IN THE COURT OF APPEALS
STATE OF GEORGIA

GARLAND FAVORITO,

et al.,

v. **A22A0939**

ALEX WAN, et, al.

BRIEF OF APPELLEES ALEX WAN, AARON JOHNSON AND VERNETTA NURIDDIN IN SUPPORT OF AFFIRMING THE JUDGMENT OF THE TRIAL COURT

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PROCEEDINGS BELOW

This declaratory judgment action was brought by nine Petitioners who claim that their vote in the November 2020 election was diluted because malfeasance on the part of the Respondents and others, resulted in the counting of many counterfeit ballots and double-counting other legitimate ballots.

This is not an election challenge. None of the nine Petitioners was a candidate. Five of the nine Petitioners were not residents of Fulton County and did not vote in Fulton County. In addition to seeking declaratory relief (in essence, a declaration that the November 2020 election results in Fulton County were rigged, or fraudulent), their primary goal is to gain access to the original absentee ballots so they can conduct their own private audit of the election results, relying on their own experts' evaluation of the ballots.

The Superior Court dismissed the lawsuit because the Petitioners lacked standing to assert any of their claims (other than Open Records Act claims that were resolved by the lower court and which are not the subject of this appeal).

This appeal is being brought by seven of the original Petitioners. The other two Petitioners filed a separate Notice of Appeal and that appeal is docketed under Case No. A22A1097. Both appeals raise the exact same issue: Whether the trial court erred in dismissing the lawsuit on the basis that the Petitioners lacked standing. This brief addresses the arguments raised by both sets of Appellants.

All citations to the Record reflect the pagination of the Record in the *Jeffords* appeal (A22A1097). The Appellees' Briefs in this Court are the same in both cases.

ARGUMENT

APPELLANTS LACK STANDING TO MAINTAIN A DECLARATORYJUDGMENT ACTION OR TO SEEK INJUNCTIVE RELIEF

Background

Though Appellants have devoted a substantial amount of their time – both in their lower court pleadings, and in their appellate briefs – reciting the importance of the foundational principle of "one-person/one vote," simply voicing these iconic words does not change the jurisprudential rule that only parties who have standing to bring a lawsuit may do so. It does not matter if the lawsuit addresses trivial rights and responsibilities, or a matter of life and death, the courts are only empowered to resolve "cases or controversies" and only for parties who have standing to assert the claims that are raised.

> Standing is, of course, a jurisdictional issue that must be considered before reaching the merits of any case, and is a "doctrine rooted in the traditional understanding of a case or controversy." And under federal and Georgia law, standing requires "(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." An "injury in fact" is one that is both "concrete and particularized" and "actual or imminent, not conjectural or hypothetical."

Sons of Confederate Veterans v. Newton County Board of Commissioners, 360 Ga. App. 798, 803–04 (2021);[1] *Black Voters Matter Fund, Inc. v. Kemp*, S21A1262, slip op 11-15 (March 8, 2022); *Center for a Sustainable Coast v. Turner*, 324 Ga. App. 762, 764 (2013); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-561(1992); *Granite State Outdoor Advertising v. City of Roswell*, 283 Ga. 417, 418 (2008).

This case began with nine Georgia voters – Appellants in this case are two of the original nine – complaining about the failure of Fulton County to properly

[1] Appellants contend that the "case or controversy" requirement is non-existent in Georgia law (Jeffords Appellant's Brief (Case No. A22A1097), page 2), an argument belied by the recent decision in the *Sons of Confederate Veterans* case, among scores of other cases. *See, e.g., Eckles v. Atlanta Technology Group, Inc.*, 267 Ga. 801, 807 (1997) ("It is well settled that this Court will not pass upon the constitutionality of a statute where no justiciable **case or controversy *is presented***…"); *Perdue v. Lake*, 282 Ga. 348 (2007) ("The only prerequisite to attacking the constitutionality of a statute [involving voting rights] is a showing that it is hurtful to the attacker … As a general rule, "standing must be determined at the time at which the plaintiff's complaint is filed" in order to place an ***actual case or controversy within the purview of the court***."); *Sexual Offender Registration Review Board v. Berzett*, 301 Ga. 391, 396 (2017) ("[i]t is a settled principle of Georgia law that the jurisdiction of the courts is confined to justiciable controversies," and "[w]e will not decide the constitutionality of a law where no ***justiciable case or controversy*** is presented.")

conduct the 2020 election.[2] Five of the initial Petitioners did not live in Fulton County but protested that their votes were diluted because, as they alleged, some votes in Fulton County were counted twice, or some votes were improperly not counted. They did not allege any particularized personal harm: they only alleged that they – like every one of the millions of people in the State of Georgia who voted – were deprived of Due Process and Equal Protection resulting from various counting errors they allege were committed in Fulton County.

