.D.S., respondent. The petition states that "Harvard Drug understands that Barr is a corporate entity," Pet. 1 n.2, but that statement is incorrect. The abbreviation "D.D.S." refers to "Doctor of Dental Surgery." Scott Barr, D.D.S., is the way Scott Barr refers to his unincorporated dental practice. As Dr. Barr informed the court of appeals in his certificate of interested persons and corporate disclosure, he is not a corporation.

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INTRODUCTION

In this case, the United States Court of Appeals for the Eleventh Circuit, following its decision in *Stein v. Buccaneers Limited Partnership*, 772 F.3d 698 (11th Cir. 2014), held that an offer of judgment made by petitioner Harvard Drug Group to respondent Scott Barr did not moot either Dr. Barr's individual claims or his effort to represent a class of persons with similar claims. In its petition for a writ of certiorari, Harvard Drug Group requests that the Court hold the case pending its disposition of *Campbell-Ewald Co. v. Gomez*, No. 14-857, in which the Ninth Circuit likewise held that an offer of judgment to a named plaintiff in a putative class action mooted neither his individual claims nor the class claims he sought to assert. *See* 768 F.3d 871, 875 (9th Cir. 2014)

Harvard Drug Group offers no reasons why this Court should consider the mootness issues in this case beyond the reasons presented in the pending petition in *Campbell-Ewald*, which Harvard Drug Group "relies upon and incorporates by reference." Pet. 3. The major reasons for denial of certiorari set forth in the *Campbell-Ewald* brief in opposition thus are equally applicable here: The courts of appeals have not disagreed concerning their approach to these mootness issues in the wake of this Court's opinion in *Genesis Healthcare Corp. v. Symczyk*, 133 S. Ct. 1523 (2013); the issues are still percolating through the federal courts, with appeals pending in multiple circuits; and the decision reached by the Eleventh Circuit below, like that of the Ninth Circuit in *Campbell-Ewald*, is correct and consistent with this Court's precedents. The Court should deny the petition in this case, as in *Campbell-Ewald*.

STATEMENT

This case arose from Harvard Drug Group's use of unsolicited junk faxes for advertising. Those faxes omitted information required by the Telephone Consumer Protection Act (TCPA), 47 U.S.C. § 227, and its implementing regulations concerning the recipients' right to opt out of receiving additional unsolicited faxes. *See* 47 C.F.R. § 64.1200(a)(4)(iii)(B) & (C), (a)(4)(v). Scott Barr, a dentist in Broward County, Florida, was among the recipients of Harvard Drug Group's faxes.

Dr. Barr filed this action in federal court on behalf of himself and a class of other recipients of the illegal faxes seeking the statutory damages provided by the TCPA. *See* 47 U.S.C. § 227(b)(3). His complaint alleged that he and other members of the class had received at least one such fax from Harvard Drug Group, and it attached as an "exemplar" a copy of a fax Dr. Barr had received.[1] The complaint alleged that Harvard Drug Group's faxes violated the TCPA and implementing regulations in at least two respects: They failed to inform recipients that any failure by Harvard Drug Group to honor a proper opt-out request within 30 days would be unlawful, and they failed to set forth the information required for a proper opt-out request under the regulations.[2]

Approximately three months after the complaint was filed, Harvard Drug Group e-mailed an offer of judgment under Federal Rule of Civil Procedure 68 to Dr. Barr's counsel. Harvard Drug Group offered Dr.

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[1] Complaint (Dist. Ct. Doc. 1) ¶¶ 48, 26.

[2] *Id*. ¶ 26.

Barr TCPA statutory damages of $1500 for each "unsolicited advertisement" the complaint alleged he had received [3]—not, as the petition asserts, $1500 for each "violation" alleged in the complaint. Pet. 5. Harvard Drug Group subsequently made clear that the offer was to pay $1500 for "one fax,"[4] although the complaint did not allege that Dr. Barr had received only one fax, and it asserted that Harvard Drug Group's faxes violated the law in multiple ways.

