IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

GARLAND FAVORITO, MICHAEL SCUPIN, TREVOR TERRIS, SEAN DRAIME, CAROLINE JEFFORDS, STACY DORAN, CHRISTOPHER PECK, ROBIN SOTIR and BRANDI TAYLOR, Petitioners, v. VERNETTA NURIDDIN, AARON JOHNSON, AND ALEX WAN, Respondents.	CIVIL ACTION NO. 2020CV343938

RESPONDENTS ALEX WAN, VERNETTA NURIDDIN AND AARON JOHNSON'S MOTION TO DISMISS

A. Introduction

On May 27, 2021, the Fulton County Board of Registration and Elections ("BRE") specially appeared and filed a preliminary Motion to Dismiss the Complaint in this case. As of that date, the BRE had not been served with the Complaint. On June 10, 2021, the Petitioners served the Complaint on the BRE. On June 24, this Court entered an Order dismissing the BRE from the lawsuit on the basis of sovereign immunity. In that same Order, the Court also granted the Petitioners' request to add the five members of the BRE in their individual capacity as defendants.

Thereafter, the two groups of Petitioners (the "Jeffords" and "Favorito" groups) filed Amendments to the Complaint.[1]

[1] The Court previously granted the Petitioners' request to sever the trial to allow the two groups to utilize different experts. The Petitioners have also decided to file separate sets of motions (including Amendments to the Complaint), which has led to two occasionally

The Respondents bringing this Motion to Dismiss (three members of the BRE), urge the Court to dismiss the Amended Complaints for the following reasons:

1. The Petitioners do not have standing to assert a Due Process or Equal Protection claim based on the facts that they allege.
2. The Complaints do not allege a cause of action for which declaratory relief may be granted;
3. The Complaints do not allege a cause of action for which injunctive relief may be granted;
4. The Complaints endeavor to highjack the clear and exclusive methods by which elections may be challenged and election improprieties may be redressed;
5. The Complaints do not allege any facts that support any relief regarding the conduct of Alex Wan, Vernetta Nuriddin, or Aaron Johnson;
    a. Alex Wan was not involved in any way with the 2020 election cycle, having not been placed on the BRE until March of 2021;
    b. Vernetta Nuriddin is no longer on the Board, because her term expired at the end of June 2021;
6. The allegations are barred by the Respondents' official Immunity. Ga. Const. Article I, § 2, ¶ IX.

The Third Amended Complaints (one from each of the Petitioner factions) allege that the Petitioners' Due Process and Equal Protection rights were violated in a variety of manners based on several allegations of ballot counting errors during the 2020 November

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inconsistent positions and (among other things) divergent allegations in the Complaints and in the Prayers for Relief. **This Motion to Dismiss applies to both the Jeffords and the Favorito Complaints unless expressly stated otherwise**.

election and subsequent recounts and audits. Among the errors were the failure to count numerous legitimate ballots; the improper counting of counterfeit ballots; and numerous acts of malfeasance and negligence during the counting of the ballots and the subsequent recount and risk limiting audit of the election results. One version of the Amended Complaint lists scores of acts of misconduct that one group of Petitioners claim have burdened their constitutional rights, or that simply violated procedures outlined in the state election code. The Due Process and Equal Protection allegations are contained in Counts 1 – 6 of the Favorito Complaint, all of which seek a Declaratory Judgment proclaiming that the ballot counting errors resulted in one or more violations of the Petitioners' constitutional rights. The remaining Counts of the Favorito Complaint seek temporary injunctive relief (Count 7). The Open Records Act Counts were omitted from the Third Amended Complaint. A new Count 11 seeks injunctive relief (enjoining illegal activity in the future) and new Counts 12 – 17 all seek a declaratory judgment *solely* regarding past acts, not about any party's obligation (contractual, court ordered, or statutory) in the future.

The Jeffords complaint alleges an equal protection violation in Count 1, with an accompanying prayer for a Declaratory Judgment; and asserts a Due Process violation (and a prayer for a Declaratory Judgment) in Count 2. The Jeffords Complaint alleges an Open Records Act violation in Count 3. The Complaint seeks equitable relief in Counts 5 and 6.[2]

The abundant case law that has developed just in the past year dismissing similar meritless lawsuits filed throughout the country has explained why similarly situated

[2] Count 4 of the Jeffords Complaint only asserts that sovereign immunity does not apply and does not allege any violation or seek any relief.

petitioners lack standing to bring this species of lawsuit. Petitioners have no standing to assert Due Process or Equal Protection violations based on a complaint that is not specific to their voting rights. The cases have uniformly rejected the efforts of citizens in a particular jurisdiction (and certainly citizens in other jurisdictions) claiming to have specific justiciable constitutional injury arising from a failure to properly count *other* individuals' ballots, to count ineligible or counterfeit ballots, or to adhere to state election law requirements.

