NO. 21-6359

In The
Supreme Court of the United States

COREY ZINMAN,

Petitioner,

v.

NOVA SOUTHEASTERN UNIVERSITY, INC., ET AL,

Respondents.

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

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTER STATEMENT OF QUESTION PRESENTED

Generally, United States Courts of Appeals shall only have jurisdiction to hear appeals from final decisions of district courts or appeals from interlocutory orders granting, continuing, modifying, refusing or dissolving injunctions. The question presented is whether the Eleventh Circuit Court of Appeals' decision to dismiss Petitioner's appeal for lack of jurisdiction was in conflict with established precedents of the Supreme Court and/or other Circuit Courts of Appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF THE CASE

In early spring of 2020, businesses across the world were forced to take decisive and informed action to respond to the Covid-19 pandemic (the "Pandemic"). South Florida Stadium LLC ("SFS") has taken extensive measures to provide a safe environment for guests at Hard Rock Stadium, a world-class facility and home of the Miami Dolphins, University of Miami Hurricanes, the Miami Open and other global events. As an initial response to the Pandemic, SFS instituted a social distancing and mandatory face mask policy for all events occurring on Hard Rock Stadium property.

During this time, Petitioner, Corey Zinman ("Petitioner"), was a student at the Nova Southeastern University ("NSU") Shepard Broad College of Law (the "College"). Petitioner had previously requested from NSU a religious exemption to NSU's then mandatory mask policy. Petitioner's request was denied by NSU. Nevertheless, Petitioner apparently wished to attend the College's commencement ceremony at Hard Rock Stadium the morning of May 16, 2021 (the "Commencement") without wearing a face covering. Rather than request a specific exemption from NSU and/or SFS (SFS and NSU, together, the "Commencement Parties") to attend the Commencement without wearing a face covering, Petitioner filed suit against the Commencement Parties, among others, in the United States District Court for the Southern District of Florida.

Petitioner filed his Second Amended Complaint on May 27, 2021. Thereafter, Petitioner served his First Request for Production of Documents and Other Things upon SFS and NSU (the "Commencement Defendants"). Petitioner requested an estimated 85,800 hours of footage from approximately 650 cameras from SFS. In response to the overly broad nature of

the request, SFS filed its Renewed Motion for Protective Order on July 7, 2021 (the "Motion"). R. 41a-56a.[1]

A hearing was held on the Motion, which ultimately resulted in the order issued by the the Honorable Magistrate Judge, Jared M. Strauss, granting the Motion (the "July 14th Order"). R. 15a-16a. In granting the Motion, the District Court followed the correct standard, finding that SFS was entitled to the issuance of a protective order after Petitioner was properly notified of the hearing yet failed to appear or file a response to the Motion.

Petitioner appealled the July 14th Order; however, the Eleventh Circuit dismissed the appeal, *sua sponte,* finding it lacked jurisdiction over the matter, consistent with established case law. R. 1a-3a. Specifically, the July 14th Order was neither a final order nor immediately appeallable as the case was still pending before the district court and the district court had not entered an order rendering the Magistrate Judge's decision final. 28 U.S.C. 1291; *World Fuel Corp. v. Geitherner*, 568 F. 3d 1345, 1348 (11th Cir 2009); *Donovan v. Sarasota Concerte Co.*, 693 F.2d 1061, 1066-67 (11th Cir. 1982). Additionally, the Petitioner failed to "appeal the Magistrate Judge's deicision to the district court, which deprived the distict court of an opportunity to effectively review the Magistrate's order" and it is well-settled law that courts of appeal may not hear appeals directly from federal magistrates. *United States v. Schultz*, 565 F.3d 1353, 1359 (11th Cir. 2009). R. 3a.

Petitioner filed a Petition for Reconsideration, which was denied. R. 4a. Subsequently, Petitioner filed a Petition for *En Banc* Rehearing; however, the Eleventh Circuit advised that no successive reconsiderations were permitted.

