

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

DAVID A. PERDUE and ELIZABETH
GRACE LENNON,
Petitioners

v.

RICHARD BARRON *et al.*,
Respondents

CIVIL ACTION 2021CV357748

ORDER DISMISSING CASE

Former United States Senator David Perdue and Fulton County voter Elizabeth Grace Lennon brought this self-styled “election justice”¹ action seeking declaratory, injunctive, and other equitable relief in connection with the November 2020 general election in Georgia (“Election”). Respondents consist of sixteen former and current Fulton County officials who Petitioners allege had direct or indirect authority over and responsibility for the Election. All Respondents answered and thirteen Respondents filed motions to dismiss. For the reasons set forth below, the Court GRANTS Respondents’ motions to dismiss as to all sixteen Respondents.

I. BACKGROUND

a. Petitioners and their claims

Petitioner Perdue served as a United States Senator for Georgia from 2014 until January 2021. He was a candidate on the ballot in the Election. He failed to obtain 50% of the vote in the Election and was forced into a runoff with T. Jonathan Ossoff, to whom he ultimately lost.

Petitioner Lennon is a Fulton County voter. She claims that when she appeared to vote in person on 23 October 2020 in the Election, staff from the Fulton County Board of Registration and

¹ Petition, ¶ 9.

Elections (BRE) told her that she had already voted by absentee ballot. After informing BRE staff that she had not, in fact, submitted an absentee ballot, Lennon was allowed to vote by provisional ballot. Lennon alleges that a fraudulent absentee ballot was submitted under her name and counted. She is understandably concerned that her provisional ballot may not have been counted, or that, if it was counted, it may have been cancelled out by the alleged fraudulent absentee ballot.

Petitioners filed their petition in this matter on 10 December 2021. Despite the background information recited above, all distilled from the petition, the petition is not really about Perdue's loss or Lennon's personal voting experience. Indeed, the petition presents many grievances,² but Petitioners' core claims are that (1) several batches of absentee ballots were scanned multiple times and (2) "thousands" of unlawful counterfeit absentee ballots were counted and certified in the Election on Respondents' watch.³

Eventually, after 55 pages of preamble, introduction, and allegations, Petitioners raise four claims for relief. The first, Count I, is styled "Deprivation of Equal Protection Rights." While it excoriates Respondents for having "negligently, willfully, wantonly, outwardly, maliciously or corruptly and unapologetically acted with malfeasance" thereby causing electors in Fulton County to experience "disenfranchisement, dilution, debasement, and corruption of their vote in the General Election," Count I never seeks a remedy. Petition at ¶¶ 209, 214. Count II requests a declaratory judgment -- although its desired substance is not made clear in the body of the Count. Count III seeks equitable relief, apparently by way of an order requiring a "forensic inspection" of

² Petitioners criticize numerous aspects of the Election, including: the temporary staffing company that was contracted to assist in the Election; the BRE and County Board of Commissioner's failure to fire Richard Barron, the former Director of Fulton County Elections; the hiring, firing, supervision, and training of BRE employees; failure to ensure adequate visibility in the ballot processing area at State Farm Arena; allowing ballots to be processed after observers and media left; the manner in which the Election audit was handled; and still more.

³ Petition, ¶¶ 43, 45.

absentee ballots. Finally, Count IV demands injunctive relief, ostensibly to preserve and protect the absentee ballots that the forensic inspector would be examining.

It is in the petition's "Prayer for Relief" section, beginning at page 76, that some specificity is at last supplied concerning the remedies Petitioners actually seek in this case. As clarified in this section, Petitioners are, via their petition and their four counts, asking for:

- 1) service of process;
- 2) an evidentiary hearing on "the temporary injunction requested" (likely, but not specified as, the request that the ballot materials be preserved, unsealed, and inspected);
- 3) a declaration that Respondents "violated the Georgia Constitution (sic) Equal Protection Clause" (perhaps this is the remedy for Count 1?);
- 4) a declaration that Respondents "violated the Georgia Constitution (sic) Due Process Clause";
- 5) an injunction that preserves certain ballot materials;
- 6) an order unsealing those ballot materials and allowing Petitioners to inspect them;
- 7) an order directing Respondents to terminate all employees and contractors shown to have participated in the alleged electoral fraud; and
- 8) despite proclaiming that they "do not seek to overturn or contest the General Election of 2020" (Petition at ¶ 264), an order directing Respondents to certify the "correct vote total" to the Secretary of State following the aforementioned forensic review.

b. Respondents

Petitioners name the following Respondents as those responsible for these alleged Election wrongs:

- Former Fulton County Elections Director Richard Barron
- Current BRE members:
 - Mark Wingate
 - Kathleen Ruth
 - Aaron V. Johnson
 - Cathy Woolard
 - Teresa K. Crawford

