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No. 14-857

IN THE

Supreme Court of the United States

CAMPBELL-EWALD COMPANY,
Petitioner,
v.
JOSE GOMEZ,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC., AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

W. JAMES YOUNG
Counsel of Record
MILTON L. CHAPPELL
WILLIAM H. DUROSS, III
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Attorneys for Amicus Curiae National Right to Work Legal Defense Foundation, Inc.

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QUESTIONS PRESENTED

Amicus curiae addresses the following two questions:

1. Does a settlement offer of "complete relief" eliminate an Article III case or controversy and render the case moot?

2. If the answer to the first question is "yes," can a class-action defendant moot the entire case by offering "complete relief" only to the representative plaintiff and only on the representative plaintiff's individual claims?

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INTEREST OF THE *AMICUS CURIAE*

The National Right to Work Legal Defense Foundation, Inc.,[1] is a nonprofit, charitable legal aid organization providing free legal assistance to individuals whose rights are infringed by compulsory unionism arrangements. Since its founding in 1968, the Foundation has been the nation's leading litigation advocate against compulsory union fee requirements, and in seeking redress for violations against existing prohibitions on such requirements.

Currently, Foundation staff attorneys represent workers in more than one hundred federal, state, and administrative cases involving forced union fee requirements. Foundation attorneys have represented workers in almost all of the public-sector compulsory union fee cases that have come before this Court.[2] These include *Abood v. Detroit Board of Education*, 431 U.S. 209 (1977), *Teachers Local No. 1 v. Hudson*, 475 U.S. 292 (1986), *Lehnert v. Ferris Faculty Ass'n*, 500 U.S. 507 (1991), *Davenport v. Washington Education Assn.*, 551 U.S. 177 (2007), *Locke v. Karass*, 555 U.S. 207 (2009), *Knox v. SEIU, Local 1000*, 132 S. Ct. 2277 (2012), and *Harris v. Quinn*, 134 S. Ct. 2618 (2014); *cf. Ellis v. Railway Clerks*, 466 U.S. 435 (1984) (compulsory fee case under the Railway Labor Act), *Communications*

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

[2] *See* http://www.nrtw.org/en/foundation-cases.htm (last visited 30 Aug. 2015).

Workers of America v. Beck, 487 U.S. 735 (1988) (compulsory fee case under the National Labor Relations Act), *Marquez v. Screen Actors Guild*, 525 U.S. 33 (1998) (same), and *Air Line Pilots Ass'n v. Miller*, 523 U.S. 866 (1998) (compulsory fee case under RLA).

Knox, *supra*, and *Davenport*, *supra*, were both certified as class actions, and obtained relief for more than 42,000 and more than 10,000 public employees, respectively.[3] Furthermore, Foundation staff attorneys have represented or are representing classes of public employees in literally dozens of class-action cases to vindicate their existing rights violated under compulsory-unionism agreements. A small sampling of these cases includes *Damiano v. Matish*, 830 F.2d 1363 (6th Cir. 1987) (class of 200 Michigan state employees), *Hohe v. Casey*, 956 F.2d 399 (3d Cir. 1992) (more than 57,000 Pennsylvania state employees), *Knight v. Kenai Peninsula Borough School District*, 131 F.3d 807 (9th Cir. 1997) (reversing denial of class certification in two of three cases consolidated for decision, with classes of 500 and 165 Alaska teachers), *Reese v. City of Columbus*, 71 F.3d 619 (6th Cir. 1996) (2,000 municipal employees), *Bromley v. Michigan Education Ass'n*, 82 F.3d 686 (6th Cir. 1996) (reversing denial of class certification; 500 Michigan public-school teachers), *Cummings v. Connell*, 316 F.3d 886 (9th Cir. 2003) (37,000 California state employees), *Mitchell v. Los Angeles Unified School District*, 744 F. Supp. 938 (C.D. Cal. 1990), *rev'd on other grounds*, 963 F.2d 258 (9th Cir. 1992) (more than 10,000 Los Angeles teachers), and *Swanson v. University of Hawaii Professional*

[3] *Abood* and *Ellis* each were consolidations of two separate cases, one of which was a class action.

