No. 18-1125

In The
Supreme Court of the United States

ZOCDOC, INC.,

Petitioner,

v.

RADHA GEISMANN, M.D., P.C.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

AMICUS CURIAE BRIEF OF ANTHONY MICHAEL SABINO IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

ANTHONY MICHAEL SABINO*
SABINO & SABINO, P.C.
92 Willis Avenue, 2nd Floor
Mineola, New York 11501
(516) 294-3199
Anthony.Sabino@sabinolaw.com

March 2019

*Counsel of Record

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

TABLE OF AUTHORITIES – Continued

Page

RULES

OTHER AUTHORITIES

INTEREST OF *AMICUS CURIAE*

This *amicus curiae* is a law professor with expertise in constitutional law, federal practice and procedure, and federal class actions. Furthermore, this *amicus curiae* often represents parties before the federal courts in controversies similar to the case at bar. This case addresses the actual case or controversy requirement of Article III, the proper utilization of Federal Rule of Civil Procedure 67, and the conduct of Rule 23 class actions. This *amicus curiae* has a professional and scholarly interest in the proper application and development of the law in these domains.[1]

STATEMENT

This *amicus curiae* respectfully adopts, in relevant part, the Statement of the Case set forth in the Petition for Certiorari filed by the Petitioner herein, ZocDoc, Inc. (hereinafter, "Petitioner"). Petition for a Writ of *Certiorari* at 3. This *amicus curiae* furthermore joins in Petitioner's Reasons for Granting the Writ. Petition for a Writ of *Certiorari* at 7.

[1] No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief, as required by Supreme Court Rule 37.2(a). Petitioner and Respondent consented to this filing.

SUMMARY OF ARGUMENT

Review should be granted for reason that the instant case is the ideal vehicle for the resolution of *Campbell-Ewald*'s unanswered question, and such review will fulfill the promise of guidance found in that same landmark. Furthermore, granting review of the instant case will assure the paramountcy of the Cases or Controversies Clause of Article III, correct the lower tribunal's misapprehensions of *Campbell-Ewald*, and, finally, end the broader internecine conflict embodied by the case at bar.

ARGUMENT

I. REVIEW SHOULD BE GRANTED FOR REASON THAT THE INSTANT CASE IS THE IDEAL VEHICLE FOR RESOLVING *CAMPBELL-EWALD*'S UNANSWERED QUESTION.

When a defendant, *inter alia*, deposits funds into a court registry, in an amount more than sufficient to accord a plaintiff complete relief on the latter's claim, is the underlying litigation no longer a "live" case, and therefore barred from continuing by the Cases or Controversies Clause of Article III? *See* U.S. Const., Art. III, § 2, cl. 1. The Court explicitly left the question open in *Campbell-Ewald v. Gomez*, 577 U.S. ___, ___, 136 S. Ct. 663, 672 (2016). Review should be granted for reason that the matter at hand represents the ideal vehicle for resolving that very question.

The relevant facts of *Campbell-Ewald* inform us that the petitioner there, in its original role as a defendant, had merely tendered a bare offer to the named plaintiff (the offer subsequently expiring of its own accord), and then did nothing further. *Id.*, 136 S. Ct. at 668. Writing for the majority, Justice Ginsburg was most emphatic in delivering the Court's salient holding: a defendant cannot moot a case with nothing more than an "unaccepted settlement offer." *Id.*, 136 S. Ct. at 672.

Significantly, the *Campbell-Ewald* majority declared that "[w]e need not, and do not, now decide" the outcome when "a defendant deposits the full amount" of all the relief the named plaintiff is entitled to with the trial court or another suitable intermediary, "and [that] court then enters judgment for the plaintiff in that amount." *Id.*, 136 S. Ct. at 672. The learned dissent was in full accord with respect to that discrete point. *Id*., 136 S. Ct. at 683 (Roberts, C.J., dissenting) (leaving for "another day" the outcome when a defendant "deposit[s] . . . offered funds with the District Court").

In the case at bar, the Petitioner in proceedings below bestowed upon the Respondent all the relief to which the latter could have possibly been entitled. The Petitioner did so by, among other things, depositing more than sufficient funds into the lower court's registry, then causing the clerk of that court to issue a check in payment to the Respondent. When the Respondent returned the check, the Petitioner did not reclaim the funds. The monies were left on deposit with the court,

accruing interest, and remain unconditionally available to the Respondent. *Geismann v. ZocDoc, Inc.*, 909 F.3d 534, 539 n. 4, 540 n. 5 (2d Cir. 2018). Simply put, the matter now before the Court neatly replicates the scenario forecast in *Campbell-Ewald*.

