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Why the Supreme Court's Next Mootness Decision Could Doom Rule 23's Private Attorney General Paradigm

BY ALEXANDER H. SCHMIDT

IN *CAMPBELL-EWALD CO. v. GOMEZ*,[1] the Supreme Court considered whether a defendant could moot and obtain dismissal of a class action by offering the class representative—through a Rule 68 Offer of Compromise or otherwise—what the defendant asserted was "complete relief" on his individual claim, even if the plaintiff rejects the offer. A "yes" answer would have enabled defendants to avoid many consumer class actions involving small individual damages by "picking off" every successive proposed class representative until the statute of limitations expired or the defendant achieved full attrition of consumers who were both cognizant of the alleged wrongdoing and willing to sue. But the Court, in an opinion by Justice Ginsburg, held that unaccepted offers alone cannot moot a claim.[2] Presaging the likely next battle over the "pick off" maneuver, the Court left open whether defendants can moot named plaintiffs' individual claims by depositing their maximum damages into accounts opened in their names and whether doing so would also moot their class claims.[3]

While consumer advocates are cheering *Campbell-Ewald*'s result, their victory might prove short-lived once the Court addresses those open questions. It was only three years ago that Justice Kagan, dissenting in *American Express Co. v. Italian Colors Restaurant*, warned that the Justices who formed the majority there (the Roberts Court "conservative majority") were "bent on diminishing the usefulness of Rule 23" and "dismantl[ing]" plaintiffs' ability to use class actions to challenge corporate behavior.[4] That was not said lightly. Although Justice Kennedy joined Justice Ginsburg's majority opinion in *Campbell-Ewald* and Justice Thomas concurred in its result, there is ample reason to believe both will realign with their three dissenting brethren when the next class action mootness case reaches the Court. Adopting a rule that unaccepted offers can moot cases and divest federal courts of jurisdiction presented practical problems that troubled Justice Kennedy at oral argument, and the Court's holdings were narrowly tailored to the specific facts and issue presented. Nothing in the majority opinion, however, would serve as *stare decisis* on the issue of whether depositing a plaintiff's maximum damages into a bank account moots the plaintiff's individual claims and requires dismissal of his putative class action.

Perhaps most unsettling from a plaintiff's perspective is that Justice Ginsburg's opinion in *Campbell-Ewald* did not mention, much less reaffirm, *Deposit Guaranty National Bank v. Roper*,[5] a decision in which the Court soundly rejected the use of "pick off" plays to moot class actions 35 years ago. In *Roper*, two notable conservative justices of the pre-Roberts era—then-Chief Justice Burger and later-Chief Justice Rehnquist—wrote majority and concurring opinions, respectively, finding that defendants could not avoid class actions by "buying off" named plaintiffs because this practice would undermine Rule 23's purpose to empower citizens to act as private attorneys general and pursue class actions.[6]

In 2013, the Roberts Court's conservative majority, in an opinion by Justice Thomas, questioned *Roper*'s continuing viability in a Fair Labor Standards Act collective action, *Genesis HealthCare Corp. v. Symczyk*.[7] Indeed, *Symczyk* stripped *Roper* of its force (albeit in dicta) and thereby invited defendants to resurrect the "pick off" tactics *Roper* had so plainly rejected.[8] Justice Kagan relied heavily on *Roper* when dissenting in *Symczyk*.[9] Thus, Justice Ginsburg's failure to cite the case signals, at best, that the Court expediently deferred debate over *Roper*'s fate for another day, or, at worst, that Justice Kennedy is ready to overrule the case at the next ripe opportunity.

Justice Ginsburg's opinion also sidestepped any discussion of the legal theory that would necessarily underlie any ruling on whether defendants can moot class actions by mooting class representatives' individual claims—namely, the breadth and meaning of Article III's "case or controversy" requirement that governs mootness determinations in federal court. As explained below, the Court recognized for 125 years that a plaintiff with a moot individual claim still had a "personal stake" in representing other putative class members or the public generally, which satisfied Article III. *Symczyk* and

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Chief Justice Roberts's dissent in *Campbell-Ewald*, however, appear to challenge that notion and favor a rule that plaintiffs must have a continuing individual *economic* or *financial* interest in a case to meet the "personal stake" requirement. That debate, too, must await the Court's next mootness decision.

