IN THE SUPREME COURT
STATE OF GEORGIA

PAUL ANDREW BOLAND,

Appellant,

v.

BRAD RAFFENSPERGER, in his official capacity as Georgia Secretary of State, et al.,

Appellees.

CASE NO.: S21M0565

APPEAL TAKEN FROM CIVIL ACTION CASE NO.: 2020CV343018

APPELLANT BRIEF

KURT R. HILBERT
Georgia Bar No. 352877
THE HILBERT LAW FIRM, LLC
205 Norcross Street
Roswell, GA 30075
T: (770) 551-9310
F: (770) 551-9311
E: khilbert@hilbertlaw.com

DAVID F. GULDENSCHUH
Georgia Bar No. 315175
P.O. Box 3
Rome, Georgia 30162-0003
T: (706) 295-0333
F: (706) 295-5550
E: dfg@guldenschuhlaw.com

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

JURISDICTIONAL STATEMENT

Appellant Paul Andrew Boland, with consent of Proposed Intervenor Shawn Still, filed an Emergency Direct Appeal or Alternatively, Emergency Petition to Seek A Writ of Certiorari to the Supreme Court of Georgia on December 14, 2020. This Court Denied Appellant's request for extraordinary relief that same day, but the merits of the case remained. This case involves an "election contest" over which this Court has exclusive appellate jurisdiction. *See Cook v. Bd. of Registrars,* 291 Ga. 67, 70 (2012), and 1983 Ga. Const. Art. VI, Sec. VI, Para. II(2). This Court has exclusive appellate jurisdiction pursuant to the 1983 Georgia Constitution, as well as O.C.G.A. § 5-6-34(a)(1) (direct appeals may be taken from "[a]ll final judgments, that is to say, where the case is no longer pending in the court below.")

JUDGMENT APPEALED

On December 8, 2020, the Superior Court of Fulton County held a hearing and later entered a Final Order (*hereinafter* "Final Order") dismissing Appellant's case. [R-26, 27; Final Order signed by Judge Emily Richardson and filed 10:28 pm, 12/28/2020][1] The lower court ruled, allegedly without addressing the merits, that the Motions to Dismiss before the Court were granted

[1] On December 30, 2020 at 11:00 am attorneys for Appellant submitted to the superior court of Fulton County Clerk, via in person courier, a law firm check made payable in the amount of $269.50 to pay for transfer of the record to this Court. The Record has not been prepared or uploaded within the time to file this brief. Accordingly, Appellant makes this good faith effort to cite to the existing Record and will supplement once the official record is available.

on several different legal grounds: 1) the named defendants were improper parties, 2) the claims are barred by the equitable doctrine of laches, 3) an individual voter lacks standing to raise grievances against election officials' conduct, 4) Appellant failed to state a claim upon which relief can be granted because presidential electors are not "federal, state, county, or municipal" officers, and thus cannot bring a claim under the O.C.G.A. §21-2-523 et seq. (hereinafter the "Code") to challenge their election, and 5) Appellant's complaint was moot. *Id.* The Order further ruled that Intervenor Shawn Still's Motion to Intervene was also moot since the underlying action was entirely dismissed. Appellant Boland, with consent of Intervenor Shawn Still, appeals the entirety of that Final Order.

STATEMENT OF FACTS

Appellant brought an election contest pursuant to the Code (O.C.G.A. § 21-2-1 et seq.) on November 30, 2020. [R-1; Plaintiff's Original Petition filed 11/30/2020] The Complaint sought equitable injunctive and other relief under the Constitutions of the United States and the State of Georgia. *Id.* In particular, the complaint sought an order decertifying any results from the General Election for the electors to the Presidency until the Secretary of State of Georgia performed various statutorily mandated obligations. *Id.* The Complaint argued from the legal premise that "The Time, Places and ***Manner*** of holding elections shall be prescribed in each State by the Legislature

thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Paces of chusing Senators." Art. I, Section 4 of the U.S. Constitution (emphasis added), and further, that the process and "**Manner** as the Legislature thereof may direct," for appointing a slate of Presidential Electors is governed by Art. II, Sec. 1, cl. 2 of the U.S. Constitution. (Emphasis added.) [R.-1at ¶16.]

Primarily, the Complaint factually alleged and challenged out-of-state voters, lack of signature verification, and violations of the National Voter Registration Act of 1993 by the Secretary of State under O.C.G.A. § 21-2-210. [R.-1 *generally*.] The facts were supported by verified facts and an expert affidavit attached to the complaint. [R.3; Verification of Paul Boland filed 11/30/2020] However, the lower court dismissed the entire case via a Final Order entered December 8, 2020 and refused to hear the Appellant's expert witness who tendered an affidavit attached to the Complaint. [R.-1; Exhibit Affidavit of Benjamin A. Overholt.]

The Code provides, that for the election contest case to proceed, the lower court must follow the judge appointment process as set forth in O.C.G.A. § 21-2-523 (b)–(e). The lower court failed to adhere to the appointment process. The "wheel" selected the Honorable Emily K. Richardson who is an active sitting judge of the Fulton County Superior

Court who resides in Fulton County. Her active status and residency disqualify her from presiding over the case. *Id.* The Record is silent as to how the Judge was appointed or how she had legal authority to conduct a hearing, hear evidence, and/or enter any orders or, in any manner whatsoever, preside over the case.

