No. 20-14480

In the United States Court of Appeals for the Eleventh Circuit

CORECO JA'QAN PEARSON, et al.,

Plaintiffs-Appellants,

v.

GOVERNOR OF THE STATE OF GEORGIA, in his official capacity, et al.,

Defendants-Appellees,

and

DEMOCRATIC PARTY OF GEORGIA, DSCC, and DCCC,

Intervenors-Appellees.

INTERVENORS' STATEMENT ON JURISDICTIONAL QUESTION

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA
No. 1:20-CV-04809-TCB

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Local Rule 26.1-1 and 26.1-3, Proposed Intervenors certify that the following is a complete list of all persons and entities known to Intervenors to have an interest in the outcome of this case, in addition to the persons and entities identified in the Certificate of Interested Parties for Plaintiffs' Emergency Motion for Expedited Briefing Schedule and Review:

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/s/ Amanda R. Callais
Counsel for Intervenors

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Local Rule 26.1, the Democratic Party of Georgia, Inc., DSCC, and DCCC ("Intervenors") certify they are not publicly traded and have no parent corporations and that no publicly held corporation owns more than 10% of their stock. No other publicly held corporation has a direct financial interest in the outcome of the litigation by reason of a franchise, lease, other profit-sharing agreement, insurance, or indemnity agreement.

/s/ Amanda R. Callais
Counsel for Intervenors

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I. INTRODUCTION

Pursuant to this Court's December 2 Order, Intervenors submit this statement on the jurisdictional question raised by this Court regarding whether the district court's November 29 Order on Appellants' "Emergency Motion for Declaratory, Emergency, and Permanent Injunctive Relief" (the "TRO Motion") is immediately appealable. In short, the November 29 Order does not meet the standards for immediate appeal under 28 U.S.C. § 1292(a) because it is merely a ten-day temporary restraining order ("TRO") granting relief on only a narrow portion of the claims raised in the motion. As a result, this Court lacks jurisdiction to review the ruling, and dismissal is warranted.

II. BACKGROUND

Appellants did not file their Complaint in this action until Wednesday, November 25, 2020. In it, they lodge a series of attacks against various aspects of Georgia's 2020 presidential election, including the validity of an eight-month-old settlement agreement between Intervenors and the State regarding the proper processing of absentee ballots, and a set of specious accusations about widespread election fraud that they claim was orchestrated by Defendants and other malicious actors such as Iran, China, and the now-deceased Venezuelan dictator Hugo Chavez. *See generally* ECF No. 1. With regard to the settlement agreement, which was entered on March 6, 2020, over half a year went by and neither the Appellants (nor

anyone else) challenged it or the related administrative guidance or rules that followed. Elections administrators planned for the November general election in light of that guidance and those rules, and millions of Georgia voters proceeded to cast their ballots in accordance with the same. Hard working election officials ran a successful election in the middle of a pandemic, and the U.S. Attorney General William Barr has announced that the Justice Department has found no evidence of widespread fraud that would have affected the outcome of the presidential election.[1] The ballots in Georgia now have been counted not once, but three times. It was only after the election was complete, and it was clear that the people of Georgia had selected Joseph R. Biden, Jr. as President-elect, that the Appellants initiated this action seeking to reverse those results.

Two days after the complaint was filed, on Friday, November 27, the Appellants moved for a TRO, seeking drastic and extraordinary relief, including (1) invalidation of the five million ballots cast in Georgia's general election; (2) decertification of Georgia's presidential election results; and (3) a court order declaring President Trump the winner of Georgia's election. ECF No. 6-3 at 1-6. Appellants also asked the district court to enjoin Defendants from resetting any

[1] Ryan Lucas, *Barr: DOJ Has No Evidence Of Fraud Affecting 2020 Election Outcome*, Nat'l Public Radio (Dec. 1, 2020), https://www.npr.org/sections/biden-transition-updates/2020/12/01/940786321/barr-doj-has-no-evidence-of-fraud-affecting-2020-election-outcome.

voting machines as part of their preparations for upcoming local elections, asserting that resetting the machines would destroy relevant evidence of the putative fraud described above that purportedly exists on each voting machine. *Id.* at 5; *see also* ECF No. 6 at 5-6.

On Sunday, November 29, the district court held an emergency hearing at Appellants' request. They sought to allow their experts access to conduct forensic audits of the Dominion voting machines in ten counties and to enjoin any deletion of data or software on the machines. Nov. 29 Tr. at 11:7-12:8. The district court rejected Appellants' request to forensically inspect Dominion voting machines in ten counties but deferred ruling on their request to inspect machines in three (Cobb, Gwinnett, and Cherokee). ECF No. 23 at 30:4-9. The Court also ordered additional briefing on the issue of inspection, to be filed by Defendants on Wednesday, December 2. ECF No. 14 at 3.