This article discusses the legal backdrop to the issues left open in *Campbell-Ewald*, as well as some of the practical and policy implications if the Supreme Court ultimately defines the "personal stake" requirement in the manner the Chief Justice advocates and holds that a named plaintiff with a moot personal claim cannot satisfy Article III as to a putative class claim on the basis that she is motivated to help others or to represent the public good.

General Article III and Mootness Principles

Before *Symczyk*, the Supreme Court's core mootness principles had been consistently expressed since the late 1800s. Article III of the Constitution limits federal courts' subject matter jurisdiction to cases involving "actual controversies" concerning "the legal rights of litigants."[10] This limitation recognizes that the law is best developed through the adversarial process,[11] which ensures that federal courts are confined to resolving "actual and concrete disputes" that "have direct consequences on the parties involved."[12] To have Article III standing, therefore, a plaintiff must possess "a legally cognizable interest, 'or personal stake,' in the outcome of the action."[13]

A mootness inquiry presumes that the plaintiff had the requisite "personal stake" when the suit was brought and addresses whether it expired during the litigation. Mooting a plaintiff's claim typically divests the court of jurisdiction and compels dismissal of the suit, although an exception arose in the late 1800s permitting federal jurisdiction to continue despite a plaintiff's expired personal stake if the legal issue raised is "capable of repetition, yet evading review"—meaning an issue that frequently arises but often expires before a lawsuit seeking judicial redress of the issue can run its course.[14] In a class action context, if the named plaintiff's individual claim becomes moot, the mootness inquiry asks whether that also moots the putative class's claims.[15]

For more than 125 years, the Supreme Court's mootness cases recognized that plaintiffs often sue to achieve a public benefit as well as to obtain private redress, and that such a plaintiff, even after obtaining full individual relief, still retained a legally cognizable personal stake in pursuing the lawsuit until the public's rights were also vindicated. Two early Supreme Court cases, neither of which has been overruled, held that when a central object of a lawsuit is to obtain public justice, a plaintiff continues to have standing to represent the public even if the plaintiff's individual claim becomes moot.

In *United States v. Trans-Missouri Freight Association*, a railroad association alleged to be a cartel had dissolved itself to try to moot a government antitrust prosecution. The Court held that it retained jurisdiction even though the government had already succeeded in dismantling the cartel because the cartel's dissolution was "not the most important object of this litigation."[16] The government also sought a judgment declaring that the railroad association's founding agreements violated the Sherman Act and enjoining the defendants from reaching similar future agreements. The Court concluded that where "there has been no extinguishment of the rights (whatever they are) of the public . . . defendants cannot foreclose those rights" by voluntarily ceasing the challenged activity.[17]

The Court extended that principle to private plaintiffs in *Southern Pacific Terminal Co. v. ICC*.[18] There the Interstate Commerce Commission had issued an order enjoining Galveston port officials from giving discounted rates to a merchant for two years. The ICC's order expired before the Supreme Court could hear the enjoined parties' appeal. The Court held that an agency order affecting private rights should not be immunized from judicial review simply because the agency issues a short-term rather than long-term order. Otherwise, the agency's action would be "capable of repetition, yet evading review."[19] Like *Trans-Missouri Freight Association*, the case invoked interests of "a public character," and the Court needed to retain jurisdiction to address the public issues even though the plaintiffs' private claims had expired.[20]

Southern Pacific Terminal held that courts must dismiss pending cases as moot if "something occurs . . . which renders it impossible" to grant "effectual relief" because "there was nothing that the judgment of the court . . . could have affected."[21] Dismissal for mootness was inappropriate, however, where not all the "acts sought to be enjoined" had ceased, where a judgment could still affect an aspect of the case, or where a matter of public concern raised in the case was "capable of repetition, yet evading review."[22]

Synthesized, these early cases hold that when a plaintiff seeks an injunction or declaratory judgment that will affect the public as well as the plaintiff individually, federal courts have subject matter jurisdiction over the public-rights aspect of the case after the plaintiff's purely individual claim expires. A live "case or controversy" still exists because the plaintiff retains a cognizable personal stake in protecting others, and defendants should not be empowered to foreclose courts from addressing matters of public concern by mooting a plaintiff's individual claims.

