No. 20-14480

In the

United States Court of Appeals
for the Eleventh Circuit

CORECO PEARSON, *ET AL.*,
Appellants,
v.

GOVERNOR OF THE STATE OF GEORGIA, *ET AL.*,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-4809-TCB — Timothy C. Batten, Sr., *Judge*

APPELLEES' RESPONSE TO JURISDICTIONAL QUESTION

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

I hereby certify that the following persons and entities may have an interest in the outcome of this case:

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The undersigned counsel certifies that no publicly traded company or corporation has an interest in the outcome of this case or appeal.

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STATEMENT OF ISSUES

1. Whether the District Court's November 29, 2020, grant of a Temporary Restraining Order is immediately appealable as to Plaintiffs-Appellants.

INTRODUCTION

This case involves a constitutional challenge to the Georgia presidential election by Plaintiffs, who are Republican presidential electors, seeking to "de-certify" the results of the election and have the presidential electors for Democratic candidate Joe Biden replaced with presidential electors for President Trump. Plaintiffs filed their Complaint on November 25, 2020, and are already seeking interlocutory review of a temporary restraining order *granted* by the district court at Plaintiffs' request. For the reasons discussed below, the Court lacks jurisdiction over the interlocutory appeal, and the appeal should be dismissed.

STATEMENT OF THE CASE

Plaintiffs-Appellants' Complaint asserts claims under the Equal Protection, Due Process, and Elections clauses as well as setting out claims under a state law provision authorizing and setting out specific procedures for bringing a statutory election contest in state court.

A. Proceedings Below

This case has a short but convoluted history. Typically, under the Federal Rules of Civil Procedures and the district court's local rules, when a party files a motion for a temporary restraining

order or preliminary injunction, a court allows the opposing party an opportunity to respond and present evidence at a hearing before ruling on the motion. That did not happen here. Instead, Plaintiffs filed their complaint after the close of business on November 25, 2020, the Wednesday prior to the Thanksgiving holiday. They then filed their "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" shortly before midnight on November 27, 2020. Plaintiffs acknowledged in email correspondence with Judge Batten's chambers on Saturday, November 28, 2020, that no service had been made on the State Defendants as to the Complaint, and their attempts to provide notice to all of the State Defendants of the emergency motion had failed.

Following an evening response on Saturday, November 28, 2020, from the Attorney General's office to Judge Batten's chambers regarding the failure of Plaintiffs to provide notice of the emergency motion, as well as the availability of counsel from the Attorney General's office during the week of November 30, 2020, Plaintiffs' counsel moved on Sunday, November 29, 2020, *within the body of an email to the court*, for immediate emergency relief, and spelled out in that email what relief they felt should issue from the Court. The Court directed the parties to engage in

several rounds of substantive briefing via email throughout that Sunday, with a Zoom hearing ultimately set by the court for the evening of November 29, 2020, with twenty-seven minutes notice to counsel for the respective parties.

At the hearing, the Court heard argument from both sides as to why emergency relief should not issue. After hearing argument, the Court entered a temporary restraining order of ten days duration, despite: 1) Plaintiffs' acknowledgment that notice had not been given to the State Defendants of either the filed emergency motion or the email "motion" for alternative emergency relief; 2) Plaintiffs' lack of Article III standing in that there was no traceability or redressability arguments applicable to the State Defendants; and 3) a wholesale failure to employ an analysis, or even invite discussion, of the factors for granting emergency injunctive relief in either the November 29, 2020, hearing or in the Temporary Restraining Order that issued the same day. The district court set a briefing schedule and a hearing date of December 4, 2020, to consider whether to continue, modify, or dissolve the emergency relief granted.

Plaintiffs then pursued the same tact that counsel for Plaintiffs, L. Lin Wood, Jr., employed as the Plaintiff-Appellant in *Wood v. Raffensperger, et al.*, No. 20-14418 (11th Cir. 2020), filing a

28 U.S.C. 1292(a)(1) direct appeal from the grant or denial of a temporary restraining order in order to avoid a ruling on the pending motions to dismiss (*Wood*) or avoid a hearing on the merits of their request for continuation/dissolution of the emergency relief (*Pearson*). Plaintiffs have improperly invoked the appellate process at this stage in order to delay a fulsome discussion of the flaws in their argument and evidence and avoid an ultimate resolution on the merits.

State Defendants submit that Plaintiffs have improperly invoked the provisions of 28 U.S.C. § 1292(a)(1) in directly appealing the *granting* of emergency relief in their favor issued by the district court. While the temporary restraining order should never have issued and was unsupported by the evidence before the court, in addition to being legally deficient, the order was not one that permitted Plaintiffs to invoke the provisions of 28 U.S.C. § 1292(a)(1) in directly appealing the issuance of that order. Accordingly, this Court should determine that it lacks jurisdiction over their appeal.