The new and revised Complaints (which were served on each of the Respondents at different times in early July 2021), alleviate the problem of sovereign immunity, but, out of the frying pan and into the fire: the Complaints do not allege *any act* that was performed by Alex Wan, Vernetta Nuriddin, or Aaron Johnson, even though they were each added as Respondents in their individual capacity. It surely comes as no surprise that there are no allegations of inappropriate conduct as to Alex Wan, because he was not even on the Board of Registration and Elections when *any* of the alleged events occurred that the Petitioners claim violated their rights. Moreover, Vernetta Nuriddin is no longer on the Board, because as the public can readily determine – and surely the Petitioners know – her term expired at the end of June 2021. Thus, there is no basis to seek any injunctive or declaratory relief as to her.

Though the impropriety of seeking declaratory relief was fully briefed prior to the June 21 hearing, the Court never reached the issue because all then-existing defendants were dismissed on sovereign immunity grounds and the individuals who are now the Respondents had not yet filed an appearance in the case. It is, therefore, now time to address the utter failure of the Complaints to state a cause of action for declaratory relief.

Finally, with regard to any allegation addressing the individuals, the doctrine of official immunity bars this lawsuit.

B. **The Petitioners Lack Standing to File this Lawsuit**

The Petitioners, five of whom live outside Fulton County, and four of whom reside in Fulton County, have not alleged that they have suffered the type of direct, individualized harm that supports their claim that their constitutional rights were violated. They have not alleged a cause of action that supports their right to any relief that they seek.

Though there are scores of cases addressing this precise issue, the recent decision in the Eleventh Circuit is precisely on point. *Lin Wood v. Raffensberger*, 981 F.3d 1307 (11th Cir. 2020). The Petitioner in that case, Lin Wood, claimed that the violation of Georgia voting laws resulted in a violation of his constitutional rights. The trial court (Judge Grimberg, District Court Judge, Northern District of Georgia) held that Lin Wood could not raise the constitutional claims because "he had alleged only generalized grievances, instead of injuries that affected him in a personal and individual way." *Id*. at 1313. Judge William Pryor authored the Eleventh Circuit unanimous decision which explained the elementary principle of standing: "To prove standing, [the plaintiff] 'must prove (1) an injury in fact that (2) is fairly traceable to the challenged action of the defendant and (3) is likely to be redressed by a favorable decision.'" *Id*. at 1314. The Eleventh Circuit opinion continued:

> Wood asserts only a generalized grievance. A particularized injury is one that "affect[s] the plaintiff in a personal and individual way." …. For example, if Wood were a political candidate harmed by the recount, he would satisfy this requirement because he could assert a personal, distinct injury. …. But Wood bases his standing on his interest in "ensur[ing that] ... only lawful ballots are counted." An injury to the right "to require that the government be

> administered according to the law" is a generalized grievance. … A generalized grievance is undifferentiated and common to all members of the public.
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> A generalized grievance is "undifferentiated and common to all members of the public." … . Wood cannot explain how his interest in compliance with state election laws is different from that of any other person. Indeed, he admits that any Georgia voter could bring an identical suit. But the logic of his argument sweeps past even that boundary. All Americans, whether they voted in this election or whether they reside in Georgia, could be said to share Wood's interest in "ensur[ing] that [a presidential election] is properly administered."

Id. The federal appellate court proceeded from these premises to reject Wood's argument (identical to the argument made by Petitioners in this case) that the alleged inclusion of unlawfully processed absentee ballots diluted the weight of his vote. *Id*. at 1314. The court concluded: "Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing." *Id*. at 1314-1315. The court then summarily rejected Wood's equal protection allegations for the same reason – lack of standing to challenge the Secretary of State's method of counting absentee ballots, or compliance with state law in the processing and counting absentee ballots. Those "violations" "did not harm Wood as an individual – it is instead shared identically by the four million or so Georgians who voted in person this November." *Id*. In sum: "When the asserted harm is shared in substantially equal measure by a large class of citizens it is not a particularized injury." *Id*.

This holding – echoed by scores of courts around the country without exception (including the United States Supreme Court) – dooms the nine Petitioners' causes of action in this Court.[3] Not one of the Petitioners claims to have suffered any "harm" that

[3] *Hollingsworth v. Perry*, 570 UJ.S. 693, 706 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992); *Spokeo, Inc, v. Robins*, 136 S. Ct. 1540, 1547 (2016).; *Warth v. Seldin*, 422 U.S. 490 (1975); *Hudson v. Haaland*, 843 Fed.Appx. 336 (D.C. Cir. April 6,

is not shared (supposedly) by the four million Georgia voters who cast ballots in the November election.

