

Case No. 18-6529

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IN THE  
SUPREME COURT of the UNITED STATES

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DON KOZICH, Individually

*Petitioner-Plaintiff,*

v.

ANN DEIBERT, et al,

*Respondents-Defendants.*

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

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BRIEF IN OPPOSITION TO PETITION  
FOR WRIT OF CERTIORARI

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## **QUESTION PRESENTED FOR REVIEW**

1. Whether the Eleventh Circuit opinion, which correctly found that a complaint seeking only declaratory and injunctive relief as to a state court judgment for eviction was moot where the Plaintiff had already been evicted from the premises, provides any basis for certiorari review?

## **LIST OF ALL PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT**

The Respondents, ANN DIEBERT, MICHAEL LONG, BROWARD COUNTY HOUSING AUTHORITY, BROWARD WORKFORCE COMMUNITIES, INC., BUILDING BETTER COMMUNITIES, INC., AND RELIANCE-PROGRESSO ASSOCIATES LIMITED, by and through their undersigned attorneys and pursuant to Supreme Court Rules 24.1(b), submit the following list of all parties to this proceedings:

1. BROWARD COUNTY HOUSING AUTHORITY, a Public Housing Authority ("BCHA" or "PHA") Chartered under Chapter 421, Florida Statutes - Appellee/Defendant
2. BROWARD WORKFORCE COMMUNITIES, INC., a For-Profit Florida Corporation and the General Partner of Property Owner/Landlord Reliance-Progresso Associates Limited - Respondent/Defendant
3. BUILDING BETTER COMMUNITIES, INC., a Not-for-Profit Florida Corporation of which Broward Workforce Communities, Inc., is a wholly owned subsidiary - Respondent/Defendant
4. BURKE, MICHAEL T. - Attorney for Ann Diebert, Michael Long, the Broward County Housing Authority, Building Better Communities, Inc., Broward Workforce Communities, Inc. and Reliance-Progresso Associates Limited
5. DIEBERT, ANN, individually and in her official capacity as Chief Executive Officer of the BROWARD COUNTY HOUSING AUTHORITY - Respondent/Defendant

6. DIMITROULEAS, JUDGE WILLIAM P., United States District Court for the Southern District of Florida
7. FERRER, WIFREDO A., U.S. Attorney, Southern District of Florida
8. FLORIDA HOUSING FINANCE CORPORATION, a Florida Corporation Chartered pursuant to Chapter 420, Florida Statutes - Respondent/Defendant
9. JOHNSON, ANSELMO, MURDOCH, BURKE, PIPER & HOCHMAN, P.A. - Attorneys for Ann Diebert, Michael Long and the Broward County Housing Authority, Building Better Communities, Inc., Broward Workforce Communities, Inc., and Reliance-Progresso Associates Limited
10. KOZICH, DON - Petitioner/Plaintiff
11. LONG, MICHAEL S., individually and in his official capacity as Chairman of the Board of Commissioners of the BROWARD COUNTY HOUSING AUTHORITY, President of BROWARD WORKFORCE COMMUNITIES, INC. and President of BUILDING BETTER COMMUNITIES, INC. - Respondent/Defendant
12. LINDSEY, MARILYN KOONCE, U.S. Attorney's Office, Southern District of Florida
13. LOWENHAUPT, SAWYERS & SPINALE, P.A., attorneys for Landlord, RELIANCE-PROGRESSO ASSOCIATES LIMITED, in Broward County eviction proceedings.
14. MARTINEZ, J. MARCOS - Attorney for Ann Diebert, Michael Long, the Broward County Housing Authority, Building Better Communities, Inc., Broward Workforce Communities, Inc., and Reliance-Progresso Associates Limited
15. NABORS, GIBLIN & NICKERSON, P.A.- Attorneys for Florida Housing Finance Corporation and Bernard Smith

