THE STRATEGIC MOOTNESS GAP

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There is a gap in mootness doctrine that allows defendants to strategically "moot" their way out of class litigation. Before a class is certified, a defendant can resolve the named plaintiff's individual claim and then argue there is nothing left to litigate. This tactic, often referred to as "picking off" or "buying off" the plaintiff, can kill a class action before it begins, leaving systemic misconduct unchallenged and the broader class without recourse. Courts and scholars have long recognized this problem. But their responses have remained too narrow and too improvised to address the broader doctrinal opening that makes pick-offs possible in the first place.

This Article provides a comprehensive framework for understanding and responding to picking off. First, it identifies the gap in mootness doctrine—what this Article calls the "strategic mootness gap"—that leaves courts without a principled basis for responding to pick-offs even when they recognize them for what they are. Second, it maps the strategic mootness gap, examining not just the forced monetary payments that dominate existing scholarship but also cases featuring injunctive remedies and settlement offers that are "too good to refuse."

Finally, this Article proposes a solution: a "picking off" exception to mootness that addresses defendant-driven conduct which undermines the class certification process. This exception provides courts with an analytical framework for identifying when individualized relief improperly forecloses class treatment, while preserving space for legitimate early dispute resolution.

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INTRODUCTION

Consider the following scenario: A married couple is trying to settle in the United States.[1] Only one spouse is a U.S. citizen.[2] They apply for a family visa—a pathway to permanent residency for the noncitizen spouse—and wait almost two years without receiving a decision.[3] After hearing stories from other couples experiencing the same delay, they suspect discrimination by the local immigration office.[4] They join with other couples to file a class action lawsuit, alleging unlawful and discriminatory delays in visa adjudication.[5]

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1. This scenario mirrors the facts of Cruz v. Farquharson, 252 F.3d 530, 531–32 (1st Cir. 2001).

2. Id.

3. See id. (describing family visas, or "immediate relative" visa petitions, as a request for "permanent residence in the United States").

4. Id. at 532.

5. Id.

Then, just weeks after the lawsuit is filed, the government locates and approves each couple's application, resolving years of unexplained delay with sudden dispatch.[6] The government then moves to dismiss the case as moot, insisting the couples no longer have a personal stake in the outcome. The couples and their lawyers are certain that others continue to face delays. They oppose the government's motion and move for class certification.[7] The question is: Should the court allow the class claims to proceed or dismiss the entire case as moot?

Under current Supreme Court doctrine, nothing stands in the way of dismissal. The traditional mootness exceptions—the "capable of repetition yet evading review" exception[8] and voluntary cessation[9] exception—do not apply. Both require some possibility that the plaintiff will again face the challenged harm.[10] But since these couples are on track for permanent residency, they are unlikely to encounter future visa delays. The class action exception, which lets class claims continue even if the lead plaintiff's case becomes moot, applies only after a class is certified.[11] Because class certification has not occurred, this exception offers no protection.

For proposed but not-yet-certified class actions, only one exception might save the class claims: the inherently transitory exception. This lesser-known exception allows a plaintiff with a moot claim to continue seeking class certification if: (1) the claim is so fleeting that no named plaintiff could maintain it long enough for certification and (2) there is a constant class of persons suffering the deprivation alleged by the plaintiff.[12] While this exception may appear to fit the couples' situation, a crucial limitation exists: The Supreme Court has signaled the exception applies only to claims that naturally expire—not to those deliberately mooted through litigation tactics.[13] Here, the couples' claims did not naturally lapse; they were (seemingly) extinguished by the government's

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6. Id.

7. Id.

8. See Erwin Chemerinsky, Federal Jurisdiction § 2.5.3 (9th ed. 2025) [hereinafter Chemerinsky, Federal Jurisdiction] (internal quotation marks omitted) (describing this exception as "[p]erhaps the most important exception to the mootness doctrine").

9. See id. at 139–40 (discussing voluntary cessation).

10. See, e.g., Fed. Bureau of Investigation v. Fikre, 144 S. Ct. 771, 777–79 (2024) (highlighting the possibility of recurrence in a voluntary cessation case); Roe v. Wade, 410 U.S. 113, 125 (1973) (describing the possibility of recurrence in a "capable of repetition, yet evading review" case (internal quotation marks omitted) (quoting Southern Pac. Terminal Co. v. Interstate Com. Comm'n, 219 U.S. 498, 515 (1911))).

11. Sosna v. Iowa, 419 U.S. 393, 399 (1975); see also Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.5 (discussing mootness in class actions).

12. Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975); *Sosna*, 419 U.S. at 402 n.11. But see Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.5 (treating *Gerstein* as an application of the Court's "flexible approach to mootness doctrine in class action suits" rather than as establishing a distinct exception).

13. Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76–77 (2013).

intentional decision to resolve the plaintiffs' cases just after the lawsuit was filed. As a result, the litigation might end, not because the alleged systemic misconduct has stopped, but because the government mooted the named plaintiffs' claims just in time to avoid judicial scrutiny of its broader practices.

This scenario illustrates what this Article calls the "strategic mootness gap." In this Article's framework, mootness has two species. Mootness can occur naturally ("inherent mootness") or through deliberate action ("strategic mootness").[14] It also can arise in different procedural contexts—in individual cases, precertification class actions or postcertification class actions. These distinctions interact, and for most of their intersections, mootness doctrine has a response. But one intersection remains conspicuously unaddressed: strategic mootness in precertification class actions. This gap effectively allows defendants to immunize themselves from class liability by selectively resolving individual claims before class certification.

The strategic mootness gap in Supreme Court mootness exception doctrine can be represented in a simple chart:

14. This Article is not the first to distinguish between inherent and strategic mootness. Matthew Hall made the distinction in *The Partially Prudential Doctrine of Mootness*, an article that sought to explain the theoretical underpinnings of mootness doctrine at large. See Matthew I. Hall, The Partially Prudential Doctrine of Mootness, 77 Geo. Wash. L. Rev. 562, 577, 580 (2009) (discussing the distinct problems of "inherently short-lived cases" and "insincere reform"). The focus of this Article is different. Rather than delving deeply into mootness theory, this Article uses the inherent–strategic distinction to identify and address a gap in mootness exception doctrine.

FIGURE 1. MOOTNESS EXCEPTIONS AND THE STRATEGIC MOOTNESS GAP

	Inherent Mootness	Strategic Mootness
Individual Action[15]	The case is not moot if the claim is *capable of repetition yet evading review.* *Example:* Pregnancy litigation[16]	The case is not moot if the defendant *voluntarily ceased* the challenged activity, unless the defendant can prove complete eradication of the alleged violation's effects and no reasonable expectation of recurrence. *Example:* Individual challenge to placement on the No-Fly List[17]
Precertification Class Action	The proposed class claims are not moot if the claim is *inherently transitory.* *Example:* Pretrial detention conditions litigation[18]	**The strategic mootness gap**
Certified Class Action	Class action exception[19]	Class action exception *or* Settlement approval under Federal Rule of Civil Procedure 23(e)

This Article identifies and addresses the strategic mootness gap. This examination arrives at a critical moment as recent developments have narrowed the procedural tools available for securing structural and systemic relief. Just last term, in *Trump v. CASA*, the Supreme Court sharply restricted universal injunctions, placing renewed weight on the class action as the central vehicle for nationwide remedies.[20] Yet the path to class certification has grown longer and more demanding as courts have imposed heightened scrutiny and more rigorous evidentiary

15. A non-solid line separates the individual and precertification-context exceptions because individual exceptions can still apply in the precertification context. If a plaintiff's claim does not fall within any individual exception, the court must then consider the precertification exception(s).

16. See Roe v. Wade, 410 U.S. 113, 125 (1973).

17. See Fed. Bureau of Investigation v. Fikre, 144 S. Ct. 771, 775, 777–79 (2024).

18. See Gerstein v. Pugh, 420 U.S. 103, 110 n.11 (1975).

19. See Sosna v. Iowa, 419 U.S. 393, 399 (1975).

20. 145 S. Ct. 2540, 2548 (2025).

requirements.[21] While some cases challenging uniform policies may still proceed quickly,[22] many class actions now require extensive discovery before issuing a certification ruling.[23] In this environment, what happens in the lead-up to class certification can make or break the possibility of aggregate relief.[24] If defendants can end a case during the

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21. The class action retrenchment has been well documented. See, e.g., Stephen B. Burbank & Sean Farhang, Class Actions and the Counterrevolution Against Federal Litigation, 165 U. Pa. L. Rev. 1494, 1517–28 (2017) (describing the recent class action retrenchment by the Roberts Court); Erwin Chemerinsky, Closing the Courthouse Doors, 90 Denv. U. L. Rev. 317, 318 (2012) (arguing that a series of the Supreme Court's class action decisions were all about "closing the courthouse doors"); Myriam Gilles, Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action, 104 Mich. L. Rev. 373, 380 (2005) ("Mass tort class actions represent an early casualty in the shift of judicial attitudes against collective litigation activity in general . . . ."); Robert H. Klonoff, The Decline of Class Actions, 90 Wash. U. L. Rev. 729, 731 (2013) (arguing that "[n]umerous courts have become skeptical about certifying class actions"); Suzette M. Malveaux, Class Actions, Civil Rights, and the National Injunction, 131 Harv. L. Rev. Forum 56, 59 (2017), https://harvardlawreview.org/wp-content/uploads/2017/12/vol131_Malveaux.pdf [https://perma.cc/S4XK-72XT] (noting that "the Court's contemporary jurisprudence has made it more difficult for litigants challenging discrimination to act collectively"); David Marcus, The Public Interest Class Action, 104 Geo. L.J. 777, 789–95 (2016) (examining a new and hostile era for the class action); Arthur R. Miller, The Preservation and Rejuvenation of Aggregate Litigation: A Systemic Imperative, 64 Emory L.J. 293, 296–98 (2014) (describing a trend toward intensified scrutiny of class certification requests); A. Benjamin Spencer, Class Actions, Heightened Commonality, and Declining Access to Justice, 93 B.U. L. Rev. 441, 487 (2013) (explaining that "heightened commonality nicks away at access" to justice).

22. See David Marcus, The Class Action After *Trump v. CASA*, 73 UCLA L. Rev. Discourse 2, 18 (2025), https://www.uclalawreview.org/the-class-action-after-trump-v-casa/ [https://perma.cc/J24S-DXX2] (explaining that although class certification has generally become more protracted, challenges to uniform policies alleged to be categorically unlawful do not demand the same extensive evidentiary showings).

23. Id.; see also Elizabeth J. Cabraser, The Class Abides: Class Actions and the "Roberts Court," 48 Akron L. Rev. 757, 769 (2015) (describing how "the Rule 23 determination" has been pushed "ever-closer to trial"); Suzette M. Malveaux, The Power and Promise of Procedure: Examining the Class Action Landscape After *Wal-Mart v. Dukes*, 62 DePaul L. Rev. 659, 670 (2013) [hereinafter Malveaux, Power and Promise] (noting that the judicial resolution of merits questions during the certification process results in a more burdensome and costly period of discovery); The Bitter and Sweet of the *Wal-Mart/Comcast/Halliburton* Triumvirate: More Grounds for Defeating Class Certification, but More Exposure to Discovery, Jones Day (Jan. 2015), https://www.jonesday.com/en/insights/2015/01/the-bitter-and-sweet-of-the-iwalmartcomcasthalliburtoni-triumvirate-more-grounds-for-defeating-class-certification-but-more-exposure-to-discovery [https://perma.cc/YV8F-4E8X] ("To date, most courts confronting class discovery issues have expanded the scope of plaintiffs' precertification discovery to include merits-based inquiries.").

24. See, e.g., Mila Sohoni, *Trump v. CASA* and the Future of the Universal Injunction, SCOTUSblog (July 2, 2025), https://www.scotusblog.com/2025/07/trump-v-casa-and-the-future-of-the-universal-injunction/ [https://perma.cc/FW6P-7PD2] ("Another important boundary to Friday's decision is that the court does not revisit the federal courts' power to issue preliminary injunctions that protect putative classes—that is, classes that are not yet certified."); Steve Vladeck, 162. What Does the Birthright Citizenship Ruling Portend?, One First (June 27, 2025), https://www.stevevladeck.com/p/162-what-does-the-birthright-citizenship [https://perma.cc/JZB6-62MM] ("[T]he viability of this alternative legal

precertification window, they can preempt the very mechanism *CASA* identified as the legitimate procedural vehicle for broad relief.[25]

The stakes come into sharper focus when one recalls what class litigation is uniquely positioned to achieve. Class actions serve as a crucial equalizer in the legal system. They empower individual plaintiffs, particularly those with limited resources, to join forces, share costs, and unite against bigger, better-funded defendants.[26] For defendants, a class action poses a significant threat. A minor and inconsequential claim in an individual lawsuit can transform into a larger, more visible, and more expensive matter when pursued as a class action.[27] Defendants therefore are highly motivated to end cases *before* they are certified as class actions.[28] If a defendant can evade a class action altogether by promptly addressing the grievances of a few individual plaintiffs, why wouldn't it?

The strategic mootness gap empowers defendants to take advantage of the unequal playing field characteristic of the precertification stage. By "picking off" or "buying off" the named plaintiffs before a class is formally certified, a defendant can sidestep judicial review of its actions and avoid class-wide liability for its wrongdoing. The strategic mootness gap thus fosters improper gamesmanship, generates inefficient case-by-case adjudication, allows systemic harms to go unaddressed, and

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procedure for blocking federal policies on a nationwide basis really depends upon just how available nationwide class actions turn out to be in practice—not just in general, but at the *outset* of litigation, as well.").

25. In addition to *CASA*, another case decided last term may have signaled judicial appetite for addressing parts of the strategic mootness gap. In *A.A.R.P. v. Trump*, the Court confirmed that courts may protect absent class members before class certification through classwide preliminary injunctive relief. 145 S. Ct. 1364, 1369–70 (2025). In doing so, the Court explicitly rejected the government's attempt to defeat class treatment "by promising . . . to treat named plaintiffs differently" from absent class members. Id. While *A.A.R.P.* addressed a distinct procedural question involving a remedy not available in every case, the Court's reasoning speaks directly to the concern animating this Article: that defendants should not be permitted to manipulate the precertification period to avoid classwide accountability.

26. See, e.g., Catherine Fisk & Erwin Chemerinsky, The Failing Faith in Class Actions: *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion*, 7 Duke J. Const. L. & Pub. Pol'y (Special Issue) 73, 74–76 (2011) ("[C]ourts and legislatures developed the class action as a procedural device to protect individuals from exploitation by large entities."); Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9 Law & Soc'y Rev. 95, 143 (1974) (explaining that the class action is a device to raise the stakes for defendants and move claimants into a position where they enjoy similar strategic advantages); see also Troy A. McKenzie, "Helpless" Groups, 81 Fordham L. Rev. 3213, 3213 (2013) (noting the role of the "helpless group" in the history of modern class litigation).

27. See Myriam Gilles & Gary B. Friedman, Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers, 155 U. Pa. L. Rev. 103, 105–07 (2006) (arguing that deterrence of wrongdoing is a more important goal than compensation).

28. See Robin D. Adelstein & Eliot Fielding Turner, US: Settling Class Actions, *in* The Settlements Guide 79, 80 (Mark H. Hamer ed., 2021) (describing class certification as "a natural inflection point in most class actions").

prevents courts from settling important legal questions. And by allowing defendants to exploit the pre–class certification power imbalance, the gap perpetuates disparities in access to justice that the class action should be uniquely positioned to confront. Ultimately, the strategic mootness gap undermines one of the most powerful procedural tools that small plaintiffs have to address exploitation by larger defendants.[29]

To be sure, some may regard this critique of the strategic mootness gap as rooted in a "romantic" image of class action litigation.[30] Certainly, not every class lawsuit is a David and Goliath story. The anti–class action narrative emphasizes that, at least in some cases, class actions are driven by well-funded lawyers more interested in their profits and reputations than in client welfare.[31] Many named plaintiffs, for their part, are rationally uninterested in the long haul of a class action.[32] A plaintiff with a small damages claim (typical of an aggregated-damages class action) has little motivation to continue a case after their own has been remedied.[33] And a plaintiff seeking injunctive relief (typical of an injunctive civil rights class action) may be desperate to protect their own well-being over pursuing some benefit for the greater good.[34] If a defendant decides to remedy a plaintiff's individual claim, many plaintiffs would readily and rationally walk away from further litigation.

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29. See Fed. R. Civ. P. 23 (authorizing class actions where individual joinder is impracticable and collective litigation is superior to case-by-case adjudication); see also Myriam Gilles, Class Warfare: The Disappearance of Low-Income Litigants From the Civil Docket, 65 Emory L.J. 1531, 1535 (2016) (arguing that "[f]or low-income groups in particular, aggregating claims has provided significant access to justice").

30. See Linda S. Mullenix, Ending Class Actions as We Know Them: Rethinking the American Class Action, 64 Emory L.J. 399, 406–17 (2014) [hereinafter Mullenix, Ending Class Actions] (contrasting the class action's "romantic narrative" with its "darker counternarrative").

31. See, e.g., John C. Coffee, Jr., The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U. Chi. L. Rev. 877, 882–83 (1987) (describing "opportunistic" behavior by attorneys); Mullenix, Ending Class Actions, supra note 30, at 413–17 (describing class action litigation's defense-side narrative).

32. See John C. Coffee, Jr., Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation, 100 Colum. L. Rev. 370, 425 (2000) (discussing "rationally apathetic" class members). It should be noted that recent scholarship has identified the emergence of more "participatory class actions," largely driven by the fact that class actions are increasingly centralized in multidistrict litigation proceedings. Elizabeth J. Cabraser & Samuel Issacharoff, The Participatory Class Action, 92 N.Y.U. L. Rev. 846, 850–51 (2017).

33. See, e.g., Maureen Carroll, Class Action Myopia, 65 Duke L.J. 843, 861 (2016) (discussing economic incentives in aggregated-damages class actions).

34. See, e.g., Derrick A. Bell, Jr., Serving Two Masters: Integration Ideals and Client Interests in School Desegregation Litigation, 85 Yale L.J. 470, 471–72 (1976) (describing tension between individual clients' interests in educational quality and lawyers' commitment to integration as serving the greater good).

