

No. 23-1178

In the
Supreme Court of the United States

FIRST FLOOR LIVING, LLC,
Petitioner,
v.

CITY OF CLEVELAND, OHIO, ET AL.,
Respondents.

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

**BRIEF IN OPPOSITION FOR RESPONDENT
BAUMANN ENTERPRISES, INC.**

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QUESTIONS PRESENTED

1. Where two appeals are consolidated at the Circuit level for the purpose of submission but review by this Court is sought as to only *one* of those appeals, whether any case or controversy is presented as to the *other* consolidated appeal where the judgment in that appeal: (a) has not been appealed or presented for review; (b) presents different issues than those for which review is sought; and (c) the appealing party is not a party to and lacks standing to appeal the decision in the *other* consolidated appeal.
2. Whether claims which fail as a matter of law based on the undisputed facts warrant allowing additional discovery which cannot change the legally dispositive outcome.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Baumann Enterprises, Inc. (“Baumann”) states that it has no parent corporation and no publicly held company owns 10% or more of Baumann’s stock.

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**JURISDICTIONAL AND PRUDENTIAL IMPEDIMENTS
TO REACHING THE PROFFERED ISSUES¹**

Respondent Baumann Enterprises, Inc. (“Baumann”) is not a proper party to this appeal and, even if it were, the discovery issues presented by First Floor do not apply to Baumann because the claims by Lush Designs were bared as a matter of law because Baumann is a private actor and not a governmental entity.

Petitioner First Floor Living, LLC (“First Floor”) makes only 5 references to Baumann in its petition which reiterate the claims against Baumann are not in issue: “Lush Designs does not join First Floor in this Petition, and First Floor therefore does not further reference Lush Designs’ claims against Baumann Enterprises or Baumann Enterprises’ involvement in the matter.” (Petition at p. 5, fn. 4.) In fact, as First Floor does make clear: Lush Designs claims against Baumann were limited to Baumann “as the contractor responsible for demolishing Lush Designs’ building,” and not First Floor’s building. *Id.* The issue proffered by First Floor is its claimed need for discovery from the City of Cleveland (“the City”) on the issue of proper notice by the City for the demotion of First Floor’s building. Nothing relevant to Baumann or the judgment in its favor is presented for this Court’s review.

At the Sixth Circuit, there were two separate appeals: (1) Sixth Cir. App. No. 22-3216 by First Floor and regarding the demolition of its building; and

¹ Pursuant to S.Ct. Rule 15.2, this is addressed to “what issues properly would be before the Court if certiorari were granted.”

(2) Sixth Cir. App. No. 22-3217 by Lush Designs as to the demotion of its building. Baumann was only involved in the demotion of Lush Designs' building and the only party with claims against Baumann was Lush Designs. That was the subject of Lush Designs' separate appeal to the Sixth Circuit and Lush Designs has not sought review of the Sixth Circuit's decision in that appeal. Thus, no issue as to Baumann is properly before this Court; nor is Baumann a proper party because the Sixth Circuit's decision in Sixth Cir. App. No. 22-3217 has not been presented to this Court for review. Thus, regardless of whether this Court accepts jurisdiction over First Floor's appeal, Sixth Cir. App. No. 22-3216, it should not do so as to the decision in Lush Designs' appeal, Sixth Cir. App. No. 22-3217, or Baumann.

There are a number of prudential and jurisdictional impediments presented as to Sixth Cir. App. No. 22-3217 and Baumann. First, Sixth Cir. App. No. 22-3216 as to First Floor and Sixth Cir. App. No. 22-3217 as to Lush Designs were consolidated by the Sixth Circuit only "for the purpose of submission"—they were not merged. (10/12/2022 Order, App. No. 22-3217, Doc #47-2, and 10/12/2022 Order, App. No. 22-3216, Doc. #54-2.) As this Court recently reiterated: "Over 125 years, this Court, along with the courts of appeals and leading treatises, interpreted that term [consolidate] to mean the joining together—but not the complete merger—of constituent cases. Those authorities particularly emphasized that constituent cases remained independent when it came to judgments and appeals." *Hall v. Hall*, 584 U.S. 59, 66, 138 S. Ct. 1118, 1125, 200 L. Ed. 2d 399 (2018). This