The Final Order provided that "[t]he Court heard argument from the parties on the Motions to Dismiss by the State Defendants and Intervenors, as well as arguments on the propriety of and scope of relief sought by Petitioner." [R.26, 27.] The lower court Dismissed the entire action, allegedly without hearing the merits, on the following legal grounds: 1) improper parties, 2) laches, 3) standing, 4) failure to state a claim upon which relief can be granted, and 5) mootness.

The Judge was not duly appointed and was ineligible to serve. All of her findings and legal conclusions should be deemed void *ab initio.* Appellant now appeals the lower court's Final Order and requests that it be voided *ab initio*, declared a nullity, and VACATED, and that this matter be remanded to the lower court for further proceedings before a proper, eligible judge.

ENUMERATIONS OF ERROR

I. THE LOWER COURT JUDGE WAS INELIGIBLE TO PRESIDE OVER THE CASE OR ENTER ITS ORDER OF DISMISSAL.

II. THE FINAL ORDER'S FIVE ENUMERATED LEGAL GROUNDS FOR DISMISSAL CONSTITUTED CLEAR LEGAL ERROR.

ARGUMENT

I. THE LOWER COURT JUDGE WAS INELIGIBLE TO PRESIDE OVER THE CASE OR ENTER ITS ORDER OF DISMISSAL.

A. O.C.G.A. § 21-2-523 (b) –(e) governs the appointment process of eligible judges to preside over election contests brought pursuant to the Georgia Election Code.

O.C.G.A. § 21-2-523(b) provides:

> The superior court having jurisdiction of a contest case governed by this article shall be presided over by a superior court judge or senior judge. The superior court judge or senior judge who presides over the contest shall be selected as set out in subsection (c) of this Code section.

O.C.G.A. § 21-2-523(c) provides:

> Upon the filing of a contest petition, the clerk of the superior court having jurisdiction shall immediately notify the administrative judge for the judicial administrative district in which that county lies, or the district court administrator, who shall immediately notify the administrative judge, of the institution of proceedings under this article. If the county in which the proceedings were instituted is not in the circuit of the administrative judge, the administrative judge shall select a superior court judge from within the district, but not from the circuit in which the proceeding was instituted, or a senior judge not a resident of the circuit in which the proceeding was instituted, to preside over the contest.

O.C.G.A. 21-2-523(d) further provides:

> If the administrative judge is a member of the circuit in which the proceeding was filed, or if the other judges of the district are unable or are unwilling to preside over the proceeding, or if the other judges of the district are judges of the circuit in which the proceeding was filed, then the administrative judge shall select an administrative judge of an adjoining district to select a superior court judge from that district, or a superior court judge from the district in which the proceeding was

filed, but not the circuit in which the proceeding was filed, or a senior judge who is not a resident of the circuit wherein the proceeding was filed.

As the underlying case was filed in Fulton County, the plain language of the foregoing statutes means that an active superior court judge of Fulton County is ineligible to "preside over the contest." *Id.*

B. Judge Richardson Was Not Appointed Under the Election Code And Therefore Was Improperly Appointed.

The Honorable Emily K. Richardson is a resident of Fulton County, Georgia, which is the circuit in which this election contest was instituted. Judge Richardson is also an active, sitting judge of the Superior Court of Fulton County, Georgia. Presumably, and upon information and belief, Judge Richardson was appointed randomly through the Clerk of Court's "wheel" system in Fulton County, Georgia, as she could not have been appointed under the Code, due to her residency and active status as a Superior Court Judge in Fulton County, Georgia. Thus, Judge Richardson was not appointed under the Code and in violation of O.C.G.A. § 21-2-523 et seq.

C. It is Reversible Error For The Court To Enter A Final Order When It Lacks Jurisdiction.

The lower court's failure to follow the proper appointment process and the Judge's failure to determine her own subject matter jurisdiction before entering

a final order of dismissal was clear legal and reversible error.[2] Judge Richardson had no legal authority to preside over or take any action in the election contest.

O.C.G.A. § 9-12-16[3] provides that "[t]he judgment of a court having no jurisdiction of the person or the subject matter or which is void for any other cause is a mere nullity and may be so held in any court when it becomes material to the interest of the parties to consider it." Here, the lower court judge was not duly and properly appointed under the Code, and then entered a Final Order dismissing the entire election contest. This judicial action was a final judgment of the superior court. The "effect of the lower court's order was to avoid its responsibility to decide the jurisdictional[4], and threshold question of whether the judge herself had legal authority to preside over the case" – which she did not. *Derbyshire v. United Builders Supplies*, 194 Ga. App. 840, 843 (1990); *see also*, *Myers v. McLarty,* 150 Ga. App. 432, 433 (1979).

D. The Final Order Of Dismissal Is Void *Ab Initio* And A Nullity.

[2] Appellant was not required to give notice to the lower court to follow the judicial appointment procedures under the Code (O.C.G.A. § 21-2-523), as nothing in the special statutory proceeding directs a contestant to do so.

[3] It is questionable whether the Civil Practice Act even applies to an election contest, however, the statute is consistent with other applicable case law.

[4] The "right for any reason" principle does "not rise to save the day, here, because a judgment or order based on an erroneous legal conclusion or theory is reversible error." *Universal Scientific v. Wolf,* 165 Ga. App. 752, 753; (1983); *Ayers v. Yancey Bros. Co.,* 141 Ga. App. 358, 361 (1977).

