ORIGINAL

No. 21-6359

IN THE

SUPREME COURT OF THE UNITED STATES

COREY J. ZINMAN —PETITIONER

vs.

NOVA SOUTHEASTERN
UNIVERSITY INC., et al. —RESPONDENT(S)

ON PETITION FOR A WRIT OF CERTIORARI TO
THE ELEVENTH CIRCUIT COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

COREY J. ZINMAN

175 SEDONA WAY

PALM BEACH GARDENS, FL 33418

(561) —566—9253

QUESTIONS PRESENTED

The jurisdiction and duties of federal magistrate judges are outlined principally in § 636 of Title 28 of the United States Code. *See Thomas v. Whitworth*, 136 F.3d 756, 758 (11th Cir. 1998). The statute, among other things, grants district judges the authority to assign certain pre-trial matters to magistrate judges. *See* 28 U.S.C. § 636(b)(1)(A). However, according to the plain language of § 636(b)(1)(A), magistrate judges are expressly prohibited from granting or refusing motions for injunctive relief. Furthermore, in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), this Court endorsed the exercise of appellate jurisdiction to consider fundamental judicial administration without regard to whether an alleged defect was raised at the earliest practicable opportunity. *Id.* at 536. Notwithstanding, in holding that it "lack[s] jurisdiction over this appeal," the panel placed undue emphasis upon the fact that "Appellant did not first appeal the magistrate judge's decision to the district court." *See* Exhibit G at 2-3. Towards that end, the panel relied upon *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982) to suggest that "the order is neither final nor immediately appealable because the district court has not entered an order rendering the magistrate judge's decision final," as well as *United States v. Schultz*, 565 F.3d 1353, 1356 (11th Cir. 2009) to support the notion that "it is well settled that [appellate courts] cannot hear appeals directly from federal magistrates." *Id.* at 3 (internal quotation marks omitted).

This Petition presents the following issues:

1. Whether magistrate judges exceed the scope of their statutory authority by issuing orders which have the practical effect of granting or refusing injunctive relief.
2. Whether the panel's decision to dismiss Zinman's appeal, *sua sponte*, for lack of jurisdiction conflicts with this Court's binding precedent set forth in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), as well as several decisions which are also binding upon the Eleventh Circuit, including *United States v. Schultz*, 565 F.3d 1353 (11th Cir.

2009), *U.S. v. Desir*, 257 F. 3d 1233 (11th Cir. 2001), *U.S. v. Maragh*, 189 F.3d 1315 (11th Cir. 1999), and *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

3. Whether the panel's determination that it lacks jurisdiction to review the July 14th order conflicts with the binding precedent set forth by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).
4. Whether the panel's determination that it lacks jurisdiction to review the July 14th order conflicts with the binding precedent set forth by this Court in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).
5. Whether and to what extent litigants must be guaranteed access to courts, especially those challenging mask mandates upon religious grounds, during the so-called "COVID-19 pandemic."
6. Whether and to what extent litigants are entitled to the discovery of admissible evidence.

LIST OF PARTIES

All parties **do not** appear in the caption of the case on the cover page. A list of all parties to the proceeding in the court whose judgement is the subject of this Petition is as follows:

1. Bean, Benjamin, Counsel for Defendant-Appellee Nova Southeastern University and Counsel for Defendant-Respondent South Florida Stadium, LLC.
2. Beauchamp, Richard, Counsel for Defendant-Appellee Nova Southeastern University and Counsel for Defendant- Respondent South Florida Stadium, LLC.
3. Broward County, Defendant-Respondent.
4. Henry, Bertha, Defendant-Respondent.
5. Jarone, Joseph, Counsel for Defendants-Respondent Broward County and Bertha Henry.
6. Katzman, Adam, Counsel for Defendants-Respondents Broward County and Bertha Henry.
7. McIntosh, Kristen, Counsel for Defendants-Respondents Broward County and Bertha Henry.
8. Meyers, Andrew J., Counsel for Defendants-Respondents Broward County and Bertha Henry.
9. Miami-Dade County, Defendant-Respondent.
10. Morse, Lauren, Counsel for Defendant-Respondent Miami-Dade County.
11. Murray, David, Counsel for Defendant-Respondent Miami-Dade County.
12. Nova Southeastern University, Defendant-Respondent.
13. South Florida Stadium, LLC, Defendant–Respondent.
14. Zinman, Corey J., *pro se* Plaintiff-Petitioner.

RELATED CASES

1. *Zinman v. Nova Southeastern University et al.*, 0:21-cv-60723-RAR, U.S. District Court for the Southern District of Florida. Judgement entered September 15, 2021.
2. *Zinman v. Nova Southeastern University et al.*, 21-11711-J, U.S. Court of Appeals for the Eleventh Circuit.
3. *Zinman v. Nova Southeastern University et al.*, 21-12456-J, U.S. Court of Appeals for the Eleventh Circuit. Judgement entered September 23, 2021.
4. *Zinman v. Nova Southeastern University et al.*, 21-13476-JJ, U.S. Court of Appeals for the Eleventh Circuit.

