IN THE COURT OF APPEALS
FOR THE STATE OF GEORGIA

GARLAND FAVORITO et al.,	)	
	)	
Appellants,	)	
	)	
v.	)	CASE NO.
	)	A22A1097
	)	
	)	
ALEX WAN et al.,	)	
	)	
Appellees.	)	

BRIEF OF APPELLEE FULTON COUNTY

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I. INTRODUCTION

Appellants[1] initially brought this case against members of the Fulton County Board of Registration and Elections and the Director of Elections, in Fulton County. The case was a request for declaratory and injunctive relief seeking access and the ability to scan all absentee ballots received for the November 3, 2020 election. Appellants contended that the manner in which the hand count audit was carried out and the processing of absentee ballots on November 3, 2020 were violations of state law and violations of the Due Process and Equal Protection clauses of the Georgia Constitution. On October 13, 2021, the Superior Court of Fulton County entered an Order dismissing Petitioners' claims against all members of the BRE and Fulton County for lack of standing.[2]

Appellants are appealing the October 13, 2021 Order of the Superior Court, and the Court's holding that the Appellants lacked standing to bring the underlying action. [Brief of Appellant, P. 2]. It must be noted that although Appellants refer to

[1] Petitioners Caroline Jeffords and Robbin Sotir in the underlying action are the Appellants in this appeal.

[2] On June 24, 2021, the Superior Court granted Fulton County's motion to dismiss on the basis of sovereign immunity. [Vol. 4, R – 1109 - 1112]. Accordingly, Appellee Fulton County is not a party to this appeal, as assuming arguendo, this Court were to agree with Appellants with respect to standing and grant their appeal; Fulton County would still remain dismissed from the case. *Id*.

"Fulton County" as the Appellee in this case, the only Appellees to which the "standing" portion of the October 13, 2021 Order refers are Alex Wan, Vernetta Nurridin, Aaron Johnson, Kathleen Ruth and Mark Wingate. These are the only Appellees against whom claims were dismissed due to lack of standing. The October 13, 2021 Order provides:

> Accordingly, the Court concludes the Petitioners have not alleged a particularized injury, and therefore, do not have standing.
>
> Having considered the evidence submitted, the arguments of counsel, and the record as a whole in the light most favorable to Petitioners, it is hereby **ORDERED** that the motion to dismiss by Respondents Alex Wan, Vernetta Nurridin, and Aaron Johnson is **GRANTED**.
>
> **IT IS FURTHER ORDERED** that, due to the similar lack of standing, the claims against Respondents Kathleen Ruth, and Mark Wingate be, and hereby are, also DISMISSED.
>
> **IT IS FURTHER ORDERED** that, 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.**

[Vol. 7, R – 2024, 2025].

Fulton County, a respondent in the underlying action, was not dismissed due to the lack of "standing." Consequently, Fulton County is not subject to Appellants' appeal, which is based wholly upon the issue of "standing" in the Superior Court's Order of October 13, 2021.

II. JURISDICTION & JUDGMENT APPEALED

Appellants have appealed the Superior Court of Fulton County's Order, granting Fulton County's Motion to Dismiss, entered on October 13, 2021. This Court has jurisdiction to review the appeal of this case, as Appellants has sought an interpretation of the Equal Protection and Due Process clauses of the Constitution of Georgia and the Appellants are seeking equitable relief. *See* Ga. Const. art. 6, sec. VI, para. II and para. III.

III. STATEMENT OF THE CASE

On December 23, 2020, Garland Favorito, Michael Scupin, Trevor Terris, Sean Draime, Caroline Jeffords, Stacey Doran, Christopher Peck, Robin Sotir, and Brandi Taylor filed a Petition for Declaratory and Injunctive Relief against (members of the Fulton County Board of Registration and Elections) Mary Carole Cooney, Vernetta Keith Nuriddin, Kathleen Ruth, Aaron Johnson, Mark Wingate, and Richard Barron, in their individual capacities, seeking injunctive and declaratory relief ("Original Petition"). [Vol. 1, R – 6]. On January 13, 2021, Petitioners filed their First Amended Petition for Declaratory and Injunctive Relief ("Amended Petition") (collectively, with the Original Petition, the "Petition"). [Vol. 1, R – 228]. The Petition alleged the following causes of action:

Count I: Declaratory Judgment for Violation of State Equal Protection Claim (Same County);

Count II: Declaratory Judgment for Violation of State Due Process Claim (Same County);

Count III: Declaratory Judgment for Violation of State Equal Protection Claim (Within State);

Count IV: Declaratory Judgment for Violation of State Due Process Claim (Within State);

Count V: Declaratory Judgment for Violation of State Equal Protection Claim (Third Party);

Count VI: Declaratory Judgment for Violation of State Due Process Claim (Third Party);

Count VII: Temporary Injunction;

Count VIII: Enforcement of Open Records Request for Interim Results by Garland Favorito;

Count IX: Enforcement of Open Records Request for Inspection of Ballots by Garland Favorito; and

Count X: Enforcement of Open Records Request for Inspection of Ballots by Caroline Jeffords.