The district court granted the TRO in part, (1) enjoining Defendants from "altering, destroying or erasing, or allowing the alteration, destruction, or erasure of, any software or data on any Dominion voting machine in Cobb, Gwinnett, and Cherokee Counties"; and (2) ordering Defendants to produce "a copy of the contract between the State and Dominion." ECF No. 14 at 2. In a separate order, the district court also set Appellants' substantive requests—*e.g.*, decertification of the election results—for hearing on Friday, December 4. *See* ECF No. 17.

Unsatisfied by this result (and undeterred by the fact that the district court had not yet held the hearing it had scheduled to permit Appellants to attempt to make their case on remaining issues in their TRO), Appellants noticed and filed this appeal on Tuesday, December 1. Appellants asserted both that they had a right to do so under 28 U.S.C. § 1292(a)(1), and that they intended to appeal their *entire* TRO Motion—including the portions of it upon which the district court had not yet ruled. *See* ECF No. 32 at 1 ("Plaintiffs . . . hereby file an emergency appeal . . . to the extent it denies the *full relief Plaintiffs requested in their motion for a temporary restraining order*."). In addition, Appellants contended that the mere noticing of the appeal divested the district court of jurisdiction and asked that the court stay its hearing scheduled for tomorrow, December 4. ECF No. 32 at 2. The district court disagreed with the Appellants' assessment of the appealability of the November 29 Order. *See* ECF No. 37 ("[T]his Court's November 29 order is a temporary restraining order . . . temporary restraining orders are not directly appealable."). But, at their request, ECF No. 32 at 2, it stayed the briefing schedule until this appeal has been resolved and cancelled the scheduled hearing. ECF No. 37 at 2-3.

Yesterday, December 2, this Court requested briefing on whether "the district court's November 29, 2020, order is immediately appealable." The answer is a resounding *no*. The district court's disposition of Appellants' Motion is not immediately appealable, and this Court therefore lacks jurisdiction.

III. THE DISTRICT COURT'S NOVEMBER 29 ORDER IS NOT IMMEDIATELY APPEALABLE UNDER 28 U.S.C. § 1292(A).

"It is well settled in this circuit that a TRO is not ordinarily appealable." *McDougald v. Jenson*, 786 F.2d 1465, 1472 (11th Cir. 1986); *see also* Wright & Miller, Fed. Prac. & Proc. § 3922.1 ("The general rule is that orders granting, refusing, modifying, or dissolving temporary restraining orders are not appealable under § 1292(a)(1)."). There are limited exceptions to the rule that a TRO is not appealable, such as (1) when there are, emergency conditions that pose a risk of serious, irreparable harm that requires immediate appeal, or (2) the order is disguised as a preliminary injunction. No exception applies here, and dismissal is thus warranted.

Appellants' attempt to skirt around the general rule (and request that the district court cancel a previously-scheduled hearing at which it was to address their TRO Motion) is as mystifying as it is improper. The November 29 Order *granted* Appellants' TRO Motion to the extent it ordered the Defendants not to delete certain data and then set a hearing—to occur that week—on Appellants' other requests; it did not outright deny any particular request. In other words, the November 29 Order simply sought to preserve the status quo before a hearing—which is precisely the limited function of a TRO. *Fernandez–Roque v. Smith*, 671 F.2d 426, 429 (11th Cir. 1982) ("One inherent characteristic of a temporary restraining order is that it has the effect of merely preserving the status quo rather than granting most or all of the

substantive relief requested in the complaint," and it "is well established that as a general rule a temporary restraining order is not appealable."). The district court noted as much when it opined that, Appellants' notice of appeal notwithstanding, its preliminary and temporary order was not rightfully appealable. *See* ECF No. 37 ("However, this Court's November 29 order is a temporary restraining order, not a preliminary injunction because, inter alia, it is of a limited duration—ten days.") (citing *Mitsubishi Int'l Corp. v. Cardinal Textile Sales, Inc.*¸14 F.3d 1507, 1515 (11th Cir. 1994)). The fact that the district court never reached the merits of the bulk of Appellants' requests and that its order was both expressly limited and temporary is reason enough to dismiss the appeal. *See Kaimowitz v. Orlando,* 122 F.3d 41, 43 (11th Cir. 1997) (finding scope of the Court's jurisdiction over appeals under 28 U.S.C. § 1292(a) are "limited to matters directly related to the denial of injunctive relief").

