Nevada Law Journal Forum

Volume 6 Article 1

4-19-2022

The Incomprehensibility of Nevada's Capable-of-Repetition-Yet-Evading-Review Doctrine

Tom Stewart

THE INCOMPREHENSIBILITY OF NEVADA'S CAPABLE-OF-REPETITION-YET-EVADING-REVIEW DOCTRINE

By Tom Stewart∗

INTRODUCTION

Nevada appellate courts recognize[1] and apply[2] an exception to the mootness doctrine that exists in federal court[3] but does not currently have any basis in any state court rule or statute and, thus, should not be applied by Nevada's appellate courts. Indeed, because no statute or court rule authorizes the Nevada appellate courts to hear cases that have been rendered moot but may be capable of repetition, yet evade review, Nevada's appellate courts have no authority to do so.[4] Thus, the appellate courts' decisions entered on that basis are void.[5] However, the solution to this problem is simple: the Nevada legislature could enact a statute that allows Nevada's courts to hear such appeals, or the Nevada Supreme Court could modify the Nevada Rules of Appellate Procedure to provide the appellate courts the ability to do so.

∗ J.D., William S. Boyd School of Law, 2016.

[1] *See, e.g.*, Traffic Control Servs. v. United Rentals, 87 P.3d 1054, 1057 (Nev. 2004) (recognizing the capable-of-repetition-yet-evading-review exception to the mootness doctrine in Nevada).

[2] *See, e.g.*, Solid v. Eighth Jud. Dist., 393 P.3d 666, 670 (Nev. 2017) (applying the doctrine); *see also In re* Guardianship of L.S. & H.S., 87 P.3d 521, 524 (Nev. 2004) ("[W]here an issue is capable of repetition, yet will evade review because of the nature of its timing, we will not treat the issue as moot.").

[3] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2323 (2016) (Thomas, J., dissenting) (citing Roe v. Wade, 410 U.S. 113, 125 (1973)) (applying the doctrine in the Fourteenth Amendment substantive-due-process context).

[4] Nevada appellate courts' appellate jurisdiction is "limited," *see* Valley Bank of Nev. v. Ginsburg, 874 P.2d 729, 732 (Nev. 1994), and the appellate courts "may only consider appeals authorized by statute or court rule." Brown v. MHC Stagecoach, 301 P.3d 850, 851 (Nev. 2013) (en banc) (citing Taylor Constr. Co. v. Hilton Hotels Corp., 678 P.2d 1152, 1153 (Nev. 1984)).

[5] *See* Stapp v. Hilton Hotels Corp., 826 P.2d 954, 956 (Nev. 1992) (concluding that orders entered without jurisdiction are void).

I. ARTICLE III MOOTNESS

A. General Background

Mootness is one of a "cluster of justiciability"[6] doctrines that have "evolved to implement the case and controversy requirement"[7] of Article III.[8] Although two of the justiciability doctrines—standing and mootness—share a "close affinity,"[9] standing "focuses on the litigant's ability to initiate a suit," while mootness "focuses on her ability to maintain it."[10] Indeed, because Article III requires that an actual " controversy be extant at all stages of review, not merely at the time the complaint is filed,"[11] if an "intervening circumstance deprives the plaintiff of a 'personal stake in the outcome of the lawsuit,' at any point during litigation, the action can no longer proceed and must be dismissed as moot."[12] A case becomes moot, however, "when it is impossible for a court to grant any effectual relief whatever to the prevailing party."[13]

B. "Capable of Repetition, Yet Evading Review"

Despite the subject-matter jurisdictional requirements of Article III's justiciability requirements, including mootness,[14] the United States Supreme Court developed an exception to the mootness doctrine that allows the Court to decide otherwise-moot claims if the Court determines the controversy is capable of repetition, yet evading review.[15]

---

[6] Justiciability is "sometimes used as an umbrella term for a cluster of doctrines, including standing, mootness, ripeness, and political question, in both their constitutional and prudential aspects." Susan Bandes, *The Idea of a Case*, 42 STAN. L. REV. 227, 245 n.117 (1990) (citing Allen v. Wright, 468 U.S. 737, 750–52 (1984)).

