No. S23G1029

In the

Supreme Court of Georgia

Sherran Lynn Wasserman,

Appellant,

v.

Franklin County,

Appellee.

On Appeal from the Georgia Court of Appeals
Case No. A23A0614

BRIEF OF THE ATTORNEY GENERAL AS *AMICUS CURIAE* IN SUPPORT OF APPELLEE

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INTRODUCTION

Litigants must assert their own legal injuries. That basic premise was virtually unchallenged for centuries. Only with the U.S. Supreme Court's creation of "third-party standing" principles did courts begin to change practices in this area. But the U.S. Supreme Court's enterprising opinions for federal courts do nothing to alter the justiciability principles inherent in *Georgia's* Constitution, and this Court should hold as much here.

This case arises out of the denial of a zoning permit, but it does not include the person whose rights were allegedly violated by that denial. Appellant Sherran Wasserman filed suit alleging that Appellee Franklin County violated equal protection principles by discriminatorily denying Anthony Pham, who is of Vietnamese ancestry, a permit to construct and operate a large poultry farm on property Wasserman had contracted to sell him. Setting aside that *all* the applicants were of Vietnamese ancestry, and that the County approved most of those applications without issue, the Court of Appeals held that Wasserman lacked standing to assert a third-party claim under federal precedents. The Court of Appeals was right, but Georgia courts should not be applying federal precedents on standing, and this Court should definitively hold that Georgia courts lack power to entertain third-party claims at all.

The judicial power in Georgia "is limited to deciding genuine controversies," and "[f]or an actual controversy to exist, *a party* must

have some right at stake that requires adjudication to protect it." *Sons of Confederate Veterans v. Henry Cnty. Bd. of Comm'rs*, 315 Ga. 39, 50 (2022) (emphasis added) (quotation marks omitted). This prohibition on so-called "third-party standing"—where one plaintiff sues on another's behalf—dovetails with this Court's historic precedents. *See, e.g.*, *Mitchell v. Ga. & Ala. Ry. Co.*, 111 Ga. 760, 771 (1900) (A Georgia plaintiff "cannot sue for … the person who has the legal right of action, but the action should be brought in the name of the real plaintiff."). That was true in 1798, when the Judicial Power clause first appeared, and it remains true today, as the Court recognized in *Sons of Confederate Veterans*.

The only reason the availability of third-party standing is open to question in modern times is a series of late-twentieth century U.S. Supreme Court holdings that allowed plaintiffs to bring suit to vindicate the rights of third parties under certain circumstances. *See, e.g., Powers v. Ohio,* 499 U.S. 400, 410–11 (1991) (describing federal test for third-party standing). This Court, in turn, sometimes "uncritically applied" those federal standing tests "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," *Black Voters Matter Fund, Inc. v. Kemp*, 313 Ga. 375, 392 (2022) (*B.V.M.F.*) (Peterson, J., concurring).

That was a mistake. The U.S. Supreme Court's third-party standing caselaw is divorced from the text of Article III and marked a

sharp departure from longstanding authority limiting standing to plaintiffs seeking to vindicate their own rights. Unsurprisingly, the current Court has begun to retreat from those precedents and limit third-party standing.

Ultimately, though, none of that matters. The Georgia Constitution—and not Article III—is the source of the judicial power of Georgia courts, so "federal standing requirements do not control [the] analysis." *Sons,* 315 Ga. at 45; *see also B.V.M.F.*, 313 Ga. at 392 (Peterson, J., concurring) (noting the "textual difference between the United States and Georgia Constitutions"). The relevant focus is instead on the common-law backdrop of the Judicial Power clause and the many decades of precedent interpreting it. *See Sons,* 315 Ga. at 46–53. And as this Court has recently held, those sources unambiguously dictate that "to invoke a Georgia court's 'judicial power,' a *plaintiff* must have a cognizable injury that can be redressed by a judicial decision." *Id.* at 39 (emphasis added). That precludes third-party standing, and there is no reason to believe that the drafters of the current Constitution, who left the Judicial Power clause unchanged from its original 1798 form, meant to silently upend blackletter Georgia standing principles based on a smattering of contentious federal standing decisions.

The Court should take this opportunity to make explicit what its holding in *Sons of Confederate Veterans* already compels—standing in Georgia courts is limited to plaintiffs seeking redress of their *own*

injuries or vindication of their *own* rights, not those of third parties. Equal protection claims inherently "belong to an individual as an individual," *Kennestone Hosp., Inc. v. Emory Univ.*, 318 Ga. 169, 78 (2024), meaning that *Pham* is the proper party to assert any such claim—not Wasserman. Her suit warrants dismissal.

