Justiciability — Class Action Mootness — Campbell-Ewald Co. v. Gomez

Article III of the Constitution limits the jurisdiction of federal courts to "Cases" and "Controversies,"[1] which the Supreme Court has understood as requiring a plaintiff to possess a live "personal stake"[2] in the outcome of the action at all points during the litigation. Otherwise, the case is moot.[3] In the class action context, the Supreme Court has held that if a named plaintiff's individual claim becomes moot *after* class certification, the class action remains justiciable. It has not, however, provided clear guidance when a named plaintiff's claim becomes moot *before* class certification.[4] Against this uncertainty, class action defendants had been making offers of complete relief to named plaintiffs prior to class certification decisions and argued that such offers, even if unaccepted, mooted the named plaintiff's individual claim and, consequently, the putative class action.[5] In *Campbell-Ewald Co. v. Gomez*,[6] the Court held that an unaccepted offer of complete relief does not moot a plaintiff's individual claim. While *Campbell-Ewald* provided some immediate relief for class action plaintiffs, its narrow holding left the door open for defendants to craft new ways to moot class actions before they begin. Still, the majority expressed unease with these opportunistic tactics, an anxiety that could be a harbinger of potential innovations to class action mootness doctrine. Should they occur, such developments would accord with the more functional approach to mootness doctrine that the Court has taken generally and in the class action context particularly.

In 2000, the United States Navy hired Campbell-Ewald Company (Campbell), a national advertising and marketing consulting firm, "to develop and execute a multimedia recruiting campaign."[7] Campbell contracted with Mindmatics LLC, which transmitted a text message to over 100,000 young adults between the ages of eighteen and twenty-four who had previously consented to receiving such material from the

---

[1] U.S. CONST. art. III, § 2, cl. 1.

[2] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1528 (2013) (quoting Camreta v. Greene, 563 U.S. 692, 701 (2011)).

[3] Arizonans for Official English v. Arizona, 520 U.S. 43, 67 (1997).

[4] *See* WILLIAM B. RUBENSTEIN, NEWBERG ON CLASS ACTIONS § 2:15, at 39 (5th ed. 2011 & Supp. 2016).

[5] *See* David Hill Koysza, Note, *Preventing Defendants from Mooting Class Actions by Picking Off Named Plaintiffs*, 53 DUKE L.J. 781, 789–92 (2003).

[6] 136 S. Ct. 663 (2016).

[7] *Id.* at 667.

Navy.[8] In May 2006, Jose Gomez received one of those messages.[9] Claiming that he had never consented to receiving the message — and that he was nearly forty years old — Gomez filed a class action complaint against Campbell pursuant to the Telephone Consumer Protection Act[10] (TCPA), which prohibits "mak[ing] any call . . . using any automatic telephone dialing system . . . to any telephone number assigned to a paging service [or] cellular telephone service" without "the prior express consent of the called party."[11] Gomez, on behalf of himself and a nationwide class of individuals, sought treble damages, costs, attorney's fees, and an injunction prohibiting Campbell from sending future unsolicited text messages.[12]

But before Gomez filed a motion for class certification, Campbell filed an offer for judgment pursuant to Rule 68 of the Federal Rules of Civil Procedure,[13] offering treble damages for each text message Gomez had received, as well as a stipulated injunction that would prohibit Campbell from sending any more messages that violated the TCPA.[14] Gomez, however, declined the offer by letting it lapse after fourteen days, per the terms of Rule 68.[15] In addition to the Rule 68 offer, Campbell offered Gomez a freestanding settlement offer along the same terms.[16] Gomez refused to accept that as well.[17]

Campbell then moved to dismiss for lack of subject matter jurisdiction, arguing that because it had offered Gomez "complete relief,"[18] Gomez's individual claim was moot, and since Gomez's claim had become moot before he had moved for class certification, the putative

---

[8] *Id.* The text message read: "Destined for something big? Do it in the Navy. Get a career. An education. And a chance to serve a greater cause. For a FREE Navy video call [phone number]." *Id.* (alteration in original).

[9] *Id.*

[10] 47 U.S.C. § 227 (2012).

