STATE OF VERMONT

SUPERIOR COURT
Washington Unit

CIVIL DIVISION
Docket No. 21-CV-02963

Charles Ferry et al.,

Plaintiffs,

v.

The City of Montpelier, Vermont, and John Odum, in his official capacity as the City Clerk for the City of Montpelier, Vermont,

Defendants.

MOTION TO DISMISS
V.R.C.P. 12(b)(1), (6)

NOW COME Defendants the City of Montpelier and John Odum, in his official capacity as the City Clerk for the City of Montpelier, Vermont, by and through their attorneys, Tarrant, Gillies & Shems, and, pursuant to Vermont Rules of Civil Procedure 12(b)(1) and (b)(6), hereby move to **DISMISS** Plaintiffs' Complaint seeking declaratory and injunctive relief regarding a 2021 amendment to the charter for the City of Montpelier authorizing voting only as to Montpelier questions and candidates by "any noncitizen who resides in the United States on a permanent or indefinite basis in compliance with federal immigration laws." 24 App. V.S.A. Ch. 5, § 1504(1). In support, Defendants state as follows:

I. Introduction.

On November 6, 2018, the voters of the City of Montpelier approved seeking legislative permission to amend the City's charter to authorize voting as to Montpelier questions and candidates by noncitizen, legal residents of the United States. On May 21, 20121, the General Assembly approved a charter change to that effect, allowing, in addition to citizens, "any noncitizen who resides in the United States on a permanent or indefinite basis in compliance with federal immigration laws," 24 App. V.S.A. Ch. 5, § 1504(1), to vote only on "City questions and

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candidates," id. § 5-1503. The charter amendment expressly precludes noncitizen voting on any state or federal question or candidate, id. § 1501(b), and requires the City to maintain separate voter checklists and to create separate ballots in any election which involves a federal, State, county, special district, or school district office or question and a city question or office, id. §§ 1502, 1503. Although the Governor vetoed this charter change, the General Assembly overrode the veto on June 24, 2021, and the charter change was effective immediately.

Now, Plaintiffs, consisting of several individuals from across the State of Vermont, only two of whom are residents of the City of Montpelier, and the Vermont Republican Party and Republic National Committee, seek to frustrate both the will of the voters of the City of Montpelier and the General Assembly by seeking declaratory and injunctive relief which would preclude the enfranchisement of the resident noncitizens who reside in the United States on a permanent or indefinite basis in compliance with federal immigration laws from participating in purely local matters.[1] Because the Plaintiffs lack standing to challenge this charter change, the Complaint must be dismissed for lack of subject-matter jurisdiction. Further, because Plaintiffs misapprehend Vermont constitutional law on local elections, the Complaint fails to state a claim for which relief can be granted, and must be dismissed.

II. Title 24, Section 901(a) Requires Dismissal of John Odum, in His Official Capacity as the City Clerk for the City of Montpelier.

To the extent that the Complaint seeks relief against John Odum, in his official capacity as the City Clerk for the City of Montpelier, it must be dismissed. Title 24, Section 901(a) provides that any action against an elected municipal officer "shall be brought in the name of the town in which the officer serves . . . ." See also 1 V.S.A. § 139 (providing that "town" shall "include city and wards or precincts therein" and that "the laws applicable to the inhabitants and officers of

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[1] The same set of plaintiffs, represented by the same counsel, simultaneously filed a largely identical action in the Chittenden County Civil Division challenging a recent amendment to the Montpelier municipal charter permitting noncitizen voting in Montpelier's municipal elections. See Weston v. City of Winooski, 21-CV-02965.

towns shall be applicable to the inhabitants and similar officers of all municipal corporations"). In Montpelier, the office of City Clerk is elected for three-year terms. 24 App. V.S.A. Ch. 5, § 509(a). Because the Complaint seeks injunctive and declaratory relief against an elected officer of the City of Montpelier, it must be dismissed and proceed solely against the City of Montpelier. 24 V.S.A. § 901(a); see, e.g., Gallipo v. City of Rutland, 173 Vt. 223, 238-39 (2001) (affirming superior court's dismissal of claim against City of Rutland Fire Chief under Title 24, Section 901(a)).

