**No. 17-1368**

# In The
# Supreme Court of the United States

JOSEPH B. SCARNATI, III
IN HIS CAPACITY AS PENNSYLVANIA
SENATE PRESIDENT PRO TEMPORE,
*Appellant,*

V.

LOUIS AGRE, *ET AL.*,
*Appellees.*

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

## RESPONSE IN OPPOSITION TO MOTIONS TO DISMISS OR AFFIRM


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## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### CASES

**STATUTES**

## I. INTRODUCTION

Appellant Senator Joseph B. Scarnati, III, in his official capacity as President Pro Tempore of the Pennsylvania Senate ("Appellant") submits this Brief in opposition to the Motions to Dismiss Appellant's Jurisdictional Statement ("JS") filed by Plaintiffs ("Plaintiff/Appellees") and Executive Defendants ("Executive-Appellees").[1]

The speech or debate privilege, which pre-dates the founding of the country, has a straightforward purpose: It allows legislators to investigate all facts underpinning legislation without fear that the sources they rely upon could be utilized by opponents for political purposes. *See* JS at 17-20. Plaintiff/Appellees do not dispute the privilege's continued existence, nor do they call for its elimination. Rather, they ask this Court to adopt a "balancing test" under which, anytime a federal court finds an undefined "important federal interest" at stake, the privilege would be qualified, and any documents considered by a legislator—which would otherwise be protected from disclosure—would then become discoverable. *See* Plaintiff/Appellees' Motion to Dismiss or Affirm ("MTD") at 20-25, 28-29.

The problem with Plaintiff/Appellees' proposed balancing test—a test that has been incorrectly adopted by various lower federal courts—is that, in practice, it eviscerates the privilege. Under the test, the privilege is qualified or eliminated any time a federal judge decides that the legislation at issue touches on an "important federal

[1] Capitalized terms used herein but not defined are ascribed the meaning given to them in the JS.

interest"—a term undefined by Plaintiff/Appellees or any court that has adopted it. And a state legislator considering legislation on *any* topic cannot know in advance whether the sources she considers will one day be disclosed. The legislator is thus forced to assume that any information considered about any legislation could later be publicly revealed—and the legislative process is necessarily chilled.[2]

The issue raised in the JS—whether and to what extent the speech or debate privilege can be qualified— has arisen in virtually every redistricting case in the past twenty years, including at least two cases currently pending before this Court. And, whether the privilege is upheld has almost always played a critical part in the panels' determination of whether to grant injunctions. Yet, there has been no consistency in how district courts overseeing redistricting cases have applied the privilege. JS at 23-24 (detailing the substantial split of authority).

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[2] While Plaintiff/Appellees insist that the balancing test is supported by this Court's precedent, in fact this Court has never applied such a test, and it has only found the privilege to be qualified a single time: in the criminal context, when the federal government sought discovery from a state senator accused of violating federal bribery laws. *See United States v. Gillock*, 445 U.S. 360 (1980). In *dicta*, the Court noted that the privilege could be qualified in that case because *the criminal accusations* touched on an "important federal interest." *Id.* at 373. From this single phrase—repeated six separate times in the MTD—Plaintiff/Appellees make several unsupported claims. They claim that *Gillock* substantially weakened the privilege; that the evidentiary privilege is weaker than the corollary immunity; and that the privilege should always be subject to a balancing test. *See* MTD 20-25. But, in the nearly forty years since *Gillock* was decided, this Court has *never* issued an opinion supporting any of these claims—nor has it found that the privilege (or the corollary immunity) can be qualified in any context other than in a criminal case.

Nonetheless, Appellees urge the Court to refuse to even consider what they correctly refer to as the "weighty privilege issues" raised in this Appeal—not on substantive grounds—but based on jurisdiction, mootness and standing. For the reasons set forth herein, Appellees' procedural arguments should be rejected.