Georgia courts have previously held that "when a court has no authority to act, ***its acts are void and may be treated as nullities anywhere, at any time, and for any purpose***." *Davis v. Page*, 217 Ga. 751, 752-53 (1962) (*holding* a court order made without legislative authority was a nullity). "When a court has no jurisdiction of a subject-matter, the whole proceeding is *coram non judice* and void." *See Deans v. Deans*, 164 Ga. 162, 164 (1927). "If the record shows that the court rendering the judgment did not have jurisdiction of the subject-matter, ***any person whose rights are affected can at any time make the objection***." *Id.* Similar to the void order entered in *Davis,* because the lower court judge here was not appointed pursuant to the dictates of the Code, all of her orders and findings of fact and law are *coram non judice* and, therefore, void *ab initio. See* O.C.G.A. § 9-12-16.

Failure to comply with the appointment procedures of the Code is not harmless error. Presumably, the selection of an impartial judge is critical in an election contest and in keeping with public policy. Ethics in government is declared to be a policy of the State of Georgia, especially in the election context. Accordingly, Appellant is permitted, as a matter of law, to challenge the legal authority of the judge to preside over the election contest before this Honorable Court to challenge the Final Order as being a nullity. Simply put, Judge Emily K. Richardson was not eligible to preside over this election contest, was not properly

appointed, and the Final Order entered by her is void *ab initio.* Appellants request that this Honorable Court declare the Final Order void *ab initio,* and therefore a nullity, VACATE the Final Order, and remand for further proceedings before an eligible election contest judge.

II. THE FINAL ORDER'S FIVE ENUMERATED LEGAL GROUNDS FOR DISMISSAL CONSTITUTED CLEAR LEGAL ERROR.

Though the lower court ruling is void due to the judge's lack of authority to preside over this election contest proceeding, the Final Order is also substantively in error as to each of its legal grounds for dismissal.

a. Legal Standard

This appeal presents a "question of law, which [this Court] review[s] de novo." *Atlanta Women's Health Grp., P.C. v. Clemons*, 299 Ga. App. 102, 102 (2009) (*holding* "[o]n appeal, this Court reviews the denial of a motion to dismiss de novo"). "When ruling on a motion to dismiss based upon jurisdictional grounds, the trial court must make the determination acting as the trier of fact." *Big Canoe Corp. v. Williamson,* 168 Ga. App. 179, 180 (1983). "Its evaluation rests on where the preponderance of evidence lies, not necessarily on whether the issue may be decided as a matter of law." *Derbyshire,* 194 Ga. App. at 842-43(1990) (citing *Barrow v. Gen. Motors Corp.,* 172 Ga. App. 287, 288 (1984)). "[A] judgment based on an erroneous legal conclusion or theory is

reversible error". *See City of Tybee Island v. Harrod*, 337 Ga. App. 523, 525 n.1, (2016).

b. The Court Erred Finding State Defendants To Be Improper Parties.

The court ruled that O.C.G.A. § 21-2-520 apparently made the "State Defendants improper parties" to the case. [R. 26, 27 ("Final Order") at 3.] The finding was predicated on the definition of "Defendants" as set forth in O.C.G.A. § 21-2-520 (2). *Id.* The court found that the State Defendants do not fit the definition of "Defendants" and are therefore not proper "Defendants" in the action. *Id.* The lower court's narrow reading of "Defendants" (capitalized in Final Order) did not analyze that provision *in pari materia* with the subsequent Code sections O.C.G.A. §§ 21-2-521; 21-2-522. The subsequent sections limit "defendant" to O.C.G.A. § 21-2-522(2) which is the only provision that uses the word "defendant" (lower case in original.)[5] "The election of any person who is declared elected to any such office" is subject to suit. O.C.G.A. § 21-2-521.

Georgia courts "must presume that statutory language has some substantive meaning," *Riley v. State*, 305 Ga. 163, 168 (2019) (quoting *Inagawa v. Fayette County*, 291 Ga. 715, 717 (2012)), and afford the "statutory text its plain and ordinary meaning," reading "the statutory text in its most natural and reasonable

[5] The Complaint generally reflects that Appellant brought his election contest under O.C.G.A.§ 21-2-522 (1), (3), (4) and (5). [R.-1 generally.]

way, as an ordinary speaker of the English language would," *Deal v. Coleman*, 294 Ga. 170, 172-173 (2013). Further, Georgia courts "may construe statutes to avoid absurd results, although [courts] do not have the authority to rewrite statutes." *Allen v. Wright*, 282 Ga. 9, 12 (2007).

As to Appellant Intervenor Still, it has been dispositively held by at least one federal circuit that a Secretary of State may be sued for injunctive relief. *Carson v. Simon*, 978 F.3d 1051 (8th Cir. 2020) (*holding* where Secretary of State enters into a consent decree that alters election deadlines without legislative authority, presidential electors are deemed "candidates" that have standing to sue the Secretary for injunctive and other relief).

