

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**

SUGGESTION OF MOOTNESS

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SUGGESTION OF MOOTNESS

In the weeks since *certiorari* was granted, respondent has learned that this case may be moot, implicating the Court's Article III jurisdiction.

STATEMENT

1. When this dispute arose in 2015, petitioner was a part-time assistant coach of the varsity football team and head coach of the junior-varsity team at Bremerton High School, for which he received an annual stipend of \$4,498 from the respondent School District. See SER531.¹ Petitioner was not otherwise employed by the School District. In his Complaint, petitioner alleged that he was a resident of Port Orchard, Washington, and that his regular employment was with the United States Navy at the Puget Sound Naval Shipyard & Intermediate Maintenance Facility in Bremerton, Washington. See ER397; accord ER289, 293 (EEOC complaint). The record closed in 2019 with the filing of motions for summary judgment.

Shortly after that, it seems, petitioner ceased to reside or be employed in the State of Washington. We have learned that, after the record closed, petitioner's employment with the Navy ended, he and his wife sold their home in Port Orchard, Washington, and they moved to Florida. See App. A, ¶ 2 & Exh. 3; App. C, ¶¶ 4-5; Statutory Warranty Deed for Parcel Number 332402-1-037-2002, Kitsap Cnty. Auditor, <https://kcwaimg.co.kitsap.wa.us/recorder/web/splash.jsp> (select "Enter" at the bottom of the page; under "Parcel #" type in "33240210372002 and then select "Search"; scroll down to the seventh row and select "Deed

¹ ER refers to the excerpts of record (ECF 14) and SER refers to the supplemental excerpts of record (ECF 27) filed in the court of appeals.

202006120243”; finally, select “View as PDF 202006120243”).

According to public records for Escambia County, Florida, petitioner now owns a home in Pensacola, which he purchased on March 26, 2020. See Escambia Cnty. Prop. Appraiser, Parcel Ref. for 24-1S-31-1300-020-007, http://www.escpa.org/cama/Detail_a.aspx?s=241S311300020007. It is our understanding that petitioner and his wife reside in their Pensacola home. See App. A, Exhs. 1-2; App. C, ¶ 5.

Additionally, petitioner is apparently a registered voter in Escambia County, Florida: The Facebook page for petitioner’s wife, Denise Castle Kennedy, includes a photo dated October 24, 2020, and captioned, “We voted!!!” App. A, Exh. 1. The photo depicts the Kennedys holding stickers that read: “I VOTED—ES-CAMBIA COUNTY.” *Ibid.*

Another Facebook posting by Mrs. Kennedy, dated May 5, 2020, bears the caption, “Our first beach day as Floridians! 82 degrees of amazing.” App. A, Exh. 2.

2. The only remedies that petitioner sought in this case are a declaratory judgment and injunctive relief ordering the School District to “reinstate Coach Kennedy to his previous [coaching] positions” while allowing him to offer prayers “at the 50-yard line at the conclusion of [Bremerton High School] football games.” ER409. Petitioner did not assert any claim for damages. See ER409-410.

3. Assistant coaches for the Bremerton High School varsity football team are expected to be physically present at the school to perform year-round coaching duties, including:

- Helping in the weight room three days a week during the winter.
- Attending and supervising two weeks of Spring Football.
- Being involved in conducting the team's summer program, which spans three to four days each week for the entire summer.
- Attending and supervising a four-day camp during the summer.
- Supervising and conducting all practices, which occur six days per week during the fall football season, from September through November.
- Attending practice-film breakdowns during the fall football season.
- Attending all games throughout the fall football season.
- Being involved with team fundraising and equipment distribution and collection throughout the year.

See App. B, ¶ 4.

The head coach of the junior-varsity team has similar duties; and the junior-varsity games are held on different days than the varsity games. See App. B, ¶ 5.

At current rates, the total annual stipend for petitioner's former coaching positions would be \$5,304. See App. B, ¶ 6.

ARGUMENT

This Court’s jurisdiction is limited to actual “cases” or “controversies.” U.S. Const. art. III, § 2. An “actual controversy must be extant at all stages of review, not merely at the time the complaint is filed.” *Alvarez v. Smith*, 558 U.S. 87, 92 (2009) (quoting *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975)). When there is no longer a “sufficient prospect that the decision will have an impact on the parties,” the case is moot and no longer justiciable. 13B Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3533. In accordance with Article III’s mandate, it appears that this case no longer presents a live controversy for the Court to adjudicate.

