IN THE SUPERIOR COURT OF FULTON COUNTY

STATE OF GEORGIA

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| GARLAND FAVORITO, ET AL,<br><br>PETITIONERS,<br><br>V.<br><br>ALEX WAN, ET AL.,<br><br>RESPONDENTS, | CIVIL ACTION FILE NO.<br><br>2020-CV-343938 |

# CAROLINE JEFFORDS' REPLY IN SUPPORT OF MOTION TO SUBSITUTE PARTIES

Comes now Caroline Jeffords, Petitioner in the above-entitled matter, and submits this reply in support of the Motion to Substitute Parties filed by co-Petitioners Garland Favorito, Trevor Terris and Christopher Peck.

The reason for substituting parties is that the membership of the Fulton County Board of Registration and Elections ("FCBRE") has changed. The Respondents who are no longer members of the FCBRE should be substituted with their replacements.

Kathy Woolard, Teresa Crawford, Michael Heekin, and Julie Adams replaced Alex Wan, Vernetta Keith Nurriden, Kathleen Ruth, and Mark Wingate on the FCBRE, respectively. Having replaced these former members, Ms. Woolard, Ms. Crawford, Mr. Heekin and Ms. Adams also take their places as Respondents in this case. Aaron Johnson remains on the FCBRE and need not be replaced.

The co-plaintiffs' motion to substitute offers either O.C.G.A. § 9-11-25(c) or (d) as legal authority for substitution. Alternatively, the motion suggests the new members of the FCBRE be added as parties under O.C.G.A. § 9-11-21 in the exercise of the Court's discretion.

In opposing the motion, Respondents begin by describing the history of substitutions and amendments in this case and, without showing why substitution would be inappropriate, jump immediately to the merits and argue that history is all the more reason to grant their motion to dismiss the case for reasons that were not addressed when the case was previously dismissed for lack of standing. As the Court well knows, that dismissal was reversed by the Supreme Court. The Respondents' argument conflates procedure with substance, which should be addressed separately. The merits arguments do not go to the issues on substitution.

The Respondents also complain that the case is four years old, as if that were a merits defense or a defense to substitution. It is neither. Judge Amero dismissed the case for lack of standing on October 13, 2021. The appellate process took nearly two years, with the last of three appellate decisions being issued May 11, 2023 in *Favorito v. Wan*, 367 Ga.App. 642, (2023). A petition for certiorari from that decision filed by David Perdue was denied by the Supreme court on October 11, 2023, Case No. S23C0776. The remittitur from that decision was mailed by the Court of Appeals on October 30, 2023. Motions to recuse were filed on May 16, 2023 and denied on December 7, 2023. The

Motion to Substitute was filed on May 14, 2024. On May 31, 2024, this Court set a hearing on the Motion to Substitute for June 24, 2024, and directed the Clerk to change the case status from "stayed" to "open."

The Respondents do not mention any of this sequence in arguing there has been undue delay. Respondents' argument cast blame upon the Petitioners for the time it took to prevail on appeal on standing, at least with respect to the Petitioners who were residents of Fulton County.[1] Of course, resort to the appellate courts was only made necessary by the Respondents seeking and obtaining dismissal for lack of standing on a theory the Supreme Court determined did not have merit under a line of cases extending back nearly 100 years. *See Sons of Confederate Veterans v. Henry County Board of Commissioners*, 315 Ga. 39, division (2)(c)(ii) commencing at p. 57 (2022).

The Respondents contend that substitution under O.C.G.A. § 9-11-25(c) is inapplicable because this case does not involve a transfer of an interest, and that's subsection (d) does not apply because it only covers governmental officials sued in their official capacities. These are fair points which is why the motion also suggests the Court exercise its discretion under O.C.G.A. § 9-11-21 to bring the new members into the case. Respondents make a glancing suggestion but do not actually argue that adding a party under O.C.G.A. § 9-11-21 should be refused on the grounds that it would be futile.

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[1] Former Senator David Perdue, who was a candidate in the November 2020 election and the ensuing senatorial runoff, was held to not have "community stakeholder" standing because he is not a resident of Fulton County.

