No. 17-1368

In The Supreme Court of the United States

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

Appellant,

v.

LOUIS AGRE, *ET AL.*,

Appellees.

On Appeal From The United States District Court For The Eastern District Of Pennsylvania

MOTION TO DISMISS OR TO AFFIRM

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QUESTIONS PRESENTED

1. Does the Court have jurisdiction under 28 U.S.C. § 1253 to hear an appeal from pretrial discovery orders overruling claims of privilege; and if the Court lacks jurisdiction under § 1253, is remand appropriate to permit an appeal to the Court of Appeals?

2. Is an appeal from the denial of privilege moot where the disputed materials are in the public domain and the appellant concedes that the courts cannot redress the harm done; and is the privilege issue capable of repetition but evading review?

3. Does an appellant have standing to assert another party's interests on appeal, when the interested party appealed to this Court and then elected not to participate; and does an appellant have standing to assert his own interests, when he withdrew a motion requesting that the lower court protect them?

4. Does an appeal present a substantial question warranting full merits briefing when the appellant asserts that the common law legislative privilege gives a state legislator an absolute privilege against pretrial disclosure, even in matters in which federal courts are empowered to act to protect "important federal interests"; when neither this Court nor any Court of Appeals has so held, and neither comity nor public policy supports that privilege?

QUESTIONS PRESENTED – Continued

5. Is an appeal an appropriate vehicle for resolving weighty privilege issues when the appellant has either forfeited or waived review, may be estopped from pursuing his privilege claims, and asserted privilege below only over a narrow subset of the types of material he seeks to protect on appeal?

PARTIES TO THE PROCEEDING

Louis Agre, William Ewing, Floyd Montgomery, Joy Montgomery, Rayman Solomon, John Gallagher, Ani Diakatos, Joseph Zebrowitz, Shawndra Holmberg, Cindy Harmon, Heather Turnage, Leigh Ann Congdon, Reagan Hauer, Jason Magidson, Joe Landis, James Davis, Ed Gragert, Ginny Mazzei, Dana Kellerman, Brian Burychka, Marina Kats, Douglas Graham, Jean Shenk, Kristin Polston, Tara Stephenson, and Barbara Shah were Plaintiffs in the district court action below. They are Appellees in this proceeding, and Appellants in No. 17-1339.

Michael C. Turzai, Speaker of the Pennsylvania House of Representatives and Joseph B. Scarnati, III, Pennsylvania Senate President Pro Tempore, intervened as Defendants below. Scarnati alone is Appellant here. Both are Appellees in No. 17-1339.

Thomas W. Wolf, Governor of Pennsylvania, Robert Torres, Secretary of State of Pennsylvania, and Jonathan Marks, Commissioner of the Bureau of Elections were named in their official capacities as Defendants below.[1] Robert Torres was substituted for the previously-named Pedro Cortés pursuant to Rule 25(d) of the Federal Rules of Civil Procedure and Supreme Court Rule 35.4.

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[1] Scarnati has identified Turzai, Wolf, Torres, and Marks as Appellees in this matter (Scarnati Jurisdictional Statement ("JS") at *ii*), but none was a prevailing party on the orders from which Scarnati appeals.

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INTRODUCTION

Appellant Joseph Scarnati urges this Court to create a common law privilege that would render federal courts powerless to determine whether state legislative action complies with the U.S. Constitution, in an arena in which both the Constitution and Congress mandate that the courts do so: redistricting litigation. Scarnati insists that state legislators enjoy an absolute privilege, in all civil cases, against the disclosure of "all information about the legislative process."

They do not. Neither this Court nor a Court of Appeals has so held. To the contrary, this Court and each Court of Appeals to consider the question have held that when "important federal interests" are at stake, the common law privilege yields. Voting rights are a paradigm of an important federal interest.

But the Court cannot subordinate federal authority to the states as Scarnati invites, even if it wanted to. It lacks jurisdiction over his appeal, for several reasons.

And even if the Court notes probable jurisdiction, it should summarily affirm. Because the lower court's rulings complied with this Court's precedent, and there is no relevant circuit split, Scarnati presents no substantial question. Moreover, his case is an inappropriate vehicle for creating the rule he seeks, for reasons including waiver, forfeiture, and estoppel. Having voluntarily inserted himself as a defendant in this litigation, Scarnati may not complain that the court

scrutinized his conduct for compliance with the Constitution.

OPINIONS BELOW

Scarnati identifies for appeal three written orders relating to his legislative privilege claim, dated November 9, 2017, November 22, 2017, and November 28, 2017 (App. 336-45). He also identifies for appeal two rulings reflected in the Transcripts of December 4, 2017, Vol. I at 85:18-24 and Vol. II at 105:21-106:12. Those rulings qualified two defense witnesses as experts.[2]

JURISDICTION

The Court lacks jurisdiction over Scarnati's appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The motion to dismiss for lack of jurisdiction involves 28 U.S.C. § 1253 and U.S. Const. art. III, § 2,

[2] Scarnati states that those transcript pages are included in his Appendix (JS 6), but they are not. He does not include these rulings in his Questions Presented, or otherwise address them. Plaintiffs will confine their Statement of the Case to the orders that Scarnati has fully presented to this Court.

cl. 1 (cases or controversies). The motion to affirm involves the U.S. Const. art. VI, cl. 2 (Supremacy Clause), and 28 U.S.C. § 2284(a).

Although Scarnati invokes the Speech or Debate Clause, U.S. Const. art. I, § 6, cl. 1, he is not protected by that provision as a state legislator.

STATEMENT OF THE CASE

Appellant Joseph Scarnati challenges interlocutory discovery orders entered pretrial by a three-judge district court convened, pursuant to 28 U.S.C. § 2284(a), to hear the matter *Agre v. Wolf*, No. 17-cv-4392 (E.D. Pa.).

The Plaintiffs are a bipartisan group of voters, from each Congressional district in Pennsylvania, who challenge the state's 2011 Congressional map as a partisan gerrymander that violates the Elections Clause, U.S. Const. art. I, § 4, and the Privileges or Immunities Clause, U.S. Const. amend. XIV, § 1.

The Plaintiffs filed their Complaint on October 2, 2017. They named three executive branch officials as defendants in their official capacity: the Governor of Pennsylvania; the Secretary of State, and the Commissioner of the Bureau of Elections. Both Scarnati, who is the President Pro Tempore of the Pennsylvania Senate, and Michael Turzai, who is the Speaker of the Pennsylvania House of Representatives, moved to intervene as defendants. Asserting their unique interest

in the litigation they told the court, inter alia, that they "possess the information regarding the 2011 Plan, which is necessary to this litigation. In this regard, permitting Applicants to intervene could limit the need for cumbersome third-party discovery. . . ." District Court Docket Entry ("DDE") 45-3, at 5.