Assembly, 212 F.R.D. 574 (D. Haw. 2003) (1,100 public university professors).

The Foundation submits this brief to urge affirmance of the judgment of the United States Court of Appeals for the Ninth Circuit as to the first two questions presented, if the Court finds it necessary to reach them at all. The Foundation takes no position as to the third question presented, but respectfully suggests that resolution contrary to the position being urged by Respondent Jose Gomez ("Gomez") would moot consideration of the first two questions.

STATEMENT OF THE FACTS

Amicus adopts the Statement of the Facts and the Proceedings Below set forth in the Brief for the Respondent ("Resp. Br."), at 4-9.

SUMMARY OF ARGUMENT

The core issue posed by the first two Questions Presented is whether a defendant in a class action case can frustrate the remedial purposes of Rule 23's policies by picking off the named plaintiff to evade litigation of a claim that could otherwise award the full measure of relief sought for, and on behalf of, all of the defendant's victims. Where, as here, each individual claim is relatively small from an economic perspective, the class action device is a necessary and effective instrument to aggregate claims to render litigation economically and practically feasible for and on behalf of the victims. With these considerations in mind, Rule 68 offers of judgment should be barred in putative class actions—*i.e.*, prior to the determination of class status—as allowing them would permit defendants to frustrate the efficiencies and economies contemplated by Rule 23, and create insoluble ethical and fiduciary

conundrums for prospective class representatives and class counsel.

ARGUMENT

More than a century ago, Rule 23, Fed.R.Civ.P., established standards for the pursuit of collective actions in the Federal courts. *See, e.g.*, Kaplan, Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I), 81 Harv. L. Rev. 356, 380-86 (1967), *cited in Snyder v. Harris*, 394 U.S. 332, 342 (1969). The class action "is a procedural device . . . adopted with the goals of economies of time, effort and expense, uniformity of decisions, the promotion of efficiency and fairness in handling large numbers of similar claims." 41 McLaughlin on Class Actions, § 1:1 (11th ed.), *citing In re West Virginia Rezulin Litigation*, 214 W. Va. 52, 585 S.E.2d 52, 62 (2003); *see also Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004) ("'The class action is a *procedural* device intended to advance judicial economy by trying claims together that lend themselves to collective treatment'") (quoting *Southwestern Ref. Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000) (emphasis added).

This case concerns, *inter alia*, whether a mass wrongdoer may "pick off" a prospective class representative by making an offer of judgment to the named plaintiff who filed the class action, and doing so: (1) before consideration of whether class treatment is appropriate; (2) in a manner that offers relief only to *that* claimant; and (3) under circumstances that lead that plaintiff to reject the offer, specifically, by offering less than all of the relief sought, including relief for the class, in the Complaint. The Court is thus presented in the general class-action context a question which it

was unable to reach in *Genesis HealthCare v. Symczyk*, 133 S. Ct. 1523, 1528-29 (2013).[4]

Similarly, this case presents a rare opportunity to clarify what one district court has recently described as the "opaque" "nature and extent of the legal status of a class prior to certification." *Epps v. Wal-Mart Stores, Inc.*, — F.R.D. —, 2015 WL 2408630, at *7 (E.D. Ark. May 21, 2015). This Court has strongly suggested that plaintiffs owe a fiduciary duty to absent class members prior to class certification. *Standard Fire Ins. Co. v. Knowles*, 133 S. Ct. 1345, 1349 (2013), *citing with approval Back Doctors Ltd. v. Metropolitan Property & Cas. Ins. Co.*, 637 F.3d 827, 830-31 (7th Cir. 2011) (noting a class representative's fiduciary duty not to "throw away what could be a major component of the class's recovery"). This suggestion should be made explicit to address the ethical considerations raised by defendants' efforts to "pick off" named plaintiffs asserting class claims. Put simply, Rule 68 should not be available in class action cases prior to certification, because it creates irremediable conflicts at odds with the duties of class representative and class counsel during that pre-certification period, and could be an instrument fostering evils far outweighing its utility in other types of cases.