The Petitioners did not seek a recount; they did not challenge the election results; they did not avail themselves of any of the statutory methods of seeking redress. Instead, they filed this lawsuit seeking declaratory relief (specifically a declaration that the November 2020 election was rife with fraud) and an injunction (prohibiting any fraud in the future). Over the course of several months and many permutations of the Complaint,[3] the Petitioners later added to their Prayers for Relief that the Superior Court should remove various elected and appointed officials from office and should install himself (the Superior Court Judge) to supervise future

[2] The initial Complaint was filed by nine Petitioners. During the course of the litigation, they divided into two factions, a group of two and a group of seven. R:537. This appeal was filed by the group of two, but this brief is written to address the appeal of all nine of the Petitioners, though their appeals are currently docketed separately.

[3] R:6-28; R:228; R:1044-1086; R:1129-1155; R: 1161-1349.

elections in Fulton County.[4] Appellants, as discussed below, also sought to conduct a "Maricopa-like" audit[5] of the 2020 absentee ballots. They insisted on the right to hire their own experts to spend an undetermined amount of time – "more than five days" – examining the original absentee ballots (all of which are legally required to be kept under seal for two years) so that they could determine whether fraud had occurred. They retained two experts, neither of whom had actually concluded that there was any fraud, but both of whom claimed that if given access to the original ballots, they would be able to detect if there had been fraud.[6]

When presented with a Motion to Dismiss based on the Petitioners' lack of standing to assert these claims, the trial court granted the motion, concluding that assorted voters who were not running for office and who could not assert how they were different than all the other voters in the State, could not maintain an action for declaratory and injunctive relief.[7] Though there were other grounds for dismissing the lawsuit presented by Appellees, the lower court concluded that in the absence of establishing standing, there was no reason to permit the continuation of the lawsuit, or to address the other defects in the pleadings.

The Petitioners Have Failed to Identify Individualized Harm
To Support their Standing to Bring the Lawsuit

[4] R:1247-1251, ¶¶370-372 & Prayer for Relief, "(l)"; ¶373 & Prayer for Relief "(m)".
[5] https://www.nytimes.com/2022/01/07/us/cyber-ninjas-arizona-vote-review.html.
[6] R:2329, 2331, 2334; and R:2337-38, 2340.
[7] R:2012-2025.

"The constitutional and procedural concept of standing falls under the broad rubric of jurisdiction in the general sense, and in any event, a plaintiff with standing is a prerequisite for the existence of subject matter jurisdiction." *Blackmon v. Tenet Healthsystem Spalding*, 284 Ga. 369, 371 (2008). Indeed, "standing is a *threshold* issue." *Rondowsky v. Beard*, 352 Ga. App. 334, 340 (2019).

The Appellants do not have standing to assert claims that their due process or equal protection rights were (or will be) violated in the manner they allege, because they have asserted no individualized harm that sets them apart from the public at large (to say nothing of the fact that a majority of the Appellants do not even live in Fulton County).

The Appellants also urge this Court to override the will of the Legislature by allowing the nine Appellants and their private investigators and experts to conduct the "integrity review" that the Legislature has expressly endowed the Performance Review Board to conduct.[8] The Petitioners insist that they have the right and authority (and, apparently the qualifications and skill) to conduct an analysis of the

[8] 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. A Review Board is currently evaluating the Fulton County election system. https://www.ajc.com/politics/panel-appointed-to-investigate-fulton-election-problems/IBRJTWD4ERAP7HRIFZ7D243JAA/

2020 election cycle results and to prescribe what must be done – what must be ordered by a court – in the future. As a matter of law, they have no such right.

Appellants claim to have standing to file this lawsuit despite citing not one case to support their argument that any citizen – without identifying individualized harm – anywhere in the State of Georgia can demand a declaratory judgment and an injunction to address alleged malfeasance committed in a prior election in one county (with respect to a majority of the Petitioners, it is not even the county in which they voted).

They cite no case to support their argument that anybody in the State can file a lawsuit if an election irregularity alleged occurred, because no case exists to support this claim. Instead, they devote their brief to a recitation about how important the ballot box is in a democracy and, *ipso facto*, they have standing to question the accuracy of the tabulation in Fulton County in 2020 and to demand that they be permitted to conduct their own audit.