III. Plaintiffs' Claims Must Be Dismissed for Lack of Standing, V.R.C.P. 12(b)(1).

"Vermont has adopted the federal standing requirements under Article III of the United States Constitution, which limits a court's jurisdiction to 'actual cases or controversies.'" Baird v. City of Burlington, 2016 VT 6, ¶ 13, 201 Vt. 112 (citation omitted); see also Wool v. Off. of Prof'l Regul, 2020 VT 44, ¶ 8, 212 Vt. 305 (reviewing dismissal for lack of standing under Rule 12(b)(1)). "This jurisdictional requirement [of standing] enforces the separation of powers between the three different branches of government by confining the judiciary to the adjudication of actual disputes and preventing the judiciary from presiding over broad-based policy questions that are properly resolved in the legislative arena." Vasseur v. State, 2021 VT 53, ¶ 9 (quotation omitted); Clapper v. Amnesty Int'l USA, 568 U.S. 398, 408 (2013) ("The law of Article III standing, which is built on separation-of-powers principles, serves to prevent the judicial process from being used to usurp the powers of the political branches."). Appropriately restraining interference with the political process is particularly important here, in evaluating a challenge to voting law, which is "the most basic of political rights." See Fed. Election Comm'n v. Akins, 524 U.S. 11, 25 (1998).

"To demonstrate standing, a plaintiff must allege injury in fact, causation, and redressability." Paige v. State, 2018 VT 136, ¶ 9, 209 Vt. 379. The injury must be personal to the plaintiff: "[T]he plaintiff must allege personal injury fairly traceable to the defendant's allegedly

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unlawful conduct, which is likely to be redressed by the requested relief." Id. (quotation omitted); see also Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 & 506 n.1 (1992) (explaining plaintiff must show "an invasion of a legally protected interest" that is "concrete and particularized," meaning, "the injury must affect the plaintiff is a personal and individual way"). "[A] plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." Lujan, 504 U.S. 555 at 573-74.

An organization asserting an injury against itself must meet the same standing test as applies to an individual. See N.Y. Civil Liberties Union v. N.Y.C. Transit Auth., 684 F.3d 286, 294 (2nd Cir. 2012); see also Parker v. Town of Milton, 169 Vt. 74, 78 (1998). Courts generally refer to this as "organizational" standing. See, e.g., N.Y. Civil Liberties Union, 684 F.3d at 294. An organization also "has standing to bring suit on behalf of its members when (1) its members have standing individually; (2) the interests it asserts are germane to the organization's purpose; and (3) the claim and relief requested do not require the participation of individual members in the action." Parker, 169 Vt. at 78. Courts generally refer to this as "associational" standing or "representational" standing. See, e.g., N.Y. Civil Liberties Union, 684 F.3d at 294.

"A plaintiff must allege facts sufficient to establish his or her standing on the face of the complaint." Paige, 2018 VT 136, ¶ 10 (quotation omitted). In determining standing at the pleading stage, the Court "accept[s] all uncontroverted allegations as true, construe[s] those facts in the light most favorable to the nonmoving party, and assume[s] the truth of all reasonable inferences that may be derived from the pleadings." Vasseur, 2021 VT 53, ¶ 10 (quotations omitted). "[T]he standing inquiry is a distinct analysis from consideration of the merits of a claim . . . ." Id.

The Complaint alleges the following facts about each plaintiff. The individual plaintiffs are citizens of the State of Vermont and the United States, and they reside and are registered voters

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in Montpelier, Essex, Essex Junction, Northfield, Castleton, Stockbridge, Georgia, or Winooski. See Complaint, ¶¶ 3-12. The Vermont Republican Party is a political party in the State of Vermont that "works to promote Republican values and assists Republican candidates in obtaining election to federal, state, and local office." See Complaint, ¶ 13. The Republican National Committee is a national political committee that manages national Republican business, "supports Republican candidates for public office at all levels, coordinates fundraising and election strategy, and promotes the Republican national platform." See Complaint, ¶ 14. The Complaint also alleges that 24 App. V.S.A. §§ 5.1501- 5.1504 violates Section 42 of the Vermont Constitution. See Complaint, ¶¶ 42-45. In the remainder of the complaint, the plaintiffs allege information about the Vermont Constitution, historical voting rights, and Montpelier's charter, and they state their prayer for relief.

The complaint alleges only one injury: that the noncitizen voting provisions of the Montpelier charter violate Section 42 of the Vermont Constitution. The complaint does not state how that alleged violation, if true, harms any of the plaintiffs. Plaintiffs' allegations are insufficient to show standing.