The instant case justifies the Court's patience, and recognizes its prescience. Review should be granted for reason that the case at bar represents the ideal vehicle for the resolution of *Campbell-Ewald*'s unanswered question.

II. REVIEW SHOULD BE GRANTED TO FULFULL THE PROMISE OF THE GUIDANCE FOUND IN *CAMPBELL-EWALD*.

Campbell-Ewald is more than a Cases or Controversies Clause landmark; it is a concise set of instructions for terminating litigation in a manner consistent with, if not in fact required by, the mandates of Article III. *See* A.M. Sabino & M.A. Sabino, "Rule 68 Offers of Judgment: Supreme Court Invites the Next Case," 255 *New York Law Journal* p. 4, cl. 4, p. 7, cl. 2 (March 1, 2016) ("*Rule 68 II*") (*Campbell-Ewald* provides "a blueprint" for determining that a matter "no longer meets the Article III requirement of being a 'live' case or controversy.").

The instant case provides an opportunity for the Court to fulfill the promise of *Campbell-Ewald*'s guidance. In the alternative, the case at bar provides the Court with the opportunity to modify or even disavow those directions, if it thinks such remediation is

necessary. Indeed, should the Court deem it wise to amend *Campbell-Ewald*'s pronouncements, the instant matter provides an ideal platform for doing so.

We commence with the concluding remonstrations found in the majority opinion. As detailed above, *Campbell-Ewald* most certainly does not decide the question of what results when a defendant deposits complete relief with the trial court, and the trial court then enters judgment in favor of the plaintiff. Justice Ginsburg forthrightly declared "[t]hat question is appropriately reserved for a case in which it is not hypothetical." *Campbell-Ewald*, *supra*, 136 S. Ct. at 672.

The *Campbell-Ewald* majority deliberately, and wisely, left that exact question unresolved, waiting for the day when the anticipated factual scenario would be at hand, and not merely conjectural. That day has now arrived. The instant case is an opportunity for the Court to fulfill the promise of the majority's forbearance in *Campbell-Ewald*.

Next, review should be granted to fulfill the promise of the dissent authored by Chief Justice Roberts. As joined by Justice Alito and the late Justice Scalia, that contrary opinion accurately relates how the holding of the *Campbell-Ewald* majority "does not say that *payment* of complete relief" would lead to an identical result, that of permitting the underlying litigation to continue. *Id.*, 136 S. Ct. at 683 (Roberts, C.J., dissenting) (emphasis in the original). Rather, the comprehensive dissent predicts that "the majority's analysis may have come out differently if Campbell had deposited

the offered funds with the District Court." *Id.* And, consonant with the learned majority, this dissent agrees that such a question is left for "another day – assuming there are other plaintiffs out there who . . . won't take 'yes' for an answer." *Id.*

The dissent of Chief Justice Roberts bears, in relevant part, striking similarities to the *Campbell-Ewald* majority opinion. Both writings explicitly leave open the question of what results when a defendant pays complete relief into court. Each opinion anticipates a future case wherein such circumstances actually exist, and are not merely hypothetical.

Here is where the two differ: whereas the *Campbell-Ewald* majority suggests the possibility of a different outcome, the dissent of Chief Justice Roberts can be read to fairly embrace the outright end of litigation, provided the defendant has made complete relief available to a plaintiff who, in the words of the Chief Justice, "won't take 'yes' for an answer." *Id*.

Much like the *Campbell-Ewald* majority opinion, the corresponding dissent holds promise for the resolution of the scenario the Court deliberately left unanswered some three years ago. The instant case embodies the very facts the Chief Justice's counterpoint deemed vital to answering the open question. As such, the case at bar provides the ideal vehicle for the Court to fulfill the promise set forth in that dissenting opinion.

Lastly, review should be granted to fulfill the promise of the separate dissent authored by Justice

Alito. The distinguishing feature of that contrary opinion is a succinct footnote, wherein the learned jurist first makes clear that the correct test is not that the underlying plaintiff accepts the proffered relief, but rather that the reluctant offeree "will *be able to* receive" the relief so offered. *Id.*, 136 S. Ct. at 683 n. 1 (Alito, J., dissenting) (emphasis in the original).