16. PROFESSIONAL MANAGEMENT, INC., a For-Profit Florida Corporation and Property Manager of Progresso Point Apartments - Respondent/Defendant
17. RELIANCE-PROGRESSO ASSOCIATES LIMITED, a For-Profit Florida Limited Partnership, Owner/Landlord of Progresso Point Apartments - Respondent/Defendant
18. RELIANCE-PROGRESSO, LLC, an inactive, for-profit Florida limited liability company and co-general partner of RELIANCE-PROGRESSO ASSOCIATES LIMITED - Non-Party
19. SMACHETTI, EMILY, ESQUIRE U.S. Attorney's Office
20. SMITH, BERNARD E., in his official capacity as Chairman of the Board of the FLORIDA HOUSING FINANCE CORPORATION - Respondent/Defendant
21. STOKELY, HEATH RYAN - Attorney for Florida Housing Finance Corporation and Bernard Smith
22. U.S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT - Respondent/Defendant
23. U.S. DEPARTMENT OF VETERANS AFFAIRS - Respondent/Defendant

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## **STATEMENT OF THE CASE**

The Petitioner/Plaintiff, DON KOZICH (“Plaintiff” or “Kozich”) is a former tenant of Respondent/Defendant, RELIANCE-PROGRESSO ASSOCIATES LIMITED’s (“Reliance”), Low-Income Housing Tax Credit (LIHTC) apartment complex known as Progresso Point. Several months before the expiration of the Plaintiff’s one-year lease, the attorney for the landlord’s property manager, Respondent/Defendant, PROFESSIONAL MANAGEMENT, INC. (“Professional Management”), delivered a non-renewal letter to the Plaintiff, advising that the lease would not be renewed and explaining the reasons for the decision.

The Plaintiff failed to vacate his apartment at the expiration of his lease term and the landlord commenced eviction proceedings in the County Court for Broward County, Florida. Following entry of a final judgment awarding possession of the unit to the landlord, the Plaintiff filed the Verified Complaint for Injunctive and Declaratory Relief below, attacking the judgment, seeking to prevent his eviction, and asserting claims only for injunctive and declaratory relief.

The Respondents/Defendants moved to dismiss the Complaint for lack of subject matter jurisdiction, for failure to state a claim upon which relief could be granted, and, as to the individual defendant officials, because they were entitled to qualified immunity.

Despite multiple extensions of time, the Plaintiff failed to respond to the Motion. The District Court then dismissed the Complaint with prejudice for lack of subject matter jurisdiction, for failure to state a claim, and granted the individual defendants qualified immunity. App. B. The Plaintiff moved for reconsideration, which was denied. See App. D.

The Plaintiff appealed the District Court's dismissal of the Complaint to the Eleventh Circuit Court of Appeal. The Eleventh Circuit affirmed the dismissal finding that the Plaintiff's claims seeking only injunctive and declaratory relief from the eviction were moot because the eviction order had already been enforced. App. A.

## **I. Facts**

### **A. The Parties**

The Plaintiff<sup>1</sup> is a disabled veteran who received housing vouchers towards a portion of his rent through the United States Department of Housing and Urban Development's (HUD) Veteran Affairs Supported Housing -- Housing Choice Voucher program (HUD-VASH HCV). Pet. at 3.

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<sup>1</sup> Kozich has been found to be a vexatious litigant and is currently barred from filing further pleadings unless signed by an attorney licensed to practice in Florida. Kozich v. Keller, 10 So. 3d 1102, 1102 (Fla. 3d DCA 2008).

Progresso Point Apartments, located at 619 N. Andrews Avenue, Fort Lauderdale, Florida, is a privately-owned LIHTC apartment complex. Pet at viii, 3.

Respondent/Defendant Reliance is a Florida for-profit limited partnership which owns Progresso Point. See Pet. at 5.

Respondent/Defendant Professional Management is a Florida for-profit corporation and the Landlord's property manager See Pet. at vii.

Respondent/Defendant, BROWARD WORKFORCE COMMUNITIES, INC. ("BWC"), a for-profit Florida Corporation, is the co-general partner of Reliance. See Pet. at v.