[7] *Id.* at 245.

[8] U.S. CONST. art. III, § 2 (limiting federal-court jurisdiction to "cases" and "controversies"). *But see* Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (citing Mills v. Green, 159 U.S. 651 (1895)) (noting that although the Supreme Court states that its mootness doctrine "is based upon Art. III of the Constitution," that analysis "seems very doubtful" because the earliest case was not premised on constitutional constraints and "in that case nowhere mentions Art. III").

[9] Cynthia L. Fountaine, *Article III and the Adequate and Independent State Grounds Doctrine*, 48 AM. U. L. REV. 1053, 1082 n.204 (1999); *see also* Warth v. Seldin, 422 U.S. 490, 499 n.10 (1975) (describing the "close affinity" between standing and mootness); Note, *Mootness on Appeal in the Supreme Court*, 83 HARV. L. REV. 1672, 1673 n.12 (1970) (claiming that the mootness doctrine, like the standing doctrine, cannot be categorized or defined specifically).

[10] Bandes, *supra* note 6, at 245 (citing Henry P. Monaghan, *Constitutional Adjudication: The Who and When*, 82 YALE L.J. 1363, 1384 (1973)).

[11] Arizonans for Off. Eng. v. Arizona, 520 U.S. 43, 67 (1997) (quoting Preiser v. Newkirk, 422 U.S. 395, 401 (1975)).

[12] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

[13] *Id.* (citing Knox v. Service Emps., 567 U.S. 298, 308 (2012)).

[14] *Genesis Healthcare Corp.*, 569 U.S. at 78–79 (2013).

[15] *See, e.g.*, Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016) (citing Spencer v. Kemna, 523 U.S. 1, 17 (1998)).

1. Historical Development

In 1911, the Supreme Court of the United States, in "an obscure case," created a standard that has "become a staple in the consideration of mootness."[16] The Supreme Court's holding in *Southern Pacific Terminal Co. v. Interstate Commerce Commission* established that administrative agencies could not escape appellate review by issuing "shortterm[] orders, capable of repetition, yet evading review."[17] Subsequent use and interpretation of the phrase have created a major exception to the recognized justiciability requirement of mootness, which "should describe those cases in which inevitable constraints of time would repeatedly gut the action before final appellate review could occur,"[18] and has since been slightly reformatted into a two-part test requiring "(1) the challenged action [is] in its duration too short to be fully litigated prior to cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party [will] be subject to the same action again."[19] Although initially aimed at the decisions of administrative agencies,[20] the doctrine has been applied to legislative enactments,[21] court orders,[22] policies of state entities,[23] campaign-finance regulations,[24] and executive actions.[25]

---

[16] David H. Donaldson, Jr., Comment, *A Search for Principles of Mootness in the Federal Courts: Part One—the Continuing Impact Doctrines*, 54 TEX. L. REV. 1289, 1291 (1976).

[17] S. Pac. Terminal Co. v. Interstate Com. Comm'n, 219 U.S. 498, 515 (1911).

[18] Donaldson, *supra* note 16, at 1292.

[19] *Kemna*, 523 U.S. 1, 17 (1998) (internal citations omitted).

[20] *S. Pac. Terminal Co.*, 219 U.S. at 515; *see also* 13 CHARLES A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3533, at 286 (4th ed. 2008).

[21] *See* Kingdomware Techs., Inc. v. United States, 579 U.S. 162, 170 (2016) (congressional statute); Roe v. Wade, 410 U.S. 113, 125 (1973) (constitutionality of state abortion statute); *see also* Storer v. Brown, 415 U.S. 724, 737 n.8 (1974) (finding that a challenge to a statute as applied may also qualify as "capable of repetition, yet evading review").

[22] *See* Nebraska Press Ass'n v. Stuart, 427 U.S. 539 (1976) (order restraining news media); Carroll v. President of Princess Anne, 393 U.S. 175 (1968) (temporary restraining order against white-supremacist rally); United States v. Schiavo, 504 F.2d 1 (3d Cir. 1974) (gag order enjoining news media).