Immediately upon receiving the e-mail, Dr. Barr's attorneys filed a motion to certify a class, and Dr. Barr rejected the offer. Harvard Drug Group responded with a motion to dismiss the action on the ground that its unaccepted offer of judgment mooted both Dr. Barr's individual claims and his attempt to represent a class. Harvard Drug Group relied on a then-recent decision in the same district, *Keim v. ADF Midatlantic LLC*, 2013 WL 3717737 (S.D. Fla. July 15, 2013), which had held that an offer of judgment to a named plaintiff mooted an uncertified class action unless a certification motion was on file before the service of the offer.[5]

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[3] Mot. to Dism. Ex. B (Dist. Ct. Doc. 19-2) at 2.

[4] Mot. to Dism. (Dist. Ct. Doc. 19) at 7.

[5] The Eleventh Circuit subsequently heard an appeal in *Keim* together with *Stein* and reversed in *Keim* in an unpublished decision released the same day as *Stein*. 586 F. Appx. 573 (11th Cir. 2014). Harvard Drug Group contends that the involvement of Dr. Barr's counsel in *Keim* somehow shows that TCPA class actions are an "extortionate weapon." Pet. 7. That Dr. Barr's counsel has faced this mootness issue in other cases demonstrates only that the tactic of attempting to end class actions by using offers of judgment to pick off named plaintiffs has become nearly universal in class actions involving claims of statutory damages.

Dr. Barr responded that the e-mail service of the Rule 68 offer was improper and that his class certification motion was on file before service was properly effected. The district court held that counsel's consent to electronic service of electronically filed documents also constituted consent to e-mail service of unfiled documents such as the Rule 68 offer, and it then followed the district court decision in *Keim* in dismissing the action as moot.

Dr. Barr appealed. While the appeal was pending, the Eleventh Circuit decided *Stein*, holding that an unaccepted offer of judgment cannot moot a plaintiff's individual claims because an unaccepted offer is a nullity that has no effect on a court's ability to grant the plaintiff effectual relief. 772 F.3d at 703–04. *Stein* further held that even if an offer of judgment could moot a named plaintiff's individual claims, class claims would remain live regardless of whether the class had yet been certified, and the proposed class representative would retain a sufficient personal stake to pursue them. *Id*. at 704–08.

Stein's holding compelled the conclusion that neither Dr. Barr's individual claims nor his efforts to represent a class were moot. The Eleventh Circuit therefore reversed the district court's dismissal of Dr. Barr's action in an unpublished opinion.

REASONS FOR DENYING THE WRIT

1. Harvard Drug Group asserts that its petition "establishes that the decisions of the 9th and 11th Circuits conflict with the decisions in other circuits," Pet. 8, but it cites no conflicting authority and relies entirely on the *Campbell-Ewald* petition. As the brief in opposition in *Campbell-Ewald* demonstrates (at pp.

8–14, 16–21), there is no conflict requiring this Court's intervention.

No appellate decision since *Genesis* has considered and rejected the analysis of Justice Kagan's dissent in that case, which demonstrated (without disagreement from the majority) that an unaccepted Rule 68 offer of judgment does not moot an individual's claim, regardless of whether that offer would have provided complete relief if it had been accepted. The only two courts of appeals that have so far addressed that question head-on after *Genesis*—the Eleventh and Ninth Circuits—have adopted Justice Kagan's analysis. *See Stein*, 772 F.3d at 702–04; *Diaz v. First Am. Home Buyers Prot. Corp.*, 732 F.3d 948, 954–55 (9th Cir. 2013); *see also Campbell-Ewald*, 768 F.3d at 875. Meanwhile, other circuits have avoided the issue while expressly noting that it is an open one; appeals raising the issue are pending in at least six circuits. *See Campbell-Ewald* Opp. at 11–13.

