NO. 21-7172

ORIGINAL

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Although "an appeal from the grant of a preliminary injunction becomes moot when the trial court enters a permanent injunction" incorporating the same relief, *Grupo Mexicano de Desarrollo, S. A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 314 (1999), this Court has made clear that "[a] quite different situation obtains ... where ... the substantive validity of the final [order] does not establish the substantive validity of the preliminary one," *id.* at 315 ("It would make no sense, when this is the claim, to say that the preliminary [order] merges into the final [order]"). Notwithstanding, where a case becomes moot on appeal, this Court has recognized that vacatur is the "established practice" to prevent a district court's order, "unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950). However, in dismissing Petitioner's appeal of the district court's denial of preliminary injunctive relief as moot, Eleventh Circuit Judges Jill Pryor, Britt Grant, and Barbara Lagoa ("the panel") held that "[b]ecause the district court has subsequently entered a final order of dismissal, any appeal from the district court's interlocutory denial of preliminary injunctive relief has merged into the final order and consequently rendered any direct appeal from the May 14 order moot." App. A at 3 (App. 3a). Compounding matters further, even though it concluded that Petitioner's appeal had become moot, the panel nevertheless declined to vacate the district court's order. Moreover, the panel effectively denied Petitioner the right to petition for rehearing en banc by denying Petitioner's motion to publish its decision and relying upon Eleventh Circuit Rule 35-4(b) which prohibits orders dismissing an appeal that aren't published from being considered by the court en banc. App. I at 2 (App. 46a).

This Petition presents the following issues:

I. Whether a final order of dismissal automatically moots an interlocutory appeal of an order denying preliminary injunctive relief, and if so, whether vacatur of the preliminary order, review of which was prevented through happen-stance, is required to prevent it from spawning any legal consequences without being subject to appellate scrutiny.

II. Whether the panel's decision to summarily dismiss Petitioner's appeal as moot via an unpublished opinion after denying him an opportunity for oral argument and delaying review until the district court eventually disposed of the underlying case nearly four months after Petitioner's appeal was filed comports with the fundamental rights to due process and to petition the government for redress of grievances guaranteed by the First and Fifth Amendments to the United States Constitution.

III. Whether the panel's failure to vacate the district court's preliminary order under these circumstances constitutes a denial of equal protection in violation of the Fifth Amendment to the United States Constitution.

IV. Whether the panel's holding undermines the purpose of the rule allowing appeals from final orders to draw in question all prior non-final orders and rulings which produced the judgment.

V. Whether Eleventh Circuit Rule 35-4(b) deprives litigants of the right to petition for rehearing en banc under Federal Rule of Appellate Procedure 35(b) in violation of the Supremacy Clause and 28 U.S.C. § 2072.

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

TABLE OF AUTHORITIES

Caselaw:

Rules:

Other:

PETITION FOR A WRIT OF CERTIORARI

Petitioner, Corey J. Zinman, proceeding pro se, respectfully petitions this Honorable Court for a writ of certiorari to review the panel's decision in this case.

OPINIONS BELOW

The panel's opinion dismissing Petitioner's May 19, 2021 appeal of the district court's May 14, 2021 order for lack of jurisdiction appears at Appendix A (App. 1a-3a) and is not published but has been reprinted at 2021 U.S. App. LEXIS 28926. The panel's opinion denying Appellant's Petition for Rehearing En Banc (App. F; App. 16a-40a) and Motion to Publish (App. J; App. 47a-54a) appears at Appendix B (App. 4a) and is not published either. The district court's May 14, 2021 order denying Petitioner's motion for preliminary injunctive relief appears at Appendix C (App. 5a-12a) and is also not published but has been reprinted at 2021 U.S. Dist. LEXIS 92180.

JURISDICTION

The judgement of the panel was entered on December 3, 2021. A timely Petition for Rehearing En Banc was denied by the panel on January 5, 2022, and a copy of the order denying the Petition 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

Article VI, paragraph two, of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States ... shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.

The First Amendment to the United States Constitution provides, in pertinent part:

> [T]he freedom ... to petition the Government for a redress of grievances [shall not be infringed].

The Fifth Amendment to the United States Constitution provides, in pertinent part:

> No person shall ... be deprived of life, liberty, or property, without due process of law ...

Section 1292 of Title 28 of the United States Code provides, in pertinent part, that the courts of appeals shall have jurisdiction of appeals from:

> Interlocutory orders of the district courts ... refusing ... injunctions ...

Section 2072 of Title 28 of the United States Code provides, in pertinent part:

> (a) The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts (including proceedings before magistrate judges thereof) and courts of appeals.
> (b) Such rules shall not abridge, enlarge or modify any substantive right. All laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.

Rule 35(b) of the Federal Rules of Appellate Procedure provides, in pertinent part:

> A party may petition for a hearing or rehearing en banc.

Rule 35-4 of the Eleventh Circuit Rules provides, in pertinent part:

> A petition for rehearing en banc tendered with respect to any of the following orders will not be considered by the court en banc, but will be referred as a motion for reconsideration to the judge or panel that entered the order sought to be reheard:
>
> (b) Any order dismissing an appeal that is not published ...

STATEMENT OF THE CASE

I. THE COMPLAINT

Petitioner, Corey J. 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, Petitioner 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, or in the alternative, to allow him to attend classes in-person without being required to wear a mask. However, those requests were all denied. Consequently, on April 2, 2021, Petitioner filed a Complaint against NSU for compensatory, declaratory, and injunctive relief under Titles II and VI of the Civil Rights Act of 1964. Furthermore, Petitioner asserted a claim against South Florida Stadium ("SFS") for injunctive relief as well.

II. THE AMENDED COMPLAINT AND MOTION FOR A PRELIMINARY INJUNCTION

On April 6, 2021, Petitioner filed an Amended Complaint adding claims against Bertha Henry, Broward County, and Miami-Dade County under, inter alia, 42 U.S.C. § 1983. App. L (App. 102a-131a). On the same day, Petitioner also filed a Motion for a Temporary Restraining Order ("TRO") and Preliminary Injunctive Relief seeking an Order (i) requiring Defendants to accommodate individuals for whom wearing a mask would conflict with their sincerely held religious beliefs; (ii) prohibiting Defendants from excluding Petitioner from NSU's May 2021 commencement ceremonies; and (iii) prohibiting Defendants from denying Petitioner

and other similarly situated individuals the full and equal enjoyment of their goods, services, facilities, privileges, advantages, and accommodations.

III. THE DISTRICT COURT'S ORDER DENYING PRELIMINARY INJUNCTIVE RELIEF

On May 14, 2021, the district court entered an order denying Petitioner's Motion for a TRO and Preliminary Injunctive Relief. App. C (App. 5a-12a). Immediately thereafter, on May 19, 2021, Petitioner filed a Notice of Appeal to the Eleventh Circuit as well as an Emergency Motion for a Stay of Proceedings Pending Appeal. App. G (App. 41a-43a). Notwithstanding, that same day, the district court entered an order denying Petitioner's motion to stay the proceedings. App. D (App. 13a).