Similarly, Respondent Raffensperger may also be sued as a "Violator" for entering into an illegal settlement contract that "corrupted legislation" so as to have such contract declared void as against public policy and an unconstitutional abuse of power under O.C.G.A. § 13-8-2; *Carson,* 978 F.3d 1051. O.C.G.A. § 21-2-2 (37) (A Violator is …"any governing authority that violates any provision of this chapter.") The State Respondents are imbued with the public authority to enforce the Code and to ultimately certify the legal votes of the presidential elector candidates. Surely, violators are subject to suit, and were intended to be subject to suit, under the Code.

The substantive provisions of the Georgia Code contest provisions further allow suit against the State Respondents. The term "Defendant" under O.C.G.A. § 21-2-520 is not exhaustive and cannot be read to be exhaustive as it would leave certain "Contestants" as defined in the Code without a remedy, which makes no sense, leaving subsequent provisions of the Code rendered meaningless. For example, O.C.G.A. § 21-2-521 provides that "any aggrieved elector" (voter) who was "entitled to vote for such person" is entitled to bring suit and a contest against "***any . . . election official or officials sufficient to change or place in doubt the result.***" O.C.G.A. § 21-2-522 (1). This first provision does not use the word "defendant" and the word "any" clearly means other election officials beyond election superintendents – as narrowly found by the lower court. The definition of "superintendent" does not even refer to Presidential elections but makes County Board of Elections subject to suit. Furthermore, provisions (3), (4) and (5) of O.C.G.A. § 21-5-522 do not use or even mention the defined word "defendant." Notably, the only provision that uses the word "defendant" is O.C.G.A. § 21-5-522 provision (2) under which Petitioners do not seek relief. The General Assembly does not insert terms that have no meaning or purpose.

Moreover, under O.C.G.A. § 21-2-30, The Secretary of State serves as the "Chairman" of the State Election Board. Therefore, the Secretary of State, as Chairman of the Board, has the duty "to promulgate rules and regulations so as to

obtain uniformity in the practices and proceedings of superintendents, registrars, deputy registrars, poll officers, ***and other officials, as well as the legality and purity in all primaries and elections***." If the Secretary of State fails in his duties, while participating in state action, he may be sued. Notably, Title 21 specifically provides remedies against the Secretary of State for both criminal and civil violations. *See e.g.,* O.C.G.A. § 21-2-586. To not provide an avenue to sue the State Respondents for their illegal actions is contrary to law, equity, shocks the conscience, and is violative of the Constitutions of the United States of America and the State of Georgia. The lower court's finding was in error.

c. The Court Erred Finding The Complaint To Be Barred By Laches.

The lower court, in error, found that the election contest was barred by laches. To support its erroneous finding, the court relied on *Waller v. Golden*, 288 Ga. 595, 597 (2011), the National Voter Registration Act 52 U.S.C. 20507(c)(2)(A), which discusses removal of persons from voter rolls "not later than 90 days prior to the date of a primary or general election for Federal Office," and *Wood v. Raffensperger*, No. 1:20-CV-04651-SDG, 2020 WL 6817513, at 7 (N.D. Ga. Nov. 20, 2020). Each of the conclusions and findings of the lower court fail.

To begin with, Appellants' claims are not barred by the doctrine of laches because Appellants' challenge to the results of the Contested Election could not have been raised until ***after*** the election. [R.-1 at ¶¶1-5; R.-21; Brief in Opposition

filed 12/07/2020, at 4-5.] O.C.G.A. § 21-2-524 provides that an election contest shall be filed "…within five days ***after*** the official consolidation of the returns of that particular office … and certification thereof by the election official having responsibility for taking action under this chapter, *or within five days* after the official consolidation and certification of the returns of that particular office . . . by the election official having responsibility for taking such action under this chapter *following a recount* pursuant to Code Section 21-2-495…."

Appellants alleged and presented a *prima facie* case that a number of illegal votes have been cast. Appellants requested discovery below to conclusively determine if enough of the suspected ballots were in fact illegally cast. Appellants could not possibly have identified those ballots prior to the certification of the election results; Appellants were not obligated to either. Notably, the Georgia Secretary of State's website does not provide information that can be physically compared to the actual voter registration applications and registrations due to the alleged personal identifying information contained within same. This information and a comparison can only be accomplished under the auspices of a court order. O.C.G.A. § 21-2-525.

Additionally, Appellants claimed that *prior* to the contested election, the Secretary of State unilaterally and materially modified and, thereby corrupted the Code through the Settlement Contract. Such is forbidden, under O.C.G.A. § 13-8-

2. [R.-1; at ¶ 15.] The settlement contract is void as a matter of public policy and is unconstitutional, and therefore, is void *ab initio* and can be challenged at "any time". Moreover, *Carson v. Simon* already held that a consent decree, similar to the Settlement Contract entered into by the State Defendants in this case, is unconstitutional and void as it impermissibly arrogated power from the legislature. This case has been affirmed and cited in several other jurisdictions and courts. Thus, Appellants' challenge to the settlement agreement at issue here is timely, as Appellant is a Republican Voter, was not a party to the Settlement Contract signed in March 2020 and Appellant, therefore, is not bound to its terms. Yet, the Settlement Contract impacted his vote and the election results resulting in his aggrieved status. *Wood v. Raffensperger* did not raise the argument that the Settlement Contract was void as a matter of public policy, and, therefore, is unconstitutional. That case is therefore inapposite to the instant case. Finally, even if Appellants were somehow bound to its terms, which they are not, the statute of limitations challenging a Settlement Contract is six (6) years under Georgia law, and four (4) years to challenge it on the basis of fraud or other such illegality. Laches cannot apply as a matter of law if you are within the applicable statutes of limitation to challenge a contract.