Respondent/Defendant, BROWARD WORKFORCE COMMUNITIES, INC., is a wholly owned subsidiary of Defendant, BUILDING BETTER COMMUNITIES, INC ("BBC"). See Pet. at v.

Respondent/Defendant, BROWARD COUNTY HOUSING AUTHORITY ("BCHA"), is the parent company of Defendant, BROWARD WORKFORCE COMMUNITIES, INC. See Pet. at v.

## **B. The Lease**

The Plaintiff formerly leased an apartment from Reliance at the Progresso Point Apartment Community. Kozich v. Deibert, 708 F. App'x 644, 645 (11th Cir. 2018)

(App. A); Kozich v. Deibert, No. 15-61386-CIV, 2015 WL 12533077, at \*1 (S.D. Fla. Oct. 20, 2015) (App. B); Pet. at 4, 6.

On December 22, 2014, Kozich received a notice of nonrenewal, informing him that Reliance would not renew his lease due to his failure to maintain his apartment in a sanitary condition and his failure to permit management to enter his unit. Kozich, 708 F. App'x at 645 (App. A); Kozich, 2015 WL 12533077 at \*1 (App. B); Pet. at 4.

Kozich refused to vacate his apartment when his lease expired. Kozich, 708 F. App'x at 645 (App. A); Kozich, 2015 WL 12533077 at \*1 (App. B); Pet. at 4.

Reliance filed a state court action to evict Kozich. Kozich, 708 F. App'x at 645 (App. A); Kozich, 2015 WL 12533077 at \*1 (App. B); Pet. at 4.

On March 19, 2015, Kozich filed his Answer, Affirmative Defenses, Request for Jury Trial, and Request for Attorney Fees and Costs in state court. Kozich, 2015 WL 12533077 at \*1 (App. B)

On April 20, 2015, the state court issued a final judgment and writ of possession in favor of Reliance. Kozich, 708 F. App'x at 645 (App. A); Kozich, 2015 WL 12533077 at \*1 (App. B).

On July 2, 2015, Kozich commenced this proceeding before the District Court by filing a complaint seeking only declaratory and injunctive relief. Kozich, 2015 WL 12533077 at \*1 (App. B).

The Complaint requested that the District Court declare that the non-renewal of the lease was wrongful and sought injunctive relief to prevent the eviction. Kozich, 2015 WL 12533077 at \*1 (App. B).

Following the District Court's denial of Kozich's motion for a temporary restraining order, Kozich was evicted from his apartment on July 23, 2015. Kozich, 708 F. App'x at 645 (App. A); Pet. at 6.

### **ARGUMENT FOR DENYING THE PETITION**

No basis exists for the Court to grant certiorari review of the Eleventh Circuit's January 11, 2018, Opinion. The Opinion -- which merely ruled that claims seeking only declaratory and injunctive to prevent an eviction were moot once the eviction occurred -- does not conflict with any decision of this Court, the Eleventh Circuit, other United States courts of appeal, or a state court of last resort and did not decide an important question of federal law that should have been decided by this Court.

First, the Eleventh Circuit's Opinion was correct and entirely unremarkable in its outcome. Following the Plaintiff's July 23, 2015, eviction, the injunctive and declaratory relief sought by the Plaintiff in the Complaint to prevent the eviction was

rendered moot and, therefore, did not present a case or live controversy regarding the eviction as required by the United States Constitution.

The United States Constitution, Article III, Section 2, provides that the judicial power of the United States federal courts shall extend only to live cases and controversies. Coral Springs St. Sys. v. City of Sunrise, 371 F.3d 1320, 1327 (11th Cir. 2004) (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992)). The case or controversy limitation on the jurisdiction of federal courts serves an important role in the constitutional separation of powers framework, Socialist Workers Party v. Leahy, 145 F.3d 1240, 1244 (11th Cir. 1998), and it is a fundamental principle of democratic government that the role of courts is properly a limited one. Thus, courts strictly observe the cases or controversies limitation. Allen v. Wright, 468 U.S. 737, 750 (1984).