STATEMENT

1. Appellant Sherran Lynn Wasserman contracted through a broker to sell a 122-acre parcel of farmland in Franklin County to Anthony Pham, who intended to use the property for poultry houses. R-627; *Franklin County v. Wasserman*, 367 Ga. App. 694, 694 (2023). The sales contract was contingent on the County's approval of a poultry-operations permit for the property. R-9; *Wasserman*, 367 Ga. App. at 695.

Permit applications are subject to a three-stage review process. The staff of the Franklin County Planning Commission performs an initial review, after which it can forward an application to the Commission itself. The Commission then votes to recommend approval or denial of the application to the County Board of Commissioners, which holds a formal vote on the recommendation. R-474–75; R-618–22.

Pham's application contemplated the construction and operation of twelve 54' x 500' poultry houses on the property, a particularly large-scale operation for the county. R-627–29. His application came before

the Commission along with three other applications for poultry operations; all four of the applicants, including Pham, were of Vietnamese ancestry. *Wasserman*, 367 Ga. App. at 698; R-1703. Members of the Franklin County Council sent letters to the Planning Commission and the Board opposing Pham's application—but not the others—because of the property's close proximity to a neighborhood school and recreation center. *Id.* at 695.

The Commission considered Pham's permit application at a public hearing in October 2016. R-1703. At the time, Franklin County "had experienced a significant increase in the number [of] applications for permits to construct poultry farms." R-1701. Pham's application "provoked fierce opposition" due to the community's concern that "smell from the poultry houses would affect [a] recreation complex," "noise from the poultry operation would affect the recreation complex and [an] elementary school," and "poultry houses … attract rats." R-1701–02. Other opponents took issue with the large, commercial scale of Pham's proposed operation, purporting to prefer "smaller, family farms." R-1702.

The Planning Commission ultimately recommended approval of two applications (again, also from individuals of Vietnamese ancestry) and denial of two applications, including Pham's. R-1709. The Commission recommended that Pham's application be denied for three reasons: "Mr. Pham had not provided a copy of a letter of intent from a poultry integrator; Mr. Pham did not provide a soil erosion and

sedimentation control permit; and Mr. Pham did not provide a copy of a pit disposal permit." R-1710–11.

In early December 2016, the Franklin County Board of Commissioners held a public hearing to consider the Planning Commission's recommendations. R-1714. The meeting included a variety of presentations and comments, and its "atmosphere" was allegedly "tense, heated, angry and unruly." R-1714 (quotation marks omitted). The Board of Commissioners voted 5-0 to accept all four of the Planning Commission's recommendations, including the denial of Pham's application. R-1716.

2. Wasserman sued the Board of Commissioners in January 2017. R-5–39. She alleged, *inter alia*, that the Board's denial of the permit was racially biased due to Pham's Vietnamese ancestry, and thus violated the Equal Protection Clause of the U.S. Constitution. *Wasserman*, 367 Ga. App. at 695; R-1739.

Over three years later, following discovery, the Board moved for summary judgment. R-470. The superior court denied the Board of Commissioners' motion because, as relevant here, it determined that disputed facts existed as to Wasserman's standing. R-1719. But, before trial, the superior court certified its summary judgment order for appellate review. R-1747.

On appeal, the Court of Appeals applied the federal third-party standing test from *Powers* and concluded that Wasserman lacked standing to "bring a third-party racial discrimination claim" on Pham's

behalf "because she has not shown she had a close relationship to [Pham] such that she could represent his interests," or that Pham "was somehow unable to protect his own interests and bring his own equal protection claim as the person allegedly discriminated against." *Wasserman*, 367 Ga. App. at 697. Having determined Wasserman lacked standing, the Court of Appeals nevertheless proceeded to analyze Wasserman's equal protection claim and concluded that she "failed to show evidence of a similarly situated applicant who was treated differently," and that the Board of Commissioners "had a rational basis for denying the [conditional use permit] application." *Id.* at 698. The Court of Appeals reversed and remanded, directing the superior court to enter summary judgment for the Board of Commissioners. *Id.* at 699.

This Court granted Wasserman's petition for a writ of certiorari on July 2, 2024, indicating that it "is particularly concerned with" two 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's courts?" and "(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."

