IN THE SUPREME COURT
STATE OF GEORGIA

SHERRAN LYNN WASSERMAN,	
Appellant,	**CASE NO. S23C1029**
v.	
FRANKLIN COUNTY, GEORGIA,	**COURT OF APPEALS CASE NO. A23A0614**
Appellee.	

BRIEF OF APPELLANT

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On July 2, 2024, this Court granted Appellant's Petition for a Writ of *Certiorari* in Court of Appeals Case No. A23A0614; and pursuant to Rule 45 it indicated that the parties' briefs should address only the following issues:

1) Under the Georgia Constitution, must a plaintiff allege a violation of the plaintiff's legal rights to invoke the judicial power of Georgia courts? *See Sons of Confederate Veterans v. Henry County Bd. of Commissioners*, 315 Ga. 39, 52 (2) (b) (880 SE2d 168) (2022).

2) In light of the answer to the first question, does the plaintiff in this case have standing under the Georgia Constitution to challenge the alleged violation of the equal protection rights of the prospective buyer of the plaintiff's property?

Subsequently, by Order passed on July 11, 2024, a copy of which is attached hereto as Exhibit "A," the Court granted Appellant an extension of time through and including August 13, 2024, in which to file her Brief.

I. PROCEDURAL POSTURE & RELEVANT FACTS

After five years of litigation with intensive discovery, including many depositions, Franklin County received on August 18, 2022, permission for a interlocutory appeal (V2: 1749) from the extremely thoughtful and detailed 31-page Order below denying its Motion for Summary Judgment, which also included a 10-page Appendix A of relevant and annotated excerpts from the applicable Franklin County Zoning Ordinance. (V2: 1697-1737.)

In the Trial Court's extensive Statement of Facts (R:1700-1716), it pointed out that the Appellant, Ms. Wasserman, owned an inherited 122.88-acre parcel of farm

land just outside of and abutting the city limits of the City of Carnesville (the "Wasserman Tract"), which she put under a sales contract with a gentleman of Vietnamese descent, Mr. Anthony Pham, whom she authorized to apply on her behalf to the Franklin County Planning Department for a conditional use permit ("CUP") to operate a 12-house poultry farm on the Wasserman Tract (the "Pham/Wasserman Application"). (V2: 627-629.) The Pham/Wasserman CUP Application was ultimately denied by the Franklin County Board of Commissioners ("BOC") on December 5, 2016. (V2: 686-700.) The case involves the circumstances of that denial and arises under the federal civil rights statute, 42 U.S.C. § 1983 ("Section 1983").

The Wasserman Tract is located in Franklin County's AI ("Agricultural Intensive District"), which was described in the 2014 Zoning Ordinance in effect in 2016 (V2: 108-165) as an area of the County where "intensive, large-scale, farming operations can be provided protection from the encroachment and complaints of non-agricultural land uses," given that poultry operations constituted "[the] major component of the agricultural economic base in Franklin County" and were "worthy of special protection." (V2: 130-131.) Indeed, as Franklin County Planning Director John Phillips noted, in 2016 poultry operations constituted the "number one industry in Franklin County." (V2: 1080.)

In November of 2016 the Franklin County Manager reported to the BOC that 75% of all applications to the Franklin County Planning Commission ("PC" a/k/a Planning and Zoning Board) were for poultry houses and that 28 such applications—each involving one or more houses—had been approved within the previous 12 months and that 32 applications were still pending—including 2 for 12 houses, being the Pham/Wasserman Application and the so-called Dinh application, which were the largest such applications to date. (V2: 679-681.) And, as it happened, most of those recently approved and pending applications were by Vietnamese immigrants like Mr. Pham, who were being financed by the large poultry integrators. (V2: 1051 & 1317-1318.)

The widely-recognized and accepted downside of the poultry industry in Franklin County is the fact that poultry houses—with their exhaust fans that are used to keep the birds cooler in warm weather—create some inevitable degree of noise and odor. Larry David, who was in charge in 2016 of locating new houses for Wayne Farms—a large poultry integrator, which financed the operations of a number of growers in Franklin County and which was financing Mr. Pham's acquisition of the Wasserman farm—testified that "with chicken houses you're going to have noises [and] . . . odors. That's just part of the business." (V2: 1005.)

And both those two ubiquitous externalities of the poultry industry in Franklin County were historically dealt with through the use of so-called objective "buffer"

standards or district setback or separation requirements. And in the case of property in Agriculture Intensive zoning districts like the Wasserman Tract, those buffer standards are found in Section 503 ("District Requirements") of the Zoning Ordinance. (V2: 130.) In particular, Section 503(7) requires that broiler houses be located at least 200 feet from a property line—or 300 feet, if there is a neighboring residence within 100 feet of the same line. More importantly, it requires that the exhaust end of a poultry house be located at least 600 feet from "an inhabitable dwelling"—since a family home was thought to be the most sensitive type of land use in the County when Section 503(7) was first adopted in 2004.

And the record below establishes that the universal assumption and practice in Franklin County after 2004 and until late 2016 had been that, given the "special protection" afforded to poultry operations in AI Districts, if a proposed poultry operation met the minimum buffer or separation requirements in Section 503(7), then it could not be denied on the basis of subjective concerns over potential noise or odor. (V2: 1199-1260.)