[11] *Id.* § 227(b)(1)(A); *Campbell-Ewald*, 136 S. Ct. at 667. It was undisputed that a text message counts as a "call" for the purposes of the TCPA. *Id.* And § 227(b)(3) of the Act creates a private right of action, under which a successful plaintiff recovers the greater of $500 or the "actual monetary loss" of the violation. 47 U.S.C. § 227(b)(3).

[12] *Campbell-Ewald*, 136 S. Ct. at 667.

[13] Rule 68 creates a mechanism by which defendants can make offers of judgment. *See* FED. R. CIV. P. 68.

[14] *Campbell-Ewald*, 136 S. Ct. at 667–68.

[15] *See id.* at 668; FED. R. CIV. P. 68(a)–(b) ("If, within 14 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. . . . An unaccepted offer is considered withdrawn, but it does not preclude a later offer.").

[16] *See* Gomez v. Campbell-Ewald Co., 805 F. Supp. 2d 923, 926 (C.D. Cal. 2011).

[17] *Campbell-Ewald*, 136 S. Ct. at 668.

[18] *Id.* Although Campbell's Rule 68 offer would not have provided the attorney's fees demanded in Gomez's complaint, Campbell argued that the TCPA did not provide for attorney's fees and thus Campbell's offer to pay Gomez's personal treble damages claim constituted "complete relief." *Id.*

class action was moot as well.[19] The district court denied Campbell's motion, holding that Campbell's Rule 68 and settlement offers did not moot Gomez's putative class claim.[20] But on summary judgment, the court held that, as a government contractor, Campbell had "derivative sovereign immunity" from liability under the TCPA.[21] On appeal, the Ninth Circuit likewise rejected Campbell's motion to dismiss for lack of subject matter jurisdiction and vacated and remanded the summary judgment order.[22] The court held that neither Gomez's individual claim nor the putative class claims had been mooted by the unaccepted Rule 68 offer.[23]

The Supreme Court affirmed.[24] Writing for the Court, Justice Ginsburg[25] began with the justiciability of Gomez's *individual* claim, holding that "an unaccepted settlement offer or offer of judgment does not moot a plaintiff's case."[26] In doing so, Justice Ginsburg quoted and adopted Justice Kagan's *Genesis Healthcare v. Symczyk*[27] dissent, which stated: "An unaccepted settlement offer — like any unaccepted contract offer — is a legal nullity, with no operative effect," and "[a]s every first-year law student learns," a rejected offer simply returns the parties to their pre-offer positions.[28] Applying these "basic principles of contract law,"[29] Justice Ginsburg explained that Campbell's unaccepted offers did not bind either party.[30] Thus, the parties maintained

---

[19] *Id.*

[20] *Gomez*, 805 F. Supp. 2d at 930–31 (arguing that a defendant should not be able to "make an end-run around a class action simply by virtue of a facile procedural 'gotcha,' *i.e.,* the conveyance of a Rule 68 offer of judgment to 'pick off' the named plaintiff prior to the filing of a class certification motion," *id.* at 930).

[21] Gomez v. Campbell-Ewald Co., No. CV 10-02007, 2013 WL 655237, at *4–6 (C.D. Cal. Feb. 22, 2013) (citing Yearsley v. W.A. Ross Constr., 309 U.S. 18, 21–22 (1940)).

[22] Gomez v. Campbell-Ewald Co., 768 F.3d 871, 874, 882 (9th Cir. 2014). In vacating and remanding the summary judgment order, the Ninth Circuit held that *Yearsley* was inapplicable and Campbell possessed no derivative sovereign immunity here. *Id.* at 879–80. The Ninth Circuit also rejected Campbell's arguments that (1) the TCPA violates the First Amendment, *id.* at 876–77, and that (2) it shouldn't be held liable for the acts of the third party Mindmatics, *id.* at 877–79.

[23] *Id.* at 874–75. To support this holding, the Ninth Circuit cited its recent decisions in *Diaz v. First American Home Buyers Protection Corp.*, 732 F.3d 948, 950 (9th Cir. 2013) (holding that an unaccepted Rule 68 offer of complete relief does not moot a plaintiff's claim) and *Pitts v. Terrible Herbst, Inc.*, 653 F.3d 1081, 1091–92 (9th Cir. 2011) (holding that an unaccepted Rule 68 offer of complete relief made prior to a motion for class certification does not moot the putative class action). *See Gomez*, 768 F.3d at 875.