What a plaintiffs' lawyer might condemn as a strategic "picking off" could be viewed by a named plaintiff as simply "making whole."[35]

Despite this complexity, the strategic mootness gap has gone underexamined. Scholars and courts have long recognized the phenomenon of defendants "picking off" named plaintiffs to avoid class liability.[36] But much of the existing scholarship treats the pick-off as a narrow procedural problem rather than a structural vulnerability that cuts across precertification class litigation broadly.[37] Recent scholarship has also examined the government's distinctive ability to moot individual claims, often in contexts in which defendants can unilaterally end litigation.[38] But this work largely overlooks how these dynamics operate in the class action context—where strategic mooting can systematically prevent class certification. This Article builds on both bodies of work to address strategic mootness as a doctrinal gap: one that allows defendants to end cases before courts can determine whether class treatment is appropriate.[39]

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35. Wilson v. Gordon, 822 F.3d 934, 959–60 (6th Cir. 2016) (Sutton, J., dissenting).

36. See Samuel Issacharoff & Peter Zimroth, An Oral History of Rule 23: An Interview With Professor Arthur Miller, 74 N.Y.U. Ann. Surv. Am. L. 105, 107 (2018) (describing the development of Rule 23(b)(2) itself as a response to the "pick-off-the-plaintiff" problem). The Advisory Committee on Civil Rules has also discussed the pick-off problem. See infra sections III.A.2, IV.B (discussing judicial and rulemaker responses to the pick-off problem).

37. See, e.g., Joseph M. Hnylka, Continuing to Litigate After You Have Won: Courts Defy Article III to Avoid Mooting TCPA Class Actions, Despite Defendants' Rule 68 Offers of Complete Relief, 64 Drake L. Rev. 381, 391–95 (2016) (discussing Rule 68 offers of judgment); David Hill Koyzka, Note, Preventing Defendants From Mooting Class Actions By Picking Off Named Plaintiffs, 53 Duke L.J. 781, 789 (2003) (same); Johnathan Lott, Comment, Moot Suit Riot: An Alternative View of Plaintiff Pick-Off in Class Actions, 2013 U. Chi. Legal F. 531, 533 (same); see also Katrina Christakis, Jeff Pilgrim & James Morrissey, "So You're Telling Me There's a Chance!": The Post-*Campbell-Ewald* Possibility of Mooting a Class Action by "Tender" of Complete Relief, 71 Consumer Fin. L.Q. Rep. 237, 242, 244–49 (2017) (exploring whether a defendant can "foist payment on an obstinate plaintiff" after *Campbell-Ewald*); Scott T. MacGuidwin, Note, Mooting Unilateral Mootness, 121 Mich. L. Rev. 641, 645 (2023) (arguing for the elimination of unilateral mootness).

38. See, e.g., Joseph C. Davis & Nicholas R. Reaves, The Point Isn't Moot: How Lower Courts Have Blessed Government Abuse of the Voluntary-Cessation Doctrine, 129 Yale L.J. Forum 325, 326–29 (2019), https://yalelawjournal.org/pdf/DavisandReaves_ThePointIsntMoot_3f4xopmf.pdf [https://perma.cc/S5V7-P8E2] (arguing against a presumption in favor of the government in voluntary cessation cases); Daniel Bruce, Note, Manufacturing Sovereign State Mootness, 63 Wm. & Mary L. Rev. 287, 290 (2021) (advocating for a presumption in favor of government defendants); Michele C. Nielsen, Comment, Mute and Moot: How Class Action Mootness Procedure Silences Inmates, 63 UCLA L. Rev. 760, 764–65 (2016) (discussing the precertification mootness issues that arise in prisoner litigation given the government's unique control over the prisoner's claim).

39. One of the most significant treatments of precertification mootness is Richard K. Greenstein's *Bridging the Mootness Gap in Federal Court Class Actions*, 35 Stan. L. Rev. 897 (1983). Greenstein critiques the Supreme Court's inconsistent reasoning in class action mootness cases and reframes what courts have treated as a mootness problem as, instead, a

This Article proceeds as follows. First, in Parts I and II, it identifies the strategic mootness gap. Part I frames the gap as a matter of theory by establishing that the gap creates precisely the scenario that existing mootness exceptions address: when the plaintiff's personal stake disappears but the underlying legal issue remains unresolved.[40] When defendants pick off putative class representatives, they eliminate individual claims but leave systemic problems untouched—exactly the kind of "personal stake mootness" that courts routinely save through exceptions.[41] Part II then traces the gap as a matter of doctrine, showing how the Supreme Court has developed exceptions for inherently transitory claims and certified class actions, yet has never extended those exceptions to cover proposed class actions deliberately mooted before certification. The result is a doctrinal framework that is both underinclusive and internally incoherent.

Second, in Part III, the Article maps what strategic mootness looks like in practice across multiple areas of law. Courts and commentators have tended to frame the issue narrowly, focusing on cases in which defendants attempt to moot class actions through Rule 68 offers of judgment or monetary tenders—particularly in consumer protection litigation. This lens responds to developments on the Supreme Court's docket. But it also reduces strategic mootness to a technical conflict between procedural rules, obscuring the broader phenomenon. In fact, strategic mootness plays out in diverse legal contexts and through a range of defendant tactics—from asylum seekers being offered individual processing two days after filing a complaint over asylum process access,[42] to Medicaid applicants who were enrolled in Medicaid after alleging unlawfully delayed eligibility determinations.[43]

Part III thus examines this broader landscape, illustrating the breadth of the strategic mootness gap. It shows that while some lower courts have acknowledged the phenomenon, their responses have been inconsistent. In the absence of a clear doctrinal framework, courts have applied existing mootness exceptions unevenly, often straining their logic to account for new pick-off strategies. This Part also explores how,

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question of standing governed by Rule 23 prudential considerations. See id. at 898. While Greenstein does not address strategic conduct by defendants, his account anticipates several of the concerns that underlie the strategic mootness gap. This Article builds on that foundation but identifies a distinct problem: the exploitation of doctrinal gaps by defendants seeking to avoid class-wide liability. It reframes the issue as a form of litigation gamesmanship and proposes a targeted doctrinal response.

40. This Article assumes that a plaintiff's personal stake is moot after a pick-off and focuses on whether a mootness exception should permit the putative class claims to continue. For discussion of whether plaintiffs retain personal interests in class certification, see Rachel Bayefsky, Remedies and Respect: Rethinking the Role of Federal Judicial Relief, 109 Geo. L.J. 1263, 1277 (2021).

41. Hall, supra note 14, at 566, 599.

42. See Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1304 (S.D. Cal. 2018).

43. See Wilson v. Gordon, 822 F.3d 934, 944–51 (6th Cir. 2016).

beyond doctrinal confusion, the strategic mootness gap threatens several core procedural values: judicial economy, deterrence, access to justice, and the courts' ability to resolve important legal questions. This analysis thus frames the strategic mootness gap as a systemic threat to the integrity of class action litigation.

Finally, Part IV offers a possible response to the strategic mootness gap in the form of a new mootness exception called the "picking off exception." Under this exception, defendants who resolve named plaintiffs' claims before certification would bear the burden of showing that their conduct does not undermine the viability of the class certification process. This approach draws from the logic of existing mootness exceptions but recalibrates them to address strategic behavior in the precertification window. If implemented, it could offer courts a practical tool to protect class adjudication and deter procedural gamesmanship.

Ultimately, the strategic mootness gap raises fundamental questions about the limits of justiciability, the role of power imbalances and gamesmanship in class litigation, and the viability of the class action device as a whole. This Article takes up these questions, offering both a structural account of the problem and a doctrinal path forward.

I. THEORIZING MOOTNESS EXCEPTIONS

This Part introduces mootness doctrine and situates the doctrine's exceptions within an ongoing debate about mootness's theoretical foundations. It then explores when an exception to mootness—such as the one this Article proposes—is justified.

The standard account of mootness links the doctrine to Article III, which limits federal courts to deciding "Cases" or "Controversies."[44] The Case or Controversy Clause requires that an actual controversy exist "at all stages of review, not merely at the time the complaint is filed."[45] Mootness doctrine safeguards Article III by searching for any intervening event that may have rendered a case hypothetical during the pendency of a lawsuit.[46] If events after the filing of the lawsuit resolve the matter, no controversy between adverse litigants remains.[47] Courts regularly invoke

44. U.S. Const. art. III, § 2, cl. 1; see also Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.1 ("The Supreme Court frequently has explained that the mootness doctrine is derived from Article III's prohibition against federal courts issuing advisory opinions."); 33 Wright & Miller's Federal Practice & Procedure § 8347 (2d ed. 2018) [hereinafter Wright & Miller, 2d ed.] (noting the mootness doctrine's connection to Article III).

45. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160 (2016) (quoting Arizonans for Off. English v. Arizona, 520 U.S. 43, 67 (1997)).

46. See id. at 160–61, 166.

47. Chemerinsky, Federal Jurisdiction, supra note 8, § 2.5.1; 33 Wright & Miller, 2d ed., supra note 44, § 8347.

Article III in mootness decisions, often describing moot cases as falling outside their Article III jurisdiction.[48]

This account of mootness has encountered significant scholarly and judicial dissent. Critics focus on three shortcomings. First, the connection between mootness and Article III lacks historical grounding. The Supreme Court did not explicitly link mootness to Article III until 1964, and even then, it did so in a footnote to a case not decided on mootness grounds.[49] Scholars have called this connection a "remarkably casual"[50] and "novel pronouncement" without meaningful historical support.[51]

Second, judicial treatment of mootness has proved internally inconsistent. While courts often frame the doctrine as a rigid constitutional command, they simultaneously describe mootness in "flexible" terms[52] and cite its "uncertain and shifting contours" and lack of "fixed content."[53] In practice, courts routinely weigh prudential considerations—like judicial economy, fairness, and the public interest—when deciding whether to dismiss on mootness grounds.[54]

Third, the existence of several well-established exceptions to mootness undermines any notion of a hard constitutional rule. Constitutional requirements do not usually permit exceptions based on policy considerations or judicial convenience. If mootness were truly a mandatory constitutional rule, then its exceptions—like the capable of repetition yet evading review exception, the voluntary cessation exception, and the class action exception—simply could not exist.[55]

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48. E.g., *Campbell-Ewald Co.*, 577 U.S. at 160.

49. See Liner v. Jafco, Inc., 375 U.S. 301, 306 n.3 (1964).

50. Evan Tsen Lee, Deconstitutionalizing Justiciability: The Example of Mootness, 105 Harv. L. Rev. 603, 611 (1992).

51. Hall, supra note 14, at 572. The Supreme Court is divided on the history, with some Justices defending and others questioning the historical justification for linking mootness to the Constitution. Compare Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) ("[I]t seems very doubtful that the earliest case I have found discussing mootness . . . was premised on constitutional restraints . . . ."), with id. at 340 (Scalia, J., dissenting) (explaining that early "courts simply chose to refer directly to the traditional, fundamental limitations upon the powers of common-law courts, rather than referring to Art. III which in turn adopts those limitations through terms").

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

53. Id. at 401 (internal quotation marks omitted) (first quoting Flast v. Cohen, 392 U.S. 83, 97 (1968); then quoting Poe v. Ullman, 367 U.S. 497, 508 (1961) (plurality opinion)).

54. See City of Erie v. Pap's A.M., 529 U.S. 277, 288 (2000) (gamesmanship); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980) (judicial economy); United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (public interest).

55. See, e.g., *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring) (explaining that if Article III "underlies the mootness doctrine, the 'capable of repetition, yet evading review' exception . . . would be incomprehensible"); Erwin Chemerinsky, A Unified Approach to Justiciability, 22 Conn. L. Rev. 677, 692–94 (1990) ("If mootness is an article III requirement, then how can the Court create broad exceptions based on the desire to facilitate judicial review . . . ?").

Scholars have developed competing theories to explain the mootness exceptions. One theory holds that mootness exceptions can only be understood through prudential considerations.[56] Proponents of this theory have thus called for either the complete or partial "deconstitutionalization" of the doctrine.[57] Another theory suggests that "mootness and its exceptions could be reconciled through hybridization," meaning the constitutional doctrine of mootness incorporates certain prudential considerations.[58] Still another theory maintains a purely constitutional account of the doctrine and contends that many of the so-called mootness exceptions are "not really exceptions at all" because they "are consistent with the requirement that a plaintiff have suffered harm or be sufficiently likely to suffer harm in the future."[59]

Despite these disagreements over theory, there is notable consensus about the application of mootness exceptions. Professor Matthew Hall has identified a useful typology that divides mootness doctrine into two categories: (1) "issue mootness," in which the underlying legal question is no longer "live," and (2) "personal stake mootness," in which the parties lack a legally recognized interest in the outcome.[60] This distinction, Hall argues, is key to understanding the relationship between mootness and Article III. Many scholars agree that the mootness exceptions primarily address personal stake mootness rather than issue mootness, regardless of their perspectives on the theoretical basis of the doctrine.[61] As Hall himself (who advocates for a partially prudential model of mootness) has observed, "courts often treat issue mootness and personal stake mootness quite differently—invariably dismissing 'issue moot' cases while treating as discretionary the decision whether to dismiss 'personal stake moot' cases."[62] And Professor Tyler Lindley (who defends a constitutional model of mootness) has also found the distinction "conceptually helpful in framing potential justifications for the exceptions."[63]

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56. See Hall, supra note 14, at 563–64 (explaining that "as articulated and applied," the exceptions "are based on prudential considerations, such as protection of judicial efficiency and authority, the preference for sufficiently-motivated parties, and avoidance of party gamesmanship"); Lee, supra note 51, at 628 ("But the baseline doctrines of standing and mootness are generally predicated on the dispute resolution model, whereas many of the exceptions reflect the public values vision or, at least, the inevitability of public law litigation.").

57. See Hall, supra note 14, at 600 (articulating a "partially prudential model of mootness"); Lee, supra note 51, at 655 (promoting "outright deconstitutionalization").

58. Scott Dodson, Hybridizing Jurisdiction, 99 Calif. L. Rev. 1439, 1476 (2011).

59. Tyler B. Lindley, The Constitutional Model of Mootness, 48 BYU L. Rev. 2151, 2158 (2023).

60. Hall, supra note 14, at 565, 599; see also U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 396 (1980) ("[M]ootness has two aspects.").

61. See, e.g., Hall, supra note 14, at 566; Lee, supra note 51, at 623; Lindley, supra note 59, at 2210 n.282.

62. Hall, supra note 14, at 566, 608 n.221.

63. Lindley, supra note 59, at 2210 n.282.

That is, all recognized mootness exceptions require some possibility of the issue recurring.[64] If the issue cannot recur (and thus is truly issue moot), no exception can prevent the case's dismissal due to mootness. But if only the plaintiff's personal stake has become moot while the underlying legal issue remains, an exception might apply and the case may be able to proceed.[65]

Consider the voluntary cessation exception as an example. When a defendant voluntarily stops challenged behavior, the case is not automatically moot.[66] Instead, the defendant carries the burden of showing that it is "absolutely clear the allegedly wrongful behavior could not reasonably be expected to recur."[67] If this showing is made, the court can conclude that the underlying legal issue has been resolved, rendering the case "issue moot" and subject to dismissal.[68] If the defendant fails to meet its burden, however, the legal issue persists, and the exception will allow the case to proceed.[69]

The class action exception is another example of how courts treat personal stake mootness and issue mootness differently. Once a class is certified, a case does not become moot just because the named plaintiff's individual claim has been resolved. Instead, the class action exception will allow the case to continue so long as a controversy exists "between a named defendant and a member of the class represented by the named plaintiff."[70] But if the underlying legal issue has been fully resolved for the entire class (meaning no class member retains a live claim), the case becomes issue moot and must be dismissed.[71]

These exceptions reveal a consistent pattern: Mootness exceptions exist when a plaintiff loses their personal stake in the case but the underlying legal controversy remains unresolved. Courts hesitate to dismiss such "personal stake moot" cases, recognizing that unresolved legal questions (especially those likely to recur) demand resolution even after the original plaintiff's interest has lapsed. This logic holds the doctrine

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64. See, e.g., Hall, supra note 14, at 608 n.221 ("The three major [mootness] exceptions . . . are solely applicable in cases of personal stake mootness, as each of them applies only where recurrence is at least reasonably likely . . . ."); Lindley, supra note 59, at 2158 (describing the two types of exceptions to mootness).

65. See Hall, supra note 14, at 608 n.221.

66. Lindley, supra note 59, at 2162.

67. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 190 (2000) (citing United States v. Concentrated Phosphate Exp. Ass'n, 393 U.S. 199, 203 (1968)).

68. See Hall, supra note 14, at 619 n.266.

69. The capable of repetition yet evading review exception also requires some possibility of recurrence to apply. See, e.g., United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1540–41 (2018).

70. Sosna v. Iowa, 419 U.S. 393, 402 (1975).

71. See id. (stating that the controversy "may" continue to exist between the defendant and members of the class).

together—until it doesn't. It is precisely where this pattern breaks down that the strategic mootness gap emerges.

II. IDENTIFYING THE STRATEGIC MOOTNESS GAP

This Part traces the development of the mootness exceptions and, in doing so, highlights a significant gap in mootness doctrine. The Supreme Court's early mootness decisions focused on what happens when a plaintiff loses their personal stake in a traditional, bilateral lawsuit. These early decisions can be understood as developing exceptions to mootness in two situations: when mootness is *inherent*, because the claim is too short-lived to be fully litigated, and when it is *strategic*, because a defendant deliberately moots the case to avoid review.[72]

By the 1970s, as class litigation gained prominence, the Court began to consider how the mooting of a named plaintiff's individual claim might affect the broader class's claims. The Court quickly concluded that class certification protects a class from both the inherent and strategic mooting of its named plaintiff's case.[73] At the same time, however, the Court struggled with mootness in the context of proposed but not-yet-certified class actions.[74] It eventually addressed inherent mootness in this context by recognizing the "inherently transitory" exception, which applies when claims become moot so quickly that no plaintiff could reasonably be expected to reach certification.[75]

Yet the Court has never squarely addressed strategic mootness in the context of a precertification class action. When presented with opportunities to resolve this issue, the Court has repeatedly declined to do so, deciding cases on other grounds and expressly leaving the question open.[76] Moreover, some of the current Justices have cast doubt on whether and to what extent a court can or should save a proposed class action from a defendant's litigation strategy.[77] That unresolved question—whether and how courts can respond to strategic behavior that targets a class action before certification—is the strategic mootness gap.[78]

A. *The Inherent–Strategic Mootness Distinction*

The Supreme Court's earliest mootness exceptions emerged in the context of individual litigation and produced two enduring rules.[79] In

72. See infra section II.A.

73. See infra section II.B.

74. See infra section II.C.

75. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 399 (1980).