Indeed, the outcome suggested by Campbell-Ewald and its *amici* would incentivize two problematic outcomes. First, litigants would be encouraged to add class allegations to individual claims to extract individually lucrative settlements from defendants facing liability to large classes of grievants, without fear of

[4] *Genesis Healthcare* was presented in the related but distinguishable context of "collective actions" pursuant to section 16(b) of the Fair Labor Standards Act ("FLSA"), 29 U.S.C. § 216(b).

ethical or fiduciary restraints. Furthermore, defendants would be encouraged to negotiate "quickie" individual settlements in prospective class actions, shortchanging or ignoring completely the interests of absent prospective class members. Neither outcome serves the ends of justice. Explicit imposition of heightened duties whenever class allegations are raised is a necessary corollary to affirming a prospective class representative's continuing standing in the face of an effort to buy off his individual claim to defeat class treatment.

The dominant rule among a majority of circuits—that a class has sufficient legal status from the time that the complaint is filed so that a case or controversy exists even if the defendant offers full individual relief to the named plaintiff—is a compelling proposition that should be adopted by this Court for the reasons demonstrated below.

I. An Unaccepted Offer of Judgment and/or Settlement Offer Cannot Moot a Class-Action Case.

It cannot be gainsaid that there was never an accepted offer in this case, nor satisfaction and accord, because Gomez "refused to accept Campbell-Ewald's tender and, instead, insisted that he was entitled to litigate the class action." Pet. Brief at 2. Thus, Campbell-Ewald's argument is that its offer of judgment alone mooted Gomez's claim, along with the claims of the class in this case, even though judgment was never entered on the terms offered and Gomez did not receive any of the offered relief.

Such a result would turn long-settled mootness doctrine on its head. This Court recently reaffirmed that "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the

prevailing party." *Knox v. Service Employees Int'l Union, Local 1000*, 132 S. Ct. 2277, 2287 (2012) (citation and internal quotation marks omitted). Here, the District Court could still have granted Gomez "effectual relief." Indeed, it could still grant Gomez all of the relief he sought, including relief to the class. The offer *proposed* that the District Court grant him relief, but the court never did; instead, it dismissed his claims as barred by "derivative sovereign immunity." Resp. Br. at 9. And while Campbell-Ewald insists that, even if this ruling (reversed by the Ninth Circuit) is unsound, its individual Rule 68 offer and/or settlement offer mooted the case, Pet. Br. at 10, 11, 19-22, even though Gomez still has not received either a judgment or a single penny of relief for himself, or for the class.

The self-contradictory nature of Campbell-Ewald's argument in this regard is discussed in detail in Respondent's Brief at 13-17, and need not be repeated here. Briefly put, the notion that a Rule 68 offer or settlement offer can somehow moot a case is plainly inconsistent with the proposition that a court responds to an accepted Rule 68 offer by entering judgment on the terms specified therein. By hypothesis, a case cannot be moot—requiring dismissal—if a court retains the power to enter judgment.

This Court has never permitted a rejected Rule 68 offer to moot a class action. The closest it has come to doing so is in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326 (1980). But even there, the Court *entered* judgment in favor of the plaintiffs and tendered them relief, so this Court never reached the question of whether a mere offer of complete relief without judgment and tender of relief can moot a case. Indeed, in the class-action context, an offer of complete individual relief rarely, if ever, can fully satisfy the

class demands of the complaint, and a district court cannot force a plaintiff to accept a suboptimal settlement. As Justice Rehnquist explained in his *Roper* concurrence:

> The action is moot in the Art. III sense only if this Court adopts a rule that an individual seeking to proceed as a class representative is required to accept a tender of only his individual claims. So long as the court does not require such acceptance, the individual is required to prove his case and the requisite Art. III adversity continues. Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable.

