

**IN THE COURT OF APPEALS  
STATE OF GEORGIA**  
**GARLAND FAVORITO et al.,  
APPELLANTS,**

v.

**CASE NO.: A22A0939**

**ALEX WAN et al.,  
APPELLEES.**

**APPELLANTS' BRIEF**

**COME NOW, THE APPELLANTS,** by and through their attorney of record to file their Appellants' Brief, as follows:

**PART ONE**

**A. STATEMENT OF PROCEEDINGS BELOW.**

The Appellants filed their original petition for relief on 12/23/2020. (R at 36-37). The Appellants filed their first amended petition for relief on January 13, 2021. (R at 256-270). The Appellees filed their answer to the original petition on January 27, 2021. (R at 332-359). The Appellants filed their second amended petition for relief on June 21, 2021. (R at 1020-1028). The Appellants filed their third amended petition for relief on July 2, 2021. (R at 1157-1183). The Appellees filed their answer to the third amended petition on August 12, 2021. (R at 1446-1580). The Appellees filed numerous motions to dismiss. The trial court conducted a hearing on the motions to dismiss on September 20, 2021. The trial court entered an order granting the Appellees' motion to dismiss on standing grounds, on

October 13, 2021. (R at 2040-2053). It is this order that the Appellants are seeking to appeal.

### **B. FACTS RELEVANT TO APPEAL.**

The Appellants were entitled to vote, and did vote, in the November 3, 2020 general election and live in various counties throughout the State of Georgia, including Fulton County. (R at 1157-1158). The Appellants pled that they would be participating in future elections (R at 1167-1168). The Respondents, at the time of the original petition, were members of the Fulton County Board of Elections, and were sued in their individual capacities. (R at 1158). The Appellants pled that Susan Voyles personally observed, as a hand count auditor, what she believed were fraudulent or fabricated absentee ballots, because the suspect absentee ballots were not creased, were not marked with a writing instrument, were marked identically in the down ballot races or appeared to be of a different paper stock than other ballots. (R at 1160). The Appellants pled that Barbara Hartman personally observed, as a hand count auditor, what she believed were fraudulent or fabricated absentee ballots, because the suspect absentee ballots were not creased, were not marked with a writing instrument, or appeared to be of a different paper stock than other ballots. (R at 1160). The Appellants also pled that Dr. Sonia Francis-Rolle personally observed, as a hand count auditor, what she believed were fraudulent or fabricated absentee ballots, because the suspect absentee ballots were not creased,

were not marked with a writing instrument, or appeared to be of a different paper stock than other ballots. (R at 1160-1161). The Appellants also pled that Gordon Rolle personally observed, as a hand count auditor, what he believed were fraudulent or fabricated absentee ballots, because the suspect absentee ballots were not creased, were not marked with a writing instrument, or appeared to be of a different paper stock than other ballots. (R at 1161). These witnesses provided sworn affidavits attesting to the above facts, which were filed into the record on December 23, 2020 (R at 90-126). Upon learning these facts, the Appellants filed the instant suit, alleging that the weight of their vote was diluted or even nullified by the inclusion and counting of fabricated and fraudulent absentee ballots (R at 1157-1183). The trial court, after a hearing on the Appellees' Motion to Dismiss, improperly found that the Appellants lacked standing to assert a claim for vote dilution, stating that the Appellants' vote being diluted in this fashion was a generalized grievance, and not a particularized injury as is required for standing purposes. (R at 2040-2053). The Appellants' claims were preserved for appeal by way of a final and appealable order entered by the trial court. (R at 2040-2053).

## **PART TWO**

### **A. JURISDICTION.**

The Court of Appeals of Georgia has jurisdiction to hear this case pursuant to O.C.G.A. § 15-3-3.1 (2020), and the Georgia Constitution of 1983, Article VI, Section VI, Paragraphs II-III.

### **B. ENUMERATION OF ERRORS.**

#### **1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE APPELLANTS LACKED STANDING TO ASSERT THEIR VOTE DILUTION CLAIMS.**

## **PART THREE**

### **A. STANDARD OF REVIEW.**

Here, the Appellants contend that the appropriate standard of review on a motion to dismiss is de novo. Pursuant to Walker County v. Tri-State Crematory, 284 Ga. App. 34 (2007), the case states in pertinent part, “[f]inally, we review the dismissal de novo, construing the complaint’s allegations and all possible inferences therefrom in favor of the plaintiff.”