76. See infra section II.C.

77. See infra section II.C.

78. See infra section II.D.

79. This Article does not include the collateral consequences exception to mootness—an "exception" used primarily to preserve a criminal defendant's appeal after

Southern Pacific Terminal Co. v. Interstate Commerce Commission, the Supreme Court coined the phrase "capable of repetition, yet evading review" to describe harms that are naturally fleeting and could recur for the plaintiff, but always fail to last long enough to permit full judicial review.[80] In *United States v. W. T. Grant Co.*, the Court recognized the "voluntary cessation" exception, which allows courts to hear cases mooted by a defendant's decision to cease the challenged conduct mid-litigation.[81]

These two exceptions address distinct categories of mootness.[82] The capable of repetition yet evading review exception addresses inherent mootness or situations in which the mootness arises from the nature of the claim itself and not the defendant's actions.[83] Pregnancy litigation is the classic example; the claim usually runs its course before any court can resolve it, yet it may return again for the same plaintiff.[84] Without an exception, no such issue would ever reach judicial review.

The voluntary cessation exception, by contrast, targets strategic mootness or mootness that stems from the defendant's actions.[85] The exception reflects judicial skepticism toward self-serving and "[i]nsincere [r]eform"[86]: If defendants could unilaterally end the challenged conduct, secure dismissal, and then "return to [their] old ways,"[87] courts would be powerless to address repeat violations. To prevent that, the Supreme Court imposes a demanding burden. The defendant must make it "absolutely clear that [its] allegedly wrongful behavior could not reasonably be expected to recur."[88] It demands "certainty" that a case is truly moot before it can be dismissed.[89]

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release from incarceration and probation—because it is "qualitatively different" from the mootness exceptions discussed here. Hall, supra note 14, at 576–77 n.61.

80. 219 U.S. 498, 515 (1911); see also 13C Wright & Miller's Federal Practice & Procedure, § 3533.8 (3d ed. 2025) [hereinafter Wright & Miller, 3d ed.] (explaining the development of the "capable of repetition, yet evading review" doctrine, originating from the *Southern Pacific Terminal Co.* decision).

81. 345 U.S. 629, 632 (1953).

82. See Hall, supra note 14, at 577, 580 (making a similar distinction).

83. See Hall, supra note 14, at 577–78 ("[T]he exception for claims that are capable of repetition, yet evading review . . . permit[s] review of moot cases that raise issues that are likely to recur and are so inherently short-lived that each occurrence is likely to be rendered moot before review can be completed.").

84. See, e.g., Roe v. Wade, 410 U.S. 113, 125 (1973) ("Pregnancy provides a classic justification for a conclusion of nonmootness.").

85. See Hall, supra note 14, at 580–81 ("Where defendant's own actions have mooted the plaintiff's claim for relief, courts have naturally been quite reluctant to deny judicial review . . . .").

86. See Hall, supra note 14, at 580 (discussing the "[i]nsincere [r]eform" problem).

87. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 189 (2000) (internal quotation marks omitted) (quoting City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 289 n.10 (1982)).

88. Id.

89. *Aladdin's Castle*, 455 U.S. at 289. A promise by the defendant to not reengage in the challenged behavior is not enough on its own to end a case. United States v. W.T. Grant

Though responding to different sources of mootness, both exceptions reflect the animating principle outlined in Part I: Mootness doctrine bends when a plaintiff's personal stake disappears but the legal issue lives on. So long as there remains a meaningful possibility that the same plaintiff will face the same harm again, courts often allow adjudication to proceed, regardless of whether the claims expire naturally or by defendant action.

B. *The Class Action Exception*

A traditional individual lawsuit with two opposing sides presents a relatively clear context for understanding and applying mootness doctrine. But with the surge in class action lawsuits in the 1970s,[90] new questions about mootness arose. Lawsuits brought on behalf of a class are supposed to be representative in nature—to transcend any single person's claim. What then should happen when a class representative's personal stake in a case grows moot, but the broader issue persists for the class?

The foundational class action mootness case, the Supreme Court's 1975 ruling in *Sosna v. Iowa*, involved a certified class challenging a one-year residency requirement for obtaining a divorce.[91] By the time the case reached the Court, the named plaintiff had satisfied the one-year requirement and had divorced elsewhere.[92] The Court nonetheless allowed the class claims to proceed.[93] The Justices reasoned that the district court's decision to certify the class gave it a legal status independent of the named plaintiff.[94] This independence allowed the class's claims to survive even when the named plaintiff's individual claims became moot.

While *Sosna* established a mootness exception for class actions, its outer limits remained uncertain. Since *Sosna* involved a challenge to an

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Co., 345 U.S. 629, 633 (1953). Courts must also consider the defendant's sincerity; the effectiveness of the corrective action taken; and, depending on the specific situation, the nature of the defendant's past conduct. Id.

90. See David Marcus, The History of the Modern Class Action, Part I: *Sturm und Drang*, 1953–1980, 90 Wash. U. L. Rev. 587, 598 (2013) [hereinafter Marcus, History of the Class Action] (explaining that "class action doctrine under the modern Rule 23 coalesced in the 1970s"); David Marcus, The Short Life and Long Afterlife of the Mass Tort Class Action, 165 U. Pa. L. Rev. 1565, 1570 (2017) ("The class action figured importantly in a more general debate that raged in the 1970s about the legitimate size of litigation's institutional footprint."); Linda S. Mullenix, Aggregate Litigation and the Death of Democratic Dispute Resolution, 107 Nw. U. L. Rev. 511, 519 (2013) ("Between 1966 and the mid-1970s, federal courts were transformed by the influx of massive class action cases seeking remediation for alleged violations of various constitutional, federal, and state laws.").

91. 419 U.S. 393, 395, 397 (1975).

92. Id. at 398 n.7.

93. Id. at 402.

94. Id. at 399.

inherently short-lived one-year residency requirement, many commentators questioned whether the class action exception applied only if the underlying claim suffered from inherent mootness.[95] The Court answered this question a year later in *Franks v. Bowman Transportation Co.*, which involved a class action seeking money damages for racially discriminatory employment policies—not an inherently short-lived claim.[96] In reaching its decision, the Supreme Court clarified that "nothing in [the *Sosna* opinion] . . . holds or even intimates that the fact that the named plaintiff no longer has a personal stake in the outcome of a certified class action renders the class action moot unless there remains an issue 'capable of repetition, yet evading review.'"[97] Instead, a case could proceed so long as it retained sufficient adverseness to "sharpen[] the presentation of issues" for the court.[98] Once a class was properly certified, the Court explained, a live and concrete controversy would continue to exist between the unnamed class members and a defendant, regardless of the named plaintiff's personal stake in the matter.[99]

In other words, class certification marks a magic moment for mootness doctrine. Once a class is certified, it can stand on its own, without need for a named plaintiff's stake in the matter.[100] The class, endowed with an independent legal persona, retains its procedural vitality.

But if class certification is so critical for mootness doctrine, what should happen if a district court incorrectly denies class certification? Can a named plaintiff appeal the denial, even if their own claim subsequently becomes moot? The Court addressed this question in two

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95. William B. Rubenstein, 1 Newberg and Rubenstein on Class Actions § 2:10 (6th ed. 2022) [hereinafter Newberg & Rubenstein, Class Actions] ("[W]as *Sosna* nothing more than a holding that 'transitory claims' could be litigated by a mooted named plaintiff or was there something about class certification itself that enabled an exception to mootness even in nontransitory cases?"); 7AA Wright & Miller, 3d ed., supra note 80, § 1785.1 ("[T]he Court's reference to the fact that the case presented an issue that otherwise might evade appellate review, raised the question whether a class action had to satisfy that standard in order to avoid dismissal."). But see *Sosna*, 419 U.S. at 416 n.4 (White, J., dissenting) ("The Court apparently also does not view certification as the key to its holding since it mentions in dicta that some class actions will not be moot even though the named representatives' claims become moot prior to certification.").

96. 424 U.S. 747, 750–51, 777 n.38 (1976) (explaining that "the dissent of necessity addresses issues not present[]").

97. Id. at 755 (quoting *Sosna*, 419 U.S. at 399–401); see also id. at 781 (Powell, J., concurring in part and dissenting in part) ("[T]his controversy is not moot, and . . . in the context of a duly certified class action the 'capable of repetition, yet evading review' criterion . . . in [*Sosna*] is only a factor in . . . whether to reach the merits of an issue, rather than an Art. III 'case or controversy' requirement.").

98. Id. at 755 (internal quotation marks omitted) (quoting Baker v. Carr, 369 U.S. 186, 204 (1962)).

99. Id. at 755–57.

100. Note that this statement concerns justiciability. Federal Rule of Civil Procedure 23 may require more to maintain a class. See infra section IV.C.3 (distinguishing justiciability analysis from adequacy-of-representation analysis).

cases decided on the same day in 1980: *United States Parole Commission v. Geraghty*[101] and *Deposit Guaranty National Bank, Jackson, Mississippi v. Roper*.[102] In both cases, the Court held that a plaintiff can appeal a class certification denial after the plaintiff's individual claim becomes moot.[103] The Court's reasoning in the two cases differed, however, reflecting whether the mootness was inherent or strategic in nature.

Geraghty was in some sense an inherent mootness case. The plaintiff had sought to certify a class challenging the federal parole release guidelines. After the district court denied class certification, the plaintiff appealed.[104] Before briefs were submitted, however, the plaintiff's claim expired as a matter of course (when he was mandatorily released from prison).[105] The problem was that the traditional inherent mootness exception—the capable of repetition yet evading review doctrine—did not clearly save his claim. There was no reasonable expectation the plaintiff himself would have the same claim again,[106] and some incarcerated individuals would inevitably receive sentences long enough to see their case through the appellate stage.[107] Still, the Supreme Court found the plaintiff had a right to appeal the class certification issue.[108] After highlighting the difference between personal stake mootness and issue mootness,[109] the Court noted the "flexible character" of mootness doctrine.[110] The Court reasoned that even when a plaintiff's individual claim expires "on the merits," "[t]he proposed representative retains a 'personal stake' in obtaining class certification."[111] This interest in representing the class, the Court explained, "is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement."[112] The Court noted its decision was necessary "to achieve the primary benefits of class suits."[113] And importantly, the Court expressly limited its decision to the appeal of a class certification denial and reserved the question whether a

101. 445 U.S. 388, 407 (1980).

102. 445 U.S. 326, 340 (1980).

103. *Geraghty*, 445 U.S. at 404 ("[A]n action brought on behalf of a class does not become moot upon expiration of the named plaintiff's substantive claim, even though class certification has been denied."); *Roper*, 445 U.S. at 339 ("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.").

104. *Geraghty*, 445 U.S. at 393–94.

105. Id. at 394.

106. See id. at 398.

107. Geraghty v. U.S. Parole Comm'n, 579 F.2d 238, 251 (3d Cir. 1978).

108. *Geraghty*, 445 U.S. at 404.

109. Id. at 396.

110. Id. at 400.

111. Id. at 404.

112. Id. at 403.

113. Id.

plaintiff with a moot individual claim would still be a "proper representative" for the class moving forward.[114]

Roper,[115] in contrast, was more of a strategic mootness case. The plaintiffs sought to certify a class of credit card holders charged certain usurious fees by their bank.[116] After the district court denied class certification, and while the plaintiffs' appeal of that denial was pending, the defendant offered each named plaintiff the maximum amount authorized by law.[117] The plaintiffs declined to accept the offers, but the district court—over the plaintiffs' objections—entered judgment in the bank's favor.[118] On the plaintiffs' appeal from the class certification denial, the bank claimed the case was moot.[119] In deciding whether the plaintiffs' class certification appeal could move forward, the Supreme Court offered some of its strongest language against strategic mootness:

> 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. It would be in the interests of a class-action defendant to forestall any appeal of denial of class certification if that could be accomplished by tendering the individual damages claimed by the named plaintiffs.[120]

Despite this forceful condemnation of "picking off" tactics, *Roper* did not turn on strategic mootness. Instead, the Court concluded the plaintiffs had retained a personal stake in the case: "an economic interest in class certification."[121] In aggregated-damages cases in particular, the Court held that named plaintiffs have an interest in "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."[122]

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114. Id. at 407.

115. Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326 (1980).

116. Id. at 327–28.

117. Id. at 329–30.

118. Id.

119. Id. at 330.

120. Id. at 339 (emphasis added).

121. Id. at 333.

122. Id. at 338 n.9. The Supreme Court has called into question the continuing validity of the holding in *Roper* in light of Lewis v. Continental Bank Corp., 494 U.S. 472, 480 (1990) ("[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 . . . ."). See Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 78 n.5 (2013) ("Because *Roper* is

The different analytical approaches in *Geraghty* and *Roper* suggest hesitation in the Court's class action mootness doctrine. Neither case saw the Court fully at ease with temporarily suspending mootness doctrine's personal stake requirement to allow a plaintiff without a personal stake to pursue an appeal. Instead, the Court reached for some semblance of a continuing personal stake: in *Geraghty*, a right to pursue certification akin to the private attorney general concept, and in *Roper*, an economic interest in class certification.[123]

C. *The Puzzle of Proposed Class Actions*

For reasons similar to those that challenged the Supreme Court in *Geraghty* and *Roper*, proposed class actions present a puzzle for mootness doctrine. On the one hand, under *Sosna*, the class action exception does not apply.[124] In the precertification stage of a class action, the class does not (yet) exist separate from the lead plaintiff. The class's future existence thus depends entirely on the lead plaintiff's personal stake in the matter and the validity of their claim. On the other hand, class litigation is supposed to exist beyond any single person's claim, and class certification is not usually something that can happen immediately upon the filing of a complaint.[125] Mootness doctrine strains under this tension, offering no clear answer when an individual's claims become moot before certification can be reached, especially where the moot claim is unlikely to recur for an individual person but persists for a broader group of people.

The Court's first, and clearest, articulation of pre–class certification mootness doctrine appeared in a footnote in *Gerstein v. Pugh*, a 1975 case involving detained individuals raising claims concerning their pretrial detention.[126] The plaintiffs were granted class certification in the district court, but by the time the case reached the Supreme Court, a question arose about whether the certification was proper.[127] Under *Sosna*, a class action would be moot if no named plaintiff had a live claim at the time of

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distinguishable on the facts, we need not consider its continuing validity in light of [*Lewis*] . . . .").

123. Notably, *Geraghty* was a more closely decided case than *Roper*. Compare U.S. Parole Comm'n v. Geraghty, 445 U.S. 388 (1980) (five-member majority and four in dissent), with *Roper*, 445 U.S. 326 (1980) (six-member majority, one concurrence, and two in dissent).

124. Sosna v. Iowa, 419 U.S. 393, 399, 402–03 (1975).

125. Cabraser, supra note 23, at 769 (noting that modern class certification often requires discovery and occurs later in the pretrial process); Malveaux, Power and Promise, supra note 23, at 670 (same).

126. 420 U.S. 103, 105–06 (1975).

127. Id. at 111 n.11. Notably, *Gerstein*'s holding was foreshadowed in *Sosna*. See *Sosna*, 419 U.S. at 402 n.11 (recognizing that in certain circumstances, class certification may relate back to the complaint's filing when named plaintiffs' claims become moot before certification).

class certification.[128] But in *Gerstein*, the plaintiffs' claims became moot when their pretrial detentions ended, and the record wasn't clear whether this happened before or after class certification.[129] Still, the Court held the case remained live. Because of the temporary and unpredictable length of pretrial detention, it was unlikely "any given individual, named as plaintiff, would be in pretrial custody long enough for a district judge to certify the class."[130] The Court concluded the case could move forward because "the constant existence of a class of persons suffering the deprivation [was] certain."[131]

Gerstein set forth a new mootness exception—the "inherently transitory exception"—for precertification class actions affected by inherent mootness. Rather than requiring a named plaintiff with a live claim to exist at the time of class certification, à la *Sosna*, *Gerstein* allows a case to move forward "when the pace of litigation and the inherently transitory nature of the claims at issue conspire to make that requirement difficult to fulfill."[132] The exception differs from the capable of repetition yet evading review exception because it does not require a showing that the named plaintiff would face the same situation again.[133] Instead, the plaintiff can point to the constant existence of a class of people suffering the alleged harm to fulfill the personal stake inquiry.[134]

Gerstein said nothing, though, about precertification class actions that suffer from strategic mootness. What should happen if the named plaintiff's individual claim is mooted not by natural expiration but by the defendant's strategic action? Could a defendant avoid a class action by resolving the named plaintiffs' individual claims before a class could be certified?

The Supreme Court first encountered the strategic mootness question in 2013, nearly forty years after the Court's *Gerstein* decision. *Genesis Healthcare Corp. v. Symczyk* featured a proposed collective action brought by an employee under the Fair Labor Standards Act (FLSA).[135] Before the collective action certification process was complete, the defendant offered the employee full satisfaction of her individual claim under Federal Rule of Civil Procedure 68.[136] The company then moved to dismiss on mootness grounds.[137] The employee claimed the company's use of a Rule 68 offer made the case "inherently transitory" because the

128. *Sosna*, 419 U.S. at 402.

129. *Gerstein*, 420 U.S. at 111 n.11.

130. Id.

131. Id.

132. United States v. Sanchez-Gomez, 138 S. Ct. 1532, 1538–40 (2018).

133. See Salazar v. King, 822 F.3d 61, 73 n.8 (2d Cir. 2016) (distinguishing the capable of repetition yet evading review and the inherently transitory exceptions).

134. Id.; see also *Gerstein*, 420 U.S. at 111 n.11.

135. 569 U.S. 66, 69 (2013).

