Nos. 20-13730, 20-14067

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DONNA CURLING, et al.,
Plaintiffs-Appellees,

v.

BRAD RAFFENSPERGER, et al.,
Defendants-Appellants.

Consolidated Appeals from the United States District Court for the Northern District of Georgia, Case No. 1:17-cv-02989-AT, Hon. Amy Totenberg

BRIEF FOR PLAINTIFFS-APPELLEES DONNA CURLING, DONNA PRICE, & JEFFREY SCHOENBERG

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JUNE 2, 2021

NOTICE REGARDING CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1.1-26.1.3, undersigned counsel of record for Plaintiffs-Appellees Donna Curling, Donna Price, and Jeffrey Schoenberg identifies the following interested persons omitted from the Certificate of Interested Persons contained in Defendants-Appellants' opening brief:

1. Palmore, Joseph R., counsel for plaintiffs-appellees Donna Curling, Donna Price, and Jeffrey Schoenberg;

2. Qian, Michael F., counsel for plaintiffs-appellees Donna Curling, Donna Price, and Jeffrey Schoenberg.

Dated: June 2, 2021 /s/ Joseph R. Palmore

STATEMENT REGARDING ORAL ARGUMENT

Curling Plaintiffs (Plaintiffs-Appellees Donna Curling, Donna Price, and Jeffrey Schoenberg) focus this brief on standing. The standing issues in these appeals do not warrant oral argument because, as this brief explains, no standing objection is properly before the Court. On the remaining issues, Curling Plaintiffs defer to the view of Coalition Plaintiffs (Plaintiffs-Appellees Coalition for Good Governance, Laura Digges, William Digges III, Ricardo Davis, and Megan Missett) that oral argument is warranted.

TABLE OF CONTENTS

TABLE OF CITATIONS

Page(s)

Cases

Statutes and Rules

JURISDICTIONAL STATEMENT

Appellants (the Secretary of State of Georgia and members of the State Election Board—collectively, "State Defendants") assert appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which allows review of interlocutory orders that, among other things, "grant[] . . . injunctions." This Court has appellate jurisdiction under that provision in No. 20-13730. But this Court lacks appellate jurisdiction in No. 20-14067 because the district court granted no injunction. *See infra* at 19-20; Joint Response to Jurisdictional Question from Plaintiffs-Appellees, No. 20-14067 (Dec. 18, 2020).

STATEMENT OF THE ISSUES

1. Whether this Court lacks appellate jurisdiction in No. 20-14067 because the district court never granted an injunction.

2. Whether Coalition Plaintiffs have standing to challenge flaws in Georgia's pollbooks and paper-ballot scanners that burden their constitutional right to vote.

3. Whether the district court correctly concluded that Coalition Plaintiffs were likely to succeed on the merits of their pollbook and scanner claims.

INTRODUCTION

Contrary to the impression conveyed by State Defendants' brief and 40-volume appendix, these two consolidated interlocutory appeals are quite narrow in scope. Each addresses a single component of Georgia's voting system. Case No. 20-13730 is an appeal from a preliminary injunction addressing electronic pollbooks at polling places. Case No. 20-14067 is an appeal from an order addressing the scanners used to tabulate paper ballots.

Meanwhile, litigation continues in the district court on other components of Georgia's voting system, including the electronic touchscreen machines with which in-person voters cast their votes. Georgia's electronic touchscreen voting machines are incapable of ensuring that votes are captured securely and accurately, as both sets of Plaintiffs (the "Curling Plaintiffs" and the "Coalition Plaintiffs") allege and are prepared to prove at trial.

Only claims concerning the pollbooks and the scanners—not claims concerning the electronic touchscreen voting machines or other aspects of Georgia's voting system—are before the Court in this interlocutory appeal. The district court entered no appealable order on those other claims, as State Defendants themselves agree. Therefore, those other claims—including whether Plaintiffs have standing to bring them—are not at issue here. They can be reviewed in a future appeal after

final judgment or if the district court enters an appealable interlocutory order on them.

Yet State Defendants devote the standing section of their opening brief to contesting Plaintiffs' standing to challenge the electronic touchscreen voting machines. In other words, State Defendants focus their fire on standing to secure relief that has not been granted and that is not before the Court. At the same time, State Defendants have not properly presented any standing objection on the claims they *did* appeal. On the scanner claim, State Defendants cannot establish appellate jurisdiction, as the district court never entered any appealable injunction. And on neither the scanner claim nor the pollbook claim did State Defendants develop any standing argument at all in their brief.