In the *Favorito* appellate brief, the Appellants proclaim: "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. (*Favorito* App. Br. page 5). The brief then – **in bold letters** – cites two cases that supposedly support the argument that in any case of ballot box stuffing, any voter

has standing to "assert a claim for their grievances": *Ex parte Siebold*, 100 U.S. 371 (1879), and *United States v. Saylor*, 322 U.S. 385 (1944). Neither case addresses the issue of standing and neither case provides any support whatsoever for Appellants' standing argument. Both cases are criminal cases in which a person who engaged in the criminal conduct of stuffing a ballot box was prosecuted. Those cases do not suggest in any way that any citizen who claims that ballot box stuffing affected his or her constitutional rights may file a lawsuit against the County where the criminal conduct occurred—or even against the alleged "stuffers."

Election Lawsuits Are not an Exception to the
Requirement that a Plaintiff Must Allege Particularized
And Certain Injury, not Speculative, Hypothetical, or Contingent Injury

The cases that have authorized lawsuits in the context of voting controversies fit into one of four major categories. This case falls within none of those categories:

(1) election challenges by one of the contestants in a timely manner and pursuant to state law;

(2) challenges to a state statute or regulation that will undeniably and definitely affect all voters in the jurisdiction;

(3) challenges to a state law, or state redistricting plan, that will undeniably and definitely affect all voters in the jurisdiction;

(4) challenges to a method of calculating the vote that will undeniably be in use during a future election and will impact voters in that jurisdiction.

With respect to each of these categories of cases, there is nothing "contingent" about the target of the challenge. The statutes, regulations, apportionment decisions and voting procedures are definite and the defendants in those cases do not question that those systems are in place. The litigation revolves around the legality of the statutes, regulations and voting procedures.

This case, in contrast, does not involve a challenge to a state statute or regulation, or a redistricting plan that is undeniably in effect and which affects the Appellants. Appellants' claims about future elections are entirely speculative and they only hypothesize that something will occur in the future to impact the value of their vote. Nor are any of the Appellants contestants in any election. This case does not involve a challenge to a method of voting (the type of voting machine used, or the scheduling of hours of early voting, for example) that undeniably is in force and which the Petitioners claim will affect *their* ability to vote.

Instead, the Petitioners in this case contend that they can present evidence that "counterfeit" ballots were used in the 2020 election – in the past – and certain individuals (nobody is identified) were unlawfully "stuffing the ballot box." And to avoid the statutory requirements for filing an election challenge, they insist they are *not* challenging the 2020 election. Instead, they are relying on what they contend they can prove about the 2020 election to establish the basis for their "fear" that their vote in the 2021 and 2022 elections will not be properly tabulated, or – to be more

precise – that somebody else's vote will not be tabulated properly, which will result in their vote being diluted. Yet, to establish standing, "[t]he injury must *also* be 'concrete,' or put another way, it must 'actually exist' and be 'real,' not 'abstract.'" *Sons of Confederate Veterans v. Newton County Board of Commissioners*, 360 Ga. App. at 804.

In short, Appellants are speculating. They are prophesying a parade of horribles that they contend will happen in the future. They contend that this prophesy is equal to the existence of state statutes and the redistricting plans and the announced early voting hours, that permitted other litigants to challenge a particular voting regime.

All they are claiming, to put it in the simplest terms, is that they predict an assortment of people will break the law and they want this Court (and the lower court) to tell the Respondents not to break the law. They do not have standing to seek that relief in the lower court or in this Court.

The Cases Cited by Appellants In Their Brief Are Distinguishable Because They Involve Challenges Brought By The Candidate Running for Office or a Challenge to a State Statute.

The Petitioners begin their argument with an ode to the sanctity of the vote in a democracy and the iconic language from landmark voting rights cases, most notably *Baker v. Carr*, 369 U.S. 186 (1962). Not one of those cases, however, involved a random collection of citizens suing individual public officials *in their*

individual capacities because of their supposed malfeasance in a prior election. The cases cited by the Petitioners either involve (a) the candidate who was running for office (*Bush v. Gore*), for which standing has always been permissible (and this was recognized by the *Lin Wood* decision discussed below), or (b) the challenge was not to the behavior of certain public officials, but rather was a challenge to a state statute or a state redistricting plan.

In the lower court Appellants cited landmark Supreme Court decisions from the past fifty years that do, indeed, insist that voting is a fundamental right and must be protected by the courts. Appellees take no exception to the importance and historic nature of those decisions. But not one of those cases vested private citizens, wherever they may live, with the authority to act as a private attorney general, or a private protector of the franchise, to say nothing of a private police officer who is predicting future criminal conduct.

