No. 20-1448

In the United States Court of Appeals for the Eleventh Circuit

CORECO JA'QAN PEARSON, ET AL.,
Plaintiffs-Appellants,

v.

BRIAN KEMP, ET AL.,
Defendants-Appellees

On Certified Order from the United States District Court
for the Northern District of Georgia, Atlanta Division,
No. 1:20-cv-04809-TCB

BRIEF OF APPELLANTS

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Democratic Party of Georgia, Inc., Proposed Intervenor-Defendant

DSCC, Proposed Intervenor-Defendant

DCCC, Proposed Intervenor-Defendant

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STATEMENT OF SUBJECT-MATTER AND APPELLATE JURISDICTION

Plaintiffs-Appellants Coreco Ja'Qan Pearson, et al. (collectively "Republican Electors")[1] filed suit in the United States District Court for the Northern District of Georgia against Defendants-Appellees Brian Kemp, et al. (collectively "Georgia Officials")[2] raising four federal claims under 42 U.S.C. §1983 (D1:66-86)[3] and one Georgia state law claim under Ga. Code §21-2-522 (D1:86-98). The district court had subject matter jurisdiction under the federal claims pursuant to 28 U.S.C. §1331. It also had supplemental subject matter jurisdiction under the state law claim pursuant to 28 U.S.C. §1367.

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[1] The Plaintiffs-Appellants in this lawsuit are Georgia Trump Electors Coreco Ja'Qan Pearson, Vikki Townsend Consiglio, Gloria Kay Godwin, James Kenneth Carroll, Carolyn Hall Fisher, and Cathleen Alston Latham; Georgia Republican Party Assistant Secretary Brian Jay Van Gundy; and Cobb County Republican Party Chairman Jason Shepherd. While Brian Jay Van Gundy and Jason Shepherd are not officially "electors," to simplify matters this motion refers to all Plaintiffs-Appellants collectively as "Republican Electors.

[2] [The Defendants-Appellees in this lawsuit are Brian Kemp, Governor of Georgia; Brad Raffensperger, Secretary of State of Georgia; and David J. Worley, Rebecca N. Sullivan, Matthew Mashburn, and Anh Le, members the Georgia State Board of Elections. To simplify matters, this motion refers to them collectively as "Georgia Officials.".

[3] All references to the record are to D[PACER-generated docket number]:[PACER-generated page number within said docket number].

On December 1, 2020, Republican Electors filed an emergency notice of interlocutory appeal as a matter of right (D32) from the district court's order partially granting and partially denying their motion for temporary injunctive relief. (D14). While appellate jurisdiction does not ordinarily exist on an order granting or denying temporary injunctive relief, it does exist if the order in question can, practically speaking, "be challenged only by immediate appeal…." *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005).

On December 2, 2020, this Court issued an order directing Republican Electors to address the jurisdictional question of whether, or to what extent, the district court's order is immediately appealable. (App. D39:3). This Court also directed that Republican Electors respond to the jurisdictional question no later than December 3, 2020. Accordingly, Republican Electors will further address the issue of appellate jurisdiction in that response, and not in this brief.

STATEMENT OF THE ISSUES

1. As a matter of Georgia Law, does the State of Georgia have lawful control over the Dominion Voting System used in all Georgia elections?

2. Did the district court err in refusing to issue an order directing Georgia State Officials to de-certify the Presidential election results or, in the alternative, enjoining them from transmitting the certified election results to the Electoral College pending the disposition of this lawsuit's outcome?

3. Did the district court err in refusing to enjoin the State of Georgia from destroying, or allowing the destruction of, any software or data on the Dominion voting machines used to tabulate voting results in ten counties, instead of just three counties?

4. Did the district court err in refusing to issue an order immediately directing Georgia State Officials to allow Republican Electors to audit and inspect all Dominion voting systems within the ten counties in question?

STATEMENT OF THE CASE

I. Pursuant to its exclusive powers under Georgia law, in the summer of 2019 the Georgia state government purchased Dominion voting machines for mandatory use throughout the State of Georgia in all of its elections.