Georgia law is no more tolerant of litigants who fail to show individualized harm:

> However, a "'generalized grievance' shared in substantially equal measure by all or a large class of citizens ... alone normally does not warrant exercise of jurisdiction."

Parker v. Leeuwenburg, 300 Ga. 789, 792-793, 797 S.E.2d 908, 911 (2017).

> [A] litigant has standing to challenge a statute, "even on First Amendment grounds and even when seeking only a declaratory judgment, 'only if the law has an adverse impact on that litigant's own rights,' which means that the litigant must establish a threat of 'injury in fact' that is 'actual and imminent, not conjectural or hypothetical.'" Sentinel Offender Svcs., LLC v. Glover, 296 Ga. 315, 323 (1) n.16, 766 S.E.2d 456 (2014) (citing Manlove v. Unified Govt. of Athens-Clarke Cnty., 285 Ga. 637, 680 S.E.2d 405 (2009)

Parker v. Leeuwenburg, 300 Ga. 789, 794, 797 S.E.2d 908, 912 (2017) (Peterson, J., dissenting).

C. The Complaint Seeks Relief for Nine Individuals, the Majority of Whom Do Not Live in Fulton County and the Relief is Inconsistent with the Express and Exclusive Methods for Asserting an Election Challenge that are Prescribed in the Georgia Code.

The Legislature has prescribed specific methods of challenging the results of an election. The Code now also includes a specific method of challenging the legitimacy and integrity of the local county Boards of Registration and Elections. Specific voters who claim that they have been denied the right to vote have a clearly-defined method of

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2021); *Bowyer v. Ducey*, 506 F.Supp.3d 699 (D. Ariz. 2020) (district court rejects challenge based on improper counting of fraudulent absentee ballots and improper vote dilution); *Bognet v. Secy. Commonwealth of Pennsylvania*, 980 F.3d 336 (3rd Cir. 2020).

seeking relief. The nine Petitioners in this case have intentionally avoided all of these sufficient and prescribed methods of correcting any inequity in the elections processes and instead, urge this Court to allow the nine of them, not one of whom identifies a specific *individualized* harm that he or she has suffered, to take control of the process or to determine the validity of the 2020 election.

There were four million people who voted in the Georgia election in 2020. There are more than ten million people who live in Georgia. The Fulton County population is in excess of one million people. These nine Petitioners not only lack standing, as explained above, they also have no right to highjack the process of challenging an election that has been certified by the county, the state, and the federal government. They have no right to insist on an 8-week in-person audit of 150,000 ballots conducted by privately-retained self-proclaimed experts.

An election challenge is a method by which the results of an election may be challenged by a contestant *or* a voter. OCGA § 21-2-520, *et seq*.

> The nomination of any person who is declared nominated at a primary as a candidate for any federal, state, county, or municipal office; the election of any person who is declared elected to any such office (except when otherwise prescribed by the federal Constitution or the Constitution of Georgia); the eligibility of any person declared eligible to seek any such nomination or office in a run-off primary or election; or the approval or disapproval of any question submitted to electors at an election may be contested by any person who was a candidate at such primary or election for such nomination or office, or by any aggrieved elector who was entitled to vote for such person or for or against such question.

OCGA § 21-2-521. None of the petitioners in this case sought to invoke this statutory remedy. The basis for such a challenge includes the exact same issues the petitioners in this case have raised:

> A result of a primary or election may be contested on one or more of the following grounds:

> (1) Misconduct, fraud, or irregularity by any primary or election official or officials sufficient to change or place in doubt the result;
> (2) When the defendant is ineligible for the nomination or office in dispute;
> (3) When illegal votes have been received or legal votes rejected at the polls sufficient to change or place in doubt the result;
> (4) For any error in counting the votes or declaring the result of the primary or election, if such error would change the result; or
> (5) For any other cause which shows that another was the person legally nominated, elected, or eligible to compete in a run-off primary or election.

OCGA § 21-2-522.

The requirements for an election challenge are set forth in the Code. OCGA § 21-2-524. The Petitioners availed themselves of none of these remedies.

The method of conducting a recount and an audit are prescribed with unmistakable clarity. OCGA § 21-2-495 *et seq*. In fact, in this case, the Fulton County election results were tabulated, then subject to a recount, and then subject to a "risk limiting audit." Thereafter, the county and the state certified the election results. And then the United States Congress certified the results.

A voter who claims to have been denied the right to vote has clearly-defined remedies and the BRE engaged in painstaking efforts to evaluate many such challenges prior to the primary and prior to the run-off election.