Instead of arguing futility, the Respondents on p. 12 of their brief argue that the Court should first rule on the issues remanded to it by the Court of Appeals and the remaining issues on their motion to dismiss. They state at pp. 12-13 that "allowing an amendment to the parties would allow this litigation to continue when this litigation should be dismissed." The issue remanded to this Court was Petitioners' "standing in the first instance," *Favorito v. Wan*, 267 Ga.App. 642, 643 (2023), which, in light of the nature of the claim, boils down to whether they are entitled to the access to the ballots they seek based on the showings previously made in the case. Before dismissing the case for lack of standing, Judge Amero granted that relief, so that hurdle should be deemed to have already been surmounted.

The Respondents' remaining merits arguments on their motion to dismiss should be decided in proper sequence – parties and standing first, merits second. Respondents want to jump to the merits arguments prematurely, and they are not appropriate for determination on the pending motion to substitute. Mrs. Jeffords suggests that once the proposed new parties are added, the Court set a hearing on the motion to dismiss.

Respondents contend that to be allowed to add parties under O.C.G.A. § 9-11-21, the Petitioners must show that (1) there is no undue prejudice to the Respondents and (2) a justification for not naming the parties previously, citing *Dean v. Hunt*, 273 Ga.App. 552 (2005).

There is no prejudice to the Respondents, much less undue prejudice because Petitioners do not seek damages. Instead, Petitioners seek access to public records that Respondents do not want to provide and have been forced into litigation to seek an order that Respondents provide the access they are seeking, and to comply with the law. Litigation to enforce a government official's compliance with the law is not cognizable as undue prejudice for a government official – such relief is expressly contemplated by O.C.G.A. § 9-6-24, one of the pillars of the *Sons of Confederate Veterans* decision, which provides that "Where the question is one of public right and the object is to procure the enforcement of a public duty, no legal or special interest need be shown, but it shall be sufficient that a plaintiff is interested in having the laws executed and the duty in question enforced."

The absence of undue prejudice is also apparent from the fact that the proposed replacement Respondents are represented by the same County Attorney's office that has been defending the case from the beginning.[2] The County Attorney's office has substantial expertise in local government law and will bring that expertise and their working knowledge of the case to the defense of the proposed new Respondents, who will be in good hands and suffer no undue prejudice from coming into the case. In *Dean v. Hunt*, 273 Ga. App. 552, 552-53 (2005), cited by the Respondents with respect to

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[2] By contrast, the undersigned is new to the case and at a relative disadvantage to the County Attorney's office given the somewhat tortuous history of the case..

O.C.G.A. § 9-11-25, there was no prejudice because "The trial court specifically found that Groover would not be prejudiced in his defense by being added to the action at a late stage because the action had been stayed due to Hunt's bankruptcy." The Court of Appeals found no abuse of discretion on that issue. The analogy to the delays pending appeal, while this case was stayed in this court, is clear.

As for justification for not naming these parties previously, the first answer is simple – they were not members of the FCBRE when the case was filed. The second answer is that "denial of joinder is an abuse of discretion where delay is the sole reason for denial." In *Dean v. Hunt*, 273 Ga. App. at 553. This case was not even placed on active status until the Court set the hearing on the Motion to Substitute. While some time did pass between the denial of the motions to recuse and the filing of the Motion to Substitute, this was not such a delay as to preclude adding these parties. Finally, counsel for both sets of petitioners have been burdened by the intense press of other business.

Finally, it appears the Court has essentially resolved the sequence for consideration of these issues by setting a hearing on the Motion to Substitute before a hearing on the issues that Respondents contend should be decided first.

In arguing against substitution and the inapplicability of § 9-11-25, the Respondents seek to take advantage of the fact that the Respondents were named in their individual rather than official capacities. Respondents do not mention here that

they were sued in their individual capacities in conformity with the contours of sovereign immunity when this case was filed in December of 2020. That was before the January 1, 2021 effective date of the 2020 constitutional amendment partially waiving sovereign immunity, found at Ga. Const. (1983) Art. I, Sec. II, Para. V. At that time, sovereign immunity barred claims for declaratory and injunctive relief against the County or against the Respondents in their official capacities. On the other hand, it was long-standing law at the time "that sovereign immunity does not bar suits for injunctive and declarative relief against state officials in their individual capacities." *Bd. of Commissioners of Lowndes Cty. v. Mayor & Council of City of Valdosta*, 309 Ga. 899, 903, 848 S.E.2d 857, 860 (2020) (*citing Lathrop v. Deal*, 301 Ga. 408, 444 (2017)). That law was the daily bread of the County Attorney's office before the 2020 constitutional amendment.