IV. THE SECOND AMENDED COMPLAINT AND THE FINAL ORDER OF DISMISSAL

On May 26, 2021, Petitioner filed a Second Amended Complaint. App. M (App. 132a-169a). The principal difference between the Amended Complaint (App. L; App. 102a-131a) and the Second Amended Complaint is that the latter included allegations that SFS selectively enforced its mask policy against Petitioner 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. App M. at 25 (App. 156a). Notwithstanding, on September 15, 2021, the district court entered a final order dismissing Petitioner's Second Amended Complaint. App. E (App. 14a-15a).

V. THE ELEVENTH CIRCUIT'S DISMISSAL OF PETITIONER'S APPEAL

On December 3, 2021, the panel dismissed Petitioner's appeal for lack of

jurisdiction. App. A (App. 1a-3a). Petitioner filed a timely Petition for Rehearing En Banc on December 6, 2021. App. F (App. 16a-40a). However, that same day, Petitioner received a notice of deficiency from the Clerk's Office stating that he could not file a petition for rehearing en banc. App. H (App. 44a). The next day, however, Petitioner received two additional notices from the Clerk's Office advising him that the notice from the previous day had been issued in error and further that his Petition had been referred to the Court as a motion for reconsideration. App. I (App. 45a-46a). In doing so, the Clerk's Office relied upon 11th Cir. R. 35-4, although it did not specify the specific subparagraph upon which it relied. App. I at 2 (App. 46a). Notwithstanding, after lengthy discussions with several employees at the Clerk's Office, it was finally explained to Petitioner that his Petition had been referred to the Court as a motion for reconsideration because Eleventh Circuit Rule 35-4(b) prohibits unpublished orders dismissing an appeal from being considered by the court en banc. Accordingly, on December 9, 2021, Petitioner filed a Motion to Publish the panel's decision. App. J (App. 47a-54a). Nevertheless, on January 5, 2022, the panel entered an order denying Petitioner's Motion to Publish as well as his Petition for Rehearing En Banc which, as noted above, had been referred to them as a motion for reconsideration. App. C (App. 5a-12a).

REASONS FOR GRANTING THE PETITION

I. THE PANEL'S HANDLING OF PETITIONER'S APPEAL SO FAR DEPARTED FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS AS TO WARRANT AN EXERCISE OF THIS HONORABLE COURT'S SUPERVISORY POWER

Generally, "[a]n appeal from the grant of a preliminary injunction becomes

moot when the trial court enters a permanent injunction" incorporating the same relief. *Grupo Mexicano de Desarrollo* at 314; *Sec. & Exch. Comm'n v. First Fin. Grp. of Tex.*, 645 F.2d 429, 433 (5th Cir. 1981) ("Once an order of permanent injunction is entered ... the order of preliminary injunction is merged with it"); *In re Estate of Ferdinand Marcos Human Rights Litig.*, 94 F.3d 539, 544 (9th Cir. 1996) ("[W]here a permanent injunction has been granted that supersedes the original preliminary injunction, the interlocutory injunction becomes merged in the final decree") (internal quotations omitted); *Ga. Advocacy Office v. Jackson*, 4 F.4th 1200, 1214 (11th Cir. 2021) ("This general rule reflects the functional continuity between preliminary and permanent injunctions—though they are put in place by separate and distinct orders, the nature of the relief is the same and the latter typically replaces the former without lapse"). However, this Court has made clear that "[a] quite different situation obtains ... where ... the substantive validity of the final injunction does not establish the substantive validity of the preliminary one." *Grupo Mexicano De Desarroll*, 527 U.S. at 315. As such, and for the following reasons, the Panel's handling of this appeal so far departed from the accepted and usual course of judicial proceedings as to warrant an exercise of this Honorable Court's supervisory power.

A. The panel's reliance upon *Shaffer* and *Harper* to suggest that the district court's final order divested it of jurisdiction to review Petitioner's appeal conflicts with this Court's holdings in those cases.

The panel's reliance upon *Shaffer v. Carter*, 252 U.S. 37 (1920) and *Harper v. Poway School District*, 549 U.S. 1262 (2007) to suggest that the district court's final

order of dismissal divested it of jurisdiction to review Petitioner's appeal conflicts with this Court's holdings in those cases.

In *Shaffer* an application for an interlocutory injunction was denied. *Shaffer*, 252 U.S. at 44. The decree as entered not only disposed of the application but dismissed the action in its entirety. *Id.* Apparently unaware of this, plaintiff appealed from the refusal of the temporary injunction. *Id.* Shortly thereafter, however, plaintiff took an appeal from the final decree dismissing the action. *Id.* In dismissing plaintiff's first appeal, this Court held that "the denial of the interlocutory application was merged in the final decree." *Id.*

More recently, in *Harper*, a high school student sought review of a judgment of the Ninth Circuit affirming the denial of his motion for a preliminary injunction "seeking to enjoin the school from continuing [its] violation of [his] constitutional rights." *Harper v. Poway Unified School District*, 445 F.3d 1166, 1173 (9th Cir. 2006). However, during the pendency of that appeal, the student graduated from high school, and the district court therefore dismissed his claims for injunctive relief as moot.[1] *Harper*, 549 U.S. at 1262. Accordingly, relying on the rule set forth by *Shaffer*, this Court remanded the case to the Ninth Circuit with instructions to dismiss the appeal as moot. *Id.*

As an initial matter, the circumstances which were before this Court in *Shaffer* are clearly distinguishable from those surrounding the instant appeal. To be

1. David L. Hudson Jr., *Harper v. Poway Unified School District (9th Cir.) (2006)*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/686/harper-v-poway-unified-school-district-9th-cir.

clear, in *Shaffer* the denial of the plaintiff's motion for a temporary injunction was part and parcel of the very same decree which disposed of the action in its entirety, whereas here the district court's final order of dismissal came nearly four months after its prior order denying Petitioner's motion for preliminary injunctive relief. Additionally, in *Shaffer* the operative pleading upon which the lower court's preliminary injunctive order was grounded was the very same pleading as that which the court's final order was based on. Conversely, the operative pleading at the time the district court issued the order denying preliminary injunctive relief was Petitioner's Amended Complaint (App. L; App. 102a-131a), whereas the operative pleading at the time it issued its final order of dismissal was Petitioner's Second Amended Complaint (App. M; App. 132a-169a). Thus, the district court's final order was premised upon a different set of factual allegations than its prior order denying preliminary injunctive relief, and as such, "the substantive validity of the final [order] does not establish the substantive validity of the preliminary one." *Grupo Mexicano De Desarroll*, 527 U.S. at 315.