Curling Plaintiffs, as parties to this litigation whose rights will be affected by the relief State Defendants seek on appeal, submit this brief to urge the Court not to decide standing issues outside these appeals—particularly for the electronic-touchscreen-voting-machine and other claims not before the Court. Curling Plaintiffs also point out that this is not the first time in this case State Defendants have taken an interlocutory appeal based on one set of issues, and then asked this Court to resolve their separate objection to Plaintiffs' standing to challenge electronic voting machines. Last time, this Court correctly refused to

reach beyond the limits of appellate jurisdiction and decide the standing objection. The Court should do the same here.

STATEMENT OF THE CASE

A. Flaws Exist In Multiple Components Of Georgia's Voting System

This case primarily implicates three aspects of Georgia's voting system. First are pollbooks—lists used at polling places to track who is allowed to vote. *See* Appx. Vol. XXXV, Tab 918 at 11-13. Georgia uses electronic pollbooks. *Id.* at 13. But in election after election, Georgia's electronic pollbooks have proven unreliable. *Id.* at 24-48. For example, voters have arrived at polling places only to be told incorrectly—based on the electronic pollbook—that they were not registered, were listed at the wrong address, or had already voted. *E.g.*, *id.* at 31-32 (December 2019 election); *id.* at 42-43 (June 2020 election); *id.* at 46 (August 2020 election). Pollbook malfunctions have also caused long lines at polling places, creating a serious barrier to voting. *E.g.*, *id.* at 32 ("lines up to 6 hours long" in June 2020 election).

Second are the scanners used to tabulate hand-marked paper ballots. Most Georgia voters usually do not cast such ballots, but when those ballots are used—such as for mail-in absentee votes—the hand markings are scanned and tabulated with optical scanners. Appx. Vol. XXXVIII, Tab 964 at 93-94, 99-102. Georgia's optical scanners routinely miscount votes. *Id.* at 95-122. For example, in a partial

recount for the June 2020 primary election, a vote review panel found that nearly 16% of absentee ballots it adjudicated contained votes that the optical scanners had not properly counted. *Id.* at 112-13. These errors occur because Georgia's Secretary of State directs that scanner settings be configured to avoid tabulating valid voter markings that the scanners are capable of interpreting. *Id.* at 99-109. This disenfranchises voters.

Third—and not within the scope of this appeal—are the electronic touchscreen machines (and related components) on which in-person voters cast their votes. Most jurisdictions in the United States use hand-marked paper ballots tabulated by scanners as the main form of balloting. *Id.* at 16. Georgia, however, is one of the only States to require in-person voters to cast votes on electronic touchscreen machines known as ballot marking devices or BMDs. *Id.* at 15-16. The current BMD system, which Georgia recently introduced, already has been plagued by numerous problems creating substantial barriers to voting. *Id.* at 31-78. The State's administration of its electronic voting system, including its poor cybersecurity practices, has left this system open to attack. *Id.* at 31-51. Yet Georgia's system offers voters no way of checking that the machines captured their votes correctly, as it is supposed to record votes on a barcode that humans cannot read. *Id.* at 82. Moreover, the State has taken shortcuts in accuracy testing, contributing to the impossibility of meaningfully auditing its BMD system. *Id.* at

51-78. Plaintiffs have amassed "a huge volume of significant evidence regarding the security risks and deficits in the system as implemented"—ranging from an actual breach of Georgia's election infrastructure in 2016 to testimony from leading election-security experts, including damning admissions from State Defendants' own experts. *Id.* at 23, 31-78. Georgia's BMDs are thus riddled with serious vulnerabilities in an environment of advanced persistent threats to U.S. elections by sophisticated actors. The upshot is that voters who wish to vote in person are forced to cast their votes on machines that cannot ensure their votes will be recorded accurately.