Additionally, the Code on its face itself further undermines a laches argument. Respondent Raffensperger is obligated to "tabulate, compute, and canvass the votes

cast for ***all* candidates**," and "tabulate, compute and canvass the votes cast for ***each slate of presidential electors***...". O.C.G.A. § 21-2-499(a), (b). Significantly, that same code section expressly provides that "[n]otwithstanding the deadlines specified in this Code section, ***such times may be altered for just cause by an order of a judge of superior court of this state***." O.C.G.A. § 21-2-499(b). This action was pending and had been seeking such relief since November 30, 2020. The unilateral and *ultra vires* acts of "Violator" Respondent Secretary of State including the unlawful Settlement Contract, should not impact a timely filed and pending lawsuit – especially when the Courts have been given the express and "plenary" power to alter deadlines. O.C.G.A. §§ 21-2-525; 21-2-499(b).

Moreover, the equitable defense of laches requires proof of three (3) prongs, all of which Appellees did not establish. The three-prong test is: (1) there was a delay in asserting a right or claim, (2) the delay was not excusable, and (3) the delay caused a defendant undue prejudice. *See U.S. v. Barfield*, 396 F.3d 1144, 1150 (11th Cir. 2005). The court seemed to shrug the concept that "laches is not merely a question of time, but ***principally the question of the inequity in permitting the claim to be enforced***." *Waller v. Golden*, 288 Ga. 595 (2011) (citing *Hall v. Trubey*, 269 Ga. 199 (1998)). In *Advanced Cardiovascular Systems, Inc. v. Scimed Life Systems Inc.*, 988 F.2d 1157 (Fed. Cir. 1993) the court held "[t]he strictures of Rule 12(b)(6), wherein dismissal of the claim is based solely on the complainant's pleading, are not

readily applicable to a determination of laches…laches usually requires factual development beyond the content of the complaint." *Id.* at 116; *Groucho's Franchise Systems, LLC v. Grouchy's Deli, Inc.,* 2015 WL 11256661 (N.D. Ga. July 1, 2015).

The applicability of laches is dependent on the specific facts of a case. *Coca-Cola Co. v. Howard Johnson Co.,* 386 F. Supp. 330, 334 (N.D. Ga. 1974) ("Whether laches bars an action depends on the circumstances of the particular case…"). The lower court ignored competing evidence and fact disputes presented, which cannot be dismissed at the pleading stage. Given the fact sensitive nature of a laches inquiry, courts have been hesitant to bar claims under a laches defense when there is limited factual information available. *Espino v. Ocean Cargo, Line, Ltd.,* 382 F2d 67, 70 (9th Cir. 1967) ("the factual issues involved in a laches defense can rarely be resolved without some preliminary evidentiary inquiry.") *Jeffries v. Chi. Transit Auth.,* 770 F.2d 676, 679 (7th Cir. 1985) ("Laches is generally a factual question not subject to summary judgment).

Moreover, there is no showing by Respondents in this case that any "undue prejudice" occurred to any party, intervenor, or non-party, in fact, the Intervenors have asserted that they have "won" the election. The Biden Electors are in no different position now than they will be when the U.S. Congress convenes to count votes in January 2021. Here, Petitioners are attempting to challenge an election based on the Code which strictly provides for such relief and allows for altered

deadlines through the court system. O.C.G.A. §§21-2-525; 21-2-499(b); *Stein v. Thomas,* 222 F. Supp.3d 539 (E.D. Mich. 2016).

The lower court's ruling was in error and should be vacated.

d. The Court Erred Finding Appellant Lacked Standing.

Contrary to the lower court's order, Appellant did not raise "generalized grievances," he is an actual "aggrieved elector (voter)" who has standing to bring an election contest *per se* under the Code. *See* O.C.G.A. § 21-2-521. The lower court erroneously ruled that Appellant was not a "Candidate" and therefore had no standing. [R.26,27 at 4.] This is simply a misinterpretation of the Code, as an "aggrieved elector" does not have to be a "Candidate" to bring an election contest. O.C.G.A. § 21-2-521. To begin with, the word "Candidate" is not even a defined term in the Code itself. O.C.G.A. § 21-2-2. The term "Voter" is defined and is synonymous with "Elector". O.C.G.A. § 21-2-2 (39). The term "Elector" is defined as "any person who shall possess all of the qualifications or voting now or hereafter prescribed by the laws of this state, including applicable charter provisions, and shall have registered in accordance with this chapter." O.C.G.A. § 21-2-2(7). Based on the lack of definition of the word Candidate, as compared to the specific definitions of "Voter" and "Elector" – Appellant qualifies as an "aggrieved voter" that specifically has standing to bring the election contest.

Georgia law is established that the results of an election may be set aside or other relief granted when an aggrieved elector has "clearly established a violation of election procedures and has demonstrated that the violation has placed the result of the election in doubt." *Martin v. Fulton Cty. Bd. of Registration & Elections*, 307 Ga. 193-94 (2019) (citation and quotations omitted); *see also,* O.C.G.A. § 21-2-521. Appellant was a duly registered voter who voted in the 2020 General Election and was aggrieved by the outcome of the election as his vote was diluted by illegally cast and counted votes. Appellant alleged in the complaint sufficient facts and violations of election procedures at the motion to dismiss stage to have standing and to survive a motion to dismiss. [R.-1.]

e. The Court Erred Finding Appellant Failed to State a Claim.