Additionally, *Harper* is clearly distinguishable from the instant case as well. As noted above, the district court in that case only dismissed plaintiff's claim for injunctive relief because he graduated from high school and therefore the requisite "case-or-controversy" no longer existed. Accordingly, even if this Court determined that the Ninth Circuit somehow erred in affirming the district court's denial of a preliminary injunction, any relief that it could've granted would've served merely as an impermissible advisory opinion. As such, the panel's reliance upon *Shaffer* and

Harper to suggest that the district court's final order of dismissal divested it of jurisdiction to review the district court's order denying Petitioner's motion for preliminary injunctive relief conflicts with this Court's holdings in those cases.

B. The panel's decision conflicts with the Fifth Circuit's decision in *Stacey G.*, the Seventh Circuit's decision in *Mansukhani*, and the First Circuit's decision in *Owen*.

The panel's decision also conflicts with that of other circuits which have recognized that final orders do not automatically moot interlocutory appeals of orders granting or denying preliminary injunctive relief.

In *Stacey G. v. Pasadena Independent School District*, 695 F.2d 949 (5th Cir. 1983) the district court granted a preliminary injunction ordering a school district to pay, pending final resolution of the case, the costs of education at a private school. *Id.* at 952. The school district appealed, however, before the appeal was heard a permanent injunction issued giving plaintiff substantially the relief sought. *Id.* at 955. In holding that the appeal of the preliminary injunction was not mooted by the final injunction, the Fifth Circuit noted that "the final judgment did not in terms resolve the issue raised by this appeal, that is, whether preliminary injunctive relief was appropriate to require Pasadena to pay the entire interim costs of Stacey's private schooling prior to the final judgment." *Id.*

Similarly, in *Nationwide Biweekly Admin., Inc. v. Owen*, 873 F.3d 716 (9th Cir. 2017), plaintiffs sought two separate preliminary injunctions. *Id.* at 725. After the district court denied both requests and while the appeals from such denials were pending, defendants filed a joint enforcement suit in California Superior Court

against plaintiffs. *Id.* The district court subsequently dismissed both cases under *Younger v. Harris*, 401 U.S. 37 (1971), and plaintiffs appealed from the dismissals in each case. *Owen*, 873 F.3d at 725. After finding that the district court erred by abstaining under *Younger* because the cases had proceeded beyond the "embryonic stage" in the district court before the corresponding state cases were filed, *id.* at 727-29, the First Circuit held that it "must decide whether the preliminary injunctions were properly denied or else the district court's decisions would be insulated from any appellate review," *id.* at 731.

According to the panel, "[b]ecause the district court has subsequently entered a final order of dismissal, any appeal from the district court's interlocutory denial of preliminary injunctive relief has merged into the final order and consequently rendered any direct appeal from the May 14 order moot." App. A at 2. Notably, however, that conclusion conflicts with the Fifth Circuit's decision in *Stacey G.* as well as the First Circuit's decision in *Owen*. Like the circumstances before the courts in those cases, here the district court's final judgment did not resolve the issue raised by this appeal—that is, whether preliminary injunctive relief was properly denied. *Stacey G.*, 695 F.2d at 955; *Owen*, 873 F.3d at 731. To be clear, Petitioner's basis for arguing that preliminary injunctive relief was wrongfully withheld is that, inter alia, the district court erred by applying the wrong standard to evaluate Petitioner's Title II claim and holding that Title II plaintiffs must comply with 42 U.S.C. § 2000a-3 as a prerequisite for obtaining preliminary injunctive relief. This claim is independent of Petitioner's claims on the merits—which is that, inter alia, Respondents deprived

Petitioner of numerous rights guaranteed by the Constitution and laws of the United States. *Grupo Mexicano de Desarrollo*, 527 U.S. at 317. Furthermore, given that the panel had been "fully briefed" regarding the issues underlying this appeal since August 25, 2021, there was "no reason to delay consideration of [those] issues." *American Can Co. v. Mansukhani*, 742 F.2d 314, 321 (7th Cir. 1984) ("[T]he parties have fully briefed these questions on this appeal; we therefore see no reason to delay consideration of these issues"). Moreover, if the panel's decision is allowed to stand, "the district court's decision[] would be insulated from any appellate review." *Owen*, 873 F.3d at 731.

Notwithstanding, the panel suggested that "because [Petitioner] has filed an appeal from the final order of dismissal in Appeal No. 21-13476, he is free to raise a challenge to the district court's May 14 order in that appeal." App. A at 3 (App. 3a). As an initial matter, however, although an appeal from a final judgement may draw into question the denial of a motion for a preliminary injunction, it doesn't necessarily follow that that is always the case. For example, where, as here, a plaintiff files an amended complaint setting forth additional factual allegations after a court denies their motion for a preliminary injunction, the court's subsequent dismissal of the amended complaint doesn't call into question the validity of its prior order because it was not a procedural step leading to the final order. *Kong v. Allied Prof'l Ins. Co.*, 750 F.3d 1295, 1301 (11th Cir. 2014) ("[T]he appeal from a final judgment draws in question all prior non-final orders and rulings *that produced the judgment*") (emphasis added) (internal quotation marks omitted); *Martin v. One*

Bronze Rod, No. 14-10688, 7 n.5 (11th Cir. 2014) ("A notice of appeal that names the final judgment suffices to support review of all earlier orders that merge in the final judgment ..., *at least if the earlier orders are part of the progression that led up to the judgment rather than being separate from that progression*") (emphasis added); *In re Westinghouse Sec. Litig.*, 90 F.3d 696, 706 (3d Cir. 1996) ("Under the 'merger rule,' prior interlocutory orders merge with the final judgment in a case, and the interlocutory orders *(to the extent that they affect the final judgment)* may be reviewed on appeal from the final order") (emphasis added); *Caracci v. Patel*, No. 1-13-3897, 4 (Ill. App. Ct. 2015) ("A reviewing court may consider an earlier judgment of the trial court *where that judgment constitutes a procedural step in the progression leading to the entry of the final judgment* from which the appeal has been taken") (emphasis added). Nevertheless, even if Petitioner would technically be permitted to challenge the district court's denial of his motion for preliminary injunctive relief in his appeal from its final order of dismissal, the purpose of the rule allowing him to do so is to promote the reviewability of otherwise non-appealable interlocutory orders. *Barfield v. Brierton*, 883 F.2d 923, 930-31 (11th Cir. 1989) ("[S]ince only a final judgment or order is appealable, the appeal from a final judgment draws in question all prior non-final orders and rulings *which produced the judgment*") (emphasis added). However, the panel's application of this rule effectively serves to insulate the district court's preliminary order from review which is clearly inconsistent with the rule's basic purpose. Notably, not only did it wait until after Petitioner filed his Initial Brief in in Appeal No. 21-13476 to dispose of this appeal as moot even though the district

court dismissed the underlying case nearly two months earlier, thereby depriving Petitioner of any notice that he would need to raise his objections to the district court's preliminary order in that brief if he wished for those objections to be addressed, but the very same panel that suggested Petitioner was free to raise his objections to the district court's preliminary order in his appeal from its final order, also denied Petitioner's motion for leave to file a brief exceeding 13,000 words in his appeal from that order as well, despite the fact that the magistrate judge's Report and Recommendation upon which it was based contained 47 pages and nearly 16,000 words. App. K (App. 55a-101a). Consequently, Petitioner has already had to forego numerous objections to the district court's final order, and if Petitioner were to raise his objections to the district court's preliminary order in his appeal from its final order, he would be forced to sacrifice even more.