By its terms the partial waiver in the 2020 Amendment "shall apply to past, current, and prospective acts which occur on or after January 1, 2021." While this phrasing might be viewed as somewhat cryptic, the applicability to events on or after January 1, 2021 is clear enough. The events in this case were before that effective date, so the rule of *Lathrop v. Deal* controls.

Wherefore, Caroline Jeffords respectfully prays that the Court allow the substitution or addition of the new members of the FCBRE for the old so that this case may proceed to determination on its merits.

Respectfully submitted, this 24th day of June, 2024.

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically lodged the within and foregoing ***Caroline Jeffords' Reply in Support of Motion to Substitute Parties*** with the Clerk of Court using the Odyssey eFile/GA system which will provide automatic notification to counsel of record for all parties.

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This 24th day of June, 2024.

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**OPPOSITION TO MOTION TO SUBSTITUTE PARTIES**

On May 14, 2024, three Petitioners—Garland Favorito, Trevor Terris, and Christopher Peck—filed a Motion to Substitute Parties. The motion should be denied, and this four-years-old litigation dismissed.

## I. FACTUAL AND PROCEDURAL HISTORY

### A. Petitioners Initiate Litigation in December 2020

On December 23, 2020, nine Petitioners—Garland Favorito, Michael Scupin, Trevor Terris, Sean Draime, Caroline Jeffords, Stacey Doran, Christopher Peck, Robin Sotir, and Brandi Taylor—initiated this action, filing a Petition seeking injunctive and declaratory relief related to the handling of the 2020 election against six Respondents—Mary Carole Cooney, Vernetta Keith Nuriddin, Kathleen Ruth, Aaron Johnson, Mark Wingate, and Richard Barron. The December 23, 2020 Petition caption states that all Respondents are named "in their individual

capacities." (*See* Dec. 23, 2020 Pet. at p.1; *see also id.* at ¶¶ 10-15 ("is named in [their] individual capacity")).

### B. Petitioners and the Court Alter the Parties Involved in this Litigation

On January 27, 2021, about one month after initiating this litigation, Petitioners filed a Motion to Substitute Parties, stating that "[a]t the time that the suit was filed," Petitioners had named "the correct Respondents," however, given an amendment to the Georgia Constitution, "Fulton County, the Fulton County Board of Elections and Registration, and the Clerk of the Superior Court of Fulton County, should be required to respond to this suit as entities." (Mot. to Sub. Parties & to Enter Prior Order Nunc Pro Tunc, Jan. 27, 2021, at 1).

On April 21, 2021, The Honorable Brian S. Amero, sitting by designation, entered an order stating in part "that Mary Carole Cooney, Vernetta Keith Nuriddin, Kathleen Ruth, Aaron Johnson, Mark Wingate, and Richard Barron shall be removed from the case-style and replaced with the following parties: Fulton County, the Fulton County Board of Registration and Elections, and the Fulton County Clerk of Superior and Magistrate Courts." The case caption of the Order issued that day does just that.

On April 27, 2021, Judge Amero issued an Order "that the claims of Petitioners Garland Favorito, Michael Scupin, Trevor Terris, Sean Draime, Stacey

Doran, Christopher Peck and Brandi Taylor are severed from the claims of Petitioners Caroline Jeffords and Robin Sotir."

On June 21, 2021, a "2nd Amendment [sic] Petition" was filed by seven named Petitioners (all but Jeffords and Sotir, although all nine original Petitioners are named in the case caption), which named only the new Respondents: Fulton County, the Fulton County Board of Registration and Elections, and the Fulton County Clerk of Superior and Magistrate Courts.

### C. Petitioners and the Court Alter the Parties Involved in this Litigation Again

The same day the "2nd Amendment [sic] Petition," was filed, June 21, 2021, the record also includes a filing titled "Petitioners Jeffords and Sotir's Motion to Substitute." This motion is titled a motion to substitute, but in reality is a motion to add. This can be divined from the substance of the motion, which states that Jeffords and Sotir "move to add." (Petitioners Jeffords and Sotir's Motion to Substitute, June 21, 2021, at p.1). The filing further states that Jeffords and Sotir seek "to add the members of Respondent Fulton County Board of Registration and Elections as respondents here. They are Alex Wan, Mark Wingate, Dr. Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson." (Petitioners Jeffords and Sotir's Motion to Substitute, June 21, 2021, at p.1). The same day, June 21, 2021, the docket reflects that Petitioners Jeffords and Sotir filed "Petitioners' Second Amended Petition for Declaratory and Injunctive Relief." The case caption for the filing includes only

Jeffords and Sotir as Petitioners, and names Fulton County, the Fulton County Board of Registration and Elections, and the Fulton County Clerk of Superior and Magistrate Courts as Respondents.