Yet when the Plaintiffs propounded discovery to them, Scarnati and Turzai ("Intervenors") responded with blanket "objections" asserting, inter alia, an absolute legislative privilege. Both declined to support their assertions with specificity, arguing that even producing a privilege log would invade their privilege. The Plaintiffs moved to compel (DDE 51), and the Intervenors opposed (DDE 57).

On November 9, 2017 the court granted the Plaintiffs' motion, holding that "the legislative privilege is a qualified privilege that may be pierced and which at a minimum does not shield communications with third-parties . . . nor protect facts and data considered in connection with redistricting." App. 336-38. It ordered the production of two narrow categories of documents: the "facts and data considered in creating the 2011 Plan," and "documents reflecting requested communications between Intervenor Defendants (including their staff and agents) and REDMAP's[3] representatives." The court also required the Intervenors to

[3] "REDMAP" is the "REDistricting Majority Project," which describes itself as "a program of the RSLC [Republican State Leadership Committee] dedicated to winning state legislative seats that will have a critical impact on congressional redistricting in 2011." *See* www.redistrictingmajorityproject.com.

produce privilege logs; and instructed the parties to return to the court, after conferring, with a "joint privilege log" setting forth any privilege claims requiring a ruling.

On November 17, 2017 the Intervenors produced the "facts and data" and certain "communications" jointly, and Scarnati separately produced additional "communications." Each produced a privilege log as well. Notably, when Scarnati did so he asserted only a "qualified legislative privilege"; and asserted it only as to five documents, as to four of which he also claimed attorney-client and/or work product privileges. *See* Tr. of Dec. 4, 2017, Vol. II, 161:16-162:4 (colloquy about contents of log). Turzai produced a much lengthier log, on which he and the Plaintiffs conferred as instructed.

Meanwhile, the Plaintiffs had noticed depositions for Scarnati and Turzai. Turzai filed a motion requesting that he be relieved from giving a deposition at all, or in the alternative relieved of answering questions revealing his "deliberative process or subjective intent." DDE 87. Scarnati later filed a near-identical motion addressing his own deposition. DDE 111. The court denied Turzai's motion on November 22, 2017 (App. 339-41), and Scarnati thereafter withdrew his motion before the court ruled (DDE 117).

Returning to the topic of Plaintiffs' document requests, on November 24, 2017 Turzai and the Plaintiffs submitted to the court a lengthy "joint privilege log" presenting for decision Turzai's unresolved claims of legislative privilege as to documents previously

produced. DDE 118. While Scarnati now implies that he was a party to that submission, requesting a ruling on "hundreds" of purportedly-privileged documents (*see* JS 9-10), he was not. The privilege claims that the court overruled on November 28, 2017 were Turzai's alone. App. 342-45.

Turzai and the Plaintiffs also submitted a "stipulated protective order" for the court's consideration; Scarnati was not a party to that either. The order would have designated Turzai's privilege log "confidential," prohibiting certain disclosures. DDE 116. The November 28th Order also rejected the protective order, on First Amendment grounds. App. 342-45.

The matter was tried to the district court on December 4-8, 2017. Neither Intervenor testified, live or via deposition. The deposition testimony of two legislative aides was read into evidence, however; and the defense experts testified about the facts and data Intervenors had produced. Neither Intervenor asserted a privilege objection to the evidentiary use of any disputed materials at trial.

On January 10, 2018, the court ruled 2-1 for the Defendants, with no judge joining another's opinion. *See* App. 1-335.

The Plaintiffs took a timely appeal to this Court, which was docketed at No. 17-1339. Scarnati and Turzai took a separate appeal (App. 346). Turzai subsequently elected not to participate in this appeal (JS 6 n.5).

ARGUMENT

I. The Court Lacks Jurisdiction Over The Appeal.

A. Dismissal Is Appropriate Because 28 U.S.C. § 1253 Does Not Confer Jurisdiction.

1. A discovery order does not grant or deny an "injunction."

Scarnati asserts that 28 U.S.C. § 1253 empowers the Court to hear his appeal from discovery orders rejecting claims of legislative privilege. It does not. The statute gives the Court jurisdiction to review "**an order granting or denying**, after notice and hearing, **an interlocutory or permanent injunction** in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. § 1253 (emphasis added).

While in some sense every court order directs a party to do (or not do) something, a discovery order does not "grant[] or deny[]" injunctive relief.[4] This

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[4] The Courts of Appeals have consistently applied this rule to hold that various types of discovery orders are not injunctions. *E.g.*, *Corporacion Insular de Seguros v. Garcia*, 876 F.2d 254, 256 (1st Cir. 1989) (order to produce documents); *New York v. U.S. Metals Ref. Co.*, 771 F.2d 796, 801 (3d Cir. 1985) (protective order); *Nat'l Super Spuds, Inc. v. N.Y. Mercantile Exch.*, 591 F.2d 174, 176-77 (2d Cir. 1979) (order compelling testimony); *Iowa Beef Processors, Inc. v. Bagley*, 601 F.2d 949, 953 (8th Cir. 1979) (order partially lifting protective order); *N.C. Ass'n of Black Lawyers v. N.C. Bd. of Law Examiners*, 538 F.2d 547, 548 (4th Cir. 1976) (refusal

Court so held in *United States v. Ryan*, 402 U.S. 530, 534 (1971) (applying 28 U.S.C. § 1292(a)(1)). *See also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 279 (1988) ("An order . . . that relates only to the conduct or progress of litigation before that court ordinarily is not considered an injunction. . . .").

In no reported case in which jurisdiction was predicated upon § 1253 has the Court reviewed a discovery order or evidentiary ruling. Indeed the Court has previously dismissed for lack of jurisdiction an appeal from an order overruling a legislative privilege claim – an appeal identical to this one, filed by Scarnati's then-colleagues in the Pennsylvania legislature. *Republican Caucus of Pa. House of Representatives v. Vieth*, 537 U.S. 801 (2002) (Mem.); *see Vieth v. Pennsylvania*, 67 F. App'x 95, 98 & n.1 (3d Cir. 2003).