Further, the Appellants contend that the appropriate standard of review on a question of law is also de novo. Pursuant to Suarez v. Halbert, 246 Ga. App. 822, 824 (1) (2000), a legal question is reviewed de novo or independently reviewed on appeal. Since no deference is owed to the trial court’s ruling on a legal question, the “plain legal error” standard of review is applied.

## **B. ARGUMENT AND CITATIONS OF AUTHORITY.**

The Appellants assert that not only do they have a cause of action, they also have standing to assert their cause of action. In Sierra Club v. Morton, 405 U.S. 727, 731 (1972), standing was defined as “a sufficient stake in an otherwise justiciable controversy to obtain judicial resolution of that controversy.” One’s vote is personal and sacred to each person, so much so that persons cast their votes in secrecy from all other persons, and persons who cast a vote are required to inform no one of their choices of candidates. Vote dilution diminishes one’s personal right, and dissuades the individual from exercising their right and ability to participate in the political process.

Numerous cases over the years show that persons whose vote was diluted or debased through some action, be it by gerrymandering, ballot box stuffing, or prohibitions on the freedom to exercise their right to vote, have standing to assert a claim for their grievances. The courts found in such cases that one had standing to assert a claim. In doing so, the United States Supreme Court reasoned that “[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. ‘[T]he right of suffrage can be denied by a debasement or dilution

of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.” Purcell v. Gonzalez, 549 U.S. 1 (2006).

Specifically, in Reynolds v. Sims, the Supreme Court stated that: “The right to vote can neither be denied outright, Guinn v. United States, 238 U.S. 347, 35 S.Ct. 926, 59 L.Ed. 1340, Lane v. Wilson, 307 U.S. 268, 59 S.Ct. 872, 83 L.Ed. 1281, nor destroyed by alteration of ballots, see United States v. Classic, 313 U.S. 299, 315, 61 S.Ct. 1031, 1037, 85 L.Ed. 1368, **nor diluted by ballot-box stuffing**, Ex parte Siebold, 100 U.S. 371, 25 L.Ed. 717, United States v. Saylor, 322 U.S. 385, 64 S.Ct. 1101, 88 L.Ed. 1341.” Reynolds v. Sims, 377 U.S. 533, 555 (1964) (Emphasis added).

Moreover, “...citizens of the United States who were legally entitled to vote at the polling places where defendants officiated, in the free exercise and enjoyment of the rights and privileges guaranteed to the citizens by the Constitution and laws of the United States, namely, the right and privilege to express by their votes their choice of a candidate for Senator and **their right to have their expressions of choice given full value and effect by not having their votes impaired, lessened, diminished, diluted, and destroyed by fictitious ballots fraudulently cast and counted, recorded, returned, and certified.**” United States v. Saylor, 322 U.S. 385 (1944) (Emphasis added). As such, a direct infringement upon *any* of one's fundamental rights is a direct, personal and particularized attack and thus

automatically confers standing on anyone wishing to challenge such a direct infringement to vindicate the infringement upon their constitutional rights. The Appellants, having had their vote diluted, have pled state due process and state equal protection claims that definitively show standing to assert their claims.

**1. THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT FOUND THAT THE APPELLANTS LACKED STANDING TO ASSERT THEIR VOTE DILUTION CLAIMS.**

The Appellants meet all the elements of standing. The general rule in Georgia is that the following elements must be present: “(1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision. Granite State Outdoor Advertising, Inc. v. City of Roswell, 283 Ga. 417 (2008). The bulk of the issue presented in this case centers around injury in fact.