Nonetheless, at the October 20 public hearing on the Pham/Wasserman Application residents and representatives of the nearby City of Carnesville had raised strident concerns over having a Vietnamese-run poultry operation so near the City and claimed that even though Mr. Pham's proposed 12 houses were over 2,000

feet from a County outdoor recreation facility and a City school, those uses deserved more protection from odors than a private dwelling.

After reviewing the Pham/Wasserman Application, which had been prepared by the real estate agent for Wayne Farms and for Mr. Pham, Chad Singleton, Franklin County Planning Director Phillips determined that the proposed poultry house layout on the large tract more than satisfied the County's buffer or setback requirements. Legible copies of the proposed Pham layout, as submitted to the PC, can be seen at V2: 1420, 1422, & 1533; and, again, they reveal that the large Wasserman Tract would have provided roughly 2,000 feet of forested separation between the exhaust ends of the proposed 12 houses and a County recreation area and roughly 2,700 feet of separation from a City school.

And, ironically, as highlighted on those plats, the recreation area and school in question were located adjacent to and with no buffer separating them from a preexisting City sewer treatment plant with open aeration and settling ponds, which, as Director Phillips confirmed had been associated with chronic odor complaints over the years (V2: 1081); and it was cited by the EPD in both October and November of 2016 for violating its discharge permit and polluting the adjacent creek with unauthorized levels of contaminants. (V2: 1260 & 1264.) As for noise, Larry Davis of Wayne Farms testified that the 2,000 feet of dense forest on the Wasserman Tract should attenuate any noise issues. (V2: 1006.)

In any event, as of 2016 Mr. Phillips could not recall a single example of a poultry house application that he had approved on the basis of the County's uniform buffer or setback requirements that had been recommended for denial by the Planning Commission; and, conversely, it had been the invariable practice of the BOC to adopt the recommendations for approval or denial by the PC in those same poultry house cases. (V2: 1059.) To the extent that the uniform County "buffer" standards for poultry houses did not completely cabin or contain all unpleasant odors from poultry operations, it was viewed as an equally-shared county-wide sacrifice for the common good and universally referred as the "smell of money." (V2: 1199.) And when asked if he had ever heard that expression, Director Phillips responded: "I most definitely have." (V2: 1080.)

And based on the testimony of Director Phillips and written discovery by Ms. Wasserman in this case, there is no evidence in the record—with the one exception of the Pham/Wasserman Application—that any poultry house application since 2004 has ever been denied on the basis of alleged noise or odors concerns once it was determined by Planning Director Phillips or his successor, Ms. Thomas, that the objective district minimum set-back requirements were met. (V2: 1059 & 1317-1318.)

As a result of the strident ethnic-based opposition to the Phan/Wasserman Application by residents of the City Carnesville and City Councilmen Chad Bennett

and Mike Barrett at the October 20, 2016, public hearing before the PC (V2: 640-645 & 1204-1209), Planning Director Phillips testified that the crowd became especially unruly when the PC attempted to discuss the "merits" of the Pham/Wasserman Application—resulting in an unusual tabling of all 4 applications before it. (V2: 1048-1049.)

The whole sordid tale that followed—involving a conspiracy among members of the PC and officials of the City of Carnesville to impose on the Pham/Wasserman Application alone the unique and irrational requirement that it satisfy the so-called Three Farmer Factors subsequently devised by PC Chairman Daphne Farmer, criteria that no other Franklin County poultry house applicant before or since has been required to satisfy—is contained in Mr. Singleton's Affidavit at V2: 1196-1256; and the Trial Court acknowledges the apparent role played by those arbitrary factors in the denial of the Pham/Wasserman Application at V2: 1710-1711.

Indeed, because Mr. Singleton also represented the 2 other poultry house applications by Vietnamese that were recommended for approval by the PC the same night it recommended denial of the Pham/Wasserman Application on the basis of the Three Farmer Factors, he could testify that neither of those applicants, nor any other successful poultry house applicants in Franklin County of which he was aware, satisfied the Three Farmer Factors.

And despite vehement denials by Franklin County throughout this litigation that the Three Farmer Factors were ever invoked by Chairman Farmer, after Director Phillips admitted in his deposition that she had invoked them to justify her motion to deny the Pham/Wasserman Application (V2: 1065-1066), the County reverted to claiming that they were not "fatal" factors.

Similarly, the County and the same Chairman Farmer strenuously denied Mr. Singleton's allegation that after the October 20, 2016, meeting Chairman Farmer initiated a highly-inappropriate *ex parte* phone call with Larry Davis of Wayne Farms to encourage Wayne Farms to withdraw its economic support for Mr. Pham. (V2: 1209 & 995-1031.) Then after Mr. Davis gave his deposition, the County acknowledged that such extraordinary conduct had in fact occurred.

And, as a result, Wayne Farms informed Mr. Pham that if the BOC denied his application, it would withdraw its financial support for him to locate in Franklin County so as not to jeopardize its other Franklin County operations—and, when that denial occurred, Wayne Farms set Mr. Pham up with a poultry operation in Elbert County instead. (V2: 995-1032.)