The "right to vote is individual and personal in nature" and "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." Gill v. Whitford, 138 S.Ct. 1916, 1929 (2018) (quotations omitted)). But a plaintiff must show that the challenged law personally and individually disadvantages that plaintiff. See id. A general allegation that a voting law is unconstitutional is insufficient to show personal and individual disadvantage. In an analogous case, Lance v. Coffman, the U.S. Supreme Court reasoned: "The only injury plaintiffs allege is that the law—specifically the Elections Clause [of the U.S. Constitution]—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." 549 U.S. 437, 441-42 (2007). The Court accordingly held: "Because

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plaintiffs assert no particularized stake in the litigation, we hold that they lack standing to bring their Elections Clause claim." Id. at 442.

Plaintiffs here failed to allege any facts showing how the Montpelier charter provisions, if unconstitutional, personally and individually disadvantage themselves. As such, they have failed to allege an injury in fact and do not have standing. It is also impossible to determine whether an alleged injury is fairly traceable to a defendant's conduct and redressable by the court when the plaintiff does not state what the alleged injury is. See Paige, 2018 VT 136, ¶ 9.

Although Vermont's notice pleading standard is "exceedingly low," Bock v. Gold, 2008 VT 81, ¶ 4, 184 Vt. 575 (mem.) (quotation omitted), plaintiffs must provide some allegation of personal injury. See Vasseur, 2021 VT 53, ¶¶ 11, 13 (explaining "plaintiff did not have to prove an injury at the pleading stage of the litigation, but he did have to allege facts in the complaint that show an injury in fact" and that plaintiff lacked standing because he "did not explain . . . how, concretely, he ha[d] been harmed" (emphasis in original)); Paige, 2018 VT 136, ¶¶ 13-16 (affirming dismissal for lack of standing because plaintiff failed to allege direct, personal injury on face of complaint).

Nor can we speculate as to what the alleged injury may be. "The gist of the question of standing is whether plaintiff's stake in the outcome of the controversy is sufficient to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." Turner v. Shumlin, 2017 VT 2, ¶ 10, 204 Vt. 78 (per curiam) (quotation omitted). If the court must resort to speculation to determine whether there is an injury in fact, the "concrete adverseness" on which litigation depends does not exist. See also Elend v. Basham, 471 F.3d 1199, 1204 (11th Cir. 2006) (holding court should not "imagine or piece together an injury sufficient to give plaintiff standing when it has demonstrated none" and that "court lacks the power to create jurisdiction by embellishing a deficient allegation of injury" (quotation omitted)).

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In failing to allege any personal injury, all the plaintiffs have failed to show standing. Accordingly, the matter should be dismissed pursuant to V.R.C.P. 12(b)(1). See Baird, 2016 VT 6, ¶ 1 (affirming dismissal based on lack of standing).

IV. The Complaint Fails to State a Claim Upon Which this Court Can Grant Relief.

Dismissal under V.R.C.P. 12(b)(6) for failure to state a claim is appropriate "only if 'it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.'" Birchwood Land Co., Inc. v. Krizan, 2015 VT 37, ¶ 6, 198 Vt. 420 (quoting Dernier v. Mortg. Network, Inc., 2013 VT 96, ¶ 23, 195 Vt. 113). The Court will "assume as true all facts as pleaded in the complaint, [and] accept as true all reasonable inferences derived therefrom." Id.

Plaintiffs' Complaint contains a single count, alleging that provisions of the City's charter, codified at 24 App. V.S.A. Ch. 5, §§ 1501-1504, violate Chapter II, Section 42 of the Vermont Constitution. Plaintiffs challenge the statute on its face, as opposed to an "as applied" challenge. This type of claim presents a "pure question of law." State v. VanBuren, 2018 VT 95, ¶ 19, 210 Vt. 293. Defendants must "establish 'that no set of circumstances exists under which [the noncitizen voting provisions] would be valid,' or that the statute lacks any 'plainly legitimate sweep.'" Id. (quoting United States v. Stevens, 559 U.S. 460, 472 (2010)).

In reviewing a constitutional challenge, the Supreme Court "presume[s] a statute is constitutional absent clear and irrefragable evidence to the contrary." Athens Sch. Dist. v. Vt. State Bd. of Ed., 2020 VT 52, ¶ 37, ___ Vt. ___ (quoting State v. Curley-Egan, 2006 VT 95, ¶ 27, 180 Vt. 305).