136. Id. at 69–70.

137. Id. at 70.

company was trying to "pick off" named plaintiffs before certification.[138] The Court disagreed.[139] Under "[a] straightforward application of well-settled mootness principles," the Justices concluded the case was moot.[140] The Court stressed that "Rule 23 actions are fundamentally different from collective actions under the FLSA."[141] Thus, the class action mootness cases—like *Sosna*, *Geraghty*, and *Roper* (including *Roper*'s dictum on picking off)—did not apply.[142]

As to the inherently transitory exception, the Court said it likely did not apply in strategic mootness cases.[143] The exception, the Court explained, "has invariably focused on the fleeting nature of the challenged conduct giving rise to the claim, not on the defendant's litigation strategy."[144] Finally, even if the inherently transitory exception could apply to strategically mooted FLSA collective actions, it would not apply to the plaintiffs' claims.[145] The plaintiffs sought money damages, and "[u]nlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review."[146] Again, the Supreme Court was careful to limit its holding to FLSA cases.[147] Nonetheless, courts and practitioners began to look at the inherently transitory exception's reach in a new light.[148]

The Court had a second chance to address the strategic mootness gap three years later, in *Campbell-Ewald Co. v. Gomez*.[149] The plaintiff had filed a proposed Rule 23 class action lawsuit against a marketing company for alleged violations of the Telephone Consumer Protection Act.[150] Before the motion for class certification filing deadline, the marketing company made a Rule 68 offer to settle the named plaintiff's individual claim.[151] The plaintiff rejected the offer, but the defendant

138. Id. at 75–76.
139. Id. at 70, 75.
140. Id. at 73.
141. Id. at 74.
142. Id. at 74, 78.
143. Id. at 76.
144. Id. at 76–77.
145. Id. at 77.
146. Id.
147. Id. at 78.
148. See, e.g., Wilson v. Gordon, 822 F.3d 934, 946–47 (6th Cir. 2016) (addressing *Genesis Healthcare* in a strategic mootness case); Maier v. J.C. Penney Corp., No. 13CV163 JLS, 2014 WL 12139073, at *1 (S.D. Cal. Jan. 22, 2014) (same); see also Jenny R. Chou & Kim E. Rinehart, Supreme Court Update: *Genesis Healthcare Corp. v. Symczyck* (11-1059), *Kiobel v. Royal Dutch Petroleum Co.* (10-1491), and *Boyer v. Louisiana* (11-9953), Wiggin & Dana (Apr. 30, 2013), https://www.wiggin.com/publication/supreme-court-update-genesis-healthcare-corp-v-symczyk-11-1059-kiobel-v-royal-dutch-petroleum-co-10-1491-and-boyer-v-louisiana-11-9953/ [https://perma.cc/S3R8-92F8].
149. 577 U.S. 153 (2016).
150. Id. at 156.
151. Id. at 157–58.

moved to dismiss anyway.[152] The Supreme Court did not address the strategic mootness gap. Instead, the Court held the case was not moot, relying on "basic principles of contract law" to conclude an unaccepted settlement offer cannot moot an individual's complaint.[153] Because the plaintiff retained an individual personal stake in the litigation, reliance on class action mootness doctrine was unnecessary.[154]

Campbell-Ewald drew two dissenting opinions. Chief Justice John Roberts, joined by Justices Antonin Scalia and Samuel Alito, contended that the majority's decision gave too much power to plaintiffs.[155] "[A] plaintiff is not the judge of whether federal litigation is necessary," he wrote, "and a mere *desire* that there be federal litigation—for whatever reason—does not make it *necessary*."[156] Chief Justice Roberts found solace in limiting the case to its facts; while an offer of complete relief might be insufficient to moot a case under the majority's opinion, he suggested actual payment of complete relief might lead to a different result.[157] Justice Alito wrote separately to propose ways a defendant might unilaterally moot a plaintiff's claim: by making actual payment to the plaintiff, tendering a certified check to the plaintiff, or depositing payment with the district court or in a bank account in the plaintiff's name.[158] *Campbell-Ewald Co. v. Gomez* thus did not deter defendants from devising strategies for picking off class representatives to avoid class actions. Indeed, the dissents actively preserved the strategic mootness gap, offering defendants a playbook of alternative tactics that might succeed where *Campbell-Ewald*'s unaccepted offer had failed.

D. *The Strategic Mootness Gap Restated*

The upshot is this: Mootness exceptions exist to prevent dismissal when a plaintiff loses their personal stake but the underlying legal issue remains unresolved. Courts have crafted tailored exceptions for inherent mootness, where claims naturally expire before resolution, and for strategic mootness, where defendants seek to sidestep review through their own conduct. In class actions, courts have extended these principles: When a certified class representative's claim becomes moot, the class's ongoing interest allows the case to proceed. And even in proposed class actions, the Supreme Court has recognized the challenge of inherent mootness and adopted the inherently transitory exception to address it.

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152. Id. at 158.
153. Id. at 163.
154. Id. at 156.
155. Id. at 175, 179 (Roberts, C.J., dissenting).
156. Id. at 179.
157. Id. at 180.
158. Id. at 186 (Alito, J., dissenting).

But the Court has yet to confront strategic mootness in precertification class actions. This silence leaves a critical vulnerability: Defendants can selectively resolve named plaintiffs' claims before certification, effectively blocking class formation and dodging systemic accountability. Worse still, the Court has not only declined to fill this gap but has also cast doubt on whether courts should protect proposed class actions from defendants' litigation tactics. In recent opinions, some Justices have gone so far as to encourage defendants to moot both individual and class claims through unilateral action.[159]

The doctrinal gap has concrete consequences. As the next Part shows, defendants have seized the opening, devising increasingly sophisticated tactics to exploit the gap. Lower courts, left without clear guidance, have responded inconsistently. And the resulting uncertainty threatens the core values class actions are meant to safeguard.

III. EXPLAINING THE STRATEGIC MOOTNESS GAP

Having now identified the strategic mootness gap, this Part explains why the gap exists and why it merits correction. It begins by uncovering the Supreme Court's and the broader legal discourse's myopia toward the problem.[160] It then maps the true scope of strategic mootness, revealing a broader array of strategic mootness tactics than typically acknowledged.[161] Next, this Part surveys how lower courts, recognizing the stakes, have struggled to respond within the confines of existing doctrine, often improvising ad hoc solutions.[162] Finally, this Part makes the case for reform. Left unresolved, the strategic mootness gap risks weakening class actions and undermining core procedural values.[163]

A. *Strategic Mootness Gap Myopia*

The Supreme Court's failure to address the strategic mootness gap reflects a dual oversight. Courts have generally failed to see the gap as a doctrinal problem worthy of direct resolution. And courts and commentators have failed to fully grasp what strategic mootness looks like in practice.

1. *Missing the Gap.* — Since expressing concern about defendants picking off class actions in *Roper*, the Supreme Court has paid little attention to pre-class certification strategic mootness. Even more, in its more recent decisions—*Symczyk* and *Campbell-Ewald*—the Court has both walked back some of its strongest anti-strategic mootness language and avoided broader questions about defendants' ability to moot class claims

159. See supra section II.C (discussing *Symczyk* and *Campbell-Ewald*).

160. See infra section III.A.

161. See infra section III.B.

162. See infra section III.C.

163. See infra section III.D.

before certification.[164] Why has the strategic mootness gap persisted for decades, and why does the Court seem reluctant to address it?

Several explanations seem plausible. First, the strategic mootness gap looks different today than in the past. When the Supreme Court decided a series of class action mootness cases in the 1970s,[165] the law allowed class certification much earlier in the litigation. Since then, the Court has raised the bar for class certification, often requiring more extensive discovery before a class can be certified.[166] This shift has lengthened the period between filing and certification, giving defendants a much longer window to strategically moot cases.

Compounding the problem, a 2003 amendment to Rule 23(e), which governs court approval of class action settlements, expanded strategic mootness opportunities.[167] Before the amendment, many courts required some form of judicial oversight over any settlement in a case filed as a class action, even if a class had not yet been certified.[168] That meant a named plaintiff generally could not accept an individual settlement without the court considering the interests of the potential class. The 2003 revision made clear that court approval is required only for settlements in *certified* class actions.[169] Hence defendants gained greater ability to moot precertification class actions by settling individually with the named plaintiff.[170]

Another explanation for the strategic mootness gap lies in the unlikelihood of a strategic mootness case reaching the Supreme Court. The improbability stems not only from the general difficulty of securing Supreme Court review,[171] but also from the nature of strategic mootness remedies. When a putative class representative receives full individual relief, they have less incentive to continue litigating. Serving as class representative demands considerable time, resources, and risk, and there

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164. See Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016) (limiting discussion to named plaintiff's continuing interest in the case); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 78 n.5 (2013) (suggesting that *Roper* may no longer be good law).

165. See supra section II.B.

166. See supra note 125.

167. See Summary of the Report of the Judicial Conference Committee on Rules of Practice and Procedure 13 (2002), https://www.uscourts.gov/sites/default/files/fr_import/ST9-2002.pdf [https://perma.cc/F6LS-Q3EL] (summarizing the proposed changes to Rule 23(e)).

168. 12 Wright & Miller, 3d ed., supra note 80, § 3001.1 (describing the pre-2003 "majority rule").

169. Fed. R. Civ. P. 23(e).

170. 12 Wright & Miller, 3d ed., supra note 80, § 3001.1 (noting that the "tactical use of offers to moot class actions depended to a significant extent on the 2003 amendment to Rule 23(e)").

171. See Journal of the Supreme Court of the United States, at II (Oct. 2022), https://www.supremecourt.gov/orders/journal/Jnl22.pdf [https://perma.cc/X966-5UH4] (showing that the Supreme Court grants less than one percent of petitions for writs of certiorari annually).

is usually little reward for the effort.[172] Even with a willing plaintiff, the high cost of class action litigation, coupled with the uncertainties of class certification, may discourage plaintiff's counsel from pursuing class certification after individual relief is attained. Most strategic mootness cases likely end quietly with no plaintiff willing to continue litigating.[173]

As for the cases in which plaintiffs resist strategic mootness, courts typically prioritize a different inquiry: whether the named plaintiff retains a continuing individual personal stake. This sequencing makes sense; it is logical to prioritize the threshold question of the plaintiff's individual stake before reaching questions about the class claims' continued viability. Take *Campbell-Ewald* for example.[174] Rather than basing its decision on the plaintiff's proposed class claims, the Supreme Court focused solely on whether a rejected offer of relief could moot the plaintiff's individual claims.[175] Once it found that the plaintiff still had a personal stake in the case, it refrained from resolving what might happen to the class claims if that individual stake had been mooted.

This focus on individual personal stake can distract from the underlying strategic mootness gap. *Geraghty* and *Roper* illustrate how the Supreme Court has historically steered clear of addressing the precertification strategic mootness issue directly, opting instead to focus on matters of individual personal stake. In both cases, the Court broadened the notion of personal stake—in *Geraghty*, by likening the right to certification to the right of a private attorney general, and in *Roper*, by expanding it to include an economic interest in certification.[176] This approach avoided the more provocative question of whether and when an individual with a personally moot claim can persist in seeking class certification.

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172. While incentive awards for named plaintiffs are common in class action settlements, they are always reviewed for excessiveness, and a circuit split has emerged regarding their permissibility. See Jay Tidmarsh & Tladi Marumo, Good Representatives, Bad Objectors, and Restitution in Class Settlements, 48 BYU L. Rev. 2221, 2228 (2023) (theorizing the benefits and risks of incentive awards in light of the circuit split); see also Jason Jarvis, Note, A New Approach to Plaintiff Incentive Fees in Class Action Lawsuits, 115 Nw. U. L. Rev. 919, 936–37 (2020) (arguing that courts do not adequately evaluate the justifications and dangers of incentive awards).

173. Cf. Nancy Gertner, Losers' Rules, 122 Yale L.J. Online 109, 113–16 (2012), https://yalelawjournal.org/essay/losers-rules [https://perma.cc/5P87-EZX8] (discussing asymmetries in judicial decisionmaking patterns, wherein defendants receive written decisions when they prevail and plaintiffs do not).

174. Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016).

175. Id. at 162–63.

176. U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 403 (1980) ("This 'right' is more analogous to the private attorney general concept than to the type of interest traditionally thought to satisfy the 'personal stake' requirement." (citing Deposit Guaranty Nat'l Bank v. Roper, 445 U.S. 326, 338 (1980)); *Roper*, 445 U.S. at 332–33 ("Neither the rejected tender nor the dismissal of the action over plaintiffs' objections mooted the plaintiffs' claim on the merits so long as they retained an economic interest in class certification.").

Finally, the strategic mootness gap presents difficult questions that courts often prefer to avoid. Allowing defendants to moot cases through strategic action could undermine the class action mechanism and leave systemic issues unaddressed.[177] But preventing defendants from resolving individual disputes may seem to discourage the very behavior courts typically want to promote: voluntary settlement and remediation of harm.[178] If defendants provide full relief to the named parties, why should they still face prolonged litigation?[179]

When viewed from the Court's increasingly skeptical stance toward class actions, pick-off tactics may even appear as a natural—and desirable—market correction: a way to settle individual cases quickly and limit sprawling litigation. Combined with growing docket pressure, these structural incentives help explain why the Court has repeatedly declined to confront the strategic mootness gap head-on.

2. *Missing the Gap's Breadth.* — Equally significant is the limited way strategic mootness has been framed in legal discourse. For decades, legal commentary on the issue had been rules-centric, with scholars framing strategic mootness primarily as a technical conflict between two rules of procedure. Rule 68 of the Federal Rules of Civil Procedure allows defendants to make formal settlement offers that shift litigation costs to plaintiffs who reject them and then fail to obtain better results at trial. Rule 23, meanwhile, governs class actions and aims to enable representative litigation on behalf of groups. Scholars and rulemakers had long expressed concern that Rule 68—designed to encourage early settlement—could pressure named plaintiffs into accepting individual relief that may undermine the goals of Rule 23.[180] This concern fueled a wave of reform efforts and scholarship that treated strategic mootness in class actions almost exclusively as a Rule 68 problem.[181]

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177. See infra section III.D (exploring the consequences of the strategic mootness gap).

178. See Judith Resnik, Managerial Judges, 96 Harv. L. Rev. 374, 376–77 (1982) ("In growing numbers, judges are not only adjudicating the merits of issues presented to them by litigants, but also are meeting with parties in chambers to encourage settlement of disputes and to supervise case preparation.").

179. The dissent in *Campbell-Ewald* expressed these concerns. See 577 U.S. at 179 (Roberts, C.J., dissenting) ("But a plaintiff is not the judge of whether federal litigation is necessary, and a mere *desire* that there be federal litigation—for whatever reason—does not make it *necessary*.").

180. See Roy D. Simon, Jr., The Riddle of Rule 68, 54 Geo. Wash. L. Rev. 1, 51–52 (1985) (summarizing the debate around Rule 68's application to class actions).

181. Specifically, in 1983 and 1984, the Advisory Committee on Civil Rules recommended an amendment to Rule 68 to exclude the rule's application from class actions. Comm. on Rules of Prac. & Proc. of the Jud. Conf. of the U.S., Preliminary Draft of Proposed Amendments to the Federal Rules of Appellate Procedure, Federal Rules of Civil Procedure, Federal Rules of Criminal Procedure, and Rules Governing Section 2254 Cases and Section 2255 Proceedings in the United States District Courts, reprinted in 102 F.R.D. 407, 432–37 (1984). The amendment did not succeed. Simon, supra note 180, at 51–52. Then, after the 2003 amendment to Rule 23(e) changed how class action

This framing took center stage when Rule 68 tactics reached the Supreme Court in *Symczyk* and *Campbell-Ewald*. Scholarly attention turned to the specific question the Court considered: whether an *unaccepted* Rule 68 offer could moot a named plaintiff's claim.[182] When the *Campbell-Ewald* majority answered no, it seemed to resolve the Rule 68 question—but only partially.[183] The decision also highlighted new vulnerabilities. Justice Alito's dissent provided what many viewed as a roadmap for defendants, listing alternative strategies—such as unilaterally "hand[ing] the plaintiff a certified check or deposit[ing] the requisite funds in a bank account in the plaintiff's name"[184]—that might still force mootness.[185]

The Advisory Committee on Civil Rules took note. In early 2016, just after the *Campbell-Ewald* decision, the Subcommittee on Rule 23 convened to assess the unresolved questions surrounding pick-off tactics.[186] The Subcommittee discussed several possible amendments to address the problem[187] but ultimately concluded that "there are sufficient questions about the present circumstances to make proposing an amendment now inappropriate."[188] It opted instead to continue studying the issue.[189]

The Subcommittee's decision to continue studying the issue identified a crucial need for a broader understanding of picking off as it actually occurs in practice. But that broader account has not emerged. Academic and popular commentary has continued to center on the types of tactics and cases that have dominated the Supreme Court's consideration: those involving clear dollar values and unilateral payments,

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settlements were reviewed and increased opportunities for precertification strategic mootness, see supra note 169 and accompanying text, legal commentators produced extensive analysis of Rule 68's deployment as a strategic weapon by class action defendants. See, e.g., M. Andrew Campanelli, Note, You Can Pick Your Friends, But You Cannot Pick Off the Named Plaintiff of a Class Action: Mootness and Offers of Judgment Before Class Certification, 4 Drexel L. Rev. 523, 525 (2012) (focusing on Rule 68 offers of judgment); see also Koyzka, supra note 37, at 789 (same); Lott, supra note 37, at 531 (same). This academic attention underscores Rule 68's central role in contemporary debates over precertification strategic mootness.

182. Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 156 (2016); Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 80–82 (2013) (Kagan, J., dissenting).

183. *Campbell-Ewald*, 577 U.S. at 156.

184. Id. at 186 (Alito, J., dissenting).

185. See Robert H. Klonoff, Class Actions in the Year 2026: A Prognosis, 65 Emory L.J. 1569, 1571 (2016) ("The Supreme Court's decision in *Campbell-Ewald v. Gomez* will not deter defendants in their efforts to design strategies for picking off class representatives through offers of judgment." (footnote omitted)).

186. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules, *in* Agenda Book of the Advisory Committee on Civil Rules 127, 127–30 (Feb. 5, 2016) [hereinafter Advisory Committee Agenda Book].

187. This Article returns to these proposals in section IV.B.

188. Rule 23 Subcommittee Report, *in* Advisory Committee Agenda Book, supra note 186, at 108.

189. See id.

typically in aggregated-damages cases.[190] This focus has contributed to a persistent framing of strategic mootness as a forced-payment problem.

Strategic mooting spans far beyond monetary offers. It includes a wide array of procedural tactics—often less visible than the forced-payment strategies spotlighted in *Campbell-Ewald*—and cuts across diverse substantive areas. As the Subcommittee's deliberations suggested, recognizing this broader pattern is essential to understanding how strategic mootness actually functions and why current doctrine has struggled to respond.

B. *Strategic Mootness in Practice*

This section maps the diverse ways strategic mootness manifests across different types of litigation, revealing a phenomenon far more varied than commonly understood. While some instances look like classic pick-offs, with defendants dangling Rule 68 offers or sending unsolicited checks, others are harder to spot. Strategic mootness can unfold in the shadows of administrative discretion or through carefully timed grants of relief. What unites these scenarios is not any particular tactic, but a common result: the elimination of a possible class before class certification because of some action taken by the defendant.

Strategic mootness typically unfolds along two key dimensions: the type of relief at stake and the mechanism by which defendants provide it. Relief type necessarily depends on the type of remedy sought by the plaintiff. Monetary remedies involve cash payments or their equivalent (as commonly seen, for example, in Rule 23(b)(3) aggregated-damages class actions), while nonmonetary remedies usually involve changes to defendant conduct (as commonly seen in Rule 23(b)(2) injunctive civil-rights class actions). The delivery mechanism describes how defendants provide the remedy to named plaintiffs. Unilateral tactics involve defendants' provision of relief without the plaintiff's agreement, while bilateral tactics require some form of plaintiff consent or participation.