Appellant initiated this action on November 30, 2020, with the filing of his Verified Complaint (the "Complaint") in the Fulton County Superior Court. A Verified Complaint is evidence as to the merits of the case under Georgia rules of evidence. *BEA Systems, Inc. v. WebMethods*, Inc, 265 Ga.App. 503 (2004). Appellant Boland is an individual resident of Monroe County, Georgia, and Appellant Still is a qualified, registered "elector" who each possess all of the qualifications for voting in the State of Georgia and actually voted. O.C.G.A. §§ 21-2-2(7), 21-2-216(a). Appellants voted in the Contested Election believing that their votes would not be diluted by the presence of illegal votes cast by out-of-state voters

or by votes cast by absentee ballots, the signatures upon which were not, or could not, be verified as required by the Code. O.C.G.A. § 21-2-1 *et seq*.

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. In deciding a motion to dismiss, all pleadings are to be construed most favorably to the non-moving party, and all doubts regarding such pleadings must be resolved in the non-moving party's favor. *Weathers v. Dieniahmar Music, LLC*, 337 Ga. App. 816, 816 (2016). Where a motion to dismiss is decided without an evidentiary hearing and based solely upon the written submissions of the parties, any disputes of fact must be resolved in the light most favorable to the party asserting the claims, and an appellate court reviews the decision of the lower court *de novo*. *Id.*

The State of Georgia is a "notice pleading" state, and Appellants have met that burden. Appellants are not required to prove their case in their pleadings. The Secretary of State has refused to provide voter registration files, applications, signed envelopes and other information, and evidence to compare Appellants' data to their data. The State Respondents cannot act in bad faith, hide the evidence, claim to this

Honorable Court that there is nothing wrong with the election, and be allowed to forego a merits hearing in the lower court. The recent *ultra vires* actions of Respondent Raffensperger in certifying the election and the presidential slate of electors, despite the letter from Coffee County, Georgia, informing the Secretary that the results "cannot be certified" and, certifying the Biden presidential elector slate while this and other lawsuits were pending, only further makes Respondent Raffensperger a "Violator" as defined in the Code. O.C.G.A. § 21-2-2(37). A "Violator" should not be able to take advantage of procedural maneuvers to conceal his wrongful acts. The General Assembly of Georgia has stated, that "It is declared to be the Policy of this State, in furtherance of its responsibility to ***protect the integrity of the democratic process and to ensure fair elections for constitutional offices***...." and this must be upheld at all costs. O.C.G.A. § 21-5-2. Whether in equity or under law, the courts should take action in situations where elected officials have engaged and continue to ***willfully*** engage in improper conduct. *Carson v. Simon.*

Notably, the Settlement Contract entered into by Secretary of State Raffensperger in *Dem. Party of Ga v. Raffensperger,* No. 1:19-cv-05028-WMR, Doc. 56-1, is one instance of the State Defendants being "Violators." That Settlement Contract is void as against public policy as it has corrupted legislation and cannot legally bind Appellants. O.C.G.A. § 13-8-2(a). The challenge to this

void and unconstitutional Settlement Contract alone states a claim upon which relief can be granted. It is clear that the Verified Complaint claims that prior to the Contested Election, the Secretary of State unilaterally modified and, thereby corrupted as contemplated under O.C.G.A. § 13-8-2, the Code established by the General Assembly. [R.-1 at ¶¶15-18.] Those modifications weakened and frustrated legislative safeguards against fraudulent ballots, such as signature requirements, in ways that were unlawful and unconstitutional and without the *imprimatur* of the General Assembly. *See Norman Enters. Interior Design v. Dekalb County*, 245 Ga. App. 538, 542-43 (2000). The corruption was effectuated through a limited party Settlement Contract which was implemented in the 2020 General Election.[6] The State Defendants entered the "Compromise and Settlement Agreement and Release" ***only*** with the Democratic Party of the State of Georgia but set forth more complicated standards to be followed by local election officials in processing absentee ballots in Georgia entirely without legislative enactment. *Dem. Party of Ga v. Raffensperger,* Doc 56-1.

The entry of the Settlement Contract was unauthorized by the Code and the United States Constitution, and the well-established public policy of this state. U.S.

[6] The Georgia GOP and Libertarian Parties were not parties to the settlement contract and are not legally bound to the contract. It is well-established under Georgia law, that non-parties to a settlement contract are not bound to its terms and cannot be held to the terms of the contract. 245 Ga. App. 538, (2000).

Const. Art I, § 4, cl. 1, Art. II, § 2, cl. 2; O.C.G.A. § 13-8-2. Accordingly, the Settlement Contract was not between all Elector slates in Georgia, was illegal on its face as it "tended to" and, in fact, corrupted the legislation governing the Code. O.C.G.A. § 13-8-2. While the Secretary of State may have power to set rules and regulations regarding process, he is not permitted to entered into legally binding contracts with limited parties that were not at the table, and especially a contract that corrupts the legislation duly enacted by the General Assembly of the State of Georgia. As a matter of law and the public policy under O.C.G.A. § 13-8-2(a)(1) and the stated Public Policy in the Code "which creates the responsibility to protect the integrity of the democratic process and to ensure fair elections for constitutional offices…" Appellants stated a claim upon which relief must be granted as to the Settlement Contract.