The First Go-Round—The Supreme Court Rejects Using "Pick off" Tactics to Moot Class Actions

The principles established by the Supreme Court's early mootness cases translated readily to the class action context. Under Rule 23, proposed class representatives have a duty to seek to vindicate their own private rights and the rights of putative class members in the same manner as non-class plaintiffs who seek declaratory judgments or public injunctions. Indeed, bringing suits as "private attorneys general" to remedy violations affecting similarly situated members of the public is Rule 23's operative paradigm.[23]

Consequently, when defendants first attempted to avoid class actions by mooting a class representative's individual claims after Rule 23 was amended in 1966 to permit damages classes, the Supreme Court, applying its earlier precedents, held that the tender of full individual relief was insufficient to moot even the named plaintiffs' individual claims, much less the class's claims.

In *Roper*, Chief Justice Burger's majority opinion addressed whether a bank's offer to pay the named plaintiffs full individual relief after class certification was denied mooted the case and terminated the plaintiffs' right to appeal their denied class certification motion.[24] Echoing the Court's earlier cases, the Court acknowledged that class representatives' interests include the plaintiffs' personal stake in the merits, their ancillary procedural right to pursue their individual claims through the class action vehicle, and—"distinct from their private interests"—their "responsibility . . . to represent the collective interests of the putative class."[25] The Court held that neither the tender of full relief for the class representatives' individual claims nor the entry of judgment "mooted the plaintiffs' [individual] claim[s] on the merits" because the named plaintiffs retained an "economic interest" in their appeal of the denial of class certification and, thus, retained a sufficient stake in the litigation to prosecute that appeal both for themselves and the class.[26] The Court further held that only the "payment and satisfaction of a final, unappealable judgment" will moot a case in the Article III sense because an appealable decision "does not absolutely resolve a case or controversy until the time for appeal has run."[27] Likewise, "a confession of judgment by defendants on less than all the issues" does not "moot an entire case" because "other issues in the case may be appealable."[28]

The *Roper* Court phrased its mootness standard in terms of whether the plaintiffs had a continuing "economic interest" in the "class certification" appeal, but the Court's analysis reveals that it used that phrase as a case-specific synonym for the traditional requirement that plaintiffs have a continuing "personal stake" in the litigation. The Court ruled that the plaintiffs' personal stake in *any* appealable issue—even if they had *accepted* payment of their full damages—would have given the Court Article III jurisdiction over that appeal and enabled the plaintiffs to prosecute it.[29] An order denying class certification was just one "example" of a collateral order that is appealable after the entry of final judgment in the plaintiffs' favor.[30]

Notably, the *Roper* plaintiffs' personal stake in the class certification appeal included "their desire to shift part of the costs of litigation to those who will share in its benefits if the class is certified and ultimately prevails."[31] The Court explained that this cost-shifting interest arose from the class representatives' contingency fee arrangement with counsel, which enabled the named plaintiffs to act as "'private attorney[s] general' for the vindication of legal rights" of victims who otherwise would be unable economically to obtain relief and would have no "effective redress" absent the class action.[32]

The *Roper* Court also concluded that permitting defendants to moot class actions by "picking off" named plaintiffs would undermine the purpose of Rule 23:

> To deny the right to appeal simply because the defendant has sought to "buy off" the individual private claims of the named plaintiffs would be contrary to sound judicial administration. Requiring multiple plaintiffs to bring separate actions, which effectively could be "picked off" by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions; moreover it would invite waste of judicial resources by stimulating successive suits brought by others claiming aggrievement.[33]

The Court also noted that without Rule 23, a plaintiff's attorneys' fees could exceed the value of an individual judgment and that "[s]uch plaintiffs would be unlikely to obtain legal redress at an acceptable cost, unless counsel were motivated by the fee-spreading incentive and proceeded on a contingent-fee basis. This, of course, is a central concept of Rule 23."[34]

Justice Rehnquist filed a concurrence in *Roper* emphasizing that the Court's mootness precedents did not require plaintiffs to accept a tender of individual relief "since the defendant has not offered all that has been requested in the complaint (i.e., relief for the class)."[35]

Defendants' first effort to moot class actions by "picking off" named plaintiffs plainly failed in *Roper*. The Court definitively held that merely tendering plaintiffs' full individual relief without offering relief on the class claims moots neither the plaintiffs' claims nor the class claims. Given that result, *Roper* amply supports the proposition that class action plaintiffs have a valid Article III personal stake in acting as private attorneys general to pursue the claims of the class and to protect the public.