445 U.S. at 341 (Rehnquist, J., concurring). This case is far stronger than *Roper*, in which "the District Court entered judgment in [plaintiffs'] favor, over [plaintiffs'] objection, and dismissed the action. The bank deposited the amount tendered into the registry of the court." *Id.* at 330 (majority opinion). Campbell-Ewald never tendered, and Gomez never received, anything.[5] The suggestion that this mooted his class claims, then, must be rejected.

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[5] Petitioner uses the term "tender" inaccurately in its Petition and Brief, attempting to fit the round peg of its actions into the square hole of the legal requirements for tender of actual financial relief. Thus, while it only "tendered an offer of judgment," Pet. at 5, and conditions its offer to "arrange for prompt payment" upon Respondent's acceptance, Pet. App. at 59a., it casually uses the word in its Brief, Pet. Br. at 2, 6, to suggest that its offer of a Rule 68 judgment and offer of settlement actually put the

II. Adoption of the Mootness-by-Offer-of-Complete-[Individual]-Relief Theory Would Allow Mass Wrongdoers to Frustrate Efforts to Obtain Relief Commensurate with Their Class-Wide Wrong.

From the earliest days of the Republic, this Court has recognized that "[i]t is a settled and invariable principle, that every right, when withheld, must have a remedy, and every injury its proper redress." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 147 (1803). The Rule 68 device utilized by Campbell-Ewald prior to determination of class certification is at war with this elementary principle of American jurisprudence in the context of this case.

Even if an unaccepted offer of judgment could moot a non-class action case, it does not moot this one, as it was brought by Gomez as a class action under Rule 23. Article III does not require district courts to dismiss class actions as moot where a defendant picks off the named plaintiff through a Rule 68 offer of judgment offering no relief whatsoever to the absent class members prior to the court's class determination. *County of Riverside v. McLaughlin*, 500 U.S. 44, 52 (1991) (recognizing circumstances where the fact "[t]hat the class was not certified until after the named plaintiffs' claims had become moot does not deprive [the Court] of jurisdiction."); *see also Roper*, 445 U.S. at 339 (allowing defendants to use Rule 68 to "buy off" or

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requested monetary relief into Gomez's hands. It did not, and it is disingenuous to contend before this Court that Campbell-Ewald "made [a] tender of complete relief." Pet. Br. at 11. Neither is it "tender of the relief sought," *id*. at 16, and therefore should not be confused with cases in which a defendant "tendered to the plaintiff a sum of money equal" to the judgment sought. *Id*. at 17.

"pick[] off" named plaintiffs before a class certification ruling could be obtained would be "contrary to sound judicial administration").

The Rule 68 offer here was used in a manner that this Court condemned in *Roper*. The Rule 68 offer did not resolve the class allegations, nor provide relief to the class sought. Gomez maintains a personal interest in the case proceeding as a class action. Therefore, Article III jurisdiction remains and this class action suit cannot be dismissed on Article III grounds.

A. A Putative Class Representative Cannot Ignore the Interests of the Class by Accepting an Offer which Fails to Provide Class-wide Relief.

Absent from the various analyses presented to the Court in the briefing thus far is discussion of the prospective or certified class representative's pre-certification duties to the class in the context of settlement offers which—while purportedly providing "complete relief" to the named plaintiff/class representative—provide lesser or no relief to absent class members.

This Court's established rule is that a class-action plaintiff and class counsel owe fiduciary duties to the absent class members, and these duties attach upon the filing of a class-action complaint. *Roper*, 445 U.S. at 331 (class representatives have a responsibility to "represent the collective interests of the *putative* class") (emphasis added); *Knowles*, 133 S. Ct. at 1349.[6] Numerous lower Federal courts have similarly described

[6] This principle is consistent with the principle that the filing of a class action complaint tolls the statute of limitations as to all of the potential members of the class. *Crown, Cork & Seal Co. v. Parker*, 462 U.S. 345, 353-54 (1983).

the relationship between class representative and absent class members as a "fiduciary" duty.[7] The existence of this duty even for aspiring class representatives alone would suggest that litigants alleging the existence of a class and seeking representative status are precluded from accepting settlement offers which provide relief only to themselves. And *Roper* anticipates justification for class treatment, as well:

> A significant benefit to claimants who choose to litigate their individual claims in a class-action context 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. Typically, the attorney's fees of a named plaintiff proceeding without reliance on Rule 23 could exceed the value of the individual judgment in favor of any one plaintiff. Here the damages claimed by the two named plaintiffs totaled $1,006.00. Such 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.