Likewise, the County strenuously denied that the Georgia Open Meetings Act was violated at the November 8, 2016, Work Session of the PC at which Mr. Singleton, who was present, alleges that the Pham/Wasserman Application was discussed by the PC with City Councilman Mike Barrett and a plan devised to justify

denial of the Pham 12-house application, while the Dinh 12-house application was approved, through use of (i) the Three Farmer Factors and (ii) a letter to the PC and BOC from the Mayor of Carnesville. Subsequently, however, Director Phillips acknowledged that the Pham/Wasserman Application had indeed come up on multiple occasions for discussion at the November 8 Work Session, which he attempted to discourage as being totally improper and out of order.

As indicated by the Singleton Affidavit and the Affidavit of Ms. Wasserman (V2: 762-771) and that of her first cousin, the Vice Mayor of Carnesville, Sid Ginn (V2: 781-874), while Vietnamese-owned poultry houses had been peacefully and uneventfully approved throughout the rest of Franklin County according to the minimum setback rules or regulations, the racial animus against Mr. Pham that was on display at the October 20, 2016, hearing before the PC was localized in the City of Carnesville—which, as Mr. Singleton noted, "is not regarded as a bastion of racial or ethnic tolerance." (V2: 1206.).

And the Trial Court noted the "nativism" in Vice Mayor Ginn's testimony where he acknowledged that "Oh, hell yes," he got a lot of negative feedback from his constituents to the Pham/Wasserman Application (V2: 809); that a "whole gaggle of folks . . . kept coming and coming and coming"—and that basically they "didn't want anybody outside of Franklin County to start with" (V2: 816)—i.e., if it had been "somebody local" and not some "Vietnamese or Canadian" outside of Franklin

County, there wouldn't have been the same opposition. (V2: 817 & 848.) And it concluded that the "nativism" could be seen as a thinly-disguised veil for racism.

In fact, Vice Mayor Ginn was more candid with his first cousin, Appellant Wasserman, who he claimed was "closer [to him] than a sister." (V2: 802.) In particular, Ms. Wasserman testified that when she asked her first cousin, the Vice Mayor, why his constituents were up in arms against Mr. Pham, she stated that his explanation was as follows:

> Because they were dirty gooks and they would not keep the chicken houses clean and [because] . . . they were aware of other Vietnamese people who owned chicken houses and they were rat infested places and they were afraid of the spillover into the city.

(V2: 768.)

Vice Mayor Ginn testified that after the November 8, 2016, Work Session, at which Councilman Barrett was in attendance, he was the "son of a bitch" who held an alleged "vote" of the Council that same day that forced the Mayor to send his November 10, 2016, letters to the PC and BOC—a letter that the Mayor was otherwise reluctant to send. (V2: 814 & 818.) After all, the Mayor would have been aware—just like Councilmen Barrett, Bennett, and Ginn[1]—of the fact that the City's

[1] Councilman Bennett has conceded that in 2016 the odor from the City sewer plant located right next to the rec department and the Carnesville Elementary School had always been a problem, especially when it rained, Bennett Dep., (V2: 890, ll. 9-11, 15-18); and Councilman Ginn conceded that the City sewer plant had suffered "[o]ne failure after another" and that odor from its open settling ponds was a constant problem: "Right there

antiquated sewer treatment plant, immediately adjacent to the County recreation fields and the City school, was itself the subject of chronic and ongoing odor complaints by constituent, not to mention creek-contamination complaints by the Georgia EPD.

Chairman Farmer successfully moved on November 17 to have the Pham/Wasserman Application denied on the basis of the arbitrary and unprecedented Three Farmer Factors; and the final public hearing and voting meeting of the BOC to address the Pham/Wasserman Application occurred on December 5, 2016. (V2: 686-700.)

Meanwhile, the purchase contract between Mr. Pham and Ms. Wasserman had been signed on September 22, 2016; and it was amended to specify a closing on or before November 30, 2016. But in light of the recommendation of denial by the PC on November 17, 2016, and Chairman Farmer's success in getting Wayne Farms to inform Mr. Pham and Mr. Singleton that it would withdraw its financial support from Mr. Pham if he chose to contest any denial of the Application by the BOC, Mr. Pham and Chad Singleton felt compelled to bring these developments to the attention of Ms. Wasserman and her legal counsel.

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by the elementary school, right there by the play yard, playground." Ginn Dep.,(V2: 822, l. 25—823, l. 25).

After a conference call on November 22, 2016, which included Ms. Wasserman, it was decided that Mr. Pham should formally acknowledge that he had filed the CUP Application on behalf of Ms. Wasserman as her agent and that he was formally assigning "all his rights, title, and interest in, to, and under the Application" to Ms. Wasserman, but without surrendering his rights under their contract, in order to facilitate Ms. Wasserman's ability to challenge on the basis of racial discrimination any denial of the Pham/Wasserman Application by the BOC—as seemed inevitable at that point. (V2: 1213-1214 & 1230-1235,)

Accordingly, on December 5, 2016, counsel for Ms. Wasserman sent the BOC a 10-page letter, together with plats showing the proposed location of the poultry houses vis-à-vis the County recreation fields and the City school, as well as the location of the City's sewer treatment plant (V2: 1236-1246), which also highlighted the irregularities in the PC process that led to its recommendation of denial, including an egregious violation of the Georgia Open Meetings Act on November 8, etc.—all based on the intelligence he had received from Mr. Singleton; and in his oral presentation he explained the arbitrary use by Ms. Farmer of the Three Farmer Factors in making her motion to deny, given the fact that Mr. Pham's satisfaction of the Section 503(7) setback requirements was understood to preclude denial on the basis of noise or odor.

