No. 12-15738-EE

IN THE

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

KARLA VANESSA ARCIA, ET AL.

Plaintiffs-Appellants,

v.

FLORIDA SECRETARY OF STATE,

Defendant-Appellee.

On Appeal from the United States District Court
for the Southern District of Florida
Case No. 12-22282-CIV-ZLOCH (*Hon. William J. Zloch*)

PLAINTIFFS-APPELLANTS' RESPONSE TO THE COURT'S JURISDICTIONAL QUESTION

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AMENDED CERTIFICATE OF INTERESTED PARTIES[1]

Pursuant to 11th Circuit Rule 26.1-1, Appellants, Karla Vanessa Arcia, Melande Antoine, 1199SEIU United Healthcare Workers East, National Congress for Puerto Rican Rights, and Florida Immigrant Coalition, Inc., furnish a complete list of the following persons that have an interest in the outcome of this case:

Advancement Project – Attorneys for Appellants

Antoine, Melande – Appellant

Arcia, Karla Vanessa – Appellant

Brady, Hon. Robert A. (Congressman) – *Amicus Curiae*

Brennan Center for Justice at N.Y.U. School of Law – *Amicus Curiae*

Cartagena, Juan – Attorney for Appellants

Carvin, Michael A. – Attorney for Appellee

Claffee, Scott A. – Attorney for *Amici Curiae*

Conyers, Hon. John, Jr. (Congressman) – *Amicus Curiae*

Culliton-Gonzalez, Katherine – Attorney for Appellants

Davis, Ashley E. – Attorney for Appellee

Davis Polk & Wardwell LLP – Attorneys for *Amici Curiae*

De Leon, John – Attorney for Appellants

Detzner, Ken, Florida Secretary of State – Appellee

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[1] Pursuant to 11th Circuit Rule 26.1-2(f), Plaintiffs-Appellants have amended their Certificate of Interested Parties to: 1) remove Diana S. Sen, who filed her Notice of Withdrawal of Counsel on December 11, 2012; and 2) add the names of *amici curiae* and their counsel who have filed briefs in this case.