Court has specifically “held that a party appealing from the judgment in one of two cases consolidated for trial could not also raise claims with respect to the other case.” *Id.*, 584 U.S. at 69, 138 S. Ct. at 1126–27. Thus, First Floor’s appeal of Sixth Cir. App. No. 22-3216 does not bring Sixth Cir. App. No. 22-3217, or Baumann, before this Court. Indeed, as discussed next, First Floor cannot raise any issues as to Bauman and lacks standing to do so.

Second, “Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of ‘Cases’ or ‘Controversies.’” *Camreta v. Greene*, 563 U.S. 692, 701–02, 131 S. Ct. 2020, 2028–29, 179 L. Ed. 2d 1118 (2011). “To enforce this limitation, [this Court] demand[s] that litigants demonstrate a ‘personal stake’ in the suit” which requires that: “three conditions are satisfied: The petitioner must show that he has ‘suffered an injury in fact’ that is caused by ‘the conduct complained of and that ‘will be redressed by a favorable decision.’” *Id.* (citations omitted). Here no case or controversy is presented by First Floor as to Baumann or the Sixth Circuit’s decision in App. No. 22-3217. Indeed, assuming it has standing to do so—which it does not, First Floor does not seek review of the Sixth Circuit’s decision as to Baumann. *Marsh v. Oregon Nat. Res. Council*, 490 U.S. 360, 369, 109 S. Ct. 1851, 1857, 104 L. Ed. 2d 377 (1989) (“Since the Corps did not seek review of that holding, we do not discuss it.”). And First Floor has no stake in Lush Designs’ building or standing to challenge the demotion of Lush Designs’ building by Baumann. *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962) (“Have

the appellants alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions? This is the gist of the question of standing.”). Thus, there is no case or controversy presented as to Sixth Circuit App. No. 22-3217, Baumann, or the demolition of Lush Designs’ building. This Court should decline jurisdiction over Sixth Circuit App. No. 22-3217 for all these reasons.

STATEMENT OF FACTS

The notice issues First Floor presents for this Court’s review have no application to the facts and settled law applicable to Baumann. Specifically, the claims against Baumann were based on it being a state actor liable under 42 U.S.C. § 1983.² *First Floor Living LLC v. City of Cleveland, Ohio*, 83 F.4th 445, 451, 456, fn.4 (6th Cir. 2023). However, as set forth below, no amount of discovery can change the fact that, as matter of law, Baumann is not a state actor.

² After finding the federal constitutional claims to lack merit and dismissing them, the District Court declined to exercise jurisdiction over the remaining state-law claims and dismissed the case. *First Floor Living LLC v. City of Cleveland, Ohio*, 83 F.4th 445, 451-52 (6th Cir. 2023) (“In 2021, Plaintiffs filed suit against Defendants, alleging (1) deprivation of property without due process in violation of the Fourteenth Amendment; (2) taking of property in violation of the Fifth Amendment; and (3) several state law claims....The district court determined that Plaintiffs had abandoned their Fifth Amendment takings claim, and because no federal constitutional issues remained, it declined to exercise supplemental jurisdiction over the remaining state-law claims and dismissed the case.”).

Thus, the same discovery issues are not presented as to Baumann’s demolition of the building located on Lush Designs’ property. That is why Judge Nalbandian, dissented in the Sixth Circuit’s opinion *only* as to First Floor. *First Floor Living LLC v. City of Cleveland, Ohio*, 83 F.4th 445, 458 (6th Cir. 2023) (Nalbandian, J., concurring in part and dissenting in part) (“I agree with the majority that the City of Cleveland provided constitutionally sufficient notice of the Linwood Avenue Property’s pending demolition to Lush Designs.”). Notably, Lush Designs also did not join in First Floor’s petition, and neither Lush Designs, nor First Floor, raise any issue for this Court’s review as to Baumann.