Symczyk—The Roberts Court Opens the Door to a Do-Over

More than 30 years after *Roper*, the current Supreme Court invited defendants to revisit the issue in *Symczyk*. There, the named FLSA plaintiff received a Rule 68 offer of judgment for the full amount of her individual claim before any other claimant had opted into the collective action. When the plaintiff ignored the offer, the defendant successfully moved to dismiss the action as moot. Both lower courts had ruled that the defendant's offer of full relief mooted the plaintiff's individual claim even though it was not accepted. The Supreme Court, in a 5–4 majority opinion by Justice Thomas, affirmed the lower court rulings, finding that it was bound by their mootness holdings because the plaintiff had not appealed the point.[36] Consequently, the Court turned to whether the plaintiff's collective claims were also moot and ruled that they were based on "[a] straightforward application of well-settled mootness principles."[37] Because no other claimant had opted in before the defendant made its Rule 68 offer, the Court held that the plaintiff "lacked any personal interest in representing others in this action."[38]

The Court declined to apply *Roper* and other class action mootness precedents on the ground that class actions were "fundamentally different" from collective actions, stating that "a putative class acquires an independent legal status once it is certified under Rule 23" that is "separate from" the named plaintiff's interest, whereas even a conditionally certified collective class has no such status.[39] Citing a pre-*Roper* decision, *Sosna v. Iowa*,[40] the Court stated that the concept of a certified class having a "separate legal status" was "essential" to its Rule 23 decisions and interpreted those precedents as having made the timing of a class certification motion dispositive to the mootness analysis: if the class representative's individual claim was mooted after filing for class certification, the class claims survived. But if the class representative's claim was mooted before filing for class certification, the class claims were moot.[41] Although that analysis is dictum given that *Symczyk* was not a Rule 23 case, it opened the door for the Court to adopt that dictum as law in future class action mootness cases.

The *Symczyk* majority did not mention (1) that the concept of a class having "separate legal status" was not part of Chief Justice Burger's rationale in *Roper* (indeed, it was not even essential in *Sosna*, which the *Symczyk* majority appears to have misread);[42] (2) that *Roper* held that a case is rendered moot in the Article III sense only by payment and satisfaction of a final judgment; or (3) that *Roper* held that named plaintiffs with moot individual claims retain standing to prosecute the class's claims so long as any issue remains alive in the case, not just the class certification issue.

When it finally addressed *Roper*, the Symczyk Court ignored the bulk of the decision and avoided the *stare decisis* impact of *Roper*'s ruling prohibiting "pick off" plays by calling it "dicta."[43] In a footnote, the Court minimized *Roper* altogether—including its conclusion that a class representative's interest in shifting attorneys' fees establishes a continuing personal stake in the class action—by questioning "its continuing validity."[44] *Symczyk* also stated that a damages action can never become "capable of repetition, yet evading review," finding, without elaboration (and without mentioning contrary Court precedents), that the mootness exception applies only when "inherently transitory" conduct prevents effective judicial review, not when a defendant's "litigation strategy" yields that result.[45] The Court reasoned that, unlike an injunctive action "challenging ongoing conduct," a damages claim for past wrongs "remains live" until it is resolved or time-barred.[46] The Court did not explain why the law should preserve judicial review for ongoing conduct but permit past misconduct to escape review.

Justice Kagan's dissent in *Symczyk* stated that unaccepted offers can never moot claims, under either Rule 68's terms or general contract principles.[47] She also stressed that the plaintiff still had an interest in obtaining relief for other employees on whose behalf she sued and that the majority's ruling undermined the purpose of FLSA collective actions, citing both *Roper*'s majority and concurring opinions.[48]

Campbell-Ewald Sidesteps *Roper*

Campbell-Ewald was a Telephone Communications Protection Act case against a marketing company that sent unsolicited text messages for the U.S. Navy. Before plaintiff Gomez moved for class certification, defendant Campbell-Ewald served an unaccepted Rule 68 Offer of Compromise to settle the case for three times the plaintiff's maximum statutory damages. The case proceeded through summary judgment, where Campbell-Ewald prevailed.[49] A month after Gomez appealed the entry of summary judgment, the Supreme Court decided *Symczyk*. Campbell-Ewald promptly moved to dismiss Gomez's appeal for lack of jurisdiction. The Ninth Circuit declined, relying on *Symczyk*'s conclusion that class and collective actions are "fundamentally different."[50]