[23] *See* DeFunis v. Odegaard, 416 U.S. 312 (1974) (state university); Sapp v. Renfroe, 511 F.2d 172 (5th Cir. 1975) (board of education).

[24] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 334 (2010) ("Citizens United decided to litigate its case to the end. Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.").

[25] *See* Nader v. Volpe, 475 F.2d 916 (D.C. Cir. 1973) (exemption from motor vehicle safety standard by Secretary of Transportation).

2. Criticisms of the Doctrine at the Federal Level[26]

Although widely recognized, mootness determinations, including the application of the capable-of-repetition-yet-evading review exception, in the federal courts "have been characterized by a fluid body of criteria championed in some cases and ignored in others."[27] Indeed, then-Chief Justice Rehnquist, noting the questionable historical accuracy of mootness as an Article III requirement, posited that "[i]f it were indeed [Article] III which—by reason of its requirement of a case or controversy for the exercise of federal judicial power—underlies the mootness doctrine, [then] the 'capable of repetition, yet evading review' exception relied upon by the Court in this case would be incomprehensible."[28]

---

[26] Scholars and courts have offered criticisms of the repetition/evasion exception. *See, e.g.*, Honig v. Doe, 484 U.S. 305, 330 (1988) (Rehnquist, C.J., concurring) (arguing that the exception for cases capable of repetition, yet evading review disproves the notion of mootness as a mandatory jurisdictional doctrine); Evan Tsen Lee, *Deconstitutionalizing Justiciability: The Example of Mootness*, 105 HARV. L. REV. 603, 623–25 (1992) (arguing that the Supreme Court "suspended" the personal stake requirement in two mootness cases); Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 CORNELL L. REV. 393, 490 (1996) (stating that the "exceptions" to mootness doctrine are "incomprehensible" if federal courts lack Article III jurisdiction to resolve moot cases); Kristen M. Shults, Friends of the Earth v. Laidlaw Environmental Services*: A Resounding Victory for Environmentalists, Its Implications on Future Justiciability Decisions, and Resolutions of Issues on Remand*, 89 GEO. L.J. 1001, 1036 (2001) ("[E]xceptions to the personal stake requirement are difficult to understand if mootness is constitutionally required and suggest that the doctrine has been applied more as a matter of discretion."). And some scholars have argued that "[b]oth constitutional and practical considerations encourage such a doctrine" because "[i]f time alone were to determine when in the judicial process a case terminates, a checkered and unstable pattern of legal precedents would result." Donaldson, *supra* note 16, at 1293–94; *see also* Matthew I. Hall, *The Partially Prudential Doctrine of Mootness*, 77 GEO. WASH. L. REV. 562, 577–78 (2009) ("One problem that would arise from the strict application of a rule that courts should dismiss cases that have become moot is that certain claims—those that are ordinarily of very short duration—would thereby be immunized from judicial review entirely. Plainly, this result would be undesirable, and the exception for claims that are capable of repetition, yet evading review, responds to this problem by permitting 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."). Such a rigid construction would insulate inherently short-term disputes—for example, disputes arising from a pregnancy—from meaningful review, which demonstrates the prudential use and necessity of the doctrine. *See* Roe v. Wade, 410 U.S. 113, 125 (1992) ("[T]he normal 266-day human gestation period is so short that the pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage, and appellate review will be effectively denied. Our law should not be that rigid. . . . Pregnancy provides a classic justification for a conclusion of nonmootness."). The ultimate propriety of the doctrine itself is outside the scope of this Article.

[27] Donaldson, *supra* note 16, at 1289.

[28] *Honig*, 484 U.S. at 330 (Rehnquist, C.J., concurring); *see also* Pushaw, *supra* note 26, at 490 ("[Mootness] exceptions are incomprehensible if federal courts lack Article III jurisdiction to resolve moot cases at all.").