In conclusion, counsel for Ms. Wasserman admonished the BOC not to adopt the tainted recommendation of the PC and instead to "do its [own] duty." (V2: 1547.) Planning Director Phillips was present, and based on his subsequent deposition testimony, he was in a position to confirm on the spot many of Appellant Wasserman's allegations, including violation of the Open Meetings Act and the subsequent invocation of the arbitrary Three Farmer Factors as a basis for denial.

Instead, as the Trial Court noted, when Commissioner Jacques suggested it might be appropriate for the BOC to table the matter and look into the disturbing allegations by Appellant Wasserman, the crowd angrily signified its displeasure; and he withdrew the suggestion. (V2: 1716.)

Similarly, in response to the suggestion by Ms. Wasserman's counsel that the BOC should reject the recommendation of the PC, City Councilman Mike Barrett, acknowledging that he was present at the November 8, 2016, PC Work Session, denied that it was a "secret meeting" and claimed that it was proper "work session"; whereas, in fact discussing the tabled Pham/Wasserman Application was not on the agenda as required by the Georgia Open Meetings Act., O.C.G.A. §§50-14-1 et seq.,. (V2: 658.)

Significantly, therefore, the vote of the BOC on December 5 was to "adopt the recommendation of the PC." (Emphasis added.)

The Trial Court at V2: 1721-1725 summarizes the circumstantial irregularities that in its mind constituted sufficient circumstantial evidence to establish a prima facie claim of discrimination, thus shifting the burden to Franklin County to produce evidence of a legitimate nondiscriminatory reason for denying Mr. Pham's Application—but with the burden of ultimate persuasion remaining on Ms. Wasserman.

In support of that conclusion, the Trial Court cited the following case law:

> Because explicit statements of racially discriminatory motivation are decreasing, circumstantial evidence must often be used to establish the requisite intent. Among the factors that are instructive in determining whether racially discriminatory intent is present are: discriminatory of segregative effect, historical background, the sequence of events leading up to the challenged actions, and whether there were any departures from normal substantive criteria. *United States v. Hous. Authority of the City of Chickasaw*, 504 F.Supp. 716, 727 (S.D.Ala. 1980) (citing *Vill. of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977).
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> A plaintiff may demonstrate intentional discrimination if the "decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizens." *United States v. Yonkers*, 837 F.2d 1181, 1225 (2d Cir.1987)

(V:2 1721.)

II. ARGUMENT OF LAW AND CITATION OF AUTHORITIES

A. Background.

Concerning the central Rule 45 issue of Appellant's standing in the Trial Court to have raised a claim of racial discrimination on behalf of the prospective purchaser of her farm property, it is true that Appellant uncritically assumed in Section C of her Brief before the Court of Appeals that Georgia had already "expressly [and properly] adopted the federal test for third-party standing set out in Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)" *via* its decision in Feminists Women's Health Ctr. v. Burgess, 282 Ga. 433, 435, 651 S.E.2d 36, 39 (2007) (hereinafter, "Feminist Women's Health"). Brief of Appellee, pp. 32-33.[2]

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[2] Section C of Appellant's Brief below reads as follows:

> C. THIRD-PARTY STANDING TO ASSERT RACIAL DISCRIMINATION
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> The County has failed to acknowledge that the Georgia Supreme Court in Feminist Women's Health Ctr. v. Burgess, 282 Ga. 433, 435, 651 S.E.2d 36, 39 (2007), expressly adopted the federal test for third party standing set out in Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)—after first explaining as follows:
>
> > In the absence of our own authority, we frequently have looked to United States Supreme Court precedent concerning Article III standing to resolve issues of standing to bring a claim in Georgia's courts. . . . It is well established under federal law that although constitutional rights must generally be asserted by the person to whom they belong, Barrows v. Jackson, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586 (1953), a litigant may assert the rights

> of a third party in exceptional circumstances. See Griswold v. Connecticut, 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed.2d 510 (1965) (physician could assert privacy rights of married patients); Barrows, supra, 346 U.S. at 259, 73 S.Ct. 1031 (property owner subject to racial covenant had standing to challenge covenant on discrimination grounds). To successfully establish third-party standing, [i] a federal litigant must have suffered an "injury in fact," thus giving him or her a sufficiently concrete interest in the outcome of the issue in dispute; [2] the litigant must have a close relation to the third party; and [3] there must exist some hindrance to the third party's ability to protect his or her own interests. Powers v. Ohio, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991). See also Craig v. Boren, 429 U.S. 190, 192–197, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976).

Id., 282 Ga. at 434–35, 651 S.E.2d at 38.

Fortunately, in interpreting the federal "jus tertii" test in Powers v. Ohio and Craig v. Boren, *supra*, the Eleventh Circuit has explained why Mrs. Wasserman, as the Plaintiff below, had third party standing to assert Mr. Pham's rights against racial discrimination at the hands of Franklin County:

> In an ordinary case, a plaintiff is denied standing to assert the rights of third parties. *Warth v. Seldin*, 422 U.S. 490, 499, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). One exception to this rule, however, allows businesses to advocate, on behalf of their clients and customers, against discriminatory actions that interfere with that business relationship. *See Craig*, 429 U.S. at 195, 97 S.Ct. 451 ("[V]endors and those in like positions have been uniformly permitted to resist efforts at restricting their operations by acting as advocates of the rights of third parties who seek access to their market or function."). This exception applies to the current case.
>
> In order to bring claims on behalf of third parties, a litigant must satisfy three important criteria.