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[7] *In re Dry Max Pampers Litigation*, 724 F.3d 713, 718 (6th Cir. 2013); *Back Doctors Ltd.*, 637 F.3d at 830-31 (noting a class representative's fiduciary duty not to "throw away what could be a major component of the class's recovery"); *see also Martens v. Thomann*, 273 F.3d 159, 173 n.10 (2d Cir. 2001); *Duhaime v. John Hancock Mut. Life Ins. Co.*, 183 F.3d 1, 4 (1st Cir. 1999); *Diaz v. Trust Territory of Pacific Islands*, 876 F.2d 1401, 1408 (9th Cir. 1989); *Kirkpatrick v. J.C. Bradford & Co.*, 827 F.2d 718, 726 (11th Cir. 1987); *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1306 (4th Cir. 1978).

Roper, 445 U.S. at 338 n.9. On this basis alone, Gomez maintains a cognizable outcome in the litigation sufficient to retain standing under Article III.[8] "Complete relief" was never offered by Campbell-Ewald, was never conceded by Gomez.[9] Losing Article III standing on the basis advanced by Campbell-Ewald and its *amici* is inconsistent with this Court's prior decisions and the very purposes of allowing the class device.[10]

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[8] That the issue is allocating costs such as attorneys' fees is what distinguishes this case from those in which "the only controversy between the parties is a claim for attorney's fees." Brief of Washington Legal Foundation as *Amicus Curiae* in Support of Petitioner ("WLF Brief"), pp. 18-19, *citing Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990). In *Lewis*, the claim was not about "allocating such costs," but about an independent claim for appellate fees under 42 U.S.C. § 1988. Thus, WLF's reading of *Lewis* is flawed. This Court ordered that the appellate decision be vacated because "an event that mooted the controversy before the Court of Appeals' judgment issued. . . ." 494 U.S. at 483. However, this Court specifically observed that it was only the appeal that was mooted, and that the plaintiffs' status as "a 'prevailing party' in the district court, even though its judgment was mooted after being rendered but before the losing party could challenge its validity on appeal, is a question of some difficulty," and remanded the case for further proceedings. *Id*.

[9] In this sense, this case is distinguishable from *Genesis Healthcare*, where the plaintiff "conceded that petitioners' offer 'provided complete relief on her individual claims . . .'" 133 S. Ct. at 1532. Gomez has never conceded any such thing.

[10] That there is no statutory claim for attorneys' fees under the TCPA is of no moment to this analysis, since that is a question for the courts to decide. "Complete relief" for purposes of the mootness analysis is defined by what the plaintiff demands, not by what the defendant thinks the plaintiff is entitled to recover. *See Smith v. Greystone Alliance, LLC*, 772 F.3d 448, 451 (7th Cir. 2014) (Easterbrook, J.) ("[A] court must resolve the merits unless the defendant satisfies the plaintiff's demand. An offer that the

Roper's analysis is analogous to this Court's nominal damages jurisprudence. *Carey v. Piphus* explains that "[b]y making the deprivation of [constitutional] rights actionable for nominal damages without proof of actual injury, the law recognizes the importance to organized society that those rights be scrupulously observed[.]" 435 U.S. 247, 266 (1978). "*Carey* obligates a court to award nominal damages when a plaintiff establishes the violation" of a constitutional right. *Farrar v. Hobby*, 506 U.S. 103, 112 (1992). And, of course, "even an award of nominal damages suffices" to constitute "relief on the merits" and create a "material alteration of the legal relationship of the parties." *Buckhannon Bd. & Care Home, Inc. v. W.V. Dept. of Health & Human Res.*, 532 U.S. 598, 604 (2001) (quotation marks & citation omitted).