Days later, on June 24, 2021, this Court, again with Judge Amero presiding, entered an Order after a hearing had taken place. (*See* June 24, 2021 Order, at p.1 ("On June 21, 2021, Respondents appeared before the Court . . . .")). The Order dismissed Fulton County,[1] the Fulton County Board of Registration and Elections, and the Fulton County Clerk of Superior and Magistrate Courts from the litigation. (Order at p.1 ("[T]he Court finds that Respondents are entitled to sovereign immunity on Petitioners' constitutional claims.")). The Order then noted that Petitioners had "asked the Court to add members of the Fulton County Board of Registration and Elections in their individual capacities . . . . Although these claims against the members of the Fulton County Board of Registration and Elections in their individual capacities may be barred by official immunity, the record is not sufficiently developed to warrant such a conclusion." (Order, June 24, 2021, at p.1 and p.1 n.1). The Order concluded noting "hereafter, Alex Wan, Mark Wingate,

[1] *See* Motion for Clarification or in the Alternative, for Reconsideration, July 26, 2021, at p.1 (stating "it is unclear whether Fulton County is still a Respondent in the instant matter"); *see also* Order Granting Motion to Dismiss, Oct. 13, 2021, at p.14 (stating "because the Court's final order on April 20, 2021 fully adjudged Petitioners' ORA claims, no further relief may be accorded to Petitioners under the ORA, and therefore, Respondent Fulton County is also DISMISSED.").

Kathleen Ruth, Vernetta Nuriddin, and Aaron Johnson, are joined as Respondents to this action." (Order, June 24, 2021, at p.4).

### D. Petitioners Seek, Through Multiple Additional Filings, to Change Parties Again

On July 1, 2021, Petitioners Jeffords and Sotir filed a First Amended Motion to Add, seeking to add numerous additional Respondents, such as Ruby Freeman and Wandrea Moss.[2] On August 5, 2021, Petitioners Jeffords and Sotir filed a Proposed Order on the docket regarding their July 1, 2021 First Amended Motion to Add. On August 16, 2021, Petitioners Jeffords and Sotir filed a Proposed Amended Order on the docket regarding their July 1, 2021 First Amended Motion. On September 17, 2021, Petitioners Jeffords and Sotir withdrew their First Amended Motion that sought to add Respondents including Freeman and Moss.

Also on September 17, 2021, Jeffords and Sotir filed a Motion for Dismissal Without Prejudice of Wan, Nuriddin, and Johnson. (Petitioners Jeffords and Robbin Sotir's Motion for Dismissal Without Prejudice of Fulton County Board of Registration and Elections Board Members, Alex Wan, Vernetta Nuriddin, and Aaron Johnson, Sept. 17, 2021). Still also on September 17, 2021, the other seven Petitioners—Favorito, Scupin, Terris, Draime, Doran, Peck, and Taylor—filed a

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[2] *See, e.g.*, "Rudy Giuliani Georgia defamation appeal denied: Judge upholds multi-million-dollar ruling," Apr. 15, 2024, available at https://www.fox5atlanta.com/news/rudy-giuliani-freeman-moss-georgia-appeal-denied ("Moss and Freeman said they received a barrage of racist and graphic threats after they became the targets of a false conspiracy pushed by Giuliani and other Trump allies.").

very similar Motion for Dismissal Without Prejudice of Wan, Nuriddin, and Johnson. (The Favorito Petitioners' Motion for Dismissal Without Prejudice of Fulton County Board of Registration and Elections Board Members, Alex Wan, Vernetta Nuriddin, and Aaron Johnson, Sept. 17, 2021).

