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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Corey J. Zinman
175 Sedona Way,
Palm Beach Gardens, Florida 33418
Tel: (561) 566-9253
CB2770@mynsu.nova.edu
Pro Se Petitioner

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REASONS FOR GRANTING THE PETITION

I. THE PETITION PRESENTS ONE OR MORE QUESTIONS OF IMPERATIVE PUBLIC IMPORTANCE

Respondent contends that "Petitioner primarily seeks to reargue the merits of the July 14th Order," and further that "[s]uch issues should be considered by the Eleventh Circuit accompanying an appeal of a final judgment." Resp't Br. in Opp'n Pg. 4. However, as Respondent aptly noted, certiorari review can be obtained before the court of appeals renders judgment if the question as to whether a district court abused its discretion "is of such imperative public importance as to justify the deviation from normal appellate practice and to require immediate settlement in this Court." *Walters v. Nat. Assn. of Radiation Survivors*, 473 U.S. 305, 350-51 (1985) ("This Court has not hesitated to exercise this power of swift intervention in cases of extraordinary constitutional moment and in cases demanding prompt resolution for other reasons"). In stark contrast to Respondent's assertion that "Petitioner fails to identify any issue of imperative public importance relative to the Court of Appeals' dismissal of his appeal," the Petition presents several questions of the utmost public importance——namely: (1) whether and to what extent litigants must be guaranteed access to courts, especially those challenging mask mandates upon religious grounds; and (2) whether and to what extent discrimination plaintiffs are entitled to the discovery of relevant evidence. Thus, although the argument's set forth in sections (I)(B) and (I)(C) of Petitioner's brief in support of his Petition weren't addressed by the Eleventh Circuit, this Court should nevertheless exercise its discretion to address those arguments because they present questions of imperative public importance.

II. 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 conflict with *Carson*, *Bodinger*, and *McQueen*.

In response to Petitioner's claim that "although Respondent SFS's motion was technically described as a 'motion for a protective order,' it ultimately constituted a motion for injunctive relief,"

Resp't Br. in Opp'n Pg. 6 (quoting Pet. Pg. 10), Respondent claims that 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." *Id.* Additionally, Respondent asserts that "Petitioner fails to identify any case equating discovery orders to injunctive relief," and further, in response to Petitioner's claim 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), that "neither of these cases held that discovery orders are equivalent to injunctive relief." Resp't Br. in Opp'n Pg. 6. Moreover, according to Respondent, "[a]t no point in time did [it] move for injunctive relief." *Id.* at 7. Rather, according to Respondent, it "sought a common discovery order limiting the scope of the documents requested by Petitioner that Respondent was required to maintain." *Id.*

As an initial matter, while Respondent correctly notes that neither *Carson* nor *Bodinger* dealt with discovery orders, in *Carson*, this Court recognized that, although the order at issue wasn't an injunction, it was nevertheless immediately appealable because it would have had the "practical effect" of an injunction, and further that the litigants would suffer a "'serious, perhaps irreparable consequence'" which could only be "'effectually challenged'" by immediate appeal. *Carson*, 450 U.S. at 83-84 (quoting *Bodinger*, 348 U.S. at 181). Additionally, in *Dameron v. Capitol House Associates Limited Partnership*, 431 A.2d 580 (D.C. 1981), the trial court granted a pretrial protective order which the defendants immediately appealed. However, a division of the D.C. Circuit Court of Appeals dismissed the appeal for lack of jurisdiction, holding that because the protective order wasn't a final order, or an interlocutory order, or a collateral order, the appeal wasn't ripe for review. *McQueen v. Lustine Realty Co.*, 547 A.2d 172, 173-74 (D.C. 1988) (en banc). Notwithstanding, in *McQueen*, sitting en banc, the D.C. Circuit Court of Appeals declined to follow *Dameron* but rather held that such orders "clearly ha[ve] the 'practical effect' of an injunction." *Id.* at 176. Moreover, although the court acknowledged that "[p]rotective orders … in addition to their characteristics as injunctions, also have attributes of prejudgment security devices, which generally

have been expressly excluded from the definition of an injunction for appeal purposes and thus are subject to appeal only to the extent they fall within the *Cohen* collateral order doctrine," *id.* at 177, the court nevertheless concluded that "protective orders (and orders with respect to protective orders) are categorically appealable as orders with respect to injunctions." *Id.* at 179-80 ("The protective order is a unique judicial creation that has been developed and refined expressly as a tool to assist the trial court in maintaining the equipoise among the variety of closely balanced legal and tactical approaches available to litigants. Having placed this formidable tool in the hands of the trial court for use, routinely, on behalf of plaintiff-landlords … it is appropriate that we also assure tenant-defendants the right to interlocutory appeal from the protective order's potentially erroneous and damaging use").