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[1] References to the record shall be made by referring to the page number. For example, "R. Page Number."

THE PETITION SHOULD BE DENIED

I. THE PETITION FAILS TO RAISE AN ISSUE OF IMPERATIVE PUBLIC IMPORTANCE IN NEED OF PROMPT RESOLUTION

The purpose of a petition for writ of certiorari is to request that this Court review a judgment or decree from a federal court of appeals. 28 U.S.C. 1254; *see also United States v. Young*, 94 U.S. 258, 259 (1876) ("the writ of certiorari is used. . . as an appellate proceeding for the re-examination of some action of an inferior tribunal."); *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 30 (1993) ("Cases in the courts of appeals may be reviewed by the Supreme Court. . .by writ of certiorari."); *Jeffries v. Barksdale*, 453 U.S. 914, 915 (1981) (Rehnquist, W., dissenting) ("certiorari jurisdiction. . .extends only to '[c]asses in the courts of appeals.").

This Court's Rule 11 provides that a petition for a writ of certiorari to review a case pending in a United States Court of Appeals prior to judgment is only appropriate where "the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination." U.S. Sup. Ct. R. 11. This is a strict standard. *United States v. Higgs*, 141 S. Ct. 645, 648 (2021) (Sotomayor, S., dissenting). If a petitioner wishes to bring a petition filed under this Court's Rule 11, they must indicate so in the petition, pursuant to this Court's Rule 14(1)(e)(i).

The Supreme Court will exercise its "power of swift intervention in cases of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons. Under this procedure, the [Supreme] Court has the discretion

to limit immediate review to exceptional cases and to leave initial review of most matters in the courts of appeals." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 351 (1985) (Brennan, W., dissenting).

Petitioner fails to identify any issue of imperative public importance relative to the Court of Appeals' dismissal of his appeal. Rather, Petitioner primarily seeks to reargue the merits of the July 14th Order. Critically, the majority of the arguments Petitioner sets forth have not yet been considered by the Eleventh Circuit. Indeed, the only matter the Eleventh Circuit ruled on was whether it had jurisdiction to hear the appeal of the July 14th Order. R. 1a-3a. By no means did the Eleventh Circuit consider the merits of the July 14th Order, or other issues raised by Petitioner for the first time, such as whether the Petitioner was denied access to the courts or whether Petitioner was denied the right to discover relevant evidence with the issuance of the July 14th Order.

Consequently, Petitioner has failed to identify any reason, let alone one of imperative public importance, which would warrant the need for a prompt resolution by this Court.

Such issues should be considered by the Eleventh Circuit accompanying an appeal of a final judgment. This Court's consideration of whether to grant the Petition must be limited to the jurisdictional issues addressed by the Eleventh Circuit.

II. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT OR OTHER CIRCUITS

The Rules of this Court provide that review on writ of certiorari is subject to judicial discretion. U.S. Sup. Ct. R. 10. A primary function of the Supreme Court is "to resolve 'important matter[s]' on which the courts of appeals are 'in conflict.'" *Gee v. Planned Parenthood of Gulf Coast, Inc.*, 139 S. Ct. 408 (2018)

(Thomas, C., dissenting); *see also Wexford Health v. Garrett*, 140 S. Ct. 1611, 1612 (2020) (Thomas, C., dissenting) (where a court presents "an important question that has divided the circuits, it serves our review."). "The principal purpose of [the Supreme Court's] exercise of its certiorari jurisdiction is to clarify the law." *Cash v. Maxwell*, 132 S. Ct. 611, 612-13 (2012).

Such review shall only be granted for compelling reasons. Rule 10 provides that the Supreme Court will consider a writ where:

> "A United States courts of appeals... has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of [the Supreme Court's] supervisory power."

U.S. Sup. Ct. R. 10. This occurs where there is a "departure. . . from the procedure followed in addressing statutory and constitutional questions." *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 570 (1979). A petitioner is required to provide in their petition for writ of certiorari a "direct and concise argument amplifying the reasons relied on for allowance of the writ." U.S. Sup. Ct. R. 14(1)(h).