[24] *Campbell-Ewald*, 136 S. Ct. at 674.

[25] Justice Ginsburg was joined by Justices Kennedy, Breyer, Sotomayor, and Kagan.

[26] *Campbell-Ewald*, 136 S. Ct. at 672.

[27] 133 S. Ct. 1523 (2013).

[28] *Campbell-Ewald*, 136 S. Ct. at 670 (quoting *Genesis Healthcare*, 133 S. Ct. at 1533 (Kagan, J., dissenting)).

[29] *Id.*

[30] *Id.* at 670–71.

a personal stake in the outcome of the litigation, and the controversy was not moot.[31]

Justice Ginsburg also distinguished the "trio of 19th-century railroad tax cases" upon which Campbell relied.[32] Those cases, she stressed, all involved the "actual payment" of taxes, in contrast to Campbell's mere unaccepted offer to pay.[33] Justice Ginsburg, however, refused to address "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount," leaving that hypothetical question for another day.[34] Finally, Justice Ginsburg rejected Campbell's derivative immunity argument. Like the Ninth Circuit, she held that derivative immunity does not apply when the government agent, like Campbell here, had "'exceeded his authority' or the authority 'was not validly conferred.'"[35]

Justice Thomas concurred in the judgment. Unlike the majority, Justice Thomas would not rely on "modern contract law principles and a recent dissent concerning Federal Rule of Civil Procedure 68,"[36] because the issue here was not whether there was a binding contract but whether the claim was still live for the purposes of Article III.[37] He argued that "the common-law history of tenders," which led to Rule 68, teaches that "courts at common law would not have understood a mere offer to strip them of jurisdiction."[38] Campbell's offers, which did not go beyond the mere offering to pay, thus did not strip the court of jurisdiction to decide the case.[39]

---

[31] *Id.* Justice Ginsburg also turned to the text of Rule 68, which provides that a settlement offer not accepted within fourteen days of service "is considered withdrawn," and the Rule's only penalty for not accepting the offer is that "[i]f the ultimate judgment . . . is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made." *Id.* at 671 (quoting FED. R. CIV. P. 68). This text, she argued, "hardly supports the argument that an unaccepted settlement offer can moot a complaint." *Id.*

[32] *Id.* Campbell had relied on *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308 (1893); *Little v. Bowers*, 134 U.S. 547 (1890); and *San Mateo County v. Southern Pacific Railroad Co.*, 116 U.S. 138 (1885). *See Campbell-Ewald*, 136 S. Ct. at 671.

[33] *Campbell-Ewald*, 136 S. Ct. at 671.

[34] *Id.* at 672.

[35] *Id.* at 673 (quoting Yearsley v. W.A. Ross Constr. Co., 309 U.S. 18, 21 (1940)).

[36] *Id.* at 674.

[37] *Id.* at 676 (Thomas, J., concurring in the judgment). Justice Thomas explained that to "resolve the meaning of 'case' and 'controversy' in Article III," the Court must consult "'the traditional, fundamental limitations upon the powers of common-law courts' because 'cases' and 'controversies' 'have virtually no meaning except by reference to that tradition.'" *Id.* at 676–77 (quoting Honig v. Doe, 484 U.S. 305, 340 (1988) (Scalia, J., dissenting)).

[38] *Id.* at 674–75.

[39] *Id.* at 676.

Chief Justice Roberts dissented,[40] arguing that there no longer was a dispute between Campbell and Gomez sufficient to sustain an Article III case or controversy.[41] Calling the case "straightforward,"[42] Chief Justice Roberts explained that when a defendant agrees to fully redress the plaintiff's injury by making an offer of complete relief, the plaintiff can no longer "demonstrate an injury in need of redress by the court" and the case is, therefore, moot.[43] For Chief Justice Roberts, that Campbell only *offered* complete relief didn't affect the mootness inquiry because "it would be mere pettifoggery to argue that Campbell might not make good on [its] promise."[44] Moreover, Chief Justice Roberts argued that the "Court has long held that when a defendant unilaterally remedies the injuries of the plaintiff, the case is moot — even if the plaintiff disagrees and refuses to settle the dispute, and even if the defendant continues to deny liability."[45] Though he agreed that an unaccepted offer is a "legal nullity" under contract law, he maintained that the question "is not whether there is a contract; it is whether there is a case or controversy under Article III."[46] Despite his disagreement with the holding, Chief Justice Roberts nevertheless found some "good news": that the majority limited its holding to an "*offer* of complete relief" without deciding whether "*payment* of complete relief leads to the same result."[47]