Further, the Verified Complaint was supported by an expert affidavit and plead facts stating a claim sufficient to have a merits hearing to expose irregularities that could change the outcome of the election or place it in doubt. Appellants suffered an injury in fact and actual harm as a result of the State Defendants' illegal and unenforceable alterations to the Code and failure to adequately and uniformly enforce the Code in the Contested Election through the Georgia General Assembly. Appellants' votes were diluted relative to votes cast by persons whose signatures were not verified. As a result of Defendants' failures, the certification of the results

of the Contested Election should have been declared null and void by the lower court. The Secretary violated his Oath of Office, and the Settlement Contract must be voided to ensure compliance with his duties as an Election Official of this State and whose office is "imbued" with the authority to "enforce the [election laws]." *See Grizzle v. Kemp,* 634 F.3d 1314, 1319 (11th Cir. 2011). There is no justifiable reason for the Secretary to hide information from the public. No state officer in the history of Georgia has taken such unlawful, anti-public policy actions as Appellee Raffensperger.

The Verified Complaint set forth and attached an expert analysis of Benjamin A. Overholt that identified ***20,312 ballots*** cast by individuals in the Contested Election who ***do not reside in Georgia***. [R.-1 at ¶ 1.] The analysis matched Georgia's list of early and absentee voters to the United States Postal Service's National Change of Address ("NCOA") database. [R.-1 at ¶ 2.] Voters were flagged if they matched along three dimensions: Full Name, Address, and Date of Birth. *Id.* They also had to be listed in the public NCOA database as having moved out of Georgia prior to the Contested Election. *Id.* At least 4,926 of these individuals actually registered to vote in another state. *Id.* Accordingly, there was sufficient evidence to survive a motion to dismiss, and a merits hearing should have proceeded.

Additionally, Appellant Boland set forth in the Complaint that the rejection rate for absentee ballots cast in the Contested Election was abnormally low. [R.-1at

¶ 7.] Election officials are required by the Code to compare voters' signatures to the oath on the secrecy envelope of absentee ballots with signatures on the applications for absentee ballots, as well as other signature samples within the state's database. O.C.G.A. § 21-2-386(a); [R.-6; Motion to Intervene, at Ex. B, ¶ 6.] If an election official determines that the signatures do not match, the absentee ballot is to be rejected and not included in the tabulation of votes. *See* O.C.G.A. § 21-2-386(a).

Examining the historical rates of rejection of absentee ballots in Georgia demonstrates that election officials failed to follow and enforce the Code's signature verification process during the Contested Election. [R.-1; at ¶ 8.] In Georgia in 2016, the rejection rate for absentee ballots due to signature abnormalities was 0.88%. *Id.* In 2018, the rejection rate was 1.53%. *Id.* In the 2020 Georgia primary election, it was 0.28%. *Id.* In the Contested Election, despite a massive increase in the number of absentee ballots cast, the rejection rate dropped dramatically to just 0.15%. *Id.*, [R.-1, at ¶¶ 8-9.] Over 1,300,000 mail absentee ballots were cast in the Contested Election. *Id.* If these ballots had been rejected at the historical rate of 0.28% to 1.53%, some 1,600 to 18,000 additional ballots should have been rejected. *Id.* That could have been enough to change the outcome of the Contested Election because Mr. Biden's margin of victor was only 12,670[7] votes. *Id.*

[7] The current number is 11,779.

The Secretary of State conceded that signature-based rejections of absentee ballots dropped significantly compared to the 2020 primary but claimed the rejection rate was the same as it was in 2018. [R.-6; Motion to Intervene, at Ex. B, Count 2, ¶ 10.] That statement is not accurate, as the Secretary of State failed to use the most accurate comparison and calculated the rates for the two years using different, inconsistent methodologies. *Id.*, [R.-1, at ¶¶ 10-11.] Furthermore, the Secretary's analysis counted only rejections identified as "signature" based rejections without including the related category of "oath" based rejections. *Id.*, [R.-1, at ¶ 12.] An "oath" based rejection occurs when a voter fails to sign or otherwise complete the oath on the absentee ballot's secrecy envelope, and therefore is a form of "signature" failure. *Id.* When oath-based rejections are included, the rejection rate drop is even more dramatic. *See id.* The suspiciously low ballot rejection rate for the Contested Election suggests that the signature verification procedures were not enforced as required by the Code. *See id.*, Count 2, ¶ 14. These are unrebutted contested facts that state a claim and are not subject to dismissal at the motion to dismiss stage. The lower court stated that the "allegations rest on speculation rather than duly pled facts."

Lastly, and of significant importance, O.C.G.A. § 21-2-524 expressly provides:

> If the recount of the votes cast in any precinct or precincts shall change the result in dispute, ***any aggrieved litigant may require recount of the***

> ***votes affecting such result, which were cast in any other precinct or precincts, by amending his or her pleadings and requesting such relief***." Moreover, "it ***shall not*** be necessary for the contestant ***to offer evidence to substantiate such allegation***.