A. There are no emergency circumstances posing a threat of irreparable harm.

Appellants purport to rely on the "emergency circumstances" exception to justify their appeal of the district court's November 29 Order but it does not apply here. *See* ECF No. 32 at 1 ("Plaintiffs . . . hereby file an emergency appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's interlocutory order of November 29, 2020 (Doc. 14) to the extent it denies the full relief Plaintiffs requested in their temporary restraining order."). Indeed, even if the

district court *had* denied Appellants' requested relief, any "emergency" is one of their own making.

A court "*may* exercise appellate jurisdiction" "when a grant or denial of a TRO might have a serious, perhaps irreparable, consequence, and can be effectually challenged only by immediate appeal . . . ." *Schiavo ex rel. Schlinder v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005) (emphasis added). In other words, a TRO may be considered to involve an appealable emergency where irreparable harm will occur before other relief can reasonably be sought. The Eleventh Circuit permits emergency appellate review of TROs in only the most extreme circumstances, for example, when a death row inmate is set to be executed within 24 hours of a TRO denial, *see Ingram v. Ault*, 50 F.3d 898, 900 (11th Cir. 1995), or when a patient is taken off of life-sustaining medical treatment pursuant to a TRO, *see Schiavo*, 403 F.3d at 1225. The burden is on the appellant to "disprove the general presumption that no irreparable harm exists." *Ingram*, 50 F.3d at 899–900.

Appellants cannot carry this burden. The November 29 Order *granted* them partial relief, ordering the production of a contract and ordering the State not to delete certain data, and the Court set a briefing schedule and hearing regarding their other requests to occur within days. Indeed, that hearing was set December 4—before the briefing on Appellants' present appeal will even be completed. If they now suggest this appeal is an emergency because they are out of time to obtain

meaningful relief below, it is as a result of their own perplexing decision-making. *See* ECF Nos. 32, 37. Appellants waited more than eight months to file this case challenging a settlement agreement that was in place long before the election, and they waited until all of the ballots were cast and counted—twice (and in the middle of a *third* count)—before bringing this case. As another district court properly found in a substantially similar lawsuit filed shortly before this one, Appellants "could have, and should have, filed [their] constitutional challenge[s] much sooner than [they] did." *Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at *7 (N.D. Ga. Nov. 20, 2020).

Appellants also could have chosen to file a preliminary injunction motion, rather than a TRO, from which there might have been a right of direct appeal under 28 U.S.C § 1292(a). *See Cnty., Mun. Emps.' Supervisors' and Foremen's Union Local 1001 v. Laborers' Intern. Union of N. Am.*, 365 F.3d 576, 578 (7th Cir. 2004) (Easterbrook, J.)

> ([T]he only reason [the denial of a TRO] might have such an effect would be [the appellants'] own strategy; rather than asking for a preliminary injunction, [they] immediately appealed. That maneuver cannot be allowed to work. . . . Only when resort to the regular processes of litigation is unavailing, and the judge is unwilling to make a prompt decision even though delay erodes or obliterates the rights in question, does inaction have the 'effect' of denying injunctive relief.).

Tellingly, Appellants have cited no applicable authority that would authorize this Court to exercise jurisdiction under these or even remotely analogous

circumstances. They rely on *Schaivo*, which involved a familial dispute over the medical care of a patient on life support, but nothing about this case's circumstances are remotely similar. The district court already recognized exactly this: "its November 29 order is not within the scope of *Schiavo*'s exception to the unappealable nature of a temporary restraining order." ECF 37 at 2. There is simply no basis to classify this "appeal" as an "emergency" to create an end-around to well-established principles of jurisdiction and civil procedure in federal courts.

Finally, to the extent Appellants claim that their substantive requests for relief were denied, this does not help their cause. Because a denial of a TRO generally simply leaves in place the status quo pending a preliminary injunction hearing, as it did here, the right to appeal a denial of a TRO is particularly disfavored. *See, e.g.*, *Office of Pers. Mgmt. v. Am. Fed'n of Gov't Emps., AFL-CIO*, 473 U.S. 1301, 1305-06 (1985) (Burger, C.J., in chambers) (distinguishing orders granting a TRO and changing the status quo from orders denying a TRO and maintaining the status quo, concluding that "the Court of Appeals was without jurisdiction over the appeal" from a district court's denial of a TRO motion).