Below, Figure 2 identifies four types of picking off remedies, offering examples of each.

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190. See, e.g., Christakis et al., supra note 37, at 253 (describing the benefits to defendants who successfully moot class claims); Hnylka, supra note 37, at 388 (discussing Rule 68 offers of complete relief); Alan B. Morrison, Response, *Campbell-Ewald Co. v. Gomez*: A (Temporarily) Failed Pick Off, Geo. Wash. L. Rev. On the Docket (Jan. 22, 2016), https://www.gwlr.org/campbell-ewald-co-v-gomez-a-temporarily-failed-pick-off/ [https://perma.cc/L778-VERP]; Allison Grande, TCPA Defendants Down, But Not Out, With 'Pick-Off' Ruling, Law360 (June 22, 2017), https://www.law360.com/articles/937402/tcpa-defendants-down-but-not-out-with-pick-off-ruling (on file with the *Columbia Law Review*) (describing a Seventh Circuit case addressing a Rule 67 pick-off tactic); Christine M. Reilly & Andrew Case, Supreme Court Holds for Plaintiff on Rule 68 Issue, but Suggests Alternatives for Mootness, Manatt (Jan. 21, 2016), https://www.manatt.com/insights/newsletters/tcpa-connect/supreme-court-holds-for-plaintiff-on-rule-68-issue [https://perma.cc/59QH-NDAL].

FIGURE 2. STRATEGIC MOOTNESS GAP TACTICS

	Monetary	Nonmonetary
Unilateral	The defendant forces a financial remedy on the plaintiff. *Examples:* ▪ Corporation makes Rule 67 deposit of requested relief ▪ Company sends a check or issues a direct deposit to the plaintiff	The defendant provides injunctive remedy to the plaintiff without plaintiff's affirmative acceptance. *Examples:* ▪ Benefits office approves delayed benefits application ▪ Internal Revenue Service expedites requested tax refund
Bilateral	The defendant offers a financial remedy and the plaintiff affirmatively accepts it. *Example:* ▪ Negotiated settlement payout	The defendant offers an injunctive remedy and the plaintiff affirmatively accepts it. *Examples:* ▪ Government offers access to asylum process if plaintiff appears at the border ▪ City offers housing to plaintiff experiencing homelessness

The aim here is not to perfectly capture every variation of strategic mootness. Nor are the lines between categories pristine. Still, this breakdown reveals meaningful patterns in how courts approach different forms of picking off, and it clarifies how the stakes and power dynamics vary across contexts.

Unilateral monetary resolution represents the most familiar form of strategic mootness and the one that dominates current scholarly discussions.[191] In these cases, a defendant seeks to end a class action by unilaterally providing the named plaintiff with complete financial relief. The practice has proliferated in the consumer protection space, where statutory damage caps make the required payment amounts easy to

191. See supra section III.A.2.

calculate.[192] A paradigmatic example involves a putative class action brought under the Fair Debt Collection Practices Act.[193] In these cases, the corporation might deposit the maximum statutory penalty with the court or send a check to the individual plaintiff, thereby extinguishing the individual claim. After unilaterally resolving the plaintiff's claim, the defendant moves to dismiss the case—including the putative class claims—as moot.

Courts have developed a variety of approaches to unilateral monetary resolution. Most begin, as in *Campbell-Ewald*, by focusing on the plaintiff's continuing personal stake.[194] Courts are split on what relief moots an individual plaintiff's claims. Some courts require a plaintiff's actual receipt of funds, holding (for example) that a Rule 67 deposit with the court can't alone moot claims since the plaintiff never actually receives the money.[195] Other courts have held that sending a check to the plaintiff suffices to moot an individual's case, regardless of whether the plaintiff cashes it.[196] Still, courts have proved reluctant to let forced individual relief cut short potential class actions, recognizing that doing so could compromise the viability of the class device. As a result, many courts permit class claims to move forward even after the individual claim becomes moot.[197]

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192. See S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791, at *6 (D. Mass. Apr. 12, 2016) (noting the prevalence of strategic mootness tactics in Telephone Consumer Protection Act (TCPA) litigation and observing that "[s]ummer has arrived" for such practices), abrogated on other grounds by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

193. E.g., Weiss v. Regal Collections, 385 F.3d 337 (3d Cir. 2004), abrogated by Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019); see also Chen v. Allstate Ins. Co., 819 F.3d 1136 (9th Cir. 2016) (involving the Telephone Consumer Protection Act); *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *8 (same).

194. See supra section III.A.1.

195. See, e.g., Radha Geismann, M.D., P.C. v. ZocDoc, Inc., 909 F.3d 534, 541 (2d Cir. 2018) (reasoning that a Rule 67 deposit with a court still "leaves a plaintiff 'emptyhanded'"); Fulton Dental, LLC v. Bisco, Inc., 860 F.3d 541, 545 (7th Cir. 2017) (finding "no principled distinction between attempting to force a settlement on an unwilling party through Rule 68 . . . and attempting to force a settlement on an unwilling party through Rule 67"). But see Leyse v. Lifetime Ent. Servs., LLC, 171 F. Supp. 3d 153, 156 (S.D.N.Y. 2016), aff'd, 679 F. App'x 44 (2d Cir. 2017) (holding that "a defendant's deposit of a full settlement with the court, and consent to entry of judgment against it, will eliminate the live controversy before a court" (citing Tanasi v. New All. Bank, 786 F.3d 195, 200 (2d Cir. 2015))).

196. See, e.g., LaSpina v. SEIU Pa. State Council, No. 18-2018, 2019 WL 4750423, at *12 n.8 (M.D. Pa. Sep. 30, 2019) (finding that a direct deposit into plaintiff's bank account coupled with uncashed checks was sufficient to moot a putative class action); *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *4–5 (holding that a defendant's tender of a check in excess of statutory damages rendered a putative class representative's individual claim moot).

197. See, e.g., *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *7 (applying the inherently transitory exception despite the mootness of the named plaintiff's individual claims).

In contrast, *bilateral monetary resolution* involves a defendant offering, and a plaintiff accepting, a financial settlement. In many ways, this is the least controversial form of picking off. Unlike unilateral tactics, bilateral resolution respects the plaintiff's autonomy and typically results in the plaintiff abandoning the case and class. It is, in essence, the standard litigation settlement—an agreement between parties to resolve a dispute without further adjudication. As a result, most of these cases end quietly, with little judicial scrutiny and minimal doctrinal development around the underlying class claims.

Occasionally, however, a plaintiff who accepts an individual settlement seeks to continue representing the class. Courts usually reject these efforts, holding that voluntary settlement forfeits the right to pursue certification.[198] Still, the surface appearance of consensual settlement can mask troubling dynamics. As Professor Owen Fiss has observed, settlements can result less from genuine agreement and more from disparities in power, resources, and abilities.[199] These concerns are amplified in the precertification class action context, in which named plaintiffs bear the burden of potential class representation alone. A plaintiff facing financial precarity or urgent personal need may view even a modest settlement offer as impossible to reject. In such circumstances, consent may obscure the lack of a meaningful alternative.[200]

Unilateral nonmonetary resolution occurs when a defendant addresses the plaintiff's nonmonetary claim without any plaintiff involvement. This tactic appears in regulatory or civil rights contexts, in which defendants (often government actors) hold the keys to the requested relief. The visa case described in the introduction—in which plaintiffs filed a putative class action challenging discriminatory delays in the visa review process—offers a good example.[201] There, the government could simply approve the plaintiffs' pending visa petitions and then move to dismiss the entire case as moot. Another example may be a putative class action brought by a noncitizen challenging their detention in cage-like facilities.[202] There, the government might strategically transfer the named plaintiff once

198. E.g., Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *5 (N.D. Cal. Sep. 29, 2023); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019).

199. See Owen M. Fiss, Against Settlement, 93 Yale L.J. 1073, 1076–78 (1984) ("[S]ettlement is also a function of the resources available to each party to finance the litigation, and those resources are frequently distributed unequally.").

200. Bilateral monetary resolution also raises important questions about the obligations of named plaintiffs to absent class members, since these individual settlements occur without judicial oversight of their fairness. For an introduction to the scope of the precertification fiduciary duty owed by class counsel, see generally Nick Landsman-Roos, Note, Front-End Fiduciaries: Precertification Duties and Class Conflict, 65 Stan. L. Rev. 817 (2013).

201. Cruz v. Farquharson, 252 F.3d 530, 532 (1st Cir. 2001).

202. E.g., P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 509 (D.D.C. 2020).

they are identified in the lawsuit and then seek dismissal of the entire case.[203]

Unilateral nonmonetary resolution raises unique evidentiary and analytical challenges because it is often hard to discern whether the defendant's actions represent strategic behavior or coincidental relief. Unlike unilateral monetary resolution, in which defendants might cut a check to a specific plaintiff in a clearly strategic manner, unilateral nonmonetary resolution can happen in ways that may appear organic. For example, an application might simply reach the top of the pile without the defendant's deliberately fast-tracking the plaintiff's case.[204] The result is a blurred line between administrative happenstance and deliberate mootness strategy. This ambiguity makes it harder for courts to detect gamesmanship, even when the facts strongly suggest it.

Bilateral nonmonetary resolution, by contrast, requires the plaintiff to affirmatively accept the offered injunctive relief. In these situations, defendants cannot unilaterally impose the requested remedy, and thus plaintiffs preserve a measure of autonomy. As with bilateral monetary resolution, many observers may conclude that once a plaintiff accepts the offered relief, they should be precluded from pursuing class certification. There are situations, however, where "acceptance" is far more ambiguous. For example, a government might offer an asylum seeker access to the asylum process but require the individual to be physically present at the border to receive the assistance.[205] Or a city might offer housing to a person experiencing homelessness, but the aid requires the person's cooperation in accepting the housing. In these situations, the urgency of the relief being offered makes refusal impossible. The power dynamics overwhelmingly favor the defendant, leaving plaintiffs little meaningful choice.

This mapping reveals the limits of treating "picking off" as a monolithic tactic. The phenomenon reaches far beyond the consumer protection and aggregated-damages cases that have dominated legal discourse. From cases involving complete defendant control to scenarios marked by plaintiffs' constrained choices, each category introduces distinct power dynamics and legal uncertainties. The resulting diversity has forced lower courts into a patchwork of improvised responses.

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203. Id. (finding that the government's actions "reveal[] an intent to make Plaintiff's claim . . . inherently transitory") (internal quotation marks omitted) (quoting J.D. v. Azar, 925 F.3d 1291, 1309 (D.C. Cir. 2019)).

204. Compare *Cruz*, 252 F.3d at 535 (finding no evidence of a "scurrilous pattern and practice of thwarting judicial review"), with Wilson v. Gordon, 822 F.3d 934, 951 (6th Cir. 2016) (finding evidence of "ad hoc process" designed to remedy the named plaintiffs' claims).

205. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018) (decided on other grounds).

C. *Lower Court Confusion*

Confronted with strategic mootness in many forms—from corporate defendants cutting checks for named plaintiffs to government agencies selectively expediting administrative relief—lower courts have improvised a range of doctrinal responses. Lacking clear guidance from the Supreme Court, they have stretched existing exceptions beyond their traditional bounds, experimenting with tools not designed for these scenarios. The result is a fragmented legal landscape marked by overlapping, inconsistent approaches that generate confusion for litigants and leave putative class actions unevenly protected across jurisdictions.

Some courts have stretched the inherently transitory exception, originally developed to address naturally fleeting claims, into the strategic mootness context.[206] Rather than focusing on the temporal nature of the named plaintiff's claim, these courts examine the defendant's power to pick off lead plaintiffs.[207] This extension appears almost exclusively in cases involving unilateral defendant action.[208] Courts reason that unilateral mootness tactics replicate the dynamics of naturally transitory claims: In both scenarios, plaintiffs lack control over when their claims expire and face the same risk of evaded judicial review.[209]

This approach has found critics, who argue it conflates natural claim expiration with deliberate conduct by defendants.[210] The inherently transitory exception traditionally applies when claims are so naturally time-sensitive that it is "doubtful" any plaintiff could maintain a live controversy long enough to reach class certification.[211] In contrast, when defendants moot cases through targeted relief, there is no guarantee they will continue the practice. They may abandon the strategy or lack resources to sustain it, leaving open the possibility that future plaintiffs could obtain certification rulings.[212] Moreover, following *Symczyk*, which stressed that the exception was designed for inherently time-sensitive

206. See, e.g., Unan v. Lyon, 853 F.3d 279, 287 (6th Cir. 2017); Chen v. Allstate Ins. Co., 819 F.3d 1136, 1143–44 (9th Cir. 2016).

207. *Chen*, 819 F.3d at 1148.

208. See id. at 1147–48. This exception has been invoked in cases for monetary relief and nonmonetary relief. See id. at 1148 (damages placed in escrow); Robidoux v. Celani, 987 F.2d 931 (2d Cir. 1993) (benefits application approval).

209. See Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981) ("By tendering to the named plaintiffs the full amount of their personal claims each time suit is brought as a class action, the defendants can in each successive case moot the named plaintiffs' claims before a decision on certification is reached.").

210. See, e.g., Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 76–77 (2013) (noting that the doctrine developed to address naturally "fleeting" claims and not claims mooted by defendant strategy).

211. *Zeidman*, 651 F.2d at 1049–50 (observing that the distinction between cases mooted by "nature" and by "purposive action" is "significant").

212. Id.

claims, some judges have grown cautious about extending it to cover defendant-driven mootness.[213]

Other courts have seized on language in *Roper* to justify a broader reading of the class action exception. The Sixth Circuit, for instance, has invoked *Roper* to explain that defendants should not be able to "strategically avoid[] litigation by settling or buying off individual named plaintiffs."[214] Although *Roper* involved mootness after a certification denial, the Sixth Circuit has found no meaningful difference between that posture and a case in which the defendant "picks off" a named plaintiff while a certification motion is still pending.[215] In both scenarios, the court reasoned, "the defendant is on notice that the named plaintiff wishes to proceed as a class, and the concern that the defendant therefore might strategically seek to avoid that possibility exists."[216]

This approach also has limits. Some courts reject any *Roper*-based exception outright, noting it relies primarily on dicta and extends the class action exception well beyond Supreme Court precedent.[217] But even among courts willing to entertain this broader reading, the approach often proves underinclusive. It is typically confined to cases in which a class certification motion is already pending[218]—leaving a significant gap in protection. That formal motion requirement overlooks the very period when strategic mootness often occurs: before plaintiffs have a chance to seek certification, when defendants may strike preemptively to avoid discovery.[219] In this way, the approach fails to capture much of the conduct it aims to address.

Noting the limitations of existing doctrine, some courts have begun developing their own versions of a novel "picking off" exception. The

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213. This is especially true in cases requesting monetary rather than injunctive relief. 569 U.S. at 77 ("Unlike claims for injunctive relief challenging ongoing conduct, a claim for damages cannot evade review; it remains live until it is settled, judicially resolved, or barred by a statute of limitations. Nor can a defendant's attempt to obtain settlement insulate such a claim from review . . . ."); see also, e.g., Wilson v. Gordon, 822 F.3d 934, 946–47 (6th Cir. 2016) (distinguishing *Symczyk*); *Chen*, 819 F.3d at 1143 (same, but applying the inherently transitory exception in a case for damages); Grice v. Colvin, No. GJH-14-1082, 2016 WL 1065806, at *5 (D. Md. Mar. 14, 2016) (holding that the inherently transitory rule only applies to naturally fleeting claims).

214. Unan v. Lyon, 853 F.3d 279, 285 (6th Cir. 2017) (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 339 (1980)).

215. *Wilson*, 822 F.3d at 947.

216. Id.

217. See, e.g., Haddock v. United States, 161 Fed. Cl. 6, 18 n.11 (Fed. Cl. 2022) ("The idea that a strategy of 'picking off' named plaintiffs in a class action triggers a mootness exception seems to have originated with language in [*Roper*], that [*Symczyk*] later characterized as dicta." (citing to 445 U.S. 326; 569 U.S. at 77–78)).

218. See Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) ("To allow a case, not certified as a class action and with no motion for class certification even pending, to continue in federal court when the sole plaintiff no longer maintains a personal stake defies the limits on federal jurisdiction expressed in Article III.").

219. See infra section IV.C.2.

Third Circuit, which pioneered this approach, applies it to claims "acutely susceptible to mootness" through the defendant's actions, provided the plaintiff has not unduly delayed seeking class certification.[220] Recognizing the vagueness of that standard, other courts have sought to sharpen it by incorporating inquiries into defendant intent. In these courts, judges may assess whether an exception is warranted based on indicia of strategic behavior, including suspicious timing,[221] ad hoc relief for named plaintiffs,[222] or recurring efforts to pick off new plaintiffs.[223]

These efforts mark a promising recognition of the unique problems posed by the strategic mootness gap. But they also raise concerns. The Third Circuit's formulation, though flexible, is underdeveloped and open-ended. It offers little guidance on how "acute susceptibility" should be assessed, creating uncertainty about when the exception applies. And efforts to analyze defendant intent introduce other challenges.[224] Defendants rarely admit to problematic strategic behavior, and plaintiffs often lack access to the kinds of evidence, such as internal deliberations or policies, that might show procedural manipulation. As a result, courts may hesitate to find intent absent clear proof of bad faith.[225]

Still, for all their varied approaches, many courts are ultimately responding to the same structural risk. Though they have improvised different doctrinal solutions, there is broad convergence on the core problem: that defendants will use precertification settlements or dismissals to wholly avoid class-wide accountability. This lively doctrinal experimentation reflects growing judicial awareness that the strategic mootness gap poses a serious threat to the integrity of aggregate litigation. Courts' willingness to stretch or rework existing mootness principles signals an appetite for clearer, more coherent doctrine—a task taken up in Part IV.

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220. Duncan v. Governor of V.I., 48 F.4th 195, 206 (3d Cir. 2022); see also Weiss v. Regal Collections, 385 F.3d 337, 347 (3d Cir. 2004) (developing the picking off exception in the Third Circuit).

221. See Sos v. State Farm Mut. Auto. Ins. Co., No. 21-11769, 2023 WL 5608014, at *12 (11th Cir. Aug. 30, 2023) (noting evidence of pick-off tactics where the defendant, after failed settlement attempts, sent checks to the plaintiff on the eve of a status conference on class certification).

222. See, e.g., Wilson v. Gordon, 822 F.3d 934, 950–51 (6th Cir. 2016) (finding the state's use of a newly created, ad hoc procedure to moot the named plaintiffs' claims supported application of a picking off exception).