Druckenmiller, Steve – *Amicus Curiae*

Fair Elections Legal Network – Attorneys for Appellants

Flanagan, Catherine M. – Attorney for Appellants

Florida Immigrant Coalition, Inc. – Appellant

Florida New Majority, Inc. – Appellant

Ford, Hon. Wendell H. (Former Congressman) – *Amicus Curiae*

Friedman, Joshua N. – Attorney for Appellants

Gilbert, George – *Amicus Curiae*

Goldman, Marc A. – Attorney for Appellants

Gonzalez, Hon. Charles A. (Congressman) – *Amicus Curiae*

Gore, John M. – Attorney for Appellee

Hair, Penda – Attorney for Appellants

Hawkins, Ernest – *Amicus Curiae*

Hovland, Ben – Attorney for Appellants

Huff, Sherril – *Amicus Curiae*

Hughes, Paul W. – Attorney for *Amici Curiae*

Jenkins, Marina K. – Attorney for Appellants

Jenner & Block LLP – Attorneys for Appellants

Jones Day – Attorneys for Appellee

Jurgensen, Margaret – *Amicus Curiae*

Kanter Cohen, Michelle – Attorney for Appellants

Kaplan, Lindsay Eyler – Attorney for Appellants

Kasdan, Diana – Attorney for *Amici Curiae*

Katsas, Gregory G. – Attorney for Appellee

Kolb, Daniel F. – Attorney for *Amici Curiae*

Konopasek, Scott – *Amicus Curiae*

LatinoJustice PRLDEF – Attorneys for Appellants

Law Offices of Chavez & De Leon – Attorneys for Appellants

The League of Women Voters of Florida – *Amicus Curiae*

The League of Women Voters of the United States – *Amicus Curiae*

Leonard, Lloyd – Attorney for *Amici Curiae*

Levitt, Justin – Attorney for *Amici Curiae*

Lewis, Hon. John R. (Congressman) – *Amicus Curiae*

Lofgren, Hon. Zoe (Congresswoman) – *Amicus Curiae*

Logan, Dean – *Amicus Curiae*

Masters, Lorelie S. – Attorney for Appellants

Mayer Brown LLP – Attorneys for *Amici Curiae*

McCormack, Conny – *Amicus Curiae*

National Congress for Puerto Rican Rights – Appellant

Nkwonta, Uzoma – Attorney for Appellants

Nordby, Daniel E. – Attorney for Appellee

Norton, Hon. Eleanor Holmes (Congresswoman) – *Amicus Curiae*

Perez, Jose – Attorney for Appellants

Pérez, Myrna – Attorney for *Amici Curiae*

Postman, Warren D. – Attorney for Appellee

Project Vote – Attorneys for Appellants

Purcell, Helen – *Amicus Curiae*

Ramamurti, Bharat R. – Attorney for Appellants

Roberson-Young, Katherine – Attorney for Appellants

Rogers, Kristen M. – Attorney for Appellants

Rothfeld, Charles A. – Attorney for *Amici Curiae*

Schmidt, Connie – *Amicus Curiae*

Singer, Stephanie – *Amicus Curiae*

Smith, Gary – *Amicus Curiae*

Swift, Hon. Allan B. (Former Congressman) – *Amicus Curiae*

Veye Yo – Appellant

Weiser, Wendy – Attorney for *Amici Curiae*

Wilkey, Tom – *Amicus Curiae*

Zloch, The Honorable William J. – U.S. District Court Judge

1199SEIU United Healthcare Workers East – Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES*

CASES

* Authorities upon which we chiefly rely are marked with asterisks.

STATUTES

OTHER AUTHORITIES

PLAINTIFFS-APPELLANTS' RESPONSE TO THE COURT'S JURISDICTIONAL QUESTION

This Court has jurisdiction over Plaintiffs-Appellants' sole active appeal, No. 12-15738-EE, under 28 U.S.C. § 1291, as this is an appeal of a final decision of the district court below – namely, an appeal of the district court's October 29, 2012, Orders entering Final Judgment in Case No. 1:12-cv-22282-WJZ.

Plaintiffs-Appellants' initially filed an appeal, docketed as No. 12-15220-E, from the district court's October 4, 2012 interlocutory Order denying Plaintiffs-Appellants' Motion for Preliminary Injunction and Summary Judgment, which relied on 28 U.S.C. § 1292(a)(1) to support this Court's jurisdiction. The district court, however, subsequently entered a final order. Plaintiffs-Appellants have withdrawn Appeal No. 12-15220-E and no longer appeal from an interlocutory order.

Simply put, Appeal No. 12-15738-EE asks this Court to review and reverse a final district court order that, through erroneous statutory interpretation applied to undisputed facts, resolved the underlying case as a matter of law in favor of the wrong party. As a result, this Court's jurisdiction is straightforward.

I. BACKGROUND

Plaintiffs filed the underlying action in this case on June 19, 2012, and an Amended Complaint on September 12, 2012. DE 1, DE 57. After the parties had settled claims on all issues but one, on September 19, 2012, Plaintiffs filed their

Motion for Preliminary Injunction and Summary Judgment on the sole remaining issue in the case – a pure statutory question as to whether, under Section 8(c)(2)(A) of the National Voter Registration Act, 42 U.S.C. § 1973gg-6(c)(2)(A), Defendant could continue a systematic purge designed to remove non-citizens from the voter rolls within 90 days of a federal election. DE 65. In their Motion, Plaintiffs sought a declaratory judgment holding that this program violated the law, and sought to enjoin Defendant's program in advance of the November 6 general election. The district court heard argument on October 1, 2012, and issued an Order denying Plaintiffs' Motion for Preliminary Injunction and Summary Judgment on October 4, 2012 ("October 4 Order"). DE 111.