B. Before The 2018 And 2019 Elections, Plaintiffs Moved For Preliminary Injunctions Against Electronic Voting Machines

In July 2017, individual Georgia voters and the Coalition for Good Governance filed suit in state court against Georgia's Secretary of State, the State Board of Elections, several county boards of elections, and a number of state and county board members. Defendants removed the case to the U.S. District Court for the Northern District of Georgia. Plaintiffs coalesced into two groups, the "Curling Plaintiffs" (Donna Curling, Donna Price, Jeffrey Schoenberg) and the "Coalition Plaintiffs" (Laura Digges, William Digges III, Ricardo Davis, and the Coalition for Good Governance). Appx. Vol. XXXVIII, Tab 964 at 2 n.1. Currently remaining as defendants in the case are the "State Defendants" (the Secretary of State and members of the State Election Board) and the "Fulton County Defendants"

(members of the Fulton County Board of Registration and Elections), all sued in their official capacities.

Early litigation focused principally on the electronic touchscreen voting machines Georgia used at the time. *See* Appx. Vol. XXXVIII, Tab 964 at 13-15. Those machines, known as Direct Recording Electronic (DRE) machines, were predecessors to the current BMDs. *Id.* Plaintiffs' second amended complaint in September 2017 challenged the unreliable and unsecured DRE system as unlawful, including because it violated the fundamental right to vote guaranteed by the Due Process Clause of the Fourteenth Amendment. Appx. Vol. VIII, Tab 70 at 23-52 (¶¶ 58-162). Plaintiffs sought, among other things, to enjoin use of the DRE voting system. *Id.* at 52-54 (¶¶ 163-73).

Before the 2018 election, both groups of Plaintiffs moved for preliminary injunctions against the use of electronic voting machines. The district court found "serious security flaws and vulnerabilities in the State's" electronic voting system that burden Plaintiffs' constitutional right to vote without sufficient justification. Appx. Vol. XII, Tab 309 at 33-34. But the court ultimately denied a preliminary injunction due to timing concerns, concluding that relief on the eve of 2018 elections would "seriously test the organizational capacity" of election personnel. *Id.* at 42.

At the same time, the district court denied a motion by State Defendants to dismiss on standing, sovereign-immunity, and legislative-immunity grounds. *Id.* at 31; *see also* Appx. Vol. XIII, Tab 336 at 2.

State Defendants took an interlocutory appeal from the denial of their motion to dismiss. This Court dismissed the appeal as to standing. Opinion at 15-16, No. 18-13951 (Feb. 7, 2019). The Court held that standing was not properly before the Court because interlocutory appellate jurisdiction extended only to the immunity issues, not to Plaintiffs' standing to challenge electronic voting machines. *Id.* On immunity, this Court affirmed, holding that "Plaintiffs comfortably satisfy" the exception to state sovereign immunity for injunctive suits against state officials, and that legislative immunity is inapplicable. *Id.* at 6, 14-15.

On remand, both sets of Plaintiffs moved for preliminary injunctions before the 2019 elections. As to electronic voting machines, the district court again found the DRE machines constitutionally deficient. Appx. Vol. XXII, Tab 579 at 130-37. The court enjoined the use of DRE machines, with the injunction taking effect after 2019 due to impending elections that year. *Id.* at 152. As to pollbooks, which Coalition Plaintiffs expressly challenged, the court found "significant" "deficiencies and vulnerabilities" in Georgia's voter registration database and electronic pollbook system and directed State Defendants to develop a plan to address those flaws. *Id.* at 149-50, 152-53. State Defendants did not appeal the injunction against the DRE

machines or any aspect of that order; instead, Georgia replaced the DRE machines with the BMD machines. *See* Appx. Vol. XXV, Tab 751 at 2-8. State Defendants did not, however, comply with the court's directives regarding the voter registration database and pollbook system. *Id.* at 23; Appx. Vol. XXXV, Tab 918 at 23-25, 149-50.