The Legislature has codified the precise scope and method by which the public (including the nine individuals in this case) may file an Open Records Act request and then seek compliance with that request. OCGA § 21-2-51; § 21-2-72; § 50-18-71(k). The Legislature expressly provided that scanned copies of ballots are subject to the Open Records Act and did *not* provide that the actual original ballots are subject to the Open Records Act, or subject to inspection. That Legislative decision which reflects the 2021 consensus of the legislators and governor who were all well aware of the controversy

surrounding the 2020 election, should be honored by this Court, not ignored as the Petitioners request.

If the legislature determines that a Board of Registration or Elections lacks integrity and needs to be removed or replaced, the Code prescribes a clear method of accomplishing this goal. OCGA § 21-2-107.

The nine Petitioners in this case have ignored all of these prescribed methods of addressing election irregularities and insist, instead, that they have the right to conduct their own "audit" on their own terms, with their own experts. They have cited no authority for this *ad hoc* adventure.

Unhappy voters in Upson County, Whitfield County, Fannin County, Cobb County, and Hall County (these are the counties in which five of the Petitioners in this case reside), or even in Fulton County, have neither constitutional standing, nor the statutory right, to challenge an election. Individual voters have no constitutional standing, nor the statutory right, to insist on an "audit" of the election results, or demand that *the voter* himself, or herself, has the right to hire an expert to conduct a "private" audit. There is no basis to seek an injunction, or to seek a declaratory judgment.

The millions of people in Georgia and in Fulton County who have voted, and the Legislature that has prescribed methods of challenging and certifying an election, have not granted to nine individuals the right to commandeer the process.

And, respectfully, this Court should not commandeer the process either.

D. The Complaint Fails To Identify Any Lawful Basis To Seek A Declaratory Judgment As Urged In Counts 1 Through 6 Of The Favorito Complaint or Count 2 of the Jeffords Complaint.

The Complaints seek a Declaratory Judgment but fail to state a claim upon which relief may be granted. OCGA § 9-11-12(b)(6). There are no conflicting rights between the parties that need to be adjudicated. Nowhere in the Complaints is there even a hint that the Petitioners are uncertain about *their* rights or about the legality of some anticipated action *they* intend to take. In fact, there is no allegation about any uncertainty regarding the course of action that either party is required or desires to take in the future. Instead, the Complaints urge in various separate counts that this Court should decide whether there were "counterfeit" ballots that were counted in the 2020 election; whether ballots were lost; and whether ballots were not counted in the proper manner. The Petitioners contend that this Court should decide that their constitutional rights were violated last year during the election. Moreover, Petitioners urge this Court to render a judgment that there were violations of the Election Code that occurred in 2020 and that ballots were tabulated in different manners, thus violating the Petitioners' Equal Protection rights.

But nowhere in the Complaint are there any facts that would even suggest that the Court's intervention is necessary to resolve an *ongoing* or *imminent* dispute between the parties, or to sort out the rights of the parties in connection with any ongoing relationship. Every alleged fact set forth in Counts 1 – 6 of the Favorito Complaint and in Count 2 of the Jeffords Complaint relates to events in 2020. In Counts 12 – 17, the new Declaratory Judgment Counts, the Favorito Petitioners *only* seek a declaration about past events, *not* future obligations or responsibilities of either party. There is not one word in these counts about any future conduct that needs to be evaluated by this Court in exercising jurisdiction pursuant to the Declaratory Judgment Act. There is no basis in law for this Court to issue a Declaratory Judgment on the basis of any fact that is recited anywhere in

the Complaint and there is surely no basis for this Court to entertain a Declaratory Judgment action relating to events that are alleged to have occurred last year.

Though the Court did not find it necessary to decide the declaratory judgment issue once it dismissed the case on sovereign immunity grounds, the Petitioners provided a window into their thinking on this issue during the June 21 oral argument. Calling the Respondents' counsel "high priced" lawyers; claiming that Fulton County was a "banana republic" and comparing the behavior of Fulton County officials to officials in Cuba, the Respondents yelled loud, but cited not a single case or statute that supported the prayer for declaratory judgment relief. The Petitioners' arguments betrayed a zesty disregard for the elementary requirements for a declaratory judgment. Not only did their arguments cite no law, their arguments were also bereft of any reliance on logic. As Justice Kagan recently wrote in another context, the argument of the Petitioners occupied a "law-free zone."

The purpose of a declaratory judgment is to adjudicate claims between the parties. OCGA § 9-11-4 ("In cases of actual controversy, the respective superior courts of this state … shall have power, upon petition or other appropriate pleading, to declare rights and other legal relations of any interested party petitioning for such declaration…"). To proceed under a declaratory judgment a party must establish that it is necessary to relieve him of the risk of taking some future action that, without direction, would jeopardize his interests. *Acevedo v. Kim*, 284 Ga 629, 669 S.E.2d 127 (2008) ("Acevedo's complaint alleged the need for a judicial determination of his rights and obligations under the divorce decree *to relieve himself of the risks of his planned future course of action*.")