223. See, e.g., P.J.E.S. v. Wolf, 502 F. Supp. 3d 492, 509 (D.D.C. 2020) (finding that the government's intent to frustrate litigation—evidenced by the transfer of any child named by counsel—rendered the plaintiffs' claims inherently transitory).

224. Intent-based inquiries in this context are also somewhat detached from litigation's practical reality. Defendants often have clear incentives to avoid class certification, making it unrealistic to treat strategic intent as an exceptional or rare occurrence.

225. See, e.g., Cruz v. Farquharson, 252 F.3d 530, 535 (1st Cir. 2001) (finding insufficient evidence that the defendant engaged in a pattern or practice aimed at avoiding judicial review).

But the argument for reform extends beyond the need for doctrinal clarity. As the next section demonstrates, the strategic mootness gap undermines several fundamental procedural values that class actions are designed to serve.

D. *Consequences*

The strategic mootness gap presents a significant incongruence within mootness law. Class action mootness doctrine explicitly addresses inherent mootness for precertification class actions but is silent on precertification strategic mootness. Thus, a plaintiff whose individual claim is mooted "naturally" may continue pursuing class certification (under the inherently transitory exception), but one whose individual claim is deliberately mooted by the defendant's actions is left with no clear path to pursue class certification. This distinction lacks a principled rationale.

Beyond doctrinal inconsistency, the strategic mootness gap enables the kind of procedural gamesmanship[226] that courts have long sought to prevent. Consider the voluntary cessation exception: Courts have long recognized that when a defendant voluntarily stops challenged conduct, the case may still proceed when there is a risk the conduct will recur.[227] Strategic mootness in the precertification context poses a similar yet often more acute problem. In many cases, the concern is not merely that a defendant *might* repeat the challenged conduct in the future. Instead, the conduct is ongoing, affecting others in the proposed class. By resolving the named plaintiff's claim while continuing the disputed practice, the defendant can evade judicial review not just temporarily, but indefinitely.[228]

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226. The term "gamesmanship," though surprisingly undertheorized in legal scholarship, is often used to describe problematic (though not necessarily impermissible) litigation behavior. Here, this Article uses the term to refer to strategic behavior against which the legal system may have reason to guard itself—specifically, conduct that so undermines foundational values of the justice system that it threatens the legitimacy of legal outcomes. For an illuminating discussion of litigation gamesmanship in the civil context, including when and why it is tolerated or constrained, see generally Edith Beerdsen, Gamesmanship in Civil Litigation, 60 Ga. L. Rev. 1, 28–62 (2025) (surveying the use of the term "gamesmanship" by federal judges and proposing that courts use the concept "(1) as part of an analysis of a statute's intent or purpose; (2) as a canon of construction; and (3) as an implied mental-state requirement"); Edith Beerdsen, Strategy for Strategy's Sake, 103 N.C. L. Rev. 733, 735, 796–800 (2025) (arguing that "strategy functions as a procedural value in its own right"). For an equally insightful treatment of strategic behavior in the criminal context, see John D. King, Gamesmanship and Criminal Process, 58 Am. Crim. L. Rev. 47, 48–49 (2020) (defining gamesmanship as "a strategy designed for winning regardless of the factual and legal merits of the case").

227. See supra section II.A.

228. See Stewart v. Cheek & Zeehandelar, LLP, 252 F.R.D. 384, 386 (S.D. Ohio 2008) (explaining that by allowing defendants to pick off plaintiffs during the precertification stage, defendants can "essentially opt-out of Rule 23" and avoid liability for class-wide relief (internal quotation marks omitted) (quoting Schaake v. Risk Mgmt. Alternatives, Inc., 203 F.R.D. 108, 112 (S.D.N.Y. 2001))).

The strategic mootness gap also undermines several other fundamental procedural values:

Judicial economy. Class actions can promote judicial economy by consolidating many individual claims into a single proceeding, avoiding the inefficiency and expense of repetitive litigation. As the Supreme Court has emphasized, Rule 23 is "designed to avoid, rather than encourage, unnecessary filing of repetitious papers and motions," and to prevent a "needless duplication of" actions.[229] Rather than forcing courts to adjudicate dozens or hundreds of nearly identical cases—each involving the same legal theories, factual patterns, and defendant conduct—class certification prevents "the multiplicity of activity" that burdens judicial resources.[230] This efficiency serves both private and public interests: Individual parties can avoid duplicative motion and discovery practice, while courts can resolve widespread disputes without the administrative burden of managing multiple cases.

The strategic mootness gap directly undermines these efficiencies. By allowing defendants to "pick off" lead plaintiffs, the gap forces other plaintiffs to bring separate individual actions, "frustrat[ing] the principal function of a class suit."[231] Each plaintiff must litigate the same issues previous plaintiffs have raised, generating the duplicative proceedings Rule 23 was meant to eliminate.

Deterrence. Class actions also serve a crucial deterrent function by imposing meaningful consequences for widespread misconduct. When defendants face potential liability to an entire class rather than isolated individual claims, the stakes become great enough to influence institutional behavior and discourage future violations.[232] This deterrent effect operates on two levels: specifically, by discouraging the defendant from repeating the harmful conduct, and generally, by signaling to other potential wrongdoers that systematic misconduct will trigger legal consequences.[233] Individual lawsuits, by contrast, often impose only minimal costs that defendants can easily absorb as a cost of doing business, particularly when the individual harm is small relative to the defendant's resources.[234]

The strategic mootness gap significantly weakens this deterrent function. By allowing defendants to extinguish class claims through individualized relief, it permits them to continue harmful conduct while incurring only the minimal cost of occasional individual remedies.

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229. Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 550, 554 (1974).

230. Id. at 551.

231. Id.

232. Gilles & Friedman, supra note 27, at 105–07.

233. Brian T. Fitzpatrick, Civ. Just. Rsch. Initiative, Do Class Actions Deter Wrongdoing? 2–3 (2022), https://civiljusticeinitiative.org/wp-content/uploads/2023/10/Class_Actions_Deter_Wrongdoing.pdf [https://perma.cc/YX7B-4XT9].

234. Gilles & Friedman, supra note 27, at 105–07.

Defendants can essentially treat individual payouts as a licensing fee for ongoing misconduct, confident they can avoid the collective liability that gives class actions their deterrent force. This dynamic is particularly troubling when low-value, high-volume harms render individual litigation economically unfeasible while the aggregate harm is substantial. Without the threat of class-wide liability, defendants have little incentive to modify their behavior, undermining one of the key benefits of class actions.

The public interest. The strategic mootness gap also undermines the "public interest in having the legality of practices settled."[235] While "baseline" mootness doctrine reflects a narrow view of litigation as resolving disputes between individual litigants, mootness exceptions acknowledge that some cases implicate broader public values, including the need for legal clarity and systemic accountability.[236] Class actions similarly embrace this public dimension of adjudication.[237] They are designed not just to redress individual harms, but to confront systemic misconduct, promote institutional accountability, and clarify the law in ways that benefit the public at large.

The strategic mootness gap allows defendants to circumvent this public function. By avoiding class certification through targeted relief, defendants can prevent systemic legal questions from reaching resolution, limiting adjudication to its dispute-settling function and sidelining its broader role in clarifying the law. This tactic not only deprives the public of judicial guidance on important issues but also allows potentially unlawful practices to continue unchallenged. Hence the gap undermines the very public values that both mootness exceptions and the class action device are designed to protect.

Access to justice. Class actions also serve a vital access to justice function by enabling individuals with limited resources to challenge powerful defendants on more equal footing.[238] When a government or corporation inflicts a small harm on many people, individuals often do

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235. United States v. W.T. Grant Co., 345 U.S. 629, 632 (1953) (citing United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 309–10 (1897)).

236. Lee, supra note 51, at 628 ("[T]he baseline doctrines of standing and mootness are generally predicated on the dispute resolution model, whereas many of the exceptions reflect the public values vision . . . .").

237. See, e.g., Abram Chayes, The Role of the Judge in Public Law Litigation, 89 Harv. L. Rev. 1281, 1291 (1976) (noting that injustices are growing increasingly systemic); Suzette M. Malveaux, The Modern Class Action Rule: Its Civil Rights Roots and Relevance Today, 66 Kan. L. Rev. 325, 332 (2017) (examining the connection between class action litigation and the 1960s civil rights movement); Marcus, History of the Class Action, supra note 90, at 590 (identifying a public "regulatory conception" of Rule 23); see also Richard H. Fallon, Jr., John F. Manning, Daniel J. Meltzer & David L. Shapiro, Hart and Wechsler's The Federal Courts and the Federal System 73–75 (7th ed. 2015) (describing the "law declaration function" of adjudication).

238. See Galanter, supra note 26, at 143.

not pursue litigation because the costs outweigh the potential recovery.[239] A damages class action makes litigation economically feasible by allowing individuals to aggregate their claims and spread costs.[240] Similarly, someone enduring discrimination may lack the resources to challenge systemic injustice.[241] But an injunctive civil-rights class action "recognize[s] the financial and political powerlessness" of individuals and enables them to join forces with others to seek meaningful redress.[242] The united front of a class exerts real pressure on defendants.[243]

The strategic mootness gap allows defendants to exploit individual plaintiffs before the playing field is leveled.[244] In the precertification stage, the named plaintiff faces the defendant alone, without the collective power of a certified class. The defendant, for its part, sees a small problem that could become a much bigger, costlier problem if not promptly addressed. Defendants therefore have a strong incentive to resolve individual claims early and eliminate the threat of a larger class action. In doing so, they leave intact the exact inequality that class actions were designed to remedy.

IV. ADDRESSING THE STRATEGIC MOOTNESS GAP

We are left with a variety of strategic mootness tactics and a mix of judicial approaches to the behavior. On one hand, lower courts have repeatedly demonstrated a desire to address strategic mootness and defendant gamesmanship in the context of proposed class actions. On the other hand, the Supreme Court has cast doubt on whether existing mootness exception doctrine can address the strategic mootness gap, and some justices seem to be encouraging the very conduct that the lower courts are trying to constrain. The result is a doctrinal patchwork that is fractured, inconsistent, and ripe for exploitation.

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239. Carroll, supra note 33, at 861 ("[B]y offering the potential for a larger overall recovery . . . , [Rule 23(b)(3)] can create an economic incentive to litigation where none existed before.").

240. Id.

241. See Phyllis Tropper Baumann, Judith Olans Brown & Stephen N. Subrin, Substance in the Shadow of Procedure: The Integration of Substantive and Procedural Law in Title VII Cases, 33 B.C. L. Rev. 211, 253 (1992) (describing how class actions, compared to individual suits, "provide a more level litigation playing field by permitting the sharing of legal resources and expenses").

242. Id.

243. Id. at 253–54 (explaining how class action can "strengthen individual plaintiffs" and provide "enormous settlement leverage" to them).

244. For broader discussion of how defendants strategically exploit procedural doctrines to disadvantage individual plaintiffs, see generally Helen Hershkoff & Luke Norris, The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline, 122 Mich. L. Rev. 1 (2023) (exploring ways that corporate parties strategically manipulate jurisdiction).

This Part proposes a solution by outlining a coherent picking off exception.[245] It addresses key criticisms surrounding the exception by delineating its boundaries and identifying its limitations.[246] This Part concludes with a series of cases and hypotheticals, illustrating how courts might approach the strategic mootness gap analysis.[247]

A. *Toward a Coherent Picking Off Exception*

This Article proposes a solution: a coherent doctrinal standard that courts can apply when a defendant provides individualized relief to a named plaintiff before class certification. A defendant can moot class claims through individualized relief only if it can show either (1) that similarly situated plaintiffs could reasonably be expected to reach class certification despite the defendant's conduct *or* (2) that the underlying violation has been remedied comprehensively, leaving no similarly situated individuals with live claims. This formulation of the rule draws from the picking off exception's neighboring exceptions (the inherently transitory and voluntary cessation exceptions) to form a coherent doctrine.

Why place the burden on the defendant? As with the voluntary cessation exception, the burden should rest on the defendant because it is the party whose actions are in question. When the "only conceivable basis for a finding of mootness" stems from the defendant's actions, the Court requires assurances *from the defendant* that it will not resume the challenged behavior after the case ends.[248] Courts have long expressed skepticism when a defendant continues to defend the validity of a challenged practice and would presumably be free to reinstate it if the case were dismissed.[249] In the context of a proposed class action, these concerns apply with equal or greater force.[250] Keeping the burden on the defendant deters improper gamesmanship, safeguards the time and resources plaintiffs invest in challenging allegedly unlawful practices, and serves the public interest by settling the legality of the defendant's practices.

The first inquiry—whether other individual plaintiffs could reasonably be expected to reach class certification despite the defendant's conduct—focuses on whether the defendant's actions materially impair the viability of class litigation. Put another way, the

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245. See infra sections IV.A–.B.

246. See infra section IV.C.

247. See infra section IV.D.

248. Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc., 528 U.S. 167, 188 (2000).

249. See, e.g., Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 43 (1944) ("Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made.").

250. See supra section III.D.

question is not whether the class could be certified, but whether the defendant's conduct systematically prevents any plaintiff from obtaining a certification decision. The test adapts the feasibility concern at the heart of the inherently transitory exception (i.e., whether any plaintiff can maintain a live claim long enough to reach class certification) but shifts the focus from the fleeting nature of claims to defendant-created barriers. Courts may consider, among other factors, the ease with which the defendant could eliminate individual claims,[251] the nature of the remedy provided,[252] and any patterns of similar conduct in other cases.[253] As developed further below,[254] this test turns in part on whether the defendant provides a remedy unilaterally or whether the plaintiff voluntarily accepts it. This approach aims to reconcile the parties' litigation interests with the procedural values that class actions are designed to protect.

The second inquiry borrows from the voluntary cessation doctrine complete relief prong. Even if a defendant's conduct threatens class formation, a case can be dismissed if the defendant has addressed the underlying violation for the putative class as a whole. The aim here is to distinguish between cases that are issue moot (and thus appropriately dismissed because no legal controversy remains) and personal stake moot (and thus should proceed because the underlying legal issue persists). Defendants might make this showing by pointing to structural reforms, permanent cessation of the challenged practice, or the provision of relief to all similarly situated individuals. Consider, for example, a lawsuit that prompts a defendant not only to remedy that plaintiff's harm but also to adopt broader reforms that address the violation for all similarly situated individuals. In that scenario, the relief reflects a genuine resolution—not a tactic to avoid class certification or insulate the underlying conduct from judicial review—and the class claims might properly be deemed moot.[255]

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251. See, e.g., Weiss v. Regal Collections, 385 F.3d 337, 347, 349 (3d Cir. 2004) (focusing on unilateral mootness tactics), abrogated by Campbell-Ewald Co. v. Gomez, 577 U.S. 153 (2016); Zeidman v. J. Ray McDermott & Co., 651 F.2d 1030, 1050 (5th Cir. 1981) (focusing on the "financial feasib[ility] [of] pay[ing] off successive named plaintiffs").

252. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018) (seeking access to the asylum process at the U.S.–Mexico border).

253. See, e.g., S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791, at *6 (D. Mass. Apr. 12, 2016) (noting pattern of pick-off attempts in TCPA cases), abrogated on other grounds by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

254. See infra section IV.C.1.

255. One critique of this inquiry is that it is the plaintiffs' burden (not the defendant's) to prove there are other similarly situated plaintiffs in the first place. But any concern about potential unfairness to the defendant is overstated. The comprehensive remedy inquiry should focus on cases where defendants claim to have implemented comprehensive, class-wide solutions—changes so sweeping that they purport to remedy the violation for everyone. In such cases, defendants are essentially conceding that a broad

While this proposal incorporates many of the objective factors lower courts already weigh in strategic mootness cases, it departs from existing approaches by offering both new language and a new framework for analysis. There are several reasons for providing a new exception. First, creating a separate picking off exception addresses courts' reluctance to apply existing doctrine to strategic mootness scenarios. Courts have struggled with strategic mootness cases precisely because they do not fit neatly within traditional mootness exceptions. A dedicated picking off exception decreases confusion and provides courts with a clear tool designed specifically for strategic mootness situations.

Second, this framework draws cleaner doctrinal boundaries than current "picking off" exceptions. For example, the Third Circuit's "acutely susceptible to mootness" language[256] blurs the line between strategic and inherent mootness, while the Sixth Circuit's approach has yet to operate independently of the inherently transitory exception,[257] thus suggesting the absence of a principled distinction between the two.

Third, this framework examines the structural consequences of defendant conduct rather than defendant intent. Intent is often opaque and difficult to prove. Even more, it is beside the point. Whether defendants act from pure or strategic motives—whether, for example, they seek to remedy a harm in good faith or to avoid litigation and class-wide exposure—the critical question is whether their conduct systematically prevents class formation. By shifting attention to that structural effect, this framework helps courts identify practices that threaten the broader procedural values class actions are meant to protect.

B. *Alternative Rules-Based Solutions*

Another possible question is why pursue a doctrinal fix rather than an amendment to the Federal Rules. The idea is not without precedent. At its 2016 meeting, the Advisory Committee on Civil Rules—

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class of affected individuals existed, making it appropriate to evaluate at the mootness stage whether their remedial actions truly addressed the class-wide harm. If parties are genuinely disputing the precise contours of a potential class, those questions should be reserved for class certification proceedings, not resolved through mootness dismissal. See infra section IV.D.1 (applying proposal to example).

256. *Weiss*, 385 F.3d at 347.

257. See, e.g., Unan v. Lyon, 853 F.3d 279, 285 (6th Cir. 2017) ("The plaintiffs argue that two such exceptions apply in this case, namely, the 'picking off' exception and the 'inherently transitory' exception."); Wilson v. Gordon, 822 F.3d 934, 947 (6th Cir. 2016) (concluding that the inherently transitory exception to mootness applies where the duration of a plaintiff's claim is tenuous and the defendant is able to quickly resolve the injury after litigation commences but before a district court can reasonably rule on a class certification motion).

specifically, the Rule 23 Subcommittee—considered several amendments aimed at addressing the pick-off problem.[258] These included:

- amending Rule 68 to exclude its application in class or derivative actions;[259]
- restoring part of pre-2003 Rule 23(e) and requiring court approval for settlements not only in certified but putative class actions;[260]
- creating a "window of opportunity" for plaintiffs' counsel to "recruit a substitute class representative" if the original becomes inadequate; and[261]
- the "Cooper Sketch," offered by Professor Edward Cooper, which would limit dismissals based on tenders of relief to cases where class certification had already been denied.[262]

Each proposal reflects the complexity of addressing the pick-off problem, and each would likely curb some forms of strategic mootness. But they also face limitations. Amending Rule 68, while helpful, would leave untouched the wide array of non-Rule 68 pick-off tactics—including those outlined in Justice Alito's *Campbell-Ewald* dissent.[263] Expanding Rule 23(e) might introduce useful judicial oversight. But without more specific standards, the review risks becoming a perfunctory exercise, especially if courts are burdened with reviewing even relatively uncontroversial and unopposed precertification settlements.[264]

The "recruit a substitute" proposal has some appeal. Experienced class action attorneys often have networks and relationships that help them identify potential representatives. And solicitation rules, which limit class counsel's ability to "recruit" new class representatives,[265] are not insurmountable barriers for resourceful counsel.[266] But this solution

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258. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules (Feb. 5, 2016), *in* Advisory Committee Agenda Book, supra note 186, at 127–28.