The state law of Georgia mandates that "[t]he state…furnish a uniform system of electronic ballot markers and ball to scanners for use in each county" in all relevant elections. *See* Ga. St. §21-2-300 (a)(3). The Georgia Secretary of State, in turn, is vested with authority to select which voting equipment shall be used in such elections. *See* Ga. St. §21-2-300(a)(1). But while county supervisors must utilize such voting equipment in administering election law, they have no authority, as county officials, to purchase such equipment themselves. *See* Ga. St. §21-2-70 (5) (declaring that county superintendents may purchase any election equipment "except voting machines…."). The Georgia Secretary of State is also a member of the State Election Board, which is authorized "to investigate…the administration of primary and election laws and frauds and irregularities in primaries and elections…." Ga. St. §21-2-31. The State Election Board may take any action "consistent with law, as [it] may determine to be conductive to the fair, legal, and orderly conduct of primaries and elections." Ga. St. §21-2-31.

Pursuant to the above powers, in the summer of 2019 the State of Georgia purchased, and the Georgia Secretary of State certified, the electronic Dominion Voting System Democracy Suite 5.5-A Voting System ("Dominion System") for universal use throughout Georgia in all elections. (D1-5; D1-6). The reliability of such software in tabulating votes for the proper candidate has been seriously questioned over the past several years. This past January, for example, the Texas Secretary of State issued a report detailing the problems revealed the Dominion System. A review and test run of the Dominion System revealed "concerns about whether the [it] is suitable for its intended purpose; operates efficiently and accurately; and is safe from fraudulent or unauthorized manipulation." (D1-23:3). Consequently, the Dominion system did "not meet the standards for certification prescribed by [relevant Texas law.]" (D1-23:3). The Texas Secretary of State accordingly "den[ied] certification of Dominion Voting Systems' Democracy Suite 5.5-A system for use in Texas elections." (D1-23:4).

Texas is not alone in noting the inherent unreliability of Dominion's voting system. In February 2020, the Election Law Journal accepted for publication an article authored by two Professors of Computer

Science—Andrew W. Appel of Princeton University and Richard A. DeMillo of Georgia Tech—as well as a Professor of Applied and Theoretical Statistics—Philip B. Stark of the University of California, Berkeley—in which they observed that the Dominion System is open to manipulation. (D1-8).

The security shortcomings and design defects of the Dominion system was reviewed in copious and damning detail in a 147-page order issued by Judge Amy Totenberg in *Curling v. Raffensperger*, No. 1:17-CV-2989-AT 2020 WL 5994029 (N.D. Ga. Oct. 11, 2020). Reviewing a prodigious quantity of expert testimony and analysis, Judge Totenberg concluded that the Dominion system was highly vulnerable to hacking, that the paper ballots printed from Ballot Marking Devices were not voter-verifiable, and that such ballots was not auditable independent of the software. *Id*. at *35 (noting that by statute the voting system was required to print a paper ballot that recorded the vote in a human readable form but that "voters who wish to vote in-person are required to vote on a system that does none of those things.") Judge Totenberg denied injunctive relief in that case primarily because the order was issued only two days before the start of early voting began.

Judge Totenberg had previously enjoined any further use of the Diebold DRE election system in Georgia after an equally thorough review of alarming deficiencies in that system, and a record which showed the state elections database was hacked and compromised and then deleted before any proper forensic analysis could be conducted. See *Curling v. Raffensperger*, 397 F.Supp.3d 1334, 1340 (N.D. Ga. 2019).

2. Proceedings Below

Plaintiffs filed their complaint and 28 exhibits on November 25, 2020. Plaintiffs alleged that the Dominion election system was vulnerable to hacking and malware, and that the election results presented mathematical and statistical anomalies bordering on the impossible. Plaintiffs supported these allegations with substantial affidavits and declarations of experts, including two cyber security experts' declarations, the "Spider" Affidavit (Doc. 01-9) and the Ramsland Declaration (Doc. 01-10). The Spider Affidavit, filed with the affiant's name redacted due to existing threats to his life from his professional work, and concern about his safety from giving this testimony, see Doc. 5, presents a truly alarming picture of Iran and China having completely penetrated Dominion's networks. Plaintiffs'

also presented mathematical testimony from Eric Quinnell, PhD., describing extreme and essentially impossible statistical anomalies in the Fulton County voting results. (Doc. 01-27). Plaintiffs also filed the affidavit of William M. Briggs, a statistician, testifying that tens of thousands of absentee ballots were cast by non-residents. Doc. 1-1.

Based on this substantial evidence, on November 27, 2020, Plaintiffs filed a motion for a temporary injunctive relief seeking an order (1) de-certifying Georgia's Presidential election results, or at least a stay in the delivery of the certified results to the Electoral College while the case proceeds; (2) preventing Georgia Officials from resetting their voting machines and wiping them of voting data; and (3) making available to Republican Electors the relevant voting machines in question for forensic analysis as a means of uncovering further evidence of election fraud. (Doc.6 at 26-30).