Justice Alito also dissented. While he agreed with the Chief Justice that a defendant's offer of complete relief does not require the plaintiff's acceptance, he wrote separately to highlight what he saw as "the linchpin for finding mootness in this case"[48]: the near certainty that Campbell would make good on its promise. Drawing an analogy to the Court's "voluntary cessation" cases — in which a defendant's willing cessation of the unlawful conduct will not moot the case unless the defendant meets the heavy burden of showing that the conduct could not reasonably be expected to recur — he argued that such an offer

---

[40] The Chief Justice was joined by Justices Scalia and Alito.

[41] *Campbell-Ewald*, 136 S. Ct. at 677–79 (Roberts, C.J., dissenting).

[42] *Id.* at 679.

[43] *Id.*

[44] *Id.* at 680. Chief Justice Roberts added that "to the extent there is a question whether Campbell is willing and able to pay, there is an easy answer: have the firm deposit a certified check with the trial court." *Id.*

[45] *Id.* To support this assertion, Chief Justice Roberts examined *California v. San Pablo & Tulare Railroad Co.*, 149 U.S. 308 (1893); *Alvarez v. Smith*, 558 U.S. 87 (2009); and *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721 (2013). *Campbell-Ewald*, 136 S. Ct. at 680–81 (Roberts, C.J., dissenting).

[46] *Campbell-Ewald*, 136 S. Ct. at 682 (Roberts, C.J., dissenting).

[47] *Id.* at 683.

[48] *Id.* at 683 (Alito, J., dissenting).

should moot a case if, and only if, it is undoubtedly clear that the defendant will provide the promised relief.[49]

In *Campbell-Ewald*, the Court narrowly held that an unaccepted offer of complete relief does not moot a plaintiff's claim, declining to address the hypothetical case of a defendant who "deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount."[50] Given the behavior of class action defendants post-*Campbell-Ewald*,[51] this hypothetical may soon materialize before the Court. If, at some point, a defendant actually delivers a payment constituting complete relief to a named plaintiff, it would be difficult to avoid the conclusion that the named plaintiff's claim has been mooted. Tossing a putative class action from court on such a basis, however, would be in tension with a core concern underlying the *Campbell-Ewald* majority opinion: that defendants will opportunistically use mootness doctrine to undermine the class action device. Ultimately addressing this concern could, in time, lead to potential innovations to class action mootness doctrine, developments that would fit with the Court's more functional approach to mootness doctrine generally and in the class action context particularly.

In practice, *Campbell-Ewald*'s tantalizing hypothetical has incentivized class action defendants to move to deposit checks, in an amount constituting complete relief, with the court and to have the court enter judgments against them,[52] or, even more directly, to tender cashier's checks to named plaintiffs.[53] Lower courts post-*Campbell-Ewald* have split over whether such tactics successfully moot a named plaintiff's individual claim.[54] But if a defendant ultimately took the step of de-

---

[49] *Id.*

[50] *Id.* at 672 (majority opinion).

[51] Following the Supreme Court's ruling, Campbell itself sent Gomez's attorney a certified check for $10,000 and asked the court to accept a payment for the same amount. Order Re Defendant's Motions to Dismiss and for Leave to Deposit Funds with the Court at 2, Gomez v. Campbell-Ewald Co., No. CV 10-2007 (C.D. Cal. June 3, 2016). The district court rejected Campbell's new strategy, citing Ninth Circuit precedent that "makes explicit that funds deposited in an escrow account have not been 'actually received' for purposes of mooting an individual plaintiff's claims," and concluding that "[n]othing in the Supreme Court's *Campbell-Ewald* opinion precludes this holding." *Id.* at 3 (quoting Chen v. Allstate Ins. Co., 819 F.3d 1136, 1138 (9th Cir. 2016)).