Before the Supreme Court, both parties addressed whether class plaintiffs have a personal stake in representing others under *Roper*. Following *Symczyk*'s lead, Campbell-Ewald argued that before a class is certified, a class representative—just like an FLSA plaintiff before other claimants opt in—"'lacks any personal interest in representing others'" because no "others" with "separate legal status" have become parties to the action.[51] Gomez (and the United States as amicus curiae) argued that no offer for "complete relief" was made because Gomez's complaint requested class certification, sought classwide relief, a specific public injunction, attorneys' fees, and the right, under *Roper*, to spread his fees among other class members.[52] Gomez argued that he sued to represent others and would be an inadequate class representative under Rule 23 if he used his suit to wrest full recovery for himself while abandoning the class. His duty required the opposite: "[I]t is the very nature of *representative* litigation for the lead plaintiff to pursue recovery *for the* class—even if that comes at some cost or delay to his personal recovery."[53]

Invoking the purpose of Rule 23, Gomez also argued that TCPA class actions would become largely extinct and violations would go unpunished if the defendant's mootness theory prevailed, because few individuals would sue to recover the small statutory penalties.[54] Campbell-Ewald responded that allowing Gomez to represent the putative class despite having a moot individual claim "serves only the interests" of "the class action bar" in seeking "a windfall in fees by leveraging the threat of certification into a lucrative settlement."[55] Campbell-Ewald also suggested that upholding its "pick off" strategy "will not spell the end of class actions" because "[i]n many, if not most cases" defendants would be unwilling to pay complete relief, the damages would be uncertain, or "too many" victims would be "lining up for relief."[56]

During oral argument, several Justices queried what "complete relief" meant. Justices Kennedy and Alito focused on practical issues, such as whether an offer of complete relief from a notoriously deadbeat defendant or one near bankruptcy should also moot the case and if the case would be unmooted if the defendant defaulted on its offer to pay.[57]

In a potentially revealing exchange, Gomez's counsel argued that even a plaintiff who obtained his full individual

damages, fees, and costs and wrote his own injunction would still have a personal stake in being a class representative. Justice Breyer did not see why that "would be a good [argument]" because "if that person now has all he wants, he can't certify this as a class because he isn't harmed."[58] Justice Breyer went further: "The only thing that's left, is you'd like, says the plaintiff, class certification, or at least the lawyer would."[59] Chief Justice Roberts followed up by asking what "financial stake" such a plaintiff would have in continuing the litigation.[60] When Gomez's counsel referred to a class representative's incentive award, the Chief Justice retorted that "[s]o the argument is that an individual plaintiff who has gotten everything that he has asked for . . . is entitled to proceed with the litigation because he might get a bonus from a class action that he would like to lead."[61]

On January 20, 2016, the Court decided in Gomez's favor, affirming 6–3. Justice Ginsburg's five-member majority decision, which both Justices Kennedy and Breyer joined, was confined to the narrow issue presented—whether an unaccepted offer could moot a named plaintiff's individual claim—and is notable as much for what it omits as what it says. In finding that unaccepted offers cannot moot claims, the majority quoted the portion of Justice Kagan's *Symczyk* dissent that relied on Rule 68's terms and general contract principles and stated, "We now adopt Justice Kagan's analysis," but it did not mention Justice Kagan's reliance on *Roper* or even cite that case.[62] Nor did the majority discuss the most potentially consequential aspect of *Symczyk*'s dicta deconstructing *Roper*, namely, whether a class representative with moot individual claims still has an Article III stake in representing absent members of a putative class that is sufficient to avoid having the class's claims mooted.

Perhaps to satisfy members of her tenuously held majority, Justice Ginsburg kicked the bigger *Roper*-related questions down the road. Signaling the next "pick off" mootness scenario that might reach the Court, the majority reserved judgment on "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."[63]

Justice Thomas concurred in the judgment, stating that the "common-law history of tenders" rather than Rule 68 or modern contract principles provides the "sound basis" for concluding that mere unaccepted offers cannot moot cases.[64] He noted that the common law and statutory law of tenders since the Constitution's framing permitted plaintiffs to deny the sufficiency of *any* tender without divesting courts of jurisdiction, and stated the majority should have looked to this history to rule on "the broader issue" of whether an "offer of complete relief eliminated the case or controversy required by Article III."[65] Disagreeing with the Chief Justice, he said Article III's breadth cannot be defined without reference to the law of tenders. But he left open the prospect that he might eschew some of that history in a future case, stating: "[W]e need not decide today whether compliance with every common-law formality would be necessary to end a case."[66]