Appellants in their prayer for relief requested decertification of results for the 2020 General Election, and to initiate and complete an independently observed, monitor-confirmed investigation of ballots, signature matches which is tantamount to a recount of the election results without illegal votes. [R.-1, Prayer for Relief at 9-10.] Appellants stated a claim and the lower court order was in error.

f. The Court Erred In Finding The Complaint Is Barred By Mootness.

The lower court was in error finding that this action is moot. Although the Biden Electors met and voted and the results were certified by the Secretary of State and the Governor and sent to the Archivist of the United States, this action is not moot. The lower court argues that the so-called "Safe Harbor" deadline may not be jeopardized and cites *Bush v. Gore*, 531 U.S. 98, 110 (2000) (*per curiam*) to ground its finding of mootness. However, the colloquial Safe Harbor deadline on December 8, 2020 does not create mootness. 3 U.S.C. § 5 provides the so-called Safe Harbor deadline stating:

> Any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, or ***its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures***, and such determination shall have been made at least six days before the time fixed for the meeting of the electors, such determination made pursuant to such law so existing on said day, and made at least six days prior to

> said time of meeting of the creditors, shall be conclusive, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned.

No applicable Georgia law, including the Code, contemplates the enforcement or even recognition of 3 U.S.C. § 5. There has been no finding by any court that the Safe Harbor deadline preempts the Code. On the contrary, the Code specifically contemplates a five (5) day window, ***after*** certification, to challenge elections and the ability to freely amend pleadings to require a recount. O.C.G.A. § 21-2-524(a) et seq. 3 U.S.C. § 5, on its face, contemplates that until resolution of all state law contests are completed, it cannot apply. It specifically references, "...***its final determination of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures***,..." Accordingly, because an election contest was timely asserted by Appellants, 3 U.S.C. § 5 cannot be used to buttress some kind of mootness argument in this case. No other case in federal or state court has addressed the foregoing relationship between state and federal law, but Appellants contend that due to the carve-out in the statute, it is inapplicable until all election contests are fully resolved. Thus, contrary to what the lower court found, "the relief which [Appellants] seek in [their] Complaint is" still available. [R. 26, 27 at 6.]

The lower court's reasoning also ignores the fact that the GOP Electors also met and voted and cast ballots for President Trump. Accordingly, there remains an

actual controversy as to which slate of electors is the proper slate. Here, Appellants are contesting the general election based on evidence of misconduct, fraud *or* irregularities sufficient to change the outcome of the election or place the result in doubt. There are currently competing slates of presidential electors that have voted for different candidates which makes the action ripe for determination. While it appears that the media desires to wash over this election and the irregularities that took place, the courts exist to get to the truth and uphold our most fundamental democratic institution of fair elections. If the GOP slate had not voted, Respondents may arguably have a valid position, but that is not what happened.

Respondent Raffensperger is obligated to "tabulate, compute, and canvass the votes cast for ***all* candidates and *each slate of presidential electors***…". O.C.G.A. §§ 21-2-499(a);(b). Moreover, O.C.G.A. § 21-2-499(b) expressly provides that "[n]otwithstanding the deadlines specified in this Code section, ***such times may be altered for just cause by an order of a judge of superior court of this state***." This action has been seeking such relief since November 30, 2020.

Finally, the Georgia Code is clear that the remedy for a tainted election is a "new" election. Although election related appeals do take time and resources, if they are meritorious and there is shown that the election was so utterly defective as to place in doubt the outcome, then the remedy in the Code ***must be given meaning***

by the courts. The timeliness of the resolution of the contest and other relief by the Courts is up to the Courts, not Petitioners.

This Honorable Court has a right to have a "***full and proper understanding and final determination and enforcement of the decision of every such case…***" O.C.G.A. § 21-2-525(b).

Accordingly, the lower court's finding of mootness was in error.

CONCLUSION

The lower court had no authority to enter an order dismissing Appellants' case and, in any event, the findings of the lower court were in error. This Court should Vacate the lower court and remand for further proceedings before an eligible judge.

WHEREFORE, for all of the above and foregoing reasons, Appellants Paul Andrew Boland and Shawn Still prays that this Court VACATE the Final Order entered by Judge Emily K. Richardson in the Superior Court of Fulton County.

Respectfully submitted, this 4th day of January 2021.

THE HILBERT LAW FIRM, LLC

KURT R. HILBERT
GA BAR NO. 352877
205 Norcross Street
Roswell, GA 30075
T: (770) 551-9310
F: (770) 551-9311
E: khilbert@hilbertlaw.com

DAVID F. GULDENSCHUH
Georgia Bar No. 315175
P.O. Box 3
Rome, GA 30162-0003
T: (706) 295-0333
F: (706) 295-5550
E: dfg@guldenschuhlaw.com

CERTIFICATE OF SERVICE

I hereby certify that on January 4, 2020, I have served the foregoing APPELLANT BRIEF upon the following counsel of record by filing a copy thereof with the Clerk of the Court using the Court's electronic filing system, as permitted by the Supreme Court of Georgia Rule 13, as well as by emailing a copy to:

Russ Willard at rwillard@law.ga.gov
Kevin Hamilton at khamilton@perkinscoie.com
Adam Sparks at sparks@khlawfirm.com

THE HILBERT LAW FIRM, LLC

KURT R. HILBERT
GA BAR NO. 352877
205 Norcross Street
Roswell, GA 30075
T: (770) 551-9310
F: (770) 551-9311
E: khilbert@hilbertlaw.com