TABLE OF CONTENTS

INDEX OF APPENDICES

TABLE OF AUTHORITIES

Caselaw

Caselaw

Caselaw

Statutes

Rules

OPINIONS BELOW

The opinion of the Eleventh Circuit panel dismissing Petitioner's July 26, 2021 appeal of the district court's July 14, 2021 order *sua sponte* for lack of jurisdiction appears at Appendix A (App. 1a-3a) and is not published in the Federal Reporter but is reprinted at 2021 U.S. App. LEXIS 28926. The panel's opinion denying Petitioner's Motion for Reconsideration (App. C; App. 5a-14a) appears at Appendix B (App. 4a) and is not published. The district court's July 14, 2021 order appears at Appendix D (App. 15a-16a) and is not published.

JURISDICTION

The judgement of the Eleventh Circuit was entered on September 23, 2021. A timely Motion for Reconsideration was denied by the panel on November 4, 2021, and a copy of the order denying the Motion appears at Appendix B (App. 4a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The relevant provisions of 28 U.S.C. § 636 are reproduced below:

* * *

(b)

(1) Notwithstanding any provision of law to the contrary—

(A) a judge may designate a magistrate judge to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law.

(B) a judge may also designate a magistrate judge to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

(C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

2. 28 U.S.C. § 1291 provides: "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States."

3. 28 U.S.C. § 1292(a)(1) provides that the courts of appeals shall have jurisdiction of appeals from: "Interlocutory orders of the district courts ... granting ... injunctions ..."

4. The First Amendment to the United States Constitution demands that: "Congress shall make no law respecting the establishment of religion, or prohibiting the free exercise thereof; or ... abridging the freedom ... to petition the Government for a redress of grievances."

5. The Fifth Amendment to the United States Constitution demands that: "No person shall ... be deprived of life, liberty, or property, without due process of law."

6. 28 U.S.C. § 1654 provides: "In all courts of the United States the parties may plead and conduct their own cases personally or by counsel as, by the rules of such courts, respectively, are permitted to manage and conduct causes therein."

7. The relevant provision of the Federal Rules of Civil Procedure is reproduced below:

RULE 26

* * *

(b) DISCOVERY SCOPE AND LIMITS.

(1) *Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

STATEMENT OF THE CASE

I. THE COMPLAINT

Petitioner, Corey J. Zinman ("Zinman"), was duly enrolled in the Nova Southeastern University ("NSU") Shepard Broad College of Law when it made the decision to implement a mask mandate during the Fall 2020 semester. On or about December 25, 2020, Zinman began requesting religious accommodations from NSU so that he could participate in the University's Criminal Justice Field Placement Clinic the following semester without being required to wear a mask. On or about December 30, 2020, Zinman received notice from NSU that the University had decided not to extend him an accommodation. However, on the same day, Zinman was made aware that some of the law offices participating in the clinic were going to be operating remotely and therefore some internships would be completed virtually. At that point, Zinman renewed his request for an accommodation which would've allowed him to participate in the clinic remotely. Nevertheless, on December 31, 2020, Zinman received a letter from NSU Shepard Broad College of Law Dean Juárez Jr. stating that participation in the clinic was optional and further advising him that if he failed to either complete the required hours at the office that he had been assigned to, or in the alternative, failed to register for another clinic/alternative coursework by the end of the add/drop period on January 10, his graduation from the College of Law would've been delayed. As such, to avoid being forced to sacrifice his religious beliefs to timely graduate, Zinman withdrew from the clinic, enrolled in alternative coursework, and requested that the University amend its campus guidelines so that Zinman could attend his classes in-person without being required to wear a mask. However, that request was likewise denied as well. Thus, on April 2, 2021, Zinman filed a Complaint against Respondent NSU for compensatory, declaratory, and injunctive relief. Furthermore, Zinman asserted a claim against Respondent South Florida Stadium ("SFS") for injunctive relief to prevent it from excluding him from participation in NSU's commencement ceremonies which were to be hosted at Hard Rock Stadium in May of 2021 due to his religious objection to complying with mask mandates.

Moreover, on April 6, 2021, Zinman filed an Amended Complaint adding claims against Respondents Bertha Henry, Broward County, and Miami-Dade County as well.

II. THE SECOND AMENDED COMPLAINT

On May 26, 2021, Zinman filed a Second Amended Complaint. The principal difference between the Second Amended Complaint and the Amended Complaint is that the former included allegations that Respondent SFS selectively enforced its mask policy against Zinman while failing to do so for countless other similarly situated individuals who were allowed to participate in NSU's commencement ceremonies at Hard Rock Stadium without being required to wear a mask, and further that Respondent SFS hosted a boxing exhibition at Hard Rock Stadium less than three weeks later wherein countless others were likewise permitted to attend without wearing a mask as well.

III. MOTION FOR PROTECTIVE ORDER

On July 7, 2021, Respondent SFS served Zinman with a motion for a protective order regarding Zinman's request for production of "surveillance footage from all commencement ceremonies hosted by Hard Rock Stadium in May of 2021," in addition to "surveillance footage from the Floyd Mayweather/Logan Paul fight hosted by Hard Rock Stadium on Sunday, June 6, 2021." *See* Renewed Motion for Protective Order (App. H; App. 41a-56a). The next day, United States Magistrate Judge Jared M. Strauss ("Judge Strauss") entered a paperless Order scheduling an in-person hearing on Respondent's Motion for July 14, 2021, and further indicating that any response to the motion should be filed by July 13, 2021. *See* July 8th Order (App G; App. 39a-40a).

