No. 17-1368

IN THE

Supreme Court of the United States

JOSEPH B. SCARNATI, III, IN HIS OFFICIAL CAPACITY AS SENATE PRESIDENT PRO TEMPORE,

Appellant,

v.

LOUIS AGRE ET AL.,

Appellee.

On Appeal from the United States District Court for the Eastern District of Pennsylvania

MOTION TO DISMISS

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QUESTION PRESENTED

Where Appellant appeals from a three-judge court's discovery orders, which did not grant or deny injunctive relief, does this Court lack jurisdiction over the appeal under 28 U.S.C. § 1253?

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MOTION TO DISMISS

OPINION BELOW

The district court's November 9, 2017 order holding that the speech or debate privilege is qualified and may be pierced (ECF No. 76), the court's November 22 and November 28, 2017 denials of protective orders on the same basis, and the court's December 4, 2017 rulings during oral argument are not published in the *Federal Supplement*.

JURISDICTION

The orders appealed from were issued November 9, 2017; November 22, 2017; November 28, 2017; and December 4, 2017. The notice of appeal was filed on January 24, 2018. Appellant invokes the jurisdiction of this Court under 28 U.S.C. §1253. However, this Court lacks jurisdiction because the orders appealed from did not grant or deny injunctive relief and there is no other basis for jurisdiction.

INTRODUCTION

Appellant, President Pro Tempore of the Pennsylvania Senate Joseph Scarnati, contends that this Court has jurisdiction to hear this appeal under 28 U.S.C. § 1253, which provides for direct appeals to this Court from decisions of three-judge courts. However, § 1253 permits direct appeals only of orders "granting or denying . . . an interlocutory or permanent injunction in any civil action, suit or proceeding[.]" Section 1253 thus does not confer jurisdiction over this appeal of discovery orders. The fact that other parties to the underlying litigation have brought a separate appeal from the district court's order denying an injunction cannot

save Appellant's appeal, because that separate appeal has been rendered moot by recent events and should be dismissed. Therefore, there is no basis for this Court to exercise jurisdiction over this appeal.

STATEMENT

1. In the underlying litigation, the plaintiffs (here, Appellees) mounted a challenge to the congressional redistricting map enacted by the Pennsylvania General Assembly in 2011 (the "2011 Plan"). Appellees contended that the 2011 Plan violated the U.S. Constitution; they sought declaratory and injunctive relief that would have barred the continued use of the 2011 Plan and required its replacement with a nonpartisan map prior to the 2018 congressional elections. A three-judge panel was appointed, and Appellant and the Speaker of the Pennsylvania House of Representatives, Michael Turzai, were granted leave to intervene as defendants.

During the course of discovery and trial, Appellant and Speaker Turzai sought to invoke legislative privilege to shield from discovery the facts and data they relied upon when drafting the 2011 Plan. *See* Plaintiffs' Motion to Compel, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. 2017) (ECF No. 51) (Oct. 30, 2017); November 17 and 22, 2017 Motions for Protective Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. 2017) (ECF Nos. 118, 123) (Nov. 17, Nov. 22). The district court held that the legislative privilege was qualified and did not apply to the documents that Appellant and Speaker Turzai sought to protect. *See* Nov. 9, 2017 Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. 2017) (App'x 336); Nov. 22, 2017 Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. 2017) (App'x 339); Nov. 28, 2017 Order, *Agre v. Wolf*, No. 2:17-cv-4392 (E.D. Pa. 2017)

(App'x 342). Accordingly, Speaker Turzai produced a set of the requested data to the plaintiffs (the "Turzai data").

A three-judge panel dismissed the action in a split decision on January 10, 2018. (App'x 1). Appellees have appealed the district court's decision to this Court. *See* Jurisdictional Statement, *Agre v. Wolf*, No. 17-1339 (March 19, 2018).

2. While the proceedings below were taking place, a separate challenge to the 2011 Plan, *League of Women Voters of Pennsylvania v. Commonwealth*, was moving through the Pennsylvania state courts. The Commonwealth Court of Pennsylvania heard the evidence in that case and issued recommended findings of fact. *See* Recommended Findings of Fact and Conclusions of Law, *League of Women Voters v. Commonwealth,* No. 261 M.D. 2017 (Dec. 29, 2017). On January 19, 2018, the Pennsylvania Supreme Court struck down the 2011 Plan as a violation of the Pennsylvania constitution. *League of Women Voters of Pennsylvania v. Commonwealth*, 175 A.3d 282 (Pa. 2018). A month later, the court ordered the use of a remedial map drawn by a court-appointed expert. *League of Women Voters of Pennsylvania v. Commonwealth*, No. 159 MM 2017, 2018 WL 936941, at *5 (Pa. Feb. 19, 2018).[1]

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[1] The record does not support Appellant's contention that the district court's discovery orders in the underlying case affected the outcome of *League of Women Voters*. First, Appellant incorrectly states that the opinions of a plaintiff's expert, Dr. Jowei Chen, "were based on data files that were produced" in the District Court case. Juris. Stmt. at 13. In fact, the bulk of Dr. Chen's expert report analyzed 1,000 computer simulations, which were "independent of [the Turzai data] shapefiles." *See* Expert

The Pennsylvania Department of State has duly implemented the remedial map. Candidate petitioning and nomination periods have already occurred under the remedial map, and the congressional primary election scheduled to occur on May 15, 2018 will proceed under the remedial map.