C. The panel's decision that it lacked jurisdiction to consider Petitioner's appeal because the district court subsequently dismissed the case conflicts with the rule recognized by the Eleventh Circuit in *Burton*.

Additionally, the panel's decision conflicts with the Eleventh Circuit's own precedent as well.

In *Burton v. Georgia*, 953 F.2d 1266 (11th Cir. 1992), 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. More recently, however, in *Carrizosa v. Chiquita Brands Int'l, Inc.*, 965 F.3d 1238 (11th Cir. 2020), the Eleventh Circuit 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). Towards that end, the court explained that "[t]his rule makes sense ... [because] [t]he standard for entering a preliminary injunction echoes the standard for entering a permanent injunction." *Id.* Thereafter, in *Birmingham Fire Fighters Ass'n 117 v. City of Birmingham*, 603 F. 3d 1248 (11th Cir. 2010), the Eleventh Circuit considered an appeal from a district court's order granting preliminary injunctive relief. There, plaintiffs sued the City of Birmingham alleging discriminatory employment practices. *Id.* at 1251. At the trial court level, the district court assumed a direct supervisory role over a county personnel board and appointed two individuals to the board when vacancies arose. *Id.* at 1252. The state later passed an act reconstituting the composition of the board which the court declared void ab initio ("the September Order"), and the City of Birmingham immediately appealed. *Id.* at 1253. However, two months later, the court issued a subsequent order reaffirming the September Order's directive that the two appointed board members serve the remainder of their respective terms as board members ("the November Order"). *Id.* at 1254. Accordingly, the Eleventh Circuit applied the rule set forth by its prior decision in *Burton* and held that although "§ 1292 initially granted this Court jurisdiction over the city's appeal, despite the fact that the September Order was[n't] a final judgment[,] ... the November Order stripped this Court of its jurisdiction over the city's appeal because, *when a final injunction incorporates the same relief as an interlocutory injunction*, an appeal is properly taken only from the

final order." *Id.* (emphasis added).

Relying on the foregoing precedents, in *Patterson v. Miami Dade Cty.*, 791 F. App'x 877 (11th Cir. 2019) (unpublished), the Eleventh Circuit dismissed a pro se prisoner's appeal from the denial of his motion for a preliminary injunction because the district court had subsequently dismissed the underlying case. *Id.* at 879. In doing so, it held that it "need not consider [plaintiff's] appeal of his denied motion for a preliminary injunction because the issue is moot." *Id.* Towards that end, the court reasoned that "[w]hen the district court dismissed the case, the denial of the motion for a preliminary injunction merged with the final order." *Id.* (citing *Birmingham Fire Fighters Ass'n*, 117, 603 F.3d at 1254-55). Thereafter, in *Griffith v. Monroe Cty. Det. Ctr.*, 2021 U.S. App. LEXIS 17996 (11th Cir. June 16, 2021) (unpublished), the Eleventh Circuit relied upon its unpublished decision in *Patterson* to dismiss a pro se prisoner's appeal from an order, inter alia, dismissing his complaint with leave to amend and denying his motion for a preliminary injunction. *Id.* at *1. In doing so, the court noted that the "order is not final because [plaintiff] opted to timely file an amended complaint[,]" rather than treating the order as final and filing an immediate appeal. *Id.* at *1-2 (citing 28 U.S.C. § 1291; *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1260-61 (11th Cir. 2006)). Furthermore, because the district court subsequently dismissed the amended complaint with prejudice, the court held that the "order has merged into the final dismissal, and the appeal is now moot." *Id.* at 2 (citing *First Fin. Grp. of Tex.*, 645 F.2d at 433). Notably, however, although an appeal from the grant of a preliminary injunction generally becomes moot if the trial court

enters a permanent injunction "because the former merges into the latter[,]" *First Fin. Grp. of Tex.*, 645 F.2d at 433; *Smith*, 270 U.S. at 588-89, an order denying a preliminary injunction cannot be said to automatically merge into subsequent orders dismissing a complaint for failure to state a claim. To be clear, the standard for entering a preliminary injunction does not echo that for surviving a motion to dismiss under Rule 12(b)(6), nor does the standard of review which applies to orders granting or denying preliminary injunctions echo that which applies to orders granting motions to dismiss for failure to state a claim. As such, the substantive validity of an order granting or denying a preliminary injunction doesn't necessarily establish the substantive validity of a subsequent order granting or denying a motion to dismiss under Rule 12(b)(6). *Grupo Mexicano De Desarroll*, 527 U.S. at 315 ("It would make no sense, when this is the claim, to say that the preliminary [order] merges into the final [order]"). Thus, the Eleventh Circuit's holdings in *Patterson* and *Griffith* conflict with this Court's holding in *Grupo Mexicano De Desarroll* which recognized that no merger occurs "where ... the substantive validity of the final [order] does not establish the substantive validity of the preliminary one." *Grupo Mexicano De Desarrollo*, 527 U.S. at 315.

Notwithstanding, the circumstances surrounding the instant appeal are immediately distinguishable from those before the Eleventh Circuit in *Burton*, *Birmingham Fire Fighters Ass'n 117*, and *Patterson*. As an initial matter, whereas the district courts in *Burton* and *Birmingham Fire Fighters Ass'n 117* granted injunctions, here the district court denied Petitioner's motion for preliminary

injunctive relief on the merits and subsequently denied his request for a permanent injunction as moot after dismissing his Second Amended Complaint for failure to state a claim. Furthermore, whereas the plaintiff in *Patterson* failed to appeal the denial of his motion for a preliminary injunction until after his complaint had been dismissed, *Patterson*, 791 F. App'x at 879, Petitioner immediately appealed the district court's order denying his motion for preliminary injunctive relief on May 19, 2021, long before his Second Amended Complaint was eventually dismissed on September 15, 2021, nearly four months later. Moreover, as was the case in *Burton* and *Birmingham Fire Fighters Ass'n 117*, the operative pleading upon which the *Patterson* court's preliminary injunctive order was grounded was the very same pleading as that which the court's final order was also based on. Conversely, as noted above, the operative pleading at the time the district court issued its order denying preliminary injunctive relief was Petitioner's Amended Complaint (App. L; App. 102a-131a), whereas the operative pleading at the time it issued its final order of dismissal was Petitioner's Second Amended Complaint (App. M; App. 132a-169a). Consequently, in contrast to the circumstances before the Eleventh Circuit in *Burton* and *Birmingham Fire Fighters Ass'n 117*, the district court's preliminary order didn't merge with its subsequent final order because the substantive validity of the latter doesn't establish the substantive validity of the former. *Grupo Mexicano De Desarrollo*, 527 U.S. 308 at 315. As such, the panel's reliance upon the Eleventh Circuit's unpublished decision in *Patterson* to suggest that the district court's final order of dismissal divested it of jurisdiction to consider Petitioner's appeal conflicts

with the rule recognized by the Eleventh Circuit in *Burton* by extending it beyond its permissible scope.