IV. THE JULY 14TH HEARING AND JUDGE STRAUSS'S ORDER

On the morning of July 14, 2021, Zinman made several attempts to contact Judge Strauss's chambers to request an accommodation allowing him to appear remotely at the discovery hearing which had been set to take place at 3 p.m. that day. *See* Order Denying Zinman's Request to Attend Hr'g Remotely (App. F; App. 37a-38a). Notwithstanding, as Judge Strauss stated at the hearing, he "did not grant Mr. Zinman's request for a couple of different reasons." *See* July 14th Mot. Hr'g Tr.

(App. E; App. 17a-36a) at 8:9-10. Towards that end, Judge Strauss noted that "the request came on the day of the hearing, despite that hearing having been set six days earlier and Mr. Zinman apparently getting notice of the hearing ... in a very simple order that very clearly and in bold language indicated that it would be in person." *Id.* at 8:11-15. Additionally, Judge Strauss emphasized that Zinman's "request came through an ex parte communication with chambers rather than through a motion filed on the docket and without any proper conferral with opposing counsel." *Id.* at 8:16-19. Thus, according to Judge Strauss, "based solely on the process ... of having received the request at the time we did and in the manner that we did, it did not appear to [be] a request that we could grant at such a late time." *Id.* at 8:20-23.

At the July 14th hearing, attorney for Respondents NSU and SFS, Mr. Benjamin Bean, asserted that there are "approximately 85,500 hours of footage" responsive to Zinman's request for production of surveillance footage, and further that "the cost of preserving ... [such] footage would cost well more than $20,000." *Id.* at 14:13-19. On that basis, Mr. Bean requested that the court "limit the required preservation to the cameras that were capturing the actual commencement ceremony." *Id.* at 15:15-18. Importantly, as Mr. Bean aptly noted, he had already proposed that limitation to Zinman prior to the hearing. *Id.* at 15:14. However, what Mr. Bean failed to disclose was that Zinman had consented to that limitation, albeit in part only. To be clear, although Zinman was in fact willing to limit the scope of production to footage from areas where patrons would've been present during the events in question, the fundamental disconnect between Mr. Bean and Zinman was with respect to whether Zinman was entitled to discovery of surveillance footage from any of the commencement ceremonies hosted by Hard Rock Stadium in May of 2021 outside of that for the NSU Shepard Broad College of Law, or any such footage from the Floyd Mayweather/Logan Paul boxing exhibition. Notwithstanding, at the hearing, Mr. Bean falsely represented to the court that Zinman was seeking disclosure of approximately 85,500 hours of footage from all 650 surveillance cameras at Hard Rock Stadium. *Id.* at 13:9-10. Upon that basis, Judge Strauss granted Defendant's motion "to the extent it

seeks a protective order relieving the defendant of its responsibility for preserving the video and other depictions of the ceremonies other than the Nova Southeastern commencement ceremonies," and also "to the extent it relieves them of the obligation to preserve the video or photograph footage of the Paul/Mayweather fight." *Id.* at 17:6-13. Notably, however, Judge Strauss seemingly expressed confusion with respect to "the scope of the ceremonies" in which Zinman sought surveillance footage from. *Id.* at 19:6-8. Compounding matters further, although Zinman's request for production clearly defined the scope of the surveillance footage in which he was seeking as "all commencement ceremonies hosted by Hard Rock Stadium *in May of 2021*," *id.* at 10:16-19 (emphasis added), including those for both Nova Southeastern University as well as University of Miami, Mr. Bean nevertheless took advantage of Judge Strauss's apparent confusion by falsely representing to him that Zinman's request failed to define the scope or to otherwise discuss the timing of the ceremonies in which he sought surveillance footage from, *id.* at 19:9-10. Consequently, although Judge Strauss originally ordered SFS to preserve surveillance footage from "the Nova Southeastern commencement *ceremonies*," *id.* at 17:9-10 (emphasis added), which, to be clear, took place over the course of multiple days, he ultimately narrowed the scope of its duty to preserve surveillance footage from "an hour before the ceremonies began to an hour afterwards and everything in between" on the day of the ceremony for the NSU Shepard Broad College of Law, *id.* at 19:15-18.

V. THE PANEL'S DECISION TO DISMISS ZINMAN'S APPEAL OF THE JULY 14TH ORDER

Unaware that he had a statutory right to appeal the July 14th Order directly to the district court, on July 21, 2021, Zinman filed a Notice of Appeal to the Eleventh Circuit. However, on September 23, 2021, a panel of the Eleventh Circuit dismissed Zinman's appeal, *sua sponte*, for lack of jurisdiction before he had been allowed an opportunity to brief any of the issues that he intended to raise regarding the July 14th order. *See* Order Dismissing Appeal for Lack of Jurisdiction (App. A; App. 1a-3a). In holding that the Court "lack[ed] jurisdiction over this appeal," the panel placed undue emphasis upon the fact that "Appellant did not first appeal the magistrate judge's decision to the

district court." *Id.* at 2-3. Towards that end, the panel relied upon *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982) to suggest that "the order is neither final nor immediately appealable because the district court has not entered an order rendering the magistrate judge's decision final," as well as *United States v. Schultz*, 565 F.3d 1353, 1356 (11th Cir. 2009) to support the notion that "it is well settled that [appellate courts] cannot hear appeals 'directly from federal magistrates.'" *Id.* at 3

On October 13, 2021, Zinman filed a motion for reconsideration requesting that the panel vacate its September 23rd order and further grant Zinman leave to fully brief the issues presented by the district court's July 14th order. *See* Zinman's Mot. for Reconsideration (App. C; App. 5a-14a). Notwithstanding, on November 4, 2021, the panel denied Zinman's Motion in a single sentence order without addressing any of the issues raised by Zinman's motion, Respondents' response, or Zinman's reply to Respondents' response. *See* Order Denying Zinman's Mot. for Reconsideration (Exhibit I).