This companionable dissent undoubtedly emphasized the foregoing in order "to account for the possibility of an obstinate plaintiff who refuses to take any relief." *Id*. As so well put by Justice Alito, "[a] plaintiff cannot thwart mootness by refusing complete relief presented on a silver platter." *Id*.

The case at bar exemplifies the salient point of Justice Alito's dissent; an obstinate plaintiff cannot be permitted to reject full relief delivered upon a silver platter. The instant case is therefore the ideal vehicle for the Court to elevate Justice Alito's parenthetical to text, and thereby propagate its sound reasoning.

For all these reasons, review should be granted so the promise of *Campbell-Ewald*'s guidance can be fulfilled.

III. REVIEW SHOULD BE GRANTED SO THE COURT MAY ASSURE THE PARAMOUNTCY OF THE CASES OR CONTROVERSIES CLAUSE OF ARTICLE III.

Review should be granted so that the Court may affirm the paramountcy of Article III, precisely the

Cases or Controversies Clause found therein, in matters such as the case at hand.

Article III delimits the jurisdiction of the federal courts to actual cases or controversies, U.S. Const., Art. III, § 2, cl. 1, thereby restricting the authority of the federal courts to deciding the legal rights and liabilities of parties to so-called "live" controversies. *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 71 (2013) (citations and quotations omitted). The constitutional exercise of that jurisdiction is predicated upon a plaintiff possessing a legally cognizable interest or personal stake in the outcome of the litigation. *Id.* (citation and quotations omitted). "This requirement ensures that the Federal Judiciary confines itself to its constitutionally limited role of adjudicating actual and concrete disputes." *Id*. *See also Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180 (2000).

The Court has proclaimed that there is no principle more fundamental to defining the constitutional role of the federal judiciary in our tripartite system of government. *See Raines v. Byrd*, 521 U.S. 811, 818 (1997). "It is the necessity of resolving a live dispute that reconciles the exercise of profound power by unelected judges with the principles of self-governance." *Campbell-Ewald*, *supra*, 136 S. Ct. at 682 (Roberts, C.J., dissenting) (citation omitted).

In contradistinction, it is no less axiomatic that the Article III power may not be applied in the absence of a live case or controversy. Chief Justice Roberts

expounded upon this at length in his *Campbell-Ewald* dissent, first noting that it is for the courts, not complaining parties, to determine whether "a concrete case or controversy exists." *Id*. at 680. In the situation where the defendant is willing to give (let alone has delivered) complete relief to the plaintiff, "there is no case or controversy to adjudicate," and litigation must end. *Id*. at 682. As succinctly put in that contrarian opinion, "the federal courts exist to resolve real disputes, not to rule on a plaintiff's entitlement to relief already there for the taking." *Id*. at 678.

The case at bar accurately portrays the last mentioned. The Petitioner bestowed upon the Respondent all the relief to which the latter could have possibly been entitled. The Petitioner did so by, among other things, depositing more than sufficient funds into the lower court's registry, and then causing the clerk of that court to issue a check in payment to the Respondent. When the Respondent returned that check, the Petitioner did not reclaim the funds. To this day, these monies remain on deposit, *and* are even accruing interest. *Geismann*, *supra*, 909 F.3d at 539 n. 4, 540 n. 5.

Upon such facts, the lower tribunal's decision to permit litigation to continue is irreconcilable with the Article III precepts set forth above. If the reasoning of the appellate panel in the instant case is to be followed, litigants, not courts, would decide the extent of federal court jurisdiction, control the determination of whether or not a case or controversy was "live," and, most egregious of all, have the ability to ignore relief

"there for the taking." *Campbell-Ewald*, *supra*, 136 S. Ct. at 678 (Roberts, C.J., dissenting).

Review should be granted to assure the paramountcy of the Cases or Controversies Clause in matters such as the case at hand, and, furthermore, sustain the vitality and effectiveness of Article III's restraints upon the exercise of the judicial power.

IV. REVIEW SHOULD BE GRANTED SO THE COURT MAY CORRECT THE LOWER TRIBUNAL'S MISAPPREHENSION OF *CAMPBELL-EWALD*.

In the case at bar, the lower tribunal misapprehended the meaning and significance of *Campbell-Ewald*'s teachings. Review should be granted so the circuit court's mistaken reading may be corrected.