The district court initially granted Republican Electors leave to conduct forensic examinations of all voting machines in Georgia, but shortly thereafter rescinded the order.[4] On November 27, 2020,

[4] Neither the initial order nor the order rescinding it are part of the record on PACER.

Republican Electors filed an emergency motion for temporary injunctive relief, seeking an order to direct Georgia Officials to allow Republican Electors' experts to inspect the Dominion voting machines in ten counties. (Doc. 6) The district court subsequently held a hearing on the motion via Zoom on the evening of November 29, 2020 and orally ordered a Temporary Restraining Order from altering or destroying voting machines in three counties. (Tr.1).

The following day—on November 30, 2020—the district court issued a written order granting in part Republican Electors' motion for a temporary injunctive relief. (D14). While not agreeing to de-certify the election results or issue a stay on delivering the certified results to the Electoral College, the district court's order did enjoin Georgia Officials from erasing any data on the Dominion voting machines for three counties—Cobb, Gwinnett, and Cherokee. (D14:3). But the order did not grant Republican Electors leave to inspect the machines themselves, instead giving Georgia Officials until December 2, 2020, to file a brief setting forth in detail the factual basis they had for opposing Republican Electors' desire to conduct a forensic inspection of the Dominion voting machines.

The day after issuing its order partially granting emergency injunctive relief to Republican Electors, the district court issued a subsequent order (D22) certifying, under 28 USC §1292(b), that its earlier order "involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." (D22:1-2).

Republican Electors filed a notice of interlocutory appeal as a matter of right in the district court on December 1, 2020. (D32). *See Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1225 (11th Cir. 2005)

SUMMARY OF THE ARGUMENT

Georgia state law plainly vests the Secretary of State with the exclusive authority to purchase and certify election voting systems and machines for utilization in Georgia elections. In 2019, Georgia implemented the Dominion system and software for utilization in all counties throughout the state. Republican Electors have produced evidence showing that there is a reasonable possibility of widespread election fraud in the elections this past November. Accordingly, they are entitled to temporary injunctive relief as outlined further below.

ARGUMENT

I. Georgia law plainly vests the Secretary of State with control over the Dominion System, thus making them the proper parties to the lawsuit. (Question 1)

Contrary to what Georgia Officials claim, the Georgia Secretary of State has ownership and control of the Dominion system, and consequently the authority to allow Republican Electors access to the Dominion system. Consequently, the Georgia Secretary of State, in her official capacity as a member of the Georgia State Board of Elections, is the proper party to this lawsuit for purposes of the relief Republican Electors are seeking.

Under Georgia law, the state—and not counties—is the entity vested with the exclusive right to purchase and certify voting machines. Ga. St. §21-2-300 (a)(1). Counties, by contrast, have no authority whatsoever to purchase voting systems. Ga. St. §21-2-70 (5). In addition, the Georgia Secretary of State, as part of the State Election Board, has the authority to "review ballots for use by counties and municipalities on voting systems in use in the state." Ga. St. §21-2-50(a)(15). This denotes an authority to make available for inspection and auditing all of the Dominion Systems in possession of the counties.

Georgia Officials, in the hearing the district court conducted on the motion for temporary injunctive relief, insisted that the case of *Jacobson v. Florida Secretary of State*, 957 F.3d 1193 (11th Cir. 2020) demonstrates that the counties are the proper parties to this lawsuit, as only they can grant Republican Electors' access to the Dominion Systems. *See Jacobson,* 974 F.3d at 1253-1257. But that case involve the application of *Florida* state law, which gives county election boards far more authority in the purchasing of voting systems than does Georgia law. Under Florida law, while the state election board promulgates uniform rules regarding the purchase of voting machines, the counties themselves are authorized to purchase such machines. Fla. St. §§101.292 (1), 101.294 (1). Counties in Georgia, by contrast, are not. *See* Ga. St. §21-2-70(5).

The Northern District of Georgia itself recently recognized this distinction between Florida law and Georgia law in this regard. *See New Ga. Project v. Raffensperger*, -- F.Supp.3d --, 2020 WL 5200930 (N.D. Ga. Aug. 31, 2020). There, the judge rejected the Secretary of State's argument that "Plaintiffs should have sued all [159] counties in Georgia." *Id*. at *6 n.16. It explicitly distinguished the plaintiffs' lawsuit

from that of *Jacobson*[5] due to the difference between Florida law and Georgia law on what powers each state's respective Secretary of State possesses.