C. Before The 2020 Elections, The District Court Entered Orders Addressing Pollbooks And Scanners

Before the 2020 elections, Curling Plaintiffs filed a new operative complaint, Coalition Plaintiffs filed a supplemental complaint, and both again moved for preliminary injunctions. In September 2020, the district court granted Coalition Plaintiffs' motion for a preliminary injunction as to pollbooks. Appx. Vol. XXXV, Tab 918 at 64-67. The court found "a system wide problem of malfunctioning" electronic pollbooks "in tandem with wholly inadequate backup plans and voter registration data deficiencies that resulted in voter disenfranchisement and that is likely to continue in the upcoming Federal Presidential election." *Id.* at 63-64. The court therefore ordered that polling places be provided paper back-ups of the electronic pollbooks, and that these paper copies be properly updated to reflect the

list of eligible voters. *Id.* at 64-66. State Defendants noticed an interlocutory appeal, which the Fulton County Defendants do not join (No. 20-13730).[1]

In October 2020, the district court entered an order addressing Coalition Plaintiffs' motion for a preliminary injunction as to the paper-ballot scanners. Appx. Vol. XXXVIII, Tab 964 at 93-142. The court found that Coalition Plaintiffs had a substantial likelihood of success on their claim that "the State Defendants' use of an arbitrary threshold on its ballot scanners to discard voter ballot markings for specific candidates or initiatives that are obvious to the human eye results in a violation of the fundamental right of each voter to have his or her vote accurately recorded and counted." *Id.* at 133. And the court concluded that the "threat of this injury is substantial and irreparable." *Id.*

But the court's October 2020 order deferred entry of a remedy on the scanners. *Id.* at 137-38. The court concluded that it was not clear what changes were feasible before the impending November 2020 elections, and the court had questions about what exact remedy was appropriate. *Id.* at 137-40. The court therefore directed the

[1] Before the November 2020 election, a divided panel of this Court stayed the district court's preliminary injunction pending appeal. Order, No. 20-13730 (Oct. 24, 2020). Following the election, a divided panel denied a motion to lift the stay. Order, No. 20-13730 (Apr. 1, 2021).

parties to submit briefing addressing the proper remedy, after which the court would "enter a further relief order." *Id.* at 141-42. In the middle of that briefing on remedy, State Defendants (again without the Fulton County Defendants) filed a notice of appeal of the district court's October 2020 order (No. 20-14067). Appx. Vol. XXXIX, Tab 991 at 1. The district court has not yet issued a remedial order.[2]

In another section of that October 2020 order, the district court separately addressed claims concerning the electronic touchscreen voting machines. Appx. Vol. XXXVIII, Tab 964 at 19-89. Both Curling and Coalition Plaintiffs had moved to preliminarily enjoin the use of the new BMD voting machines, which Georgia had adopted to replace the DRE machines. *Id.* at 2-3. Both sets of Plaintiffs showed that the BMD machines suffer from the same basic problems that plagued the DRE machines—voters cannot verify their votes, and the State's mismanagement of the system has left them unsecure. *Id.* at 31-78. The district court accordingly recognized "Plaintiffs' strong voting interest and evidentiary presentation that indicate they may ultimately prevail in their claims." *Id.* at 84. But the court concluded that enjoining the use of BMD machines and shifting to hand-marked

[2] This Court *sua sponte* noted that "it appears that this court may lack jurisdiction over this appeal" and ordered briefing on appellate jurisdiction. Jurisdictional Question Notice at 2, No. 20-14067 (Dec. 4, 2020). After jurisdictional briefing, the Court ordered that the jurisdictional question be carried with the case. Order, No. 20-14067 (Mar. 29, 2021).

paper ballots would be too "sweeping" a change given the proximity of the 2020 elections. *Id.* at 89. "[F]or this reason alone, despite the strength of Plaintiffs' evidence," the court denied Plaintiffs' motions as to the electronic voting machines. *Id.* at 89.

D. Litigation Continues In The Trial Court Over Standing To Challenge Electronic Voting Machines And The Merits

While State Defendants' two appeals have been pending, the district court has been conducting proceedings to assess whether Plaintiffs have standing to challenge Georgia's BMD system. Appx. Vol. XXXIX, Tab 1049 at 1. State Defendants urged the district court to certify that question so they could file an interlocutory appeal under 28 U.S.C. § 1292(b). Joint Supp. Appx., Tab 1061 at 28-29 (State Defendants' counsel: "entering a new order that can then be certified is probably our best way to get to an appeal and have the Eleventh Circuit hear" the standing issue regarding Georgia's BMD system). In response, Plaintiffs argued that they have standing to challenge Georgia's BMD system and that, in any event, the question should be decided in the ordinary course of summary-judgment and trial adjudication once discovery is complete. *E.g.*, Appx. Vol. XL, Tab 1067 at 9-20 (page numbers referring to ECF header, *see* 11th Cir. R. 28-5).