[52] *See, e.g.*, Tegtmeier v. PJ Iowa, L.C., No. 3:15-CV-00110, 2016 WL 3265711, at *3 (S.D. Iowa May 18, 2016).

[53] *See, e.g.*, Mey v. N. Am. Bancard, LLC, No. 14-2574, 2016 WL 3613395, at *3 (6th Cir. July 6, 2016).

[54] *Compare* Gray v. Kern, 143 F. Supp. 3d 363, 367 (D. Md. 2016) ("[I]f [d]efendant . . . deposits the full amount recoverable with the Clerk of the Court, and the Court then enters judgment in that amount, the case is moot."), *and* S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069, 2016 WL 1441791, at *4–5 (D. Mass. Apr. 12, 2016) (holding that defendant's tender of a bank check to plaintiff moots the latter's claim), *with Chen*, 819 F.3d at 1144

positing the full amount of a named plaintiff's claim in a bank account to that plaintiff's name, it's hard to see how such a plaintiff has not "received full redress for the injuries asserted in their complaints."[55] Distinguishing such a plaintiff from those in "the trio of 19th-century railroad tax cases," whose claims were all mooted by *receiving* payments fully satisfying their claims,[56] would be increasingly difficult.

And yet, a finding of mootness in such a case would lie in tension with a significant concern underlying the *Campbell-Ewald* majority opinion: a discomfort with defendants opportunistically using mootness doctrine to undermine class actions. The majority explicitly characterized Campbell's offers as a "strategy" — a "gambit" by which Campbell "sought to avoid a potential adverse decision, one that could expose it to damages a thousand-fold larger than the bid Gomez declined to accept."[57] Whether a defendant tries to moot larger class damages by offering or by actually giving complete relief to the named plaintiff, the gambit remains the same: moot the named plaintiff's claim before the potentially more-damaging class action becomes viable.

The *Campbell-Ewald* majority's anxiety about such opportunistic use of mootness doctrine could presage at least two areas of doctrinal innovations. First, the majority hinted that a named plaintiff might have a "personal stake" in receiving a decision on the certifiability of the putative class action. Under current doctrine, the right to bring a class action is purely procedural and cannot, absent substantive individual claims alongside it, prevent a case from becoming moot.[58] While this has long been the standard view, Justice Kagan's *Genesis Healthcare* dissent cast doubt on its long-term validity, suggesting that a judgment providing relief to a plaintiff's individual claim is not complete when that plaintiff has also requested — and is now being denied — the "right to sue on behalf of other[s]."[59] The *Campbell-Ewald* majority largely avoided this part of Justice Kagan's *Genesis*

(holding that depositing money in escrow does not provide plaintiff with "actual relief" and does not moot plaintiff's individual claim), *and* Ung v. Universal Acceptance Corp., No.15-127, 2016 WL 3136858, at *5 (D. Minn. June 3, 2016) (holding that tendering a certified check does not moot plaintiff's individual claim).

[55] *Campbell-Ewald*, 136 S. Ct. at 671 n.5.

[56] *Id.* at 671.

[57] *Id.* at 672.

[58] *See* Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 332 (1980).

[59] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1536 (2013) (Kagan, J., dissenting). To be sure, *Genesis Healthcare* involved a collective action under the Fair Labor Standards Act, not a class action, but Justice Kagan explained that "[n]o more in a collective action brought under the FLSA than in any other class action may a court, prior to certification, eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole." *Id.*

Healthcare dissent,[60] focusing instead on her contracts point.[61] Nonetheless, in explaining its holding, the majority went out of its way to state that "Gomez sought treble statutory damages and an injunction *on behalf of a nationwide class*, but Campbell's settlement offer proposed relief for Gomez *alone*,"[62] insinuating that providing full relief to the named plaintiff's personal claim might not be truly "complete" relief when it precludes the plaintiff from obtaining at least a verdict on the certification of the putative class.