Given the age of this case and its voluminous record, Wan, Nuriddin, and Johnson's nearly three-years-old response to "Petitioners' cynical motion to dismiss" them could get lost in the shuffle. (*See* Response of Nuriddin, Wan, and Johnson to Petitioners' Motion to Dismiss Without Prejudice, Sept. 20, 2021). But given the current posture of this case, their 2021 Response is worth briefly revisiting now for its prescience. It stated: "This court should not preside over a case that is no longer an adversary legal proceeding: This proceeding has devolved into nothing other than political theatrics. . . . This court, in exercising its discretion, should decide that the proper course of action is to decide the Motion to Dismiss that is now pending and only then consider whether adding or removing parties is appropriate." (*Id.* at p.4). And so it should be today too.

One can see that Petitioners now seek to have history repeat itself, and not in a good way, from Wan, Nuriddin, and Johnson's 2021 Response. What Petitioners were doing then is frustratingly similar to what they are still doing now, as described by Wan, Nuriddin, and Johnson: "Again, this ping-pong litigation strategy in which parties are in, then out, then in—like Kurt Vonnegut characters—further delayed the

case and necessitated the filing of a new complaint which the Petitioners delayed accomplishing for nearly a month. Now the Petitioners want to continue the unnecessary volley by once again removing parties. At least for now." (*Id.* at 6). The same remains true at the present.

### E. This Court Grants a Motion to Dismiss, the Case is Appealed, and the Case Returns to Fulton County Superior Court

On October 13, 2021, Judge Amero ordered the case dismissed in response to a motion to dismiss filed by Respondents Wan, Nuriddin, and Johnson, who had "argu[ed], *inter alia*, Petitioners lack standing to bring their state constitutional equal protection and state constitutional due process claims." (Order Granting Motion to Dismiss, Oct. 13, 2021, at p.1). In that Order, Judge Amero found that Petitioners Ruth and Wingate "similarly lack standing as to the other two Respondents," and dismissed the case. The "inter alia" matters here: Wan, Nuriddin, and Johnson argued many other grounds to dismiss the litigation that Judge Amero did not address. (Respondents Alex Wan, Vernetta Nuriddin and Aaron Johnson's Motion to Dismiss, Aug. 12, 2021, at pp.10-23).

Petitioners appealed and the Georgia Court of Appeals affirmed. *Favorito v. Wan*, 364 Ga. App. 745 (2022). The Supreme Court of Georgia granted certiorari, vacated the opinion of the Georgia Court of Appeals, and remanded with direction to reconsider in light of *Sons of Confederate Veterans v. Henry County Board of Commissioners*, 315 Ga. 39 (2022). Based in part on that decision, in the appeal of

the present case, the Georgia Court of Appeals on May 11, 2023, affirmed in part, vacated in part, and remanded the case with direction. The Georgia Court of Appeals stated: "As for appellants Favorito, Jeffords, Terris, and Peck, they all alleged in the petitions that they are residents of Fulton County. Accordingly, we vacate the dismissals of their claims and remand to the trial court for further consideration in the first instance of their standing in light of *Sons of Confederate Veterans*." *Favorito v. Wan*, 367 Ga. App. 642, 643 (May 11, 2023). On May 12, 2023, upon remand, Judge Amero transferred the case to Judge McBurney. Petitioners moved to recuse Judge McBurney, which was denied.

On May 14, 2024, Petitioners filed the motion at issue here.

## II. ARGUMENT AND CITATIONS OF AUTHORITY

Petitioners' Motion to Substitute lacks legal and factual merit and should be denied. In so doing, this Court should further examine this case in its totality and dismiss it in its entirety.

### A. Legal Framework

#### 1. Substitution of parties and O.C.G.A. § 9-11-25.

The Georgia Code discusses the substitution of parties most directly in O.C.G.A. § 9-11-25, titled "Substitution of parties." There are four categories in this code section for which substitution is proper: two, death (O.C.G.A. § 9-11-25(a)) and incompetency (O.C.G.A. § 9-11-25(b)), are not cited by Petitioners in the

relevant motion. Petitioners state they have "file[d] this motion to substitute parties pursuant to Ga. Code Ann. § 9-11-25 (c) and (d)." (Mot. to Sub. Parties at p.1).

