SUPREME COURT OF THE UNITED STATES

JOSIAH BUNTING, III, AND J. H. BINFORD PEAY, III, SUPERINTENDENT, VIRGINIA MILITARY INSTITUTE *v.* NEIL J. MELLEN AND PAUL S. KNICK

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 03–863. Decided April 26, 2004

The petition for a writ of certiorari is denied.

Opinion of JUSTICE STEVENS, with whom JUSTICE GINSBURG and JUSTICE BREYER join, respecting the denial of certiorari.

The "perceived procedural tangle" described by JUSTICE SCALIA's dissent, *post*, at 1, is a byproduct of an unwise judge-made rule under which courts must decide whether the plaintiff has alleged a constitutional violation before addressing the question whether the defendant state actor is entitled to qualified immunity. JUSTICE BREYER and I both questioned the wisdom of an inflexible rule requiring the premature adjudication of constitutional issues when the Court adopted it. See *County of Sacramento* v. *Lewis,* 523 U. S. 833, 858, 859 (1998). Relaxing that rule could solve the problem that JUSTICE SCALIA addresses in his dissent. JUSTICE SCALIA is quite wrong, however, when he states that the "procedural tangle" created by our constitutional-question-first procedure explains our denial of certiorari in this case. Indeed, it is only one of three reasons for not granting review. The other two are, first, that we have no jurisdiction, and second, that the alleged conflict of authority is more apparent than real.

Respondents have graduated from the Virginia Military Institute (VMI). The Court of Appeals accordingly held

that respondents' "claims for declaratory and injunctive relief are moot" and vacated the District Court's judgment insofar as it awarded such relief. 327 F. 3d 355, 360 (CA4 2003). That leaves respondents' claim for damages against Bunting in his individual capacity. The Court of Appeals concluded that Bunting is entitled to qualified immunity, *id.*, at 376, and respondents have not challenged that ruling. All that remains, therefore, is the parties' dispute over the constitutionality of VMI's supper prayer.

Whether or not such a dispute would be sufficient to support jurisdiction in different circumstances, it plainly falls short in this case. Bunting has retired from his position as Superintendent of VMI, see *id.*, at 360, and will suffer no direct injury if VMI is unable to continue the prayer. Thus, there no longer is a live controversy between Bunting and respondents regarding the constitutionality of the prayer. As for the other named petitioner, new Superintendent Peay, there *never* was a live controversy. Peay was added to the case (apparently in error) after the Court of Appeals issued its decision vacating the District Court's award of injunctive and declaratory relief. At that point, the only issue was Bunting's individual-capacity liability—an issue in which Peay obviously has no interest. VMI itself is not a party.

The jurisdictional issue in this case differs from that presented in *Erie* v. *Pap's A. M.,* 529 U. S. 277 (2000). The respondent in *Erie*, which operated a nude dancing establishment, obtained an injunction barring the city from enforcing an ordinance banning public nudity. After we granted the city's petition for certiorari to review the state court's decision, respondent submitted an affidavit stating that it had "ceased to operate a nude dancing establishment in Erie." *Id.*, at 287 (internal quotation marks omitted). We concluded, nevertheless, that the case was not moot. We observed that respondent had "an interest in

preserving the judgment" of the state court," *id.*, at 288, because it was "still incorporated under Pennsylvania law, and it could again decide to operate a nude dancing establishment in Erie," *id.*, at 287, notwithstanding the owner's "'advanced age'" of 72, *id.*, at 288. Meanwhile, the city had "an ongoing injury because it [was] barred from enforcing the public nudity provisions of its ordinance." *Ibid.* "If the challenged ordinance is found constitutional," we explained, "then Erie can enforce it, and the availability of such relief is sufficient to prevent the case from being moot." *Ibid.* Finally, we emphasized that the case did not involve "run of the mill voluntary cessation" because respondent was seeking to have the case declared moot after *prevailing* in state court. *Ibid.* Respondent's argument, if successful, would have resulted in dismissal of the petition, leaving intact the state court's ruling. We noted that "[o]ur interest in preventing litigants from attempting to manipulate the Court's jurisdiction to insulate a favorable decision from review further counsel[ed] against a finding of mootness." *Ibid.*

In this case, by contrast, none of the parties has a present stake in the outcome. There is no reason to believe that Bunting ever will return to VMI in an official capacity, and even if there were, we have made clear that such speculation cannot "shield [a] case from a mootness determination." *City News & Novelty, Inc.* v. *Waukesha,* 531 U. S. 278, 283 (2001) (explaining that the possibility that the respondent in *Erie* would reopen or reinvest in the business was not sufficient to explain our rejection of mootness in that case). Unlike the situation in *Erie*, moreover, there is no injunction presently barring VMI from reinstituting the supper prayer. This case also lacks the potential for gamesmanship that concerned us in *Erie*. Respondents are not seeking to have the case declared moot after prevailing below (respondents lost on the issue of damages), and their graduation from VMI obviously is

distinguishable from the voluntary cessation of a business enterprise.

The second reason justifying a denial of certiorari is the absence of a direct conflict among the Circuits. The Courts of Appeals for the Sixth and Seventh Circuits have rejected constitutional challenges to state universities' inclusion of a nondenominational prayer or religious invocation in their graduation ceremonies, reasoning that college-age students are not particularly "susceptible to pressure from their peers towards conformity," *Lee* v. *Weisman,* 505 U. S. 577, 593 (1992). See *Chaudhuri* v. *Tennessee*, 130 F. 3d 232 (CA6 1997); *Tanford* v. *Brand*, 104 F. 3d 982 (CA7 1997). The Fourth Circuit endorsed that principle in theory, but found it unhelpful in this case because of the features of VMI that distinguish it from more traditional institutions of higher education—for example, its use of the "adversative" method and its emphasis on submission and conformity. 327 F. 3d, at 371–372. Given the unique features of VMI, we do not know how the Fourth Circuit would resolve a case involving prayer at a state university, or, indeed, how the Sixth or Seventh Circuits would analyze the supper prayer at issue in this case. Thus, while the importance of this case might have justified a decision to grant, it is not accurate to suggest that a conflict of authority would have mandated such a decision.