ARGUMENT

I. The judicial power of Georgia courts does not encompass claims by plaintiffs asserting the rights of third parties.

Georgia law is clear that "to invoke a Georgia court's 'judicial power,' a plaintiff must have a cognizable injury that can be redressed by a judicial decision." *Sons,* 315 Ga. at 39. And the alleged injury must match the judicial relief sought. *See Cobb County v. Floam*, 319 Ga. 89, 89 (2024) (declaratory relief unavailable when plaintiffs showed no uncertainty regarding their future conduct). The Court granted certiorari here to determine whether a Georgia plaintiff can have standing to sue when *another person's* legal rights are at issue. The answer is no. Nearly two centuries of history and precedent from Georgia and other courts limit standing to *plaintiffs* who have suffered a legal injury. And while the U.S. Supreme Court began in the 1970s to allow third-party standing in some circumstances, those rulings have no bearing on the Georgia Constitution, which is the sole source of standing for state courts. The Georgia Judicial Power clause has remained unchanged for over two centuries, and there is no reason to believe that these federal cases—from which the U.S. Supreme Court itself has retreated—would upset this settled understanding.

A. The common law and this Court's precedents make clear that plaintiffs have standing only to remedy *their own* legal injuries, not those of third parties.

Standing is a jurisdictional prerequisite to invoke the judicial power of state courts. *Sons,* 315 Ga. at 44–45. And the judicial power,

in turn, derives from the Georgia Constitution, which "provides that 'the judicial power of the state shall be vested exclusively in' certain classes of courts." *Id.* at 46 (quoting Ga. Const. of 1983, Art VI, § 1, ¶ 1). That provision has been "carried forward without material change" from its appearance in the 1798 Constitution. *Id.* And while the Judicial Power clause contains no express standing requirements, *compare* U.S. Const. Art. III, § 2 (limiting federal judicial power to certain "Cases" or "Controversies"), this Court has definitively construed the provision in holding that, "to invoke a Georgia court's 'judicial power,' a plaintiff must have a cognizable injury that can be redressed by a judicial decision." *Sons,* 315 Ga. at 39.

This construction reflects the common law backdrop of the 1798 Constitution, under which courts had "broad power to adjudicate suits involving private rights—those belonging to an individual as an individual." *Id.* at 47 (citing 3 William Blackstone, *Commentaries on the Laws of England* 2 (Robert Bell ed., 1772)). It also echoes this Court's own longtime understanding that the judicial power is "limited to genuine controversies," meaning that "a party must have some right at stake that requires adjudication to protect it." *Id.* at 50. Separation of powers dictates as much. If courts were to "[d]ecide questions in which a plaintiff has suffered no injury and where no rights can be vindicated by a judicial decision," that would be "tantamount to 'making law,' rather than interpreting and applying it to an accrued set of facts." *Id.* at 62.

The same history and precedent that limits the judicial power to cases and controversies also makes clear that plaintiffs have standing only to vindicate their own rights, not those of third parties. After all, a plaintiff advocating for the rights of a third party does not herself "have some right at stake that requires adjudication to protect it." *Id.* at 50. At common law, the general rule was that "the action should be brought in the name of the party whose legal right has been affected." *Tyler v. Judges of the Ct. of Registration*, 179 U.S. 405, 407 (1900) (quoting Joseph Chitty, *A Treatise on Pleading, and Parties to Actions* 1 (1851)). Thus, an action in contract "must be brought in the name of the party in whom the legal interest in such contract was vested," and a tort claim "in the name of the person whose legal right has been affected." *Id.* (quotation marks omitted). One of the leading early constitutional treatises explained that "a court [will not] listen to an objection made to the constitutionality of an act by a party whose rights it does not affect, and who has, therefore, no interest in defeating it." Thomas M. Cooley, *A Treatise on the Constitutional Limitations Which Rest Upon the Legislative Power of the States of the American Union* 163 (1871).

This Court's standing jurisprudence long reflected this common-law understanding. As early as 1888, the Court refused to consider a claim by a citizen challenging a bond issue on the ground that it discriminated against non-parties. *See Reid v. Town of Eatonton,* 80 Ga. 755 (1888). The Court noted that the plaintiff "does not claim to be