Consider the cases the Appellants in both appeals cited repeatedly in the lower court, starting with *Bush v. Gore,* 531 U.S. 98 (2000). This case was not brought by a citizen in Florida challenging the recount: it was brought by one of the contestants in the election. The second most cited case by the Appellants in the lower court was *Reynolds v. Sims*, 377 U. S. 533 (1964). That case involved a state-wide class action filed against the State of Alabama (various public officials in their *official capacity*) based on intentional discrimination in the reapportionment scheme developed by the

Alabama legislature. They specifically challenged the constitutionality of the Alabama legislation, not the conduct of any individuals in a county where they did not reside.

The next-most cited case was *Gray v. Sanders*, 372 U.S. 368 (1963), another case in which the plaintiff was not challenging a prior election or the conduct of one or more election officials in their individual capacity, but instead, was challenging a state statute (Georgia's county unit system). *See also Wesberry v. Sanders*, 376 U.S. 1 (1964) (challenging the statute that established unequally apportioned Congressional districts in Georgia).

Other Supreme Court cases also outline the type of voting rights litigation that citizens may bring. In *Moore v. Ogilvie*, 394 U.S. 814 (1969), the plaintiff challenged a state statute that prevented the formation of new political parties. In *Hopkins v. Virginia Board of Elections*, 383 U.S. 663 (1966), the Virginia statutory poll tax was successfully challenged.

It is Well-Established that the "Vote Dilution" Theory Does Not Confer Standing Upon a Voter

The Appellants' substantive argument relating to standing devotes considerable attention to *Lin Wood v. Raffensberger*, 981 F.3d 1307 (11th Cir. 2020),

in a futile effort to distinguish that case and claim that the *Curling*[9] decision in the Northern District of Georgia supports their assertion of standing.

In *Lin Wood*, the trial court 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. On appeal, 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.

Appellants' attempt to distinguish the *Lin Wood* case fails to address even one word regarding standing that led to the dismissal in that case. To be sure, the Eleventh Circuit *also* held that the challenge to an election must be conducted according to state law. That is surely true (Appellees, too, have argued that state law regarding the challenge to an election must comply with state law, but the Appellants ignore that argument and claim that state law does *not* limit their choice of forum – they want to pursue their challenge notwithstanding the unambiguous provisions in state law that dictate the method of challenging an election).

[9] *Curling v. Kemp*, et al. 1:17-cv-02989-AT (N.D. Ga.). The *Curling* case is currently on appeal to the Eleventh Circuit, scheduled for oral argument on May 23, 2022. *Curling v. Worley*, Case No. 20-14067 (11th Cir.). The appeal directly focuses on the standing of the Plaintiffs to bring the lawsuit (*Id*.)

The standing argument in the *Lin Wood* case did not involve federalism issues at all. The standing issue was decided independently of the portion of the decision that focused on the necessity of abiding by state law. And even *Lin Wood* did dictate that standing was a state law question, Georgia law is no different than federal law, which is why the decision in *Parker v. Leeuwenburg*, 300 Ga. 789 (2017) (discussed below), quotes the exact same language that the federal courts cite in limiting the right of an individual citizen to institute the type of litigation that the Appellants seek to bring in this case.

How can the Appellants seriously argue that *Lin Wood* has no relevance to the standing issue in this case? The federal appellate court rejected Wood's argument (identical to the argument made by Appellants 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*. 981 F.3d 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 of 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*.

Even a cursory reading of *Lin Wood* reveals how definitive the standing ruling is:

> [E]ven Wood agrees that he is affected by Georgia's alleged violations of the law in the same way as every other Georgia voter. 'This injury is precisely the kind of undifferentiated, generalized grievance that the Supreme Court has warned must not be countenanced…And irregularities in the tabulation of election results do not affect Wood differently from any other person. His allegation, at bottom, remains "that the law ... has not been followed.

981 F.3d at 1315.

Curling, like many of the Supreme Court cases upon which Petitioners rely, addressed a specific provision of the law that directly impacted the plaintiffs: the specific voting machines that were being used in Georgia. Like the state statutes that impacted the plaintiffs in *Sanders*, *Wesberry*, *Hopkins*, and *Ogilvie*, there was nothing diffuse about the procedure being employed by the state. Like the poll tax, *Curling* involved a challenge regarding a voting machine that affected all voters – nobody was exempt from its hazards. Nothing in the trial court's decision (to the extent that it is binding or even persuasive authority in this Court) suggests that any time any citizen desires to analyze a *past* election, or the conduct of specifically identified election office employees, to try to prove that there was malfeasance that *may* be repeated, the citizen, from any corner of the state or country, may institute a

lawsuit to inquire into the specific acts of malfeasance and invoke the court's jurisdiction to issue declaratory and injunctive relief.

