

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**

**RESPONSE TO RESPONDENT'S
SUGGESTION OF MOOTNESS**

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February 25, 2022

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RESPONSE TO RESPONDENT'S SUGGESTION OF MOOTNESS

This case is not remotely moot. Petitioner believes that he was unconstitutionally removed from his job, and he seeks a declaration of his constitutional rights and reinstatement. He remains ready, willing, and able to return to his job just as soon as his constitutional rights are vindicated. It is really that simple, and a phone call to opposing counsel would have confirmed as much and saved the parties and the Court the trouble of dealing with a frivolous suggestion that a very live controversy is moot.

1. Joseph Kennedy is a former high-school football coach at Bremerton High School (BHS) whose religious beliefs compel him to kneel and say a brief, quiet prayer of gratitude at the 50-yard line after each game. Although the First Amendment protects such personal religious observance twice over, the Bremerton School District suspended Kennedy because he refused to move it behind closed doors. In response, Kennedy sued the district for violating his First Amendment rights. In his prayer for relief, Kennedy sought a judgment “ordering [the district] to reinstate [him] to his previous positions as assistant coach of the BHS varsity football team and head coach of the BHS junior varsity football team” and “to provide [him] with a religious accommodation that affirms his right to offer a brief, quiet prayer at the 50-yard line at the conclusion of BHS football games.” JA165. As Kennedy’s just-filed opening brief demonstrates, the Ninth Circuit’s decision sustaining the district’s actions and refusing to grant him that relief is wrong at every turn. And as the act of filing

that brief underscores, Kennedy still very much wants that relief.

Evidently not anxious to defend the Ninth Circuit's decision before this Court, the district instead elected to file a suggestion of mootness. The suggestion was not based on intervening legislation or the actions of some third party. Instead, it was based entirely on Kennedy's actions and supposed inability to take advantage of judicial relief. And yet it was filed without consulting with Kennedy's counsel. Moreover, the filing is based on events that date back two years. But rather than raise a mootness question back in the district court or the Ninth Circuit, the district waited until the deadlines for petitioner's merits briefs and supporting amicus briefs were approaching to file its misguided suggestion.

According to that remarkable (yet markedly equivocal) filing, some sleuthing on Facebook and real-estate records led the district to determine that Kennedy and his wife moved to Florida nearly two years ago (in March 2020) when the case was still in district court. As a result, the district suggests that it "appears" and "seem[s]" that this case "may be moot," because a "Floridian ... could not serve as or perform the duties of a Bremerton football coach," which requires "a year-round time commitment for physical presence and active, in-person coaching." SM.1, 4, 5 & n.2, 7 (quotation marks and alterations omitted).

Had the district picked up the phone and called Kennedy's counsel at any point during its extra-record investigation, it could have saved itself a lot of trouble, for Coach Kennedy and his wife have never concealed the fact that they presently live in Florida. Indeed, his

wife resigned from her job *in the Bremerton School District* to make the move. Dec.2, ¶10. But as counsel would have confirmed just as readily, the relocation to Florida is not permanent, and Kennedy stands ready, willing, and able to move back to Bremerton as soon as humanly possible should he prevail in this litigation and be permitted to resume his coaching duties at BHS without having to sacrifice his sincerely held religious beliefs. Dec.2-3, ¶¶13-14. And if the district would not take Kennedy and his counsel at their word, they could have provided the district with the kind of sworn declaration attached to this response, which still would have avoided a frivolous filing and a public airing of the details of the Kennedys' private life.

2. As the declaration details, the Kennedys have always intended to return home to Bremerton if Coach Kennedy's legal rights are vindicated and his job restored. Kennedy grew up in Bremerton; he returned to Bremerton after his military service ended in 2008; he is a BHS graduate with a passion for coaching football (in person) at his alma mater (whatever the annual stipend); much of the Kennedys' family—including three of their four children, their grandchildren, and Kennedy's father and birth mother—continues to live in the Bremerton area; their friends are in Bremerton; and their church family is there too. Dec.3, ¶15.

The Kennedys have temporarily relocated to Pensacola, Florida, only because of a personal family tragedy, the details of which he and his wife understandably did not wish to advertise on Facebook or elsewhere. During the course of a single week in

July 2019, Kennedy's father-in-law, who lives in Pensacola, "went through a divorce, received news that his son had been murdered, and was laid off from his job." Dec.1-2, ¶7. On top of that, Kennedy's father-in-law faces "numerous health challenges." Dec. 1-2, ¶¶7, 11 (detailing health issues). Kennedy and his wife thus began exploring ways in which they could help him.

At the onset of the COVID-19 pandemic, and as travel restrictions took hold throughout the Nation, the Kennedys decided to temporarily move to Florida so that they could support him in person. Dec.2, ¶9. Kennedy's wife gave notice to the district and moved to Pensacola in March 2020, and Kennedy followed about a month later. Dec.2, ¶10. Kennedy feels "privileged to be near" his father-in-law and "support him during this extremely difficult time." Dec.2, ¶12. But if given the opportunity, he "cannot wait" to return to the life that he led before the district abruptly upended it in 2015, and he has attested in a sworn declaration that he has every intention of doing so should this Court conclude that he is entitled to that relief. Dec.2-3, ¶¶14-15.