one of the … people against whom, he contends, this act discriminates," and, after canvassing precedents barring third-party claims, concluded that he "had no right to interfere in this matter, as he alleged no damage or injury to himself arising by the enforcement of this act." *Id.* at 757–58. A decade later, the Court reiterated that "[i]t is a well-settled rule of law that equity will not grant relief to any one [sic] who seeks to enjoin that which in no wise affects his rights of person or property." *Plumb v. Christie,* 103 Ga. 686, 691 (1898). So too in *Braswell v. Equitable Mortgage Co.*, 110 Ga. 30, 30–32 (1900), where the administrator of an intestate estate sold the deceased's tract of land at a court-ordered sale to settle the estate's debts, but later, when a mortgage company claimed that it held a deed to the property to secure a loan taken out by the deceased, the administrator brought suit seeking a ruling that the mortgage loan was void for usury. The Court held that the administrator lacked standing because any dispute about the validity of the mortgage was between the new owner of the land and the mortgage company, and did "not concern the administrator of the estate." *Id.* at 32. "As a general rule," the Court concluded, "no one can be party to an action if he has no interest in the cause of action, and, in order for a plaintiff in error to succeed in this court, he must show, not only error, *but injury*." *Id.* (emphasis added) (citing *White v. Haslett,* 49 Ga. 262 (1873); *Brown v. Atlanta*, 66 Ga. 71 (1880)*; Hicks v. Cohen,* 72 Ga. 210 (1883)).

This Court's decisions involving the common-law doctrine of *jus tertii*—a common-law doctrine allowing for the assertion of third-party rights as a *defense* in certain property actions—are particularly illustrative of its approach to third-party standing. *Jus tertii*, meaning "the law concerning the third," historically allowed a defendant in trover, replevin, or similar action who has no defense of his own to "defeat the plaintiff's action by alleging a defect in the plaintiff's title or the fact that the plaintiff has no title at all." *Jus Tertii Under Common Law and the N.I.L.*, 26 St. John's L. Rev. 135, 135 (1951). In other words, a *jus tertii* defense could defeat a claim by arguing that the plaintiff asserted a third party's (the actual property owner's) rights instead of his own.

But while this Court recognized the doctrine generally, it consistently rejected plaintiff's attempts to *file suit* based on *jus tertii* principles. In *Lockhart v. Western and Atlantic Railroad Co.*, 73 Ga. 472, 472–73 (1884), for example, the plaintiff sought to recover $100 for damage to an oil painting. The plaintiff won at trial, but on appeal it was discovered that her brother owned the oil painting, and he had "suffered her to keep it until he called for it." *Id.* at 473. This Court concluded that because the plaintiff "had no property" and was "only a borrower" then "she had no right to maintain the suit." *Id.* at 474. Likewise, in *Mitchell v. Ga. & Ala. Ry. Co.*, 111 Ga. 760, 761 (1900), the plaintiff sued to recover possession of a lumber lot from a railway, claiming he owned the lot and the railway "refused to deliver it to him

or to pay him the profits thereof." But trial revealed that the plaintiff's *wife* owned the lumber lot, and the plaintiff merely acted as her "agent." *Id.* This Court affirmed a dismissal for lack of jurisdiction, holding that a plaintiff "cannot sue for the use of the person who has the legal right of action," and that "the action should be brought in the name of the real plaintiff." *Id.* at 771.

And in *Witt v. Nesar*, 145 Ga. 674, 676 (1916), the Court limited the availability of *jus tertii* even as a defense, explaining that if a trover defendant "is an entire stranger, having no interest whatever in the property, [he] can not set up a jus tertii to defeat the plaintiff's claim for full damages." In doing so, the Court also noted that a plaintiff, "if not the complete owner of the personalty in controversy, was limited to the recovery of the value of his special interest therein," meaning a plaintiff with *no* legal ownership rights could not base his lawsuit on another's rights, regardless of possession. *Id.; see also Jus Tertii Under Common Law and the N.I.L.*, *supra* at 139 ("Even at common law courts recognized that a plaintiff having no title at all is not entitled to sue, and that such lack of legal title may be pleaded by the defendant. The reason for such a rule is that the plaintiff, if he has no legal title, is not the proper party to sue.").

This Court continued to reject the idea of third-party standing right up to the adoption of the current Constitution in 1983. It held in *South Georgia Natural Gas Co. v. Georgia Public Service Commission*, 214 Ga. 174, 176 (1958), for instance, that an interstate gas company

lacked standing to challenge a law requiring *intra*state providers to require a certificate of necessity from the Public Service Commission—even though the law permitted the company to object to other providers' applications for such certificates—because the law would not have any impact on the interstate gas company's business. The Court reiterated that in order to mount a constitutional challenge, a plaintiff "must show that the alleged unconstitutional feature of the statute injures him, and so operates as to deprive him of rights protected by the Constitution of this State or by the Constitution of the United States, or by both." *Id.* at 175 (collecting cases). And in *Sims v. State,* 243 Ga. 83 (1979), the Court held that a criminal defendant lacked standing to challenge the admission of statements from co-defendants as being the "fruit of the poisonous tree" because "[a] party will not be heard to complain of the violation of another person's constitutional rights," and "[t]he only person with standing to complain of the admission of fruits gained from an illegally obtained confession would be the person who *made* the confession." *Id.* at 85 (emphasis added); *see also Massey v. Smith,* 224 Ga. 721, 721 (1968) ("It is a wellknown [sic] axiom of the law that this court will not consider a constitutional attack upon an act whether the [challenger] does not allege any injury accruing to him by the enforcement of the act[.]") (quotation marks omitted).