Like the consent decree at issue in *Carson*, and the protective order at issue in *McQueen*, the protective order at issue here satisfies both prongs of the *Carson* "practical effect" test. Although called a "protective order," it effectively prohibited Petitioner from using discovery to obtain 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, and relieved Respondent of any duty to preserve such footage as well. The protective order at issue in this case is therefore a permanent injunction and a final, appealable judgment. *See,* e.g., *B.C. v. Rhodes ex rel. T.L.R.*, 116 S.W.3d 878, 880 (Tex. App. 2007) (recognizing that "protective orders are final and appealable"); *Cooke v. Cooke*, 65 S.W.3d 785, 787 (Tex. App. 2002) ("Even though not labeled as a permanent injunction, an order may be classified as such as long as the character and the function of the order is in the nature of a permanent injunction"); *Rosado v. Bridgeport Roman Catholic Diocesan Corp.*, 276 Conn. 168, 214 (Conn. 2005) (recognizing that "discovery related protective orders … are injunctive in nature … [because] [s]uch orders have both the force and effect of an injunction, and serve a similar equitable purpose, namely, to regulate prospectively the conduct of the parties"). As such, the panel's determination that the order at issue was a non-dispositive pretrial order conflicts with

this Court's decisions in *Carson*, *supra*, and *Bodinger*, *supra*, as well as the D.C. Circuit Court of Appeals decision in *McQueen*, *supra*.

B. The panel's decisions conflict with *Zdanok*, *Schultz*, *Desir*, and *Maragh*.

Regarding Petitioner's claim that *U.S. v. Schultz*, 565 F.3d 1353, 1362 (11th Cir. 2009) is at conflict with the case at hand, Respondent contends that "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," and further that "Petitioner cannot identify how [this] case[] differ[s] at all[;] [r]ather, he believes the law stated in *Schultz* was not applied appropriately." Resp't Br. in Opp'n Pg. 7. Towards that end, Respondent asserts that, "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.* As an initial matter, however, 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." *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, it 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. On that basis alone, the panel's decision to dismiss Petitioner's appeal of the July 14th order, *sua sponte*, for lack of jurisdiction because Petitioner failed to object in the district court conflicts with this Court's decision in *Zdanok*, *supra*, as well as the Eleventh Circuits decisions in *Schultz*, *supra*, *Desir*, *supra*, and *Maragh*, *supra*.

However, Respondent attempts to mischaracterize Petitioner's position by suggesting that he contends that the aforementioned cases "permit a party to immediately challenge an interlocutory

order issued by a magistrate judge via appeal to a Court of Appeals," and further asserting that such cases "do not pertain to the immediate appeal of interlocutory orders but rather deal with issues which are part of final orders." Resp't Br. in Opp'n Pg. 7-8. Notwithstanding, at no point did Petitioner ever suggest that such cases stand for the proposition that interlocutory orders issued by a magistrate judge are categorically appealable. To be clear, it's Petitioner's position that such cases permit a party to appeal a magistrate judge's authority to issue an order irrespective of whether that party objected to the magistrate judge's authority in the district court. Moreover, in stark contrast to Respondent's position, the orders at issue in *Schultz*, *supra*, *Desir*, *supra*, and *Maragh*, *supra*, weren't final orders, at least not in the traditional sense of the term. *Catlin v. United States*, 324 U.S. 229, 233 (1945) ("A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgement"). Rather, *Schultz*, *supra*, dealt with a magistrate judge's authority to enter an order denying a criminal defendant's request to represent himself at trial, whereas *Maragh*, *supra*, and *Desir*, *supra*, dealt with the authority of magistrate judges to conduct critical stages of a criminal trial.

C. <u>The panel's decisions conflict with *Cohen* and its progeny.</u>

In response to Petitioner's claim that the panel's decision 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 … completely separate from the merits of the underlying action," Resp't Br. in Opp'n Pg. 9 (quoting Pet. Pgs. 13 – 14), Respondent contends that "it is incorrect to compare the case at hand to these cases because the appeals in [such] cases were not of pretrial discovery orders," *id.* Furthermore, Respondent declares that "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." *Id.* Rather, according to Respondent, "the July 14th Order is a standard pretrial discovery order that can be adequately reviewed on appeal from the final judgment." *Id.* Toward that end, Respondent cites to a bevy of caselaw without offering any semblance of an explanation as to how such decisions somehow apply to the case at hand. *Id.* at 9-

10. Notably, however, none of the cases to which Respondent cites support the proposition that the collateral-order doctrine is categorically inapplicable to discovery orders; rather, such cases establish the principle that orders which are reviewable on appeal after final judgement aren't immediately appealable collateral orders.