This distinction between Georgia law and Florida law on this matter is crucial for purposes of whether the Georgia Secretary of State is the proper party in this lawsuit. Because the Georgia Secretary of State maintains ownership—or at the very least control—over the Dominion System, it is the proper party for purposes of giving Republican Electors access to the Dominion System within each of the relevant counties. Georgia Officials' arguments to the contrary are unavailing.

II. Republican Electors are entitled to temporary injunctive relief. Questions 2—4) as they have shown a substantial likelihood of success of the merits and the public interest will be harmed absent such injunctive relief.

Time is of the essence in this lawsuit. The Electoral College is set to vote this upcoming December 14, and the Georgia Secretary of State

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[5] The *Jacobson* opinion the district court cited to was subsequently withdrawn by this Court and replaced with a new opinion. *See Raffensperger*, 2020 WL at *6 n.16 (citing *Jacobson v. Fla. Sec. of State*, 957 F.3d 1193, 1208 (11th Cir. 2020), *vacated by panel*, 974 F.3d 1236 (11th Cir. 2020). But the portion of the original *Jacobson* opinion the district court relief on, 957 F.3d at 1207-12110, was re-adopted by the substitute opinion. *See* 957 F.3d at 1253-1258.

has already certified the results of the Presidential election for Vice President Biden. As described further below, the likelihood of Republican Electors' success on the merits, along with the public interest, favor an order decertifying the election results and allowing Republican Electors to conduct their audit of the relevant Dominion System.

The grounds for granting temporary injunctive relief are identical to those for granting preliminary injunctive relief. *See Schaivo*, 403 F.3d at 1231. Its purpose "is to protect against irreparable injury and preserve the status quo until the district court renders a meaningful decision on the merits." *Id*. The movant must demonstrate (1) a substantial likelihood of success on the merits; (2) that in the absence of such an injunction irreparable injury will occur; (3) that the threatened injury to the moving party outweighs any damage the proposed injunction may cause the opposing party; and (4) that if the injunction is issued, it will not adversely affect the public interest. *Id*.

Here, Republican Electors have satisfied all four requirements and are entitled to (1) an order temporarily decertifying the Georgia Presidential election results pending the completion of the audit of the

Dominion System within the relevant ten counties; (2) an order directing the Secretary of State to preserve and prevent the erasure of all data on the Dominion System within the relevant ten counties; and (3) an order directing the Secretary of State to allow Republican Electors access to, and the ability to audit, the Dominion systems in question. At the very least, such temporary injunctive relief should operate until the day before the Electoral College is set to vote.

The plethora of evidence Republican Electors have submitted in attachment to their complaint demonstrates the likelihood of success on all four of their §1983 claims as well as their Georgia state law claim. The wrongful tabulation of votes—along with the inclusion of invalid votes in such a tabulation—amounts to the disenfranchisement of those who cast valid votes. *See Reynolds v. Sims*, 377 U.S. 533, 555 (1964) ("The right to vote can neither be denied outright, nor destroyed by alteration of ballots, nor diluted by ballot-box stuffing." (internal citations omitted)). There are serious problems with the Dominion System, and Republican Voters are entitled to an audit of that system within the relevant ten counties. This is the only manner they have of uncovering further, detailed evidence of voter fraud.

In addition, Republican Electors will suffer irreparable harm in the absence of this relief being granted. The district court has, to this day, refused to allow Republican Electors access to the Dominion System, and time is running short. Delaying the certification of the election for a relatively short amount of time will not result in any harm to the public.

CONCLUSION

Accordingly, Republican Electors respectfully ask this Court for a temporary injunctive order (1) decertifying the results of the Presidential election; (2) ordering Georgia Officials to preserve all data on the Dominion System; and (3) allowing Republican Electors to audit the Dominion System in the relevant ten counties.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **December 2, 2020,** I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the CM/ECF system.

A true and correct copy of the foregoing will be emailed to the following counsel:

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Certificate of Compliance

I certify under Fed. R. App. P. 5(c)(1) that this petition contains ***** words, excluding those parts exempted under Fed. R. App. P. 32(f).

I further that certify this brief complies with type-volume limitations under Fed. R. App. P. 32(g) as it is written in proportionally-spaced, 14-point Century font using Microsoft Office Word.

/s/ Sidney Powell