No. 20-14418

In the

United States Court of Appeals

for the Eleventh Circuit

L. LIN WOOD,

Appellant,

v.

BRAD RAFFENSPERGER, *et al.*,

Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division.
No. 1:20-cv-04651-SDG — Steven D. Grimberg, *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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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

STATEMENT OF ISSUES

1. Whether the District Court's November 20, 2020, denial of the Appellant's "Emergency Motion for Temporary Restraining Order" is immediately appealable.

2. Whether the challenge to the District Court's denial of the relief requested in the "Emergency Motion for Temporary Restraining Order" is moot.

INTRODUCTION

This case involves a constitutional challenge to Georgia's November 3, 2020, general election by Wood Appellant L. Lin Wood, Jr. ("Wood"). In the district court, Wood requested injunctive relief that would prohibit the certification of the vote cast in Georgia for President, require any recount be conducted in compliance with Georgia law and include certain additional non-statutory components, require that county officials be supervised in the performance of certain of their electoral responsibilities by agents from a single political party, and provide that a single political party be given access to election materials and permitted to conduct a non-statutory review process of those materials.

The results of Georgia's presidential election were certified by the Secretary of State and the Governor on November 20, 2020, as required by state law. It is therefore impossible for the Court to grant Wood's requested relief as to the November 3, 2020, presidential election, even if there were any merit to his constitutional claims—and there is not.

Wood seeks to set aside the election results based upon two claims: (1) that State Defendants and the Democratic Party of Georgia entered into a March 2020 settlement agreement that allegedly altered the process by which counties verify voter

signatures on absentee ballots in a way that he asserts is contrary to the Georgia election code; and (2) that poll watchers for the Trump Campaign and the Republican Party were not permitted to observe the vote tabulations or post-election audit. The district court correctly held that neither of these theories presented a legally cognizable constitutional claim.

Appellant first moved on November 23, 2020, for the district court to enter an order certifying the question for interlocutory review under 28 U.S.C. § 1292(b). The district court ordered on November 24, 2020, that both Appellees and Intervenor Defendants-Appellees respond to the request as to certification by November 25, 2020, and additionally required Appellant to respond to the pending motions to dismiss also by November 25, 2020. Appellant then shifted tack and filed this, a direct appeal under 28 U.S.C. § 1292(a)(1).

Appellees submit that the Defendant has improperly invoked the provisions of 28 U.S.C. § 1292(a)(1) in directly appealing the denial of his "Emergency Motion for Temporary Restraining Order." Accordingly this Court should determine that it lacks jurisdiction over his appeal. Alternatively, this Court should find that the challenge to the denial of the requested relief is moot.

STATEMENT OF THE CASE

Wood filed his Complaint on November 13, 2020, asserting claims under the Equal Protection, Due Process, and Elections and Electors clauses. On November, 17, 2020, Wood filed an emergency motion for a temporary restraining order, asking the district court to enjoin the Secretary of State from certifying the results of the general election unless 1.3 million absentee ballots cast by Georgia voters were excluded from the tabulation. The district court promptly held a hearing on November 19, 2020, to consider Wood's emergency motion and issued an oral ruling denying the motion at the conclusion of the hearing, followed by a written order on November 20, 2020. Later that same day, the Secretary of State certified the presidential vote in Georgia, and the Governor of Georgia subsequently certified Georgia's slate of presidential electors.

A. Proceedings Below[1]

Wood filed his Complaint on November 13, 2020, asserting three constitutional counts: (1) that the Litigation Settlement violates the Equal Protection Clause of the Fourteenth Amendment (Count I); (2) that the Litigation Settlement violates

[1] Appellees omit a factual background from this Jurisdictional Question response.

the Electors and Elections Clauses of Articles I and II (Count II); and (3) a Due Process claim based upon the allegation that the State Defendants denied Republican party monitors meaningful access to observe and monitor the tabulation of votes or the statewide audit (Count III).

On November, 17, 2020, Wood filed an emergency motion for a temporary restraining order ("TRO"), asking the district court to enjoin the Secretary of State from certifying the results of the general election unless 1.3 million absentee ballots cast by Georgia voters were excluded from the tabulation. On November 19, 2020, the district court held an evidentiary hearing on Wood's emergency motion, and issued an oral ruling denying the motion at the conclusion of the hearing. On November 20, 2020, the district court issued a written order denying Wood's motion. The State Defendants filed a motion to dismiss for lack of subject matter jurisdiction under FED. R. CIV. P. 12(b)(1). The Intervenor-Defendants also filed a motion to dismiss under FED. R. CIV. P. 12(b)(1) and (6). Before the district court could rule on the motions to dismiss, however, Wood filed a motion for interlocutory appellate review of the district court's order denying his motion for a TRO, followed by a direct notice of appeal a day later.

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).