The federal appellate courts' ongoing consideration of the issue may produce unanimity. Should it instead lead to conflict, this Court will have ample opportunity to consider whether it requires resolution. The pending appeals raising the issue will also inevitably produce further reasoned analysis that will benefit this Court should it ultimately determine that review is necessary.

The courts of appeals likewise are not in conflict over whether 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. Indeed, *every* court to consider that issue since *Genesis* has rejected the argument that if a class is not yet certified, an offer of complete relief to the named plaintiff necessarily

moots the proposed class action. *See Campbell-Ewald* Opp. 16–19. The consensus of the courts of appeals before *Genesis* likewise was that a pre-certification offer of complete relief to a named plaintiff does not necessarily moot class claims. *See id*. at 18–21.[6]

Moreover, like the question whether a complete offer moots the named plaintiff's individual claims, the question whether such an offer moots class claims is currently pending in multiple circuits. *Campbell-Ewald* Opp. 18 n.8. The issue should be permitted to continue to percolate unless and until a conflict justifying intervention by this Court arises.

2. Harvard Drug Group also asserts in conclusory fashion that the decision below "contravene[s] basic Article III principles," Pet. 8, but again it provides no

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[6] As the *Campbell-Ewald* opposition explains, the Seventh Circuit, before *Genesis*, had agreed with other circuits in rejecting the view that certification of a class before an offer is received is required to avoid mootness but had taken a less flexible view than other circuits of the circumstances in which an uncertified class action could be sustained in the face of an offer of complete relief to the named plaintiff: The court's view was that a certification motion must be on file at the time of the offer to avoid mootness. *Damasco v. Clearwire Corp.*, 662 F.3d 891 (7th Cir. 2011). After *Genesis*, however, the Seventh Circuit has repeatedly stated that its views about offers of judgment and mootness may require reconsideration, and it has specifically indicated that in the proper case it might bring its idiosyncratic position that the mootness consequences of an offer depend on whether it is made before or after the filing of a certification motion into line with the consensus of the other circuits that that factor is not determinative. *See Campbell-Ewald* Opp. 11–12, 19–20. In any event, because the *Campbell-Ewald* petition, whose arguments Harvard Drug Group adopts, does not even advocate the *Damasco* position, the divergence between *Damasco* and the other circuits on the timing issue does not justify review.

analysis of its own and relies entirely on the arguments in the *Campbell-Ewald* petition. As demonstrated in the *Campbell-Ewald* brief in opposition, "basic Article III principles" dictate that a damages claim is not moot until it has been satisfied, and that an unaccepted Rule 68 offer that has provided the plaintiff with no relief thus cannot moot his individual claims. *Campbell-Ewald* Opp. 9–11, 14–15. As the Court stated in *Genesis*, a damages claim "remains live until it is settled, judicially resolved, or barred by a statute of limitations." 133 S. Ct. at 1531.

Likewise, the holding below that class claims would remain live even if the named plaintiff's individual claims could be mooted by an unaccepted offer of relief finds solid support in the distinction *Genesis* drew between class actions, which involve the creation of a juridical entity with "an independent legal status," *id*. at 1530, and Fair Labor Standards Act collective actions, which are simply vehicles into which individual plaintiffs may opt to pursue their own claims. *See Campbell-Ewald* Opp. 22–23. An FLSA collective action into which no plaintiff with a live claim has opted thus presents no case or controversy, in contrast to a putative class action, where the nascent class has cognizable interests and the proposed class representative also has live interests in representing the class. *See id*.

3. Like *Campbell-Ewald*, this case presents a poor vehicle for resolving the mootness consequences of an offer of judgment for complete relief to the named plaintiff in an uncertified class action. It is unclear at best whether the offer in this case qualifies as one of complete relief, and there is no dispute that an offer of less than complete relief cannot moot a plaintiff's

claims. *See*, *e.g.*, *Scott v. Westlake Servs. LLC*, 740 F.3d 1124, 1126–27 (7th Cir. 2014).