3. As a consequence of the Pennsylvania Supreme Court's rulings in *League of Women Voters*, the 2011 Plan that Appellees challenged in the underlying litigation will not be used in the 2018 congressional elections. Therefore, the parties filing the instant Motion to Dismiss—Governor Thomas W. Wolf, Acting Secretary of the Commonwealth Robert Torres, and Commissioner Jonathan Marks—have also moved to dismiss as moot Appellees' appeal of the District

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Report of Jowei Chen, Ph.D., App'x at 354. While Dr. Chen analyzed the Turzai data and discussed it briefly in his expert report, that analysis was independent from his analysis of the simulations. *Id.* Second, the Commonwealth Court expressly noted that it did not rely upon Dr. Chen's analysis of the Turzai data, or the data itself, for any of its factual findings, stating: "Dr. Chen testified regarding data files purportedly produced by Speaker Turzai in the *Agre* case, but the Court makes no findings regarding that aspect of Dr. Chen's expert report or testimony." Recommended Findings of Fact and Conclusions of Law at ¶ 307, *League of Women Voters v. Commonwealth*, No. 261 M.D. 2017 (Dec. 29, 2017). Finally, the Pennsylvania Supreme Court did not rely upon the Turzai data or any testimony regarding the Turzai data. In its February 7, 2018 opinion, the court discussed only the portion of Dr. Chen's expert testimony that concerned his simulations and analysis thereof. *League of Women Voters v. Commonwealth*, 178 A.3d 737, 821 (Pa. 2018). The court acknowledged that Dr. Chen had testified about the Turzai data and that the data had been submitted to the court, but indicated it would "not further address these materials[.]" *Id.* at 768. Appellant's assertions that the Pennsylvania Supreme Court "considered" and "relied upon testimony concerning the [Turzai] data files" are thus misstatements of the record. Juris. Stmt. 16.

Court's order dismissing their claims. *See* Motion to Dismiss filed April 23, 2018, *Agre v. Wolf*, No. 17-1339. Appellant and Speaker Turzai have also moved to dismiss Appellees' appeal, arguing that it is moot and otherwise jurisdictionally defective. *See* Motion to Affirm filed April 23, 2018, *Agre v. Wolf*, No. 17-1339.

ARGUMENT

I. UNDER § 1253, THIS COURT LACKS JURISDICTION OVER APPELLANT'S CHALLENGE TO THE DISTRICT COURT'S DISCOVERY ORDERS BECAUSE THOSE DECISIONS DID NOT GRANT OR DENY INJUNCTIVE RELIEF.

This Court "has more than once stated that its jurisdiction under the Three-Judge Court Act is to be narrowly construed since any loose construction of the requirements of (the Act) would defeat the purposes of Congress to keep within narrow confines our appellate docket." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970). Accordingly, the Court has repeatedly declined to exercise § 1253 jurisdiction over appeals of orders from three-judge courts where, as here, the orders at issue did not grant or deny injunctive relief. In *Goldstein*, the appellant sought Supreme Court review of a three-judge court's order denying a motion for summary judgment by a plaintiff whose complaint requested injunctive relief. The Court held that such an order was not "an order . . . denying an . . . injunction" within the meaning of § 1253, and therefore the Court could not hear the appeal. *Id.* at 475-76. This Court has repeatedly reaffirmed the holding in *Goldstein*. *See Rockefeller v. Catholic Med. Ctr. of Brooklyn & Queens, Inc.*, 397 U.S. 820, 820 (1970) (finding that the court

lacked jurisdiction to hear appeal of declaratory judgment order from three-judge district court because "[t]he judgment appealed from does not include an order granting or denying an interlocutory or permanent injunction and is therefore not appealable to this Court under 28 U.S.C. § 1253"); *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 386 (1970) (no jurisdiction under § 1253 where three-judge court's opinion held statute unconstitutional but did not enjoin its enforcement); *Gerstein v. Coe*, 417 U.S. 279, 279 (1974) (dismissing appeal from three-judge court for want of jurisdiction where only declaratory relief was granted). Here, Appellant seeks to challenge several rulings by the three-judge court that declined to apply the legislative privilege to a set of documents Appellant sought to shield from discovery. Such rulings do not fit within the plain meaning of § 1253.