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S DECISIONS SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS, OR AT LEAST SANCTIONED SUCH A DEPARTURE BY THE MAGISTRATE JUDGE, AS TO CALL FOR AN EXERCISE OF THIS COURT'S SUPERVISORY POWER

A. The panel's decisions of September 23, 2021 and November 4, 2021 are in conflict with precedents from this Court as well as other decisions binding upon the Eleventh Circuit.

i. Magistrate judges lack authority to issue orders granting injunctive relief.

The jurisdiction and duties of federal magistrate judges are outlined principally in § 636 of Title 28 of the United States Code. *See Thomas v. Whitworth*, 136 F.3d 756, 758 (11th Cir. 1998). The statute, among other things, grants district judges the authority to assign certain pre-trial matters to magistrate judges. *See* 28 U.S.C. § 636(b)(1)(A). However, according to the plain language of § 636(b)(1)(A), magistrate judges are expressly prohibited from granting or refusing motions for injunctive relief. *Id.* By definition, injunctive relief comes by way of court order and directs one or both parties as to what they may or may not do. *See McGoldrick v. Bradstreet*, 397 F.Supp. 3d 1093,

1100 (S.D. Ohio 2019); *see also Birmingham Fire Fighters Ass'n 117 v. City of Birmingham*, 603 F.3d 1248, 1254 (11th Cir. 2010) (recognizing that "the classic definition of an injunction" is "a clear and understandable directive from the district court" that is enforceable and gives "some or all" of the relief sought by a party) (internal quotation marks omitted). Notably, this Court has long recognized that certain orders may have the practical effect of granting or refusing injunctive relief even though they did not expressly do so. *See Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981); *see also Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

Both § 636(b)(1)(A) and § 636(b)(1)(B) provide for proceedings to be held before a United States magistrate judge. *See* 28 U.S.C. § 636(b)(1)(A); *see also* 28 U.S.C. § 636(b)(1)(B). However, the chief difference between subparagraph (A) and (B) is that the former permits a magistrate judge "*to hear and determine* any pretrial matter pending before the court, *except a motion for injunctive relief*, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action," whereas the latter permits a magistrate judge "to conduct hearings ... and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A)." *See* 28 U.S.C. § 636(b)(1)(A); *see also* 28 U.S.C. § 636(b)(1)(B). Moreover, with respect to proposed findings of fact and recommendations issued under subparagraph (B), such findings and recommendations must be filed with the court and a copy must forthwith be mailed to all parties, and within ten days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations which must be reviewed de novo by a judge of the court. *See* 28 U.S.C. § 636(b)(1)(C).

In *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982), the Eleventh Circuit's predecessor Court held that "no limitation of the right to appeal ... and no limitation of the scope of

appeal ... shall result unless the magistrate informs the parties that objections must be filed within ten days after service of a copy of the magistrate's report is made upon them." *Id.* at 410. Notably, however, *Nettles* involved a magistrate judge's report and recommendation issued under § 636(b)(1)(B), not a pretrial order issued under § 636(b)(1)(A). Although the subparagraphs are similar in some ways, subparagraph (B) carries a ten-day time limit on appeals to the district court, whereas subparagraph (A) does not. *See United States v. Schultz*, 565 F.3d 1353, 1361-62 (11th Cir. 2009). As the Eleventh Circuit aptly noted in *Schultz*, "[t]he reason that the *Nettles* court adopted the notice requirement was to give the parties fair warning that § 636(b)(1)(B) required any objection to be filed within ten days of receiving a copy of the magistrate judge's report and recommendation. *Id.* at 1362 (citing *Nettles*, 677 F.2d at 408); *see also United States v. Jacqueline Brown*, 342 F.3d 1245, 1246, 1260 n. 10 (11th Cir. 2003) (observing that subparagraph (A), unlike subparagraph (B), does not require parties to receive a copy of the magistrate judge's findings). As such, in *Schultz*, the Eleventh Circuit held that "there is no logical reason to extend *Nettles'* notice requirement" to pretrial orders issued under § 636(b)(1)(A). *See Schultz*, 565 F.3d at 1362. Additionally, several other circuits, while agreeing with *Nettles* that notice of the time limit is required for dispositive motions, have concluded that notice is not required for non-dispositive orders issued under § 636(b)(1)(A). *See*, e.g., *Caidor v. Onondaga County*, 517 F.3d 601, 604-05 (2d Cir. 2008) (limiting its notice requirement to dispositive recommendations issued under § 636(b)(1)(B), and declining to extend such a requirement to non-dispositive orders issued under § 636(b)(1)(A)); *United States v. Akinola*, 985 F.2d 1105, 1108 (1st Cir. 1993) ("Moreover, as we pointed out during oral argument, even when such a warning is required, it is necessary only as part of a Magistrate Judge's report and recommendation to the district judge, 28 U.S.C. § 636(b)(1)(B), (C), and not when the Magistrate Judge issues a non-dispositive order [under § 636(b)(1)(A)]").