Here, Harvard Drug Group offered to pay the maximum statutory damages for each "unsolicited advertisement" the complaint alleges Harvard Drug Group sent to Dr. Barr.[7] Harvard Drug Group acknowledged that it was offering to pay for only "one fax,"[8] even though the complaint did not allege that Dr. Barr had received only one fax, but that he had received *at least* one fax.[9] Moreover, Dr. Barr's complaint alleged that the one fax that it attached as an "exemplar" violated the FCC's regulations concerning opt-out notices in at least two different ways.[10]

Although the issue has not been definitively resolved, some authority indicates that a single call or fax transmission can violate the TCPA in multiple respects, potentially giving rise to multiple statutory damages under 47 U.S.C. § 227(b)(3), which provides for damages for each violation, not each call or fax. *See*, *e.g.*, *Burdge v. Assoc. Health Care Mgmt., Inc.*, 2009 WL 414595, at *23 (S.D. Ohio Feb. 18, 2009). Harvard Drug Group's offer to pay statutory damages for one fax transmission thus did not necessarily offer all the relief to which Dr. Barr's complaint might entitle him.

For this reason, determining whether the offer provided all the relief to which Dr. Barr was entitled would require making merits determinations concern-

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[7] Mot. to Dism. Ex. B (Dist. Ct. Doc. 19-2) at 2.

[8] Mot. to Dism. (Dist. Ct. Doc. 19) at 7.

[9] Complaint (Dist. Ct. Doc. 1) ¶ 48.

[10] *Id*. at ¶ 26.

ing how many faxes Dr. Barr received, in what respects they violated the TCPA, and whether multiple violations in one fax support multiple awards of statutory damages. An offer that requires resolution of such merits issues to determine its adequacy cannot moot a case. "Deciding any part of the merits … is possible only if there is jurisdiction. A court can't decide the merits and *then* dismiss for lack of jurisdiction." *Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 449–50 (7th Cir. 2014); *accord*, *e.g.*, *Payne v. Progressive Fin. Servs., Inc.*, 748 F.3d 605, 607–08 (5th Cir. 2014); *Scott*, 740 F.3d at 1126–27; *Hrivnak v. NCO Portfolio Mgmt., Inc.*, 719 F.3d 564, 567–70 (6th Cir. 2013). Harvard Drug Group may believe that the complaint entitles Dr. Barr to damages for at most one violation, but absent a merits adjudication, that belief can offer no basis for terminating the case. "An offer limited to the relief the defendant believes is appropriate does not suffice" to moot a claim under any view of mootness. *Id*. at 567.

In addition, the issue disputed in the district court—whether the offer of judgment was served before Dr. Barr moved for class certification when the purported service was made by e-mail—further muddles the clarity with which this case presents issues as to whether class claims can be mooted by a Rule 68 offer to a named plaintiff. If the timing of a certification motion in relation to the offer bears on that issue (as the Seventh Circuit concluded before *Genesis* in *Damasco*), the dispute over the effective timing of the Rule 68 offer in this case would make this case a poor vehicle for considering that possibility.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

SCOTT L. NELSON
Counsel of Record
ALLISON M. ZIEVE
PUBLIC CITIZEN
LITIGATION GROUP
1600 20th Street NW
Washington, DC 20009
(202) 588-1000
snelson@citizen.org

SCOTT D. OWENS
PATRICK CROTTY
SCOTT D. OWENS, P.A.
3800 S Ocean Drive
Suite 235
Hollywood, FL 33019
(954) 589-0588

STEVEN R. JAFFE
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GABRIEL F. ZAMBRANO
FARMER, JAFFE, WEISSING,
EDWARDS, FISTOS &
LEHRMAN, P.L.
425 N. Andrews Avenue
Suite 2
Ft. Lauderdale, FL 33301
(954) 524-2820

Attorneys for Respondent

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