Second, the majority's concern with mootness doctrine being used to undermine the class action device suggests that, in the face of defendants trying to avoid large class action damages by "picking off" named plaintiffs, the majority might be inclined to reject a finding of mootness *even before* a decision on class certification. Under *Sosna v. Iowa*,[63] a class action may still proceed if the named plaintiff's claims become moot *after* the class has been certified.[64] The Court extended the logic of *Sosna* in two later cases decided on the same day. In *U.S. Parole Commission v. Geraghty*,[65] the Court held that a named plaintiff whose claim had been mooted by an external circumstance after the denial of class certification could still appeal that decision.[66] And in *Deposit Guaranty National Bank v. Roper*,[67] the Court reached the same conclusion when, also after the trial court had denied the plaintiffs' motion for class certification, the defendant mooted the named plaintiffs' individual claims by tendering the maximum amount they could have recovered.[68] But the Court has remained silent on whether putative class claims are rendered moot when named plaintiffs' individual claims are mooted *before* a decision on class certification.[69] Several lower courts have weighed in on the issue, with some holding that the class action survives if the alleged mooting occurs after the plaintiff *files a motion* for class certification,[70] and others going as far as holding that the class action survives even if the alleged mooting occurs before then, assuming the plaintiff does not unduly delay filing

---

60 *See* Alexander H. Schmidt, *Why the Supreme Court's Next Mootness Decision Could Doom Rule 23's Private Attorney General Paradigm*, ANTITRUST, Spring 2016, at 74, 77–78.

61 *See Campbell-Ewald*, 136 S. Ct. at 670–71.

62 *Id.* at 670 (emphasis added).

63 419 U.S. 393 (1975).

64 *See id.* at 399–402 (holding that, after certification, "the class of unnamed persons described in the certification acquired a legal status separate from the interest asserted by appellant," *id.* at 399).

65 445 U.S. 388 (1980).

66 *Id.* at 402–04.

67 445 U.S. 326 (1980).

68 *Id.* at 329.

69 *See* RUBENSTEIN, *supra* note 4, § 2:15, at 39.

70 *See id.* at 39 n.22 (collecting cases).

the motion.[71] The latter approach, adopted by several circuits,[72] is premised on the idea that to hold otherwise would "undercut the viability of the class action procedure, and frustrate the objectives of this procedural mechanism for aggregating small claims"[73] — a concern echoed in *Campbell-Ewald*.[74]

Should the Court eventually adopt the aforementioned doctrinal innovations, it would be acting consistently with the Court's historically functional approach to mootness. As a general matter, the Court tends to take a more functional approach to mootness than to other doctrines of justiciability,[75] and the Court often will not dismiss a seemingly moot case "where strong prudential reasons" caution against such dismissal.[76] And in the class action context specifically, the Court has pointed to "the flexible character of the [Article] III mootness doctrine."[77] This flexibility is necessary because of the inherent tension

---

[71] *See id.* at 39 n.23 (collecting cases).

[72] *See id.* (citing cases from the First, Second, Third, Eighth, Ninth, Tenth, and Eleventh Circuits).

[73] Weiss v. Regal Collections, 385 F.3d 337, 344 (3d Cir. 2004).

[74] *Campbell-Ewald*, 136 S. Ct. at 672 ("[A] would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted.").

[75] In qualifying Professor Henry Monaghan's classic formulation of mootness doctrine as "the doctrine of standing set in a time frame," Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973), the Court in *Friends of the Earth, Inc. v. Laidlaw Environmental Services, Inc.*, 528 U.S. 167 (2000), explained that the costs of dismissing a case differ from those of barring a case upfront, *id.* at 190–92. Of course, as the Court admitted, "[t]his argument from sunk costs does not license courts to retain jurisdiction over cases in which one or both of the parties plainly lack a continuing interest." *Id.* at 192 (footnote omitted). Nevertheless, the Court averred, "the argument surely highlights an important difference between the two doctrines." *Id.*; *see also* RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 200–01 (7th ed. 2015) (suggesting four additional reasons to treat "mootness doctrine differently from standing," *id.* at 200, and querying whether "mootness doctrine [should] bar adjudication only when the functional requisites of effective adjudication, such as effective adversarial presentation of sharply framed issues, are absent," *id.* at 201).