Having considered those arguments, the district court "establish[ed] an abbreviated schedule for the parties' completion of discovery and summary judgment briefing." Joint Supp. Appx., Tab 1088 at 2; *see* Joint Supp. Appx.,

Tab 1092 at 1 (ordering close of all discovery by September 3, 2021 and completion of summary judgment briefing by November 1, 2021).

STANDARD OF REVIEW

This Court "*sua sponte* examine[s] the existence of appellate jurisdiction and review[s] jurisdictional issues *de novo*." *United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union v. Wise Alloys, LLC*, 807 F.3d 1258, 1266 (11th Cir. 2015). Standing issues are reviewed *de novo*. *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1349 (11th Cir. 2009).

SUMMARY OF THE ARGUMENT

I. In these interlocutory appeals, only pollbooks and paper-ballot scanners are at issue. But State Defendants develop no standing arguments about those claims. Instead, State Defendants challenge Plaintiffs' standing to bring claims against Georgia's BMD system. Yet those claims are not at issue on appeal.

Standing is assessed claim-by-claim. The only standing question even arguably before this Court is thus whether Coalition Plaintiffs have standing for the claims State Defendants have attempted to appeal—those concerning pollbooks and scanners. State Defendants' objection to Plaintiffs' standing to bring different claims—those concerning Georgia's BMD system—is beside the point. Recognizing that standing to challenge the BMD system is not currently on appeal, State Defendants asked the district court to enter an appealable interlocutory order

on that question—and the court has not done so. With no appealable order, an incomplete record, and proceedings ongoing in the district court, this Court should not address State Defendants' objection to Plaintiffs' standing to challenge the BMDs.

II. Nor is any standing objection properly before this Court even on the pollbook or scanner claims. To start, the Court lacks appellate jurisdiction over the scanner claim because the district court's interlocutory order granted no injunction and therefore is not immediately appealable. And in any event, State Defendants' brief fails to properly develop *any* argument against Coalition Plaintiffs' standing to raise either the pollbook or scanner claims.

ARGUMENT

This Court should decline to address standing to challenge Georgia's BMD system. No claim against the BMD system is on appeal. Instead, these interlocutory appeals are limited to Coalition Plaintiffs' claims concerning pollbooks and scanners. And even on those claims, no standing objection is properly before this Court.

On the pollbook and scanner claims, Curling Plaintiffs support Coalition Plaintiffs' requests for relief and adopt their arguments by reference. *See* Fed. R. App. P. 28(i). Curling Plaintiffs' own claims challenging Georgia's BMD system are not on appeal—as State Defendants themselves state. Opening Br. 2 n.1. State

Defendants have even moved to prevent Curling Plaintiffs from being heard at all in this Court. Mot. to Correct Appeal Style Or Dismiss Curling Pls. (June 1, 2021). Yet at the same time, State Defendants devote the standing section of their brief to attacking Curling Plaintiffs' claims challenging Georgia's BMD system. State Defendants cannot hijack these appeals about pollbooks and scanners to defeat Curling Plaintiffs' BMD claims.

I. STANDING TO CHALLENGE GEORGIA'S BMD SYSTEM IS NOT BEFORE THIS COURT

Standing is claim-specific, "not dispensed in gross." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (citation and quotation marks omitted). The Article III "'standing inquiry'" asks "'whether the particular plaintiff is entitled to an adjudication of *the particular claims asserted*.'" *Hollywood Mobile Ests. Ltd. v. Seminole Tribe of Fla.*, 641 F.3d 1259, 1265 (11th Cir. 2011) (emphasis added) (quoting *Allen v. Wright*, 468 U.S. 737, 752 (1984)). Accordingly, a court "must separately assess" standing for "each type of relief sought." *Tokyo Gwinnett, LLC v. Gwinnett Cnty., Ga.*, 940 F.3d 1254, 1262 (11th Cir. 2019); *see I.L. v. Alabama*, 739 F.3d 1273, 1279 (11th Cir. 2014) (court must "address standing for each category of claims separately").

