

**In the Supreme Court of the
United States**

KOBE,

Petitioner,

V.

BEVERLY BUSCEMI, EMMA FORKNER, KATHI LACY, THOMAS WARING,
JACOB CHOREY AND JUDY JOHNSON

Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Fourth Circuit**

BRIEF IN OPPOSITION

*KENNETH P. WOODINGTON

**Counsel of Record*

WILLIAM H. DAVIDSON, II

DAVIDSON, WREN & DEMASTERS, P.A.

Post Office Box 8568

Columbia, SC 29204

kwoodington@dml-law.com

(803) 806-8222

*Counsel for Respondents Buscemi, Lacy, Waring
and Chorey*

Damon C. Wlodarczyk

RILEY POPE & LANEY, LLC

Post Office Box 11412

Columbia, SC 29211

damonw@rplfirm.com

(803) 799-9993

Counsel for Respondent Forkner

CHRISTIAN STEGMAIER
KELSEY J. BRUDVIG
COLLINS & LACY, P.C.
Post Office Box 12487
Columbia, SC 29211
cstegmaier@collinsandlacy.com
kbrudvig@collinsandlacy.com
(803) 256.2660
Counsel for Respondent Judy Johnson

QUESTION PRESENTED

Although the Petition is 40 pages long, only its last five pages (pp. 35-40) actually sets forth an argument as to why the decision of the court of appeals should be reversed. A review of that brief argument will show that it was rejected in a prior appeal of this case, *Kobe v. Haley*, 666 F. App'x 281, 292 (4th Cir. 2016) ("*Kobe I*"), cert. denied *sub nom. Kobe v. McMaster*, 137 S. Ct. 2270 (2017). The only challenge Petitioner makes to the more recent court of appeals decision, *Kobe v. Buscemi*, 821 F.App'x. 180 (4th Cir. July 13, 2020) ("*Kobe II*"), i.e., the one for which review is sought, is to complain that the court of appeals should have revisited and reversed *Kobe I*. Even that argument is based only on the ground of factual error in *Kobe I* and on a claim that the court of appeals in *Kobe I* erred in holding that an issue had been waived on appeal. As stated in the Petition itself, the only arguments pertinent to this case are that "The Fourth Circuit's Decision is Factually Wrong and the Fourth Circuit Applied the Wrong Standard in Granting Summary Judgment." Pet. 35.

The Petition therefore does not raise any issue worthy of review by this Court. The present Brief in Opposition is being filed in order to make it clear that the case no longer involves a live claim of any kind: Any damage claims that were not abandoned by Petitioner were settled in 2015 and 2018. With regard to any nonmonetary claims, the court of appeals held that such claims were either moot or otherwise no longer live. The Petition devotes many pages to abstract discussions of two legal issues (Pet. 18-35), but it fails to show why either issue actually matters to this case.

The Question Presented is:

Whether the only issues for which Petitioner seeks review were either resolved by *Kobe I* in 2016, for which certiorari was previously denied, or if not so resolved, have not been shown to have affected Petitioner?

TABLE OF CONTENTS

QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iii
BRIEF IN OPPOSITION.....	1
STATEMENT OF THE CASE.....	1
Factual Background.....	1
Proceedings Below.....	3
REASONS FOR DENYING THE PETITION	4
The only issues for which Petitioner seeks review were either resolved by <i>Kobe I</i> in 2016, for which certiorari was previously denied, or if not so resolved, have not been shown to have affected Petitioner.....	4
CONCLUSION.....	5

TABLE OF AUTHORITIES

Cases

Kobe v. Haley, 666 F. App'x 281, 292 (4th Cir. 2016), cert. denied *sub nom. Kobe v. McMaster*, 137 S. Ct. 2270 (2017)(*Kobe I*)*passim*

Kobe v. Buscemi, 821 F. App'x 180 (4th Cir. July 13, 2020 (*Kobe II*")*passim*

BRIEF IN OPPOSITION

STATEMENT OF THE CASE

Factual Background

The Statement of Facts in the Petition apparently is intended to suggest that there was a live controversy in this case by the time it reached the court of appeals the second time in 2020. However, any such suggestion would be completely misleading, First, to the extent that the case presented non-abandoned claims for damages against a small fraction of the defendants, those claims were settled in 2016 and 2018, respectively. And secondly, to the extent that Petitioner was seeking nonmonetary relief in his second appeal, the court below in *Kobe II* correctly dismissed all such claims, either because they were waived in *Kobe I*, or because Petitioner failed to show that any of those claims resulted in injury to himself.