D. The panel's decision to dismiss Petitioner's appeal as moot conflicts with exceptions to the mootness doctrine recognized by this Court and various courts of appeals as well.

The panel's decision to dismiss Petitioner's appeal as moot conflicts with exceptions to the mootness doctrine recognized by this Court and various courts of appeals as well.

i. The district court's denial of Petitioner's motion for preliminary injunctive relief is "capable of repetition, yet evading review."

A well-established exception to the mootness doctrine occurs where the issues are "capable of repetition, yet evading review." *Southern Pacific Terminal Co. v. Interstate Commerce Commission*, 219 U.S. 498, 515 (1911). However, in the absence of a class action, this exception is limited to cases in which: 1) the challenged action is too short in duration to be fully litigated prior to its cessation or termination, and 2) there is a reasonable expectation that the same complaining party will be subject to the same action again. *City of Los Angeles v. Lyons*, 461 U.S. 95, 109 (1983).

In *Wolfson v. Brammer*, 616 F.3d 1045, 1054 (9th Cir. 2010), plaintiff filed an action alleging that several canons of the Arizona Code of Judicial Conduct imposed unconstitutional restrictions on his political speech and campaign activities. *Id.* at 1052. However, the district court dismissed the case as moot after finding that plaintiff "did not intend to seek judicial office in the next election." *Id.* at 1052. Notwithstanding, the Ninth Circuit reversed, holding that the case was not moot under the "capable of repetition yet evading review" exception. *Id.* at 1052, 1054. In

doing so, the court concluded that plaintiff had established a "reasonable expectation" that he would be subjected to the same action or injury again because his "complaint expresses an intention to seek judicial office in the future, and a desire to engage in prohibited conduct . . . in future judicial elections." *Id.* at 1055. According to the court, "[t]hese expressions of intent are sufficient to establish a 'reasonable expectation' that this action is 'capable of repetition.'" *Id.*

Similarly, in *Mid-Atlantic Express, LLC v. Baltimore County*, 410 F. App'x 653 (4th Cir. 2011), plaintiff sought a preliminary injunction granting pre-acquisition entry into certain county properties and residences along a proposed liquid natural gas pipeline route to complete certain surveys for submission to the Federal Energy Regulatory Commission for final project approval. The district court granted the injunction and defendant immediately appealed. During the pendency of that appeal, however, plaintiff completed the surveys and voluntarily dismissed the action. On that basis, plaintiff moved to dismiss defendant's appeal, arguing that "because it ha[d] dismissed its complaint in the district court and because it ha[d] completed the survey work that was at issue, the controversy presented in this case [was] no longer live." *Id.* at 655. Notwithstanding, after finding that plaintiff had represented that it might perform further surveys in connection with the construction of the pipeline, the Fourth Circuit held that the case remained reviewable under the capable-of-repetition-yet-evading-review exception to the mootness doctrine. *Id.* at 656.

Additionally, in *Enyart v. National Conference of Bar Examiners, Inc.*, 630 F.3d 1153 (9th Cir. 2011), the Ninth Circuit considered an appeal from preliminary

injunctions entered by the district court which required the National Conference of Bar Examiners to allow the plaintiff to take certain bar examinations using "assistive software." *Id.* at 1156-159. Even though those injunctions only related to particular administrations of those examinations, "which [had] since come and gone," according to the court, the appeals were not moot because "the situation [was] capable of repetition, yet evading review." *Id.* at 1159. Toward that end, the court explained that "[d]ue to the limited duration of [the] injunctions," it was "practically" impossible for the appellant to obtain review of the district court's orders. *Id.* at 1160.

As an initial matter, Petitioner did everything in his power to preserve the district court's denial of preliminary injunctive relief for review by making a prompt application for a stay pending appeal. *Bunker Ltd. Partnership v. United States*, 820 F.2d 308, 311 (9th Cir. 1987) (explaining that "a party may not profit from the 'capable of repetition, yet evading review' exception to mootness, where through his own failure to seek and obtain a stay he has prevented an appellate court from reviewing the trial court's decision"). Notwithstanding, although the panel had been fully briefed regarding the issues underlying this appeal since August 25, 2021, that decision apparently couldn't be fully litigated prior to the issuance of the district court's final order of dismissal. However, Petitioner fully intends to seek similar judicial relief in the future, at least until this Court rules against him on the merits of his claims, and such an expression of intent suffices to establish a "reasonable expectation" that this action is "capable of repetition." *Wolfson*, 616 F.3d at 1054-55 (holding that plaintiff had established a "reasonable expectation" that he would be

subjected to the same action or injury again because his "complaint expresses an intention to seek judicial office in the future, and a desire to engage in prohibited conduct . . . in future judicial elections"); *Mid-Atlantic Express, LLC*, 410 F. App'x at 655 (holding that an appeal of a district court's preliminary injunction order remained reviewable under capable-of-repetition-yet-evading-review exception because plaintiff had represented that it might perform further surveys). Moreover, as was the case in *Enyart*, due to the limited amount of time between the district court's preliminary order and the events allegedly rendering Petitioner's appeal of that order moot, this appeal necessarily satisfies the "evading review" prong of the capable-of-repetition-yet-evading-review exception to mootness as well. *Enyart*, 630 F.3d at 1160. Lastly, it would be unreasonable and would otherwise be a substantial waste of resources to require Petitioner to file an additional motion just to be denied upon the same grounds in which he seeks to appeal now. *Mansukhani*, 742 F.2d at 321 ("[T]he parties have fully briefed these questions on this appeal; we therefore see no reason to delay consideration of these issues"). As such, the panel's decision to dismiss Petitioner's appeal as moot conflicts with the Ninth Circuit's decisions in *Wolfson* and *Enyart*, as well as the Fourth Circuit's decision in *Mid-Atlantic Express*.

ii. *The district court's order will have collateral legal consequences.*

Another exception to the mootness doctrine occurs where the trial court's order will have possible collateral legal consequences. *ConnectU LLC v. Zuckerberg*, 522 F.3d 82, 88 (1st Cir. 2008) ("There is a recognized defense to a claim of mootness in the appellate context when a party can demonstrate that a lower court's decision, if

allowed to stand, may have collateral consequences adverse to its interests"). However, to prevent a district court's order, "unreviewable because of mootness, from spawning any legal consequences," this Court has recognized that vacatur of the order is the "established practice." *United States v. Munsingwear, Inc.*, 340 U.S. 36, 39-41 (1950).