Scarnati would have the Court read § 1253 to confer jurisdiction to review *all* orders entered in a proceeding before a three-judge district court – but that is not what the statute says. The Court construes its mandatory jurisdiction narrowly; *e.g.*, *Goldstein v. Cox*, 396 U.S. 471, 478 (1970); and routinely enforces the express limitation in § 1253. *See, e.g.*, *Vieth*, 537 U.S. 801; *Brown v. Plata*, 134 S. Ct. 436 (2013) (Mem.) (dismissing where district court orders declined to vacate, and modified, prior injunction); *Citizens United v. Fed. Elec. Comm'n*, 552 U.S. 1278 (2008) (Mem.) (dismissing

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to issue protective order); *Time, Inc. v. Ragano*, 427 F.2d 219, 221 (5th Cir. 1970) (order quashing the taking of depositions).

where three-judge panel was utilized but not required); *Mitchell v. Donovan*, 398 U.S. 427, 430-31 (1970).

Scarnati will be on no stronger ground if he urges this Court to exercise a species of pendent jurisdiction over his appeal given the pendency of Plaintiffs' appeal (in No. 17-1339) from the denial of injunctive relief.[5] While in the interest of efficiency the Court sometimes reviews additional forms of relief arising out of the ruling that underlies an injunction – *e.g.*, when a district court has granted both injunctive and declaratory relief – that review is limited to relief based on the same reasoning, awarded to the same prevailing party. *See, e.g.*, *Supreme Court of Va. v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 737 n.16 (1980); *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 35 (1980); *Roe v. Wade*, 410 U.S. 113, 123 (1973); *White v. Regester*, 412 U.S. 755, 760 (1973). Only with that limitation does that form of pendent jurisdiction serve judicial efficiency.

Here the district court's analyses of the discovery orders and the request for injunctive relief are legally distinct, with different prevailing parties pursuing separate appeals. The Court lacks jurisdiction over Scarnati's appeal from the discovery orders.

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[5] Scarnati moved the Court on April 23, 2018 to affirm the ruling in No. 17-1339, and executive branch defendant Thomas Wolf moved to dismiss it on the same date. This appeal must be dismissed even if that one continues.

2. Dismissal, not remand, is the appropriate disposition.

The time for Scarnati to appeal to the Third Circuit has expired. *See* Fed. R. App. P. 4(a)(1)(A), 4(a)(5)(A); *Bowles v. Russell*, 551 U.S. 205, 213 (2007) (bar is jurisdictional). Although this Court sometimes affords appellants in his position a fresh opportunity to appeal to the circuit – by remanding to the district court with instructions to enter a new order from which a timely appeal may be taken (*see, e.g.*, *Mitchell*, 398 U.S. at 431) – it should not do so here, for two reasons.

First, the Court does not dispense remands to protect appellants from the consequences of their failure to follow established procedures for obtaining review, but only to rescue appellants who may have been trapped by "somewhat arcane jurisprudence." *E.g.*, *Donovan v. Richland Cnty. Ass'n for Retarded Citizens*, 454 U.S. 389, 390-91 (1982) (per curiam). This Court has catalogued in detail several "long-recognized options" for obtaining appellate review of orders rejecting privilege claims. *E.g.*, *Mohawk Inds. v. Carpenter*, 558 U.S. 100, 111 (2009). "Were [Scarnati and his counsel] to reflect upon their appellate options, they would find that litigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review" (*id.* at 110), including:

- asking the district court to certify, and the circuit court to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b);

- petitioning the Court of Appeals for a writ of mandamus;[6]
- accepting sanctions that will entitle the party to post-judgment review; and
- accepting a contempt citation that is punitive in nature, and appealing directly from it.

Id. at 110-11. If the privilege holder feels strongly about avoiding a disclosure, it may move to stay the district court's order pending the certified question or mandamus process; or it may accept sanctions or contempt, both of which assume nondisclosure. *See id.*

Scarnati elected to forego each of these options.[7] Instead he took an appeal to this Court in derogation of the plain language of 28 U.S.C. § 1253. Any litigant who paused "to reflect" upon the scope of § 1253 would find inescapable the conclusion that a discovery order is not an "injunction," which *Ryan* confirms. *See Ryan*, 402 U.S. at 534.

And Scarnati was better positioned than many to ascertain that. He relied heavily below on this Court's ruling in *Vieth v. Jubelirer*, 541 U.S. 267 (2004). *E.g.*,

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[6] The Third Circuit recognizes mandamus as an appropriate means of obtaining "immediate appellate review" of orders compelling the disclosure of privileged material. *E.g.*, *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 861 (3d Cir. 1994).

[7] He plainly knew of them. *See* Tr. of Dec. 4, 2017, at 147:14-20 (noting that Turzai's counsel stated at Turzai's deposition that they were going to appeal; Turzai and Scarnati had counsel in common).

DDE 45-1 (Motion to Intervene), passim; DDE 168 (Motion for Summary Judgment), passim. Surely his skilled counsel knew that this Court had dismissed on jurisdictional grounds a § 1253 appeal from an order denying a motion to quash – on legislative privilege grounds – in that very litigation. *Vieth*, 537 U.S. 801. As the Third Circuit observed in a subsequent opinion, "appeal to the Supreme Court would have been inappropriate" – although the Caucus took one anyway – because the discovery order did not grant or deny an injunction. *Vieth*, 67 Fed. App'x at 98 & n.1. Scarnati himself was a member of the Pennsylvania legislature when those rulings were made. Scarnati's "simple failure in this case to follow the clear commands" of § 1253, and of opinions by this Court and the Third Circuit, does not merit the indulgence of a remand. *See Donovan*, 454 U.S. at 390-91.

Second, Scarnati cannot maintain a direct appeal of the orders at all. Orders rejecting privilege assertions are not final orders under 28 U.S.C. § 1291. *Mohawk Inds.*, 558 U.S. at 112-13. And as the prevailing party below, Scarnati may not appeal from the final judgment. *See, e.g.*, *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 333 (1980); *Nanavati v. Burdette Tomlin Memorial Hosp.*, 857 F.2d 96, 102 (3d Cir. 1988).

Moreover, Scarnati's appeal to the Third Circuit would be moot, as is his appeal to this Court; and he would lack standing in the circuit to appeal from two of the orders he purports to appeal from, just as he lacks standing here. *See* Section I.B, infra. A remand would be both unmerited and futile.

B. Dismissal Is Appropriate Because The Case Is Moot.

Each of the "long-recognized options" available to Scarnati for obtaining review when the district court rejected his privilege claims afforded a mechanism for avoiding a disclosure in the meantime. *Mohawk Inds.*, 558 U.S. at 110-11. Scarnati pursued none of them.

He now opines that he had "no incentive" do so (JS 37) – while complaining bitterly about the predictable outcome of his inaction: the materials at issue are on the public record in two court systems; have received substantial press attention; and have subjected Scarnati to criticism from other branches of state government. *See* JS 30-31. In addition, since becoming public the materials have been shared and discussed widely.