3. All of that makes clear beyond cavil that this case is not remotely moot, despite Kennedy's temporary move to Florida. "A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. Serv. Emps. Int'l Union*, 567 U.S. 298, 307 (2012). "As long as the parties have a concrete interest, however small, in the outcome of the litigation, the case is not moot." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013). Kennedy retains the same concrete (and very large) interest in

this case as he has always had: He is champing at the bit to “resume the job [he] love[s]—coaching high school athletes on the football field for BHS,” Dec.3, ¶16—should this Court determine that he need not choose between that job and his sincerely held religious beliefs.

That readily distinguishes this case from the ones the district invokes. To be sure, a case may become moot when it is undisputed that the plaintiff no longer has any intention of accepting the relief sought in the complaint. *See, e.g., Camreta v. Greene*, 563 U.S. 692, 711 (2011) (finding case moot when plaintiff whose claim depended on her status as a minor in an Oregon high school explicitly represented to the Court that she had “moved to Florida, and ha[d] no intention of relocating back to Oregon”); *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278, 283 (2001) (“It is undisputed that City News has ceased to operate as an adult business and no longer seeks to renew its license.”). But the district identifies no case in which a court has ever deemed a case moot notwithstanding the plaintiff’s assurances in a sworn declaration that the case is not dead yet because the plaintiff continues to have every intention of accepting the relief he has sought should it be granted.

For all those reasons, when Kennedy received the district’s “suggestion,” he offered the district a suggestion of his own: If it really wanted to conserve “judicial and party resources,” SM.5 n.2, it should promptly withdraw its ill-considered suggestion of mootness in light of the additional information and assurances Kennedy has now supplied. But the district refused to take Kennedy at his word that he

does indeed plan to return to BHS if given the chance, hence necessitating this very public airing of the Kennedys' personal information. The need for this filing is unfortunate, but the bottom line is unmistakable: The dispute between the parties is alive and well. Kennedy has not spent the past six years fighting for constitutional rights that he has no interest in exercising.

CONCLUSION

For the foregoing reasons, this Court should reject respondent's suggestion of mootness.

Respectfully submitted,

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February 25, 2022

APPENDIX

DECLARATION OF JOSEPH KENNEDY

Pursuant to 28 U.S.C. §1746, I, Joseph Kennedy, hereby declare as follows:

1. I am a former high school football coach at Bremerton High School (BHS) and the sole petitioner in this matter. This declaration is based on my personal knowledge.

2. I was born and raised in Bremerton, Washington. I resided in the Bremerton area until I joined the military in 1988.

3. After I retired from the military in 2006. I resided in Kitsap County in Washington until 2020. I built my career, raised my family, and established life-long friendships in the Bremerton area. Bremerton is my home.

4. I served as an assistant football coach at BHS from 2008 until I was suspended by the Bremerton School District in 2015.

5. I filed this case in the U.S. District Court for the Western District of Washington in 2016 to vindicate my right to act in accordance with my sincerely held religious beliefs by offering a brief, private prayer of thanksgiving at the conclusion of BHS football games.

6. On March or April of 2020, my wife and I temporarily relocated to Pensacola, Florida, to take care of my father-in-law during a very difficult time in his life.

7. In the course of one week in July of 2019, my father-in-law, who lives in Pensacola, went through a divorce, received news that his son had been

murdered, and was laid off from his job. He also faced numerous health challenges.

8. Following these traumatic experiences, my wife and I began exploring how we might be able to support him.

9. We determined that we would temporarily relocate to Pensacola while this litigation was pending, so that we could be physically close to offer him support and comfort at this time.

10. My wife therefore resigned her employment with the Bremerton School District and temporarily moved to be near him in March 2020, which was also at the beginning of the COVID-19 pandemic and associated limitations on travel. I followed about a month later.

11. My father-in-law continues to receive regular treatment for cancer, chronic obstructive pulmonary disease (COPD), breathes on about 30% of his lung capacity for his one remaining lung, and this past fall had major surgery to replace nearly half of his back.

12. My wife and I dearly love my father-in-law. We were delighted to celebrate Father's Day with him for the first time ever last year. And we have been privileged to be near him and support him during this extremely difficult time.

13. But the relocation to Florida was always designed to be temporary.

14. If the Court were to grant me the relief I am seeking in this case—to be able to return to the sidelines as a football coach at Bremerton High School without having to sacrifice my sincerely held religious beliefs—I would return home to Bremerton

immediately. I am ready and willing to resume my coaching duties in Bremerton, WA. I can do so within 24 hours of reinstatement, if I am still temporarily residing in Florida. If I have already returned to Bremerton, I can be at the field within 1 hour of reinstatement.

15. Three of our four children live in Bremerton. Our fourth child is stationed out of the country in the Marines. Our grandchildren live in Bremerton. My birth mother lives in the Bremerton area. My dad lives in the Bremerton area. Our church family is in Bremerton. Our friends are in Bremerton. I cannot wait to return home.

16. After 20 years in the military, I chose to return home to Bremerton and have invested in Bremerton High School and the broader Bremerton community for nearly 15 years. If permitted, I fully intend to return and resume the job I love—coaching high school athletes on the football field for BHS.

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

Executed on February 22, 2022

/s/ Joseph Kennedy

Joseph Kennedy