

IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 10-114

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RICKY D. FOX,

*Petitioner,*

v.

BILLY RAY VICE and the TOWN OF VINTON, LOUISIANA,

*Respondents.*

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

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**UNOPPOSED MOTION BY RESPONDENTS AND JUDY ANN VICE,  
AS EXECUTRIX OF THE ESTATE OF BILLY RAY VICE, FOR  
SUBSTITUTION**

1. Pursuant to this Court's Rule 35.1, respondents and Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice, respectfully submit this motion for substitution of Judy Ann Vice, as Executrix of the Estate of Billy Ray Vice, as the authorized representative of Mr. Vice in his individual capacity.

2. Mr. Vice died on August 26, 2010, after the petition for a writ of certiorari was filed. The brief in opposition was filed on August 27, 2010, and the reply brief in support of the certiorari petition was filed on September 7, 2010. This court granted certiorari on November 1, 2010. Petitioner filed his opening brief on the merits on December 23, 2010, which noted that Vice had

died. Petitioner also filed on that date a formal suggestion of death. Respondents filed their brief on the merits on January 31, 2011, also noting that Vice had died. Petitioner filed his reply brief on the merits on March 2, 2011. On March 4, 2011, this Court entered an order directing the parties to file briefs addressing the impact of Vice's death under Rule 35. Respondents' brief is being submitted contemporaneously with this motion; additional facts and reasons in support of this motion are set forth in that brief.

3. Rule 35.1 provides, *inter alia*, that “[i]f the substitution of a representative of the deceased is not made within six months after the death of the party, the case shall abate.” Although this request is made more than six months after Mr. Vice's death, the case with respect to Mr. Vice in his individual capacity need not abate. As this Court reaffirmed in *Riegel v. Medtronic, Inc.*, 552 U.S. 804 (2007) (citing *State Farm Mut. Auto Ins. Co. v. Campbell*, 537 U.S. 1042 (2002); *Schacht v. United States*, 398 U.S. 58, 63-64 (1970)), the six-month period set forth in Rule 35.1 is not jurisdictional and may be waived in the Court's discretion. We respectfully submit that ordering substitution is warranted under these circumstances. All parties have been aware of Mr. Vice's death, and petitioner filed a suggestion of death with this Court on December 23, 2010. No party would be prejudiced by substitution, and the matter has been fully briefed on the merits. Moreover, because the case between petitioner and respondent Town of

Vinton persists without regard to Vice's death, substitution would not require the expenditure of additional resources by either party or by this Court.

4. Counsel for petitioner does not oppose this motion. Compare *Riegel*, 552 U.S. at 804 (granting motion for substitution out of time over opposition, and where petitioner had died more than a year-and-a-half before the petition was filed).

### **CONCLUSION**

For the foregoing reasons, and for the reasons stated in the brief of respondents and prospective respondent in response to the Court's March 4, 2010, order, the motion for substitution should be granted.

Respectfully submitted.

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