259. Id. at 126.

260. Id. at 121–22.

261. Id. at 123–25.

262. Id. at 119–20.

263. Id. at 126.

264. Cf. Civil Rules Advisory Committee Draft Minutes (Nov. 5, 2015), *in* Advisory Committee Agenda Book, supra note 186, at 47–48 (discussing concern that establishing a "laundry list" of factors for evaluating precertification settlements would devolve into perfunctory "check-list" compliance without meaningful case-by-case analysis).

265. See 6 Newberg & Rubenstein, Class Actions, supra note 95, § 19:6 ("The primary concern arising from communications between putative class counsel and absent class members precertification is one of solicitation."). In contrast, defense counsel may approach and enter into settlements with individual potential class members prior to class certification. Id. § 19:7.

266. See Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for

faces several challenges. For one, it's reactive rather than proactive, addressing strategic mootness only after defendants have already succeeded in eliminating the original representative. It also assumes, as one court put it, "an absurd situation in which plaintiffs' attorneys [have] an endless supply of willing class representatives to file complaints identical to the class action complaints that would be dismissed as defendants buy off named representatives one by one."[267] This is especially the case in situations involving vulnerable plaintiffs, who may be reluctant to come forward.[268] And even when substitute plaintiffs can be found, the process allows defendants to systematically drain resources and discourage future litigation.[269]

The Cooper Sketch offers perhaps the most tailored response to the pick-off problem: It prohibits defendants from using "tender[s]" to terminate a case until the court has ruled on class certification.[270] This proposal directly responds to *Campbell-Ewald* (and the dissent), adopting the "tender" terminology that emerged as significant in some of the justices' analyses.[271] That said, its framing appears tailored to that narrow context. As written, it does not clearly extend to strategic mootness tactics involving nonmonetary forms of relief, which fall outside traditional notions of "tender."[272]

In these ways, a doctrinal solution may offer the adaptability that rule-based reforms sometimes lack. Rule-based solutions risk being both over-inclusive (capturing legitimate dispute resolution) and under-inclusive (missing novel approaches that defendants will inevitably develop).[273] Doctrine, by contrast, may better enable courts to respond to

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Reform, 58 U. Chi. L. Rev. 1, 5 (1991) (noting that the ethics rules governing class counsel "are routinely circumvented with only the thinnest veneer of compliance").

267. Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104, 2007 WL 1994026, at *4 (D. Minn. July 3, 2007).

268. See Strict Scrutiny, SHOCKING DECISION: Supreme Court Clears the Way for More Trump Lawlessness (YouTube, June 27, 2025), https://www.youtube.com/watch?v=bvIauDu5vx4 (on file with the *Columbia Law Review*) (discussing how certain individuals—such as undocumented people—may face legal risks or other barriers to serving as class representatives, thus limiting the availability of class actions in some contexts).

269. See Macey & Miller, supra note 266, at 86 ("Everyone understands that attorneys support the litigation, and that if the case is unsuccessful the attorney will not ask for reimbursement of costs from the representative plaintiff.").

270. Notes on Meeting and Conference Call of the Rule 23 Subcommittee and Advisory Committee on Civil Rules (Feb. 5, 2016), *in* Advisory Committee Agenda Book, supra note 186, at 119–20.

271. Id. at 120; see also Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 169–70 (2016) (Thomas, J., concurring in the judgment) (advocating that the Court rest its decision on the concept of "tender").

272. Advisory Committee Agenda Book, supra note 186, at 119 (noting that tender "must be made on terms that ensure actual payment").

273. For example, had the proposed Rule 68 amendment passed in the 1980s, it would not have addressed the full scope of picking-off tactics seen today, which promptly moved past Rule 68 after *Campbell-Ewald*. See supra section III.A.2.

evolving pick-off strategies while remaining attentive to the structural dynamics that make strategic mootness problematic. Indeed, courts are already working to adapt existing mootness principles across a range of procedural and substantive settings. A well-defined doctrinal framework can channel that effort, offering clear guidance without sacrificing the responsiveness needed to address fact-specific or novel strategies.

Importantly, doctrinal solutions can operate alongside rule-based reforms rather than displacing them. A clear doctrinal standard can address the problem in the near term and complement future reform efforts, ensuring that both courts and rulemakers approach strategic mootness with a fuller understanding of its practical stakes.

C. *The Boundaries of the Picking Off Exception*

What are the boundaries of the picking off exception? Lower courts that have recognized any version of this exception have struggled to define its limits.[274] This section draws those boundaries by addressing key critiques of the proposed picking off exception.

1. *Settlement incentives.* — One possible critique of the picking off exception is that it might disincentivize defendants from promptly settling cases with plaintiffs. If defendants could find themselves litigating a class action, what would motivate them to offer named plaintiffs a settlement?

To balance the litigants' interests and encourage good-faith settlement, this Article's proposed test treats unilateral and bilateral relief differently. Unilateral relief—where defendants impose remedies without plaintiff consent—typically cannot satisfy the first inquiry (i.e., that similarly situated plaintiffs could still reach class certification). When defendants moot claims unilaterally, it is unreasonable to expect other plaintiffs to reach class certification before encountering similar tactics.[275] Defendants could simply repeat the unilateral process with any future potential class representative. Thus, unless the defendant can show the underlying legal violation has been comprehensively resolved for the entire putative class,[276] unilateral mooting should not render the case moot.[277]

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274. See supra section III.C.

275. See, e.g., Weiss v. Regal Collections, 385 F.3d 337, 347, 349 (3d Cir. 2004) (focusing on unilateral mootness tactics), abrogated by *Campbell-Ewald*, 577 U.S. at 156; see also Wilson v. Gordon, 822 F.3d 934, 943 n.2 (6th Cir. 2016) (noting that the impact of unilateral settlements on mootness is "an area of considerable complexity that has divided our sister circuits").

276. See infra section IV.D.1 (applying proposal to example).

277. The notion that a defendant's unilateral remedy should not moot a case has garnered support in recent years. See, e.g., MacGuidwin, supra note 37, at 645 (calling to "eliminate the mootness doctrine entirely" in unilateral mootness cases); Nielsen, supra note 38, at 800–01 (arguing similarly in the prisoner litigation context). Moreover, *A.A.R.P. v. Trump*—the Supreme Court's recent decision granting preliminary injunctive

By contrast, bilateral resolutions—where plaintiffs voluntarily accept the offered relief—warrant different treatment. Courts that have addressed bilateral "pick-off" cases usually have held that a named plaintiff's acceptance of relief bars invocation of a mootness exception.[278] As one judge explained, "Where a plaintiff voluntarily accepts an offer to be made whole on all individual claims, the concerns about defendants exercising unilateral power to 'pick off' named class members is not implicated."[279] This reasoning aligns with the proposed test's approach. Under the picking off exception proposed in this Article, a plaintiff's voluntary acceptance of an individual remedy is prima facie evidence that other plaintiffs could reach class certification. The logic is straightforward: If future plaintiffs can decline similar offers and continue to pursue class certification, then the defendant's conduct is not systematically preventing class formation.

Plaintiffs can rebut the presumption of mootness caused by bilateral resolution in two ways. For one, they can show that their "voluntary" acceptance of relief did not reflect genuine choice and in fact was compelled or functionally unavoidable. For example, if a plaintiff lacks a viable alternative to accepting relief, it may be unrealistic to expect future plaintiffs to resist similar offers.[280] Or if defendants routinely secure early acceptances with little resistance, that pattern may signal that future named plaintiffs will be functionally unable to reach class certification.[281] Alternatively, a plaintiff could show that the settlement has created a structural barrier that prevents future class formation. Consider, for

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relief to members of a not-yet-certified class—was in many ways a unilateral action case. 145 S. Ct. 1364, 1369–70 (2025) (involving the government's threat to unilaterally remove putative class members prior to class certification).

278. See, e.g., Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *4 (N.D. Cal. Sep. 29, 2023); see also McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019) (holding that a plaintiff who plans to accept individual relief cannot preserve class claims by filing a placeholder class certification motion). One wrinkle is that some courts have found that once a putative class representative has moved for class certification, they may have a continuing individual interest in an incentive award or shifting a portion of fees and expenses incurred as the purported class representative to class members. Compare Ruppert v. Principal Life Ins. Co., 705 F.3d 839, 844 (8th Cir. 2013) (finding that voluntary settlement moots the case, including proposed class claims), and Rhodes v. E.I. du Pont de Nemours & Co., 636 F.3d 88, 100 (4th Cir. 2011) (same), with Narouz v. Charter Commc'ns, LLC, 591 F.3d 1261, 1264–65 (9th Cir. 2010) (finding that a plaintiff has a continued interest in incentive award); Pastor v. State Farm Mut. Auto. Ins. Co., 487 F.3d 1042, 1043–44 (7th Cir. 2007) (finding that "acceptance of the offer did not resolve the dispute between the unnamed class members and the defendant and so did not render the case moot"); Richards v. Delta Air Lines, Inc., 453 F.3d 525, 528–29 (D.C. Cir. 2006) (finding that a plaintiff has a continued interest in shifting fees to class members).

279. *Moreland*, 2023 WL 6450421, at *4.

280. See infra section IV.D.3 (highlighting a case with similar pressures toward settlement).

281. See infra section IV.D.2 (exploring an example of routine settlements making certification difficult).

example, a defendant who offers relief just before the statute of limitations runs, therefore leaving no time for another plaintiff to step in (and thus effectively ensuring that no one can ever reach class certification).[282] When bilateral settlements involve compelled acceptance, systematic targeting, or other structural barriers, they create risks similar to unilateral cases.

To be clear, bilateral resolution creates a presumption that the case is moot. In many instances, such agreements will not implicate the structural risks that justify a picking off exception. But courts should view with skepticism those cases marked by circumstances suggesting that class formation remains functionally unattainable. The point is not to unsettle bona fide settlement practices, but to prevent systemic evasion of accountability masked as consensual resolution. This framework, though imperfect, seeks to preserve settlement incentives for genuine dispute resolution while guarding against strategic behavior that undermines the integrity of class litigation.

2. *Motion timing*. — Another key question about the picking off exception concerns timing: Must plaintiffs formally move for class certification before the exception applies, or can it apply as soon as a proposed class action complaint is filed?

Lower courts have long divided on this issue. One approach requires a class certification motion to be pending at the time of mootness for the court to apply the exception. Courts in this camp—particularly the Seventh Circuit[283]—emphasize that leading Supreme Court class action decisions (*Sosna*, *Gerstein*, *Geraghty*, and *Roper*) all involved cases where certification motions were either pending or already decided.[284] A second approach focuses more on whether plaintiffs have had a fair chance to seek class certification.[285] This analysis, grounded in language from *Campbell-Ewald v.*

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282. See China Agritech v. Resh, 138 S. Ct. 1800, 1804 (2018) (holding that while "*American Pipe* tolls the statute of limitations during the pendency of a putative class action, allowing unnamed class members to join the action individually or . . . if the class fails," it "does not permit the maintenance of a follow-on class action past expiration of the statute of limitations").

283. See Damasco v. Clearwire Corp., 662 F.3d 891, 896–97 (7th Cir. 2011), overruled by Chapman v. First Index, Inc., 796 F.3d 783 (7th Cir. 2015); see also Adkisson v. Eagleson, No. 22-C-63, 2023 WL 5580735, at *6 (N.D. Ill. Aug. 29, 2023) (recognizing that *Chapman*'s partial overruling of *Damasco* "left intact" the requirement that a motion for class certification be pending to defeat defendants' mootness strategies).

284. See, e.g., U.S. Parole Comm'n v. Geraghty, 445 U.S. 388, 393 (1980); Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 329 (1980); Gerstein v. Pugh, 420 U.S. 103, 111 n.11 (1975); Sosna v. Iowa, 419 U.S. 393, 402 n.11 (1975) (questioning what should happen in "cases in which the controversy involving the named plaintiffs is such that it becomes moot as to them before the district court *can reasonably be expected to rule on a certification motion*" (emphasis added)).

285. See, e.g., Richardson v. Bledsoe, 829 F.3d 273, 286 (3d Cir. 2016) ("[T]his mootness exception should apply only in situations where the mooting of the individual claim 'occurred at so early a point in litigation that the named plaintiff could not have been expected to file a class certification motion.'" (quoting Lucero v. Bureau of Collection Recovery, Inc., 639 F.3d 1239, 1249 (10th Cir. 2011))); Stein v. Buccaneers Ltd.

Gomez,[286] seeks to balance two competing interests: protecting plaintiffs who have no realistic chance to move for certification before their claims are mooted, while guarding against plaintiffs who unduly delay seeking certification.

This Article's proposed picking off exception does not require a pending motion for class certification. Conditioning the exception on such a motion would leave the entire pre-motion period unprotected. As courts have pushed certification further into the litigation timeline (often near trial and after substantial discovery),[287] the pre-certification stage has become an especially vulnerable period—one in which strategic mooting could thrive. Plaintiffs concerned about being picked off usually cannot feasibly move for class certification early in a lawsuit. And when defendants can easily eliminate claims before plaintiffs can realistically seek certification, few cases will ever reach that stage.[288] While courts could require placeholder certification motions,[289] such barebones motions often create judicial waste and administrative inefficiencies.[290]

P'ship, 772 F.3d 698, 707 (11th Cir. 2014) ("What matters is that the named plaintiff acts diligently to pursue the class claims."); *Lucero*, 639 F.3d at 1249 ("[W]e conclude that a nascent interest attaches to the proposed class upon the filing of a class complaint . . . .").

286. See Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 165 (2016) ("While a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." (citation omitted) (citing Sosna v. Iowa, 419 U.S. 393, 399 (1975))).

287. See Cabraser, supra note 23, at 762 (noting that the class certification process has become more contested following the decision in *Wal-Mart Stores v. Dukes*); Gerson H. Smoger & David M. Arbogast, The Post-*Dukes* "Rigorous Analysis" and Pre-Certification, 82 Geo. Wash. L. Rev. Arguendo 104, 110 (2014), https://www.gwlr.org/smoger_arbogast/ [https://perma.cc/24EY-92RU] ("[A]lthough prior to *Dukes* commonality was considered the easiest requirement to satisfy under Rule 23(a), following *Dukes* plaintiffs seeking to certify a class have begun to find it the most contested."(footnote omitted)); Jenny R. Yang, The Impact of *Wal-Mart v. Dukes*, ALI-CLE Course Materials (2012) ("Plaintiffs are also relying on more tailored statistics, and often increased discovery, to satisfy the new standards the Court set forth."); see also Barbara J. Rothstein & Thomas E. Willging, Fed. Jud. Ctr., Managing Class Action Litigation: A Pocket Guide for Judges 6 (2005) ("As experience with Rule 23 evolved, however, judges began to rule on motions to dismiss and even motions for summary judgment before turning to class certification.").

288. See Jancik v. Cavalry Portfolio Servs., LLC, No. 06-3104, 2007 WL 1994026, at *4 (D. Minn. July 3, 2007) (finding that allowing defendants to moot a case, "even before scheduling orders are issued and plaintiffs have the applicable motion deadlines in front of them, would be bad policy and would effectively eviscerate the effectiveness of class actions").

289. See, e.g., Damasco v. Clearwire Corp., 662 F.3d 891, 896 (7th Cir. 2011) (finding the pick-off exception unnecessary because a "simple solution to the buy-off problem" is for class plaintiffs "to move to certify their class at the same time that they file their complaint"); see also Adkisson v. Eagleson, No. 22-C-63, 2023 WL 5580735, at *4 (N.D. Ill. Aug. 29, 2023) (noting that *Damasco*'s placeholder motion suggestion has not technically been overruled, and is an appropriate suggestion in cases facing a similar buy-off concern).

290. See Fauley v. Drug Depot, Inc., No. 15-C-10735, 2016 WL 11730950, at *2 (N.D. Ill. Aug. 16, 2016) (discouraging placeholder motions, "as they come with administrative

Should courts nevertheless inquire into whether plaintiffs have unduly delayed seeking certification? Not necessarily. The question of delay is better understood as a matter of case management, not mootness doctrine. Courts have ample tools to ensure diligent prosecution: scheduling orders, discovery timelines, certification deadlines, and (when necessary) dismissal for failure to prosecute.[291] If a plaintiff is slow-walking class litigation, the proper remedy lies in active judicial management, not the stripping away of mootness protections.

3. *Attorney power*. — A third question concerns the role of plaintiffs' counsel in strategic mootness cases. Specifically, doesn't allowing attorneys to continue pursuing class claims after the named plaintiff loses personal stake give counsel too much power?

Concerns about "headless class actions," or class lawsuits without clients, are not unique to the picking off exception.[292] Scholars have long worried that class counsel may have greater interests in outcomes than their clients,[293] with some judges criticizing mootness doctrine as "a concession to the notion that a class suit belongs to no one so much as the plaintiff's lawyer."[294]

But the picking off exception actually preserves more oversight than other contexts. Both precertification mootness exceptions—the inherently transitory exception and the proposed picking off exception—offer a safeguard other contexts do not: Rule 23(a)(4). That requirement, which asks whether the named plaintiff and counsel

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costs and create an unhelpful drag on efficiency and judicial economy"); Kensington Physical Therapy, Inc. v. Jackson Therapy Partners, LLC, 880 F. Supp. 2d 689, 695 (D. Md. 2012) ("[O]ne policy concern regarding pick-offs is that they create a perverse incentive to prematurely file motions for conditional class certification.").

291. See William W. Schwarzer & Alan Hirsch, The Elements of Case Management 1–2 (3d ed. 2019).

292. Comment, The Headless Class Action: The Effect of a Named Plaintiff's Pre-Certification Loss of a Personal Stake, 39 Md. L. Rev. 121, 150, 170 (1979); see also Girardeau A. Spann, Simple Justice, 73 Geo. L.J. 1041, 1053–54 (1984) ("The headless class actions demonstrate that technical niceties about mootness need not be dispositive.").