## II. ARGUMENT

### A. This Court Has Jurisdiction To Consider The Appeal

Appellees urge the Court to dismiss the Appeal for lack of jurisdiction under 28 U.S.C. §1253 because the Orders being challenged do not result directly in the granting or denial of an injunction. Executive Appellees' Motion to Dismiss ("EMTD") at 5-7; MTD 7-9. This argument must be rejected. Section 1253 provides that this Court has direct appellate jurisdiction to consider the propriety of an order granting or denying an injunction in actions "required by an Act of Congress to be heard and determined by a district court of three judges." Although the language of §1253 speaks only to this Court having jurisdiction to consider appeals in which an injunction is granted or denied, the Court regularly exerts jurisdiction to consider final orders addressing issues that are intertwined with an order granting or denying an injunction. *See Lewis v. BT Inv. Managers, I*nc., 447 U.S. 27, 35 & n.5 (1980); *Roe v. Wade*, 410 U.S. 113, 123 (1973); *White v. Regester*, 412 U.S. 755, 760 (1973).

Appellees respond to this precedent by citing to a handful of cases in which the Court held,

unremarkably, that absent a final order granting or denying an injunction, the Court lacks jurisdiction to consider any direct appeal under §1253. *See e.g.*, *Goldstein v. Cox*, 396 U.S. 471, 478-79 (1970) (no jurisdiction to consider denial of summary judgment where court had not issued order granting or denying injunction); *Gunn v. Univ. Committee to End the War in Viet Nam*, 399 U.S. 383, 390 (1970) (absent order granting an injunction, the court lacks jurisdiction over §1253 appeal).[3] But these cases do not limit the Court's jurisdiction to consider issues in a case where an injunction *has* been granted or denied (as in the instant matter), so long as those issues are closely tied to the merits of the injunction sought.

There can be little doubt that the Orders challenged here are closely tied to the Panel's denial of the injunction; in fact, they are inseparable from it. And it is the Court's order denying Plaintiff/Appellees' request for an injunction that made the Orders final and appealable. *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 107-09 (2009) (discovery orders related to privilege are not final and appealable until final judgment). And, as the Opinions of two of the three members of the Panel make clear, the privileged information that Appellant and Speaker Turzai were

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[3] Plaintiff/Appellees cite to *Republican Caucus of Pa. House of Representatives v. Vieth*, 537 U.S. 801 (2002) for the proposition that §1253 does not confer jurisdiction on this Court over direct appeals from orders related to privilege. While Plaintiff/Appellees claim that the circumstances in *Vieth* are "identical" to those here, they are not. *Id*. *Vieth* involved an attempt by an appellant to file a direct appeal on a discovery issue *prior* to a three-judge panel's injunction order. *Vieth v. Pennsylvania*, 67 F. App'x 95, 97-98 (3d Cir. 2003). Because there was no final order at the time the discovery order was appealed, the Court had no jurisdiction to consider it.

forced to disclose played central roles in each of the Panel members' decisions. *Agre v. Wolf*, 284 F. Supp. 3d 591, 645 & n.28 (E.D. Pa. 2018) (Shwartz, J. concurring) (partisan intent was a substantial component of the 2011 Plan); *id.* at 675 (Baylson, J. dissenting) (relying on privileged information when finding that the 2011 Plan violated the Elections Clause). Moreover, throughout the trial below, Appellees argued that the privileged information that is the subject of the Orders was critical support for their proposed injunction. Trial Tr. vol. 8, 40:9-42:13, 46:2-47:24, 49:2-10, 47:25-48:12, 49:11-24, 12/7/2017, ECF No. 198-1. For these reasons, this Court has jurisdiction over the Appeal.

### B. This Court Should Remand To The District Court To Allow For Appeal To The Circuit Court If It Lacks Jurisdiction

If the Court finds, however, it does not have jurisdiction under §1253, it should remand the case with direction to permit the filing of an appeal to the Third Circuit. In cases where this Court has found that an appellant lacks jurisdiction under §1253 or analogous statutes, the Court has consistently "vacat[ed] the judgment below and remand[ed] the case to the District Court so that it may enter a fresh decree from which a timely appeal may be taken to the Court of Appeals." *Wilson v. Port Lavaca*, 391 U.S. 352, 352 (1968); *see also MTM, Inc. v. Baxley*, 420 U.S. 799, 804 (1975); *Mitchell v. Donovan*, 398 U.S. 427, 431-32 (1970); *Mengelkoch v. Industrial Welfare Com.*, 393 U.S. 83, 84 (1968). In these cases, the Court remanded despite the fact that the

appellant, like Appellant here, did not file a "safety appeal" in the circuit court. *See id*.