The leading case on vacatur is *Munsingwear* wherein the government argued that a district court opinion shouldn't have been given res judicata effect because it was prevented from appealing the adverse judgment due to mootness. *Id.* at 39. In rejecting that argument, this Court held that any unfairness to the government was preventable because it had "slept on its rights" by failing to ask the court of appeals to vacate the district court's decision before the appeal was dismissed. *Id.* at 39-41. Notwithstanding, the Court noted that:

> The established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss ... That procedure clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

Id. at 39-40. As such, "it is the duty of the appellate court to set aside the decree below and to remand the cause with directions to dismiss" where it appears upon appeal that a controversy has become entirely moot. *Great Western Sugar Co. v. Nelson*, 442 U.S. 92, 93 (1979). Under such circumstances, vacatur prevents the party that lost in the district court from suffering the estoppel effects of that court's judgment when, through no fault of its own, the losing party has lost its right to have the judgment reviewed. *Manufacturers Hanover Trust Co. v. Yanakas*, 11 F.3d 381,

383 (2d Cir. 1993). Without such a vacatur, if a party that won in the district court took action to render the matter moot, the party would "shield[] erroneous decisions from reversal," and thereby produce the "bizarre result that judgments mooted [during an] appeal would have greater preclusive effect than cases susceptible of review." *Penguin Books USA Inc. v. Walsh*, 929 F.2d 69, 73 (2d Cir. 1991).

On the other hand, appellate courts should not vacate a judgment if the case has become moot due to the voluntary act of the losing party. *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters*, 686 F.2d 720, 721-22 (9th Cir. 1982) (holding that an appellate court has no duty to vacate if the appellant made the case moot). By way of example, in *Karcher v. May*, 484 U.S. 72 (1987), this Court was confronted with a matter that had become moot because a losing party had voluntarily abandoned its right to appeal. *Id.* at 82-83. According to the Court, the "controversy did not become moot due to circumstances unattributable to any of the parties," and on that basis it refused to apply the *Munsingwear* procedure and vacate the lower courts' decisions. *Id.* at 83; *see also Yanakas*, 11 F.3d at 383 ("If we were to vacate where the party that lost in the district court has taken action to moot the controversy, the result would be to allow that party to eliminate its loss without an appeal and to deprive the winning party of the judicial protection it has fairly won"). Conversely, however, "[i]f an appellee unilaterally and intentionally moots a case to preserve its preclusive effect, the appellant can easily avoid issue preclusion by moving to vacate the judgment." *In re Otasco, Inc.*, 18 F.3d 841, 844 (10th Cir. 1994). "In that case the appellate court clearly would have a duty to vacate the mooted

judgment, because the appellant had no control over the circumstances making the case moot." *Id.* (citing *Yanakas*, 11 F.3d at 383).

In *Nat'l Iranian Oil Co. v. Mapco Int'l, Inc.*, 983 F.2d 485 (3d Cir. 1992), plaintiff petitioned the district court to compel arbitration of a contract dispute with defendant. The district court dismissed plaintiff's petition as untimely based on its holding that the three-year Delaware statute of limitations applied to the action, rather than the ten-year Iranian statute of limitations urged by plaintiff, who had filed its petition six years after the relevant events. In response to this decision, plaintiff appealed. However, plaintiff subsequently moved to dismiss its appeal and to vacate the district's court's order due to mootness, arguing that defendant lacked assets with which to satisfy a judgement. Notwithstanding, the Third Circuit held that the case was not moot because, inter alia, plaintiff had filed two additional lawsuits in other federal district courts for the same breach of contract claim for which it sought arbitration, and therefore "[t]he district court's holding that the Iranian statute of limitations does not apply would have a collateral estoppel effect in those actions and could result in their dismissal." *Id.* at 490. Toward that end, the court noted that:

> [T]he mootness doctrine incorporates not only the threshold constitutional requirement of a live case or controversy, but also prudential concerns such as judicial economy ... A case is not moot if there is a reasonable likelihood that the parties will relitigate the same issues in the future ... Because [plaintiff] has filed two other lawsuits against [defendant] for breach of the same contract, the parties are reasonably likely to relitigate the issue of which jurisdiction's statute of limitations applies. The resulting expenditure of judicial resources counsels against our finding this case to be moot.

Id. (internal citations omitted).

Like the case in *Nat'l Iranian Oil*, the district court's order denying Petitioner's motion for preliminary injunctive relief could have collateral consequences in other litigation; in fact, it already has. Not only was it relied upon by the district court to dismiss a similar but unrelated case brought by Petitioner, but it was also recently relied upon by the Common Pleas Court of Delaware County, Pennsylvania to deny a petition for a preliminary injunction:

> Like the plaintiff in Zinman, Beck has failed to point to any authority indicating that Title II requires Williamson to accommodate his religious beliefs. Therefore, Beck cannot prevail on the theory that Williamson has failed to offer him a religious accommodation because Williamson has no duty to even offer the accommodation.

Beck v. Williamson College of the Trades, 2021 Pa. Dist. & Cnty. Dec. LEXIS 2401, *20 n. 16 (Pa. Commw. 2021) (citing *Zinman v. Nova Se. Univ.*, No. 21-CIV-60723-RAR, 2021 U.S. Dist. LEXIS 92180, 2021 WL 1945831, at *2 (S.D. Fla. May 14, 2021)); *Zinman v. L.A. Fitness Int'l LLC*, No. 21-CIV-20315-BB 2021 U.S. Dist. LEXIS 114827, at *23 n.5 (S.D. Fla. June 21, 2021) ("[I]t is questionable whether Title II requires Defendant to *accommodate* Plaintiff's religious beliefs") (citing *Zinman v. Nova Se. Univ.*, No. 21-CIV-60723-RAR, 2021 U.S. Dist. LEXIS 92180, 2021 WL 1945831, at *2). As such, vacatur of the district court's opinion would do nothing to address such collateral legal consequences which have already occurred. *Nat'l Iranian Oil*, 983 F.2d at 490; *Owen*, 873 F.3d at 731 ("[W]e must decide whether the preliminary injunctions were properly denied or else the district court's decisions would be insulated from any appellate review"). Thus, the panel's decision to dismiss Petitioner's appeal as moot even though the district court's order has already

produced collateral consequences and is likely to produce additional collateral consequences conflicts with the Third Circuit's decision in *Nat'l Iranian Oil.*