**a). INJURY IN FACT.**

Voting is a well-established fundamental and constitutional right, and that right includes the right to ensure that one’s vote is not debased or diluted by fraud. The Appellants have suffered an injury in fact because they contend the weight and value of their votes have been, and will in the future, be affected by the insertion of counterfeit ballots into elections result. This insertion of counterfeit ballots has and will continue to dilute and debase the Appellants’ vote value. Thus, their personal stake in the political process is minimized. To assert standing, “[a]s a general rule,

a litigant has standing to challenge the constitutionality of a law [an act] only if the law [the act] has an adverse impact on that litigant's own rights.” Feminist Women's Health Center v. Burgess, 282 Ga. 433, 434 (1) (2007). Additionally, “a prerequisite to attacking the constitutionality of a statute [an act], the complaining party must show that it is hurtful to the attacker.” Parker v. Leeuwenburg, 300 Ga. 789 (2017) (citing Agan v. State, 272 Ga. 540, 542 (1) (2000)). However, the alleged injury must be particularized to the individual. “A particularized injury is one that ‘affect[s] the plaintiff in a personal and individual way.’” Wood v. Raffensberger, 981 F.3d 1307 (11<sup>th</sup> Cir. 2020). Further expanding on particularization of an injury, “the Supreme Court has made clear that ‘a person’s right to vote is individual and personal in nature,’ so ‘voters who allege facts showing disadvantage to themselves as individuals have standing to sue.’” Jacobson v. Fla. Sec’y of State, 974 F.3d 1236 (11<sup>th</sup> Cir. 2020) (quoting Gill v. Whitford, 138 S. Ct. 1916, 1929 (2018)). The Appellants have been disadvantaged by the dilution of their vote and being removed from the full value of participating in the political process.

In Wood, the Appellant was an aggrieved elector who sued Secretary of State Brad Raffensperger, among others, over how Georgia conducted the November 2020 election. The Court determined that Wood had based “his standing on the interest in ‘ensur[ing that] ... only lawful ballots are counted’”, and that

such a grievance was a generalized grievance. Wood, at 1314. The Appellant also claimed that his vote was diluted but failed to provide a point of comparison. Id. The Court dismissed this case on standing and other grounds. Wood, at 1313.

Distinguished from Wood, the Appellants' claims are not for the general enforcement of the election laws or general disputes over counting and marking of ballots. Specifically, this case is to ensure that the Appellants' votes are not diluted and are given the full weight of value to be afforded a valid vote within the context of the political process. The insertion of counterfeit ballots into an election result amounts to stuffing the ballot box, which violates state equal protection and state due process. A counterfeit ballot would not be entitled to be counted and considered in a result because it dilutes the value of the valid and authentic ballots cast for candidates that do not prevail. So, as a point of comparison and distinct from Wood, counterfeit ballots lessen the value of the one groups' vote, while simultaneously increasing the value of another groups' vote, which has the similar effect as gerrymandering.

Gerrymandering has not been found to be a generalized grievance because, as in this case, not all of the citizenry can assert the claim, only those whose constitutional rights have been affected by the vote dilution. The mere fact that many people may assert a claim does not mean that each has not suffered an individualized harm. Each voter whose vote was marginalized by the insertion of

counterfeit ballots has been denied equal protection of the “one person, one vote” standard by which elections are supposed to be conducted. Such marginalization is not a generalized grievance of the electorate, but is concrete and particularized to those whose vote value is undermined and weakened because while the first group’s vote value is lessened, the second group’s vote value is increased by the dilution of the first group’s vote value. The injury is therefore concrete and particularized to each such individual within the diluted group. This is similar to the effect of gerrymandering a group’s vote value by diluting it via manipulation of the location of district boundaries. This is not a generalized election law grievance that goes to seeking the implementation of general election law or a bare assertion of a statute or act being unconstitutional, but strikes at the heart of the value of each citizen’s vote, which is a particularized harm to that individual’s rights. It is a fundamental principle of free government that we must uphold the “one person, one vote” standard.

In Jacobson, the Appellant sued the Florida Secretary of State over how candidates were listed on ballots. In that case, the Appellant claimed that listing the incumbent first, which in recent years has mostly been Republicans, violated the First and Fourteenth Amendments, because some voters tend to vote for the first candidate listed, regardless of party. Jacobson, at 1241. The Appellant contended that she would be injured because such placement could cause her preferred

candidate to lose. Id., at 1246. The Court ruled that the Appellant had not only not shown specific facts to show any such injury, but that the alleged injury could “neither be fairly traceable to the Secretary nor redressable by a judgment against her [the Secretary]....” Id., at 1241.