Not only do Appellants seek a declaratory judgment and injunctive relief, they also insist on the right to conduct their own private audit of the ballots that were cast by Fulton County voters and to hire their own experts to do so. Appellants express no interest whatsoever in the fact that a comprehensive legislative scheme is in place in Georgia that governs elections, challenges to elections, and challenges to election procedures and results. They claim that *they* and every other voter in the State, have a right to conduct their own recount and audit. Even the debacle in Maricopa County was not prompted by individual voters: there, the procedure was created and conducted by the State Legislature. Here, the Petitioners have no public authority to seek the relief to which they claim entitlement.

Citizens are concerned about all kinds of political decisions that affect our lives. We are concerned that public officials violate various ethical rules, campaign finance rules and oath of office laws. But that does not give every citizen standing to demand that this Court (or a trial court) review the past practices of the governor or the mayor or a local county commission member with regard to conduct that was not directed at any one of us, even if we fear that in the future we will be affected. Our fears do not open the courthouse to declaratory judgment cases to every

"worried" citizen, even if there is a basis for claiming that a public official has strayed.

Appellants do not faithfully explain the concept of standing. They argue that their right to vote has been diluted by the acts of public officials in one county, therefore, without any additional showing, they have standing to file a lawsuit. They cite not one Georgia case that supports the breadth of standing that they claim governs the courts in this state. They cite no statute that they are challenging on a statewide basis. They cite no regulation that impacts their ability to vote.

Several federal cases in the past eighteen months focus directly on claims of the lack of standing in the context of improper vote tabulation allegations. *See Hudson v. Haaland*, 843 Fed.Appx. 336 (D.C. Cir. April 6, 2021); *Bowyer v. Ducey*, 506 F.Supp.3d 699, 711-712 (D. Ariz. 2020) (district court rejects challenge based on improper counting of fraudulent absentee ballots and improper vote dilution; plaintiffs lacked standing); *Bognet v. Secy. Commonwealth of Pennsylvania*, 980 F.3d 336 (3rd Cir. 2020).[10]

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."

[10] The Supreme Court subsequently dismissed the case as being moot. 141 S. Ct. 2508.

Parker v. Leeuwenburg, 300 Ga. 789, 792-793 (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 (2017) (Peterson, J., dissenting). This holding – echoed by scores of courts around the country without exception (including the United States Supreme Court) – dooms the nine Appellants' causes of action in this Court.[11]

Indeed, if the Petitioners are right that anybody who claims his or her vote has been diluted can sue Fulton County officials, why is it limited to Georgia voters? Are not voters in Alabama and Alaska also deprived of an undiluted vote if the Biden voters in Georgia had an advantage as Appellants allege? If every Biden vote in Georgia was counted ten times (or every Trump vote was shredded and not counted), Biden would therefore win the electoral votes of Georgia through this hypothetical,

[11] *See Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573-574 (1992); *Spokeo, Inc, v. Robins*, 136 S. Ct. 1540, 1547 (2016); *Warth v. Seldin*, 422 U.S. 490 (1975); *Paher v. Cegavske*, 457 F.Supp.3d 919, 926 (D. Nev. 2020); *Martel v. Condos*, 487 F.Supp.3d 247, 253-254 (D.Vt. 2020); *Moore v. Circosta*, 494 F.Supp.3d 289 (M.D.N.C. 2020).

imaginary fraud, and this would diminish the value of the legitimate votes in every State in the country. Thus, our Superior Courts would endure an avalanche of claims of improper vote-counting in Fulton County.

If the Appellants are right, every unhappy voter in the State of Georgia can file a lawsuit (just as Ms. Jeffords did, just as Mr. Favorito did, just as two other people have done in a new case recently filed in Fulton County, which is almost identical to the Favorito and Jeffords petitions.[12] Whatever the lower court in this case decides about the 2020 election, the next plaintiff – perhaps a voter in Baker County, or Chatooga County, or Camden County – could then file a similar lawsuit, insist on his or her own right to examine the ballots for a couple weeks and employ a different expert to examine the ballots and insist on a declaratory judgment. Litigation would never end. Over and over, judges in Fulton County would be reviewing past elections at the request of voters from all 159 counties in Georgia.

The failure to establish standing to pursue their claims is not just a function of the nature of the claim (pursuing their complaint about a past election) but is also shown by the prospective relief they demand. 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." *Polo Golf and Country Club Homeowners Association,*

[12] *Perdue v. Barron*, et al., 21-CV-357748 (Fulton County Superior Court).

Inc. v. Cunard, 306 Ga. 788, 791 (2019). 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 (2014) (citing *Manlove v. Unified Govt. of Athens-Clarke Cnty.*, 285 Ga. 637 (2009).