The three dissenters left no doubt about where they stood: Gomez's individual claim was moot because once he received an offer of full relief he no longer had "an injury in need of redress by the court."[67] Rejecting *Roper* and adopting *Symczyk*'s dicta without citing either case, the dissent stated that Gomez's class claims were likewise moot because "under this Court's precedents Gomez does not have standing to seek relief based solely on the alleged injuries of others, and Gomez's interest in sharing attorney's fees among class members or in obtaining a class incentive award does not create Article III standing."[68]

Practical and Policy Implications

For 125 years, the Supreme Court accepted that the "personal stake" required by Article III included non-financial incentives, such as a desire to obtain a public injunction or act as a private attorney general under Rule 23. However, given *Symczyk*'s dictum, the *Campbell-Ewald* argument, and the Chief Justice's dissent there, the Court may be primed to reduce the "personal stake" concept to a requirement that class representatives have a continuing personal "economic" or "financial" stake in a lawsuit to avoid dismissal of class actions. If so, the 1966 amendments to Rule 23, designed to enable victims of wrongdoing to help other victims recover their losses, will be eviscerated by the newly narrowed Article III. After the Court's next mootness case, federal courthouse doors may close on any plaintiff pursuing a classwide damages remedy if the defendant deposits full individual relief in court or a bank account before a class certification motion is filed.

The Chief Justice's view that no plaintiff has a cognizable legal interest in acting solely as an advocate for others overlooks a fundamental aspect of human nature.[69] To make it a centerpiece of mootness doctrine would artificially circumscribe Article III. Many people value public service above money and care more about advancing society than their bank accounts. Public interest groups, legal aid lawyers, and many class action lawyers and their clients litigate to help others,[70] frequently sacrificing or risking their own financial best interests. Mootness doctrine should not turn on the fiction that plaintiffs will fight to put a few dollars in their own pockets but not to benefit others, even when they accept a fiduciary duty to represent others under Rule 23. Should the Court adopt a rule limiting Article III's personal stake requirement to having a continuing economic or financial stake, it would in the eyes of many plaintiffs' advocates add fuel to Justice Kagan's warning that the Court's conservatives are motivated to restrict consumer class actions and undermine Rule 23.

Any suggestion that the Court's endorsement of pick-off maneuvers will not doom most class actions is dubious. Meritorious consumer cases involving small damages to thousands or millions of people could disappear by attrition. Defendants will not need global releases once the trickle of

willing class representatives abates and the statute of limitations nears.

Large antitrust damages actions could also decline. Faced with a strong complaint built on months of investigation and expensive expert analysis, a culpable defendant will have incentives to pick off each successive class representative. Paying treble damages to even a substantial percentage of the class is cheaper than paying them all, and the defendant can save millions in defense costs and will never have to disclose incriminating documents, face a classwide liability judgment, or perhaps even an order enjoining its anticompetitive conduct, unless the government steps in.

Some believe the *Campbell-Ewald* majority will not permit defendants to moot class actions without admitting liability,[71] but the Court did not so hold. Even if admissions become required, the Court could rule that only liability to the named plaintiff needs to be admitted since putative classes have no independent legal status under *Symczyk*. Such admissions may be admissible in future cases but would not necessarily be binding as to absent class members because mootness dismissals are not on the merits, making preclusion principles typically inapplicable.[72] While some consumer claims mooted out of federal court may be refiled in state courts without Article III standing requirements, that alternative will be unavailable as to federal antitrust claims and other cases where federal jurisdiction is exclusive.

Plaintiffs' lawyers will attempt creative ploys to avoid pick offs if the Court ultimately endorses a form of them, but each undoubtedly will be met by opposition. For example, the Seventh Circuit permits plaintiffs to file class certification motions simultaneously with their complaints and has suggested that district courts would abuse their discretion by not staying those motions pending class discovery,[73] but courts in other circuits may conclude that this practice is an impermissible end-run around Article III mootness principles. If plaintiffs allege their damages are indeterminable absent discovery, defendants will ask courts to accept defendants' own calculations behind their tenders when moving to dismiss. The Supreme Court should avoid engendering such collateral litigation by reaffirming *Roper* and honoring Rule 23's private attorney general paradigm in future class action mootness cases.