This fundamental prerequisite for seeking a Declaratory Judgment has been applied in a case where voters challenged the practices of a county election authority.

Fourth Street Baptist Church of Columbus v. Board of Registrars, 253 Ga. 368, 320 S.E.2d 543 (1984) (dismissing lawsuit against County Board of Registration seeking declaratory judgment because the plaintiffs failed to prove an actual controversy concerning future conduct or decisions of the Board).

Declaratory relief is not available where the petition fails to disclose a substantial controversy *between the parties* having adverse legal interests of such immediacy and reality as to warrant the court's intervention. Absent an actual controversy involving palpable insecurity, the court is without power to act by way of a declaratory judgment. *Chambers of Georgia Inc. v. Dept. of Natural Resources*, 232 Ga. App. 632, 502 S.E.2d 553 (1998). A declaratory judgment may not be granted to serve merely as an advisory opinion, or for the sole purpose of adjudicating and enforcing rights already accrued. *See Sexual Offender Registration Review Board v. Berzett*, 301 Ga. 391, 801 S.E.2d 821 (2017). The proper scope of declaratory judgment is to adjudge those rights among parties upon which *their future conduct* depends. *Id*. Neither the BRE, nor the County, nor the Petitioners envision, or predict any "future conduct" that a declaratory judgment would affect. The Petitioners' Complaint looks only in the rear-view mirror, not to the road ahead. As such, a declaratory judgment is not available.

Relief is authorized under the state Declaratory Judgment Act "when there are circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest." *GeorgiaCarry.org v. Atlanta Botanical Garden, Inc.*, 299 Ga. 26, 28, 785 S.E.2d 874 (2016). Justice Hunstein

continued: "The proper scope of declaratory judgment is to adjudge those rights among parties upon which their future conduct depends." *Id*.

The Declaratory Judgment statute applies where a legal judgment is sought that would *control or direct <u>future</u> action*, and it requires the presence in the declaratory action of a party with an interest in the controversy adverse to that of the petitioner. *Larolla Industries, Inc. v. Hess*, 325 Ga. App. 256 (2013). The declaratory judgment statute is available in situations presenting an actual controversy where interested parties are *asserting adverse claims* upon a state of facts wherein a legal judgment is sought that would *control or direct future action*. *Black v. Bland Farms*, 332 Ga. App. 653, 659, 774 S.E.2d 722 (2015).

Where in the Complaint have the Petitioners revealed any future action that they intend to take, but are uncertain about the propriety of the intended course of action? Nowhere.

> Under Georgia law, a declaratory judgment is not available 'for any and all justiciable controversies.' .... Rather, to have standing to request such relief, a plaintiff must demonstrate facts or circumstances whereby he is in a position of uncertainty or insecurity because of a dispute and having to take some future action which is properly incident to [his] alleged right, and which future action without direction from the court might reasonably jeopardize his interest.

Zitrin v. Georgia Composite State Bd. of Medical Examiners, 288 Ga. App. 295, 298, 653 S.E.2d 758 (2007). The Petitioners have expressed no uncertainty about any future conduct that they fear taking. There is no claim anywhere in the Complaint about a disputed course of action that needs judicial evaluation. They each are entitled to vote in their respective counties. There is no question or controversy about their future rights.

Pursuant to the Declaratory Judgment Act, superior courts are authorized to enter a declaratory judgment in cases of "actual controversy" and to determine and settle by

declaration any justiciable controversy of a civil nature where it appears to the court that the ends of justice require that such should be made *for the guidance and protection of the petitioner*, and when such a declaration will *relieve the petitioner from uncertainty and insecurity with respect to his rights*, status, and legal relations. *East Beach Properties, Ltd. v. Taylor*, 250 Ga. App. 798, 802, 552 S.E.2d 103, 107 (2001). A party seeking a declaratory judgment must establish that it is necessary to relieve himself of the risk of taking some future action that, without direction, would jeopardize his interests. A declaratory judgment action will not lie where the rights between the parties have already accrued, because there is no uncertainty as to the rights of the parties or risk as to taking future action. *Atlanta Nat. League Baseball Club, Inc. v. F.F.*, 328 Ga. App. 217, 761 S.E.2d 613 (2014) (The object of a declaratory judgment is to *permit determination of a controversy before obligations are repudiated or rights are violated*); *Baker v. City of Marietta,* 271 Ga. 210, 518 S.E.2d 879 (1999). *See also Clark v. Deal*, 298 Ga. 893, 894, 785 S.E.2d 524, 525 (2016) (declaratory judgment action cannot be invoked to address a past harm).