A petition of writ of certiorari is rarely granted for "erroneous factual findings or the misapplication of a properly stated rule of law." U.S. Sup. Ct. R. 10. "Even when we suspect error, we may have many reasons to not grant certiorari outright in a case. . . a reluctance to correct 'the misapplication of a properly stated rule of law.'" *Youngblood v. W. Virginia*, 547 U.S. 867, 873 (2006) (Scalia, A., dissenting).

A. The July 14th Order does not grant injunctive relief nor does it have the "practial effect" of granting injunctive relief.

Petitioner is unable to demonstrate how the Eleventh Circuit is in conflict with Supreme Court and/or Eleventh Circuit precedent as it pertains to the magistrate's decision on the Motion and the subsequent dismissal of the appeal of such order. Petitioner suggests the Eleventh Circuit erred in its classification of the Motion. Petitioner is correct in that magistrate judges have the right to "hear and determine any pretrial matters pending before the court except for a motion for injunctive relief." *See* 28 USC §636(b)(1)(A). However, Petitioner's argument fails because the July 14th Order was neither an injunction nor had the practical effect of an injunction. Rather, the July 14th Order was a common protective order, granted in cases every day in district courts across the country.

Petitioner argues that "although Respondent SFS's motion was technically described as a 'motion for a protective order,' it ultimately constituted a motion for injunctive relief." Pet. Pg. 10. Petitioner asserts this is because "it ultimately sought to enjoin Zinman from being able to obtain discovery of surveillance footage." Pet. Pg. 10 – 11. Petitioner also states that the July 14th Order had the "practical effect" of granting injunctive relief, thus making it appealable under 28 U.S.C. § 1292(a)(1). However, Petitioner fails to identify any authority which would suggest that the Eleventh Circuit departed from the decisions of other circuits when it determined the order was based on a non-dispositive pre-trial motion.

In fact, Petitioner fails to identify any case equating discovery orders to injunctive relief. Indeed, while Petitioner argues that the case at hand conflicts with *Carson v. American Brands, Inc.,* 450 U.S. 79, 84 (1981) and *Baltimore Contractors, Inc. v. Bodinger*, 348 U.S. 176, 181 (1955), neither of these cases held that discovery orders are equivalent to injunctive relief.

Indeed, it is clear that a motion seeking a protective order is quite different than a motion for injunctive relief, and

they are accordingly subject to different standards. A protective order is a mechanism which allows courts to use their discretion in "limit[ing] the scope of discovery when the information sought is overboard or unduly burdensome." *In re Ohio Execution Protocol Litig.*, 845 F.3d 231, 236 (6th Cir. 2016). An injunction is "a clear and understandable directive from the district court. . . enforceable through contempt proceedings, and it. . . [gives] some or all of the substantive relief sought in the complaint." *Birmingham Fire Fighters Ass'n 117 v. City Of Birmingham, AL*, 603 F.3d 1248, 1254 (11th Cir. 2010).

At no point in time did Respondent move for injunctive relief, nor could Respondent obtain relief which was requested by Petitioner in the Second Amended Complaint. Rather, the Motion sought a common discovery order limiting the scope of the documents requested by Petitioner that Respondent was required to maintain.

Petitioner does not appear to appreciate the difference between a court's decision which conflicts with other circuits' decisions and rearguing an alleged misapplication of law. For example, Petitioner argues that *United States v. Schultz*, 565 F.3d 1353, 1362 (11th Cir. 2009) is at conflict with the case at hand. However, as in this case, the Court in *Schultz* found that it did not have jurisdiction to consider an appeal of a pretrial discovery order because the party did not sufficiently appeal the order to the district court. *Id.* Petitioner cannot identify how these cases differ at all. Rather, he believes the law stated in *Schultz* was not applied appropriately in the Appeals Court's determination that the July 14th Order constituted a protective order rather than injunctive relief.