Mootness is among the important limitations placed on the power of the federal judiciary and serves long-established notions about the role of unelected courts in the democratic system. Nat'l Adver. Co. v. City of Miami, 402 F.3d 1329, 1332 (11th Cir. 2005). By its very nature, a moot suit “cannot present an Article III case or controversy and the federal courts lack subject matter jurisdiction to entertain it.” Coral Springs, 371 F.3d at 1328 (internal citations omitted). If a lawsuit is mooted by subsequent developments, any decision a federal court might render on the merits

of a case would constitute an advisory opinion. See id.; Al Najjar v. Ashcroft, 273 F.3d 1330, 1336 (11th Cir. 2001); Socialist Workers Party, 145 F.3d at 1244.

Article III requires a live case or controversy at the time a federal court decides the case, and ““a federal court has no authority to give opinions upon moot questions[.]”” See Zinni v. ER Solutions, Inc., 692 F.3d 1162, 1166 (11th Cir. 2012) (quoting Church of Scientology of Cal. v. United States, 506 U.S. 9, 12 (1992)). “A case is moot when events **subsequent to the commencement of a lawsuit** create a situation in which the court can no longer give the plaintiff meaningful relief.” See Jews for Jesus, Inc. v. Hillsborough Cnty. Aviation Auth., 162 F.3d 627, 629 (11th Cir. 1998) (emphasis added); Adler v. Duval Cty. Sch. Bd., 112 F.3d 1475, 1477 (11th Cir. 1997) (“**When the threat of future harm dissipates**, the plaintiff’s claims for equitable relief become moot because the plaintiff no longer needs protection from future injury.”) (emphasis added).

In eviction and foreclosure cases, the Eleventh Circuit has held that claims for injunctive and declaratory relief are rendered moot when the occupant has been removed from the premises. For example, in Philippeaux v. Apartment Investment and Management Co, the Eleventh Circuit found that a plaintiff’s vacating of an apartment in an eviction action rendered claims for injunctive and declaratory relief moot. 598 F. App’x 640, 643 (11th Cir. 2015) (“Mr. Philippeaux vacated his



apartment and no longer lives at the Flamingo Apartments. Consequently, the district court correctly ruled that Mr. Philippeaux's claims for equitable and declaratory relief were moot."), citing Jews for Jesus, 162 F.3d at 629; see also Ware v. Deutsche Bank (In re Ware), 562 F. App'x 850, 853 (11th Cir. 2014)("The district court properly dismissed Ware's appeal as moot because he had already been ejected from the Property pursuant to a state court judgment and had not obtained a stay pending appeal.").

The Eleventh Circuit properly found that the case was moot following the Plaintiff's eviction. It is undisputed that the Plaintiff was evicted from his apartment on July 23, 2015. Kozich, 708 F. App'x at 645 (App. A); Pet. at 6. His efforts to stay the state court's eviction order in both the state and federal court system proved unsuccessful. Id. Having been evicted from the premises, the District Court could not grant the Plaintiff the relief he sought and the Plaintiff's claims for injunctive and declaratory relief relating to the judgment of eviction became moot. No future harm would befall the Plaintiff and any declaration would have constituted an advisory opinion.

Moreover, the events are not capable of repetition as the Plaintiff no longer lives in Progresso Point. The Plaintiff did not allege that he intended or desired to rent an apartment from Reliance in the future. See Pet.



Second, none of the opinions from this Court, the Eleventh Circuit, or other United States court of appeals cited by the Plaintiff conflict with the Eleventh Circuit's Opinion finding that a tenant's removal from a premises moots claims seeking only declaratory and injunctive relief to prevent the eviction.<sup>2</sup> Indeed, most of the cases cited by the Plaintiff dealt with constitutional challenges to procedures utilized in administering benefit programs and did not involve a claim for declaratory and injunctive relief seeking to prevent an eviction after the tenant vacated the premises. See Goldberg v. Kelly, 397 U.S. 254, 255–56, 90 S. Ct. 1011, 1014, 25 L. Ed. 2d 287 (1970) (addressing a suit brought by New York City residents receiving financial aid under federally-assisted or state-created aid programs, which challenged the adequacy of the procedures for notice and hearing in connection with termination of such aid.); Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919, 920–21 (11th Cir. 1982) (addressing a constitutional challenge to the “eviction procedures administered by the Georgia Residential Finance Authority (GRFA) for tenants receiving benefits under the Section 8 Existing Housing Assistance Payments (HAP) Program of the U.S. Department of Housing and Urban Development (HUD).”); Ressler v. Pierce, 692 F.2d 1212, 1213–14 (9th Cir. 1982) (involving “a class action