3. Inapplicability of the Doctrine at the State Level

Likewise, the "incomprehensibility" of the doctrine is even more apparent when applied to state courts, which are not bound by Article III's "case or controversy requirement."[29] Indeed, because "[s]tate courts do not see themselves as bound by the 'cases' and 'controversies' requirement of Article III,"[30] states "have been free to vary justiciability standards in their courts from federal norms."[31] Many states have explicitly examined the mootness doctrine—and, as important here, the repetition/evasion exception—and have expressly rejected those doctrines unless the doctrines are independently supported by the state's constitution[32] or other prudential concerns.[33]

---

[29] The United States Supreme Court has "repeatedly stated" that state courts are not bound by the federal "case or controversy" requirement. William A. Fletcher, *The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions*, 78 CALIF. L. REV. 263, 264 n.1 (1990); *see also* N.Y. State Club Ass'n v. City of New York, 487 U.S. 1, 8 n.2 (1988) ("[T]he special limitations that Article III of the Constitution imposes on the jurisdiction of the federal courts are not binding on the state courts. The States are thus left free . . . to determine matters that would not satisfy the more stringent requirement in the federal courts that an actual 'case' or 'controversy' be presented for resolution." (citation omitted)); Secretary of Md. v. Joseph H. Munson Co., 467 U.S. 947, 971 (1984) (Stevens, J., concurring) ("Nothing in Art. III of the Federal Constitution prevents the Maryland Court of Appeals from rendering an advisory opinion concerning the constitutionality of Maryland legislation if it considers it appropriate to do so. Thus, the decision of the Maryland Court of Appeals that it had jurisdiction to decide this case is one we have no power to review." (footnote omitted)); DeFunis v. Odegaard, 416 U.S. 312, 316 (1974) ("Although as a matter of Washington state law it appears that this case would be saved from mootness by 'the great public interest in the continuing issues raised by this appeal,' the fact remains that under Art. III '[e]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve before it assumes jurisdiction.' " (citations omitted) (quoting North Carolina v. Rice, 404 U.S. 244, 246 (1971))). The cases cited in these three examples all involved federal constitutional challenges to either state laws (*N.Y. State Club Ass'n* and *Joseph H. Munson Co.*) or the policies of a state institution (*DeFunis*).

[30] Omer Kimhi, *Private Enforcement in the Public Sphere–Towards a New Model of Residential Monitoring of Local Governments*, 18 NEV. L.J. 657, 679 (2018).

[31] James W. Doggett, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 851 (2008).

[32] *See, e.g.*, Couey v. Atkins, 355 P.3d 866, 878, 902 (Or. 2015) (determining that, although Oregon's state constitution contained no case or controversy requirement, and Oregon was not bound to follow the Federal Article III, mootness and the repetition/evasion exception only exist because Oregon's state constitution imposed no impediment to the legislature authorizing the courts to exercise judicial power in moot cases that are otherwise capable of repetition, yet evading review); Jack L. Landau, Couey v. Atkins*: A Reevaluation of State Justiciability Doctrine*, 79 ALB. L. REV. 1467, 1476 (2016) (discussing *Couey*); Bowers Off. Prods., Inc. v. Univ. of Alaska, 755 P.2d 1095, 1096 (Alaska 1988) (" '[C]ase o[r] controversy' is a term of art used to describe a constitutional limitation on federal court jurisdiction. But as this court has observed for many years, 'Our mootness doctrine . . . is a matter of judicial policy, not constitutional law.' . . . Thus, instead of looking to federal courts . . . this court should first look to its own precedent and statutes."); Salorio v. Glaser, 414 A.2d 943, 947 (N.J. 1980) ("New Jersey State courts are not bound by the 'case or controversy' requirement governing federal courts . . . . This Court remains free to fashion its own law of [justiciability] consistent with notions of substantial justice and sound judicial administration."); Provo City Corp. v. Willden, 768 P.2d 455, 456–57 (Utah 1989) ("[T]he

C. Nevada State-Court Justiciability Doctrines

Nevada's appellate courts "may only entertain [an] appeal[] when authorized by a statute or court rule."[34] Although Nevada appellate courts have expressly adopted the repetition/evasion doctrine,[35] no statute authorizes the court to consider an appeal rendered moot but capable of repetition, nor does any court rule. Indeed, the relevant court rules[36] only authorize appeals from a discrete set of orders, generally defined as "final, appealable orders,"[37] from a

---

federal rules . . . are not binding on state courts, and the article III constitutional restrictions and federalistic prudential considerations that have guided the evolution of federal court [justiciability] law are not necessarily relevant to the development of the standing rules that apply in Utah's state courts.").