Additionally, this Court lacks jurisdiction due to mootness if an act occurs prior to the appeal being heard that "makes it impossible for the court to grant 'any effectual relief whatever' to a prevailing party." *Brooks v. Ga. State Bd. of Elections*, 59 F.3d 1114, 1118 (11th Cir. 1995) (quoting *Church of Scientology of Cal. V. United States*, 506 U.S. 9, 12 (1992)). The only way to evade

the mootness doctrine is through establishing that one of three exceptions exists: 1) where the issues raised are capable of repetition yet evade appellate review; 2) where an appellant has taken all steps necessary to perfect the appeal and to preserve the status quo before the dispute becomes moot; or 3) where the trial court's order will have possible collateral legal consequences." *National Broadcasting Co. v. Communications Workers of America*, 860 F.2d 1022, 1023 (11th Cir. 1988) (citing *B & B Chemical Co. v. United States E.P.A.*, 806 F.2d 987, 990 (11th Cir. 1986)).

SUMMARY OF ARGUMENT

This Court should find that the order appealed is properly construed as a denial of a temporary restraining order, as Appellant recognized in moving first for a 28 U.S.C. § 1292(b) order. The crux of the relief sought was to prevent the certification by the Secretary and the Governor of the presidential vote and slate of presidential electors, an event that occurred on the same day and shortly after the district court denied the relief sought by Appellant.

Additionally, Appellant satisfies none of the three prongs necessary to treat the TRO sought as a request for injunction

under 1292(a)(1). Appellant's claims likewise fail to satisfy the standard for permissive consideration of his appeal.

Finally, the substantive acts that Appellant was attempting to prevent have already occurred, and as a result his challenge of the denial of that relief is moot. His claims also do not fall within a recognized exception to the mootness doctrine.

Appellant's appeal should be dismissed for want of jurisdiction or, in the alternative, as moot.

ARGUMENT

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

Appellant correctly characterized the relief he was seeking as a temporary restraining order in both his original motion and his first post-denial motion seeking 1292(b) certification for appellate review. His relief was first and foremost to stop the impending certification of the results from the presidential election in Georgia and the subsequent certification of the slate of electors for Georgia to the Electoral College. The relief that he sought beyond that was contingent in nature to set up a non-statutory review process for absentee ballots in order to either set aside enough legitimately cast votes to ensure that his preferred candidate was

declared the winner or to delay the process sufficiently long enough so that no certification of a presidential slate of electors, *based on the votes cast by the people of Georgia*, would be temporally possible. As such, his appeal is properly cast as that from denial of a temporary restraining order over which this Court lacks 28 U.S.C. § 1292(a)(1) jurisdiction.

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

Appellant sought to stop the compilation of the returns from Georgia's 159 counties by the Secretary with the attendant certification by the Secretary of the presidential vote totals, followed by certification of the Governor of the presidential slate of electors to the Electoral College. Everything beyond that was contingent relief designed to arrive at a new count of votes deemed by Appellant to be "legitimate" in a process not approved by the General Assembly nor in place in either the conduct of the November 3, 2020, general election nor in either the statewide primary or primary run-off elections held earlier in the cycle.

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 ten days. *AT&T Broadband*, 381 F. 3d at 1314. Here, the certification of the vote for president was required to be made by the Secretary on the 17th day following the election, to wit: November 20, 2020. O.C.G.A. § 21-2-499(b). The Governor, following delivery of that certification, is required to certify the slate of presidential electors to the Electoral College no later than 5:00pm on the 18th day following the general election, to wit: November 21, 2020. *Id.* The motion for emergency relief was made on November 17, 2020, and a hearing was held on November 19, 2020, with the purpose of preventing that which occurred immediately following denial of relief, the respective certifications from the Secretary and the Governor. Once the events occurred, the contingent relief that Appellant also sought was meaningless.[2]

[2] While Appellant's motion made mention in his complaint and emergency motion to the process to be in place for the January 5, 2021, election runoffs, he failed to press that claim in his argument in support of emergency relief in the district court. As such, that claim by Appellant should be noted for what it was, a throw-in argument that has been cast aside and abandoned at the district court level by Appellant in favor of concentrating on the relief that he actually sought, preventing certification of the election results. As such, any claims that he might assert in that regard should be regarded as abandoned, at least as far as the

The second *AT&T* factor is also missing from this appeal. Appellant was not seeking a permanent injunction, instead he was scrambling to stop that which was statutorily *required* to happen within the week of his filing for emergency relief. *See* O.C.G.A. § 21-2-499(b). He did not seek, at least in the emergency motion, to alter the status quo beyond the 2020 election cycle. As such, he cannot be deemed to be seeking an injunction that would prevent the happening of events or alter the status quo beyond the events happening within mere hours of the hearing on his request for emergency relief.

Appellant's challenge to denial of relief also fails to satisfy the final *AT&T* factor. He was scrambling to preserve the status quo in his emergency relief and to keep Georgia in a state of uncertified election results. His argument during the hearing was focused on preventing certification based on what he contended

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challenge to the denial of emergency relief is concerned. *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 he fails to present argument on the issue to the district court).

were illegitimate votes and a flawed recount process. It was for the non-emergency relief laid out in his complaint that he sought to reverse the actual election results in Georgia, but relief sought in his complaint will not permit bootstrapping of his targeted prayer for emergency relief into the third *AT&T* factor.