B. The TRO Motion denial does not otherwise resemble a denial of a preliminary injunction.

Although Appellants appear not to not rely on it as a basis for direct appeal of the November 29 Order, the denial of a TRO can also be appealed under 28 U.S.C. § 1292(a)(1) when "the relief sought was a preliminary injunction," rather than a

TRO. *AT&T Broadband v. Tech Commc'ns, Inc.*, 381 F.3d 1309, 1314 (11th Cir. 2004). Specifically, [a]n order granting a TRO may be appealable as an order granting a preliminary injunction when three conditions are satisfied:

> (1) the duration of the relief sought or granted exceeds that allowed by a TRO ([14] days), (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.

Id. To the extent Appellants may attempt to argue that this exception applies, none of these factors are met.

First, the November 29 Order did not exceed 14 days, the duration allowed by a TRO. It explicitly required the Defendants to not delete certain data for ten days, or until further order of the court—whichever came first. ECF No. 14 at 4. The district affirmed this when it noted this Order was "not directly appealable" "because, inter alia, it is of a limited duration." ECF No. 37 at 2.

Second, the November 29 hearing was conducted on the premise that the relief sought was a TRO, and the order that followed refers to itself as a TRO. *Id.* at 4; *see also* Nov. 29 Tr. 11:16. And in these proceedings, the district court and the parties, including Appellants, have consistently referred to their Motion as one for a TRO and not a preliminary injunction. *See, e.g.*, ECF 32 at 1 ("Plaintiffs . . . appeal to the United States Court of Appeals for the Eleventh Circuit from this Court's interlocutory order of November 29, 2020 (Doc.14) to the extent it denies the full relief Plaintiffs requested in their motion for a temporary restraining order.").

Though "the label placed upon the order is not necessarily dispositive of its appealability," *AT&T Broadband*, 381 F.3d at 1314, when the plaintiff *and* the court are in agreement that the motion sought a TRO, this Court should defer. *Cf. Wheeler v. Talbot*, 770 F.3d 550, 552 (7th Cir. 2014) ("We think it best, however, to take the district court at its word. The court certainly knew the difference between a TRO and a preliminary injunction, and its order specified that it was denying Wheeler's motion for a 'preliminary injunction . . . .'"); *Overstreet v. Lexington-Fayette Urban Cnty. Gov't*, 305 F.3d 566, 572 (6th Cir. 2002) (relying on fact that "both parties have treated the motion, and the district court's ruling thereon, as a motion for a preliminary injunction" in determining that order was appealable).

Third, the relief addressed by the November 29 Order did not seek to change the status quo. Instead, the focus of the hearing and the relief that issued was on Appellants' request to preserve and to inspect certain data in the immediate term. The Court granted the preservation request to the best of its ability, by ordering Defendants not to delete any of the relevant data, while determining it would take up Appellants' remaining requests at a hearing scheduled less than a week later. While Appellants now appear to contend that this was a denial of their substantive request to de-certify the election, App. Br. at 8 (filed Dec. 2, 2020), this contention is puzzling, since no decision was rendered with respect to that relief. *Kaimowitz*, 122 F.3d at 43 (11th Cir. 1997) (The scope of the Court's jurisdiction over appeals

under 28 U.S.C. § 1292(a) are "limited to matters directly related to the denial of injunctive relief.").

In short, Appellants have jumped the gun. This is not an appeal of preliminary injunction. Nor do they face irreparable harm that can be remedied only through immediate appeal. As a result, this Court does not have jurisdiction to hear this appeal.

IV. CONCLUSION

In the present circumstances, the Court clearly lacks jurisdiction under U.S.C. § 1292(a). While this alone is sufficient grounds for dismissal, Intervenors further and respectfully request that this Court dismiss the appeal because it sets a dangerous precedent for American elections. As the Third Circuit explained just a week ago, "[v]oters, not lawyers, choose the President. Ballots, not briefs, decide elections." *Donald J. Trump for President v. Sec'y of Commw.*, No. 20-3372, slip op. at 11 (3d. Cir. Nov. 27, 2020). Georgia's voters have decided this election and the Secretary has soundly certified those results. This Court should dismiss this appeal.

Dated: December 3, 2020 *<u>/s/ Amanda R. Callais</u>*

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limitation of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 3774 words as counted by the word-processing system used to prepare the document.

Respectfully submitted this 3rd day of December, 2020.

/s/ Amanda R. Callais
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CERTIFICATE OF SERVICE

I hereby certify that on December 3, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record.

Respectfully submitted this 3rd day of December, 2020.

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