A. Chapter II, Section 42 of the Vermont Constitution Does Not Apply to City Elections.

Both the plain language of the Vermont Constitution and an unwavering line of Supreme Court precedent provide that Chapter II does not apply to municipal elections. It was wholly within the Legislature's purview to amend Montpelier's charter to allow noncitizens who reside in the

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United States on a permanent or indefinite basis to vote solely on municipal matters, and nothing in the Vermont Constitution constrained that power.

1. Constitutional Background.

The current Chapter II, Section 42 of the Vermont Constitution is rooted in the freeman's oath established in 1777 in the original Vermont Constitution:

> Every man of the full age of twenty-one years, having resided in this State for the space of one whole year, next before the election of representatives, and who is of a quiet and peaceable behavior, and will take the following oath (or affirmation), shall be entitled to all the privileges of a freeman of this State.
>
> "I _____ _____ solemnly swear by the ever living God (or affirm in the presence of Almighty God) that whenever I am called to give my vote or suffrage, touching any matter that concerns the State of Vermont, I will do it so, as in my conscience, I shall judge will most conduce to the best good of the same, as established by the constitution, without fear or favor or any man."

Vt. Const. 1777, Chapter II, Section VI. "Freeman," a term no longer in use, referred to a man eligible to vote at elections of state and federal officers. See Woodcock v. Bolster, 35 Vt. 632 (1863) (holding that 1828 amendment to Vermont Constitution requiring that "freemen" be U.S. citizens was "by no means synonymous with that of a voter in town or school meeting"); accord State v. Marsh, N. Chip. 28, 1789 WL 103 (1789) (noting that "Freemen," synonymous with "The People" as used in the original Vermont Constitution, was confined to the "collective body of the people" who have a right to vote in "electing the officers to the general government" and General Assembly).

Subsequent versions of the Constitution retained substantially the same language, requiring taking the freeman's oath "to be entitled to all the privileges of a freeman of this State." See, e.g., Vt. Const. 1793, Chapter II, Section 21; Vt. Const. 1786, Chapter II, Section XVIII.

The 1827 Council of Censors acknowledged that to date the Vermont Constitution had not directly addressed whether noncitizens could vote in state and federal elections, and made a recommendation that noncitizens be excluded from such elections. The proposed amendment was

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adopted by the constitutional convention in 1828 and eventually became Amendment 1 of the Constitution of 1793:

> No person, who is not already a freeman of this state, shall be entitled to exercise the privileges of a freeman, unless he be a natural born citizen of this, or some one of the United States, or until he shall have been naturalized, agreeably to the acts of congress.

See RECORDS OF THE COUNCIL OF CENSORS OF THE STATE OF VERMONT, 311-312, 322-23 (Paul S. Gillies & Gregory D. Sanford, eds., 1991). This amendment was adopted as a resolution, not as a change to the existing text of the 1793 Constitution. Id. Amendment 1 thus did not directly alter the text of Vt. Const. Ch. II Section 21, the precursor to Vt. Const. Ch. II, Section 42. Id. at 146. The amendment was finally integrated into Chapter II when the Vermont Supreme Court revised the Constitution in 1913. Vermont Secretary of State, CONSTITUTION OF THE STATE OF VERMONT ESTABLISHED JULY 9, 1793 AND AMENDED IN 1828, 1836, 1850, 1870, 1883 AND 1913 (1913) 3-4. In this revision, the Court renumbered Chapter II, Section 21 as Chapter II, Section 34 and rewrote it as follows:

> Qualifications of Freemen. Section 34. Every man of the full age of twenty-one years, who is a natural born citizen of this or some one of the United States, or has been naturalized agreeably to the Acts of Congress, having resided in this State for the space of one whole year next before the election of Representatives, and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a freeman of this State:

Id. 34–35 (emphasis supplied).