[76] Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 563 (2009). Some common examples are cases involving the "voluntary cessation of challenged conduct," *e.g.*, Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2287 (2012), and those involving short-lived conduct that is "capable of repetition, yet evading review," *e.g.*, FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 463 (2007) (quoting Storer v. Brown, 415 U.S. 724, 737 n.8 (1974)). While these cases are often described as "exceptions" to mootness doctrine, they demonstrate that the doctrine must be understood, at least in part, in functional or prudential terms. *See* Hall, *supra*, at 563–64; *see also* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) ("If our mootness doctrine were forced upon us by the case or controversy requirement of [Article] III itself, we would have no more power to decide lawsuits which are 'moot' but which also raise questions which are capable of repetition but evading review than we would to decide cases which are 'moot' but raise no such questions."); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 625 (1992) ("[T]he solidity of the doctrine linking Article III and its personal stake requirement to mootness jurisprudence is dubious, at best.").

[77] U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 400 (1980).

between the class action form and mootness; as one scholar has put it, "if an individual litigant's claims are moot yet she desires to keep litigating, what she essentially wants to do is litigate other people's claims — that, of course, is the definition of a class action."[78] Consequently, the Court's class action mootness jurisprudence has focused on reaching "sensible results,"[79] even if a few doctrinal somersaults have been required. For the *Campbell-Ewald* majority, such a "sensible result" could seemingly include precluding defendants from eviscerating Rule 23 through manipulation of mootness doctrine.[80]

Given the flurry of class action defendants seeking to "exploit the back door left ajar by *Campbell-Ewald*"[81] and the lower courts' varied responses, the Court will inevitably face the question it reserved for itself in this case. And the result will likely hinge on Justice Kennedy, who joined the *Campbell-Ewald* majority but also joined the *Genesis Healthcare* majority, which concluded, albeit in a Fair Labor Standards Act collective action case, that the plaintiff had "no personal interest in representing putative, unnamed claimants."[82] Ultimately, the decision may come down to weighing the prudential concern of maintaining the viability of class actions against constraining the power of Article III courts, thus far a particular interest of the Roberts Court.[83] But if the *Campbell-Ewald* majority's concerns are any indication, class action defendants may find it increasingly difficult to moot class actions before the class gets its day in court.

---

[78] RUBENSTEIN, *supra* note 4, § 2:9, at 92.

[79] Richard K. Greenstein, *Bridging the Mootness Gap in Federal Court Class Actions*, 35 STAN. L. REV. 897, 909 (1983).

[80] *See Campbell-Ewald*, 136 S. Ct. at 672. Indeed, the majority's citation to *U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership*, 513 U.S. 18 (1994), is telling. The majority employed the case to argue that the use of mootness doctrine as an end run around a "potential adverse decision" has been and should be rejected. *Campbell-Ewald*, 136 S. Ct. at 672. As Chief Justice Roberts noted in dissent, *Bancorp* dealt with the "equitable powers of the courts to vacate judgments in moot cases," not whether a case was moot to begin with. *Id.* at 682 n.2 (Roberts, C.J., dissenting). For Chief Justice Roberts, this difference demonstrated *Bancorp*'s inapplicability. *Id.* Yet the majority's decision nevertheless to cite the case suggests that it thought *Bancorp*'s core rationale — that mootness doctrine ought not be used as a shield — should be applied broadly.

[81] Family Med. Pharmacy, LLC v. Perfumania Holdings, Inc., No. 15-0563, 2016 WL 3676601, at *5 (S.D. Ala. July 5, 2016).

[82] Genesis Healthcare Corp. v. Symczyk, 133 S. Ct. 1523, 1532 (2013). Justice Thomas, who authored the majority opinion in *Genesis Healthcare*, *id.* at 1526, and who concurred in *Campbell-Ewald* solely on the basis of "the common-law history of tenders," *Campbell-Ewald*, 136 S. Ct. at 674 (Thomas, J., concurring in the judgment), would seemingly agree with Chief Justice Roberts and Justice Alito in the event the "company ma[d]e payment" and did not just "declar[e] its intent to pay," *id.* at 676.

[83] *See* Linda Greenhouse, *Judges Standing Upside-Down*, N.Y. TIMES (Sept. 3, 2015), http://www.nytimes.com/2015/09/03/opinion/judges-standing-upside-down.html [https://perma.cc/E3M8-NNMZ]; *cf. generally* John G. Roberts, Jr., *Article III Limits on Statutory Standing*, 42 DUKE L.J. 1219 (1993).