Likewise, the Trial Court in its July 14, 2022, Order cited Feminist Women's Health and adopted its three-factor test for third-party standing in rejecting Franklin County's claim that Ms. Wasserman lacked standing to assert a claim of racial discrimination:

> The Court determines that disputed facts exist as to Ms. Wasserman's standing. She alleges direct economic injury due to discrimination against Mr. Pham, with whom she had a contractual relationship. A jury could find that Ms. Wasserman experienced economic injury due to racial discrimination. Additionally, a jury could believe that the Chair of the Franklin County Planning Commission interfered with Mr. Pham's relationship with his poultry integrator, compromising Mr. Pham's ability to vindicate his own rights in the matter. *Feminist Women's Health Center, et al. v. Burgess, et al.*, 282 Ga. 433 (2007).

(V2: 1719.)

Of course, the possibility that this Court's adoption of the federal *jus tertii* precedent in the Feminists Women's Health case might be subject to future

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> [T]he litigant must have suffered an "injury-in-fact," thus giving him or her a "sufficiently concrete interest" in the outcome of the issue in dispute; the litigant must have a close relation to the third party; and there must exist some hindrance to the third party's ability to protect his or her own interests.

Harris v. Evans, 20 F.3d 1118, 1122 (11th Cir.1994) (quoting *Powers v. Ohio*, 499 U.S. 400, 411, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991) (citations omitted)). All three of these criteria are met in the current case.

Young Apartments, Inc. v. Town of Jupiter, FL, 529 F.3d 1027, 1041–44 (11th Cir. 2008) (emphasis added).

reexamination was forecast several months earlier by Justice Peterson in his concurrence in Black Voters Matter Fund, Inc. v. Kemp, 313 Ga. 375, 391-400, 870 S.E.2d 430, 443-449 (March 8, 2022), in which he noted that this Court had previously "announced new rules of Georgia [standing] law by adopting wholesale . . . federal precedent," citing as an example "*Feminist Women's Health Ctr. v. Burgess*, . . . (adopting federal third-party standing doctrine as defined in *Powers v. Ohio*, . . .)" and observing that the Court had adopted such federal standing precedent "without actually explaining why federal case law interpreting Article III of the U.S. Constitution should be considered persuasive authority for the different question of Georgia standing law." Id.

That process of reexamination began in earnest with Sons of Confederate Veterans v. Henry County Bd. of Commissioners, 315 Ga. 39, 880 S.E.2d 168 (2022) (hereinafter, "SCV") and continued earlier this year in Cobb County v. Floam, 319 Ga. 89, 901 S.E.2d 512 (2024) (hereinafter, "Floam").

B. The Controlling Importance of the Federal Context.

At the outset, however, it is critical in addressing the two issues highlighted by the Court in its grant of *certiorari* to draw a distinction between this case and SCV—not to mention Feminist Women's Health and Floam.

In particular, as formulated by Justice Peterson in his opinion for the Court in SCV, Feminist Women's Health, SCV, and Floam all posed—or should have posed—the same "discrete and important threshold question," namely:

> [W]hether the Georgia Constitution requires a plaintiff to establish some cognizable injury to bring a lawsuit in Georgia courts, *i.e.*, to have standing to sue, separate and apart from the statutory authorization [by the Georgia General Assembly] to bring suit.

SCV, supra, 315 Ga. at 39, 880 S.E.2d at 171.

But all those cases involved purely state statutory and constitutional law. For example, in Feminist Women's Health case, which involved the Georgia Medical Assistance Act of 1977, O.C.G.A. §§ 49-4-140 *et seq*., the plaintiffs alleged that "the program's exclusion of medically necessary abortions violated the Georgia Constitution on privacy and equal protection ground." Feminist Women's Health, supra, 282 Ga. at 433, 651 S.E.2d at 37. The SCV case concerned O.C.G.A. § 50-3-1, which proscribed the removal of certain historic monuments by local governmental entities among others; and the plaintiffs' legal claims involved no federal statutory or constitutional component. Similarly, in the Floam case individual county residents challenged the legality and constitutionality of a Cobb County ordinance that purported to change commission districts established by Act 562 of the General Assembly on the basis that it violated the Act and exceeded the County's Home Rule powers under Article IX, Section II, Paragraph I, of the Georgia Constitution.

Interestingly, the outcome of both SCV[3] and Floam was to confirm that in certain respects the doctrine of standing compelled by the Georgia Constitution is broader or more expansive than the analogous federal doctrine compelled by Article III of the U.S. Constitution in that, among other things, it recognizes that so-called "community stakeholders"—residents, voters, and/or taxpayers—have standing to sue based on generalized grievances, not concrete and particularized injury, because of their cognizable interest in having their government follow the law—that is, with the exception of a citizen's right to challenge the constitutionality of a state statute. See SCV, supra, 315 Ga. at 44-45, 61, & 53-61, 880 S.E.2d 168; and Floam, supra, 319 Ga. at 91-95, 901 S.E.2d at 515-518.