The text of the current version, memorialized in Chapter II, Section 42, remains largely unchanged. It has more modern and inclusive verbiage—the title now reads "Qualifications of Freemen and Freewomen" and "voter" is substituted for "freeman" in the body of the provision—but nothing to suggest a change in the category of elections to which it applies. "Freeman" has always been synonymous with a voter in state and federal elections. See Marsh, N. Chip. 28, 1789 WL 103 (1789) (defining "freeman" as those who have a right to vote in "electing the officers to the general government" and General Assembly). Despite modifications and renumbering, the

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purpose of this section of the Constitution has remained the same: to establish the qualifications of a "freeman" (or freewoman)—a person eligible to vote in state and federal elections. See also Vt. Const. Ch. II, § 76 (directing revision of Chapters I and II of the Constitution "in gender inclusive language" and explaining "[t]his revision shall not alter the sense, meaning or effect of the sections of the Constitution").

2. The Plain Language of Section 42 of the Vermont Constitution Does Not Apply to Municipal Elections.

Section 42 provides:

> Every person of the full age of eighteen years who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the following oath or affirmation, shall be entitled to all the privileges of a voter of this state:
>
> You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person.
>
> Every person who will attain the full age of eighteen years by the date of the general election who is a citizen of the United States, having resided in this State for the period established by the General Assembly and who is of a quiet and peaceable behavior, and will take the oath or affirmation set forth in this section, shall be entitled to vote in the primary election.

Vt. Const. Ch. II, § 42. The plain language makes clear that to participate in state elections, a voter must be "a citizen of the United States." Id.; see also id. (requiring citizenship "to be entitled to all the privileges of a **voter of this state**" and applying oath to "any matter that **concerns the State of Vermont**" (emphasis supplied)). However, it does not refer to local or municipal elections. This is the sole constitutional provision concerning voter qualifications, and it is therefore reasonable to assume that the framers would have mentioned local matters or local elections if they intended these restrictions to apply locally, but they did not.

The same logic underlies State v. Marsh, N. Chip. 28, 1789 WL 103 (1789), decided a mere twelve years after the adoption of the first Vermont Constitution. There, the plaintiff argued that

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a Town Constable was without authority to distrain his property because the Constable had not been legally elected to his office. Id. He challenged the results of this election as unconstitutional because a provision of the Vermont Constitution required "elections" to be conducted by ballot, whereas the Town Constable had been elected by voice vote, as was typical of Town Meetings at the time. Id. The Vermont Supreme Court rejected the plaintiff's argument and held that the provisions in the Constitution addressing elections applied only to "the mode of electing officers to the general government." Id. Chief Justice Chipman explained:

> The framers of the constitution were forming a plan for the general government of the State. They do not appear to have had an eye to the internal regulation of lesser corporations. In this section they point out the mode of electing the officers to the general government, and in this view they confine it to elections by the people and General Assembly. "The People," here means the collective body of the people, who have a right to vote in such elections—and is used as synonymous to "Freemen."
>
> The word "Election," when the choice is to be by the people or freemen, is, in every part of the Constitution, used in the same appropriate sense; as in the 7th section, "In order that the Freemen of this State may enjoy the benefit of elections as equally as maybe, each town within this State may hold elections therein"—For what purpose? for the choice of Representatives.—In the 10th section, "On the day of election for choosing Representatives," &c.
>
> I am, therefore, clearly of opinion, that the 31st section of the Constitution does not extend to the choice of town officers, and is to be laid wholly out of the case under your consideration.

Id.

Subsequent amendments to the Constitution show no deviation from this state-level focus. There has never been a reference to local or municipal elections in Chapter II, the Plan or Frame of Government of the Vermont Constitution, and reading one in would contravene unequivocal and binding precedent.

3. Case Law Uniformly Supports that Section 42 Does Not Apply to Municipal Elections.

At all times before and after its statehood, the qualifications of a voter or candidate for office in a municipal election in Vermont have been exclusively determined by the General

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Assembly. Just as municipalities are "creatures of statute," so too are their elections. Every Vermont Supreme Court case to address this matter has concluded that municipal voter qualifications are strictly a legislative determination, to which the constitutional prescription on voter qualifications does not apply.

In Woodcock v. Bolster, 35 Vt. 632 (1863), the Court directly addressed this question. In that case, a town resident who was not a U.S. citizen had been elected the local school district tax collector under a state statute that authorized residents of a municipality to vote and hold office in local elections despite lacking citizenship. When the tax collector seized property of the plaintiff for tax purposes, the plaintiff challenged the seizure, arguing, in part, that the tax collector could not constitutionally hold office because he was not a citizen. Acknowledging that the Vermont Constitution had been amended to require "freemen" (voters in state and federal elections) to be U.S. citizens, the Court nevertheless concluded "this requirement was by no means synonymous with that of a voter in town or school meeting." The Court explained:

> [W]e fail to see how it would follow that a change of the constitution in relation to the qualifications of freemen should work a corresponding change in the statutes regulating voting in town and school meetings . . . It has not been questioned but that it is actually within the power of the legislature to regulate the right of voting in such meetings, and the right of holding office, according to their pleasure, and that there is nothing in the constitution restraining this exercise.