- Former BRE members:
 - Vernetta Keith Nuriddin
 - Mary Carole Cooney
 - Alex Wan

- Members of the Fulton County Board of Commissioners (BOC):
 - Chairman Rob Pitts
 - Natalie Hall
 - Marvin S. Arrington, Jr.
 - Khadijah Abdur-Rahman
 - Liz Haussmann
 - Bob Ellis
 - Lee Morris

c. The *Favorito* litigation

Petitioners’ lawsuit mirrors a case filed in this Court a year earlier -- *Favorito et al. v. Fulton County et al.*, Civil Action 2020CV343938. Petitioners’ claims here are very similar to those raised by the petitioning voters in *Favorito* and many of the Respondents named in this case were also respondents in *Favorito*. *Favorito* was ultimately dismissed by Chief Judge Brian J. Amero⁴ in October 2021 on the ground that those petitioners lacked standing. That decision is being challenged on appeal.⁵

d. Motions to dismiss

Respondents Barron, Wan, Johnson, Cooney, Woolard, Crawford, and the seven County Commissioners all filed motions to dismiss. The moving Respondents raise several grounds for dismissal, including that Petitioners lack standing, fail to state claims for declaratory and injunctive relief, and failed to seek the proper redress for their election claims. They also raise issues of

⁴ Chief Judge Amero presides in the Superior Court of Henry County of the neighboring Flint Judicial Circuit. He was assigned by the Administrative Judge of the 6th Judicial Circuit to handle *Favorito* because that case was deemed an election challenge under O.C.G.A. § 21-2-521 and required assignment to a judge outside of this Circuit per O.C.G.A. § 21-2-523(d). However, by Petitioners’ own admission, “[t]his action is not an election contest case.” Petition at ¶ 4 (emphasis added). Thus the case properly remains with a judge of the Superior Court of Fulton County.

⁵ Georgia Court of Appeals Case Nos. A22A0939, A22A1097.

immunity and Petitioners' failure to state a claim against them in their individual capacities. Given the Court's findings below on Petitioners' claims for declaratory relief, it is unnecessary to address each of the grounds raised by the moving Respondents; one is enough to defeat the claims.⁶

II. LEGAL ANALYSIS

a. Standard of review

A motion to dismiss for failure to state a claim upon which relief may be granted should not be sustained unless

(1) the allegations of the complaint disclose with certainty that the claimant would not be entitled to relief under any state of provable facts asserted in support thereof; and (2) the movant establishes that the claimant could not possibly introduce evidence within the framework of the complaint sufficient to warrant a grant of the relief sought.

Glob. Payments, Inc. v. InComm Fin. Servs., Inc., 308 Ga. 842, 842-43 (2020) (punctuation and citation omitted). In deciding the moving Respondents' motions to dismiss, "all pleadings are to be construed most favorably to the party who filed them, and all doubts regarding such pleadings must be resolved in the filing party's favor." *Id.*

b. Declaratory relief

Petitioners ask the Court to declare that Respondents violated the Equal Protection and Due Process Clauses of the Georgia Constitution. In response, the moving Respondents argue that Petitioners have failed to state a proper claim for declaratory relief. They are correct.

⁶ That said, the Court will also briefly address standing, given that it is a threshold jurisdictional question and the fate of *Favorito* turned on this issue. While the Court finds it a closer question than Petitioners' failure to state a claim for declaratory relief, the Court agrees with the moving Respondents that Petitioners lack standing under *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020), *cert. denied* 141 S. Ct. 1379 (2021). That is, Petitioners cannot establish an injury in fact because their grievances of vote dilution and the like are generalized. *See also Parker v. Leeuwenburg*, 300 Ga. 789, 792-93 (2017) (generalized grievance shared in substantially equal measure by all or a large class of citizens does not warrant exercise of jurisdiction). Petitioners are two voters among many that could bring these general claims. Indeed, Petitioners often speak (without authority) on behalf of all Georgia voters in their petition. The Court is not persuaded that Perdue's status as a candidate in the Election cures his lack of standing in this case. On balance, Perdue's claims do not relate to his experience as a candidate. Rather, they relate to his alleged experience as a voter claiming that his vote has been diluted by Respondents' actions.

The purpose of the Declaratory Judgment Act is “to settle and afford relief from uncertainty and insecurity with respect to rights, status, and other legal relations.” O.C.G.A. § 9-4-1. Declaratory relief is a forward-looking remedy; Petitioners, in seeking it, must demonstrate that they are in a position of uncertainty or insecurity *as to some future action they must take* and that, without direction from the Court, they might act in a manner that jeopardizes their interests. *Collins v. Athens Orthopedic Clinic*, 356 Ga. App. 776, 780 (2020). Thus, a declaratory judgment is improper where the declaration sought addresses an act that already occurred. *Effingham County Bd. of Commrs. v. Effingham County Indus. Dev. Auth.*, 286 Ga. App. 748, 750 (2007).