In the proceedings below, the circuit court declared that "[t]he deposit of funds in the district court registry, without more, leaves a plaintiff 'empty-handed' because the deposit alone does not provide relief." *Geismann*, *supra*, 909 F.3d at 541. The appellate panel further portrayed Rule 67 as nothing more than a bare mechanism for "safekeeping . . . disputed funds" during the course of litigation. *Id*. (citation and internal quotation omitted). *See* Fed. R. Civ. P. 67 ("Deposit into Court"). Finally, the lower tribunal relegated to an unobtrusive footnote a description of how the Respondent reacted to the availability of complete relief. *Id*. at 540 n. 5.

With respect, that interpretation is antithetical to the teachings of *Campbell-Ewald*, for the following reasons.

Campbell-Ewald "appropriately reserved" for another occasion the question of what results when "a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff." *Campbell-Ewald*, *supra*, 136 S. Ct. at 672. The clear implication of that language was that the Court would, in all likelihood, answer that query on the day it is presented as a fact, not a hypothetical. *Id*.

More to the point, the Court's explicit reservation of the pertinent question suggested, if not presaged, that a quite different result might obtain, once *Campbell-Ewald*'s speculations became reality. The circuit court below failed to grasp such implications. Review should be granted in order to correct that oversight.

Nor is it at all apparent that the lower tribunal took the full measure of *Campbell-Ewald*'s dissents. Taking the dissent of Chief Justice Roberts first, we remind that it robustly argued for a different outcome when a defendant actually deposits complete relief with the court below. *Id.*, 136 S. Ct. at 683 (Roberts, C.J., dissenting). Furthermore, that writing was openly critical of a plaintiff who "won't take 'yes' for an answer." *Id*. It is uncertain if the appellate panel took full cognizance of such remonstrations. Review should therefore be granted.

Next, there is a genuine question as to whether the alternative scenario posited by Chief Justice

Roberts was accorded proper weight by the lower tribunal. At least one commentator characterized the Chief Justice's counterpoint as a plainspoken invitation for a subsequent litigant to place before the Court a fact pattern conforming to the Chief Justice's dissent. *Rule 68 II*, *supra*, at p. 7, cl. 4-5. Given that the matter at hand more closely aligns with the Chief Justice's prediction than the original circumstances prevailing in *Campbell-Ewald*, review should be granted to assure that the lower tribunal properly compared the case at bar to *Campbell-Ewald*'s two distinct predicates.

Lastly, we contemplate in the same light as above the separate dissent of Justice Alito, as this additional counterpoint issues three warnings nearly identical to those posited by Chief Justice Roberts.

Justice Alito first contends that the true test in these situations is whether the complaining party is "*able to* receive" the complete relief offered, not whether a reluctant plaintiff actually does so. *Campbell-Ewald*, *supra*, 136 S. Ct. at 683 n. 1 (Alito, J., dissenting) (emphasis in the original). Next, the erudite dissent declares that unyielding complainants cannot unilaterally prolong litigation when "complete relief [is] presented on a silver platter." *Id*. Third, Justice Alito's dissent indicates that the courts cannot be dissuaded from a straightforward application of the Cases or Controversies Clause, even when confronted by "an obstinate plaintiff who refuses to take any relief." *Id*.

There is legitimate concern that the appellate panel did not accord full weight to the three points so strongly articulated in Justice Alito's dissent. Review should therefore be granted so the Court may set in counterpoise the decision below with Justice Alito's dissent in *Campbell-Ewald*, and, as necessary, either confirm or refute the former's fidelity to the latter's mandates.

Whether one considers *Campbell-Ewald*'s majority opinion and the accompanying dissents individually or as a whole, it is not at all clear that the lower tribunal accorded the Court's articulations their proper due. Review should be granted to address any inconsistency between the appellate court's reasoning and the proclamations of *Campbell-Ewald*.

Two ancillary points bear mentioning with respect to the lower tribunal's reasoning in the case at bar.

First, it is troubling that the appellate panel indicated that relief to the Respondent would not be complete unless it included "the additional award [the Respondent] hopes to earn by serving as the lead plaintiff for a class action." *Geismann*, *supra*, 909 F.3d at 543. Such a contention is contrary to the Court's recent confirmation that an interest in such further compensation, by itself, does not serve to satisfy the strictures of the Cases or Controversies Clause. *Genesis Healthcare Corp.*, *supra*, 569 U.S. at 78 n. 5, *citing Lewis v. Continental Bank Corp.*, 494 U.S. 472, 480 (1990) (quotation omitted).