This principle was the default nationwide. "The rule that a litigant has standing to raise only his 'own' rights has a long history.

The early case law contains no suggestion that this limitation was understood to be simply a matter of judicial discretion." Henry P. Monaghan, *Third Party Standing*, 84 Colum. L. Rev. 277, 286 (1984). The U.S. Supreme Court's rulings are consistent on this point from the early days of the republic. In *Owings v. Norwood's Lessee,* 9 U.S. 344 (1809), a defendant in an ejectment action argued unsuccessfully that the plaintiff's title to the land was invalid because the interest of the former British mortgagees was protected from confiscation under the Treaty of Paris. *Id.* at 344. The Supreme Court held that the defendant could not invoke the Court's appellate jurisdiction for actions "arising under a treaty" because the treaty at issue protected only the British subjects with interests in confiscated lands, but the defendant did "not contend that his right gr[ew] out of the treaty." *Id.* at 347–48.

"The Court repeatedly relied on *Owings* and its progeny … into the early twentieth century … to hold that a litigant seeking Supreme Court review of a state judgment must assert his own rights—not a third party's rights—under a provision of the federal Constitution or of a federal statute or treaty." Brian Charles Lea, *The Merits of Third-Party Standing*, 24 Wm. & Mary Bill Rts. J. 277, 289 (2015). Among many examples, the Court made clear in *Tyler* that a plaintiff is "bound to show an interest in the suit personal to himself," because federal courts are "not empowered to decide moot questions or abstract propositions, or to declare … principles or rules of law which cannot affect the result as to the thing in issue in the case before it." *Tyler*,

179 U.S. at 406, 409 (quotation omitted). And in *Yazoo M.V.R. & Co. v. Jackson Vinegar Co.,* 226 U.S. 217, 219–20 (1912), the Court held that a railroad lacked standing to challenge the constitutionality of a law applied to others. The Court reasoned that it "must deal with the case in hand, and not with imaginary ones," and that it was limited to holding that, "as applied to cases like the present, the statute is valid." *Id.*

State courts applied the rule, as well. The Pennsylvania Supreme Court, for example, held in *Smith v. McCarthy*, 56 Pa. 359 (1867), that the plaintiffs could not challenge the constitutionality of an act because "[t]hey allege[d] no private or individual injury." *Id.* at 362 ("Even supposing the act to be as alleged, unconstitutional, private parties cannot interfere … to ask it to be so declared, unless on account of some special damage or injury to them in person or property."). The Virginia Supreme Court observed in *Antoni v. Wright*, 63 Va. 833, 857 (1872), that "it is well settled that the courts will never pronounce a statute unconstitutional because it may perhaps impair the rights of others not complaining." And the Kansas Supreme Court held that plaintiffs could not challenge a statute on equal-protection grounds because, "[o]wning no agricultural land, the [plaintiffs] are not affected by the discrimination which the statute makes between the different classes of owners of such kind of land." *Kansas City v. Union Pac. Ry. Co.*, 53 P. 468, 469 (Kan. 1898). Indeed, the State is not aware of any U.S.

jurisdiction that adopted third-party standing principles or found them in the common law prior to the twentieth century.

Of course, the federal and Georgia constitutions are not the same, and the relevant clauses of other states' constitutions may differ as well, but the point remains. Regardless of the jurisdiction, there was no third-party standing for most of the country's history, which undermines any argument that Georgia's 1798 constitution somehow impliedly contained a provision for such a concept. Plaintiffs may invoke the jurisdiction of Georgia courts only to vindicate *their own* legal rights and property interests in court.

B. Neither the U.S. Supreme Court's late-twentieth century experiments with third-party standing, nor this Court's decisions uncritically applying them, warrant departing from well-established limits on the judicial power.

Sons of Confederate Veterans, viewed along with the authorities it canvassed, should leave little doubt that the judicial power does not include resolution of claims made on behalf of third parties. The only reason the availability of third-party standing is even at issue here is a series of twentieth-century decisions in which the U.S. Supreme Court departed from centuries of its own precedent and began to allow for third-party standing in certain circumstances. This Court, in turn, has applied some of those standing rules without analysis. But there is no reason to think that these federal decisions—which this Court has criticized and from which the U.S. Supreme Court itself has signaled

its retreat—should have any bearing on standing under the Judicial Power clause, which has remained unchanged for more than 200 years.