1. Because a declaratory judgment “cannot alone supply jurisdiction otherwise absent,” it is unavailable if the party seeking it is not also entitled to some other remedy. *E.g.*, *California v. Texas*, 141 S. Ct. 2104, 2116 (2021). That is because Article III requires that a controversy be “real and substantial” and ‘admi[t] of specific relief through a decree of conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.’ *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 127 (2007) (quoting *Aetna Life Ins. Co. v. Hawthorn*, 300 U.S. 227, 240-241 (1937)). Hence, when other claims for relief become moot, a request for a declaratory judgment is as a matter of law insufficient to preserve a live controversy; the entire case is instead moot and no longer justiciable. *See California*, 141 S. Ct. at 2116.

2. Taken all together, the evidence strongly suggests that, as a “Floridian[]” (App. A, Exh. 2), petitioner could not serve as or perform the duties of a

Bremerton football coach. The year-round time commitment for physical presence and active, in-person coaching at Bremerton High School (App. B, ¶¶ 4-5) and the \$5,304 annual stipend (*id.* ¶ 6) would not appear to allow for petitioner to commute to Washington from Florida, where petitioner and his wife have resided since at least 2020.

Indeed, not only is it unlikely that petitioner would be able to benefit from the injunctive relief that he sought, but that appears to have been so throughout the proceedings in the court of appeals also; and it may have been true even during some portion of the district-court proceedings on the merits after the record closed.²

3. Because “[t]here is no reason to believe that [petitioner] ever will return to [Bremerton]” to live and work, and because petitioner would therefore seem to be unable to accept a position as, or fulfill the year-round responsibilities of, a Bremerton High School football coach, he is not entitled to, and could not take advantage of, the requested injunctive relief. *Bunting v. Mellen*, 541 U.S. 1019, 1021 (2004) (Stevens, J., respecting denial of certiorari). And hence, “none of the

² Had we been aware of these post-record developments before *certiorari* was granted, respondent would have promptly raised the mootness issue with the lower courts or this Court. Dismissal of the case as moot at any point would have saved respondent substantial time and expense litigating this matter, while also conserving judicial resources. Respondent certainly had nothing to gain from unnecessarily continuing to litigate the merits of moot claims asserted against it. Because the issue goes to the Court’s jurisdiction, we are providing this suggestion of mootness and the attached supporting materials at the earliest possible opportunity, so that these concerns may be addressed before further judicial and party resources are expended unnecessarily on a nonjusticiable matter.

parties has a present stake in the outcome” of this litigation. *Ibid.*; see also, *e.g.*, *Camreta v. Greene*, 563 U.S. 692, 710-711 (2011) (party’s moving from Oregon to Florida mooted her Fourth Amendment claim against Oregon officials); *Libertarian Party of Erie Cnty. v. Cuomo*, 970 F.3d 106, 120 (2d Cir. 2020) (party’s moving from New York to Colorado mooted claims concerning New York firearm-licensing law), cert. denied, 141 S. Ct. 2797 (2021); *J.S. v. Westerly Sch. Dist.*, 910 F.3d 4, 6 (1st Cir. 2018) (family’s move out of school district mooted dispute over their child’s entitlement to Individualized Education Program in that district).³

Even supposing that there were some genuine possibility that petitioner might decide to leave his home in Pensacola, Florida, and move approximately 2,800 miles back to Bremerton, Washington, for a \$5,304 part-time coaching job, this Court has “made clear that such a speculation cannot ‘shield [a] case from a mootness determination.’” *Bunting*, 541 U.S. at 1021 (quoting *City News & Novelty, Inc. v. Waukesha*, 531 U.S. 278, 283 (2001)).

³ The boilerplate request in the Complaint for “all other appropriate relief as the Court deems just and proper” (ER410) does not affect the mootness determination because that request becomes moot when a case is otherwise moot and no equitable remedy is available. See, *e.g.*, *Moseley v. Board of Educ.*, 483 F.3d 689, 692-693 (10th Cir. 2007). If it were otherwise, no case would ever become moot, because a version of that expansive language is included in virtually every complaint filed in every civil case in every jurisdiction.