O.C.G.A. § 9-11-25(c) is titled "Transfer of interest." It reads, in its entirety: "In case of any transfer of interest, the action may be continued by or against the original party unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a) of this Code section." *Id.*

O.C.G.A. § 9-11-25(d) is titled "Public officers; death or separation from office," and has two subsections, (1) and (2). Both subsections relate only to public officers who are sued in their official capacities. O.C.G.A. § 9-11-25(d)(1) begins: "When a public officer is a party to an action in his official capacity . . . ." It deals with the substitution of official-capacity public officers. *Id.* Similarly, O.C.G.A. § 9-11-25(d)(2) begins: "When a public officer brings or defends an action in his official capacity . . . ." It deals with the description/naming of official-capacity public officers. *Id.*

**2. Misjoinder and nonjoinder of parties and O.C.G.A. § 9-11-21.**

O.C.G.A. § 9-11-21 is titled "Misjoinder and nonjoinder of parties." It reads, in its entirety: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own

initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately." *Id.*

**B. What Petitioners Claim in their Motion**

Petitioners claim that this Court should allow the substitution of certain parties in this case under either O.C.G.A. §§ 9-11-25(c) or 9-11-25(d). Petitioners argue: "Under the unusual circumstances of this case, the substitution of parties could fall under either category." (Mot. to Sub. Parties at p.2). Immediately following that claim, Petitioners write: "Alternatively, the Court can permit the addition of the new Respondents, and the subtraction of the old Respondents, under O.C.G.A. § 9-11-21." (Mot. to Sub. Parties at p.2). For the reasons detailed below, Petitioners' motion should be denied.

**C. The Motion Should be Denied Because it Lacks Legal Merit**

**1. O.C.G.A. § 9-11-25(d) is inapplicable.**

O.C.G.A. § 9-11-25(d) only applies to public officials sued in their official capacities and, therefore, is inapplicable here. Petitioners sued no official in their official capacity, but only sued Respondents in their individual capacities. (*See* Dec. 23, 2020 Pet. at p.1; *see also id.* at ¶¶ 10-15 ("is named in [their] individual capacity"); *see also* Mot. to Substitute Parties, *entire*).

O.C.G.A. § 9-11-25(d) refers only to parties sued in their "official capacity." *See* O.C.G.A. §§ 9-11-25(d)(1) and 9-11-25(d)(2). Therefore, Petitioners cannot use

O.C.G.A. § 9-11-25(d), an act about substituting parties sued in their official capacities, to substitute parties in this case, where Respondents have only sued parties in their individual capacities. "Georgia law provides that the express mention of one thing in an Act or statute implies the exclusion of all other things." *Allen v. Wright*, 282 Ga. 9, 13 (2007) (quoting *Abdulkadir v. State*, 279 Ga. 122, 123 (2005)). Therefore, Petitioners' reliance on O.C.G.A. § 9-11-25(d) is misplaced.

**2. O.C.G.A. § 9-11-25(c) is inapplicable.**

O.C.G.A. § 9-11-25(c) does not allow for the substitution of parties when one public official, sued in their individual capacity, leaves office and another comes in. Therefore, it is inapplicable here.

O.C.G.A. § 9-11-25(c) deals with the "transfer of interest." No original party's "interest" has been "transferred" to anyone else. Petitioners do not allege any transfer of interest nor explain what interests were (and were not) supposedly transferred, when the interests were supposedly transferred, and by what provision of law the interests were supposedly transferred. And, perhaps most importantly, the Supreme Court of Georgia has recently clarified that a public official sued in their individual capacity does not transfer their interest to a new public official who assumes that office. *See Riley v. Georgia Association of Club Executives*, 313 Ga. 364, 365 (2022) ("Because GACE sued Riley in her individual capacity, Crittenden,

the current Revenue Commissioner, cannot be automatically substituted in Riley's place.").

Because Petitioners brought this action against Respondents in their individual capacities, and there has been no transfer of interest, Petitioners cannot properly seek to substitute parties using O.C.G.A. § 9-11-25(c).

**3. O.C.G.A. § 9-11-21 is inapplicable.**

O.C.G.A. § 9-11-21 allows courts to drop or add parties, but it has a limit that applies here: courts should not allow amendment under O.C.G.A. § 9-11-21 if such amendment would be futile. *See Preferred Women's Healthcare, LLC v. Sain*, 348 Ga. App. 481, 482 (2019) ("Generally, a trial court's decision as to whether a party to a pending lawsuit should be permitted to add a party to the suit lies in the court's sound discretion and will be overturned on appeal only upon a showing of abuse of that discretion." (quotation marks omitted)); *cf. Hall v. United Insurance Company of America*, 367 F.3d 1255, 1262-63 (11th Cir. 2004) ("Under *Foman* [*v. Davis*, 371 U.S. 178, 182 (1962)], however, a district court may properly deny leave to amend the complaint under Rule 15(a) when such amendment would be futile."). Here, deciding both the outstanding issues in Respondents' motion to dismiss, as well as the issue ordered to be considered by the Georgia Court of Appeals, before deciding Petitioners' motion to alter the parties would be the better course of action. This is

because allowing an amendment to the parties would allow this litigation to continue when this litigation should be dismissed.