As the Georgia Court of Appeals explained: "The object of a declaratory judgment is to permit determination of a controversy ***before*** obligations are repudiated or rights are violated; its purpose is to permit one who is walking in the dark to ascertain where he is and where he is going, to turn on the light before he steps, rather than after he has stepped in a hole." *Richardson v. Phillips*, 302 Ga. App. 305, 690 S.E.2d 918 (2010) (emphasis supplied); *Fourth Street Baptist Church of Columbus v. Board of Registrars,* 253 Ga. 368, 369, 320 S.E.2d 543 (1984) (applying these principles to lawsuit against a County Voter Registration Office). *See also Women's Surgical Center, LLC v. Berry*, 302 Ga. App. 349, 806 S.E.2d 606 (2017) (A party has standing to pursue a declaratory action

where the threat of an injury in fact is actual and imminent, not conjectural or hypothetical).

To sum it up: "Declaratory relief is limited to *future, not past actions." SAWS at Seven Hills LLC v. Forestar Realty, Inc.*, 342 Ga. App. 780, 784, 805 S.E.2d 270. 274 (2017); *U-Haul Company of Arizona v. Rutland*, 348 Ga. App. 738, 824 S.E.2d 644 (2019) (A "justiciable controversy" under the Declaratory Judgment Act means there are circumstances showing a necessity for a determination of the dispute to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest). Just three months ago, the Court of Appeals reiterated these uncontroversial principles that govern *all* declaratory judgment actions:

> The Act is designed "to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations[.]" OCGA § 9-4-1.
>
> The proper scope of declaratory judgment is to adjudge those rights among parties *upon which their future conduct depends*. Such relief is authorized when there are circumstances showing a necessity for a determination of the dispute *to guide and protect the plaintiff from uncertainty and insecurity with regard to the propriety of some future act or conduct*, which is properly incident to his alleged rights and which if taken without direction might reasonably jeopardize his interest. *Walker*, 298 Ga. at 518-519, 783 S.E.2d 114 (citations and punctuation omitted). See *Weaver v. Jones*, 260 Ga. 493, 493 (1), 396 S.E.2d 890 (1990) ("A declaratory judgment is an appropriate means of ascertaining one's rights and duties under a contract and decree of divorce.") (citation and punctuation omitted). "An action for a declaratory judgment ... may be used to clarify the meaning or application of a previously existing court order." *Merchant Law Firm, P.C. v. Emerson*, 301 Ga. 609, 616 (2) (b), 800 S.E.2d 557 (2017) (citation and punctuation omitted).

Brown v. Brown, --- Ga. App. ---, 857 S.E.2d 505, 511 (2021).

Of course, any injunctive or declaratory relief that the Petitioners seek against Ms. Nuriddin is moot given her retirement from the Board. Indeed, if the Petitioners persist in their claims against her, it is proof positive that they are not, in fact, seeking legitimate injunctive or declaratory relief about a future course of action or any uncertainty they are suffering based on their relationship to her. Ms. Nuriddin has nothing to offer. The only impact she will have on any future election is her own personal vote.

The fact that the Petitioners may have a viable cause of action to enforce an Open Records Act request (whether they do, or do not, is not assumed) does not provide a ticket, as well, for a declaratory judgment action. Imagine a case in which a vehicle driver files an Open Records Act complaint seeking to obtain a police report that documents the driver's prior arrest for a traffic violation. Would any court believe that its authority to compel the public agency to produce the report also authorizes the court to review the contents of the report and offer a declaratory judgment that the stop was illegal? Or that the driver's constitutional rights were violated? The court's authority begins and ends with the decision that the report is subject to the Open Records Act and must be provided to the Petitioner.

The Petitioners also contend that the expert testimony that was presented at the May 21 hearing and the affidavits that were submitted with the Complaint somehow expand the court's power to enter a Declaratory Judgment. But that is nonsense. The Petitioners may present an expert who persuasively opines that the earth is flat. That, however, does not empower the court to authorize litigation and to issue a Declaratory Judgment to determine the curvature (if any) of the earth. And if the Petitioners present an expert who opines that the sun revolved around the earth *last year*, that would not authorize the court to engage in a fact-finding mission and issue a Declaratory Judgment

on the topic of last year's Copernican anomaly. The fact that experts may disagree (or even agree) about certain matters – particularly matters that occurred in the past – does not create a controversy that must (or may) be resolved by a court. There must be parties who have divergent interests and an ongoing need to resolve the divergence so that the Petitioner can proceed with a course of conduct that has been blessed by the court.