Second, a portion of the lower tribunal's decision seemingly elevates Rule 23, the class action proviso, above its brethren. *Geismann*, *supra*, 909 F.3d at 543. *See* Fed. R. Civ. P. 23 ("Class Actions"). Generally speaking, nowhere in the text of the Federal Rules of Civil Procedure, the accompanying Advisory Notes or in the many judicial interpretations thereof is there any indication that Rule 23 enjoys a loftier position in the hierarchy of federal procedural mechanisms. Conversely, those same sources bear no indication that other provisos of the Federal Rules are subservient to Rule 23. Yet that is the effective result of the reasoning of the appellate panel in the matter at hand.

While review should be granted for the primary reasons set forth herein above, the two points last mentioned provide secondary, yet nonetheless important, reasons to grant review of the case at bar.

V. REVIEW SHOULD BE GRANTED SO THE COURT MAY BRING AN END TO THE INTERNECINE CONFLICT EMBODIED IN THE CASE AT BAR.

While the precise focus of the instant case is the interplay between the Cases or Controversies Clause and Rule 67, it cannot be denied that the matter at hand encompasses a larger and more divisive controversy. Review should be granted in order to end this internecine conflict.

Before the case at bar added Rule 67 to an already volatile mix, there was a great deal of contentiousness

over the applicability of Federal Rule of Civil Procedure 68 in Rule 23 class litigation. As is well known, the first regulates procedures for making offers of judgment, while the second sets forth detailed rules for the conduct of class actions. *See*, *respectively*, Fed. R. Civ. P. 68 ("Offer of Judgment") *and* Fed. R. Civ. P. 23.

This deep division was most evident where defendants sought to employ Rule 68 to resolve class claims instituted pursuant to the Telephone Consumer Protection Act, *see* 47 U.S.C. § 227, *et seq.*, the same statutory body undergirding the instant case. *See* A.M. Sabino & M.A. Sabino, "Applying Rule 68 on Offers of Judgment to Class Actions," 253 *New York Law Journal* p. 4, cl. 4, cl. 5 (June 1, 2015) ("*Rule 68 I*") (highlighting "[t]he collision amongst the . . . trial courts . . . where defendants have sought to employ Rule 68 within the context of Rule 23 class actions").

To be sure, Rule 68 is not, strictly speaking, part of the Questions Presented in the matter at hand. *See* Petition for *Certiorari* at i. Nonetheless, its presence is felt, if for no other reason than the lower tribunal's discussion of the procedural history of the instant case, wherein the Rule 68 aspect played a significant role. *Geismann*, *supra*, 909 F.3d at 538-59.

What is undeniable is the interrelationship of Rule 23 to the Cases or Controversies Clause question at the heart of the case at bar. After all, the Respondent is most insistent its claims herein be litigated on behalf of a class, albeit a class yet to be certified. *Id*. at 538, 543.

Determining whether or not a "live" case or controversy is extant in the matter at hand shall, in turn, append a new permutation to Rule 23, a proviso which irrefutably plays a significant role in federal litigation. *See generally Wal-Mart v. Dukes*, 564 U.S. 338 (2011). The instant case therefore holds far-reaching implications for the constancy and relative high stakes of Rule 23 class litigation, cases which are routinely prosecuted across a broad swath of federal statutes, including the statutory regime underlying the instant matter.

In truth, the matter at hand is but the latest iteration of the same, longstanding disagreements exposited in earlier cases, *see generally Rule 68 I* (analyzing the plethora of earlier, conflicting opinions), merely with the addition of the Rule 67 aspect to the pre-existing clash of Rules 68 and 23. The most significant part of this evolution is that the matter now presents itself to the Court in the new light bestowed by *Campbell-Ewald*.

Review should be granted so the Court may end the internecine conflict exemplified by the case at bar, and with *Campbell-Ewald* serving as the appropriate touchstone for bringing this fractious debate to a just end.

CONCLUSION

Respectfully, for all the reasons set forth above, the Petition for a Writ of *Certiorari* should be granted.

Respectfully submitted,

ANTHONY MICHAEL SABINO*
SABINO & SABINO, P.C.
92 Willis Avenue, 2nd Floor
Mineola, New York 11501
(516) 294-3199
Anthony.Sabino@sabinolaw.com

March 2019

**Counsel of Record*