Following the filing of the Petition, the Petitioners in the underlying case sought to substitute Original Respondents with Fulton County, the Fulton County Board of Elections and Registration, and the Clerk of the Superior Court of Fulton County. [Vol. 2, R – 302]. The Superior Court granted this request and entered an Order substituting the Original Respondents with the Substituted Respondents. [Vol. 3, R – 641].

After a hearing on June 21, 2021, the Court granted the Motions to Dismiss filed by the Clerk, Fulton County and the Board of Registration and Elections, ruling that they all are protected by sovereign immunity. [Vol. 4, R – 1109 - 1112]. At that time, the Court also granted the Petitioners' motion to add the individual members of the Board of Registration and Elections back into the case. Board of Registration and Elections Members, Aaron, Johnson, Alex Wan and Vernetta Nuriddin,[3] filed a Motion to Dismiss.

On October 13, 2021, the Court entered an Order dismissing Appellants' claims against all members of the Board of Registration and Elections for lack of standing and reiterating that there were no outstanding claims against Fulton County. [Vol. 7, R – 2012].

[3] Remaining Board of Registration and Elections members, Mark Wingate and Dr. Kathleen Ruth did not oppose the requested "audit".

IV. ENUMERATION OF ERRORS

The lower court did not err in dismissing Appellants' petition containing claims of due process and equal protection violations under the Georgia Constitution of the State of Georgia, Article VI, Section VI, Paragraphs II & III and O.C.G.A. § 21-2-500(a) under the Georgia Elections Code, for lack of standing. The standard and law applied by the lower court was proper and the decision of the lower court was proper and should be upheld.

V. ARGUMENT AND CITATION TO AUTHORITY

The lower court did not err in dismissing Appellants' petition containing claims of due process and equal protection violations under the Georgia Constitution of the State of Georgia, Article VI, Section VI, Paragraphs II & III and O.C.G.A. § 21-2-500(a) under the Georgia Elections Code, for lack of standing.

1. APPELLANTS ARE INCORRECT IN THEIR ASSERTION THAT STANDING IS NOT A REQUIREMENT UNDER THE GEORGIA CONSTITUTION.

"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); *see also*, e.g., *State v. Alford*, 347 Ga. App. 208, 211, (2018). To have standing, a party seeking relief must show: (1) he has suffered "an injury in fact that is (a) concrete

and particularized and (b) actual or imminent, not conjectural or hypothetical"; (2) a causal connection between the injury and the challenged wrong; and (3) "it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *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). Stated another way, "the foremost element of standing is injury in fact, which requires the plaintiff to show a harm that is both concrete and particularized and actual or imminent, not conjectural or hypothetical. *Spokeo, Inc., v. Robins*, 136 S. Ct. 1540, 1547–48 (2016).

Appellants raised six separate Georgia constitutional counts. However, because Appellants could not and cannot establish standing as to any of these causes of action, the Superior Court lacks jurisdiction to consider the merits of any of their claims. Under Georgia law, to establish injury-in-fact sufficient to establish standing, Plaintiff must show he suffered "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560.

As the Trial Court held in this case, Appellants have shown no concrete and particularized injury to their own, individual right to vote. Instead, they have asserted

generalized grievances against Appellees on behalf of all Georgia voters, which courts repeatedly have held insufficient to establish standing.

a. Under Georgia law, Appellants do not have standing to bring Due Process claims.

Appellants' due process claims —premised on the purported "substantial likelihood" of the introduction of "fraudulent and fabricated ballots"— fail. As a threshold matter, to succeed on a procedural due process claim, a plaintiff must demonstrate that he has a "private interest that will be affected by the official action." *Mathews v. Eldridge*, 424 U.S. 319, 334–47 (1976). Speculation about somone's ballots, not necessarily is insufficient to be a "private interest" that has been or will be affected.

The Supreme Court of Georgia has held that Georgia's due process clause "is in substantial accord with the fourteenth amendment to the Constitution of the United States." *Frank v. State*, 142 Ga. 741, 83 S.E. 645, 649–50 (1914). The due process clause under the Georgia State Constitution has been interpreted as providing the same procedural rights as the federal due process clause. *Camden Cty. v. Haddock*, 271 Ga. 664, 665 (1999). Appellants' claims under the due process clause of the Georgia Constitution fail.

b. Appellants do not have standing to bring Equal Protection claims.