Accordingly, where—as in Feminist Women's Health, SCV, and Floam—the threshold issue is a plaintiff's standing to sue under a Georgia state statute, local ordinance, and/or constitutional provision, nothing in federal law or state law requires that the Georgia courts follow federal law on standing. The Supremacy Clause of the U.S. Constitution, Article VI, Section 2, and any notion of federal preemption are officially quiescent or dormant—and arguably irrelevant—in that

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[3] The Court of Appeals in SCV, relying on federal precedent decided under Article III of the U. S. Constitution, as adopted by previous Georgia case law, held that all the plaintiffs lacked standing since—contrary to the apparent intent of the General Assembly to provide plaintiffs with a cause of action—the constitutionally-compelled doctrine of standing still required that a cause of action involve a concrete and particularized injury.

context.[4] But where, as here, the cause of action arises under "Th[e] Constitution and the Laws of the United States," the opposite is true.

In short, in the narrow state-law confines of Feminist Women's Health, SCV, and Floam, Justice Peterson's formulation in SCV is a valuable and newly-recognized truism of Georgia law:

> Since federal standing doctrine does not control, we must consider whether the nature of the judicial power that the Georgia Constitution vests in Georgia courts imposes some standing requirement.

SCV, supra, 315 Ga. at 46, 880 S.E.2d at 175.

Here, however, Appellant's claim arises under the Civil Rights Act of 1871, 41 USC § 1983, passed pursuant to the express authority granted Congress by Section 5 of the Fourteenth Amendment:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . ..

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[4] The Supremacy Clause reads in relevant part as follows:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, anything in the Constitution or Laws of any State to the Contrary notwithstanding.

In this immediate context, therefore, the relevant language of the Supremacy Clause of the U.S. Constitution bears repeating:

> This Constitution, and the Laws of the United States which shall be made in pursuance thereof . . . shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

(Emphasis added.)

C. Federal Preemption of State "Jurisdictional" Rules That Do Not Concern the Core Issues of "Power Over the Person" and "Competence Over the Subject Matter."

As articulated by the Supreme Court in Howlett v. Rose, 496 U.S. 356, 367, 110 S. Ct. 2430, 2438 (1990), it is the Supremacy Clause that compels Georgia courts to exercise concurrent jurisdiction over federal causes of action like Section 1983:

> Federal law is enforceable in state courts not because Congress has determined that federal courts would otherwise be burdened or that state courts might provide a more convenient forum—although both might well be true—but because the Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature. The Supremacy Clause makes those laws "the supreme Law of the Land," and charges state courts with a coordinate responsibility to enforce that law according to their regular modes of procedure. "The laws of the United States are laws in the several States, and just as much binding on the citizens and courts thereof as the State laws are.... The two together form one system of jurisprudence, which constitutes the law of the land for the State; and the courts of the two jurisdictions are not foreign to each other, nor to be treated by each other as such, but as courts of the same country, having jurisdiction partly different and partly concurrent." *Claflin v. Houseman,* 93 U.S. 130, 136–137, 23 L.Ed. 833 (1876)

In addition, the Court in Howlett v. Rose also indicated that the only state "jurisdictional" rules that could justify a state court in abdicating its duty to accept jurisdiction over federal causes of action under the Supremacy Clause would be those that implicated the core jurisdictional concerns of either "power over the person" or "competence over the subject matter":

> The fact that a [state] rule is denominated jurisdictional does not provide a court an excuse to avoid the obligation to enforce federal law if the rule does not reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect. It is settled that a court of otherwise competent jurisdiction may not avoid its parallel obligation under the Full Faith and Credit Clause to entertain another State's cause of action by invocation of the term "jurisdiction." See *First Nat. Bank of Chicago v. United Air Lines, Inc.*, 342 U.S. 396, 72 S.Ct. 421, 96 L.Ed. 441 (1952) . . .. A State cannot "escape this constitutional obligation to enforce the rights and duties validly created under the laws of other states by the simple device of removing jurisdiction from courts otherwise competent." . . . [T]he same is true with respect to a state court's obligations under the Supremacy Clause. [Footnote omitted.] The force of the Supremacy Clause is not so weak that it can be evaded by mere mention of the word "jurisdiction."

Howlett v. Rose, supra, 496 U.S. at 382-383, 110 S. Ct. at 2445-2346 (emphasis added).

In Howlett the Court rejected in a Section 1983 case tried in state court a state immunity claim based on the fact that federal courts in analogous cases had determined that the individuals in question were "persons that Congress [had] subjected to liability," lest states be allowed to nullify "legislative decisions that

Congress has made on behalf of all the People." Id. 496 U.S. at 383, 110 S.Ct. at 2447.