In its earlier stages, this action involved claims arising out of three separate factual issues, set forth below along with the resolution of each by the court below:

1. Whether Kobe was ever deprived of Adult Day Health Care services (“ADHC”). The Fourth Circuit held in *Kobe I* that that issue was rendered moot, because the issue was resolved administratively and without the loss of those services at any time. App. E at 15.
2. Whether Kobe needed to be provided with certain medical equipment—a wheelchair and an augmentative communications device (“ACD”). The Fourth Circuit held in *Kobe II* that those items of equipment were eventually provided to

him, and that having waived his damage claims, “he does not seek any other form of relief as to those specific claims,” i.e., the claims about the wheelchair and the ACD. App. A at 7.

3. Whether Kobe should be placed in a private supervised living placement (“SLP”) apartment. The Fourth Circuit in *Kobe I* held that Petitioner had “offer[ed] no challenge to the district court’s ruling that their claim that Kobe is entitled to be provided with an SLP is unripe.” App. E at 14 n. 21 (emphasis in original). In *Kobe II*, the Fourth Circuit reiterated that the issue had been waived in *Kobe I*, and further held that there was no reason to hold otherwise in the subsequent appeal because, among other things, “we cannot fault the district court for declining to expand the litigation to include an issue that arose two years after the filing of the complaint. Kobe remains free, as he has been since the district court first announced its view that the claims were not ripe, to file a separate complaint addressing the SLP apartment placement. But as to the questions raised in this appeal, the SLP claims are not at issue, and Kobe cannot establish error by complaining about the district court’s approach to the SLP claims.” App. A at 6.

The Petition, pp. 2-17, contains a lengthy statement of facts, riddled with inaccuracies and misleading statements. It is unnecessary to attempt a point-by-point refutation of the Petition’s many misstatements, however, because the only

pertinent facts at present are those discussed above, showing that, as the court of appeals held, Petitioner no longer has a live claim.¹

Proceedings Below

Petitioner Kobe (a pseudonym) filed this action on May 11, 2011, seeking declaratory and injunctive relief, as well as damages, against a plethora of state and federal agencies and officials. In a series of orders extending from 2012 through 2015, the district court dismissed the entire action. In 2016, the Fourth Circuit affirmed the dismissal of the claims against some of the defendants, and reversed the dismissal of certain other claims, including the present Respondents, remanding the case for further proceedings. *Kobe v. Haley*, 666 F. App'x 281, 292 (4th Cir. 2016), cert. denied *sub nom. Kobe v. McMaster*, 137 S. Ct. 2270 (2017) (*Kobe I*).²

In *Kobe I*, the Fourth Circuit noted that Petitioner had abandoned any damages claims against all remaining defendants other than the ADA claim against the Office of the Governor, which had been dismissed at the time of the abandonment. App. E at 12 n.19.³ In addition, *Kobe I* also held that “Appellants offer no challenge to the district court’s ruling that their claim that Kobe is entitled to be provided with

¹ To cite one example of the Petition’s misleading tendencies, n. 1 on pp. 6-7 of the Petition contains a discussion of several financial matters, but there has never been a showing that any of those matters ever affected Petitioner. Also, pages 7-12 of the Petition refer only to allegations in Petitioner’s pleadings, rather than to facts actually proven by Petitioner in the summary judgment stage of this case. However, this case was decided on summary judgment, not on a motion to dismiss.