Jacobson is distinguished from the present case because that case shows that no one has a right of action based solely on the outcome of an election. The injury specified in Jacobson is a general injury to everyone in Florida whose candidate loses and the harm of her candidate not winning was not an injury in fact because one does not have a right to have their preferred candidate win. Thus, her injury was not personal to her individual constitutional rights. This case is not about the outcome of an election; this case is about how the Appellants’ votes were diluted via the insertion of counterfeit ballots, which gave rise to the Appellants’ state due process and state equal protection arguments. However, the case specifically points out that one *does* have a right of action for their vote being diminished or debased, which is exactly what the Appellants’ assert. The Court determined that voters “have an interest in their ability to vote and *in their vote being given the same weight as any other.*” Id., at 1246. (Emphasis added). Furthermore, the Court also concluded that “*absent any evidence of vote dilution or nullification*, a citizen is not injured by the simple fact that a candidate for whom she votes loses or stands to lose an election.” Id., at 1247 (emphasis added). These statements show

definitively that vote dilution, the very act alleged by the Appellants, is a particularized injury for which the Appellants have standing to assert.

The public policy implications of allowing this ruling to become law are enormous. The upholding of a decision that in effect states that if large groups share a similar injury, it bars them from vindicating their individual rights has repercussions that will institutionalize election fraud and other harms in this state. The public policy of not allowing generalized grieves goes to where an individual seeks to challenge government action for the sake of challenging government action, without more injury than that the act or statute is unconstitutional. The Appellants have shown injury in fact because they have averred more than just a general grievance about the general enforcement of the law or the general claim that an act or statute is unconstitutional; they have averred that their individual right to have their votes given equal weight under the law has been violated. Ergo, the Appellants have met the element of injury in fact.

**b). A CAUSAL CONNECTION BETWEEN THE ACT AND INJURY.**

As previously stated, the general rule for standing in Georgia requires the presence of the following elements: “(1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision. Granite State Outdoor Advertising, Inc. v. City of Roswell, 283 Ga. 417 (2008). The analysis now turns to the second

element.

Here, the Appellants assert that the insertion of counterfeit ballots into Fulton County's vote count for the November, 2020 election has diluted the weight of their vote and would affect future elections. Such insertion of counterfeit ballots is the cause of the Appellants' injury. Within the right to vote is the right for one's vote to be counted fairly and accurately, without the interference of debasement, dilution, or prohibition. But for the Appellees' lack of oversight on their agents, the Appellants would not have suffered the injury of having their vote diluted or having their vote diluted in future elections. Therefore, the causal connection is the conduct of the insertion of counterfeit ballots, which directly diluted the Appellants' votes, and would do the same in future elections, which is the injury for which the Appellants now assert.

**c). REDRESSABILITY OF THE HARM.**

Again, the general rule for standing in Georgia requires the presence of the following elements: "(1) an injury in fact; (2) a causal connection between the injury and the causal conduct; and (3) the likelihood that the injury will be redressed with a favorable decision. Granite State Outdoor Advertising, Inc. v. City of Roswell, 283 Ga. 417 (2008). The discussion now turns to the third element, redressability.

Georgia law holds that a declaratory judgment is a remedy that redresses one's grievances. O.C.G.A. § 9-4-2 (2020). In the instant case, the Appellants seek a declaratory judgment finding a violation of their state constitutional rights from vote dilution from the November 2020 election and future elections, which proves that their votes were diluted. The trial court had already granted access to the paper absentee ballots before issuing its ruling on standing. Reversing the trial court's decision on standing would allow the Appellants to move forward with their state constitutional claims, thus redressing the Appellants grievances.

### C. CONCLUSION

In conclusion, taking the facts as pled in this civil action as true, the trial court committed reversible error when it dismissed the Appellants' cause of action for lack of standing. The Appellants pled that there was an actual dilution and debasement of their votes, and it is imminent that such actions will occur in further elections. The Appellants contend that they have not pled a generalized grievance which merely asserts some statute or act is unconstitutional without more, but they have pled an actual injury in fact to their individual constitutional rights, by way of vote dilution. Therefore, the Court must **REVERSE**, and **REMAND** based upon the proper showing of standing.

This submission does not exceed the word count limit imposed by Rule 24.

Respectfully submitted this the 18<sup>th</sup> day of February, 2022.

**MADDOX & HARDING, LLC**

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**CERTIFICATE OF SERVICE**

This is to certify that I have this day served the Parties via their counsels of record, a true and correct copy of the **APPELLANTS' BRIEF** via U.S. Mail, to the following addresses:

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