The Supreme Court of Georgia has held that Georgia's equal protection clause "is generally co-extensive with and substantially equivalent to" the equal protection clause of the Fourteenth Amendment, and "we apply them as one." *Rhoden v. Athens Clarke-County Board of Elections*, 310 Ga. 266, 277 (2020) *citing Democratic Party of Ga., Inc. v. Perdue*, 288 Ga. 720, 728 (2), (2011). Thus, just as the Appellants' claims under the equal protection clause of the Fourteenth Amendment fail, so too do their claims under the equal protection clause of the Georgia Constitution.

The prohibition against generalized grievance also applies to equal protection claims. *United States v. Hays*, 515 U.S. 737, 743 (1995) ("The rule against generalized grievances applies with as much force in the equal protection context as in any other"). Appellants do not differentiate their alleged injury from any one of Georgia's more than seven million registered voters who would seemingly have standing to assert these claims. This is a textbook generalized grievance, as courts which have addressed standing in vote dilution cases arising out of the possibility of unlawful or invalid ballots being counted, as Appellants have argued here, have said that this harm is unduly speculative and impermissibly generalized because all voters in a state are affected, rather than a small group of voters. *See, e.g., Donald J. Trump for President, Inc. v. Cegavske*, 488 F.Supp.3d 993, 999–1000, (D. Nev. 2020). *See also Moore v. Circosta*, No. 1:20-cv-911, 2020 WL 6063332 (M.D.N.C. Oct. 14, 2020).

Contained in their claims of equal protection violations, Appellants also put forth a theory of vote dilution; "[by] allowing illegal ballot processing, the Respondents, by and through their own misconduct or the negligent supervision of their agents they allow the disenfranchisement or dilution of qualified Georgia electors." [Vol. 1, R – 22].

Appellants' vote dilution theory in support of their equal protection claim is based upon their speculation that county elections officials may have allowed some counterfeit absentee ballots to be counted, which in turn dilutes their vote. This is not a recognized theory of vote dilution. Vote dilution under the Equal Protection Clause is concerned with votes being weighed differently. *See Rucho v. Common Cause*, 139 S. Ct. 2484, 2501, 204 (2019) ("[V]ote dilution' in the one-person, one-vote cases refers to the idea that each vote must carry equal weight.") Appellants' equal protection claim is not akin to gerrymandering cases in which votes were weighted differently. *See Baker v. Carr*, 369 U.S. 186 (1962). Instead. Appellants' claims are based upon alleged violations of state law that does not cause unequal treatment. However, "if dilution of lawfully cast ballots by the 'unlawful' counting of invalidly cast ballots were a true equal-protection problem, then it would transform every violation of state election law...into a potential federal equal-protection claim." *Jacobson v. Florida Secretary of State*, 974 F.3d 1236, 1247 (11th Cir. 2020) (rejecting partisan vote dilution claim). Appellants claims fail as they

have not and cannot allege a particularized injury and as a result, do not have standing. The Trial Court's decision must be upheld.

c. The Superior Court did not err in applying federal law and principles in this case.

As demonstrated above, the Supreme Court of Georgia has held that the due process and equal protection clauses of the Georgia Constitution are analogous to those under the United States Constitution and have been interpreted and applied in that manner. Appellants argue that the Superior Court erred in applying federal law to their state claims. However, in their misguided attempt to do so, they rely heavily on federal case law. [*See* Brief of Appellant, PP. 16-18] *citing Curling v. Kemp*, 334 F. Supp. 3d 1303 (N. D. Georgia 2018); *Common Cause Georgia v. Kemp,* 347 F. Supp. 3d 1270 (N.D. Ga. 2018); *Fair Fight Action, Inc. v. Raffensperger,* 413 F. Supp. 3d 1251 (N.D. Ga. 2019).

Although the Appellants attempt to distinguish the case of *Wood v. Raffensperger*, 981 F.3d 1307 (11th Cir. 2020) from their own claims, it should be noted that in support of their Petition, the Appellants filed Exhibits "A-U" into the record of this case. Contained in these documents are several affidavits (Exhibits C, E, F, G and H) that were created for and relied upon by Plaintiff in the *Wood v. Raffensperger*, District Court case. [Vol. 1, R – 45- 122].