As relevant to Baumann, on October 1, 2018, Lush Designs purchased the property located at 7410 Linwood Avenue, Cleveland, Ohio 44103, also recorded as 7400 Linwood Avenue (the “Linwood Property”) from the State of Ohio at a foreclosure sale. (Pls.’ Amended Complaint, R. 19, Page ID #178, ¶¶ 29-30.) The Linwood Property contained approximately 0.33 acres of land and a 14,188 square foot building. (*Id.* at ¶ 31.)

On March 1, 2019, the City of Cleveland’s (hereinafter often referred to as “the City”) Department of Building and Housing sent a certified letter to Lush Designs stating that Lush Designs needed to submit a rehabilitation plan within ten days of the transfer of the property in accordance with the Cleveland Codified Ordinances. (Exhibit N to the City’s Motion for Summ. J., R.33-15, Page ID #333.) Furthermore, the Notice informed Lush Designs that the City would demolish the structure if Lush Designs

failed to comply with the Notice. (*Id.*) The City sent this letter to Lush Designs using three different addresses: (1) the Linwood Property, (2) the address Lush Designs listed with the Ohio Secretary of State, and (3) its tax mailing address in Cuyahoga County. (*Id.* and Exhibit T to the City's Motion for Summ. J, R. 33-21, Page ID #350.) The City sent another certified letter to two addresses on May 8, 2019. (Exhibit T to the City's Motion for Summ. J, R. 33-21, Page ID #350.)

After Lush Designs failed to respond or object to the condemnation of the Linwood Building, the City solicited bids in July 2019 for the demolition of the Building. (Stacy Corrigan Affidavit, R. 35-1, Page ID #376-379.) Baumann submitted a bid and the City awarded the demolition project to Baumann. (*Id.*)

Next, the City provided the Order to Abate and Demolish which is known as the Proceed Order. (*Id.* and Exhibit B—Proceed Order, R. 35, Page ID #380-381.) Upon receipt of the Proceed Order, Baumann applied for the demolition permit. (Stacy Corrigan Affidavit, R. 35-1, Page ID #376-379.) On August 12, 2019, the City issued a demolition permit to Baumann. (*Id.* and City of Cleveland Building Permit No. B19027201, R.35-3, Page ID #382.) The permit authorized Baumann to enter the property located at 7400 Linwood Avenue, Cleveland, Ohio and demolish the two-story structure. (Stacy Corrigan Affidavit, R. 35-1, Page ID #376-379.) Baumann notified the City about one week before the demolition and started demolition on August 13, 2029. (*Id.*)

None of this establishes Baumann as a governmental entity; rather, it establishes that Baumann is not such an entity under any applicable legal standard. (Stacy Corrigan Affidavit, R. 35-1, Page ID #376-379.) In fact, Baumann performs demolition services for private individuals, private businesses, and governmental entities throughout the State of Ohio. (*Id.*) Baumann determines the best course and practice for the demolition of any building or structure. (*Id.*) The City does not direct or control how Baumann demolishes a building. (*Id.*) The City does not control the manner or means of how Bauman will perform the demolition of any structure. (*Id.*) Thus, the undisputed facts establish that Baumann could not be sued for violating Lush Designs' Constitutional rights because Baumann is a private actor as a matter of law. No amount of discovery could have changed that.

SUMMARY OF THE ARGUMENT

As to Baumann, the issues are not factual, but legal. Thus, this Court cannot reach the issue of the need for additional discovery as to Baumann because: (1) Lush Designs' claims against Bauman failed as a matter of law based on the undisputed fact that Baumann is a private actor that had a valid demolition permit thus precluding any Constitutional due process or Fifth Amendment taking claims because Baumann was a non-governmental entity; and (2) the only party that could be aggrieved by the Sixth Circuit's decision in App. No. 22-3217 (Lush Designs) is not presenting any issue for this Court's review and did not join First Floor's Petition to this Court.