In holding that it "lack[s] jurisdiction over this appeal," the panel placed undue emphasis upon the fact that "Appellant did not first appeal the magistrate judge's decision to the district court."

See App. A at 2-3. Towards that end, the panel relied upon *Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982) to suggest that "the order is neither final nor immediately appealable because the district court has not entered an order rendering the magistrate judge's decision final," as well as *United States v. Schultz*, 565 F.3d 1353, 1356 (11th Cir. 2009) to support the notion that "it is well settled that [appellate courts] cannot hear appeals 'directly from federal magistrates.'" *Id.* at 3. As an initial matter, however, when the Eleventh Circuit stated in *Sarasota Concrete Co.* that "[d]ecisions by a magistrate pursuant to 28 U.S.C. § 636(b) are not final orders and may not be appealed until rendered final by a district court," it did so within the context of non-dispositive pretrial orders issued under § 636(b)(1)(A), as opposed to proposed findings of fact and recommendations issued under § 636(b)(1)(B). *See Sarasota Concrete Co.*, 693 F.2d at 1066-67. Additionally, in *Schultz*, the Eleventh Circuit explicitly noted that appellate courts have jurisdiction to "review challenges to a magistrate judge's authority even when the [appellant] has not objected in the district court," albeit "only for plain error." *See Schultz*, 565 F.3d at 1356 (citing *U.S. v. Desir*, 257 F. 3d 1233, 1235 (11th Cir. 2001)); *see also U.S. v. Maragh*, 189 F.3d 1315, 1318 (11th Cir. 1999) ("This court may directly review the merits of a challenge to a magistrate judge's authority to conduct critical matters of a defendant's trial, even though the defendant failed to object to the procedure in the district court"). In doing so, the court relied heavily upon *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962) wherein this Court endorsed the exercise of appellate jurisdiction to consider fundamental judicial administration without regard to whether an alleged defect was raised at the earliest practicable opportunity. *Id.* at 536. Notwithstanding, in denying Zinman's Motion for Reconsideration, the panel neglected to explain why it wouldn't review Zinman's challenge to Judge Strauss's authority to issue the July 14th order. *See* App. B (App. 4a).

Although Respondent SFS's motion was technically described as a "motion for a protective order," as opposed to a motion for injunctive relief, it ultimately sought to enjoin Zinman from being able to obtain discovery of surveillance footage from any of the commencement ceremonies hosted

by Hard Rock Stadium in May of 2021 outside of that for the NSU Shepard Broad College of Law, or any such footage from the Floyd Mayweather/Logan Paul boxing exhibition. See App. H at 5 (App. 45a). As such, in contrast to the pretrial order at issue in *Schultz*, Judge Strauss's July 14th order granting all of the ultimate relief sought by SFS had the practical effect of an injunction relieving Respondent SFS of any duty to preserve such footage in violation of § 636(b)(1)(A). *See McGoldrick*, 397 F.Supp. 3d at 1100; *see also Birmingham Fire Fighters Ass'n 117*, 603 F.3d at 1254. As such, the panels reliance upon the Eleventh Circuit's decision in *Schultz* is misguided on that basis alone. Notwithstanding, even if Judge Strauss had followed the correct procedure by submitting proposed findings of fact and recommendations to an Article III judge for final disposition of Respondent SFS's motion, under *Nettles*, no limitation upon Zinman's right to appeal such findings and recommendations could've resulted unless he was informed that objections must be filed in the district court within ten days after service of a copy of the magistrate's report was made upon him. *See Nettles*, 677 F.2d at 410. Accordingly, given that Judge Strauss not only failed to follow the correct procedure by issuing a final decision regarding Respondent's motion rather than submitting proposed findings of fact and recommendations to an Article III judge, but also failed to inform Zinman of his statutory right to appeal to the district court and of the consequences that would result if he failed to exercise that right, the panel's decision to dismiss Zinman's appeal of the July 14th order, *sua sponte*, for lack of jurisdiction because Zinman failed to object in the district court conflicts with this Court's decision in *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962), as well as several decisions which are also binding upon the Eleventh Circuit, including *United States v. Schultz*, 565 F.3d 1353 (11th Cir. 2009), *U.S. v. Desir*, 257 F. 3d 1233 (11th Cir. 2001), *U.S. v. Maragh*, 189 F.3d 1315 (11th Cir. 1999), and *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982).

ii. ***Rulings which conclusively decide an important issue separate from the merits of the case and would effectively be unreviewable upon final judgment are immediately appealable under 28 U.S.C. § 1291.***

While 28 U.S.C. § 1291 grants jurisdiction over "final decisions," this Court has long given § 1291 a "practical rather than a technical construction." *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546-47 (1949). As such, courts of appeals have jurisdiction under § 1291 not only over decisions which end litigation on the merits, but also over a "narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as final." *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (internal quotation marks and citation omitted). However, the latter category comprises only those decisions which are (1) conclusive, (2) that resolve important questions completely separate from the merits, and (3) that would render such important questions effectively unreviewable on appeal from final judgment in the underlying action. *Id.* at 867-68.