Assuming arguendo that such transparency is pernicious rather than salutary, the Court is powerless to remedy it. Even if the Court were otherwise inclined to instruct the state courts, and the press, and the advocacy groups, and the interested academics and other individuals who have copies of the disputed materials to destroy them – a dubious proposition given, among other substantial barriers, the First Amendment – those parties are not before it. The matter is moot because the Court cannot "grant any effectual relief whatever" to Scarnati.[8] *Church of Scientology of Calif. v. United States*, 506 U.S. 9, 12-13 (1992).

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[8] The only arguably-redressable harm of which Scarnati complains is the outcome of the separate state court litigation, *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa.

Scarnati admits this. JS 37 ("the damage . . . cannot be undone"). He argues only that the matter is "capable of repetition, yet evading review." *Id.* at 36-37. That is specious. As detailed above – and by this Court (*e.g.*, *Mohawk Inds.*, 558 U.S. at 110-11) – future litigants who "reflect upon their appellate options" will quickly identify several means of securing intermediate appellate review. That Scarnati elected to forgo those options does not make them unavailable to future litigants. Moreover, a future litigant who loses at final judgment will be able to present the issue on direct appeal to a circuit court.

Scarnati ignores that this Court has already held that a disclosure of privileged material does not necessarily moot an appeal. *Scientology*, 506 U.S. at 17-18. The disclosure has done so here, because the materials

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2018), which he attributes to the use of the material produced in this case – but that outcome is not redressable in this appeal. While Scarnati is free to seek certiorari review of that decision, the Court cannot decide whether the Pennsylvania court violated the Pennsylvania constitution by admitting the disputed materials into evidence. *See, e.g.*, *Chandler v. Florida*, 449 U.S. 560, 570 (1981).

And in any event, the Pennsylvania Supreme Court has explained that the disputed materials were not necessary to its judgment, given "the other unrebutted evidence of the intent to dilute the vote of citizens who historically voted for Democratic candidates." *League of Women Voters*, 178 A.3d at 767 n.38. Moreover, this Court long ago rejected the proposition that a party's unwillingness to have discovery materials used in a separate litigation justifies a protective order. *Ex parte Uppercu*, 239 U.S. 435 (1915).

have already passed into the public sphere.[9] But future litigants in Scarnati's position have in *Mohawk* and *Scientology* a roadmap for accessing intermediate appellate review and avoiding mootness. The privilege issue will repeat, but it will not evade review. The appeal is moot.

C. Scarnati Lacks Standing To Appeal The November 22, 2017 And November 28, 2017 Orders, And Has Waived The Challenges He Failed To Brief.

As detailed above (at 2, 4-6), Scarnati purports to appeal three pretrial orders: the November 9, 2017 Order granting the Plaintiffs' Motion to Compel, which he and Turzai both opposed; the November 22, 2017 Order denying Turzai's Motion for Protective Order, addressing Turzai's deposition; and the November 28, 2017 Order overruling Turzai's privilege assertions, and disapproving the stipulated protective order submitted by Turzai and the Plaintiffs. Scarnati also lists among the "Opinions Below" (JS 6) oral rulings qualifying two defense witnesses as experts.

Even if § 1253 otherwise gives the Court jurisdiction, Scarnati lacks standing to appeal the November

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[9] In *Scientology* the disputed materials had been disclosed to only one party, a federal law enforcement agency that was before the Court. *Scientology*, 506 U.S. at 10-11. Instructing the agency to return the material to the privilege holder would, therefore, redress the harm of which the privilege holder complained. The availability of that remedy saved that case from mootness and distinguishes it from this one. *See id*. at 13.

22nd and November 28th Orders, to which he was not a party; and has waived any challenges related to the stipulated protective order and the qualifications of the experts.

1. Scarnati lacks standing to appeal the orders adjudicating Turzai's privilege claims, and has affirmatively waived relief as to the November 22, 2017 Order.

Standing requires an "injury in fact – an invasion of a legally protected interested which is . . . concrete and particularized." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). And when identifying that injury, a party "cannot rest his claim to relief on the legal rights . . . of third parties." *Sessions v. Morales-Santana*, 137 S. Ct. 1687, 1689 (2017). In the privilege context that means asserting one's own privilege, even if the legal process that threatens to invade it is directed to someone else. *E.g.*, *Gravel v. United States*, 408 U.S. 606, 608-09 n.1 (1972).

Scarnati never asserted below that Turzai's deposition testimony or document production threatened a privilege that Scarnati holds. Thus on appeal he is purporting to assert privileges held by Turzai. While this Court does occasionally permit a third party to assert another's interests, it does so only when, inter alia, "there is a hindrance to the possessor's ability to protect his own interests." *Sessions*, 137 S. Ct. at 1689 (citing *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004)).

Turzai, of course, was perfectly capable of pursuing an appeal in this Court: he and Scarnati filed a joint Notice of Appeal, jointly represented by a lawyer who continues in this Court for Scarnati, with additional counsel representing Turzai alone. *See* DDE No. 215. Turzai has elected not to participate in this appeal (JS 6 n.5), but in so doing he did not empower Scarnati to assert Turzai's interests.

Indeed as to the November 22nd Order Scarnati not only failed to assert that Turzai's deposition threatened Scarnati's privilege, but affirmatively waived the argument that his own deposition threatened his privilege. Scarnati, like Turzai, moved the Court for a protective order regarding his own deposition. *See* DDE 87 (Turzai); DDE No. 111 (Scarnati); *see* discussion supra at 5. But Scarnati withdrew his motion (DDE 117) after the Court denied Turzai's motion.

Waiver is the intentional relinquishment or abandonment of a known right. *E.g.*, *United States v. Olano*, 507 U.S. 725, 733 (1993); *United States v. Rodriguez*, 311 F.3d 435, 437 (1st Cir. 2002). A party cannot "resurrect [the] forgone challenge" on appeal. *Rodriguez*, 311 F.3d at 437; *accord Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view. . . ."). Had Scarnati wished to preserve for appeal the claim that his deposition would invade his

privilege he would have allowed the district court to rule on his motion.[10]

2. Scarnati lacks standing to assert Turzai's interest in the November 28, 2017 Order.

As also explained above (at 5-6), Turzai – but not Scarnati – submitted detailed privilege assertions to the district court on November 24th. *See* DDE No. 118. Turzai and the Plaintiffs also asked the court to approve a "stipulated protective order" that would have designated Turzai's privilege log "confidential." *See* DDE 116. The November 28th Order overruled Turzai's privilege assertions, and denied the protective order on First Amendment grounds. App. 342-45. Because these rulings concern Turzai's interests and not Scarnati's, Scarnati lacks standing to appeal them.