Conclusion

Symczyk used an FLSA case to narrow *Roper* artificially to its facts and undermine a century of Supreme Court precedent establishing that a private plaintiff, even after achieving full individual redress, can continue to represent the public interest and pursue the rights of others within the meaning of Article III. *Symczyk* thereby encouraged class action defendants to resurrect the pick-off maneuver that *Roper* forbade. If the Court ultimately holds that such a maneuver can moot putative class claims, it will cause many observers to conclude that its intent is to gut consumers' ability to pursue class actions as private attorneys general to seek redress under important federal and state laws. The Supreme Court has long recognized that human beings are often motivated to fight for others, not just themselves, and therefore that the Constitution's requirement that plaintiffs have a "personal" stake in a case is much broader than having an "economic" or "financial" stake. The Court should not hold otherwise when it decides sequels to *Campbell-Ewald*. ■

1 No. 14-857, 2016 U.S. LEXIS 846 (Jan. 20, 2016).

2 *Id.* at *15.

3 *Id.* at *19; *id.* at *38 n.1 (Roberts, C.J., dissenting).

4 133 S. Ct. 2304, 2320 (2013) (Kagan, J., dissenting).

5 445 U.S. 326, 327 (1980).

6 *See infra* notes 24–36 and accompanying text.

7 133 S. Ct. 1523 (2013).

8 *See infra* notes 37–47 and accompanying text.

9 133 S. Ct. at 1536 (Kagan, J., dissenting).

10 *Id.* at 1528 (citations and internal quotations omitted).

11 *See* Flast v. Cohen, 392 U.S. 83, 96–97 (1968) (quoting United States v. Fruehauf, 365 U.S. 146, 157 (1961)).

12 *Symczyk*, 133 S. Ct. at 1529.

13 *Id.* (citations and some internal quotations omitted).

14 *See* S. Pac. Terminal Co. v. ICC, 219 U.S. 498, 515 (1911).

15 *Symczyk*, 133 S. Ct. at 1529 (citations omitted).

16 166 U.S. 290, 308 (1897).

17 *Id.* at 308–09.

18 219 U.S. at 498, 515.

19 *Id.*

20 *Id.* at 516.

21 *Id.* at 514–15 (citations omitted).

22 *Id.* at 515.

23 *Roper*, 445 U.S. at 339 & n.9.

24 *Id.* at 327.

25 *Id.* at 331.

26 *Id.* at 332–33 (emphasis added).

27 *Id.* at 333.

28 *Id.*

29 *Id.* at 334; *see id.* at 334–35, 337 (discussing Elec. Fittings Corp. v. Thomas & Betts Co., 307 U.S. 241 (1939) (prevailing party that sought to reform judgment on appeal had Article III personal stake in deleting provision that could have an adverse *stare decisis* or collateral estoppel impact on that party "in some unspecified future litigation")).

30 *Id.* at 336.

31 *Id.*; *see id.* at 334 n.6.

32 *Id.* at 338–39; *see also id.* at n.9 ("A significant benefit to" class action plaintiffs "is the prospect of reducing their costs of litigation, particularly attorney's fees, by allocating such costs among all members of the class who benefit from any recovery.").

33 *Id.* at 339.

34 *Id.* at 338 n.9.

35 *Id.* at 341.

[36] 133 S. Ct. at 1526–27.

[37] *Id.* at 1528–29.

[38] *Id.*

[39] *Id.* at 1530 (citations omitted).

[40] Sosna v. Iowa, 419 U.S. 393 (1975).

[41] *Id.* at 1530–31 (citing *Sosna*, 419 U.S. at 399–402).

[42] *Sosna* involved a challenge to Iowa's one-year residency requirement for obtaining a divorce brought by a plaintiff who had satisfied that requirement by the time her appeal was heard. The Court held that the plaintiff had an Article III personal stake in the class's claims even though her individual claim was moot because members of the class had not yet satisfied the residency requirement and, as to them, the constitutionality of that requirement would evade review. Justice Rehnquist's majority opinion did say that upon certification the class "acquired a legal status separate from the interest asserted by the [plaintiff]" and that this "factor significantly affects the mootness determination." 419 U.S. at 399. But the Court then stated that "the rationale of *Dunn* [*v. Blumstein*] controls the present case." *Sosna*, 419 U.S. at 401. *Dunn* was a case where a named plaintiff with a moot individual claim who had never even moved to certify a class nevertheless retained standing to represent the purely putative class. *See* Dunn v. Blumstein, 405 U.S. 330 (1972), *aff'g on direct appeal* Blumstein v. Ellington, 337 F. Supp. 323 (M.D. Tenn. 1970) (three-judge panel). If certification of the class was the essential factor justifying the non-mooting of the class claims in *Sosna*, the Court would have held that *Dunn* was wrongly decided instead of citing it as controlling law. Read fairly, *Sosna*'s essential concept was that class claims should not be mooted after the named plaintiff's individual interest in an issue expires if absent class members still have an interest in litigating that issue. That concept reconciles perfectly with *Roper*, and as *Sosna*'s analysis shows, it applies equally to putative as well as certified classes.