In *Cohen*, this Court held that a district court's order refusing to apply a state statute which makes the plaintiff, if unsuccessful, liable for the reasonable expenses, including attorney's fees, of the defense and entitles the corporation to require security for their payment, was immediately appealable "because it is a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it." *See Cohen*, 337 U.S. at 546-47.

In *Jackson v. Vasquez*, 1 F.3d 885 (9th Cir. 1993), the Ninth Circuit held that an order requiring the State, at its expense, to transport a potential habeas corpus petitioner to a medical facility for a brain scan met the second and third requirements of the collateral order doctrine. *Id.* at 888. With respect to the second requirement, the court noted that:

> The transportation order also resolves an important issue that is completely separate from the merits of the underlying action. The decision that the Warden appeals here is the district court's determination that it possessed the legal authority to issue the transportation order. The Warden's claims present pure questions of law that can be reviewed without reference to the merits of Jackson's habeas corpus petition. The transportation order is not a mere step toward final disposition of Jackson's claims, but rather it "'plainly presents an important issue separate from the merits'" of the habeas petition.

Id. (citations omitted).

"The third condition of the collateral order doctrine, which asks whether a right or claim can be vindicated adequately on appeal following final judgment, simply cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *See SmileDirectClub, LLC v. Battle*, 2021 U.S. App. LEXIS 21393, *14 (11th Cir. 2020) (citation and internal quotation marks omitted). "The decisive consideration is whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Id.* (citation and internal quotation marks omitted). "In determining the answer to this question, the focus is not on the specific case under consideration, but rather on the entire category to which a claim belongs." *Id.* (citation and internal quotation marks omitted). "The crucial question . . . is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Id.* (citation omitted).

As was the case with the district court's order at issue in *Cohen*, here the July 14th order is immediately appealable because it's a final disposition of a claimed right—namely, whether Zinman was entitled to discovery of surveillance footage from any of the commencement ceremonies hosted by Hard Rock Stadium in May of 2021 outside of that for the NSU Shepard Broad College of Law, or any such footage from the Floyd Mayweather/Logan Paul boxing exhibition. *See Cohen,* 337 U.S. at 546-47. Furthermore, what the Ninth Circuit held with respect to the transportation order at issue in *Jackson* applies with equal force to the protective order at issue in the case at bar. To be clear, the decision that Zinman sought to appeal was Judge Strauss's arbitrary determination that he possessed the legal authority to issue an order limiting Zinman's right to discovery of relevant evidence in the first place, especially without at least granting him an adequate, effective, and meaningful opportunity to be heard on the matter. As such, the July 14th order plainly presents an important issue

that is completely separate from the merits of the underlying action. Zinman's appeal of the July 14th order therefore presents pure questions of law which can be reviewed without reference to the merits of Zinman's complaint.

Lastly, due to Judge Strauss's failure to follow the correct procedure by issuing a final decision regarding Respondent SFS's motion rather than submitting proposed findings of fact and recommendations to an Article III judge, in addition to his failure to inform Zinman of his statutory right to appeal directly to the district court and of the consequences which would result if he failed to exercise that right, Zinman was operating under the belief that if he failed to file a notice of appeal within 30 days after entry of the July 14th order that he would've effectively waived any challenge that he may have had to Judge Strauss's decision to schedule an in-person hearing knowing that Zinman wouldn't be able to attend and to impose an accelerated briefing schedule upon him despite knowing that he was proceeding pro se and was also busy studying for the Florida Bar Exam at the time, in addition to Judge Strauss's arbitrary refusal to allow Zinman to attend the hearing remotely, as well as to the substantive merits underlying the order itself. As such, Zinman reasonably believed that delaying review of the July 14th order would've imperiled several substantial public interests—namely, the publics distinct interest in meaningful access to the courts, especially within the context of remedial statutes, particularly those involving civil rights, which rely "largely on lay persons, operating without legal assistance, to initiate and litigate administrative and judicial proceedings." *See Goodman v. District of Columbia Rental Hous. Comm'n*, 573 A.2d 1293, 1299 (D.C. 1990). Moreover, given that Hard Rock Stadium's policy is to only retain surveillance footage for 60 days, *see* App. E at 13:6-8 (App. 29a), and because it had already been well over 30 days since the commencement ceremonies in addition to the Floyd Mayweather/Logan Paul boxing exhibition by the time of the hearing and entry of the July 14th order, Zinman's right to discovery of surveillance footage from those events would've been effectively unreviewable upon final judgement. Thus, it's clear that the July 14th order falls within that small class of rulings which are sufficiently final to

satisfy the requirements of § 1291 and to warrant collateral review on appeal. As such, the panel's determination that it lacked jurisdiction to review the July 14th order conflicts with the rule set forth by this Court in *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

iii. Orders which have the practical effect of granting injunctive relief are immediately appealable under 28 U.S.C. § 1292(a)(1).