Petitioner also argues that the case at hand conflicts with *United States v. Schultz*; *U.S. v. Desir*, 257 F.3d 1233, 1235 (11th Cir. 2001); *U.S. v. Maragh*, 189 F.3d 1315, 1318 (11th Cir. 1999), *Glidden Co. v. Zdanok*, 370 U.S. 530 (1962)

and *Nettles v. Wainwright*, 677 F.2d 404 (5th Cir. Unit B 1982), asserting that such cases permit a party to immediately challenge an interlocutory order issued by a magistrate judge via appeal to a Court of Appeals. However, Petitioner is incorrect in his interpretation of these cases. The cited cases do not pertain to the immediate appeal of interlocutory orders but rather deal with issues which are part of final orders. Petitioner cannot appeal each of the Magistrate Judge's orders in a piecemeal fashion at this time. Rather, Petitioner may attempt to appeal such decisions as part of the appeal of the final order.

B. The July 14th Order is not appealable under the Collateral Order Doctrine

Petitioner argues that the case at hand conflicts with the "accepted and usual judicial proceedings" because the July 14th Order "falls within [a] small class of rulings which are sufficiently final to satisfy the requirements of [28 U.S.C.] §1291. . . to warrant collateral review on appeal." Pet. Pg. 14 – 15. However, again, Petitioner fails to identify any authority which would suggest that the Court of Appeals departed from the decisions of other circuits when it determined the July 14th Order was non-dispositive and, thus, not subject to the collateral order doctrine.

To be sure, the group of decisions which fall under the collateral order doctrine is "narrow" and must be sufficiently important as to be "nonetheless. . . treated as final." *Will v. Hallock*, 546 U.S. 345, 347 (2006). The only time finality has been departed from is when "observance of it would practically defeat the right to any review at all." *Cobbledick v. United States*, 309 U.S. 323, 324 (1940). Such decisions must be "too important to be denied review and too independent of the cause itself to require appellate consideration be deferred until the whole case is adjudicated" to permit an appeal. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

Petitioner suggests that this case conflicts with *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949) and *Jackson v. Vasquez*, 1 F.3d 885 (9th Cir. 1993) because the July 14th Order was "a final disposition of a claimed right – namely, whether Zinman was entitled to discovery of surveillance footage" and "the July 14th Order plainly presents an important issue that is completely separate from the merits of the underlying action." Pet. Pgs. 13 – 14. However, it is incorrect to compare the case at hand to these cases because the appeals in these cases were not of pretrial discovery orders.

Here, it is without question that the July 14th Order does not seek to resolve important issues completely separate from the merits of the underlying action. Rather, the July 14th Order is a standard pretrial discovery order that can be adequately reviewed on appeal from the final judgment. *See generally Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009); *see also Doe No. 1 v. United States*, 749 F.3d 999, 1004 (11th Cir. 2014) ("Discovery orders are ordinarily not final orders that are immediately appealable."); *Paylan v. Teitelbaum*, No. 17-12960-A, 2017 WL 6760757, at *1 (11th Cir. Oct. 3, 2017) ("[P]rotective order is a non-final discovery order that is not immediately appealable under the collateral order doctrine.") (internal citations omitted); *Firestone Tire & Rubber Co. v. Risord*, 449 U.S. 368, 377 (1981) (collateral order doctrine inapplicable to denial of motion to disqualify because it was addressable at the conclusion of trial); *United States v. Ryan,* 402 U.S. 530, 530 (1971) (respondent could not appeal the denial of its motion to quash a subpoena duces tecum under the collateral order doctrine); *United States v. Currency $184,980.00, in US, et al.*, 2018 WL 8731609 (11th Cir. 2018) (denial of a motion to stay discovery was not immediately appealable.); *Johnson v. Baltimore City Police Dept.*, 535 Fed. Appx. 315 (4th Cir. 2013) (denial of motion to modify scheduling order did not fall within the collateral order doctrine.); *Gakuba v. Henderson*, 2020 WL 8618211 (7th Cir. 2020) (appeal of order denying motion for default judgment was not appealable under