[33] *See, e.g.*, Liberty Mut. Ins. Co. v. Fales, 505 P.2d 213, 215 (Cal. 1973) ("If an action involves a matter of continuing public interest and the issue is likely to recur, a court may exercise an inherent discretion to resolve that issue, even though an event occurring during its pendency would normally render the matter moot."); *In re* Geraghty, 343 A.2d 737, 738–39 (N.J. 1975) ("[W]e have often recognized that courts may hear and decide cases which are technically moot where issues of great public importance are involved."); People *ex rel.* Guggenheim v. Mucci, 298 N.E.2d 109, 110 (N.Y. 1973) ("[A]n appeal should not be dismissed as moot if a question of general interest and substantial public importance is likely to recur."); *In re* Recall of Certain Off. of the City of Delafield, 217 N.W.2d 277, 279 (Wis. 1975) ("[T]he great weight of authority supports the proposition that an appellate court may retain an appeal for determination if it involves questions of public interest even though it has become moot as to the particular parties involved." (footnote omitted)); McBain v. Hamilton Cnty., 744 N.E.2d 984, 987 (Ind. Ct. App. 2001) (establishing that Indiana state courts will review moot cases when they present questions of "great public interest that contain issues likely to recur"); Gernstein v. Allen, 630 N.W.2d 672, 676 (Neb. Ct. App. 2001) (establishing that Nebraska courts will review moot cases that "involve a matter of great public interest or when other rights or liabilities may be affected by the case's determination"); Cobb v. State Canvassing Bd., 140 P.3d 498, 504 (N.M. 2006) (establishing that New Mexico state courts will review moot cases that present issues of substantial public interest or that are capable of repetition, yet evading review); City of Yakima v. Mollett, 63 P.3d 177, 179 (Wash. Ct. App. 2003) (establishing that Washington state courts will review moot cases that present "matters of continuing and substantial public interest").

[34] Brown v. MHC Stagecoach, 301 P.3d 850, 851 (Nev. 2013) (citing Taylor Constr. Co. v. Hilton Hotels Corp., 678 P.2d 1152, 1153 (Nev. 1984)); *see also* Valley Bank of Nev. v. Ginsburg, 874 P.2d 729, 732 (Nev. 1994) (noting that Nevada appellate courts' appellate jurisdiction is limited).

[35] Traffic Control Servs. v. United Rentals, 87 P.3d 1054, 1057 (Nev. 2004) (recognizing the capable-of-repetition-yet-evading-review exception to the mootness doctrine in Nevada).

[36] In addition to these court rules, which almost uniformly require the appeal to arise from a final order, there are a handful of statutes that authorize interlocutory appeals. *See, e.g.*, NEV. REV. STAT. § 155.190 (2013) (allowing appeals of certain probate orders*)*; *id.* § 164.015 (certain interlocutory trust orders). The statutory exceptions to the final judgment rule allowing for the appeal of a specified interlocutory order must be strictly construed, *see* Yonker Constr., Inc. v. Hulme, 248 P.3d 313, 314 (Nev. 2010), and because no statute specifically addresses the repetition/evasion exception, no such statute confers appellate jurisdiction over those cases.

[37] *See, e.g.*, NEV. R. APP. P. 3A(b) (only allowing appeals in civil actions to be taken from "[a] final judgment"; "[a]n order granting or denying a motion for a new trial"; "[a]n order granting or refusing to grant [or dissolve] an injunction"; "[a]n order appointing or refusing to appoint a receiver or vacating or refusing to vacate an order appointing a receiver"; "[a]n order dissolving or refusing to dissolve an attachment"; "[a]n order changing or refusing to

discrete set of parties, which both statute and court rules generally define as a party who is "aggrieved" by an appealable judgment or order.[38] When Nevada's appellate courts lack jurisdiction, they cannot entertain an appeal and must dismiss it.[39]