The Appellants cannot seriously argue that their complaint establishes on its face that the threat of future injury is "actual and imminent." It is the exact opposite: it is nothing more than a fear based on sheer speculation. Unlike cases in which statutes, regulations, voting systems, or redistricting plans are challenged – cases in which the process challenged is undeniably in effect – the event that the Appellants prophesize in this case is no more likely to occur than the proverbial falling sky.

Appellants will likely urge this Court to consider the affidavits that were attached to the original Petition for Declaratory Relief.[13] While affidavits are not generally relevant to a Motion to Dismiss – whether on standing grounds, or some other grounds – if the Court has any interest in reviewing those allegations about what certain poll watchers claimed to have observed, the Court should also review

[13] In their brief, Appellants initially state that the lower court "noted the veracity of [Appellants'] claims." (*Jeffords* Appellant's Brief at p. 1). Actually, what the lower court wrote was "However, *regardless of the veracity* of these allegations, the Court finds Petitioners have still failed to allege a particularized injury." (R:2022). The lower court made no finding whatsoever about the accuracy, or truthfulness of any of the affiants' claims.

the Amicus brief filed by the Georgia Secretary of State's Office, which documents the fact that the affidavits have been proven to be inaccurate if not simply false.[14]

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[14] The lower court judge requested that the Attorney General's Office file an Amicus Brief on behalf of the Secretary of State reviewing the investigation conducted by law enforcement officials regarding Appellants' allegations. *See* Amicus Brief filed by Secretary of State, October 12, 2021 (R:1923, *et seq*.) Excerpts from the Amicus Brief confirm that the allegations were thoroughly investigated and refuted:

> "[I]nvestigators reviewed nearly 24 hours of security footage for the tabulation room recorded between November 3 and 4, 2020, and interviewed all witnesses present at State Farm Arena during the relevant time period. The investigators' review of the video confirms that the alleged "suitcases" of ballots were normal ballot bins, which had been filled by elections workers with absentee ballots that had been opened and sorted but not yet scanned for tabulation …. In sum, investigators concluded that there was no evidence to corroborate the Petitioners' allegations that elections workers at State Farm Arena scanned and counted fraudulent ballots that they had previously hidden under tables in the tabulation center. The U.S. Attorney for the Northern District of Georgia reached the same conclusion based upon the witness statements to the assisting FBI agents and independent review of the available evidence." *Id.* R:1927-1929.
>
> Regarding the affiant who claimed to have seen "pristine ballots" that appeared to be counterfeit, "[T]wo of the Secretary's investigators interviewed Ms. Voyles on January 7, 2021. The witness confirmed the statement in her affidavit that she had seen a batch of "pristine" absentee ballots during the risk-limiting audit, and told investigators that the absentee ballots were from Box 5/Batches 28-36. The witness then added the caveat that she could have been mistaken in her sworn statement and that Batches 28-36 instead could have been in Box 135. Investigators followed up on this lead and confirmed with county elections officials that Box 135/Batches 28-36 was not a box/batch combination that existed. The witness also told investigators that she reported the suspicious-looking absentee ballots to a Fulton County elections official. Investigators interviewed all elections officials meeting the description provided by the witness, and all of them

There were four million people who voted in the Georgia election in 2020.[15] There are more than ten million people who live in Georgia. The Fulton County population exceeds one million people.[16] The nine original 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 in-person audit of 150,000+ ballots conducted by privately-retained self-proclaimed experts. They have no right to ask the Superior Court Judge to "fire" county employees (or, for that matter, elected county officials) or to "supervise" local elections.

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

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denied having spoken to the witness about suspicious looking ballots." *Id.* R:1930-1931).

[15] https://sos.ga.gov/index.php/elections/georgia_breaks_all-time_voting_record.
[16] https://www.census.gov/quickfacts/fultoncountygeorgia.

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 grant a Superior Court Judge the power to commandeer the process either.

Appellants Have No Standing to Bring a Declaratory Judgment Action

There is not even an objective basis for the fears the Petitioners express: they simply have announced that they fear their votes in the future will be diluted. A subjective expression of fear of future harm does not support a declaratory judgment action.

The "fear" that some malfeasance that occurred two years ago (Appellees dispute that any such malfeasance occurred) will happen again in the future (even if the Petitioners can prove it happened in the past), does not support a cause of action for Declaratory relief. Declaratory Judgment actions require that there be an *ongoing* dispute, or a persistent controversy that needs to be resolved so that the parties can move forward without uncertainty. There is no basis in this case for the issuance of any Declaratory Judgment. "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." *Black Voters Matter Fund, Inc. v. Kemp*, S21A1262, slip op. 15

(March 8, 2022), *citing Women's Surgical Center, LLC v. Berry*, 302 Ga 349, 351 (2017).