Federal third-party standing doctrine finds its roots in *Barrows v. Jackson*, 346 U.S. 249 (1953), where a white landowner was sued for breaching a racially restrictive covenant by conveying his home without the restriction, resulting in non-whites moving in. *Id.* at 251–52. In his defense, Barrows asserted the constitutional rights of non-white persons who were not parties to the lawsuit. *Id.* The U.S. Supreme Court saw the case as a "unique situation" in which a state court judgment for the plaintiff "might result in a denial of constitutional rights" in circumstances "in which it would be difficult if not impossible for the persons whose rights are asserted to present their grievance before any court." *Id.* at 257. This theme of *defendants* asserting third-party rights continued in *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958) (defendant asserted members' rights to resist mandatory disclosure of their names and addresses to state), and *Griswold v. Connecticut*, 381 U.S. 479, 480–81 (1965) (defendants found guilty of violating state contraception statute had "standing to raise the constitutional rights of the married people with whom they had a professional relationship"). Indeed, years after *Barrows*, the U.S. Supreme Court continued to insist that a "plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

That shifted in the 1970s. In *Singleton v. Wulff*, a plurality of the U.S. Supreme Court permitted physicians who performed elective abortions to challenge a Missouri statute that excluded the procedure from Medicaid benefits. 428 U.S. 106, 108 (1976); *see also Craig v. Boren,* 429 U.S. 190, 191–92 (1976) (allowing vendor to assert equal protection claim on behalf of males challenging a law establishing a drinking age of 18 for females and 21 for males). The Court ultimately settled on a three-part test for third-party standing: (1) The litigant must have suffered an "injury in fact," thus giving him 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*, 499 U.S. at 411 (citations omitted).

During the same period, the U.S. Supreme Court also permitted third-party standing in the context of overbreadth and associational standing. In overbreadth cases, federal courts permit a plaintiff to challenge a statute's constitutionality "not because their own rights of free expression are violated, but because of a judicial prediction or assumption" that the statute may chill the protected speech *of others*. *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973).[1] And associational

[1] The undersigned recently submitted a brief explaining at length why the federal overbreadth doctrine should not apply in Georgia courts. *See* Supp. Br. of Appellees, *Williams v. Powell*, No. S24A0591 (July 8, 2024).

standing in federal court "recognize[s] that an association may have standing to assert the claims of its members even where it has suffered no injury[.]" *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 342 (1977).

This Court, by contrast, has never "squarely addressed third-party standing" under the Georgia Constitution. *See Feminist Women's Health Ctr. v. Burgess*, 282 Ga. 433, 434 (2007). It has, on occasion, uncritically applied these federal tests "to resolve issues of standing to bring a claim in Georgia's courts." *Id.* For example, in *Aldridge v. Georgia Hospitality & Travel Association*, 251 Ga. 234, 235 (1983), a trade association challenged a county fee schedule on behalf of its members. After noting that no Georgia cases addressed associational standing, the Court applied the three-part standard from *Hunt* to hold that the association had standing to sue. *Id.* at 236. And in *Feminist Women's Health*, medical providers who were denied payment for performing "medically necessary abortions" challenged the constitutionality of Georgia's prohibition on Medicaid coverage for these procedures. 282 Ga. at 433. The trial court determined the providers lacked standing to sue "on behalf of their Medicaid-eligible patients," *id.* at 433–34, but this Court reversed—again based on federal third-party standing, which it applied "[i]n the absence of [its] own authority," *id.* at 434. A year later, this Court acknowledged that it had never "expressly adopted the federal overbreadth doctrine as an exception to standing" but nevertheless applied it without examining

whether the Georgia Constitution authorizes it. *Granite State Outdoor Advert., Inc. v. City of Roswell*, 283 Ga. 417, 420 (2008).

None of this should impact the Court's analysis here. Most importantly, "federal standing requirements do not control [this Court's] analysis." *Sons*, 315 Ga. at 45. "[S]tate constitutions are not mere shadows cast by their federal counterparts." *Olevik v. State*, 302 Ga. 228, 234 n.3 (2017). To the contrary, "the text, history, and precedents relating to judicial power under the Georgia Constitution and the United States Constitution are not identical." *B.V.M.F.*, 313 Ga. at 383. That means the Court "*must* examine whether the *Georgia* Constitution" authorizes third-party standing, *Sons,* 315 Ga. at 43 (emphases added). The Court did so in *Sons of Confederate Veterans* and concluded, consistent with more than a hundred years of precedent, that a plaintiff who invokes Georgia's judicial power must seek to remedy her own injury. *Id.* at 50. Neither federal standing precedents, nor this Court's decisions "uncritically appl[ying]" them, *id.* at 45 n.4, have any bearing on that rule.