[43] 133 S. Ct. at 1532.

[44] *Id.* at 1532 n.5 (citing Lewis v. Cont'l Bank Corp., 494 U.S. 472, 480 (1990) (stating, in a case involving a bank's mootness challenge to state banking regulations, that an "interest in attorney's fees is, of course, insufficient to create an Article III case or controversy where none exists on the merits of the underlying claim")).

[45] *Id.* at 1531. The Court overlooked that it was the defendant's conduct that caused the issue being litigated to evade judicial review in both *Trans-Missouri Freight Association* (defendants dissolved their cartel) and *Southern Pacific Terminal* (ICC issued short-term order), the seminal cases giving rise to the "capable of repetition, but evading review" exception.

[46] *Id.*

[47] *Id.* at 1533–34, 1536 (Kagan, J., dissenting).

[48] *Id.* at 1536.

[49] Gomez v. Campbell-Ewald Co., 768 F.3d 871, 873–74 (9th Cir. 2014); Brief for Petitioner at 6–7, Campbell-Ewald Co. v. Gomez, U.S. No. 14-857 (July 16, 2015) [hereinafter Campbell-Ewald Brief].

[50] *Campbell-Ewald*, 768 F.3d at 875–76.

[51] Campbell-Ewald Brief, *supra* note 49, at 8, 27–28 (quoting *Symczyck*, 133 S. Ct. at 1529) (other citations omitted).

[52] Brief for Respondent at 1, 4, 10–12, 18–20, 28, 33, Campbell-Ewald Co. v. Gomez, U.S. No. 14-857 (Aug. 24, 2015).

[53] *Id.* at 34.

[54] *Id.* at 37, 41–43.

[55] Reply Brief for Petitioner at 9, Campbell-Ewald Co. v. Gomez, U.S. No. 14-857 (Sept. 22, 2015).

[56] *Id.*

[57] Transcript of Oral Argument at 3–5, 14, 16–17, 27–30, Campbell-Ewald Co. v. Gomez, U.S. No. 14-857 (Oct. 14, 2015).

[58] *Id.* at 46–48.

[59] *Id.* at 50.

[60] *Id.* at 51.

[61] *Id.* at 52–53.

[62] *Campbell-Ewald*, 2016 U.S. LEXIS 846, at *13–19.

[63] *Id.* at *19.

[64] *Id.* at *24 (Thomas, J., concurring).

[65] *Id.* at *25–30.

[66] *Id.* at *31.

[67] *Id.* at *37–38 (Roberts, C. J., dissenting).

[68] *Id.* at *38 n.1 (citing Lewis v. Cont'l Bank Corp. and a non-class, standing case, Steel Co. v. Citizens for a Better Envt., 523 U.S. 83, 107 (1998)).

[69] *See* Maia Szalavitz, *Is Human Nature Fundamentally Selfish or Altruistic?*, TIME (Oct. 8, 2012), http://healthland.time.com/2012/10/08/is-human-nature-fundamentally-selfish-or-altruistic/; Dacher Keltner, *The Compassionate Instinct*, GREATER GOOD (Mar. 1, 2004), http://greatergood.berkeley.edu/article/item/the_compassionate_instinct/.

[70] *See, e.g.*, Jenna Greene, *Here's Why Plaintiffs Lawyers Deserve Those Fat Fees*, LAW.COM (Feb. 1, 2016), http://www.law.com/sites/articles/2016/02/01/heres-why-plaintiffs-lawyers-deserve-those-fat-fees/ ("As a class member, I care far less about collecting my $6 than sending a message to companies that they can't make stuff up and put it on their packaging.").

[71] Jay Edelson & Ryan D. Andrews, *Pick-Offs After* Campbell-Ewald*: Some Predictions*, LAW360 (Jan. 21, 2016).

[72] *See* Bank v. Spark Energy Holdings, 13-cv-6130, LLC, 2014 U.S. Dist. LEXIS 84493, at *7–22 (E.D.N.Y. June 20, 2014).

[73] Damasco v. Clearwire Corp., 662 F.3d 891, 896–97 (7th Cir. 2011), *overruled on other grounds by* Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015).