Appellants have no ongoing relationship with any of the Respondents that would justify invoking the procedure for a declaratory judgment action.[17] To pursue a declaratory judgment action, a party must establish that it is necessary to relieve the party of the risk of taking some future action that, without direction, would jeopardize the party's interests. *Acevedo v. Kim*, 284 Ga 629 (2008). 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 (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).

> 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.

[17] Two of the Appellees, Alex Wan and Vernetta Nuriddin, are no longer on the Board of Registration and Elections.

Zitrin v. Georgia Composite State Bd. of Medical Examiners, 288 Ga. App. 295, 298 (2007). *See also U-Haul Company of Arizona v. Rutland*, 348 Ga. App. 738 (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). Appellants are enduring no "uncertainty" about their rights. They have no uncertainty about their obligations or responsibilities. There are no controversial provisions of the law or debatable aspects of their relationship to Fulton County or the individual Respondents they have sued.

For the foregoing reasons, this Court should affirm the decision of the trial court dismissing the claims of the Appellants on the basis that they lack standing to bring these claims.

II.

ACCESS TO THE ORIGINAL BALLOTS FOR EXAMINATION BY THE PETITIONERS' CHOSEN EXPERTS IS NOT AUTHORIZED

As a fallback position, the Jeffords Appellants urge this Court to order the lower court to permit them – and their chosen experts – to engage in an audit of the original absentee ballots (this audit will require a platoon of 45 individuals, a Special Master, more than two experts, and a group of Georgia Tech students to evaluate the

paper used in the 150,000 absentee ballots). They specifically have requested that the ballots be unsealed and that their experts be permitted to examine the ballots under an infrared light and ultraviolet lights to determine the authenticity of the ballots.[18] They urge the Court to direct the lower court to permit the audit to go forward, *even if the Appellants lack standing to bring the lawsuit*.

The Legislature has provided that the Open Records Act authorizes disclosure of a scanned copy of the absentee ballots. And that was provided to the Appellants. *See* OCGA § 21-2-51; § 21-2-72; § 50-18-71(k). But they want better scans and they want to have their experts actually examine the originals, not just scanned copies. Not only does the Open Records Act not cover the original ballots, but a separate statute specifically provides that the original ballots are to be sealed, unless ordered released by a Superior Court Judge. There are no expressed considerations in the statute governing when or to whom, or under what conditions, the Superior Court Judge should order the ballots released. OCGA § 21-2-500.

The Superior Court Judge expressly rejected Appellants' request to order the ballots released pursuant to their Open Records Act request.

> Mr. Favorito contends that he is entitled to have access to the paper absentee ballots due to Fulton County's violation of the ORA. However, a technical violation of the ORA does not entitle Mr. Favorito to have access to the paper absentee ballots. See *Chua v. Johnson*, 336 Ga. App. 298, 301-303, 784 S.E.2d 449 (2016). **Rather, disclosure is only**

[18] They rejected an offer to examine a sample of the ballots: they insist on the right to examine all of the ballots individually, one-by-one (R:2341).

> **permitted if the paper absentee ballots are, in fact, public records subject to disclosure, which, as noted above, they are not pursuant to OCGA § 21-2-500 (a).** (R:631, 636).

Appellants offer no support in their appellate brief that Judge Amero's decision about the Open Records Act request was erroneous.

Recognizing that the law did not allow them to simply ask for access to the original ballots and having failed in their effort to invoke the Open Records Act to access the original ballots, Appellants decided to try option #3: they claimed that pursuant to O.C.G.A. § 9-11-34, they would simply demand the ballots as part of the discovery process in the lawsuit that was then pending (seeking declaratory and injunctive relief).[19]

Throughout the course of the litigation in the lower court, Appellants' route to gain access to achieve their hand-picked expert audit was to argue that it was part of the routine discovery process in the lawsuit. This claim was repeatedly asserted by Appellants' counsel in open court and the lower court judge tentatively agreed to

[19] O.C.G.A. § 9-11-34 only authorizes a party to seek discovery – including production of documents for inspection – from another party who has access to the documents. None of the five Appellants has access to, or custody of, the original ballots, therefore, by the time the litigation came to a conclusion in October 2021, there was no basis even to request access to the ballots from any of the five members of the BRE who were Respondents in their individual capacity. The ballots are in the sole possession of the Fulton County Superior Court Clerk as required by law, O.C.G.A. § 21-2-500(a). Thus, even this effort by Appellants was destined to failure.

provide for a disclosure of the original ballots, in accordance with the rules of discovery:

(R:2176): Counsel describing Exhibit "A" to the Motion to Unseal as a "discovery request;"

(R:2185): Counsel describing the request to examine the ballots as a Rule 34 request;

(R:2224): Counsel refers to the request as a §9-11-26 request.