Plaintiff/Appellees argue that the Court should not remand because Appellant should have followed "established procedures for obtaining review." MTD at 10. Among the procedures suggested by Plaintiff/Appellees is that Appellant could have refused to comply with the Orders and accepted sanctions or subjected himself to contempt. MTD at 11. Alternatively, Plaintiff/Appellees suggest that remand should be denied because Appellant could have sought mandamus or a stay of the proceedings below. *Id*. But this Court has never held that remand is contingent upon a party exposing itself to contempt or sanctions, nor should it. If it did, every party with a case pending in front of a three-judge panel would be encouraged to violate discovery orders or seek immediate relief therefrom.

*Donovan v. Association for Retarded Citizens*, 454 U.S. 389 (1982), the only case Plaintiff/Appellees cite where a request for remand was denied, does not help them. In *Donovan*, appellants, after unsuccessfully defending the constitutionality of a statute at the district court level, were unequivocally entitled to appeal directly to this Court but chose to appeal to the circuit court, which did not have jurisdiction. *Id*. at 389-90 (citing 28 U.S.C. §1252 (providing for direct appellate jurisdiction to this Court) and 28 U.S.C. §1291 (if this Court has jurisdiction to consider a direct appeal, then the circuit court lacks jurisdiction)). After the appeal was denied by the circuit court, appellants appealed to this Court, which vacated the circuit court's order for want of jurisdiction and denied the appeal as

untimely. *Donovan*, 454 U.S. at 390. The Court also refused to remand to the district court because of appellants' "failure … to follow the clear commands of [§§ 1252 and 1291]." *Id.* at 390-91. In contrast, the appellate procedures set forth in §1253, the statute at issue here, are not clear, which is why the Court has remanded every case in which a party incorrectly appealed under that statute. *See supra*, at 6-7. Plaintiff/Appellees have identified no reason why the Court should depart from its established course.

Next, Plaintiff/Appellees argue that the Court should not remand the decision because the circuit court lacks jurisdiction to consider a direct appeal on discovery issues. *See* MTD at 12. But in so arguing, Plaintiff/Appellees misstate the holding of *Mohawk*, which held only that a direct appeal of a discovery order cannot be sought until after a final order on the merits. 558 U.S. at 108-9 ("We routinely require litigants to wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system"). Here, unlike in *Mohawk*, the Panel had issued a final order on the merits when the JS was filed. Accordingly, a direct appeal was proper.

Finally, Plaintiff/Appellees argue that remand is inappropriate because "as the prevailing party below, Scarnati may not appeal from the final judgment." MTD at 12 (citing *Deposit Guaranty Nat. Bank. v. Roper*, 445 U.S. 326, 333 (1980)). Plaintiff/Appellees are once again wrong. *Roper* held that an "appeal may be permitted from an adverse ruling collateral to the judgment on the merits at the behest of the party who has prevailed on the merits, so long as that party retains a stake in the appeal satisfying the requirements of Article III." *Roper*,

445 U.S. at 334. Here, Appellant has standing to bring the Appeal, so *Roper* is inapposite.

For these reasons, if the Court finds that it does not have jurisdiction to review this Appeal, it should vacate the Panel's decision and remand to the Panel for a new Order.

### C. This Case Is Not Moot

Appellees also argue that the case is moot because the Court cannot grant effectual relief. MTD at 13-14; EMTD at 7-9. In support of this argument, Appellees rely on: (i) Appellant's successful defense of the 2011 Plan below; (ii) the Plan's invalidation by the Pennsylvania Supreme Court; and (iii) the public release of certain of the disclosed privileged materials. But these events do not prevent the Court from considering the Appeal. Rather, under the well-established exception to the mootness doctrine, the Court can consider the Appeal because it is capable of repetition yet evading review. JS at 37.

Executive-Appellees make no attempt to argue that this exception is inapplicable, and Plaintiff/Appellees only challenge the existence of one of the exception's two prongs. They argue that the issues identified in the JS will not evade review because "future litigants who 'reflect upon their appellate options' will quickly identify several means of securing intermediate appellate review," such as filing for mandamus, seeking interlocutory review or violating the order and accepting a contempt charge. MTD at 14. But none of these options provide definitive appellate protection. Seeking interlocutory review or mandamus requires satisfying an

exceptionally high burden of proof. And, the notion that a party should subject himself to contempt charges merely to attempt to establish appellate rights is absurd.