In denying Plaintiffs' Motion, the district court concluded that "'this action involves a pure question of law'" and "there are no disputed issues of material fact for the Court to consider at this time." DE 111 at 23 (quoting DE 71 at 5 (Joint Pretrial Stipulation)). The district court's resolution of that legal question against Plaintiffs signaled the loss of Plaintiffs' only claims. Defendant, however, had never himself moved for summary judgment. Thus, despite the fact that the district court, in its October 4 Order, concluded that the case could be resolved *against* Plaintiffs as a matter of law, the trial court entered no judgment in Defendant's favor at that time.

Because Plaintiffs sought to obtain relief before the fast-approaching November 6 general election, and because there was nothing left they could do to prevail before the district court, Plaintiffs did two things. First, on the morning of October 5, 2012, Plaintiffs moved the district court to enter final judgment in the case – a step Plaintiffs believed to be *pro forma* in light of the district court's October 4 Order that effectively disposed of all issues in the case. *See* DE 113. Second, because of the short amount of time remaining before the election, when the district court had not entered final judgment by the end of the day, Plaintiffs filed their Notice of Appeal of the district court's October 4 Order as well as a Motion to Expedite the appeal.[2] *See* DE 114; Appellants' Mot. to Expedite Appeal, No. 12-15220-E (11th Cir. Oct. 12, 2012) (DE 6690494-1). This appeal was docketed as No. 12-15220-E (11th Cir. Oct. 12, 2012).

On October 29, 2012, before Plaintiffs-Appellants filed their initial brief in Appeal No. 12-15220-E, the district court granted Plaintiffs' Motion for Entry of Judgment in favor of Defendant (DE 124) ("October 29 Order"), entered final judgment in favor of Defendant and against Plaintiffs (DE 125), and terminated the case in the district court. On November 1, 2012, Plaintiffs filed a Notice of Appeal

[2] On October 16, 2012, Judge Rosemary Barkett denied Plaintiffs' Motion to Expedite "[b]ased on the Secretary's representation that there is no chance that a citizen will be removed from the voter rolls under the Program before the November 6 election." Order, *Arcia v. Fla. Sec'y of State*, No. 12-15220-E (11th Cir. Oct. 16, 2012) (DE 6690494-2). Appeal No. 12-15220-E therefore proceeded thereafter in accordance with this Court's normal schedule for appeals.

of the district court's October 29 Order, which this Court docketed as Appeal No. 12-15738-EE (11th Cir. Nov. 7, 2012) on November 7. In order to streamline their appeal and because obtaining a preliminary injunction was no longer an issue after the November 6 election had passed, Plaintiffs-Appellants filed an unopposed motion to dismiss their first appeal (No. 12-15220-E), which this Court granted on December 3. *See* Order, *Arcia v. Fla. Sec'y of State*, No. 12-15220-E (11th Cir. Dec. 3, 2012) (DE 6720697-2).

The only appeal Plaintiffs-Appellants now present for this Court's review is Appeal No. 12-15738-EE, which is an appeal of the district court's October 29 Order entering final judgment.

II. ARGUMENT

A. This Court Has Jurisdiction over Plaintiffs-Appellants' Second Appeal, No. 12-15738-EE, Because It Is an Appeal of a Final Judgment and There Remains an Active Controversy

This Court has jurisdiction over appeals that are "both (1) authorized by statute and (2) within constitutional limits." *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1355 (11th Cir. 2008). Plaintiffs-Appellants' Appeal No. 12-15738-EE (11th Cir. Nov. 1, 2012), meets both criteria.

Appeal No. 12-15738-EE is authorized by statute – specifically, 28 U.S.C. § 1291 ("The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States"). The instant appeal is an

appeal of the district court's entry of Final Judgment (DE 125) and accompanying Order granting Plaintiffs' Motion for Entry of Judgment (DE 124). *See* Notice of Appeal (Nov. 1, 2012) (DE 126). Under § 1291, the Court has jurisdiction over appeals from such "final judgments." *OFS Fitel*, 549 F.3d at 1355-56.