As an initial matter, although Respondent correctly notes that *Cohen*, *supra*, and *Jackson*, *supra*, didn't deal with pretrial discovery orders, Respondent fails to identify any authority to suggest that the collateral order doctrine is somehow inapplicable to such orders. Contrary to Respondent's apparent implication, this Court didn't foreclose interlocutory appeals of pretrial discovery orders in *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. 100 (2009). Rather, it foreclosed interlocutory appeals of orders requiring the disclosure of materials protected by the attorney-client privilege. *Id.* at 114. In doing so, it explained that an appeal from a final judgment suffices "to protect the rights of litigants and ensure the vitality of the attorney-client privilege" because "[a]ppellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence." *Id.* at 109. Importantly, however, that logic is inapposite to "an asserted right ... which could be destroyed if it were not vindicated before trial." *U.S. v. MacDonald*, 435 U.S. 850, 860 (1978). To be clear, given that Hard Rock Stadium's policy is to only retain surveillance footage for 60 days, App. E at 13:6-8 (App. 29a), by the time that Petitioner could've appealed from a final judgement in this case, his right to discovery of relevant evidence would've already been permanently lost. Thus, as was the case with the orders at issue in *Cohen*, *supra*, and *Jackson*, *supra*, here the July 14th order is immediately appealable because it's a final disposition of a claimed right which would be effectively unreviewable upon final judgement.

Additionally, in *Doe v. United States*, 749 F.3d 999 (11th Cir. 2014), another case upon which Respondent relies, the Eleventh Circuit explicitly noted that, while "[d]iscovery orders are *ordinarily* not final orders that are immediately appealable[,] ... [f]ive notable exceptions to this

rule exist," including "the collateral-order doctrine." *Id.* at 1004 (emphasis added). Additionally, although Respondent correctly notes that in *Paylan v. Teitelbaum*, No. 17-12960-A, 2017 WL 6760757, at *1 (11th Cir. Oct. 3, 2017), the Eleventh Circuit held that the protective order at issue was "a non-final discovery order that is not immediately appealable under the collateral order doctrine," in doing so it relied upon its decision in *Drummond Co. v. Collingsworth*, 816 F.3d 1319, (11th Cir. 2016) wherein it held that "*most* discovery issues can be reviewed effectively on appeal from final judgment ... [a]nd 'in the rare case when appeal after final judgment will not cure an erroneous discovery order, a party may defy the order, permit a contempt citation to be entered against him, and challenge the order on direct appeal of the contempt ruling.'" *Id.* at 1325 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 377 (1981)). Notwithstanding, Petitioner didn't have that option because the July 14th order wasn't directed at him and therefore, he could neither defy the order nor permit a contempt citation to be entered against him. 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*, *supra*, and its progeny.

III. THE DISTRICT COURT'S FINAL ORDER OF DISMISSAL DIDN'T RENDER THIS APPEAL MOOT

Respondent notes that "[d]uring the pendency of this appeal, the District Court issued an order dismissing Petitioner's Second Amended Complaint." Resp't Br. in Opp'n Pg. 11. On that basis, Respondent contends that "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," and further that "the dismissal of the appeal was proper, and the Petition for Writ of Certiorari should not be granted." *Id.* Toward that end, Respondent cites to *Burton v. Georgia*, 953 F.2d 1266 (11th Cir. 1992) wherein the Eleventh Circuit held that "[o]nce a final judgment is rendered, the appeal is properly taken from the final judgment, not the preliminary injunction." *Id.* at 1272 n. 9 (citations omitted). Notably, however, in *Carrizosa v. Chiquita Brands Int'l, Inc.*, 965 F.3d 1238 (11th Cir. 2020), the court

clarified that "*Burton* merely restated a commonsense principle: A permanent injunction order moots interlocutory review of a corresponding preliminary injunction order because the preliminary injunction order inherently merges with the permanent injunction order." *Id.* at 1245 (internal quotation marks and citation omitted). However, the same doesn't hold true with respect to the standard for entering an injunction and that for dismissing a complaint under Rule 12(b)(6). Accordingly, the logic underlying the rule set forth by the Eleventh Circuit in *Burton* is inapposite to Petitioner's appeal of the July 14th order. Notwithstanding, even if the district court's final order of dismissal did render the instant appeal moot to some extent, this Court should nevertheless grant the Petition to prevent the panel's decision, "unreviewable because of mootness, from spawning any legal consequences." *U.S. v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950) (recognizing that vacatur of such decisions is the "established practice").

CONCLUSION

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