(R:2353-54): COURT: referring to production of original envelopes as "discovery;"

(R:2366): COURT: "[T]hen this does take the form of a civil case of where there is some discovery under the declaratory judgment, arguably."

(R:2449): Counsel: So we're asking [to review the ballots] under discovery."

(R:2453): Counsel: We're asking to look at the ballots as part of discovery to show that there was a dilution and then again ask the Court to declare that it would continue.

(R:2457): Counsel: But our request for the ballots was actually a discovery request.

Appellants' pleadings similarly relied on the Civil Practice Act discovery vehicles (once the Open Records Act claims were rejected):

(R:345): consolidated motion to unseal (Exhibit "A" – referring to OCGA § 9-11-26 as authority for reviewing the original ballots).

(R:616): (¶4) Petitioners' response to Raffensberger amicus regarding access to ballots.

(R:357): Petitioners' motion to compel (referring to ballots as documents subject to OCGA § 9-11-34).

In a last ditch effort to secure access to the ballots for their experts, Appellants now claim that even if the Court agrees with the lower court that they lack standing to assert the Due Process and Equal Protection claims (to say nothing of their prayer for relief that elected officials and other officials in Fulton County should be fired; and that the trial judge should assume some kind of supervisory position over future elections) – even if they lack standing to assert any of those claims or to achieve any of their prayers for relief – they should be allowed to continue their pursuit of discovery in a lawsuit brought by Petitioners who lack standing to bring the suit.

That is a somewhat astonishing request and lacks any supporting authority (or logic). Discovery under the Civil Practice Act is not an end in itself; it is a means of gathering information in pursuit of a legitimate claim. If there is not a legitimate claim raised by a party who has standing to assert the claim, there is no pursuit of information that is permitted under the Civil Practice Act.[20]

There is good reason why the lower court did not authorize Appellants to personally examine the original ballots as a free-standing right. If they have that authority, who doesn't? Indeed, there is now a new set of Petitioners – represented

[20] *See* O.C.G.A. §9-11-27 (limited circumstances in which party may take a deposition to preserve testimony prior to filing complaint, or while case is on appeal). *Worley v. Worley*, 161 Ga. App. 44 (1982).

by the same attorney who represents Appellants in this case – who also want to personally examine the original November 3, 2020 ballots. They have filed a new lawsuit in Fulton County.[21] They have no claim to entitlement any more than Appellants, yet this exposes the slope we are on: anybody, anywhere in the state, may ask a Superior Court Judge to unseal the ballots so they can be viewed personally by anybody and examined under an ultraviolent light.

There is good reason to require the sealing of ballots and there is good reason to exempt the original ballots from the Open Records Act. If anybody at any time can allege "fraud" and thereby gain access to the original ballots, the Legislature's clear plan to keep the ballots under seal would be frustrated. This Court should reject this path.

CONCLUSION

For the foregoing reasons, Appellees urge this Court to affirm the judgment of the lower court.

RESPECTFULLY SUBMITTED,

GARLAND, SAMUEL & LOEB, P.C.

/s/ *Donald F. Samuel*
DONALD F. SAMUEL, ESQ.
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[21] *Perdue v. Barron*, et al., 21-CV-357748 (Fulton County Superior Court).

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IN THE COURT OF APPEALS
STATE OF GEORGIA

GARLAND FAVORITO, et al.,	)	
	)	
Appellants,	)	
	)	APPEAL NUMBER:
v.	)	
	)	A22A0939
ALEX WAN, et al.,	)	
	)	
Appellees.	)	

CERTIFICATE OF COMPLIANCE

I hereby certify that this BRIEF OF APPELLEES ALEX WAN, AARON JOHNSON AND VERNETTA NURIDDIN IN SUPPORT OF AFFIRMING THE JUDGMENT OF THE TRIAL COURT is in 14-point Times New Roman type and contains 7,529 words.

This, the 14th day of March, 2022.

RESPECTFULLY SUBMITTED,

GARLAND, SAMUEL & LOEB, P.C.

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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 BRIEF OF APPELLEES ALEX WAN, AARON JOHNSON AND VERNETTA NURIDDIN IN SUPPORT OF AFFIRMING THE JUDGMENT OF THE TRIAL COURT via U.S. Mail, to the following addresses:

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