Two years earlier, in Felder v. Casey, 487 U.S. 131, 138, 108 S.Ct. 2302, 2306-07 (1988), the Supreme Court had foreshadowed its ruling in Howlett when it rejected the application of state *anti litem* notice requirements in Section 1983 cases in state courts, precisely because federal courts had determined as a matter of federal law that no such notice requirements were applicable at the federal level. In short, aside from the core jurisdictional concerns of "power over the person" and "competence over the subject matter," no alleged state "jurisdictional" doctrines or rules of procedure should be applied to a Section 1983 action at the state level that would produce a different outcome "based solely on whether the claim is asserted in state or federal court":

> No one disputes the general and unassailable proposition relied upon by the Wisconsin Supreme Court below that States may establish the rules of procedure governing litigation in their own courts. By the same token, however, where state courts entertain a federally created cause of action, the "federal right cannot be defeated by the forms of local practice." *Brown v. Western R. Co. of Alabama,* 338 U.S. 294, 296, 70 S.Ct. 105, 106, 94 L.Ed. 100 (1949). The question before us today, therefore, is essentially one of pre-emption: is the application of the State's notice-of-claim provision to § 1983 actions brought in state courts consistent with the goals of the federal civil rights laws, or does the enforcement of such a requirement instead "'stan[d] as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'"? *Perez v. Campbell,* 402 U.S. 637, 649, 91 S.Ct. 1704, 1711, 29 L.Ed.2d 233 (1971) (quoting *Hines v. Davidowitz,* 312 U.S. 52, 67, 61 S.Ct. 399, 404, 85 L.Ed. 581 (1941)).

> Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield." *Free v. Bland,* 369 U.S. 663, 666, 82 S.Ct. 1089, 1092, 8 L.Ed.2d 180 (1962). Because the notice-of-claim statute at issue here conflicts in both its purpose and effects with the remedial objectives of § 1983, and because its enforcement in such actions will frequently and predictably produce different outcomes in § 1983 litigation based solely on whether the claim is asserted in state or federal court, we conclude that the state law is pre-empted when the § 1983 action is brought in a state court.

Felder v. Casey, 487 U.S. 131, 138, 108 S. Ct. 2302, 2306–07 (1988) (emphasis added).

The Felder Court then elaborated on its conclusion that a state may not apply "outcome-determinative" jurisdictional rules when entertaining Section 1983 actions or other federal causes of action:

> While we fully agree with this near-unanimous conclusion of the federal courts [that *ante litem* notice requirements are not applicable to Section 1983 claims], that judgment is not dispositive here, where the question is not one of adoption but of pre-emption. Nevertheless, this determination that notice-of-claim statutes are inapplicable to federal-court § 1983 litigation informs our analysis in two crucial respects. First, it demonstrates that the application of the notice requirement burdens the exercise of the federal right by forcing civil rights victims who seek redress in state courts to comply with a requirement that is entirely absent from civil rights litigation in federal courts. This burden, as we explain below, is inconsistent in both design and effect with the compensatory aims of the federal civil rights laws. Second, it reveals that the enforcement of such statutes in § 1983 actions brought in state court will frequently and predictably produce different outcomes in federal civil rights litigation based solely on whether that litigation takes place in state or federal court. States may not apply such an

> outcome-determinative law when entertaining substantive federal rights in their courts.

Id. 487 U.S. at 140-141, 108 S.Ct. at 2308 (emphasis added).

Subsequently, in Johnson v. Fankell, 520 U.S. 911, 918–20, 117 S. Ct. 1800, 1804–06, 138 L.Ed.2d 108 (1997), the Supreme Court reaffirmed the outcome-determinative test of Felder v. Casey for whether a so-called state "jurisdictional" doctrine could be applied to a Section 1983 claim in state court:

> One of the primary grounds for our decision was that, because the notice-of-claim requirement would "frequently and predictably produce different outcomes" depending on whether § 1983 claims were brought in state or federal court, it was inconsistent with the federal interest in uniformity. *Id.,* at 138, 108 S.Ct., at 2306–2307. [Footnote omitted.]

D. Conclusion.

At this point, therefore, Appellant commends to the Court for its consideration and adoption the analysis of the Oregon Supreme Court in concluding that Oregon courts cannot apply state standards of mootness or justiciability to a Section 1983 claim brought in state court if application of those standards would preclude a plaintiff's federal claim, where application of federal standards would not:

> In *Howlett v. Rose,* 496 U.S. 356, 110 S.Ct. 2430, 110 L.Ed.2d 332 (1990), the Supreme Court addressed whether a state law defense of sovereign immunity is available to a school board otherwise subject to suit in a Florida court, when such a defense would not be available if the action had been brought in a federal court. 496 U.S. at 358–59, 110 S.Ct. at 2433. The Court held that such a defense was not available. *Id.* at 383, 110 S.Ct. at 2446. In reaching that conclusion, the Court stated:

> "The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented. The general rule bottomed deeply in [a] belief in the importance of state control of state judicial procedure, is that federal law takes the state courts as it finds them. The States thus have great latitude to establish the structure and jurisdiction of their own courts. In addition, States may apply their own neutral procedural rules to federal claims, unless those rules are pre-empted by federal law." *Id.* at 372, 110 S.Ct. at 2441 (citations omitted; internal quotation marks omitted).

Under *Howlett,* the threshold question becomes whether a state's standards of mootness and justiciability are either jurisdictional rules or "neutral procedural rules" not pre-empted by federal law. *See also Rogers,* 306 Or. at 281, 760 P.2d 232 (court considered whether state's law is jurisdictional or procedural).