Here, Plaintiffs asked the district court to enter final judgment, but that does nothing to deprive this Court of its jurisdiction. As made clear by this Court in *OFS Fitel* and by the U.S. Supreme Court in *United States v. Procter & Gamble Co.*, 356 U.S. 677 (1958), the general rule – that plaintiffs who have voluntarily dismissed their suits may not appeal – does not apply where a district court issues an interlocutory order that is effectively case-dispositive against a plaintiff and the plaintiff consents to dismissal in order to obtain expeditious appellate review of the interlocutory order. *See OFS Fitel*, 549 F.3d at 1358; *Procter & Gamble*, 356 U.S. at 680-81. In such a case, the plaintiff stands adverse to the final judgment despite the fact that the plaintiff consented to its entry, and the appellate court maintains its jurisdiction over the plaintiff's appeal therefrom. *OFS Fitel*, 549 F.3d at 1356.

Procter & Gamble and *OFS Fitel* directly control the present case. In denying Plaintiffs' Motion for Summary Judgment, the district court's interpretation of the law in Defendant's favor effectively disposed of Plaintiffs' entire case. At the same time, the district court failed to enter judgment in favor of Defendant. As in *Procter & Gamble* and *OFS Fitel*, despite having vigorously

opposed Defendant's interpretation of the law throughout the case, Plaintiffs moved for entry of final judgment in Defendant's favor because they recognized that the district court's October 4 Order denying their Motion for Summary Judgment was effectively case-dispositive, and because they sought expeditious appellate review.

For these reasons, Plaintiffs-Appellants' remain adverse to the entry of final judgment against them, there remains a "case or controversy" between the parties as required by Article III of the Constitution, and this Court has jurisdiction over Plaintiffs-Appellants' Appeal No. 12-15738-EE.

B. This Court Has Jurisdiction over the District Court's October 4 Order Denying Plaintiffs' Motion for Summary Judgment Because an Appeal from a Final Judgment Draws into Question All Prior Non-Final Orders and Rulings That Produced the Judgment

It is not critical whether this Court has jurisdiction over the district court's October 4 Order denying Plaintiffs' Motion for Summary Judgment, as the Court incontrovertibly has jurisdiction over the district court's October 29 Order entering final judgment, which raises the identical statutory issue as the October 4 Order. The Court does, however, also have jurisdiction to review the October 4 Order denying summary judgment.

This Circuit follows the rule that an "appeal from a final judgment draws in question all prior non-final orders and rulings which produced the judgment."

Toomey v. Wachovia Ins. Servs., Inc., 450 F.3d 1225, 1228 n.2 (11th Cir. 2006) (*per curiam*) (quoting *Club Car, Inc. v. Club Car (Quebec) Import, Inc.*, 362 F.3d 775, 785 n.5 (11th Cir. 2004), *abrogated on other grounds by Diamond Crystal Brands, Inc. v. Food Movers Int'l, Inc.*, 593 F.3d 1249, 1258 n.7 (11th Cir. 2010)); *see also Myers v. Sullivan*, 916 F.2d 659, 673 (11th Cir. 1990) ("Under general legal principles, earlier interlocutory orders merge into the final judgment, and a party may appeal the latter to assert error in the earlier interlocutory order."). This is so even where a plaintiff's notice of appeal mentions only the final judgment. *Toomey*, 450 F.3d at 1228 n.5.

While this general rule does not permit review of a pre-trial denial of summary judgment when judgment on the merits has been entered following a full trial on the merits, *see Ortiz v. Jordan*, 131 S. Ct. 884, 888-89 (2011) (emphasis added); *Akouri v. Florida Dep't of Transp.*, 408 F.3d 1338, 1347 (11th Cir. 2005), an interlocutory order denying summary judgment merges into a final judgment – and thus comes within a reviewing court's jurisdiction – where, as here, no trial occurred and judgment was entered as a matter of law on the same record that the district court considered in denying summary judgment. *See* 15B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & EDWARD H. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3914.28 (2d ed. 2012); *California ex rel. Cal. Dep't of Toxic Substances Control v. Neville Chem. Co.*, 358 F.3d 661, 665 (9th Cir. 2004);