293. See, e.g., John C. Coffee, Jr., Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions, 86 Colum. L. Rev. 669, 671–72 (1986) (discussing "the conflicts that arise between the interests of [plaintiff's] attorneys and their clients"); Susan P. Koniak & George M. Cohen, In Hell There Will Be Lawyers Without Clients or Law, 30 Hofstra L. Rev. 129, 132 (2001) (discussing ethical problems in class action representation); see also William P. Barrett, I Have No Clients, Forbes Mag., Oct. 11, 1993, at 52 ("I have the greatest practice of law in the world . . . . I have no clients." (internal quotation marks omitted) (quoting William Lerach)).

294. Satterwhite v. City of Greenville, 557 F.2d 414, 426 (5th Cir. 1977) (Gee, J., dissenting), vacated by Satterwhite v. City of Greenville, 578 F.2d 987 (5th Cir. 1978) (en banc); see also Elizabeth A. Grimes, Note, *Satterwhite v. City of Greenville* and Breathing New Life Into the Headless Title VII Class Action, 32 Stan. L. Rev. 743, 744 (1980).

"fairly and adequately protect the interests of the class,"[295] operates as a natural moment of heightened scrutiny in class litigation, when courts assess whether the proposed representatives are equipped to represent the class.[296] In short, the concern about "headless" class actions is properly addressed at the class certification stage, not through mootness doctrine.[297]

The picking off exception can ultimately promote better ethical alignment between counsel and their clients. Before certification, counsel technically owes duties both to the named plaintiff and to the prospective class,[298] though the precise contours of the latter obligation remain unsettled.[299] When defendants extend early settlement offers, counsel may face conflicting responsibilities: a duty to advocate for the named plaintiff's immediate interests, and a broader obligation to safeguard the class's potential claims. The picking off exception reduces this ethical tension by preserving the possibility of class-wide relief, enabling counsel to advise their clients based on genuine best interests rather than being forced to choose between competing loyalties.

D. *Application to Examples*

This section applies the picking off exception described above to concrete examples with the goal of illustrating how courts might approach and analyze different mootness fact patterns.

1. *Unilateral Remedies Across Contexts.* — Unilateral remedies, in which defendants provide relief without plaintiff consent, present the clearest case for applying the picking off exception. Consider the case mentioned in the introduction, a First Circuit action regarding alleged discriminatory delays in a federal immigration office's processing of visa applications.[300] Four visa applicants and their spouses endured a twenty-two-month wait without receiving a decision on their visa applications.[301] Within ten weeks of their bringing a putative class action challenging the

295. Fed. R. Civ. P. 23(a)(4).

296. While a class representative's adequacy can be challenged after the Rule 23 analysis, such arguments run against the grain of the court's prior determination. See, e.g., Cohen v. Brown Univ., 16 F.4th 935, 948 (1st Cir. 2021) (finding class representatives still adequate in a Title IX university athletic program case despite the passage of twenty years and their no longer being eligible to compete).

297. See Sosna v. Iowa, 419 U.S. 393, 403 (1975) (distinguishing the question of whether a plaintiff "is entitled to litigate the interests of the class she seeks to represent" from the question of whether she can "fairly and adequately protect the interests of the class").

298. See 6 Newberg & Rubenstein, Class Actions, supra note 95, § 19:2 ("[T]here is little doubt that an attorney pursuing a class suit has some duty to the prospective class and generally must act in the class's best interests.").

299. See Landsman-Roos, supra note 200, at 820 (discussing the questions around the precertification fiduciary duties an attorney has to class members).

300. See Cruz v. Farquharson, 252 F.3d 530, 532 (1st Cir. 2001).

301. Id. at 532 & n.1.

delays, the government identified, processed, and granted each named plaintiff's application.[302] Then the government moved to dismiss on mootness grounds, and the district court granted the motion.[303] The First Circuit affirmed, holding no mootness exception applied.[304]

Under the proposed test, the government would face a heavy burden to justify dismissal. It could try to show that similarly situated plaintiffs could reasonably be expected to reach class certification despite its conduct. The easiest way to make this showing would be to demonstrate that the plaintiffs voluntarily agreed to settle their claims, suggesting that future plaintiffs could instead choose to reject such relief and proceed to certification.[305] But when a defendant wields unilateral control over a plaintiff's claim—as was the case here, when the government resolved the visa applications on its own initiative—this showing becomes more difficult. The ability to eliminate individual claims without consent poses a structural barrier to certification, effectively foreclosing the class mechanism.

The government therefore would need to rely on the second prong: proving the underlying violation has been comprehensively remedied for the putative class, so no similarly situated individuals remain with live claims. The government could try to show that systemic reforms have addressed the underlying delays for all visa applicants, not just the named plaintiffs. But crucially, the burden to make that showing should rest with the defendant. Only the defendant itself has access to the internal data, procedures, and timelines necessary to show comprehensive resolution.

The First Circuit's analysis demonstrates the problems with current approaches that place the burden on the plaintiff. The court said the plaintiffs needed to show the defendants were engaged in "a scurrilous pattern and practice of thwarting judicial review" by speedily adjudicating the visa applications of people who brought lawsuits.[306] "[T]he plaintiffs' experience, in and of itself," the court added, was not enough to make that showing.[307] This standard sets the bar too high. Plaintiffs often lack access to the internal government data and decisionmaking processes needed to prove systemic conduct. And even absent "scurrilous" behavior, the government's unilateral control over visa adjudication creates a risk that future class claims will be mooted before they reach certification. The concern is structural: When defendants wholly control both the harm and the fix, the class mechanism can easily be short-circuited, regardless of intent.

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302. Id.
303. Id. at 532–33.
304. Id. at 535–36.
305. See supra section IV.C.1.
306. *Cruz*, 252 F.3d at 535.
307. Id.

Consider a different scenario from a Medicaid case in the Sixth Circuit. Certain Medicaid recipients in Michigan were mistakenly assigned Emergency Services Only Medicaid instead of comprehensive benefits due to a system-wide computer error.[308] Two days after the plaintiffs filed a class action complaint and motion for class certification, Michigan officials fixed the named plaintiffs' assignments.[309] Over the next year, the state worked to permanently correct the computer error.[310] Along the way, it manually reprocessed over sixteen thousand cases as part of its remediation efforts.[311]

Under the proposed picking off exception, Michigan would likely fail the first part of the test for the same reasons as in the visa case. Since Michigan can provide unilateral relief—by processing the plaintiffs' applications—it cannot reasonably be expected that any future individual plaintiff's claim can survive through certification.

The analysis would then turn to the second prong: whether Michigan had comprehensively remedied the underlying violation. On this point, the record is mixed. Michigan offered evidence of a system-wide fix and extensive manual reprocessing.[312] If these efforts successfully resolved the root cause of the error and ensured continued accuracy in future Medicaid assignments, that might suffice to show that no class members remained with live claims—making dismissal appropriate. But if those efforts fell short, and significant numbers of affected individuals continued to experience erroneous coverage, dismissal would not be warranted.

It's worth noting that the Sixth Circuit panel was divided on this issue. The majority found that Michigan's systemic fix had not fully resolved the problem, citing post-fix data showing ongoing errors and affidavits documenting persistent administrative issues.[313] The dissenting judge disagreed, emphasizing that plaintiffs had not identified any putative class members with live claims and that occasional errors did not render the controversy ongoing.[314] Under the proposed framework, this would be a determination for the court to resolve. Though fact-intensive, such inquiries are common in mootness doctrine—for example, in evaluating whether relief is complete and irrevocable under the voluntary cessation exception—and are necessary to prevent premature dismissal of viable class claims.[315]

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308. Unan v. Lyon, 853 F.3d 279, 282 (6th Cir. 2017).

309. Id. at 284.

310. Id.

311. Id.

312. Id.

313. Id. at 287.

314. Id. at 294 (Sutton, J., dissenting).

315. See, e.g., John F. Muller, Comment, *Olmstead v. L.C.* and the Voluntary Cessation Doctrine: Toward a More Holistic Analysis of the "Effectively Working Plan", 118 Yale L.J.

2. *Bilateral remedies and patterns of settlement.* — Bilateral remedies, in which plaintiffs voluntarily accept defendants' offers, require more nuanced analysis under the proposed picking off exception. While voluntary acceptance provides prima facie evidence that future plaintiffs can reach certification, patterns of settlement can override this inference and reveal systemic obstacles to class treatment.

Consider a modified version of a case from the U.S. District Court for the District of Massachusetts.[316] After a plaintiff received a number of junk faxes in violation of the Telephone Consumer Protection Act (TCPA), it brought a proposed class action against the defendant.[317] The TCPA has a statutory maximum penalty of $1,500 per unsolicited fax.[318] So shortly after the complaint was filed, the defendant tendered a bank check to the plaintiff covering treble damages and costs.[319] In response—and here is the modification—the plaintiff accepted the offer.[320]

Applying the proposed strategic mootness exception, the defendant could point to the plaintiff's voluntary acceptance of compensation as proof that future plaintiffs could reach certification. Future potential class representatives could simply reject such offers and proceed to class certification. Moreover, by voluntarily settling, plaintiffs forfeit the right to seek class certification.[321] Under this view, the parties' bilateral settlement moots the class claims.

This analysis could change, though, based on the defendant's conduct across cases or claimants. If the defendant has repeatedly made similar settlements to eliminate potential class representatives—and those settlements have succeeded—class treatment might still be appropriate.[322] The defendant's repeated success may show that plaintiffs

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1013, 1020 n.46 (2009) (noting the "fact-intensive" character of voluntary cessation decisions).

316. S. Orange Chiropractic Ctr., LLC v. Cayan LLC, No. 15-13069-PBS, 2016 WL 1441791 (D. Mass. Apr. 12, 2016), abrogated by Bais Yaakov of Spring Valley v. ACT, Inc., 12 F.4th 81 (1st Cir. 2021).

317. Id. at *1.

318. Id.

319. Id.

320. In *South Orange Chiropractic Center, LLC v. Cayan LLC*, the plaintiff did not actually accept the offer. Id. The defendant—seeking to take advantage of a loophole in *Campbell-Ewald*—offered to deposit a check with the court in satisfaction of all of the plaintiff's individual claims (and more). Id. The district court held that even without the plaintiff's express acceptance of the payment, this action mooted the plaintiff's claim. Id. at *5. This holding was later abrogated in part by the First Circuit. See *Bais Yaakov of Spring Valley*, 12 F.4th at 94–95 (holding that the tender of a check does not moot a plaintiff's claims if the plaintiff did not actually or constructively receive the money).

321. See Moreland v. Prudential Ins. Co., No. 20-cv-04336-RS, 2023 WL 6450421, at *5 (N.D. Cal. Sep. 29, 2023); McClain v. Hanna, No. 2:19-cv-10700, 2019 WL 2325678, at *8 (E.D. Mich. May 31, 2019).

322. See, e.g., Wilson v. Gordon, 822 F.3d 934, 959 (6th Cir. 2016) (Sutton, J., dissenting) (dissenting from the majority's conclusion that the case was not moot despite the state's commitment to provide remedy to named plaintiffs and one hundred others

face systemic pressure that makes rejection of similar offers unrealistic. And repeated use of such tactics suggests the defendant will keep deploying this strategy to avoid class treatment. Even if individual plaintiffs voluntarily accept compensation, the broader pattern may demonstrate systemic obstacles to class certification.

What if the pattern of settlements is not defendant-specific but industry-wide? Evidence of "a widespread whac-a-mole practice aimed at picking off a named plaintiff before class certification"[323] could complicate the picking off analysis, as it would suggest broader structural dynamics beyond a single defendant's behavior.

Under the picking off exception proposed in this Article, patterns of settlement within an industry can be considered in the analysis. While holding individual defendants responsible for industry-wide practices raises fairness concerns (and while defendant-specific conduct is significantly more probative), the systemic use of cheap settlements across an industry can raise routine obstacles to certification. If defendants across an industry can eliminate class actions through individualized payments, future plaintiffs cannot reasonably expect their claims to survive through certification regardless of which specific defendant they sue. Moreover, individual defendants operating within such an industry culture have little incentive to deviate from successful strategic practices, suggesting the conduct likely will continue. Permitting such widespread settlement tactics to short-circuit class litigation would undermine judicial efficiency and deterrence by enabling defendants to avoid accountability at scale.

This approach would not render the exception limitless or permit every settling plaintiff to continue pursuing class certification as a matter of right. The picking off exception would apply only where specific patterns of behavior demonstrate systemic obstacles to certification. In many litigation contexts, plaintiffs may voluntarily accept settlements without broader implications.

3. *Bilateral Remedies and "Too Good to Refuse" Offers.* — Consider, too, offers plaintiffs cannot realistically reject. When defendants offer essential or life-changing relief—such as access to critical benefits, immigration relief, or urgent medical care—voluntary acceptance is questionable. These "too good to refuse" offers show how bilateral remedies can function like unilateral relief despite the appearance of choice.

For example, in 2017, six asylum seekers brought a putative class action against Customs and Border Protection and Homeland Security

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through a bargained-for agreement); see also Unan v. Lyon, 853 F.3d 279, 286 (6th Cir. 2017) (finding that defendant mooted the named plaintiff's spouse's claim after discovering his potential class membership to "avoid litigation by selectively resolving the claims of any potential representatives").

323. *S. Orange Chiropractic Ctr.*, 2016 WL 1441791, at *6.

officials, alleging illegal denial of access to the asylum process.[324] A mere two days later, the government agreed to process the named plaintiffs and their children and permit them to access the asylum process.[325] In the next weeks, most of the plaintiffs appeared at the border and received the requested relief.[326]

Applying the proposed picking off exception, the government could argue the plaintiffs voluntarily accepted relief, proving future plaintiffs could reach certification. Future asylum seekers could "simply" reject such offers and proceed to class certification. But this conclusion ignores the nature of the relief offered. Many requests for asylum are urgent by definition.[327] An offer of immediate processing provides asylum seekers with an option too good to refuse. They simply lack the luxury of declining or delaying the chance to access the asylum process.

The ease with which the government could eliminate any later plaintiff's claims—"as soon as the case is filed and long before a court could reasonably be expected to rule on a motion for class certification"[328]—diminishes any chance future plaintiffs could reach certification. When defendants control access to essential relief that plaintiffs cannot realistically reject, the bilateral nature of the remedy becomes largely illusory. Future potential class representatives facing similar desperate circumstances cannot expect to survive to certification when defendants possess both the power and the incentive to provide individual relief no rational person would decline.

This scenario highlights the power imbalances often at play in precertification class litigation. As Professor Fiss has argued, consent cannot be equated with justice when parties face stark disparities in bargaining power.[329] While some remedies may appear bilateral, they can function as de facto unilateral tools if vulnerable plaintiffs cannot afford to reject them. The picking off exception must account for these realities rather than treating all voluntary acceptance as genuine choice.

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Like any doctrinal innovation, the exception proposed in this Article would require further refinement. Contested questions might include: What distinguishes a truly voluntary settlement from one shaped by

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324. See, e.g., Al Otro Lado, Inc. v. Nielsen, 327 F. Supp. 3d 1284, 1291 (S.D. Cal. 2018).

325. Id. at 1304.

326. Id. at 1295.

327. See Refugee Act of 1980, Pub. L. No. 96-212, § 101(a), 94 Stat. 102, 102 (codified at 8 U.S.C. § 1521 (2024)) ("The Congress declares that it is the historic policy of the United States to respond to the urgent needs of persons subject to persecution in their homelands . . . .").

328. *Al Otro Lado*, 327 F. Supp. 3d at 1304.

329. See Fiss, supra note 199, at 1076–78 (describing how "[t]he disparities in resources between the parties can influence the settlement").

overly coercive pressure? At what point do a defendant's actions constitute systematic interference with class certification? How should courts account for power disparities, timing constraints, and the nature of the relief offered?

While the discussion above has attempted to sketch some guiding principles and bright lines, there will inevitably be close cases. At times, the proposed exception may fail to preserve otherwise meritorious class actions. This points toward the potential value of supplementary Rules-based solutions. At other times, the exception might prove overinclusive and allow cases to proceed that would have been better off being resolved individually. Still, the alternative—permitting individualized relief to routinely end class actions—poses a deep threat to procedural fairness and systemic accountability.[330] Ultimately, confronting strategic mootness through doctrine is not about perfecting the class action mechanism, but about ensuring it remains a viable tool for collective justice.

CONCLUSION

This Article has aimed to expose the strategic mootness gap. It has highlighted patterns and inconsistencies in courts' treatment of the strategic mootness gap, analyzed reasons why the gap should be addressed, and offered a proposal in the form of a new exception to mootness. In sketching the specifics of this proposal, this Article has sought to illuminate the difficult questions courts face when considering whether and how to address strategic mootness in the proposed class action context.

The strategic mootness gap has broad implications for federal court theory and practice. First, it calls into question the integrity of the class action device. By allowing defendants to pick off named plaintiffs and avoid judicial review, the gap undermines the class action as a tool for collective redress and accountability. Second, the strategic mootness gap raises concerns about the judiciary's ability to adapt to evolving strategies employed by parties in litigation. As the burden on plaintiffs seeking class certification has increased, defendants have found ways to exploit gaps in existing procedural frameworks, allowing them to avoid class-wide judgment and accountability. This raises the question: As law inevitably evolves, should procedural safeguards adapt alongside it? Third, the strategic mootness gap highlights a tension in mootness theory between personal stake and private interest in a matter and the broader public interest in resolving systemic issues. Mootness exceptions in the putative

330. Cf. Brian T. Fitzpatrick, The End of Objector Blackmail?, 62 Vand. L. Rev. 1623, 1663–64 (2009) (arguing that preserving collective benefits for absent class members justifies restricting private settlements that would eliminate those benefits, even if the restriction occasionally captures legitimate individual settlements).

class context push mootness law to its limits, challenging purist notions of justiciability.

The picking off exception proposed in this Article is meant to safeguard the integrity of class action litigation by preventing defendants from undermining class claims through the mooting of individual plaintiffs' claims. Though it introduces new doctrinal language, the exception adapts familiar principles from existing mootness exceptions to achieve analytical consistency. While it draws some bright-line rules, it also maintains flexibility for courts to balance the litigants' competing interests based on case-specific circumstances.

Ultimately, the strategic mootness gap requires careful attention by courts and policymakers. This Article has analyzed current and potential practices around the strategic mootness gap to advance the conversation about how courts might balance procedural fairness, settlement incentives, and systemic accountability.