² A state law damage claim against the Babcock Center, a private entity that provides services to persons with disabilities, was settled prior to the appeal in *Kobe I*.

³ The court held in *Kobe I* that the damage claims against the Office of the Governor were not waived at the time when the other damage claims were waived, because the Office of the Governor, having been dismissed earlier, was not a party at the time the waiver occurred.

an SLP is unripe. . . . We therefore do not address [that and other] issues.” *Id.* at 14 n. 21.

On remand, the district court again dismissed the remaining claims. App. B, C. The court of appeals in *Kobe II* affirmed, concluding that none of the claims asserted by Petitioner in that appeal involved anything that actually affected Petitioner. *See* App. A at 6 (ADA and Rehabilitation Act claims), 7 (Section 1983 claims) and 8 (Section 1985 claims). Following a denial of rehearing, the present petition was filed.

REASONS FOR DENYING THE PETITION

A. The only issues for which Petitioner seeks review were either resolved by *Kobe I* in 2016, for which certiorari was previously denied, or if not so resolved, have not been shown to have affected Petitioner.

As noted above, the only part of the 40-page Petition that actually makes an argument addressed to the facts of this case, that is, pp. 35-40, is confined almost entirely to decisions and events that occurred before the Fourth Circuit decided the first appeal in this case.⁴ Indeed, the Petition is noteworthy for its near-total failure to discuss the substance of *Kobe II*, the only decision properly before this Court for review. Only passing mention is made of *Kobe II* in the factual/procedural history of the case, Pet. 17. *Kobe II* is not mentioned again until the end of the Petition, at pp. 39-40, but even then, the argument asserts only that the court of appeals in *Kobe II*

⁴ Every district court ECF docket entry referenced in those pages, with just one exception (ECF No., 457-2, cited at Pet. 40) antedates the 2016 decision in *Kobe I*. (ECF Nos. 1 through 367 represent activity in the district court prior to *Kobe I*.)

should have revisited its holdings in *Kobe I* with regard to specific issues of fact and the issue of appellate waiver in *Kobe I. Id.* Although the Petition expends many pages (Pet. 18-35) to a discussion of circuit conflicts, it fails to show how any such circuit conflicts might apply to this case. In connection with the Section 1985 conspiracy claim, for instance, the court below specifically held that Petitioner had not provided evidence that a conspiracy existed, App. A at 8. It further held that Petitioner “has not been injured by the alleged conspiracy.” *Id.* Those conclusions are unchallenged by the Petition.

Aside from the procedural irregularity of Petitioner’s attempt to raise old, previously-resolved issues at this late date, it should be noted that the district court held three years ago that even though the present case was being dismissed, Petitioner was free to file a new action setting forth claims arising after the date of the 2011 Amended Complaint. App. C at 33. The court of appeals in *Kobe II* reiterated the district court’s holding on this point. App. A at 6. For reasons known only to himself and/or his counsel, Petitioner has not availed himself of this opportunity, but his remedy is not in this Court.

CONCLUSION

For the foregoing reasons, Respondents respectfully submit that the petition for writ of certiorari should be denied.

Respectfully submitted,

*KENNETH P. WOODINGTON

**Counsel of Record*

WILLIAM H. DAVIDSON, II

DAVIDSON, WREN & DEMASTERS, P.A.

Post Office Box 8568

Columbia, SC 29204

kwoodington@dml-law.com

(803) 806-8222

*Counsel for Respondents Buscemi, Lacy, Waring
and Chorey*

Damon C. Wlodarczyk

RILEY POPE & LANEY, LLC

Post Office Box 11412

Columbia, SC 29211

damonw@rplfirm.com

(803) 799-9993

Counsel for Respondent Forkner

CHRISTIAN STEGMAIER

KELSEY J. BRUDVIG

COLLINS & LACY, P.C.

Post Office Box 12487

Columbia, SC 29211

cstegmaier@collinsandlacy.com

kbrudvig@collinsandlacy.com

(803) 256.2660

Counsel for Respondent Judy Johnson

March 2021