1. Similarities with Federal Justiciability Doctrines

While the limitations on Nevada appellate court jurisdictions may seemingly mirror or coincide with many federal justiciability doctrines, the limitations do not authorize the court to entertain an appeal that is moot (and thus no longer aggrieves a party) but capable of repetition, nor do the jurisdictional requirements allow for Nevada courts to adopt the doctrine for prudential reasons. Consider that if an issue is not "ripe" for appeal in the federal Article III sense—meaning that the issue has not yet developed to a point when the effects of the issue have been "felt in a concrete way by the challenging parties"[40]—then an order rendered on the same issue in the state court context is likely not "final" for purposes of establishing appellate jurisdiction in Nevada courts, which requires that the order "disposes of the issues presented in the case, determines the costs, and leaves nothing for the future consideration of the court."[41]

Likewise, if a party lacks standing to bring an appeal on a claim in federal court—meaning, at least in part, that she "[has] suffered an 'injury in fact,'" which is "an invasion of a legally protected interest which is concrete and particularized and actual or imminent rather than conjectural or hypothetical"[42]—then the same party likely lacks standing to appeal from an order on that issue in Nevada's state courts, because only an "aggrieved party"—one whose "personal right or right of property is adversely and

---

change the place of trial"; "[a]n order entered in a proceeding that did not arise in a juvenile court that finally establishes or alters the custody of minor children"; "[a] special order entered after final judgment"; "[a]n interlocutory judgment, order or decree in an action to redeem real or personal property from a mortgage or lien that determines the right to redeem and directs an accounting"; or "[a]n interlocutory judgment in an action for partition that determines the rights and interests of the respective parties and directs a partition, sale or division"); *id.* 3B (allowing appeals in criminal actions as set forth in NEV. REV. STAT. § 176.09183 (2017) (authorizing appeal from denial of petition requesting genetic marker analysis), §§ 177.015.305 (authorizing appeals from a "final judgment or verdict"), and § 34.575 (authorizing appeals from the grant or denial of a writ of habeas corpus)); NEV. R. APP. P. 3D(c) (authorizing appeal "[f]rom an order of suspension from the exercise of [a judicial] office" and "[f]rom an order of censure, removal, retirement, or other form of discipline").

[38] NEV. R. APP. P. 3A(a); *see also* NEV. REV. STAT. § 177.015 (2015) (allowing criminal appeals by "[t]he party aggrieved in a criminal action").

[39] *See* Stapp v. Hilton Hotels Corp., 826 P.2d 954, 956 (Nev. 1992) (concluding that orders entered without jurisdiction are void).

[40] Reno v. Catholic Soc. Servs., Inc., 509 U.S. 43, 57 (1993) (quoting Abbott Lab'ys v. Gardner, 387 U.S. 136, 148–49 (1967)).

[41] Lee v. GNLV Corp., 996 P.2d 416, 417 (Nev. 2000).

[42] Lujan v. Defs. of Wildlife, 504 U.S. 555, 560 (1992) (internal quotation marks and citations omitted).

substantially affected" by a district court's ruling—has standing to appeal in Nevada's state courts.[43]

Finally, if an issue becomes moot before or during a federal court case—meaning the plaintiff has lost her "personal stake in the outcome of the lawsuit"[44]—the same fact pattern would also likely mean the plaintiff would not be an aggrieved party under Nevada's court rules and statutes, and, thus, the Nevada appellate court should rightly dismiss the claim.[45]

2. Inapplicability of Repetition/Evasion Exception in Nevada's State Courts

Given the strict jurisdictional limitations imposed by Nevada's statutes and court rules, the repetition/evasion exception should not exist, even for the prudential considerations utilized by other state courts' adoption of the doctrine.[46] Indeed, application of the doctrine requires the Nevada appellate courts to first recognize that an issue has become moot—meaning that the court can no longer "afford no relief from the district court's . . . order," and, thus, must dismiss the appeal[47]—which, because the issue no longer "aggrieves" the party bringing the appeal, renders the appellate court without jurisdiction to further consider it, irrespective of any prudential considerations.[48] The doctrine then requires the appellate court—having acknowledged it is without jurisdiction to act—to expand its own jurisdiction to consider an issue it otherwise cannot adjudicate, a power the Nevada appellate courts do not possess, because the right to appeal is only conferred by statute or court rule.[49] Thus, because the Nevada appellate courts are without jurisdiction to decide issues that are moot—even those capable of repetition, yet evading review—the decisions rendered in the cases in which the repetition/evasion exception is invoked are void.[50] Thus, the incomprehensibility of the doctrine—which, at the federal level, stems from its questionable constitutional underpinning—exists at the state-court level, too; although the Nevada appellate courts