C. Appellant has 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,* 403 F.3d 1223. As the district court found, Appellant did not raise claims of particularized harm, much less irreparable harm, that would accrue to him. Instead, his argument concerned the fact that his preferred candidate had not prevailed in the General Election. Under this Court's precedent, that does not create either legally cognizable or irreparable harm. *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1247 (11th Cir. 2020). Instead, his claim was an interest in his preferred candidate winning the election, which is "a 'generalized partisan preference[]" that federal courts are 'not responsible for vindicating." *Id.* at 1250 (citing *Gill v. Whitford*,

138 S. Ct. 1916, 1933 (2018). Thus, Appellant cannot satisfy the *Schiavo* permissive grant of appellate jurisdiction.

II. The challenge to the denial of relief is moot

A. The events that the denied emergency relief sought to prevent have occurred, eliminating any case or controversy from this appeal

Appellant sought to stop the certification of the presidential vote by the Secretary with the attendant, subsequent certification of the slate of presidential electors to the Electoral College. Both of those events have now transpired. Accordingly, this Court lacks the ability to grant "any effectual relief whatever" to Appellant from the denial of the TRO. *Brooks*, 59 F.3d at 1118. The events sought to be prevented have actually happened, and "this Court cannot prevent what has already occurred." *De La Fuente v. Kemp*, 679 Fed. Appx. 932, 933 (11th Cir. 2017). As such, there is no case or controversy remaining before the court, and the appeal must be dismissed as moot.

B. No exception to the mootness doctrine applies to the instant appeal

The only way to evade the mootness doctrine is through establishing that one of three exceptions to the mootness doctrine exists, none of which are applicable here. Those exceptions are

where 1) where the case is capable of repetition yet evades review; 2) where an appellant has taken all steps necessary to preserve the status quo and perfect the appeal before the dispute becomes moot; or 3) where the order appealed will have possible collateral legal consequences. *National Broadcasting Co.*, 860 F.2d at 1023 (citing *B & B Chemical Co.,* 806 F.2d at 990).

This Court has found that there is a "narrow exception for actions that are capable of repetition yet evading review … only in the exceptional circumstances in which the same controversy will recur and there will be inadequate time to litigate it prior to its [conclusion]." *Naijar v. Ashcroft*, 273 F.3d 1330, 1340 (11th Cir. 2001). Here, the complaint concerns the method that Georgia employs for voting on and certifying the results of a presidential election, with an attendant certification of the presidential slate of electors. This is an event that occurs every four years and, as this Court has previously held, there is nothing that would prevent the continuation of this lawsuit, or even commencement of a new lawsuit aimed at the 2024 election cycle that will once again include the contest for president, which could be fully litigated in the intervening three plus years before commencement of the 2024 election cycle. *See De La Fuente*, 679 Fed. Appx. at 935 (there is "no reason to believe that the district court will be unable to rule

on his requests for a permanent injunction and declaratory relief in the next three and a half years").

The remaining exceptions to the mootness doctrine are likewise inapplicable to this appeal. The Appellant has not taken all steps necessary to preserve the status quo before perfecting this appeal. This Court has held that this particular exception to the mootness doctrine "is an extremely narrow one that has been limited primarily to criminal defendants who seek to challenge their convictions notwithstanding that they have been released from custody." *Ethredge v. Hail*, 996 F.2d 1173, 1176-77 (11th Cir. 1993).

Even assuming that consideration of this exception was warranted in this particular context, Appellant would be unable to avail himself of its operation. On the day that the district court entered its order denying the requested relief, Appellant began propounding discovery and even moved the court for an emergency discovery order, despite the fact that Appellant knew from the oral ruling of the district court the night before that no TRO was forthcoming. There was no effort made on that Friday to file anything in an effort to get appellate review prior to the *completion* of the events that were sought to be prevented. It was not until the following Monday, November 23, 2020, that appellant

even moved for 1292(b) certification, after both the Secretary and the Governor had performed the acts that the emergency motion tried to stop. It was a full day later, on Tuesday, November 24, 2020, a full four days after the Secretary's certification, that the Appellant filed this direct appeal. As such, there can be no claim that he made efforts to preserve the status quo for appellate review.

The final prong, the collateral legal consequences, is likewise inapplicable to the instant appeal. The only consequences are those directly challenged, namely certification of the presidential vote in Georgia along with the attendant certification of the president slate of electors. There are no collateral legal consequences that will necessarily flow from the Appellant's failure to prove that he is entitled to the emergency relief that he sought in the district court. Any truly collateral consequences that can be proffered on a reasonable basis are simply too "speculative" in nature to justify relief. *B & B Chemical Co.*, 806 F.2d at 991; *see also Ethredge*, 996 F.2d at 1177 (any attendant "consequences that might derive from the district court opinion[]" are insufficiently certain to warrant exception to the mootness doctrine).

CONCLUSION

For the reasons set out above, this Court should find that it lacks jurisdiction over this appeal or, in the alternative, find that the challenge to the relief sought is moot.

Respectfully submitted, this 1st 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 4,395 words as counted by the word-processing system used to prepare the document.

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CERTIFICATE OF SERVICE

I hereby certify that on December 1, 2020, I served this brief 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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