While this Court has sometimes heard appeals from non-injunctive orders in cases where a party *also* appealed a grant or denial of injunctive relief, such appeals have come from the same parties that appealed the grant or denial of injunctive relief. They have not concerned discovery issues entirely separate from the subject of injunctive relief, but rather addressed questions closely tied to the merits of the injunction sought. *See, e.g., Roe v. Wad*e, 410 U.S. 113, 123 (1973) (in appeal from injunctive relief order, also exercising jurisdiction over appeal from declaratory judgment order where "the arguments as to both aspects [were] necessarily identical"); *Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 737 n.16 (1980) (hearing appeal from injunctive relief and attorneys' fees orders where statute provided for injunctions and permitted prevailing party to seek fees); *Perez v.*

Ledesma, 401 U.S. 82, 90 (1971) (Stewart, J., concurring) (Court lacked jurisdiction over appeal from declaratory judgment where "the District Court's action on the prayer for declaratory relief was [not] so bound up with its action on the request for an injunction that this Court might, on direct appeal, consider the propriety of declaratory relief on pendency grounds"). Appellant's challenge to the district court's legislative privilege decisions is far afield of the merits of the question of enjoining the use of the 2011 Plan. Accordingly, this Court lacks jurisdiction under § 1253.

II. BECAUSE THE *AGRE* PLAINTIFFS' APPEAL OF THE DENIAL OF INJUNCTIVE RELIEF IS MOOT, IT CANNOT CREATE § 1253 JURISDICTION OVER THIS APPEAL.

Even if one party's appeal of a grant or denial of an injunction could ever create a form of pendent § 1253 jurisdiction over another party's appeal of a discovery order—which, as discussed above, it cannot—Appellees' appeal (No. 17-1339) could not serve that purpose here. This is because Appellees' appeal has been rendered moot by events that have occurred since the district court's decision, and the Court therefore lacks jurisdiction over it. As such, Appellees' appeal cannot confer this Court with jurisdiction over Appellant's appeal. *See* Motion to Dismiss filed April 23, 2018, *Agre v. Wolf*, No. 17-1339 (arguing that because the 2011 Plan has been struck down and replaced, plaintiffs' claims in the underlying action no longer present a "live" case or controversy, and no effectual relief remains to be granted). Indeed, Appellant and Speaker Turzai recently filed a Motion to Affirm in response to Appellees' Statement of Jurisdiction; they

argue, *inter alia*, that "[i]t is hard to imagine a more jurisdictionally defective appeal than this one," "[t]his appeal violates numerous jurisdictional bars to relief," and "the case is moot." Motion to Affirm, filed April 23, 2018, *Agre v. Wolf*, No. 17-1339, at 1, 8.[2]

This Court confronted a similar scenario in *Republican Caucus of Pennsylvania House of Representatives v. Vieth*, 537 U.S. 801 (2002) (Mem.), when the Republican Caucus appealed to this Court from a three-judge district court's denial of a motion to quash a subpoena. *See Vieth v. Pennsylvania*, 67 F. App'x 95, 98 (3d Cir. 2003). In the same underlying case, the district court had also entered an order granting the *Vieth* plaintiffs' request for injunctive relief, and while that order was also appealed to this court, the appeals were ultimately dismissed as moot. *See Schweiker v. Vieth*, 537 U.S. 801 (2002) (Mem.) (dismissing appeal as moot); *Jubelirer v. Vieth*, 537 U.S. 801 (2002) (Mem.) (dismissing appeal as moot). On the same day, this Court also dismissed the Caucus's appeal of the discovery order "for want of jurisdiction." *Republican Caucus*, 537 U.S. at 537. The Third Circuit subsequently exercised jurisdiction over the Caucus's appeal and explained, "the discovery order at issue in this appeal was not, of course, an order granting or denying injunctive relief and so appeal to the Supreme Court [was] inappropriate" under § 1253. *Vieth v. Pennsylvania*, 67 F. App'x 95, 98 (3d Cir. 2003). Similarly, in *Virginia v. Consumers Union of U. S., Inc.*, 446 U.S.

[2] While the Movants agree that Appellees' appeal is moot, they do not adopt any of the Motion to Affirm's other jurisdictional arguments. They also do not adopt any of Appellant and Speaker Turzai's arguments regarding the substantive merits of the claims below.

719, when an appeal from a three-judge district court's order no longer presented a live controversy because this Court had already decided it during an earlier round of appeals, the Court dismissed two related appeals of attorneys' fee awards "for want of jurisdiction." *See Supreme Court of Virginia v. Consumers Union of the United States*, 451 U.S. 1012 (1981) (Mem.); *Consumers Union of the United States v. Virginia State Bar*, 451 U.S. 1012 (1981) (Mem.). Subsequently, the Fourth Circuit Court of Appeals took jurisdiction over the fee award appeals and noted that "[t]he Supreme Court did not have appellate jurisdiction under 28 U.S.C. s 1253 to entertain a direct appeal of the attorney's fee dispute since the question of injunctive relief sought pursuant to the section 1983 issue was no longer before the Court." *See Consumers Union of U.S., Inc. v. Virginia State Bar*, 688 F.2d 218, 220 n.1 (4th Cir. 1982) (citing *Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 737, n. 16 (1980)).

Because Appellees' separate appeal is moot, this Court need not reach the issue of whether one party's direct appeal of an order "granting or denying . . . an interlocutory or permanent injunction" can confer jurisdiction to hear other parties' direct appeals of other issues in the case. Here, Appellees' separate appeal cannot stand, and therefore it cannot provide a basis to contend that this Court may exercise jurisdiction over the instant appeal.

CONCLUSION

For the foregoing reasons, the appeal should be dismissed for want of jurisdiction.

Respectfully submitted,

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