Moreover, the Judicial Power clause has remained substantively unchanged since 1798, *id.* at 46, and this Court "generally presume[s] that a constitutional provision retained from a previous constitution without material change has retained the original public meaning that provision had at the time it first entered a Georgia Constitution, absent some indication to the contrary," *Elliott v. State,* 305 Ga. 179, 183 (2019). But nothing whatsoever indicates that the drafters of the 1983

Constitution meant to silently upend long-established rules limiting standing to cases involving a plaintiff's own rights. Indeed, that would be the ultimate example of "hid[ing] elephants in mouseholes," *Whitman v. Am. Trucking Ass'ns.*, 531 U.S. 457, 468 (2001), since at that point even the U.S. Supreme Court had recently reiterated that a plaintiff generally "cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499.

Nor could the prior-construction canon even conceivably apply here. *See Olevik*, 302 Ga. at 237 (quoting Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322–26 (2012)) (explaining that "if a [constitutional] provision is enacted with words or phrases that had previously received authoritative construction by a jurisdiction's court of last resort, the words and phrases are to be understood according to that construction"). This Court does not appear to have definitively construed the Judicial Power clause until *Sons of Confederate Veterans* in 2022, and all of its pre-1983 precedent *precluded* rather permitted third-party standing. *See supra,* at 9–17. Moreover, the Court stated in *1979* that "[a] party will not be heard to complain of the violation of another's constitutional rights." *Sims*, 243 Ga. at 85.

Finally, to the extent this Court deems federal standing cases informative, the U.S. Supreme Court itself is retreating from its earlier expansions of third-party standing. While that Court has continued to authorize defendants to assert the rights of third parties in limited

circumstances, *see, e.g.*, *Powers*, 499 U.S. at 410–11, it has "not looked favorably upon third-party standing" assertions by plaintiffs, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (citing *Conn v. Gabbert*, 526 U.S. 286, 292–93 (1999) (rejecting attorney's assertion of client's rights). It generally applies traditional *jus tertii* principles, by which a party asserts another's rights as part of a case in which the court's jurisdiction is *already established*.

Whereas the U.S. Supreme Court once described standing as a "requirement … [that] is *often used to describe* the constitutional limitation on the jurisdiction of this Court to 'cases' and 'controversies,'" *Barrows*, 346 U.S. at 255 (emphasis added), it now emphasizes that "the text of the Constitution … confines the federal judicial power to the resolution of 'Cases' and 'Controversies," and "[f]or there to be a case or controversy under Article III, the plaintiff *must* have … standing," *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (emphasis added). And while some federal courts once viewed class actions as an "exception[] to the prohibition against third-party standing" in federal court, *Laurelwood Cleaners, LLC v. Am. Express Co.*, No. CV-20-2973, 2020 WL 2318206, at *1 (C.D. Cal. May 11, 2020), the Court has since put that notion to rest, making clear that "[e]very class member must have Article III standing in order to recover individual damages," and that "Article III does not give federal courts the power to order relief to any uninjured plaintiff, class action or not," *TransUnion*, 594 U.S. at 431.

In sum, this Court has consistently approached its standing jurisprudence with a clear, though sometimes implicit, assumption that the plaintiff who invokes Georgia's judicial power must seek to remedy his or her own injury. This was true in the nineteenth century, *see Reid*, 80 Ga. at 602 (no standing where plaintiff "does not claim to be one of the … people against whom, he contends, this act discriminates"), and remains true today, *see Sons*, 315 Ga. at 50 ("For an actual controversy to exist, *a party* must have some right at stake that requires adjudication to protect it.") (emphasis added). That alone is enough to preclude third-party standing. But because of this Court's occasional application of federal tests for third-party standing in some instances, the Court should take this opportunity to definitively hold that Georgia courts are not empowered to consider claims by plaintiffs advocating the rights of third parties.