Oregon standards of mootness and justiciability are not "jurisdictional rules," as that term is used in *Howlett.* In *Howlett,* the court described jurisdictional rules as rules that "reflect the concerns of power over the person and competence over the subject matter that jurisdictional rules are designed to protect." 496 U.S. at 381, 110 S.Ct. at 2445–46. Because Oregon circuit courts will hear section 1983 cases, they have competence over the subject matter. There also is no issue here of power over the person; the parties have availed themselves of the jurisdiction of Oregon courts.

Neither are Oregon standards of mootness and justiciability "neutral procedural rules," as that term is used in *Howlett.* "Neutral procedural rules" are "rule[s] regarding the *administration* of the courts." 496 U.S. at 372, 110 S.Ct. at 2440 (emphasis added). In other words, procedural rules control *how* a party may bring a claim (*e.g.,* where to file a complaint or how to serve it) and how a court proceeds with a claim, rather than *who* may bring a claim or *what* claim is viable. Mootness and justiciability rules do not fit *Howlett* 's definition of procedural rules.

Barcik v. Kubiaczyk, 321 Or. 174, 184–85, 895 P.2d 765, 772 (1995).

And, as demonstrated above, where a state court relies on independent state justiciability doctrines to refuse to reach the merits of federal claims, the U.S. Supreme Court has treated such judgments as reviewable by it because they raise a federal question as to the constitutional adequacy of the alleged state ground under the Supremacy Clause. The leading U.S. Supreme Court decision rejecting the use by a state court of state justiciability standards to refuse to reach a federal claim is Liner v. Jafco, Inc., 375 U.S. 301, 84 S.Ct. 391 (1964).

The Liner case rejected the use by the Tennessee Chancery Court of state mootness doctrine as a valid excuse for refusing to entertain a federal claim arising out of a labor dispute. The logic of the Liner decision and that of the other cases cited above has led the author of one of the primary treatises on Section 1983 litigation in state courts to conclude as follows:

> When state justiciability standards are more restrictive than federal standards, state courts should not be allowed to exclude § 1983 or other federal actions that meet federal standards.[Footnote omitted.] Exclusion of federal actions on that basis is inconsistent with the duty to hear § 1983 cases. Thus, the requirements of the federal case or controversy doctrine, including its prudential elements, should be viewed as a floor and state courts should not be permitted to interpose their own justiciability doctrines to exclude § 1983 actions that could be heard in federal courts.[Footnote omitted.]

Steinglass, 1 Section 1983 Litigation in State and Federal Court, § 13:4 (2023).

In the omitted footnotes Professor Steinglass cites U.S. Dept. of Labor v. Triplett, 494 U.S. 715, 110 S.Ct. 1428, 1432 (1990), for the cautionary observation by the Supreme Court (extremely relevant here) that "[I]t is questionable whether or not . . . [state courts] have the power, by . . . denying third-party standing to . . . destroy federal causes of action," as well as Gordon and Gross *Justiciability of Federal Claims in State Courts*, 59 Notre Dame L.Rev. 1145, 1151 (1984), to the effect that "[T]he supremacy clause of the United States Constitution requires state courts to vindicate federal rights, even when similar rights under state law are held to be non-justiciable."

WHEREFORE, this Court should reverse the Court of Appeals and remand the case to the Trial Court.

Respectfully submitted this 13th day of August, 2024.

This submission does not exceed the word-count limit imposed by Rule 20.

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ATTORNEY FOR APPELLANT

SUPREME COURT OF GEORGIA
Case No. S23G1029

July 11, 2024

SHERRAN LYNN WASSERMAN v. FRANKLIN COUNTY.

Your request for an extension of time to file the brief of appellant in the above case is granted. You are given an extension until August 13, 2024.

Appellee's brief shall be filed within 20 days after the filing of appellant's brief.

A request for oral argument must be independently timely filed, except in direct appeals from judgments imposing the death penalty, every interim review which is granted pursuant to Rule 37, appeals following the grant of petitions for writ of certiorari, applications of certificates of probable cause to appeal in habeas corpus cases where a death sentence is under review, and appeals in habeas corpus cases where a death sentence has been vacated in the lower court, where oral argument is mandatory. Rule 50 (1)-(2). No extensions of time for requesting oral argument will be granted. Rule 51 (1).

A copy of this order **MUST** be attached as an exhibit to the document for which you received this extension.

SUPREME COURT OF THE STATE OF GEORGIA
Clerk's Office, Atlanta

I certify that the above is a true extract from the minutes of the Supreme Court of Georgia.
Witness my signature and the seal of said court hereto affixed the day and year last above written.

EXHIBIT A
(PAGE 1 OF 1)

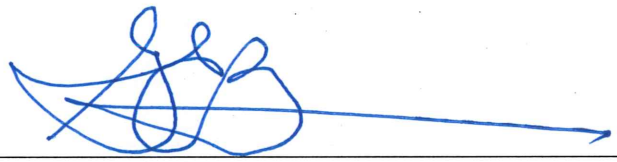
, Clerk

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing BRIEF OF APPELLANT upon counsel of record for Appellees, by filing a true and correct copy thereof through the efile system utilized by this Court and by depositing a true copy of the same in the United States Mail, postage prepaid, addressed as follows:

Timothy J. Buckley III, Esq.
Eric J. O'Brien, Esq.
Buckley Christopher & Hensel, P.C.
2970 Clairmont Road, N.E.
Suite 650
Atlanta, Georgia 30329

This 13th day of July, 2024.



George E. Butler II