B. Standard to determine jurisdiction

An appeal from denial of a temporary restraining order is not directly appealable absent special circumstances. *See* 28 U.S.C. §

1292(a)(1) (appellate courts have jurisdiction over interlocutory orders "refusing or dissolving injunctions"). An order disposing of a request for a TRO may be directly appealable if three conditions are met: 1) the duration of the relief sought exceeds ten days in length; 2) the notice and hearing sought or afforded suggest that the relief sought was a preliminary injunction; and 3) the requested relief seeks to change the status quo. *AT&T Broadband v. Tech Commc'ns., Inc.*, 381 F. 3d 1309, 1314 (11th Cir. 2004). The Court may also exercise permissive jurisdiction, in the absence of these three factors, if the denial of the TRO might have "serious, perhaps irreparable, consequence, and can be effectually challenged only by immediate appeal." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005).

SUMMARY OF ARGUMENT

This Court should find that the order appealed is properly construed as the grant of a temporary restraining order and not appealable as to Plaintiffs-Appellants pursuant to 28 U.S.C. § 1292(a)(1). The crux of the relief sought was to stop Georgia election officials from performing the necessary steps to conduct the January 5, 2021, run-off election that will involve two seats for the United States Senate and one seat on the Georgia Public

Service Commission, in order to conduct a vague forensic search to support various conspiracy theories. The impact of the relief improperly granted already, as well as the relief that Plaintiffs continue to seek, on Georgia's ongoing elections process is very real and violative of the restraint demanded by *Purcell v. Gonzalez*, 549 U.S. 1 (2006) and its progeny.

ARGUMENT

I. The order appealed is a denial of a temporary restraining order that is not subject to direct appeal.

The appealed order is a temporary restraining order that is not subject to direct appeal under 28 U.S.C. § 1292(a)(1). Plaintiffs were seeking to stop, temporarily, the use in a future election of the voting equipment used in the November 3, 2020, general election. While that relief was unauthorized, it also would have directly impacted the ability of unnamed *county* election officials to do the necessary steps to conduct the December 1, 2020, runoff election and will, if it remains in force, significantly impact the ability of unnamed *county* election officials to prepare for and conduct the January 5, 2021, runoff election.

While Plaintiffs' *filed* motion for emergency relief sought other short term, albeit grossly disproportionate and far-reaching,

relief from the baseless assertions of fraud that Plaintiffs have advanced, that was not the relief that Plaintiffs sought on November 29, 2020, from the district court. Instead, the November 29, 2020, relief sought by Plaintiffs was short term, even though the resultant harm to the public was significantly greater than whatever negligible benefit might inure to the Plaintiffs. The public's interest in seeing the *actual* results of the election, already certified, carried into force and effect is essential to ensuring continuing voter trust in our republic and its democratic principles. *See Purcell*, 549 U.S. at 4-5. Additionally, preventing election officials, including *non-party* county election officials, from discharging their attendant duties regarding ensuring the logic and accuracy of voting equipment for the then-underway December 1, 2020, runoff election and the approaching January 5, 2020, runoff election "violate[s] *Purcell's* well-known caution against federal courts" interfering with the election process on the eve of an election. *New Georgia Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020).

A. The relief sought was temporary in nature and constituted a claim for a temporary restraining order.

At the November 29, 2020, hearing, Plaintiffs sought to stop election officials, including *non-party* county election officials,

from processing the voting *equipment* in such a way as to make it ready for the conduct of the December 1, 2020, and the January 5, 2021, runoff elections. While the earlier November 27, 2020, relief sought by the Plaintiffs was more permanent in nature, that was not the relief sought by the Plaintiffs on November 29, 2020, nor was it requested of, nor entertained by, the district court at the November 29, 2020, hearing. Thus, the relief requested by Plaintiffs and ordered by the district court at the November 29, 2020, hearing was temporary in nature.

B. None of the *AT&T Broadband* factors support treating this appeal as a denial of an injunction

Appellant satisfies none of the three factors enumerated in *AT&T Broadband* ("AT&T factors") for treating the relief denied as a request for an injunction. The first factor is that the relief sought is for a duration of more than fourteen days. *AT&T Broadband*, 381 F. 3d at 1314. Here, the impoundment of voting equipment, as well as the forensic audit contemplated by Plaintiffs, was to be completed within eight days of the Zoom hearing according to Plaintiffs' emailed request for relief. Despite the fact that the consequential damage done to the public and the State would extend well beyond the fourteen day time period, the relief requested at the November 29, 2020, hearing clearly was

limited in duration to less than fourteen days, and the temporal element of the *AT&T Broadband* test is unsatisfied.

The second AT&T factor is also missing from this appeal. Appellant was not seeking a permanent injunction. Instead, they were scrambling to stop county election officials from conducting their duties in regards to the December 1, 2020, and January 5, 2021, runoff elections in order to examine the machines in a futile attempt to prove their alleged but non-existent fraud. While Plaintiffs' November 27, 2020, motion that, by Plaintiffs' counsel's own admission was neither served on nor noticed to all of the State Defendants prior to the hearing, sought relief in the nature of a permanent injunction, that was not the motion entertained by the district court at the November 29, 2020, hearing. Rather, the relief sought was temporary in nature, designed to permit plaintiffs' "experts" unfettered access to the voting machines *still in use* for the 2020 election cycle.