3. Scarnati has waived the issues that he failed to identify as "Questions Presented" and to brief.

Scarnati has not identified as "Questions Presented" either the First Amendment ruling on which the district court rejected the stipulated protective order on November 28th (App. 345), or the oral rulings qualifying two defense expert witnesses that he

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[10] Doing so would not have put the district court to unnecessary effort; Scarnati could have acknowledged that the disposition of Turzai's motion controlled, while requesting that the court rule for the record.

identifies in "Opinions Below" (*see* JS 6). This Court warns litigants that "[o]nly the questions set out in the petition, or fairly included therein, will be considered by the Court." Sup. Ct. R. 14.1(a) (made applicable to jurisdictional statements by Sup. Ct. R. 18.3); *see Wood v. Allen*, 558 U.S. 290, 304 (2010). Scarnati has waived these challenges as well.

* * *

For these reasons, the Court should dismiss Scarnati's entire appeal for lack of jurisdiction. In the alternative it should dismiss for lack of jurisdiction the portion of the appeal that addresses the November 22, 2017 and November 28, 2017 Orders and December 4, 2017 rulings.

II. Even If The Court Rules That It Has Jurisdiction To Decide The Merits, Summary Affirmance Is Warranted.

Even if the Court concludes that it has jurisdiction over the appeal it should summarily affirm, both because the appeal presents no substantial question and because it is an inapt vehicle for addressing the question that Appellant poses.

A. The Appeal Presents No Substantial Question.

1. The district court's ruling is consistent with this Court's precedent.

Scarnati manufactures an inconsistency between the district court's ruling and this Court's precedent by obfuscating three controlling distinctions: between the constitutional protections afforded federal legislators and the common law protections afforded state legislators; between immunity from suit and evidentiary privilege; and between civil suits to vindicate private interests and civil suits to vindicate important federal interests.

The Speech or Debate Clause of the U.S Constitution does not protect state legislators; only federal common law does. *Tenney v. Brandhove*, 341 U.S. 367, 372-73 (1951). The constitutional and common law protections are coextensive in the context of legislative immunity from civil suit. *E.g.*, *Consumers Union*, 446 U.S. at 732-33. But the common law protections are weaker than the constitutional in the context of evidentiary privilege.[11] *E.g.*, *id.* (distinguishing coextensive immunity from weaker evidentiary privilege); *cf.*, *e.g.*, *United States v. Helstoski*, 442 U.S. 477 (1979) (evidentiary privilege for federal legislator as criminal

[11] The Court sometimes uses the term "legislative privilege" to refer to immunity, as the context of the cases makes clear. *See, e.g.*, *Bogan v. Scott-Harris*, 523 U.S. 44, 48-49 (1988). To avoid ambiguity, Plaintiffs use "privilege" herein to refer to the evidentiary privilege, and "immunity" to refer to immunity from suit and liability.

defendant) *with United States v. Gillock*, 445 U.S. 360, 373 (1980) (no evidentiary privilege for state legislator as criminal defendant). Just how much weaker is the central question dividing Scarnati not only from the district court in this case, but from every circuit that has considered the issue.

Scarnati insists that the common law evidentiary privilege is weaker only in criminal cases (such as *Gillock*), and remains absolute in civil cases – all civil cases, including those brought to vindicate important federal interests. *See* JS 19-20. As discussed below no appellate court, let alone this Court, has endorsed that proposition.

The reasoning of *Gillock* demonstrates that it applies in all matters brought to vindicate important federal interests, of which criminal matters are one example – and redistricting matters are another. When addressing legislative privilege *Gillock* drew the line that governs this case: it held that the comity concerns that animated the Court's earlier holding (in *Tenney*, 341 U.S. 367), that state and federal legislative immunity are coextensive in civil cases, must yield when "important federal interests are at stake." *Id.* at 373 (discussing *Tenney*, 341 U.S. at 372). That is, *Gillock* distinguished *Tenney*, "a civil action brought by a private plaintiff to vindicate private rights," from "cases . . . where important federal interests are at stake, as in the enforcement of federal criminal statutes." *Gillock*, 445 U.S. at 372-73.

Gillock's discussion of the separation of powers and comity in the federal-state context illustrates that its analysis was not cabined to the criminal arena. Invoking federal supremacy, the Court observed that "in those areas where the Constitution grants the Federal Government the power to act, the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power. . . . Federal interference in the state legislative process is not on the constitutional footing with the interference of one [federal] branch" with another. *Id.* at 370 & n.9.

Redistricting litigation is a paradigmatic example of an "area where the Constitution grants the Federal Government the power to act." Federal courts unquestionably have jurisdiction to enjoin state legislative action that violates the Constitution. *E.g.*, *Ex parte Young*, 209 U.S. 123, 160-62 (1908). In the redistricting context, the Constitution empowers the states to draw districts for federal elections, but contemplates federal supremacy over the process: it permits Congress to make or alter the districts if it wishes. U.S. Const. art. I, § 4, cl. 1 ("Elections Clause"); *see Vieth v. Jubelirer*, 541 U.S. at 275 (plurality). Congress has not exercised that authority but has delegated oversight to the judicial branch: it mandates that a three-judge federal district court hear and determine all actions "challenging the constitutionality of the apportionment of congressional districts." 28 U.S.C. § 2284(a). For all his indignation that a federal court might examine whether a state legislature has properly exercised its authority under the Elections Clause (*see, e.g.*, JS

27-30), Scarnati never acknowledges that the Constitution and Congress mandate that the court do so. Plainly redistricting cases present the sort of "important federal interest" that *Gillock* contemplated, which voids Scarnati's claim to absolute privilege.[12] *See also* discussion infra at 29-30.

Scarnati insists that this Court has limited *Gillock* to the criminal arena and held that the privilege is absolute in all civil cases. *See* JS 19-20. But the two post-*Gillock* Supreme Court cases that Scarnati cites addressed legislative immunity, not privilege. Neither reached the disclosure question that Scarnati presses. The first, *Consumers Union*, 446 U.S. 719, actually cites *Gillock* itself to distinguish expressly between state legislative **privilege** – which is weaker than the federal protection – and state legislative **immunity**, which is coextensive. *Consumers Union*, 446 U.S. at 733. Granted, *Consumers Union* recounts that *Gillock* explained that "the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions" (*id.*), but that merely summarized the *Gillock* opinion; because privilege was not at issue, *Consumers Union* presented no occasion to limit *Gillock* to its facts.

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[12] Indeed *Gillock* held that there is no evidentiary privilege at all. *Gillock*, 445 U.S. at 373. Thus if the lower courts that recognize a qualified privilege have contravened this Court's precedent, they have done so to the benefit of legislators rather than their detriment. Plaintiffs have not challenged that ruling and Scarnati would not have standing to do so.