It's axiomatic that if a court does not act until a trial on the merits of the cause of action, the party seeking relief may be irreparably harmed in the interim. *See Alabama v. U.S. Army Corps of Engineers*, 424 F.3d 1117, 1128 (11th Cir. 2005). As such, Congress has created exceptions to the rule that an appeal will lie only after final judgment. *See Bodinger*, 348 U.S. at 181. One of these exceptions permits appeal as of right from "[i]nterlocutory orders of the district courts ... granting, continuing, modifying, refusing or dissolving injunctions." *See* 28 U.S.C. § 1292 (a)(1). Towards that end, two strands of analysis have developed for 1292(a)(1) appeals: the first applies to orders ruling on express motions for injunctive relief and the second applies to orders with the "practical effect" of granting or refusing an injunction. *See MAI Basic Four, Inc. v. Basis, Inc.*, 962 F.2d 978, 982 (10th Cir. 1992) (citing *Tri-State Generation & Transmission Ass'n v. Shoshone River Power, Inc.*, 874 F.2d 1346, 1351 (10th Cir. 1989)). An interlocutory order expressly denying or granting an injunction fits squarely within the plain language of § 1292(a)(1) and need not make the additional showings required in the second strand of analysis. *See Tri-State Generation*, 874 F.2d at 1351. However, for appellate jurisdiction to exist under the second strand of analysis, this Court requires that the challenged order have (1) "the practical effect of refusing [or granting] an injunction," (2) threaten a "'serious, perhaps irreparable, consequence,'" and be (3) "'effectually challenged'" only by immediate appeal. *See Carson*, 450 U.S. at 84 (citing *Bodinger*, 348 U.S. at 181). Thus, courts customarily deny review of protective orders that do not grant any of the ultimate relief sought by a party if neither party can show any damage from the order. *See Fonar Corp. v. Deccaid Services, Inc.*, 983 F.2d 427, 430 (2d Cir. 1993).

Although Respondent's motion was technically described as a "motion for a protective order," *see* App. H (App. 41a), the July 14th order nevertheless had the "practical effect" of granting injunctive relief to Respondent SFS and relieving it of its obligation to preserve relevant evidence responsive to Zinman's request for production. *See Fonar Corp.*, 983 F.2d at 430. As a direct result, Zinman was irreparably harmed by being deprived of the right to discovery of relevant evidence that would've tended to support his claim for discrimination against Respondents NSU and SFS. Thus, jurisdiction to review the July 14th order clearly exists under § 1292(a)(1). As such, the panel's decision to dismiss Zinman's appeal for lack of jurisdiction conflicts with this Court's decisions in *Carson v. American Brands, Inc.*, 450 U.S. 79, 84 (1981) and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955).

B. <u>The panel's decision to dismiss Zinman's appeal before allowing him an opportunity to brief any of the issues that he intended to raise regarding the July 14th order effectively sanctioned Judge Strauss's denial of Zinman's right of access to the courts.</u>

In *Chambers v. Baltimore & Ohio Railroad*, 207 U.S. 142 (1907), this Court explained that:

> The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship.

Id. at 148 (citations omitted). Furthermore, in *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609 (1972), this Court recognized that "[t]he right of access to the courts is indeed but one aspect of the right of petition." *Id.* at 612. Moreover, in *Bounds v. Smith*, 97 S.Ct. 1491 (1977), this Court made clear that a mere formal right of access to the courts does not pass constitutional muster; rather, access must be "adequate, effective, and meaningful." *Id.* at 1495.

As a direct result of Judge Strauss's decision to schedule an in-person hearing knowing that Zinman was challenging the authority of corporations and governments to deny services to those for whom compliance with such mandates would conflict with their sincerely held religious beliefs, and to impose an accelerated briefing schedule upon him even though S.D. Fla. L.R. 7.1(c)(1) grants "each party opposing a motion ... fourteen days after service of the motion" to file and serve an

opposing memorandum of law and despite knowing that he was proceeding pro se and studying for the Florida Bar Exam at the time which was scheduled to take place just two weeks later on July 27-28, 2021, in addition to Judge Strauss's arbitrary refusal to allow him to attend the hearing remotely, Zinman was wrongfully deprived of an adequate, effective, and meaningful opportunity to be heard regarding Respondent SFS's motion prior to the issuance of the July 14th order in violation of the First and Fifth Amendments to the United States Constitution, as well as 28 U.S.C. § 1654. Accordingly, because Zinman's appeal of the July 14th order presented one or more questions of the utmost constitutional importance—namely, whether and to what extent litigants must be guaranteed access to courts, especially those challenging mask mandates upon religious grounds, during the so-called COVID-19 pandemic—the panel's decision to dismiss Zinman's appeal of the July 14th order before allowing him an opportunity to brief any of the issues that he intended to raise effectively sanctioned Judge Strauss's unlawful denial of Zinman's right of access to the courts.

C. The panel's decision to dismiss Zinman's appeal before allowing him an opportunity to brief any of the issues that he intended to raise regarding the July 14th order effectively sanctioned Judge Strauss's denial of Zinman's right to discovery of admissible evidence.