Based, in part, upon these very affidavits, the Court found that the Plaintiff was asserting a generalized grievance and lacked standing to assert equal protection, due process or vote dilution claims under the United States Constitution against the Georgia Secretary of State and the State Election Board in conducting the November 2, 2020 General Election. [Vol. 1, R – 45- 122].

It is clear from Appellants' own assertions and briefing that the Superior Court properly applied federal principles and case law to the Appellants' claims. Furthermore, the Supreme Court of Georgia, by relying on federal precedent, has indicated that it is proper to analyze cases brought pursuant to the Georgia Constitution's due process and equal protection clauses using federal principles and precedent. *Haddock* and *Purdue*, *supra*.

2. **APPELLANTS DO NOT HAVE A STATUTORY RIGHT TO ACCESS BALLOTS.**

a. Appellants are not Entitled to the Relief Sought in this Case.

Appellants' contentions that this case is not an election contest are incongruent with their claims. Appellants are not asking the Superior Court to overturn any election results, but by alleging there were counterfeit ballots that were improperly and illegally counted, Appellants are challenging the results of the November 2020 Election. Appellants are alleging that illegal ballots were received and counted, a matter redressed by an election contest and Appellants have continuously alleged

misconduct and illegal behavior by the Fulton County election officials which is another matter remedied by an election contest.

All of these claims are necessary to and part of cause of action known as an election challenge. O.C.G.A. §§ 21-2-520 et seq. An election contest is the only cause of action granted by the laws of Georgia for the alleged grievances at issue in this case. Appellants' attempt to call this lawsuit challenging election results by another name is a thinly, veiled disguise as a private right of action and is insufficient. This is an election contest in which Appellants failed to follow the statutory process and was then properly dismissed.

Appellants also failed to avail themselves of another legislatively approved remedy afforded to them under Georgia law if they thought there were mistakes or errors not apparent on the face of the returns. Appellants waived the relief requested in this case by failing to do so. In particular, Appellants ignore that O.C.G.A. § 21-2-495(d) allows a losing candidate for a federal office or three electors to request a recount or recanvas of votes any time prior to the certification of the results when it appears that a discrepancy or error, although not apparent on the face of the returns, has been made.

With respect to challenging the results of an election, the Georgia Supreme Court stated that "[i]t is not sufficient to show irregularities which simply erode confidence in the outcome of the election. Elections cannot be overturned on the

basis of mere speculation." *Meade v. Williamson*, 293 Ga. 142 (2013) (emphasis added) (quoting *Middleton v. Smith*, 539 S.E.2d 163 (Ga. 2000)).

Appellants have offered no legal or factual support to justify their request for declaratory relief. Georgia law provides a process to challenge an election where alleged illegal votes have been cast and improprieties by election officials have taken place. O.C.G.A. § 21-2-520. Georgia law also already provides the mechanisms for a recount of votes cast in a presidential election. O.C.G.A. § 21-2-495. Further, as opined by the Attorney General of Georgia in 1990, interpreting O.C.G.A. § 21–2–406 and O.C.G.A. § 21–2–384(d), inspection of returned absentee ballots is not allowed under Georgia law. *1990 Ga. Op. Atty. Gen. 60 (Ga. A.G.), Ga. Op. Atty. Gen. No. 90-31, 1990 WL 487258*. Even if Plaintiff's claims were supported, the requested remedy of a ballot inspection is incongruous to anything allowed or provided for by Georgia or federal laws as they have no private right to conduct recounts or ballot inspections in Georgia. For the substantive due process clause to be implicated, the situation "*must go well beyond the ordinary dispute over the counting and marking of ballots*." *Curry v. Baker*, 802 F.2d 1302, 1315 (11th Cir. 1986). (Emphasis added).

Moreover, Georgia law does not provide private individuals with an enforceable "private interest" in conducting a recount or ballot inspection. Rather, Georgia law provides that *candidates* and *political parties* may send "two

representatives to be present" at a recount. *See* O.C.G.A. § 21-2-495(a). Thus, Appellants are not due any process as a form of relief.

b. Appellants are Incorrect in their Assertion that Standing is not a Requirement with Respect to their Request Pursuant to O.C.G.A. § 21-2-500(a).