---

[43] NEV. R. APP. P. 3A(a); Pascua v. Bayview Loan Servicing, LLC, 434 P.3d 287, 290 n.5 (Nev. 2019) (citing Valley Bank of Nev. v. Ginsburg, 874 P.2d 729, 734 (Nev. 1994)).

[44] Campbell-Ewald Co. v. Gomez, 577 U.S. 153, 160–61 (2016) (quoting Genesis Healthcare Corp. v. Symczyk, 569 U.S. 66, 72 (2013)).

[45] Personhood Nev. v. Bristol, 245 P.3d 572, 576 (Nev. 2010) (dismissing a moot appeal because mootness means that Nevada appellate courts "can afford no relief").

[46] *See, e.g.*, *In re* Recall of Certain Offs. of the City of Delafield, 217 N.W.2d 277, 279 (Wis. 1975) ("[T]he great weight of authority supports the proposition that an appellate court may retain an appeal for determination if it involves questions of public interest even though it has become moot as to the particular parties involved." (footnote omitted)).

[47] *Personhood Nev.*, 245 P.3d at 576 (dismissing a moot appeal because mootness means that Nevada appellate courts "can afford no relief").

[48] NEV. R. APP. P. 3A(a); NEV. REV. STAT. § 177.015 (2021).

[49] Taylor Constr. Co. v. Hilton Hotels Corp., 678 P.2d 1152, 1153 (Nev. 1984) (providing that a right to appeal only exists if a rule or statute authorizes the appeal).

[50] *See* Stapp v. Hilton Hotels Corp., 826 P.2d 954, 956 (Nev. 1992) (concluding that orders entered without jurisdiction are void).

routinely recognize and apply the doctrine, they are without the authority to do so because the doctrine has no statutory or court-rule basis.

3. Possible Solutions

Two possible solutions exist to rectify the doctrine's jurisdictional failings: Nevada's legislature could enact a statute formally adopting the repetition/evasion exception, or the Supreme Court of Nevada could enact a court rule allowing the same. Both solutions are possible, but both also have downsides.

Statutory enactment may prove difficult because doing so would likely require legislative drafters to identify, consider, and potentially modify each statutory grant of appellate jurisdiction contained within Nevada's revised statutes. Additionally, the legislature's ability to enact statutes regarding the legal process is limited to substantive, rather than procedural, rules.[51]

Likewise, modifying Nevada's court rules may prove difficult because while the rules are geared toward both "the just, speedy, and inexpensive determination of every action"[52] and "the proper and efficient administration of the business and affairs of the courts,"[53] the court system also refuses to "render advisory opinions on moot or abstract questions,"[54] a practice that could be jeopardized by adopting a rule that, in essence, allows the appellate courts to decide questions that no longer affect the parties to the appeal. Thus, while two solutions exist, both carry some risk, although the need and utility of the changes outweighs the inherent risks.

CONCLUSION

Because no statute or court rule authorizes the Nevada appellate courts to hear cases that have been rendered moot but may be capable of repetition, yet evade review, Nevada's appellate courts have no authority to do so. The appellate courts' decisions utilizing that exception are void, but Nevada's legislative and judicial departments both have potential solutions to solve this jurisdictional failing, should they wish to do so.

---

[51] *See, e.g.*, State v. Connery, 661 P.2d 1298, 1300 (Nev. 1983); NEV. REV. STAT. § 2.120 (2021).

[52] NEV. R. CIV. P. 1.

[53] NEV. R. APP. P. 1(c).

[54] Applebaum v. Applebaum, 621 P.2d 1110, 1110 (Nev. 1981) (citing NEV. CONST. art. VI, § 4; Boulet v. City of Las Vegas, 614 P.2d 8 (Nev. 1980)).