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<sup>2</sup> The Plaintiff also cites to several district court opinions in an effort to establish a conflict. District court opinions can not create conflict with a circuit court of appeal.

against the Secretary of Housing and Urban Development ('HUD') and the owners of certain subsidized housing in Alaska" where the plaintiffs, all applicants and potential applicants for HUD rent subsidies, "alleged that they were denied due process and equal protection by the manner in which the owners of a subsidized apartment complex processed their applications for rent subsidies.").

Two more of the cases cited by the Plaintiff dealt generally with mootness, but did not address a suit seeking only injunctive and declaratory relief to prevent an eviction where the eviction had already taken place. See DeFunis v. Odegaard, 416 U.S. 312, 318–19, 94 S. Ct. 1704, 1707, 40 L. Ed. 2d 164 (1974) (addressing whether a law school student's challenge to the law school admission process was moot or whether it was a question that was capable of repetition, yet evading review.); Sims v. State of Fla., Dep't of Highway Safety & Motor Vehicles, 862 F.2d 1449, 1459–60 (11th Cir. 1989) (finding that challenge to the constitutionality of statute preventing owner of gray market vehicle from acquiring title and vehicle registration until owner obtained required documentation from federal agencies was capable of repetition yet evaded review since the state ultimately, even after trial, delivered the documents preventing effective review.).

Finally, the single case cited by the Plaintiff involving an eviction is distinguishable. In Joy v. Daniels, the Fourth Circuit addressed an action for

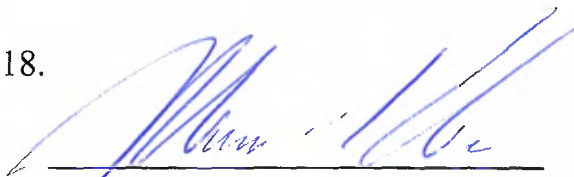
declaratory and injunctive relief under 42 U.S.C. § 1983, where the “plaintiff challenge[d], as violative of the fifth and fourteenth amendments, her **threatened** eviction from the Joseph Paul Apartments.” 479 F.2d 1236, 1237 (4th Cir. 1973) (emphasis added). The Fourth Circuit did not consider whether the claims would not have remained ripe for adjudication **after** the eviction took place. Since the Plaintiff here was actually evicted, Joy does not create any conflict.

Finally, the Plaintiff argues that his status as a veteran and the levels of poverty in the United States makes this a case of “exceptional importance” or “great public interest.” Pet. at 12. However, the Eleventh Circuit’s opinion was not based on and did not consider the Plaintiff’s veteran status or receipt of benefits. Instead, the Eleventh Circuit’s Opinion hinged entirely on nature of the relief -- injunctive and declaratory relief seeking to prevent an eviction -- and events subsequent to the commencement of the case -- the Plaintiff’s removal from the premises. As a result, the Eleventh Circuit’s Opinion does not raise any issues particular to veterans or to those receiving benefits.

## CONCLUSION

The Court should decline to grant the Plaintiff's petition for writ of certiorari since the Plaintiff's has not established any conflict or that the case is of great public importance so that it should be addressed by this Court.

Dated: Nov. 30, 2018.



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**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on the 30<sup>th</sup> day of November 2018, I conventionally filed the foregoing document via FedEx with the Clerk of the Court and electronically filed the foregoing document via the Court's electronic filing system. I also certify that the foregoing document is being served this day on all counsel of records or pro se parties identified on the attached Service List via U.S. Mail.

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