Plaintiffs' challenge to the limited grant of relief also fails to satisfy the final AT&T factor. They were scrambling to preserve the status quo in their emailed emergency relief and to keep Georgia election officials in a state of staring at undisturbed voting machines while the wheels of the electoral process for both the December 1, 2020, and the January 5, 2021, runoff elections

came to a statutorily unauthorized and uncountenanced halt. While the continent *consequences* to the State Defendants and the public writ large would have been, and still have the potential to be, catastrophic in scope and effect, the relief granted to plaintiffs is to freeze the status quo, regardless of the attendant harm that such a freeze will cause.

C. Plaintiffs have failed to establish a risk of serious or irreparable harm sufficient to grant this court permissive jurisdiction from an order otherwise not subject to direct appeal

This appeal is likewise not saved by the permissive appellate jurisdiction contemplated in *Schiavo ex rel. Schindler v. Schiavo.* 403 F.3d 1223 (11th Cir. 2005). In this Circuit, this Court will exercise permissive jurisdiction, if the "grant or denial of a TRO might have serious, perhaps irreparable, consequence and can be effectually challenged only by immediate appeal." *Schiavo,* 403 F.3d at 1225 (quoting *Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995)).

Plaintiffs' claims are, at heart, complaints that their preferred candidate failed to win the election, which is "a 'generalized partisan preference[]' that federal courts are 'not responsible for vindicating.'" *Jacobson,* 974 F.3d 1236, 1250 (11th Cir. 2020) (citing

Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018)). Plaintiffs have failed to raise claims of particularized harm that would accrue to them to sufficiently establish standing to even assert a claim of irreparable harm.

In their appellate briefing, Plaintiffs appear to be relying on the failure of the district court, in *granting* relief to the Plaintiffs, to immediately enjoin the Governor and the Secretary from certifying the election results to the Electoral College as the primary basis for their argument that permissive jurisdiction exists under *Schiavo*. However, at *no* point in the transcript of the November 29, 2020, hearing did any of the four attorneys for Plaintiffs request relief as to certification of the Georgia election results or their transmittal to the Electoral College. Under the law of this circuit, that constitutes an abandonment of that particular argument as a component of this appeal, as the pled argument and prayer is deemed abandoned by the plaintiffs for purposes of the appealed order. *See Coalition for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1326 (11th Cir. 2000) (failure to brief *and argue* a pled issue during district court proceedings found issue was abandoned for appellate consideration); *see also McMaster v. United States*, 177 F.3d 936, 940-41 (11th Cir. 1999) (a claim in the complaint may be considered

abandoned when a party fails to present argument on the issue to the district court). As such, the district court's failure to grant relief on an issue that the Plaintiffs failed to press cannot be considered a basis on which to rest this Court's permissive *Schiavo* jurisdiction.

For the three counties referenced in the order granting relief, there was an order in place preventing the *State* Defendants from doing anything to alter that voting equipment. There was a hearing scheduled for Friday, December 4, 2020, to consider whether to grant access to machines in those counties prior to the filing of this appeal by Plaintiffs. To the extent that Plaintiffs argue that they have been harmed by the failure to access that equipment, there has been *no* proffer of harm *that can be redressed by an appeal* in the wait from November 29, 2020, to December 4, 2020, to consider access to machines that are, to the extent that *unnamed* county defendants are voluntarily abiding by an order that does not apply to them, remaining in the same state they were in at the time that Plaintiffs brought their claims. As such, nothing in regards to those three counties can establish jurisdiction under *Schiavo*, as nothing will have changed on the machines in those three counties between November 29, 2020, and December 4, 2020. To the extent that Plaintiffs do not have an

answer for those three counties at the close of the day on December 4, 2020, that is a problem of their own making in pursuing this unauthorized appeal.

For the seven counties named in Plaintiffs' email request for relief that were not named in the order, once again, Plaintiffs had the opportunity to argue their entitlement to relief as to those seven counties at the December 4, 2020, hearing. Additionally, Fulton and DeKalb counties, two of those seven counties, held a special election runoff on December 1, 2020, for the Fifth Congressional District, and Fulton County also had a special election runoff for State Senate District 39 on December 1, 2020. As such, no relief would have been proper affecting voting equipment in those two counties as Georgia was "not on the eve of the election-[it] was in the middle of it … [and a]n injunction here would thus violate *Purcell's* well known caution against federal court's mandating" last minute changes to election rules, including here the actual use of the voting and tabulation equipment. *New Georgia Project*, 976 F.3d at 1283. As to the remaining five counties, Plaintiffs have not, and cannot, proffer any evidence that anything was going to be done in those remaining counties prior to the scheduled December 4, 2020, hearing. As such, Plaintiffs have failed to establish that they were in danger of any serious or

irreparable harm sufficient to establish permissive *Schiavo* jurisdiction.

CONCLUSION

For the reasons set out above, this Court should find that it lacks jurisdiction over this appeal.

Respectfully submitted, this 3rd day of December, 2020.

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3,633 words as counted by the word-processing system used to prepare the document.

/s/ *Charlene S. McGowan*
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I served this Jurisdictional Question Response by electronically filing it with this Court's ECF system, which constitutes service on all attorneys who have appeared in this case and are registered to use the ECF system.

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