Even if this appeal were not reviewable under the collateral consequences exception to the mootness doctrine, however, contrary to the circumstances before this Court in *Karcher,* the controversy here did not become moot due to circumstances attributable to Petitioner. *Compare Karcher,* 484 U.S. at 82-83 (appellant voluntarily abandoned its right to appeal), *with In re Otasco,* 18 F.3d at 844 (observing that courts should vacate mooted judgments unless the appellant contributed to mootness) (citing *Yanakas,* 11 F.3d at 383). Additionally, unlike the circumstances before this Court in *Munsingwear,* this is not a case where Petitioner "slept on [his] rights" by failing to ask the court of appeals to vacate the district court's decision before the appeal was dismissed. *Munsingwear, Inc.*, 340 U.S. at 39-41. App. F at 23 (38a) ("[i]n the interest of preventing a situation similar to what happened in *Munsingwear,* if this Court declines to exercise jurisdiction to review the district court's May 14th Order, Zinman respectfully requests that this Court at least vacate the order to prevent it 'from spawning any legal consequences' in future litigation"). Nevertheless, the panel inexplicably declined to vacate the district court's preliminary order, despite its reliance upon *Harper* wherein this Court recognized that "vacatur of the [preliminary] order [was] appropriate to 'clea[r] the path for future relitigation of the issues between the parties and [to] eliminate] a judgment, review of which was prevented through happen-stance.'" *Harper,* 549 U.S. at 1262 (quoting *Anderson v. Green,* 513 U.S. 557, 560 (1995) (per curiam)). Notably,

however, not two weeks before the panel eventually dismissed Petitioner's appeal as moot, in *Sterigenics U.S., LLC v. Phelps*, 2021 U.S. App. LEXIS 34731 (11th Cir. Nov. 22, 2021), Circuit Judge Barbara Lagoa, who was on the panel which dismissed Petitioner's appeal, entered an order observing that:

> When a case becomes moot on appeal, under controlling law the Court of Appeals must not only dismiss the case, but also vacate the district court's order. This practice clears the path for future relitigation of the issues between the parties and eliminates a judgment, review of which was prevented through happenstance.

Id. at *1-2 (internal quotations omitted). Additionally, the other two judges on the panel dismissing Petitioner's appeal—Circuit Judges Jill Pryor and Britt Grant—have each entered similar orders recently as well. *O'Neal v. United States*, 825 Fed. Appx. 695, 698 (11th Cir. 2020) (Circuit Judge Pryor observing that "[w]hen a case has become moot, we do not consider the merits presented, but instead vacate the judgments below with directions to dismiss even if a controversy did exist at the time the district court rendered its decision"); *Jackson*, 4 F.4th at 1216 (Circuit Judge Grant holding that "[b]ecause this appeal is moot and no exception to mootness applies, we dismiss the appeal and vacate the District Court's order imposing the preliminary injunction"). Thus, since the panel concluded that Petitioner's appeal of the district court's order denying preliminary injunctive relief was moot, it's unclear why it chose not to vacate the district court's order despite apparently being well aware that it had a duty to do so under such circumstances. Notwithstanding, the panel's failure to vacate the district court's order despite dismissing Petitioner's appeal from that order as moot conflicts with this Court's decision in *Munsingwear*.

E. The panel's handling of this appeal deprived Petitioner of numerous rights guaranteed by the Constitution and laws of the United States.

Lastly, but perhaps most significantly, the panel's decision to summarily dismiss Petitioner's appeal as moot via an unpublished opinion after denying him an opportunity for oral argument and delaying review until the district court eventually disposed of the underlying case nearly four months after Petitioner's appeal was filed effectively deprived Petitioner of numerous rights guaranteed by the Constitution and laws of the United States.

The rights protected under the Due Process Clause are not limited to those enumerated in the Constitution. *Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). Rather, such rights include "those fundamental rights and liberties which are, objectively, 'deeply rooted in this Nation's history and tradition,'" *id.* (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)), "and 'implicit in the concept of ordered liberty,' such that 'neither liberty nor justice would exist if they were sacrificed,'" *id.* (quoting *Palko v. Connecticut*, 302 U.S. 319, 325, 326 (1937)). Among these rights is indisputably the constitutional right of access to the courts as well as the statutory right of appeal. Indeed, for well over a century this Court has recognized 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.

Chambers v. Baltimore & Ohio Railroad, 207 U.S. 142, 148 (1907) (citations omitted). A mere formal right to an appeal, however, does not pass constitutional muster. Rather, consistent with the right of access to the courts, litigants must be guaranteed an "adequate, effective, and meaningful" opportunity to redress their grievances on

appeal. *Bounds v. Smith*, 97 S.Ct. 1491, 1495 (1977); *California Motor Transport Co. v. Trucking Unlimited*, 92 S.Ct. 609, 612 (1972) ("The right of access to the courts is indeed but one aspect of the right of petition"). Any deliberate interference with this right, "even a delay of access," constitutes a violation of due process. *Jackson v. Procunier*, 789 F.2d 307, 310-11 (5th Cir. 1992) ("[I]nterference with access to the courts may constitute the deprivation of a substantive constitutional right, as well as a potential deprivation of property without due process").

Providing every litigant full appellate review, including the opportunity for oral argument and a well-reasoned, published opinion, "assur[es] that the complaints of every litigant-small or large, rich or poor-are given equal treatment by those most powerful of governmental figures, the judges of the federal courts of appeals."[2] However, numerous commentators have concluded that courts are more inclined to hear oral argument and issue a published decision in "important" cases (such as antitrust or securities) and are more likely to utilize "procedural shortcuts" to dispose of "trivial" cases (such as those involving social security or pro se/prisoner petitions).[3] According to such commentators, "procedural shortcuts" have the practical effect of encouraging arbitrary and discriminatory practices, thereby tending to further disenfranchise ordinary citizens.[4] Among the critics of such practices are current and former members of this Honorable Court. Notably, in a dissent from a summary

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2. William M. Richman & William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L. Rev. 273, 297 (1996).
3. *Id.* at 295; Lauren K. Robel, *The Myth of the Disposable Opinion: Unpublished Opinions and Government Litigants in the United States Courts of Appeals*, 87 Mich. L. Rev. 940, 947 (1989).
4. *Id.*

reversal of a Ninth Circuit ruling, Justice John Paul Stevens opined that "[t]he brevity of analysis" in the lower court's "unpublished, noncitable opinion ... [did] not justify the Court's summary reversal," and further commented that "the Court of Appeals would have been well advised to discuss the record in greater depth." *County of Los Angeles v. Kling*, 474 U.S. 936, 938 (1985) (Stevens, J., dissenting). On that basis, he concluded that the Court of Appeals' "decision not to publish the opinion or permit it to be cited—like the decision to promulgate a rule spawning a body of secret law—was plainly wrong." *Id.* at 936. Moreover, in *Plumley v. Austin*, 135 S. Ct. 828 (2015), Justice Anthony Scalia joined with Justice Clarence Thomas in his dissent from the majority's denial of certiorari wherein he stated that:

> True enough, the decision below is unpublished and therefore lacks precedential force in the Fourth Circuit ... But that in itself is yet another disturbing aspect of the Fourth Circuit's decision, and yet another reason to grant review. The Court of Appeals had full briefing and argument on Austin's claim of judicial vindictiveness ... By any standard—and certainly by the Fourth Circuit's own—this decision should have been published. The Fourth Circuit's Local Rule 36(a) provides that opinions will be published only if they satisfy one or more of five standards of publication. The opinion in this case met at least three of them: it "establishe[d] ... a rule of law within th[at] Circuit," "involve[d] a legal issue of continuing public interest," and "create[d] a conflict with a decision in another circuit." Rules 36(a)(i), (ii), (v) (2015). It is hard to imagine a reason that the Court of Appeals would not have published this opinion except to avoid creating binding law for the Circuit.