Under Federal Rule of Civil Procedure ("FRCP") 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." *See* Fed. R. Civ. P. 26(b)(1). The key phrase in this definition—relevant to the claim or defense of any party—has been construed broadly to encompass any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case. *See Hickman v. Taylor*, 329 U.S. 495, 501 (1947). Nevertheless, "discovery, like all matters of procedure, has ultimate and necessary boundaries." *Id.* at 501. Towards that end, generally, discovery of matter not "reasonably calculated to lead to the discovery of admissible evidence" is not within the scope of Rule 26(b)(1). *See Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 (1978).

Although Judge Strauss correctly noted that "Rule 26(b) limits the scope of discovery to matters that are relevant and proportional to the needs of the case," *see* App. E at 16:7-8 (App. 32a),

he nevertheless abused his discretion by limiting Zinman's right to discovery of surveillance footage from any of the commencement ceremonies hosted by Hard Rock Stadium in May of 2021 outside of that for the NSU Shepard Broad College of Law, or any such footage from the Floyd Mayweather/Logan Paul boxing exhibition upon the basis that he could not "conceive how [Zinman] will be able to review, much less make use of that amount of footage," *id.* at 16:25, *id.* at 17:1 (App. 32a-33a). To be clear, Judge Strauss's arbitrary perception of Zinman's ability to make use of the surveillance footage at issue was not the proper test for determining whether Zinman was entitled to discovery of such footage; rather, the proper test is whether Zinman's request for production was "reasonably calculated to lead to the discovery of admissible evidence." *See Akridge v. Alfa. Mut. Ins. Co.*, 1 F.4th 1271, 1276 (11th Cir. 2021) (*quoting Degen v. United States*, 517 U.S. 820, 825–26 (1996) (recognizing that civil litigants are generally entitled to "any information sought if it appears reasonably calculated to lead to the discovery of admissible evidence")).

Additionally, given that the requested surveillance footage would've shown countless people patronizing Hard Rock Stadium unmasked, it was therefore relevant to proving an essential element of Zinman's Title II claims against Defendants NSU and SFS; namely, whether Zinman was denied the full benefits or enjoyments of a public accommodation which were available to similarly situated persons outside of his protected class who received full benefits or who were otherwise treated better. *See Benton v. Cousins Props.*, Inc., 230 F. Supp. 2d 1351, 1382 (N.D. Ga. 2002), aff'd, 97 F. App'x 904 (11th Cir. 2004); *see also Dozier v. Waffle House, Inc.*, No. 1:03-CV-3093-ODE, 2005 WL 8154381, at *7 (N.D. Ga. May 4, 2005) ("In order to satisfy the fourth prong of the prima facie case, Plaintiffs must show that Mr. Steward treated Plaintiffs less favorably with regard to the allegedly discriminatory act than he treated other similarly situated persons who were outside Plaintiffs' protected class"). Notably, in *Afkhami*, the plaintiffs sued pursuant to 42 U.S.C. § 2000a after being removed from a Carnival cruise ship for boarding the ship with fifty to sixty live bees. *See Afkhami v. Carnival Corp*, 305 F. Supp. 2d 1308, 1313-314 (S.D. Fla. 2004). In dismissing the plaintiffs'

complaint, the Southern District of Florida held that the plaintiffs were required to "identify Carnival passengers who also brought live animals on board a Carnival ship in violation of their ticket contracts and without prior permission and were not removed after Carnival learned of the circumstances." *Id.* at 1322 ("This is what Plaintiffs are required to show because these are the relevant aspects of Plaintiffs' conduct that Carnival was confronted with when it made the decisions in question"). Importantly, however, the court did not hold that the plaintiffs were required to identify Carnival passengers who brought live animals upon but were not removed from the same exact Carnival ship that the plaintiffs were also removed from. Presumably, had the plaintiffs identified passengers who brought live animals upon but were not removed from a different Carnival ship, they would've sufficiently met their burden to show that similarly situated persons outside of their protected class were treated better. Thus, applying the same logic, surveillance footage from the NSU commencement ceremonies outside of that for the Shepard Broad College of Law, as well as such footage from the Floyd Mayweather/Logan Paul boxing exhibition showing unmasked individuals receiving services and benefits that Zinman was in fact denied would've sufficiently proven an essential element of Zinman's Title II claims against Defendants NSU and SFS. As such, it was a flagrant abuse of discretion for Judge Strauss to arbitrarily limit Zinman's right to discovery of relevant evidence upon the basis of non-judicially recognized factors. *See United States v. Welsh*, 879 F.3d 530, 536 (4th Cir. 2018) (recognizing that a district court abuses its discretion where it "has acted arbitrarily or irrationally[,] ... has failed to consider judicially recognized factors constraining its exercise of discretion, or when it has relied on erroneous factual or legal premises") (internal quotation marks omitted). Compounding matters further, the panel's decision to dismiss Zinman's appeal, *sua sponte*, before allowing him an opportunity to brief any of the issues that he intended to raise regarding the July 14th order effectively sanctioned Judge Strauss's arbitrary and unlawful denial of Zinman's right to the discovery of evidence relevant to the subject matter of the pending action.

CONCLUSION

For the foregoing reasons, Zinman respectfully requests that this Honorable Court grant this Petition.

Respectfully submitted,

Corey J. Zinman
E-Mail: cb2770@mynsu.nova.edu
175 Sedona Way,
Palm Beach Gardens, FL 33418
Telephone: (561) 566-9253
Pro Se Petitioner