Standing is therefore at issue now only as to the claims on appeal. These interlocutory appeals concern just two forms of relief: a preliminary injunction addressing pollbooks and an order addressing paper-ballot scanners. Opening

Br. 3-5 ("The orders on appeal"); Appx. Vols. XXXIX-XL, Tabs 973, 991 (notices of appeal). The only relevant standing inquiry is whether Plaintiffs have standing to seek *that* relief. Whether Plaintiffs have standing to seek different relief is a "separate[]" issue not presented here. *Tokyo Gwinnett*, 940 F.3d at 1262. State Defendants initially acknowledged this, limiting the standing issues presented in their Civil Appeal Statements to "jurisdiction to enter the injunction[s]" against the pollbooks and scanners, respectively (though they incorrectly characterize the order regarding scanners as an "injunction"). Civil Appeal Statement at 2, No. 20-13730 (Oct. 16, 2020); Civil Appeal Statement at 2, No. 20-14067 (Nov. 17, 2020); *see infra* at 19-20 (scanner order was not actually an injunction).

But now, State Defendants' standing arguments focus on relief not at issue on appeal. Except for a single sentence about pollbooks and scanners (Opening Br. 43), the entire standing section of State Defendants' opening brief disputes only standing to challenge Georgia's BMD system. Opening Br. 30-44. State Defendants argue, for example, that Coalition Plaintiffs lack standing in that they "seek to enjoin the use of the State's BMD system and mandate a change to their preferred method of voting based on alleged 'vulnerabilities.'" Opening Br. 35. But whether Plaintiffs have standing to challenge "the State's BMD system" is entirely separate from whether they have standing to challenge pollbooks and scanners.

State Defendants' own arguments illustrate that their standing objections about Georgia's BMD system are distinct from the standing inquiry about pollbooks and scanners. State Defendants contend that certain individuals lack standing because they "would not vote on BMDs in the 2020 election" and "would instead use hand-marked paper ballots." Opening Br. 33. But the relief on appeal concerns paper-ballot scanners, not BMDs. That certain Plaintiffs' 2020 votes were counted with the very paper-ballot scanners they are challenging can only help—not hurt—their standing to seek that relief.

Notwithstanding the misplaced arguments in State Defendants' brief, the claims challenging Georgia's BMD system are not part of these interlocutory appeals. State Defendants cannot appeal the district court's order regarding use of the BMDs because the court ruled *in State Defendants' favor*, denying a preliminary injunction against the BMDs. Appx. Vol. XXXVIII, Tab 964 at 89. State Defendants do not contend otherwise. *See* Opening Br. 3-5; Appx. Vols. XXXIX-XL, Tabs 973, 991 (notices of appeal).

In fact, State Defendants themselves have acknowledged that they currently lack an appealable order on plaintiffs' standing to challenge Georgia's BMD system. Even though the present appeals were already pending, they recently urged the district court to certify the standing question regarding Georgia's BMD system for interlocutory appeal under 28 U.S.C. § 1292(b). Joint Supp. Appx., Tab 1061

at 28-29. State Defendants' counsel explained that "entering a new order that can then be certified is probably our best way to get to an appeal and have the Eleventh Circuit hear" the standing issue regarding Georgia's BMD system. *Id.* The district court has not granted that request, instead ordering discovery followed by dispositive briefing. Yet State Defendants are attempting to litigate this appeal as if § 1292(b) certification had been granted.

It would be particularly inappropriate to decide the standing question regarding Georgia's BMD system in these appeals because that question is still being litigated in the district court. The parties recently briefed the question, and the court has yet to rule, instead suggesting it may not do so until summary judgment briefing (after discovery). Joint Supp. Appx., Order, Tab 1088 at 2; *see*, *e.g.*, Appx. Vol. XL, Tabs 1066, 1067, 1071. Fact development on that issue is ongoing—as State Defendants' opening brief acknowledges. Opening Br. 25 (noting "100 pages of new declarations and exhibits," which were filed after this appeal was taken and which the district court is still considering); *see* Joint Supp. Appx., May 18, 2021

Order, Tab 1092 at 1 (ordering fact and expert discovery through September 2021).[3] State Defendants' request to decide the BMD standing issue now not only flouts the limits of appellate jurisdiction, but it would also circumvent the ordinary sequence of judicial review and force this Court to decide the issue on an incomplete record. The Court should reject that request.

II. NO OTHER STANDING OBJECTION IS PROPERLY BEFORE THIS COURT

Even on the claims State Defendants are appealing—concerning pollbooks and scanners—they raise no standing objection properly before this Court.