Contrary to Appellants' assertions, O.C.G.A. 21-2-500(a) does not bestow upon them a right to access the ballots and related elections materials which they seek. O.C.G.A. § 21-2-500(a) provides:

> Immediately upon completing the returns required by this article, in the case of elections other than municipal elections, the superintendent shall deliver in sealed containers to the clerk of the superior court or, if designated by the clerk of the superior court, to the county records manager or other office or officer under the jurisdiction of a county governing authority which maintains or is responsible for records, as provided in Code Section 50-18-99, the used and void ballots and the stubs of all ballots used; one copy of the oaths of poll officers; and one copy of each numbered list of voters, tally paper, voting machine paper proof sheet, and return sheet involved in the primary or election. In addition, the superintendent shall deliver copies of the voting machine ballot labels, computer chips containing ballot tabulation programs, copies of computer records of ballot design, and similar items or an electronic record of the program by which votes are to be recorded or tabulated, which is captured prior to the election, and which is stored on some alternative medium such as a CD-ROM or floppy disk simultaneously with the programming of the PROM or other memory storage device. ***The clerk, county records manager, or the office or officer designated by the clerk shall hold such ballots and other documents under seal, unless otherwise directed by the superior court,*** for at least 24 months, after which time they shall be presented to the grand jury for inspection at its next meeting. Such ballots and other documents shall be preserved in the office of the clerk, county records manager, or officer designated by the clerk until the

> adjournment of such grand jury, and then they may be destroyed, ***unless otherwise provided by order of the superior court.*** [emphasis added].

Pursuant to this statute, the materials are (as in this case) under seal with the Clerk of the Fulton County Superior Court. There they kept "*unless otherwise directed by the Superior Court."* Appellants have sought an order directing that they be allowed access to the ballots and related elections materials in this case. *See* Petition Counts VIII – X. [Vol. 1, R – 6]. However, they are not entitled to that which they seek, as the Georgia Legislature has codified the precise scope and method by which the public may file an Open Records Act request and then seek compliance with that request. OCGA § 21-2-51; § 21-2-72; § 50-18-71(k). The Legislature expressly provided that scanned copies of ballots are subject to the Open Records Act and did *not* provide that the actual original ballots are subject to the Open Records Act, or subject to inspection. That Legislative decision which reflects the 2021 consensus of the legislators and governor who were all well aware of the controversy surrounding the 2020 election, should be honored by this Court, not ignored as the Appellants request.

The Appellants have sought more than the statute allows. And for that, they must have standing.

> [A] litigant has standing to challenge a statute, "even on First Amendment grounds and even when seeking only a declaratory judgment, 'only if the law has an adverse impact on that litigant's own rights,' which means that the litigant must establish a threat of 'injury

> in fact' that is 'actual and imminent, not conjectural or hypothetical.'" Sentinel Offender Svcs., LLC v. Glover, 296 Ga. 315, 323 (1) n.16, 766 S.E.2d 456 (2014) (citing Manlove v. Unified Govt. of Athens-Clarke Cnty., 285 Ga. 637, 680 S.E.2d 405 (2009).

Parker v. Leeuwenburg, 300 Ga. 789, 794, 797 S.E.2d 908, 912 (2017) (Peterson, J., dissenting). *See also Smith v. DeKalb,* 288 Ga.App. 574 (2007) (holding that a citizen was not entitled, under the Open Records Act, to a copy of the CD-ROM included with the elections materials in the clerk of court's possession). In that case, the Court of Appeals held that because the Superior Court had not ordered the seal lifted (pursuant to O.C.G.A. § 21-2-500(a)) as to the material the Plaintiff sought, the material was exempt from inspection by the general public and was not an open record subject to disclosure. *Id*. at 472. Further, standing was raised as a threshold matter in *Smith.* The Court of Appeals was asked to decide whether the Secretary of State had standing in pursuing injunctive relief, pursuant to the Open Records Act and O.C.G.A. § 21-2-500(a). The court held that the Secretary of State did indeed have standing.

As demonstrated above, the Superior Court applied the proper analysis in determining whether Appellants had standing in order to access the ballots as they have sought in this case. Appellants do not shave standing and do not have a right to access the ballots in this case.

VI. CONCLUSION

As explained fully herein, Appellee Fulton County is not a party to this appeal, as Fulton County was not dismissed on the issue of standing, the only issue appealed to this Court. Notwithstanding, Appellees have demonstrated that the Superior Court applied the proper standard when determining whether Appellants had standing to bring the underlying action and properly dismissed the case. The trial court's ruling must be upheld.

Accordingly, Appellees plead that this Honorable Court affirm the Trial Court's granting of Appellees' motion to dismiss.

Respectfully submitted on this 18th day of April, 2022.

This submission is in compliance with Rule 24 regarding margins and type size – Times New Roman 14-point font and spacing; and word limit.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day filed the foregoing **BRIEF OF APPELLEE FULTON COUNTY** with the Clerk of Court using the SCED online system and served opposing counsel by depositing a copy of the same in the United States Postal Service with adequate First-Class Mail postage thereon and addressed as follows:

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