Id. at 831 (Thomas, J., dissenting) (internal citation omitted).

Not only was the panel's decision to deny Petitioner an opportunity for oral argument only to summarily dismiss his appeal as moot via an unpublished opinion after delaying review until the district court eventually disposed of the underlying case nearly four months after it was filed "plainly wrong," *Kling*, 474 U.S. at 938

(Stevens, J., dissenting), but it deprived Petitioner of an "adequate, effective, and meaningful" opportunity to redress his grievances on appeal, and therefore constitutes an unconstitutional interference with the rights of access to the courts and to petition the government for redress of grievances, not to mention a deprivation of fundamental liberty without due process as well. *Bounds*, 97 S.Ct. at 1495; *California Motor Transport*, 92 S.Ct. at 612; *Green v. Johnson*, 977 F.2d 1383, 1389 (10th Cir. 1992) ("'Any deliberate impediment to access [to the courts], even a delay of access, may constitute a constitutional deprivation'") (quoting *Jackson*, 789 F.2d at 311).

Compounding matters further, by refusing to vacate the district court's order despite every member of the panel having recently vacated district court orders for similarly situated litigants under similar circumstances, the panel denied Petitioner equal protection of the laws. *Boiling v. Sharpe*, 347 U.S. 497, 499 (1954) ("Although it contains no Equal Protection Clause as does the Fourteenth Amendment, the Fifth Amendment's Due Process Clause prohibits the Federal Government from engaging in discrimination that is 'so unjustifiable as to be violative of due process'"); *U. S. Dept. Agriculture v. Murry*, 413 U.S. 508, 517 (1973) (Marshall, J., concurring) ("One aspect of fundamental fairness, guaranteed by the Due Process Clause of the Fifth Amendment, is that individuals similarly situated must receive the same treatment by the Government").

Additionally, due to its refusal to publish its decision, the panel effectively denied Petitioner the right to petition for rehearing en banc under Rule 35 of the

Federal Rules of Appellate Procedure by relying upon Eleventh Circuit Rule 35-4(b) which prohibits litigants from filing such petitions with respect to any order dismissing an appeal that is not published. However, while courts are free to create local rules governing practices not covered by the Federal Rules, such rules must be consistent with the Federal Rules. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (explaining that by virtue of the Supremacy Clause, a Federal Rule which covers the issue in dispute will prevail over a local procedural rule); *Colgrove v. Battin*, 413 U.S. 149, 161 n.18 (1973) (explaining that, if in conflict, the local rule must yield to the federal rule); *Coady v. Aguadilla Terminal Inc.*, 456 F.2d 677, 678 (1st Cir.1972) ("[A] local rule cannot be applied if it is contrary to a federal statute or rule"); *Lawrence v. Lawson*, 804 F. 2d 153 (D.C. Cir. 1986) ("The local rule cannot, of course, supersede the Federal Rules"); *Carver v. Bunch*, 946 F.2d 451, 453 (6th Cir.1991) ("Local court rules . . . cannot conflict with the Federal Rules"); *Brown v. Crawford County, Ga.*, 960 F.2d 1002, 1008 (11th Cir. 1992) ("[C]ourts are not required to adopt local rules, but they must not circumvent the Federal Rules of Civil Procedure by implementing local rules or 'procedures' which do not afford parties rights that they are accorded under the Federal Rules"). Notwithstanding, petitions for rehearing en banc are explicitly governed by Rule 35 of the Federal Rules of Appellate Procedure. Thus, the panel had no right to rely upon a local rule to construe a petition expressly authorized by the Federal Rules of Appellate Procedure as a motion for reconsideration, and the fact that it chose to do so not only violated the Supremacy Clause and 28 U.S.C. § 2072 but constitutes an unconstitutional interference with the rights of access to the

courts and to petition the government for a redress of grievances, as well as a deprivation of fundamental liberty without due process.

Lastly, by any standard—and certainly the Eleventh Circuit's own—the panel's decision to dismiss Petitioner's appeal for lack of jurisdiction should've at least been published. 11th Cir. I.O.P 36-5 ("Opinions that the panel believes to have no precedential value are not published"). To be clear, given that the Eleventh Circuit's Internal Operating Procedure explicitly states that the "court generally does not cite to its 'unpublished' opinions[,] ... [except] where they are specifically relevant to determine whether the predicates for res judicata, collateral estoppel, or double jeopardy exist in the case, to ascertain the law of the case, or to establish the procedural history or facts of the case[,]" 11th Cir. I.O.P 36-7, coupled with the fact that the only Eleventh Circuit decision upon which the panel relied to justify dismissing Petitioner's Appeal was *Patterson*, an unpublished opinion, the panel couldn't have reasonably believed that its decision had "no precedential value." Not only did that decision establish "persuasive authority" within the Eleventh Circuit holding that a final order of dismissal automatically moots an interlocutory appeal from a district court's order denying preliminary injunctive relief, which is obviously a legal issue of continuing public interest, but it flouted this Court's jurisprudence and created conflicts with numerous decisions of various courts of appeals as well. Consequently, although the panel's decision is unpublished and therefore lacks precedential force within the Eleventh Circuit, "that in itself is yet another disturbing aspect of the [panel's] decision, and yet another reason to grant review." *Plumley*, 135

S. Ct. at 831 (Thomas, J., dissenting).

CONCLUSION

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

Respectfully submitted,

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CERTIFICATE OF FILING AND SERVICE

In compliance with Supreme Court Rule 39(2), I hereby certify that, on February 14, 2022, I mailed the foregoing document, along with ten copies, to the Supreme Court of the United States at 1 First Street, NE, Washington, DC 20543. In accordance with Supreme Court Rule 29(3), I further certify that all parties required to be served have been served with a single copy of the foregoing via mail, including counsel for Respondents Nova Southeastern University Inc. and South Florida Stadium LLC, Benjamin Bean and Richard Beauchamp, 2400 East Commercial Boulevard, Coastal Towers, Suite 905, Fort Lauderdale, Florida 33308, (954) 390-0100, counsel for Respondents Broward County and Bertha Henry, Andrew Meyers and Adam Katzman, 115 S. Andrews Avenue, Suite 423, Fort Lauderdale, FL 33301, (954) 357-7600, and counsel for Respondent Miami-Dade County, Geraldine Bonzon-Keenan and Lauren Morse, 111 N.W. 1st Street, Suite 2810, Miami, Florida 33128, (305) 375-5151.

I declare under penalty of perjury under the laws of the United States of America that the foregoing information is true and correct.

Dated: February 14, 2022

Corey J. Zinman

COREY J. ZINMAN

STATE OF FLORIDA

COUNTY OF PALM BEACH

The foregoing instrument was acknowledged before me this 14th day of February 2022, by COREY J. ZINMAN.

Samantha Cavaliero

NOTARY PUBLIC