A. State Defendants Cannot Establish Appellate Jurisdiction Over The Scanner Claim

The scanner claim is not subject to appellate jurisdiction at all, as Plaintiffs fully explained in their Joint Response to this Court's Jurisdictional Question in No. 20-14067 (Dec. 18, 2020), incorporated here by reference. *See* Fed. R. App. P. 28(i). State Defendants assert appellate jurisdiction under 28 U.S.C. § 1292(a)(1), which allows review of interlocutory orders that, among other things, "grant[] . . .

[3] State Defendants' 40-volume appendix contains record materials addressing standing to challenge the BMD system filed *after* the district court entered the orders on appeal. *E.g.*, Appx. Vol. XL, Tabs 1067, 1067-1, 1067-2, 1067-3. Those materials are doubly irrelevant here. Not only do they concern claims not before the Court, but also the Court "may consider only evidence that was before the district court when it made its decision." *Price v. Time, Inc.*, 416 F.3d 1327, 1346 (11th Cir. 2005).

injunctions." *See* Opening Br. xi-xii. "Section 1292(a) is not, however, a golden ticket litigants can use to take any decision affecting injunctive relief on a trip to the court of appeals." *Edwards v. Prime, Inc.*, 602 F.3d 1276, 1290 (11th Cir. 2010). An order is not an appealable grant of an injunction if it lacks "a clearly defined and understandable directive by the court to act or to refrain from a particular action," is not "enforceable through contempt, if disobeyed," or does not "give[] some or all of the substantive relief sought in the complaint." *Alabama v. U.S. Army Corps of Eng'rs*, 424 F.3d 1117, 1128 (11th Cir. 2005).

The order here flunks all of those requirements. The district court *declined* to order any particular, enforceable relief. Appx. Vol. XXXVIII, Tab 964 at 137-142. Instead, it ordered further briefing on what remedy it might order and deferred consideration of that remedy "until after certification of the January 5, 2021 runoff election." *Id.* at 141; Joint Supp. Appx., Tab 1021 at 1. Until the district court actually issues a remedial order imposing an injunction, there is no appealable order under § 1292(a)(1). The Court should therefore dismiss the appeal of the scanner order for lack of appellate jurisdiction, without reaching any standing inquiry.

B. State Defendants Developed No Standing Objection To The Pollbook Or Scanner Claims

Even setting aside the lack of appellate jurisdiction over the scanner claim, State Defendants fail to present any standing objection to it or the pollbook claim. Their opening brief contains only a single sentence on standing to bring those claims:

in the midst of arguing that injuries caused by deficient BMDs are traceable only to third parties, State Defendants add that "[t]he same goes for the relief actually ordered by the district court" on the pollbook and scanner claims. Opening Br. 43. Such a "conclusory assertion[]" "buried within other arguments" is insufficient to raise a contention for appellate review. *Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681-82 (11th Cir. 2014) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority."). And even if State Defendants were to develop a standing objection in their "reply brief," that would "come too late." *Id.* at 682-83; *see Little v. T-Mobile USA, Inc.*, 691 F.3d 1302, 1307 (11th Cir. 2012) ("Letting the [appellants] put forward their arguments on this issue for the first time in the reply brief would deprive [the appellee] of the opportunity to reflect upon and respond in writing to [the appellants'] arguments and would deprive this Court of the benefit of written arguments." (citation and quotation marks omitted)).

CONCLUSION

The district court's order in No. 20-13730 should be affirmed. The appeal in No. 20-14067 should be dismissed for lack of appellate jurisdiction, or in the alternative, the district court's order should be affirmed.

Dated: June 2, 2021

Respectfully submitted,

/s/ Joseph R. Palmore

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a) because it contains 4,575 words excluding the parts of the brief exempted by Fed. R. App. P. 32(f), as determined by the word-counting feature of Microsoft Word 2016.

This brief complies with the typeface requirement of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface, including serifs, using Microsoft Word 2016 in Times New Roman 14-point font.

Dated: June 2, 2021 /s/ Joseph R. Palmore

CERTIFICATE OF SERVICE

I certify that 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 appellate CM/ECF system on June 2, 2021.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Dated: June 2, 2021 /s/ Joseph R. Palmore