One quick note before addressing the outstanding issues raised by Respondents in their motion to dismiss and the issue this Honorable Court was ordered to consider by the Georgia Court of Appeals. To succeed on an O.C.G.A. § 9-11-21 motion, Petitioners have at least two burdens: (1) to show that the new Respondents will not be unfairly prejudiced; and (2) to demonstrate any excuse or justification for not naming these parties previously. *Dean v. Hunt*, 273 Ga. App. 552, 552-53 (2005). Petitioners have not said anything about prejudice to the new Respondents in their motion, let alone explained how the proposed new Respondents would not be unfairly prejudiced. Nor have Petitioners said anything about why it has taken until May 2024 to file their motion, let alone offered a reasonable explanation for the delay. For these reasons, the motion should be denied. *See Dean*, 273 Ga. App. at 552-53.

### 4. Respondents' Motion to Dismiss is Ripe and Should be Granted.

Respondents raised the issue of standing in their motion to dismiss. But the Georgia Court of Appeals remanded this case "for further consideration in the first instance of [Respondents'] standing." *Favorito*, 367 Ga. App. at 643. That

consideration has not happened yet on the record, and such consideration should happen before deciding Respondents' "Motion to Substitute Parties."

There are several additional issues raised previously by Respondents in their motion to dismiss that have not been addressed by this Court, and those issues should also be addressed before deciding Respondents' "Motion to Substitute Parties." In the motion to dismiss filed on August 12, 2021, the following were the arguments advanced:

- "The Petitioners Lack Standing to File this Lawsuit;
- 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 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;
- Injunctive Relief Which Only Seeks To Enjoin Illegal Conduct is not the Proper Basis for Granting an Injunction;
- 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 Individual Defendants Are Cloaked in Official Immunity and the Complaints Fail to Pierce the Immunity."

(Respondents Alex Wan, Vernetta Nuriddin and Aaron Johnson's Motion to Dismiss, pp.5-21).

If this case is not dismissed after consideration of the issue raised by the Georgia Court of Appeals in its remand, as well as consideration of all issues raised previously by Respondents in their motion to dismiss, only then should there be a determination on Petitioners' motion to substitute. Even if this Court does reach the issue of substitution, it should nonetheless be denied for the reasons detailed above.

## CONCLUSION

Petitioners have not advanced any arguments sufficient under Georgia law to, yet again, alter the parties involved in this action. Therefore, Petitioners' motion should be denied. The legal arguments supporting the denial of Petitioners' motion should also lead to this litigation being dismissed.

Respectfully submitted this 13th day of June, 2024.

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**IN THE SUPERIOR COURT OF FULTON COUNTY**
**STATE OF GEORGIA**

| | |
|---|---|
| GARLAND FAVORITO, et al.,<br><br>Petitioners,<br><br>v.<br><br>ALEX WAN, et al.,<br><br>Respondents. | CIVIL ACTION FILE NO.:<br>2020CV343938 |

## CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically filed and served **OPPOSITION TO MOTION TO SUBSTITUTE PARTIES** using the Odyssey e-File GA system, which should automatically send email notification of such filing to all attorneys of record and which constitutes effective service on all attorneys of record. I have also sent a courtesy copy by email to Todd A. Harding at his official email address of kamikazehitman@comcast.net.

This 13th day of June, 2024.