The second case, *Bogan* (supra n.11) likewise reaffirmed that "legislators are absolutely immune from liability for their legislative activities" (*id.* at 48) – but it did not address evidentiary privilege either. The plaintiff in *Bogan* used 42 U.S.C. § 1983 to challenge the termination of her employment (*id.* at 47), presenting no opportunity to decide whether privilege applies in civil cases "vindicating important federal interests." The Court has never limited *Gillock* to its facts and held that the common law privilege is absolute in civil matters "where important federal interests are at stake."

The district court's rulings were consistent with this Court's precedent for another reason as well: Scarnati assumes that the evidentiary privilege that this Court has recognized is also a pretrial nondisclosure privilege (*e.g.*, JS 19), but this Court has not so held.[13] Each of its privilege cases addressed the evidentiary use of legislative materials. *See, e.g.*, *Helstoski*, 442 U.S. 477 (evidentiary privilege for federal legislator); *Gillock*, 445 U.S. at 373 (no evidentiary privilege for state legislator). Surprisingly given this jurisprudential backdrop, neither Scarnati nor Turzai objected at trial to the admission as evidence of any material over which they asserted privilege. Indeed Scarnati attempts to appeal only pretrial discovery orders. *See* JS *i* (Questions Presented); JS 6 (Opinions Below), and

[13] The Third Circuit, for example, holds that the privilege proscribes only the evidentiary "use" of protected material against the legislator, and does not protect against disclosure. *E.g.*, *In re Search of Elec. Comm. in the Account of chakafattah@gmail.com at Internet Serv. Prov. Google, Inc.*, 802 F.3d 516, 524-25 (3d Cir. 2015).

discussion supra at 4-6. Each of those rulings was consistent with this Court's precedent.

2. There is no circuit split on the privilege question.

Scarnati implies that only a small minority of outlier courts have qualified the common law legislative privilege in any type of civil case. *See* JS 1, 24. That is incorrect. Literally every circuit to have considered the privilege issue in a suit asserting important federal interests has rejected the absolute privilege that Scarnati urges. *Jefferson Cmty. Health Care Centers, Inc. v. Jefferson Parish Gov't*, 849 F.3d 615, 624 (5th Cir. 2017) (" . . . the legislative privilege for state lawmakers is, at best . . . qualified" and "must be strictly construed"); *In re Hubbard*, 803 F.3d 1298, 1311-12 (11th Cir. 2015) ("To be sure, a state lawmaker's legislative privilege must yield in some circumstances where necessary to vindicate important federal interests. . . . [B]ecause the specific claim asserted does not legitimately further an important federal interest in this context, the legislative privileges must be honored. . . ."); *Powell v. Ridge*, 247 F.3d 520, 526 (3d Cir. 2001) (where legislators waived immunity and intervened as defendants in suit addressing public education funding, no recognized privilege applies) (discussed further below, at 32-34).[14]

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[14] The First Circuit has addressed common law legislative immunity in civil cases; *e.g.*, *Torres Rivera v. Calderon Serra*, 412

None of the circuit cases that Scarnati cites is to the contrary. Three concern federal legislators protected by the Speech or Debate Clause; two of those were private civil suits to which the legislators were non-parties, and the third was a criminal investigation. *MINPECO S.A. v. Conticommodity Servs., Inc.*,

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F.3d 205, 212 (1st Cir. 2005); but has not addressed the privilege in a civil case to vindicate important federal interests.

The question is also open in the Second Circuit, where two district courts have held that the privilege is qualified in redistricting cases. *Citizens Union of New York v. Attorney Gen. of New York*, 269 F. Supp. 3d 124, 155 (S.D.N.Y. 2017); *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 93-94 (S.D.N.Y. 2003).

The Fourth Circuit has recognized a testimonial privilege for legislators in civil suits raising private wrongs but has not addressed whether it applies to civil suits raising important federal interests. *See, e.g.*, *E.E.O.C. v. Wash. Suburban Sanitary Comm'n*, 631 F.3d 174, 181 (4th Cir. 2011).

The Seventh and Eighth Circuits have both acknowledged legislative immunity in cases by private plaintiffs to redress private wrongs, but have not addressed privilege in a suit where important federal interests are at stake. *E.g.*, *Reeder v. Madigan*, 780 F.3d 799, 801-02 (7th Cir. 2015); *Mitchell v. Kirk*, 20 F.3d 936, 938 (8th Cir. 1994). A district court in the Seventh Circuit has held that the legislative privilege is qualified in redistricting cases. *Committee for a Fair and Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *6-7 (N.D. Ill. Oct. 12, 2011).

The Ninth Circuit affirmed a district court's application of the privilege in a suit by private plaintiffs to assert their individual rights. *Jeff D. v. Otter*, 643 F.3d 278, 289 (9th Cir. 2011). A district court in the Ninth Circuit subsequently noted that *Jeff D.* does not control in the redistricting context, and rejected a claim of absolute privilege. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1069 (D. Ariz. 2014).

And the issue is open in the Sixth, Tenth and D.C. Circuits as well.

844 F.2d 856, 859 (D.C. Cir. 1988); *Brown and Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 421 (D.C. Cir. 1995); *United States v. Rayburn House Office Bldg.*, 497 F.3d 654, 660 (D.C. 2007). While Scarnati also cites two matters addressing the common law privilege, neither arose in a civil matter to vindicate an important federal interest; one was a suit by a private plaintiff and the other a criminal prosecution. *Larsen v. Senate of Pa.*, 152 F.3d 240 (3d Cir. 1998); *Gov't of the Virgin Islands v. Lee*, 775 F.2d 514, 523 (3d Cir. 1985).

As explained above, Scarnati elected to forego intermediate appellate review in the Third Circuit. He opines that he had "no incentive" to pursue it. JS 37. Setting aside the fallacy of that position even as Scarnati presents it (*see* discussion supra at 10-13), one "incentive" would have been to permit the orderly development of the law – a process on which this Court depends to sharpen and prioritize issues worthy of full merits briefing. *See generally, e.g.*, *McCray v. New York*, 461 U.S. 961, 962 (1983) (Stevens, J., with Blackmun and Powell, JJ.) (denying certiorari where further consideration by "other courts will enable [the Court] to deal with the issue more wisely at a later date"). At this time no circuit has held that state legislators hold an absolute privilege in civil litigation "where important federal interests are at stake"; nor held (more narrowly) that state legislators hold an absolute privilege in redistricting litigation. That is, no circuit has confined *Gillock* to its facts. Perhaps the Third Circuit would have created a circuit split had Scarnati

presented the matter to it, but Scarnati foreclosed that possibility by bypassing the circuit.