Here, Petitioners are asking this Court to make a declaration about something that, if it happened, *already* happened -- *i.e.*, a violation of their constitutional rights occasioned by Respondents’ alleged mismanagement of the Election.⁷ Even assuming that Petitioners could prove every allegation they have made about the Election (and they are legion) and that these allegations resulted in corresponding violations of their rights, this Court cannot issue a declaration about things that have already occurred. *See, e.g., Collins*, 356 Ga. App. at 781 (data breach victims not entitled to declaratory relief when their personal information had already been stolen); *Richardson v. Phillips*, 302 Ga. App. 305, 310 (2010) (declaratory relief not available when petitioner asking trial court to decide propriety of past conduct).⁸

c. Injunctive relief

Petitioners also ask the Court to issue temporary and permanent injunctive relief. The moving Respondents argue that Petitioners again fail to state a claim for this relief. The debate is

⁷ See Petition at 76, describing the declarations being sought as ones that declare that Respondents violated Petitioners’ Equal Protection and Due Process rights.

⁸ It follows that it is also improper to allow Petitioners to go on a fishing expedition through *past* absentee ballots and election materials to search for proof in support of their demand for retroactive declaratory relief.

moot, as the Court on 7 April 2022 entered an Order preserving the electoral records Petitioners seek to preserve (and ultimately unseal and inspect).⁹

d. Other orders

Finally, Petitioners urge the Court to enter a series of orders that would effectively empower Petitioners' unnamed "forensic experts" to intrude upon the sealed ballot materials of tens of thousands of Fulton County voters, hunt for speculative voter fraud or error, and then determine for themselves what the "actual" vote count should have been in the Election. This quixotic journey will not take place. The purported basis for such sweeping relief would be the Court's declaration that Petitioners' rights were violated, a backwards-looking declaration that no trial court may make. Absent the Court's declaration, Petitioners are left only with speculation, conjecture, and paranoia -- sufficient fodder for talk shows, op ed pieces, and social media platforms, but far short of what would legally justify a court taking such action.¹⁰

Lastly, if Petitioners' demands for equitable relief were not denied for the reasons set forth above, they would fail on the basis that Petitioners are not without legal remedies for any past or future election improprieties. Perhaps most significant are those offered under O.C.G.A. § 21-2-522. Section 21-2-522 allows an election contest on the grounds of, among others, "[m]isconduct, fraud, or irregularity by any primary or election official," "[w]hen illegal votes have been received," and "[f]or any error in counting the votes." Given that such legal remedies were available to Petitioners, declaratory, injunctive, or other equitable relief is improper. *Glass v.*

⁹ As noted in that Order, the Order is something of a backstop to the Clerk of Court's statutory obligation to maintain the relevant records through at least November 2022. O.C.G.A. § 21-2-500(a).

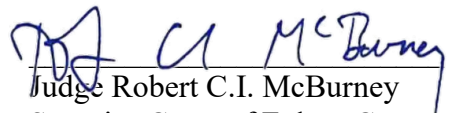
¹⁰ "Such relief sought is made dependent upon the prayer for declaratory judgment which, under the ruling above, fails. Without the declaratory judgment as its foundation, the request for injunctive relief fails." *Sexual Offender Registration Review Bd. v. Berzett*, 301 Ga. 391, 395 (2017)

Faircloth, 354 Ga. App. 326, 329 (2020) (“equity will not step in where there is an adequate and complete remedy at law”).¹¹

III. CONCLUSION

Petitioners have failed to state a claim for declaratory relief. Their demand for injunctive relief is moot. Their remaining requests for equitable relief, absent the declaratory relief they cannot have, are left supported only by sour grapes which make a wine this Court will not serve. Respondents, including the non-moving Respondents,¹² are entitled to judgment as a matter of law on all four of Petitioners’ claims. Any motion not specifically addressed to date is hereby DENIED as moot. The Clerk should mark this matter “closed.”

SO ORDERED this 11th day of May 2022.


Judge Robert C.I. McBurney
Superior Court of Fulton County
Atlanta Judicial Circuit

¹¹ The Court notes that, until they move to substitute parties, Petitioners also seek equitable relief against individuals who no longer work for the County or its elections in any capacity.

¹² Petitioners claim that the three non-moving Respondents (Wingate, Ruth, and Nuriddin) actually support Petitioners and the relief they are seeking. (Petitioners’ response to Respondent Barron’s motion to dismiss at 6). Even if true, this changes none of the factual findings and legal analysis buttressing the Court’s conclusion that the remedies Petitioners are pursuing are unavailable to them.