ARGUMENTS WHY PETITION SHOULD BE DENIED**I. Regardless of any notice issues regarding the City, Lush Designs' Constitutional claims against Baumann are not presented for review.**

As this Court has held, a plaintiff cannot proceed under a theory of 42 U.S.C. § 1983 liability against a private party “no matter how discriminatory or wrongful” the party’s conduct. *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999). As previously discussed, Baumann is not a state actor because: (1) it performs demolition services for private individuals, private businesses, and governmental entities; (2) it determines the best course and practice for the demolition of any building or structure; (3) its demolition practices are not directed or controlled by any governmental agency; and (4) how it performs the demolition of any structure is not controlled by any governmental agency. (Stacy Corrigan Affidavit, R. 35-1, Page ID #376-379.) No amount of discovery can change these legally operative facts.

Accordingly, the Sixth Circuit correctly reasoned as follows:

To the extent Plaintiffs argue that Laster and Baumann were state actors and therefore liable under 42 U.S.C. § 1983, they have failed to demonstrate, under any test, that this is true. The public function test traditionally applies to the exercise of “powers traditionally reserved to the state, such as holding elections, taking private property under

the eminent domain power, or operating a company-owned town.” *Romanski v. Detroit Ent., LLC*, 428 F.3d 629, 636 (6th Cir. 2005). Plaintiffs have failed to demonstrate that demolition is a power “traditionally reserved to the state.” *Id.* An argument pursuant to the nexus test fares no better. Under the nexus test, there must be “a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself.” *S.H.A.R.K. v. Metro Parks Serving Summit Cnty.*, 499 F.3d 553, 565 (6th Cir. 2007) (internal quotation marks and citations omitted). Here, Laster and Baumann were simply private contractors hired to perform a demolition and were not acting under color of state law. See *Dale E. Frankfurth, D.D.S. v. City of Detroit*, 829 F.2d 38 (6th Cir. Sept. 17, 1987) (table) (finding “demolition of the building ... was not action taken under color of state law”). No party argues that the third and final test, the state-compulsion test, is applicable in this case. Therefore, Plaintiffs’ argument fails.

First Floor Living LLC, 83 F.4th at 456, fn. 4. No amount of discovery would establish Baumann as a state actor. As discussed in the Statement of Facts, Stacy Corrigan’s Affidavit describes the process for bidding upon demolition projects. (*Id.*) Baumann

produced its contract with the City for this demolition project. (*Id.*) All of this information shows that Baumann determines how to perform demolition. (*Id.*) Baumann is not a governmental entity and the Lush Designs' Constitutional claims fail accordingly. (*Id.*)

As this Court has held, “[a]cts of such private contractors do not become acts of the government by reason of their significant or even total engagement in performing public contracts.” *Rendell-Baker v. Kohn*, 457 U.S. 830, 841 (1982). Baumann is not a state actor under any of the three tests and First Floor does not argue otherwise, nor does it seek review of that issue or of the applicable legal tests for a private entity to be considered a state actor. Thus, no issue is presented or preserved as to Baumann and, even if this Court were to accept jurisdiction as to the issues First Floor proffers in Sixth Cir. App. No. 22-3216, it should not do so as to Baumann or Sixth Cir. App. No. 22-3217 of the un-appealed claims of Lush Designs against Baumann.

The facts and legal conclusions as to Baumann are not challenged by First Floor and, as previously discussed, First Floor would lack standing to raise such a challenge. Lush Designs does not seek review and, regardless, the legal determination that Baumann is not a state actor is not impacted by any claimed lack of discovery as to notice provided by the City as alleged by First Floor. There is no reason for this Court to accept jurisdiction over Baumann or Lush Designs' Sixth Cir. App. No. 22-3217. Nothing is presented for this Court to review.