3. A multifactor balancing test creates no predictability problem.

Scarnati furthers asks this Court not to endorse the balancing test applied in this case, in *Benisek v. Lamone*, 241 F. Supp. 3d 566, 575 (D. Md. 2017),[15] and in numerous other decisions, calling it "unpredictable" and "unwieldy." He implies that the legislative function will be chilled absent the predictability of a bright line test. *See* JS 34-36. Yet core government functions and venerable privileges alike manage to endure the application of balancing tests – which the Court has repeatedly endorsed when weighing claims of privilege against important federal interests. *See*, *e.g.*, *United States v. Nixon*, 418 U.S. 683, 711-12 (1974) (balancing confidentiality of Presidential communications against need for evidence); *Wayte v. United States*, 470 U.S. 598, 618 (1985) (balancing test for "deliberative process executive privilege"); *see also* Fed. R. Civ. P. 26(b)(3)(A)(ii) (permitting discovery of otherwise-protected attorney work product upon showing of need).

In any event, Scarnati's suggestion of a "bright line" rule for a "qualified" privilege (JS 36) is both

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[15] The Court is presently reviewing the final judgment in *Benisek* but is not, of course, reviewing the privilege ruling; it lacks jurisdiction to do so under § 1253. *See* Section I.A.1, supra; *see also* JS, Questions Presented, *Benisek v. Lamone*, No. 17-333.

internally inconsistent[16] and new on appeal.[17] An appellant may not press here an argument he did not press below. *E.g.*, *Cutter*, 544 U.S. at 718 n.7.

4. The comity and policy concerns that Appellant invokes are illusory.

This Court has already rejected the notion that comity requires cloaking state legislators with absolute evidentiary privilege in cases vindicating important federal interests. *See Gillock*, 445 U.S. at 370-71. As explained above (at 22-23), in addition to general supremacy principles the Constitution contemplates federal oversight of the redistricting process; and Congress has expressly given the federal courts jurisdiction to hear challenges to the states' performance of their redistricting duties. Scarnati cannot explain how the courts are to meaningfully exercise that jurisdiction if all information about the redistricting process is absolutely privileged.

Scarnati also raises the specter of federal courts undermining state constitutional privileges by affording less protection to legislators than states do. JS 33. But his suggestion that federal courts charged with

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[16] Scarnati actually seems to propose a narrower definition of privilege, not a privilege that may be overruled in certain circumstances. *See* JS 36.

[17] Scarnati also seeks an advisory opinion, insofar as his proposal addresses the types of materials that he either denies having produced (*e.g.*, information "considered") or waived a ruling upon below (*e.g.*, internal thought processes explored in deposition testimony). *See* discussion infra at 36-37.

hearing redistricting matters restrict their access to evidence in deference to state law flips the Supremacy Clause on its head. Unsurprisingly, this Court has already rejected the proposition that comity requires federal courts to honor state constitutional privileges. *Gillock*, 445 U.S. at 368.

Scarnati's emphasis upon respecting state law is ironic given that he neglects to mention that the Pennsylvania Supreme Court has already repudiated the intermediate appellate court's privilege ruling, in pointed dicta. Pennsylvania's highest court pointed out that it has never interpreted the Pennsylvania Speech or Debate Clause to provide a privilege, but only immunity from suit. *League of Women Voters*, 178 A.3d at 767 n.38. Scarnati does not truly urge comity; he urges that this Court conform federal common law to a repudiated analysis by an intermediate state appellate court, which shields him from unwelcome scrutiny.

Indeed the heart of Scarnati's appeal is his indignation that a court – or a governor, or other legislators, or the press, or voters (*see* JS 28-31) – might acquire the tools to assess whether he has discharged the obligations of his office. His attempt to distinguish criminal prosecutions from redistricting litigation highlights this. "An exception to the absolute speech or debate privilege may be practical and logical in the criminal context, where the criminal act itself is antithetical to the legislator's representation of the people," Scarnati allows. JS 27. A redistricting challenge poses the same question: has the legislator "discharge[ed] his public trust with firmness and success"

(*Tenney*, 341 U.S. at 373), or taken action antithetical to his oath, for personal and partisan gain instead?

Scarnati's fretting about the possibility of partisan gamesmanship in redistricting litigation (*e.g.*, JS 29) is in tension with his blithe declaration that redistricting "is the most political of state legislative functions."[18] JS 27. Whether redistricting is, or should be, political is of no moment here; the key point is that a balancing test for privilege is an excellent way to address Scarnati's concerns. If a federal court perceives that a redistricting challenge has been brought solely for private political gain – *e.g.*, by a rival candidate for office, rather than (as here) by a bipartisan group of voters – it will find a reduced federal interest and uphold the privilege. And if a federal court perceives that a suit raises weighty issues that the Constitution and Congress require the court to address, it will overrule the privilege to the extent necessary for a meaningful review. Permanently shielding from scrutiny "all information about the legislative process," as Scarnati urges, would render federal courts powerless to determine whether state legislative action complies with the U.S. Constitution, in an arena in which they must do so.

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[18] And his digression into the supposed erosion of standing requirements for plaintiffs in redistricting matters (JS at 27-28) denigrates the careful attention that the Court is giving to the issue in *Gill v. Whitford*, No. 16-1161. *See, e.g.*, Tr. of Oral Argument, No. 16-1161 (Oct. 3, 2017). Regardless, in this case the bipartisan Plaintiff group includes at least one Plaintiff from each Pennsylvania Congressional district.

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The district court's privilege rulings were consistent with this Court's precedent and the precedent of every circuit that has considered the issue. They raise no comity or policy concerns. Scarnati raises no substantial question justifying full merits briefing.

B. This Appeal Is An Inappropriate Vehicle For Deciding The Privilege Issue That Scarnati Raises.

Even if the questions that Scarnati presses were substantial, his appeal would be an inappropriate vehicle for addressing them.

1. Scarnati forfeited or waived, and may be estopped from asserting, the absolute privilege he now claims.

Legislative privilege and legislative immunity share a common root in the desire to avoid undue outside inference with the legislative process. Scarnati himself connects the two, arguing that "the speech or debate privilege is intended to allow legislators to avoid civil litigation that would force them, 'to divert their time, energy, and attention from their legislative tasks to defend the litigation.'" JS 27 (quoting *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 503 (1975)). Oddly, however, Scarnati neglects to note that his "time, energy, and attention" were diverted to this matter **at his own request**: he and Turzai moved to intervene as defendants. DDE 45. Having

waived immunity from suit, Scarnati likely waived privilege as well. *See, e.g.*, *Powell*, 247 F.3d at 527 & n.4 (noting but not deciding issue).