Perhaps recognizing the illusory nature of the aforementioned "appellate options," Plaintiff/Appellees further argue that a "future litigant who loses at final judgment will be able to present the issue on direct appeal to a circuit court." MTD at 14. In other words, Plaintiff/Appellees argue that a legislator could only challenge a ruling requiring him to produce privileged information if his objection to producing such information is overruled *and* the district court ultimately rules against him on the merits. But, this is impractical at best, because decisions regarding the qualification of the speech or debate privilege most often arise in redistricting cases—where plaintiffs' challenges are almost always denied—legislators will rarely, if ever, have that opportunity. Thus, the avenues of appeal identified by Plaintiff/Appellees do not provide an effective means to challenge an adverse privilege ruling.

Empirical evidence bears this out. In the 30 years since the first district court applied *Gillock* to qualify the speech or debate privilege in a civil case, state legislators have regularly been required to disclose privileged information. *See* JS at 24. And, despite all of Plaintiff/Appellees' confidence in the availability of an appeal, the substantive issue of whether the speech or debate privilege can be qualified in redistricting cases has never reached this Court. The issues raised in this appeal will continue to evade review until this Court resolves

the issue; it is not moot. *See FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462-64 (2007).

### D. Appellant Scarnati Has Standing

Plaintiff/Appellees also claim that Appellant lacks standing to bring this appeal because two of the Orders being challenged, those dated November 22, 2017 and November 28, 2017, addressed motions made by only Speaker Turzai, not Appellant. MTD at 16-18. This contention must be rejected for several reasons. First, there is no dispute that Appellant has standing to challenge the Panel's November 9, 2017 Order, which required Appellant to produce privileged documents over *his* objection. JS at 8-9. That alone establishes standing to pursue this Appeal, regardless of whether he can appeal the other Orders. *U.S. v. SCRAP*, 412 U.S. 669, 689 n. 14 (1973) ("We have allowed important interests to be vindicated by plaintiffs with no more at stake in the outcome of an action than a fraction of a vote, a $5 fine and costs, and a $1.50 poll tax") (citations omitted).

Moreover, even though Appellant was not an express party to the November 22 and November 28, 2017 Orders, he still possesses standing to appeal them. The aforementioned November 9, 2017 Order, which was undoubtedly applicable to Applicant, established the law of the case "that the legislative privilege is a qualified privilege that may be pierced" and that it "does not shield communications third-parties … nor protect facts and data considered in connection with redistricting". While Appellant was not a movant bringing about the November 22, 2017 and November 28, 2017 Orders, those Orders flow inexorably from the November 9, 2017 Order. For

example, the November 22, 2017 Order begins by noting that the motion it denied "would arguably extend to" discovery already covered in its November 9, 2017 Order. Similarly, the November 28, 2017 Order notes that counsel had apparently misinterpreted its prior Orders, which were meant to be "a ruling on any assertion of legislative privilege". App. 342-45. If Appellant has standing to challenge one of the Orders, which he clearly does, he has standing to challenge them all.

Finally, Plaintiff/Appellees argue that Appellant "waived" his standing to appeal the November 22, 2018 Order denying Speaker Turzai's motion seeking a protective order precluding his deposition. MTD at 17. In support, Plaintiff/Appellees note Appellant's withdrawal of his motion to quash his noticed deposition following entry of the Order denying Speaker Turzai's motion. This argument must be rejected. Appellant's motion to quash was substantively identical to Speaker Turzai's motion. With denial of Speaker Turzai's motion, Appellant knew he would be forced to sit for a deposition and therefore withdrew his plainly futile motion.[4] Clearly, Appellant would not have been subject to a deposition and required to reveal privileged information but for the November 22, 2018 Order. Thus, Appellant has standing to challenge the November 22, 2018 Order.

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[4] The notion that Appellant was required to continue to litigate his motion when the panel already rejected an identical Motion from Speaker Turzai flies in the face of judicial economy—a particularly important consideration here where the parties were operating under an incredibly compressed and expedited schedule (63 days from Complaint to trial).

## III. CONCLUSION

For the reasons set forth herein, the Motions should be denied.

Dated: May 11, 2018

Respectfully submitted,

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