Carey and its progeny stand for the proposition that "a claim for nominal damages avoids mootness" in cases alleging a constitutional deprivation. *Morgan v. Plano Indep. Sch. Dist.*, 589 F.3d 740, 748 (5th Cir. 2009) (citing *Carey*); *accord, e.g., Utah Animal Rights Coal. v. Salt Lake City Corp.*, 371 F.3d 1248, 1257-58 (10th Cir. 2004) (same); *Bernhardt v. County of Los Angeles*, 279 F.3d 862, 871 (9th Cir. 2002) (same). That is so because "[t]he very determination that nominal damages are an appropriate remedy for a particular wrong implies a ruling that the wrong is worthy of vindication by an essentially declaratory judgment." 13A Charles Alan Wright *et al*., FEDERAL PRACTICE & PROCEDURE § 3533.3 (2d ed. 1984). Thus "[a] valid claim for nominal damages should avoid mootness." *Id*.

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defendant or the judge believes sufficient, but which does not satisfy the plaintiff's demand, does not justify dismissal.").

So it is here. Gomez is "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," *Roper*, 445 U.S. at 338 n.9, as available through the class action device. And because Gomez retains this interest notwithstanding Campbell-Ewald's offer of individual "complete relief," his claim is neither mooted by the offer, nor does Gomez lose his standing to pursue his claim on a class-wide basis.

Campbell-Ewald and its *amici* spend a great deal of time in their briefs casting aspersions on "a 'cottage industry of attorneys' . . . responsible for a rising tide of class action suits . . . turning an unwanted message into a potential for an attorney's fee or settlement bonanza." Pet. Br. at 4 (footnote omitted).[11] Given

[11] *See also* WLF Brief at 19 n.5 ("Lawsuits like these are almost always lawyer-driven, and a desire to generate fees for Gomez's attorneys is likely what prompted this litigation in the first place"); Brief for the National Black Chamber of Commerce as *Amicus Curiae* in Support of Petitioner, p. 3 (dismissing case as one among "hypothetical disputes implicating only the interest of plaintiffs' attorneys in extracting windfall fee awards"); Brief of DRI—The Voice of the Defense Bar and PSC—The Voice of the Government Services Industry as *Amici Curiae* in Support of Petitioner, p. 3 (referring to the "attorney-fee bonanza that class counsel seek"), *id*. at 16 (describing instant suit as representing "an effort to transmogrify the individual, modest, attorney-less small claims-court proceeding . . . into a gargantuan money-making machine for creative class-action lawyers who hope to cash-in on inadvertent mistakes made by companies trapped by the every-increasing [*sic*] challenges of complying with . . . federal privacy and financial protection statutes") (footnote and citations omitted); Brief of the Chamber of Commerce of the United States of America and Business Roundtable as *Amici Curiae* in Support of Petitioner, p. 2 (describing suit of this kind as "private lawsuits prosecuted not by plaintiffs with a personal stake in the outcome as required by Article III, but by lawyers in search of attorneys' fees"). Indeed, the Brief of the Consumer Data Industry Association

rather short shrift are the underlying allegations that drive any class-action lawsuit: wrongful conduct toward large groups of people. That point should not be lost among the *sturm und drang* directed toward attorneys specializing in class relief.

B. Campbell-Ewald's Offer Does Not Constitute "Complete Relief" for Absent Class Members.

The case was never moot because this is a "voluntary cessation" case. The injunctive relief sought below would have a continuing impact because Campbell-Ewald's offer of entry of a consent injunction (never actually entered) was little more than a promise not to violate, as to Gomez only, existing prohibitions against "spam," Resp. Br. at 29-30, leaving it free to engage in such conduct again at any time, and with no protection for absent class members. And "[i]t is well settled that 'a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice.'" *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 189 (2000) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). "[I]f it did, the courts would be compelled to leave '[t]he defendant . . . free to return to his old ways.'" *Id*.