Fencorp, Co. v. Ohio Ky. Oil Corp., 675 F.3d 933, 940 (6th Cir. 2012); *Owatonna Clinic–Mayo Health Sys. v. Med. Protective Co. of Fort Wayne*, 639 F.3d 806, 809-10 (8th Cir. 2011); *Fireman's Fund Ins. Co. v. North Pac. Ins. Co.*, 446 F. App'x 909, 911 (9th Cir. 2011) (unpublished).

The district court's grant of Plaintiffs' Motion for Entry of Judgment and subsequent entry of final judgment in this case is procedurally analogous to cases in which a district court grants one party's motion for summary judgment while denying the other's cross-motion and the losing party appeals. In the latter case, it is uncontroversial that losing parties may appeal the denial of their own summary judgment motions at the same time that they challenge the granting of their opponents'. *See, e.g.*, *Great Lakes Reinsurance (UK) PLC v. Vasquez*, 341 F. App'x 515, 516, 518 (11th Cir. 2009) (unpublished); *McMullen v. Meijer, Inc.*, 355 F.3d 485, 489 (6th Cir. 2004); *Scribner v. WorldCom, Inc.*, 249 F.3d 902, 907 (9th Cir. 2001); *Nat'l Coalition for Students with Disabilities Educ. & Legal Defense Fund v. Allen*, 152 F.3d 283, 293 (4th Cir. 1998).

C. In Any Event, This Court Could Have Decided the Merits of Plaintiffs-Appellants' Claim Through an Appeal from the District Court's Denial of Plaintiffs' Motion for Preliminary Injunction

With respect to Plaintiffs' other motion denied by the district court's October 4 Order – Plaintiffs' Motion for Preliminary Injunction – this Court need not decide whether and to what extent it has jurisdiction over an appeal of the

district court's denial of a preliminary injunction because the court below entered a final judgment and Plaintiffs-Appellants no longer pursue appellate review of the preliminary injunction ruling.

Because this Court asked, however, we note that this Court had jurisdiction over Plaintiffs-Appellants' first appeal, No. 12-15220-E, at the time Plaintiffs-Appellants filed that appeal on October 4, 2012, under 28 U.S.C. § 1292(a)(1). Section 1292(a)(1) provides jurisdiction over "[i]nterlocutory orders of the district courts . . . refusing or dissolving injunctions."

Were this Court to review the district court's denial of Plaintiffs' Motion for Preliminary Injunction, it would have been appropriate, under *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1272-74 (11th Cir. 2005), and *Massey v. Congress Life Insurance Co.*, 116 F.3d 1414, 1416-17 (11th Cir. 1997), to reach the merits of Plaintiffs-Appellants' statutory claim. Any appellate review of the district court's opinion would undoubtedly require this Court to review Plaintiffs' likelihood of success on the merits of their claim, which, as there were no material facts in dispute in the case, turned solely on a question of law. *See* DE 111 at 23. That makes appellate review of the merits appropriate. *Solantic*, 410 F.3d at 1274.

However, as Plaintiffs-Appellants have withdrawn their appeal of the district court's denial of their Motion for Preliminary Injunction, and no longer seek preliminary injunctive relief in this case, this Court need not decide the question of

whether and to what extent it would have had jurisdiction over Plaintiffs-Appellants' appeal of the preliminary injunction aspect of the district court's October 4 interlocutory order.

CONCLUSION

For the foregoing reasons, this Court has jurisdiction over Plaintiffs-Appellants' appeal from the district court's October 29 Order granting Plaintiffs' Motion for Entry of Judgment.

Dated: January 14, 2013

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 14th day of January, 2013, a true and correct copy of the foregoing Plaintiffs-Appellants' Initial Brief was served on all counsel of record via CM/ECF.

Dated: January 14, 2013

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