No. 21-418

In the Supreme Court of the United States

JOSEPH A. KENNEDY,

Petitioner,

v.

BREMERTON SCHOOL DISTRICT,

Respondent.

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

RESPONDENT'S REPLY IN SUPPORT OF SUGGESTION OF MOOTNESS

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The Response does not deny that in 2020, petitioner sold the family home in Port Orchard, Washington; that his employment at the Puget Sound Naval Shipyard ceased; and that he moved to Florida, purchased a new home, registered to vote, and became a "Floridian[]." It instead details the tragic circumstances surrounding the Kennedys' move.

Respondent respects the Kennedys' major life decision to uproot themselves and move across the country for a relative in need. They have and deserve respondent's sympathy and highest regard.

Article III's dictates are, however, clear and unambiguous: Federal courts lack jurisdiction if there is no live case or controversy, regardless of the reason. And when a plaintiff can no longer take advantage of the only relief requested, the case is moot.

We do not doubt that the Kennedys themselves "never concealed the fact that they presently live in Florida." Resp. 2. But "counsel * * * have a 'continuing duty to inform the Court of any development which may conceivably affect the outcome' of the litigation," including anything that "could have the effect of depriving the Court of jurisdiction due to the absence of a continuing case or controversy." *Board of License Comm'rs* v. *Pastore*, 469 U.S. 238, 240 (1985) (quoting *Fusari* v. *Steinberg*, 419 U.S. 379, 391 (1975) (Burger, C.J., concurring)). Hence, "[i]t is the duty of counsel to bring to the federal tribunal's attention, '*without delay*,' facts that may raise a question of mootness." *Arizonans for Off. Eng.* v. *Arizona*, 520 U.S. 43, 68 n.23 (1997) (citing *Pastore*, 469 U.S. at 240); see also Sup. Ct. R. 14.1(e), (g)(ii) (petition must set forth the basis

for federal jurisdiction). That was also true in the district court and court of appeals. See, *e.g.*, *In re Cellular 101, Inc.*, 539 F.3d 1150, 1154 (9th Cir. 2008) (citing *Arizonans*, 520 U.S. at 68 n.23). And given the duty of all attorneys to communicate on an ongoing basis with their clients about facts relevant to the client's case (see Wash. R. Pro. Conduct § 1.4; Tex. R. Pro. Conduct § 1.03; D.C. R. Pro. Conduct § 1.4), it is reasonable to assume that at least some of petitioner's legal team would have learned of the Kennedys' move over the course of the past two years.

In keeping with our duty, we collected the pertinent information and presented it to the Court "*without delay*" on discovering the justiciability issue after certiorari was granted (*Pastore*, 469 U.S. at 240). If, as we suspect, the case has been moot for the past two years, the Court should order vacatur of the decisions below, not adjudicate the merits of moot claims.[1]

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[1] Petitioner's counsel imply that we knew all along but "waited until the deadline[] for petitioner's merits brief[]" to file the suggestion of mootness, as if to gain some strategic advantage. Resp. 2. Not only is that factually incorrect, but it defies common sense. When Mrs. Kennedy resigned her position with the School District to move to Florida, she explained that her husband would continue to reside in Bremerton and work at the Naval Shipyard there. See App. A, ¶ 2. To restate the obvious, the School District had nothing to gain from two years of litigation on the merits of moot claims against it. See Suggestion of Mootness 5 n.2. Quite the contrary: Dismissal at any earlier point would have saved substantial time and resources that the District would have been able to devote to educating students; and the Bremerton community would have been spared the ongoing divisiveness wrought by this unfortunate situation. Because the District cannot recover attorney's fees, continuing litigation could only increase its expenses. Finally, the Suggestion of Mootness was filed well before petitioner's opening brief was due, leaving ample time for

The Response mistakenly implies that to find nonjusticiability the plaintiff must concede the supporting facts. Compare Resp. 5, with, *e.g.*, *FW/PBS, Inc.* v. *City of Dallas*, 493 U.S. 215, 235 (1990) (finding challenge to ordinance nonjusticiable despite affidavit and averments at oral argument, because evidence "f[ell] short of establishing" jurisdiction), and *United States* v. *Articles of Drug Consisting of 203 Paper Bags*, 818 F.2d 569, 574 (7th Cir. 1987) (Posner, J.) ("If we thought it highly probable as a matter of common sense or common knowledge that [the importer would resume its challenged activity,] we would not dismiss the case as moot, since as we have said a judgment of mootness is, realistically, a judgment of more or less rather than yes or no. But as far as we can guess from the scanty materials in the record, the probability is small."). See generally *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 68 (1987) (Scalia, J., concurring in part and concurring in the judgment) ("It is well ingrained in the law that subject-matter jurisdiction can be called into question *either* by challenging the sufficiency of the allegation *or* by challenging the accuracy of the jurisdictional facts alleged."). In all events, while the Response does not concede mootness, it also does not contest any of the facts presented in the Suggestion of Mootness.

As for the statement that petitioner would return to Bremerton immediately if this Court rules in his favor, that must be weighed against all the facts supporting mootness, which are unrebutted. And while

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rebuttal of the facts of petitioner's sale of the family home in Washington and move to Florida, or else voluntary dismissal without further unnecessary expenditures of party or judicial resources. Petitioner has done neither.

the Response labels petitioner's move to Florida "temporary," the supporting declaration makes clear that the family situation prompting it dates back to July 2019, when the Kennedys first began "exploring how [they] might be able to support" Mrs. Kennedy's father. Resp. App. 2a, ¶ 8. We respectfully submit that the undoubted effort and expense during the approximately nine months leading up to petitioner's move, including Mrs. Kennedy's resignation from her job in Washington, the sale of the family home in Washington, the purchase of the home in Florida, the physical move to Florida, and all the rest, are more consistent with winding up one's affairs for a permanent cross-country move. And the fact that the Kennedys remain homeowners and registered voters in Florida nearly two years later further underscores that conclusion.

Finally, petitioner insists that a phone call could have resolved this matter.[2] But if this case were so obviously still justiciable, petitioner's legal team could have disclosed the facts of his move to Florida and the issue could have been resolved—in the district court, or in the court of appeals, or in this Court—at any point during the past two years. Because they didn't, we have raised the issue at the earliest possible moment and welcome determination of it.

CONCLUSION

The Response does not dispute the facts going to mootness. It appears, therefore, that there is no live controversy and no Article III jurisdiction.

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[2] A request for consent to a dispositive motion is neither required by the Rules nor customary practice in any jurisdiction of which we are aware. Cf. Sup. Ct. R. 21.1 ("Non-dispositive motions * * * shall state the position on the disposition of the motion or application of the other party or parties to the case.").

Respectfully submitted.

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FEBRUARY 2022

APPENDIX

APPENDIX A

SUPPLEMENTAL DECLARATION OF AARON LEAVELL

I, Aaron Leavell, declare that, if called upon, I would testify to the following:

1. I am the Superintendent of the Bremerton School District in Bremerton, Washington.

2. Denise Kennedy, wife of petitioner Joseph Kennedy, is a former employee of the Bremerton School District. She resigned her position in early 2020, explaining that she was moving to Florida for family reasons but that Mr. Kennedy would be remaining in Bremerton, Washington, where he would continue to work at the Puget Sound Naval Shipyard.

/s/ Aaron Leavell

Date: February 27, 2022