Informed by that prospect, a "stringent" standard is applied to determine whether a defendant's voluntary cessation moots a case: "'A case might become moot if subsequent events made it *absolutely clear* that the allegedly wrongful behavior could not reasonably be

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as *Amicus Curiae* in Support of Petitioner is a virtual assault on "enterprising class action attorney[s]" generally. *Id*. at 14; *see also id*. at 4 (asserting factual conclusions about "Respondent's attorneys" unsupported by the record).

expected to recur.'" *Id*. (quoting *U.S. v. Concentrated Phosphate Export Ass'n*, 393 U.S. 199, 203 (1968)) (emphasis added). The advocate for a finding of mootness must demonstrate with absolute clarity that the behavior will not reoccur. *Id*.

That burden is "heavy." *U.S. v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953). It is not met, for example, where a city responds to litigation by repealing an objectionable ordinance, because "the city's repeal . . . would not preclude it from reenacting precisely the same provision if the . . . judgment were vacated." *City of Mesquite*, 455 U.S. at 289 & n.10.

Likewise, it is not met where a contractor alters its behavior after being hailed into court under similar circumstances: "The same concerns—the fear that a defendant would be 'free to return to his old ways,' and that he would have 'a powerful weapon against public law enforcement,' —dictate that we review the legality of the practice defended before the District Court." For this reason, this Court rejected a suggestion of mootness in *Hudson*, 475 U.S. at 305 n.14 (citation omitted).

Campbell-Ewald never met its "heavy" burden here, especially to the class. Indeed, Campbell-Ewald's arguments are reminiscent of those rejected in *City of Mesquite* and *W.T. Grant*. Campbell-Ewald argues that there is no reasonable probability that its conduct will recur because it was willing to enter into a "stipulation to an injunction." Pet. Br. at 7. But that sort of pious posturing does not make "absolutely clear" that the challenged conduct is a thing of the past. *Friends of the Earth*, 528 U.S. at 189. Far from it: for all that appears, Campbell-Ewald's behavior could change with the tides; it could revert to its old practices at

a moment's notice, literally with the stroke of a computer key, especially since the requested injunction has no application to the class.

Campbell-Ewald's soothing assurances thus are even less compelling than the city's repeal in *City of Mesquite*; there, at least, the city could take shelter in the presumption that government bodies act in good faith. *See Alden v. Maine*, 527 U.S. 706, 755 (1999). Campbell-Ewald is entitled to no such presumption. Its change in practices amounts merely to telling the court "that the [objectionable practices] no longer exist[] and disclaim[ing] any intention to revive them." *W.T. Grant*, 345 U.S. at 633. That does not suffice in *any* circumstance. Much less does it suffice where the defendant faces considerable economic liability and buys off prospective class representatives when hailed into court only to avoid a potential adverse ruling. As Wright & Miller observe: "A defendant's mootness argument is particularly suspect in face of . . . abandonment of its conduct mid-trial," and "[t]he effect of discontinuance may be affected by the defendant's continued assertion that the discontinued acts are lawful." *Wright & Miller* § 3533.5.

For these reasons, Campbell-Ewald cannot demonstrate that it is "*absolutely clear* that the allegedly wrongful behavior could not reasonably be expected to recur." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 66 (1987) (quoting *Concentrated Phosphate Export Ass'n*, 393 U.S. at 203) (emphasis added). The case is not moot, and was never mooted by Campbell-Ewald's offer of "complete relief" and injunction applicable only to the named plaintiff in a lawsuit seeking class-wide relief.

CONCLUSION

On the first two Questions Presented, this Court should affirm the judgment of the Ninth Circuit, and remand the case for further proceedings consistent with its decision.

Respectfully submitted,

W. JAMES YOUNG
Counsel of Record
MILTON L. CHAPPELL
WILLIAM H. DUROSS, III
C/O NATIONAL RIGHT TO WORK LEGAL DEFENSE FOUNDATION, INC.
8001 Braddock Road, Suite 600
Springfield, VA 22160
(703) 321-8510
wjy@nrtw.org

Attorneys for Amicus Curiae National Right to Work Legal Defense Foundation, Inc.

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