The grounds upon which Scarnati moved to intervene make the waiver problem particularly acute. Indeed they may even rise to the level of judicial estoppel. To establish their unique interest in the litigation, Scarnati and Turzai asserted that they

> played an integral part in drawing and enacting the redistricting plan at issue. . . . From a pragmatic perspective, [proposed **intervenors] possess the information regarding the 2011 Plan, which is necessary to this litigation**. In this regard, **permitting Applicants to intervene could limit the need for cumbersome third-party discovery** and serve to streamline the use of judicial resources.

DDE 45-3, at 5 (emphasis added). The district court permitted them to intervene, presumably accepting that representation. Scarnati may be estopped from resisting discovery given his earlier commitment to providing it.

Or Scarnati may simply have forfeited his claim to an absolute legislative privilege. As the Third Circuit observed when Scarnati's former legislative colleagues intervened as defendants and subsequently resisted discovery in *Powell*, the legislators did not assert any recognized legislative privilege but one they "buil[t] from scratch": "a privilege which would allow them to continue to actively participate in this litigation by

submitting briefs, motions, and discovery requests of their own, yet allow them to refuse to comply with and, mostly likely, appeal from every adverse [discovery] order. . . . In short, they assert a privilege that does not exist." *Powell*, 247 F.3d at 525. Whatever the contours of the privilege Scarnati asserted below, it is not the one that he asserts here.

Scarnati at least forfeited, and may have waived, the privilege he now claims in another way too: by failing to assert it with specificity, as Fed. R. Civ. P. 26(b)(5)(A) requires. *See* Adv. Comm. Note to 1993 Amendment to Fed. R. Civ. P. 26(b) (noting that noncompliance risks waiver); *accord, e.g.*, *United States v. Construction Products Research*, 73 F.3d 464, 473 (2d Cir. 1996). Scarnati simply interposed blanket "objections" of legislative privilege in response to the Plaintiffs' discovery requests, and provided no factual information on which the Plaintiffs could evaluate the validity of his privilege claim.[19] Indeed he argued below that even *naming* the people who provided information to a legislator would violate the privilege. DDE 57, at 16.

The district court disagreed and required Scarnati and Turzai to produce privilege logs by November 17, 2017. Order of Nov. 9, 2017, App. 337. Notably, when Scarnati did so he asserted only a "qualified legislative

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[19] *See* Plaintiffs' Motion to Compel Discovery (DDE 51), at 2 & Exh. A (identifying discovery requests to which Intervenors interposed legislative privilege objections); and appendix to that Motion, at 1-28, 67-76, and 89-99 (Scarnati's objections).

privilege"; and asserted it only as to five documents, as to four of which he also claimed attorney-client and/or work product privileges.[20] *See* Tr. of Dec. 4, 2017, Vol. II, 161:16-162:4 (colloquy about log). Thus the record reflects the following: when Scarnati asserted an absolute privilege, he failed to support his claims with specificity. And when he supported his claims with specificity, he asserted only the qualified privilege that he now attacks.

Thus even if the Court were to order full briefing on Scarnati's appeal, the record would leave it distracted by threshold questions of forfeiture, waiver, and estoppel.[21] And even if the Court eventually defined the contours of a privilege, it would be defining only the privilege that applies – if any does – when a state legislator waives immunity and inserts himself as a defendant in redistricting litigation.

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[20] As explained above (at 5-6), only Turzai asserted privilege over the documents identified on the lengthy privilege log submitted to the court on November 24, 2017 (DDE 118). While Scarnati criticizes the district court for overruling each of Turzai's privilege claims without in camera review (JS 10, referencing Order of Nov. 28, 2017 (App. 342); *see also* JS 25 n.10, and 30), Scarnati had no interest of his own in those documents.

[21] Although the district court did not rule on the basis of waiver, estoppel, or forfeiture, and the Plaintiffs did not press those issues below, this Court may affirm on any basis apparent in the record. *E.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1949 (2017); *Greenlaw v. United States*, 554 U.S. 237, 250 n.5 (2008) ("An appellee or respondent may defend the judgment below on a ground not earlier aired."); *accord Thigpen v. Roberts*, 468 U.S. 27, 30 (1984); *United States v. American Ry. Exp. Co.*, 265 U.S. 425 (1924).

Second, the order that Scarnati has standing to challenge was exceedingly narrow, and all the more so as Scarnati claims to have interpreted it. As explained above (at 16-18), Scarnati contested only one of the rulings that he purports to appeal. That order compelled the production of "the facts and data considered in creating the 2011 Plan," and communications with a third party. App. 336-38. While Scarnati may have been expected to argue that the order to produce facts and data that were "considered" required him to disclose his internal thought processes[22] – representing a significant intrusion into a core legislative function – he actually disavows that. Indeed he objected through counsel below that the data were not necessarily "considered," but only "in the possession of the legislature at the time" Tr. of Dec. 4, 2017, Vol. II, 113:2-114:17; and maintains that position here (*e.g.*, JS 3, 30, 31 (facts and data "may have been considered")).[23] Moreover, he represented to the district court that the "facts

[22] Testimony was inherent in the act of producing documents responsive to the court order: producing them asserted "I considered the facts and data contained in these documents in creating the 2011 plan." *See Hubbell v. United States*, 520 U.S. 27, 40 (2000). That is, the production was "equivalent to answering either a [ ] written interrogatory" or a "question[ ] at an oral deposition." *Id.* at 41-42.

[23] On this theory, Scarnati is admitting to producing more documents than the district court required him to produce. He can hardly complain on appeal about a production he made voluntarily.

and data" at issue were **publicly-available**. Tr. of Dec. 4, 2017, Vol. II, 114:19-24 (statement of counsel).

Taking Scarnati at his word, then, his appeal concerns only two items that are – at best – at the periphery of the concerns that animate the legislative privilege: facts and data that are in legislative files, but that do not reveal a legislator's thought process, and that were publicly-available; and communications with a third party outside the legislature. A privilege ruling on these facts would resolve few, if any, of the weighty issues that Scarnati now says are vitally important – but which he felt "no incentive" to raise with the Court of Appeals when he had the opportunity (JS 37).

The risk that full merits briefing would yield a narrow ruling that does not reach the privilege issue that Scarnati raises also counsels summary affirmance.

CONCLUSION

The Court lacks jurisdiction over this appeal, which in any event presents no substantial question and is an inapt vehicle for creating the novel privilege that Scarnati seeks. The Court should dismiss, or in the alternative summarily affirm.

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Respectfully submitted,

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