II. All issues as to Baumann are rendered moot because notice by the City to Lush Designs was legally sufficient.

The discovery issues proffered by First Floor are not relevant to the City's notice to Lush Designs or the resulting demotion of its building. As the Sixth Circuit correctly held, "informal conversations with city employees regarding the status of the property do not negate the official notice that Lush Designs received by certified mail and through the posting on the property." *First Floor Living LLC*, 83 F.4th at 455-56 (citing *Hill v. City of Jackson*, 751 F. App'x 772, 775 (6th Cir. 2018)). Thus, no amount of discovery could have changed the legally operative facts which establish sufficient notice by the City of the impending demotion of Lush Designs' building. *First Floor Living LLC*, 83 F.4th at 449-50. Because Lush Designs' underlying claims based on faulty notice fail, its claims against Baumann for the demotion itself, also fail. Because Lush Designs does not seek review of the underlying notice issue, any argument as to Baumann is rendered moot. *First Floor Living LLC*, 83 F.4th at 458 (Nalbandian, J., concurring in part and dissenting in part) ("I agree with the majority that the City of Cleveland provided constitutionally sufficient notice of the Linwood Avenue Property's pending demolition to Lush Designs.").

For this additional reason, once again, there is no reason for this Court to accept jurisdiction over Baumann or Lush Designs' Sixth Cir. App. No. 22-3217. Nothing is presented for this Court to review because this Court would first have to address the underlying notice issue as to Lush Designs and find

notice lacking, but that issue is not presented for this Court's review.

III. First Floor lacks standing to raise any issues as to Baumann; no case or controversy is presented as to Baumann.

As previously discussed, at the Sixth Circuit, there were two separate appeals: (1) Sixth Cir. App. No. 22-3216 by First Floor; and (2) Sixth Cir. App. No. 22-3217 by Lush Designs. Baumann's conduct was only at issue in Lush Designs' appeal. Those appeals were consolidated by the Sixth Circuit only "for the purpose of submission". (10/12/2022 Order, App. No. 22-3217, Doc #47-2, and 10/12/2022 Order, App. No. 22-3216, Doc. #54-2.) Thus, they are not merged, but rather, "remained independent when it came to judgments and appeals." *Hall v. Hall*, 584 U.S. 59, 66, 138 S. Ct. 1118, 1125, 200 L. Ed. 2d 399 (2018).

Here, only First Floor seeks review by this Court. First Floor had no claim against Baumann at the District Court level or the Sixth Circuit level. In fact, First Floor raises issues only as to discovery it wished to conduct regarding the issue of notice of the condemnation/demolition of First Floor's building. "Article III of the Constitution grants this Court authority to adjudicate legal disputes only in the context of 'Cases' or 'Controversies.'" *Camreta v. Greene*, 563 U.S. 692, 701–02, 131 S. Ct. 2020, 2028–29, 179 L. Ed. 2d 1118 (2011). First Floor as no "personal stake" in [Lush Designs'] suit" against Baumann and First Floor does not claim to have "suffered an injury in fact" caused by Baumann. First Floor has no stake in Lush Designs' building or

standing to challenge the demotion of Lush Designs' building by Baumann. Accordingly, no case or controversy is presented by First Floor as to Baumann or the Sixth Circuit's decision in App. No. 22-3217. See, e.g., *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 703, 7 L. Ed. 2d 663 (1962); Petition at p. 11, fn. 5. This Court should decline jurisdiction over Lush Designs' appeal and Baumann accordingly.

CONCLUSION

As to Respondent Baumann Enterprises, Inc., the judgment in its favor has not been appealed and no issue for this Court's consideration is proffered. For this, as well as all the foregoing reasons, Baumann respectfully requests that this Court not accept jurisdiction as to it and deny the Petition for Writ of Certiorari in its entirety.

In remaining part, Baumann incorporates the arguments against discretionary review presented by the City because there is no Circuit conflict and this matter is a poor vehicle to render a generally applicable statement of law.

Respectfully submitted,

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