The Amended Complaints do not present a controversy that even suggests that a declaratory judgment action or injunctive relief is appropriate. They do not even present an *ipse dixit* argument in favor of pursuing a declaratory judgment action.

E. Injunctive Relief Which Only Seeks To Enjoin Illegal Conduct is not the Proper Basis for Granting an Injunction.

In the new and revised Complaints, the Respondents now also seek injunctive relief. But injunctive relief is unavailable, because the relief they seek is entirely limited to a request that the Court order the Respondents to "obey the law." There is no need for injunctive relief. The law commands compliance without the court's help or insistence. *See Wiggins v. Bd. Of Commissioners of Tift Co.*, 258 Ga. App. 666, 574 S.E.2d 874 (2002) (Superior court erred in granting injunctive relief against the Board from future violations of the Act, in effect, requiring the Board to obey the law, a duty which it already had and as to which relief in equity is generally unavailable).

F. The Complaint Fails to Identify with Specificity Any Act of Misconduct (or the need for Injunctive or Declaratory Relief) Regarding Alex Wan, Vernetta Nuriddin, or Aaron Johnson.

The purpose of a Complaint is to provide a short and plain statement of facts that identifies the basis for the cause of action and the facts that the Respondents will need

to address. At a minimum, a complaint must contain "[a] short and plain statement of the claims showing that the pleader is entitled to relief," and this short and plain statement must include enough detail to afford the defendant fair notice of the nature of the claim and a fair opportunity to frame a responsive pleading. *Fairfax v. Wells Fargo Bank, N.A.*, 312 Ga. App. 171, 718 S.E.2d 16 (2011); *Patrick v. Verizon Directories Corp.*, 284 Ga. App. 123, 124, 643 S.E.2d 251 (2007).

Both Complaints fail to identify a single fact – not one – that addresses anything that Alex Wan, Vernetta Nuriddin, or Aaron Johnson did (or did not do, but were supposedly required to do). As noted above, Alex Wan did not join the BRE until March 2021. Vernetta Nuriddin is no longer on the BRE. These facts apparently do not concern the Petitioners. Instead, the Petitioners simply allege, over and over, that "the Respondents" engaged in criminal behavior, or failed to do what they were required by law to do and that the Court's equitable power is invoked to govern their future conduct.

Undeniably, in many instances, the Petitioners' allegations regarding "the Respondents" do not apply to any member of the BRE (and surely not Mr. Wan, Mr. Johnson, or Ms. Nuriddin). Instead, the Petitioners are referring to employees of the Department of Elections, including Rick Barron or Ralph Jones.[4] But Barron and Jones are not, at the current time, or at the time the Complaints were filed, "the Respondents." *See, e.g.,* ¶¶ 227, 228, 230, 231, 232, 233, 234, 235, 236, 237, 238. In fact, in almost no paragraph of either Complaint does the phrase "the Respondents" refer to any of the five named Respondents in this lawsuit. Maybe the allegations refer to future Respondents,

[4] In fact, the Jeffords Complaint refers to both Barron and Jones as "Respondents." (e.g., ¶¶ 160 – 164). But at the time the Jeffords Complaint was filed and the Answer and Motion to Dismiss are being filed, neither Jones nor Barron are Respondents in this case.

or past Respondents. But the allegations do not apply to Mr. Wan, Mr. Johnson, or Ms. Nuriddin.

Even more concerning is the fact that the Petitioners have sued individuals in their individual capacity without explaining how any of these individuals can provide the relief (opening the ballots and agreeing to an audit) that the Petitioners seek. Mr. Wan does not have that authority. Nor does Ms. Nuriddin. Nor does Mr. Johnson. And while the Petitioners trumpet the fact that two of the Respondents, Dr. Ruth and Mr. Wingate, are in favor of an audit of the ballots, neither of them has the authority (and certainly not in their individual capacity) to authorize an audit, or to authorize a recount, or to authorize unsealing the ballots so private parties and their privately-retained experts can examine the ballots for weeks at a time.

In a case with multiple defendants, the complaint should contain specific allegations with respect to each defendant; generalized allegations lumping multiple defendants (and non-parties) together are insufficient. *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.*, 287 Fed.Appx. 81, 86 (11th Cir.2008). In *Brooks v. Blue Cross,* 116 F.3d 1364 (11th Cir. 1997), the court concluded that the complaint alleging a RICO claim did not meet the Rule 9(b) standard because it was devoid of specific allegations with respect to each defendant; the plaintiffs lumped together all of the defendants in their allegations. *Id.* at 1381. "[I]n a case involving multiple defendants … the complaint should inform each defendant of the nature of his [or her] alleged participation in the fraud." *See also Fairfax v. Wells Fargo Bank*, 312 Ga. App. 171, footnote 2 (2011).