collateral order doctrine because appellant could "challenge the district court's rulings after the district court enter[ed] a final judgment."); *Adult Film Ass'n of America, Inc. v. Thetford*, 776 F.2d 113, 115 (5th Cir. 1985) (appeal of order denying default judgment "clearly fails the last requirement of [the Cohen] test [because it]. . . can be reviewed on appeal from the court's final judgment on the merits."); *Bean v. Dormire*, 10 F.3d 538 (8th Cir. 1993) (district court's order denying sanctions and a default judgment were not final appealable orders.); *McCright v. Santoki*, 976 F.2d 568, 569 (9th Cir. 1992) (plaintiff's appeal of an order denying his motion for sanctions was not permitted because plaintiff would suffer very little from having to wait for the entry of judgment to appeal the order.); *Cassidy v. Cassidy*, 950 F.2d 381, 383 (7th Cir. 1991) (finding if district court denies a motion for sanctions, "review waits until the end of the case."); *Shurance v. Plan. Control Int'l, Inc.*, 839 F.2d 1347, (9th Cir. 1988) (finding that petitioners could not identify any irreparable harm related to the denial of petitioner's motion to disqualify opposing counsel to justify application of the collateral order doctrine.); *P Stone, Inc. v. Koppers Corp.*, 631 F.2d 24, 25 (3d Cir. 1980) (order denying a motion to disqualify counsel was not immediately appealable under the *Cohen* test because the appellants could not "demonstrate an irreparable harm" and "their contentions may be reviewed in due course on appeal from a final judgment."); *Ohio A. Philip Randolph Inst. v. Larose*, 761 F. App'x 506, 511 (6th Cir. 2019) (appeal of motion to stay discovery was not appropriate under collateral order review because parties did not allege any irreparable harms and they had alternatives means to address the alleged harms.); *Blake v. Gov't of Virgin Islands, Dep't of Hous., Parks & Recreation*, 198 F. App'x 216, 217-18 (3d Cir. 2006) (collateral order doctrine was inapplicable to appeal of motion to stay discovery because there was no irreparable injury and the "finality aspect of the collateral order doctrine [was] not satisfied."); *Gantt v. Maryland Div. of Correction*, 16 F.3d 409 (4th Cir. 1994) (denial of a motion requesting judicial notice was not an interlocutory collateral order.).

III. THE ISSUANCE OF THE FINAL ORDER HAS RENDERED THIS MATTER MOOT

It is axiomatic that federal courts lack the authority to give opinions on moot questions. *Zinni v. ER Solutions, Inc.*, 692 F.3d 1162, 1166 (11th Cir. 2012). Intervening events can affect an appellate court's jurisdiction over an appeal. *Birmingham Fire Fighters Ass'n 117* at 1254; *see also C & C Prod., Inc. v. Messick*, 700 F.2d 635, 636 (11th Cir. 1983) ("An appellate court does not have jurisdiction under the Article III 'case or controversy' provision of the United States Constitution to decide questions which have become moot by reason of intervening events."). At least in the preliminary injunction context, courts have held that "[o]nce a final judgment is rendered, the appeal is properly taken from the final judgment." *Burton v. Georgia*, 953 F.2d 1266, 1272 n.9 (11th Cir. 1992).

During the pendency of this appeal, the District Court issued an order dismissing the Petitioner's Second Amended Complaint. As such, an appealable final order now exists. This final order dismissing the case in its entirety serves as an intervening event, and an appeal of the final judgment to the Eleventh Circuit is now the proper avenue to raise Petitioner's arguments relative to the July 14th Order. Therefore, the dismissal of the appeal was proper, and the Petition for Writ of Certiorari should not be granted.

CONCLUSION

For all the aforementioned reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted: December 16, 2021.

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