/s/ Richard Caplan
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IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

**GARLAND FAVORITO, TREVOR TERRIS,**
**CAROLINE JEFFORDS, AND**
**CHRISTOPHER PECK,**
**PETITIONERS,**

**v.** **CIVIL ACTION NO.: 2020CV-343938**

**ALEX WAN, VERNETTA KEITH**
**NURIDDIN, KATHLEEN RUTH,**
**AARON JOHNSON, AND**
**MARK WINGATE, in their individual capacities,**
**RESPONDENTS.**

## MOTION TO SUBSTITUTE PARTIES

**COME NOW, PETITONER GARLAND FAVORITO, PETITIONER TREVOR TERRIS, AND PETITIONER CHRISTOPHER PECK** (hereafter Favorito Petitioners), by and through their attorney of record, and file this motion to substitute parties pursuant to Ga. Code Ann. §9-11-25 (c) and (d) and move to substitute the following Respondents: Alex Wan, Vernetta Keith Nuridden, Kathleen Ruth, and Mark Wingate, in their individual capacities, as Respondents, as follows:

1.

Alex Wan, Vernetta Keith Nuridden, Kathleen Ruth, and Mark Wingate, in their individual capacities, as these Respondents are no longer members of the Fulton County Board of Registration and Elections.

2.

Kathy Woolard is a current member of the Fulton County Board of Registration and Election and is the successor for Respondent Alex Wan, in his individual capacity.

3.

Teresa Crawford is a current member of the Fulton County Board of Registration and Election and is the successor for Respondent Vernetta Keith Nuridden, in her individual capacity.

4.

Michael Heekin is a current member of the Fulton County Board of Registration and Election and is the successor for Respondent Kathleen Ruth, in her individual capacity.

5.

Respondent Aaron Johnson is a current member of the Fulton County Board of Registration and Election.

6.

Julie Adams is a current member of the Fulton County Board of Registration and Election and is the successor for Respondent Mark Wingate, in his individual capacity.

7.

Accordingly, the Favorito Petitioners request to substitute those Parties as Respondents, in the place of the individuals currently named.

8.

The Favorito Petitioners ask that the orders already entered by this Court in this case be entered against these substituted parties nunc pro tunc, as of the original date of entry of the orders.

9.

Georgia law permits the substitution of parties when there is a "transfer of interest" or when a public officer "dies, resigns or otherwise ceased to hold office:" (c) Transfer of interest. In case of any transfer of interest, the action may be continued by or against the original party unless the court, upon motion, directs the person to whom the interest is transferred to be substituted in the action or joined with the original party. Service of the motion shall be made as provided in subsection (a) of this Code section. (d) Public officers; death or separation from office. (1) When a public officer is a party to an action in his official capacity and during its pendency dies, resigns, or otherwise ceases to hold office, the action does not abate, and his successor is automatically substituted as a party. Proceedings following the substitution shall be in the name of the substituted party, but any misnomer not affecting the substantial rights of the parties shall be disregarded. An order of substitution may be entered at any time, but the omission to enter such an order shall not affect the substitution. O.C.G.A. § 9-11-25. Under the unusual circumstances of this case, the substitution of parties could fall under either category.

10.

Alternatively, the Court can permit the addition of the new Respondents, and the subtraction of the old Respondents, under O.C.G.A. § 9-11-21: "Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on

motion of any party or of its own initiative at any stage of the action and on such terms as are just."

**WHEREFORE, THE FAVORITO PETITIONERS** pray:

a). that the Court **CONDUCT** a hearing upon the motion to substitute parties;

b). that the Court **GRANTS** the motion to substitute parties;

c). that the Court **ORDERS** the requested substitution of Parties;

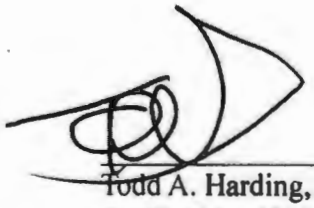
d). that the Court **ORDERS** the caption to be amended to reflect the Court's order;

e). that the Court **ORDERS** the Favorito Petitioners to amend their petition to reflect these substitutions within fifteen (15) days of the entry of the order to substitute parties; **AND**

f). for any other relief the Court **DEEMS** just and proper.

Respectfully submitted this the 14th day of May, 2024.

**HARDING LAW FIRM, LLC**



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**IN THE SUPERIOR COURT OF FULTON COUNTY**
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**RESPONDENTS.**

## CERTIFICATE OF SERVICE

**COME NOW, THE FAVORITO PETITIONERS**, notifies the Court that they have served a copy of **MOTION TO SUBSTITUTE PARTIES** via email to the contacts listed in the Odyssey Automated service system.

Respectfully submitted this the 14th day of May, 2024.

**HARDING LAW FIRM, LLC**

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