II. Wasserman lacks standing to challenge the alleged violation of Pham's equal protection rights.

The Court of Appeals was correct that Wasserman cannot satisfy the requirements for third-party standing under federal law. *Wasserman,* 367 Ga. App. at 698 n.6. As noted above, a plaintiff can establish third-party standing in federal court if she (a) demonstrates an injury in fact giving her a "concrete interest" in the outcome of the issue in dispute, (b) the plaintiff has a close relation to the third party, and (c) there is some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 410–11

(quotations omitted). The Court of Appeals correctly observed that Wasserman can hardly claim to have a "close relationship" with Pham, given that she had never met him prior to the Board meeting, was not involved with preparing the poultry-operations application, and "did not even realize the sale of her property was contingent upon approval of the … application." 367 Ga. App. at 697. Nor, as the court noted, has Wasserman shown that Pham was somehow unable to protect his own interests as the alleged target of the discrimination. *Id.* She does not even attempt to argue otherwise here, so even if federal third-party standing rules applied, Wasserman would still lack standing.

But as discussed above, federal standing requirements do *not* apply in state court, and the Judicial Power clause does not empower Georgia courts to entertain third-party claims. Instead, *Sons of Confederate Veterans* controls, so to invoke standing Wasserman must first show that she has "some right at stake that requires adjudication to protect it." 315 Ga. at 50. That right can be either private, i.e., "those belonging to an individual as an individual," or, in some cases, public, i.e., those held by "the whole community, considered as a community." *Id.* at 47–48 (citing 3 William Blackstone, *Commentaries on the Laws of England* 2 (Robert Bell ed., 1772)). The Court explained in *Sons of Confederate Veterans* that "[w]here a public duty is at stake, a plaintiff's membership in the community" can provide standing to

bring an action "to ensure a local government follows the law." *Id.* at 61.[2]

Wasserman does not seek to vindicate either type of right. Her sole surviving claim is that the Board of Commissioners rejected the poultry-operations application because Pham was of Vietnamese descent. *Wasserman,* 367 Ga. App. at 697 & n.4 (noting that Wasserman "conceded that the equal protection claims are the only ones upon which she was proceeding [and] thus has abandoned any claim arising from an alleged injury based on interference with her contractual rights").

While it is sometimes difficult to draw "a definitive line" between private and public rights, *Kennestone*, 318 Ga. at 176–77, this case presents no such challenge. The right to equal protection of the laws is undoubtedly a "core" private right—one that "belong[s] to an individual as an individual." *Id.* at 176–78 (quotation omitted). Georgia's equal protection guarantee stems from Section I of Georgia's Constitution, titled "Rights of Persons", which states: "No person shall be denied the equal protection of the laws." Ga. Const. of 1983, Art. I, § I, ¶ II. Like most constitutional rights, it is a private right. *See New York v. Ferber*, 458 U.S. 747, 767 (1982) (referencing "the personal nature of

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[2] The Court left open whether "[t]he Georgia Constitution might impose a higher requirement when a plaintiff challenges the constitutionality of a statute," noting that the Court has "long held that in such cases, the plaintiff must show an actual, individualized injury." *Sons*, 315 Ga. at 39.

constitutional rights"); *McGowan v. Maryland*, 366 U.S. 420, 429 (1961) ("[T]he general rule is that a litigant may only assert his own constitutional rights or immunities.") (quotation omitted). And here, the right is private to Pham, not Wasserman. She alleges that the Board subjected *Pham* to differential treatment because of his race or ancestry, not that it subjected *her* to any discrimination. *Wasserman,* 367 Ga. App. at 697 & n.4.

Wasserman does not address any of these arguments on appeal. Instead, she contends that the Supremacy Clause of the U.S. Constitution "requires courts to vindicate federal rights," even if the plaintiff would lack standing under state law. Appellant Br. at 29. That argument is a nonstarter. Even assuming, as she contends, that "state courts should not be permitted to interpose their own justiciability doctrines to exclude § 1983 actions that could be heard in federal courts," *id.* at 28 (quoting 1 Steven H. Steinglass, *Section 1983 Litigation in State and Federal Courts*, § 13:4 (2023)), the Court of Appeals correctly held that Wasserman would lack standing to assert her third-party claim in *federal* court, 367 Ga. App. at 697, and Wasserman does not argue otherwise here.

* * *

Georgia law is clear that "[w]hen … the legal right of action is not in the plaintiff, he has no right of action at all,—either in his own name or in that of another." *Mitchell*, 111 Ga. at 771. Thus, only Pham has standing to sue based on allegations that Pham's right to equal

protection was violated. The Georgia Constitution does not permit Wasserman to sue on his behalf.

CONCLUSION

For the reasons set out above, this Court should hold that the Georgia Constitution requires a plaintiff to allege a violation of his or her own legal rights to invoke Georgia's judicial power.

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

Respectfully submitted,

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I hereby certify that on September 13, 2024, I served a copy of this brief by email, addressed as follows:

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