Mr. Wan, Mr. Johnson, and Ms. Nurridin recognize that a complaint's well-pled allegations for purposes of a Motion to Dismiss must be accepted as true. *Roberson v.*

Northrup, 302 Ga. App. 405 (2020). But neither the Court nor the Respondents are required to guess what a well-pled complaint *intends* to allege. They are not required to fill in the blanks or suggest the missing elements that might have been alleged. The Respondents in this case (Mr. Wan, Mr. Johnson and Ms. Nuriddin) are not required to guess which allegations apply to them and which allegations do not.

Well *pled* envisions that the pleading will stand on its own and inform a defendant as to exactly what he has alleged to have done. This Amended Complaint utterly fails in this mission.

G. The Individual Defendants Are Cloaked in Official Immunity and the Complaints Fail to Pierce the Immunity.

As explained above, the Complaints do not allege any facts relating to anything that Mr. Wan, Ms. Nuriddin, or Mr. Johnson did. They did nothing in their "individual" capacity. The Complaint does not allege that any of them, individually, inserted one (or ten thousand) counterfeit ballots into the ballot boxes. They are not alleged, in their individual capacity, to have twice-counted certain ballots. They are not alleged to have been present, or to have witnessed, or been aware of, any double-counting, or ballot stuffing. Again, of course, any such allegation against Mr. Wan would be subject to frivolous litigation sanctions, because Mr. Wan was not involved in any way with any election in Fulton County until he was placed on the BRE in March 2021.

Suing someone in his or her individual capacity does not automatically recreate history. The Complaint in this case is unburdened with any facts that would demonstrate that any of the three Respondents personally violated the rights of any Petitioner.

> [Official Immunity] offers public officers and employees limited protection from suit in their personal capacity. Official immunity protects individual public agents from personal liability for discretionary actions taken within the scope of their official authority, and done without wilfulness, malice, or corruption. Under Georgia law, a public officer or employee may be personally liable only for ministerial acts negligently performed or acts performed with malice or an intent to injure.

Parr v. Cook County School District, 2021 WL 2450725, at *2 (Ga. App., 2021). *See also Barnett v. Caldwell*, 302 Ga. 845, 847-848, 809 S.E.2d 813 (2018) ("[Public Officials] may be held personally liable for negligence relating to their official duties only when performing 'ministerial' acts; 'discretionary' acts are only subject to suit when performed with actual malice or intent to cause injury."); *Ware v. Jackson*, 357 Ga. App. 470 (2020); *Watkins v. Latif*, 323 Ga. App. 306 (2013) ("actual malice" sufficient to expose public officers to liability does not include implied malice).

Nowhere in the Complaints do the Petitioners allege that Ms. Nuriddin personally in her individual capacity, acted with malice, or that she acted negligently. Nowhere in the Complaint is there an allegation that Alex Wan, four or five months *before he joined the BRE*, acted negligently or with malice with respect to his ministerial or discretionary acts. Nowhere in the Complaints is Mr. Johnson's name even mentioned, other than to state where he can be served with the Complaint.

The Jeffords Complaint in ¶¶ 255 and 256 assert that the authority of the BRE members to supervise and implement the Election Code are "ministerial" acts is the paradigm of an *ipse dixit* argument. The Board members, as the Petitioners know and as decreed by state law, are required to exercise considerable discretion in decision-making about the location of polling locations, the use of poll workers, the method of limiting long lines, the eligibility of individual voters to vote, the hours during which early voting will

be conducted, the location and management of drop boxes, the training of poll workers, the implementation of call centers to deal with emergencies on election day. Not one of these tasks is "ministerial" or handled "by rote." The essence of a Board, such as the BRE, requires precisely the type of discretionary decision-making and the exercise of judgment that the Petitioners deny Respondents exercised in this case. *See Middlebrooks v. Bibb County*, 261 Ga. App. 382 (2003) (explaining that a ministerial act is one that is "simple, absolute, and definite … requiring merely the execution of a specific duty"); *Todd v. Kelly*, 244 Ga. App. 404 (2000) (A "discretionary act" calls for the exercise of personal deliberation and judgment, entailing an examination of facts and reaching a reasoned conclusion and acting on them in a way not specifically directed).

CONCLUSION

The Petitioners' allegations and arguments not only occupy a "law free zone," their arguments and the Complaints are all securely located in a "fact free zone" as well.

The Amended Complaints should be summarily dismissed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that I have electronically filed this RESPONDENTS ALEX WAN, VERNETTA NURIDDIN AND AARON JOHNSON'S MOTION TO DISMISS using the ODYSSEY eFileGA system which will automatically send email notification of such filing to all attorneys and parties of record.

This the 12th day of August, 2021.

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