CONCLUSION

For the foregoing reasons, it appears that this case is moot, leaving the Court without Article III jurisdiction to hear and decide it.

Respectfully submitted.

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FEBRUARY 2022

APPENDICES

APPENDIX A

**DECLARATION OF GABRIELA HYBEL
IN SUPPORT OF RESPONDENT'S
SUGGESTION OF MOOTNESS**

I, Gabriela Hybel, declare that, if called upon, I would testify to the following:

1. I am a Madison Legal Fellow at Americans United for Separation of Church and State. I am an attorney representing Respondent Bremerton School District in this case.

2. I have confirmed on the Kitsap County, Washington, website that Parcel ID number 332402-1-037-2002 corresponds to 7660 SE Southworth Drive, Port Orchard, Washington 98366. According to Kitsap County land records, Joseph Kennedy sold that property to Joseph Lee Johnson on June 12, 2020. I have confirmed that 7660 SE Southworth Drive, Port Orchard, Washington 98366, is the home address that Joseph Kennedy listed on his EEOC complaint. See ER289.

3. Exhibit 1 is a true and correct screenshot from Denise Castle Kennedy's Facebook page of a posting dated October 24, 2020.

4. Exhibit 2 is a true and correct screenshot from Mrs. Kennedy's Facebook page of a posting dated May 5, 2020.

2a

5. Exhibit 3 is a true and correct screenshot from Joseph Kennedy's Facebook page of a posting dated April 2020.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Gabriela Hybel

Date: February 18, 2022

3a

EXHIBIT 1



4a

EXHIBIT 2



5a

EXHIBIT 3

 **Joe Kennedy** is in **Puget Sound Naval Shipyard**. ...
April 2020 · 🌐 · 🌐



Left Job at Puget Sound Naval Shipyard
April 2020 — Process Improvement Project Manager
Puget Sound Naval Shipyard

APPENDIX B

**DECLARATION OF AARON LEAVELL
IN SUPPORT OF RESPONDENT'S
SUGGESTION OF MOOTNESS**

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. I know Joseph Kennedy, petitioner in this case.

3. Joseph Kennedy has not been an employee of the Bremerton School District since the expiration of his one-year term contract in 2016, when he did not apply to renew his contract to coach the following year.

4. Assistant coaches for the Bremerton High School varsity football team are expected to:

- a. Help in the weight room three days a week during the winter.
- b. Attend and supervise the two weeks of Spring Football.
- c. Be involved in conducting the team's summer program, which runs three to four days each week for the entire summer.
- d. Attend and supervise a four-day camp during the summer.

- e. Supervise and conduct all practices, which occur six days per week during the fall football season, from September through November.
- f. Attend practice-film breakdowns during the fall football season.
- g. Attend all games throughout the fall football season.
- h. Be involved with team fundraising and equipment distribution and collection throughout the year.

5. The head coach of the Bremerton High School junior-varsity team has similar responsibilities, including being physically present at Bremerton High School to supervise and train the junior-varsity team several days a week during pre-season training in August, for practices and games throughout football season, and again for the team's spring workouts. The junior-varsity games are held on different days than the varsity games.

6. Under the applicable collective-bargaining agreement, the current total annual coaching stipend from the District for an assistant varsity coach and head junior-varsity coach with Mr. Kennedy's number of years as a Bremerton coach would be \$5,304.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Aaron Leavell

Date: February 18, 2022

APPENDIX C

**DECLARATION OF PAUL PETERSON
IN SUPPORT OF RESPONDENT'S
SUGGESTION OF MOOTNESS**

I, Paul Peterson, declare that, if called upon, I would testify to the following:

1. I am a resident of Bremerton, Washington.
2. I am employed at the Puget Sound Naval Shipyard in Bremerton.
3. I worked with Joseph Kennedy at the Shipyard starting in October 2007. Our paths crossed several times at work since then.
4. I have personal knowledge that Mr. Kennedy's employment at the Shipyard ceased in early 2020, around the time when the COVID-19 pandemic began. My understanding is that Mr. Kennedy no longer holds a security clearance to work at the Shipyard, which is a prerequisite to employment there.
5. I have personal knowledge that Mr. Kennedy moved to Florida in 2020.

I declare under penalty of perjury that the foregoing is true and correct.

/s/ Paul Peterson

Date: February 18, 2022