Id. at 639.

Woodcock, like Marsh before it, affirmed that there is a legal difference between "freemen"—voters in state and federal elections—and those persons eligible to vote in municipal elections. The current Section 42 of the Vermont Constitution applies to the former, but not the latter. The Vermont Supreme Court has steadfastly held to its interpretation of the Vermont Constitution that the Legislature alone may regulate the right to vote and hold office in municipal elections "according to their pleasure" and without constitutional prescription. Id.

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In Rowell v. Horton, 58 Vt. 1 (1886), the Supreme Court considered a similar constitutional challenge to the power of a town tax collector. There, the plaintiff, whose property had been seized by the tax collector, argued that the collector held his office in violation of the constitution because he failed to take the oath set forth in Chapter II, Section 29, which "every officer, whether judicial, executive, or military, in authority under this state, before he enters upon the execution of his office, shall take and subscribe." Id. at 4–5 (emphasis in original). The Supreme Court rejected the challenge, explaining:

> We think this requirement to take and subscribe an official oath applies only to such officers, judicial, executive, and military, as are strictly state officers, and such county and probate officers as were by section 9 of the same chapter . . . .

Id. at 5 (emphasis in original). Because the tax collector was a town officer and not "strictly [a] state officer[]," the constitutional oath did not apply to him.

The Court went on to opine on the purpose of Chapter II of the Constitution, the same Chapter containing the provision Plaintiffs challenge in this case, as follows:

> Chapter 2 of the constitution, with the amendments thereto, relates to the plan or frame of the state government, and to the executive, legislative, judiciary, and military departments thereof; to the qualification of freemen; to the election and qualification of the members of the legislature; to the election and qualification of governor, lieutenant governor, state treasurer, secretary of state, auditor of accounts, judges of the supreme court, major and brigadier generals, and other purely state officers, county officers, probate judges, and justices of the peace. It has no reference to the plan and frame of town governments, nor to the qualification of voters therein, nor to the election and qualification of the officers thereof. Towns are not the creations of the constitution; they exist either by virtue of charters granted by the sovereign before the adoption of the constitution, or by acts of the legislature since its adoption, and derive their powers, not from constitutional provisions, but from legislative enactments.

Id. at 5-6 (emphasis supplied).

State v. Foley, 89 Vt. 193 (1915), is likewise consistent with these decisions. There the Court upheld the election of a woman to a school district office, even though women were not considered "freemen" and not permitted to vote in state or federal elections. The Court's decision

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rested squarely on statutory analysis. Concluding that the relevant statute permitted a woman to hold a school district office ended the inquiry; no constitutional provision applied.

4. Municipalities Are Creatures of the Legislature and the Legislature, Not the Vermont Constitution, Controls Municipal Voting Qualifications.

The reasoning of these cases reflects fundamental principles of Vermont municipal law. Vermont is a Dillon's rule state and therefore its municipalities "may exercise only those powers and functions 'specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof.'" Demarest v. Town of Underhill, 2021 VT 14, ¶ 31, ___ Vt. ___ (quoting City of Montpelier v. Barnett, 2012 VT 32, ¶ 20, 191 Vt. 441). Rather than directly prescribe principles to govern municipalities such as local voter qualifications, the Vermont Constitution granted sweeping power to the General Assembly to "grant charters of incorporation [and] constitute towns, boroughs, cities and counties." Vt. Const. Ch. II, § 6.

In explaining why election provisions in the Vermont Constitution do not apply to municipal officers, the Supreme Court stated:

> [Chapter II of the Vermont Constitution] has no reference to the plan and frame of town governments, nor to the qualification of voters therein, nor to the election and qualification of the officers thereof. Towns are not the creations of the constitution; they exist either by virtue of charters granted by the sovereign before the adoption of the constitution, or by acts of the legislature since its adoption, and derive their powers, not from constitutional provisions, but from legislative enactments.

Rowell v. Horton, 58 Vt. 1, 5-6 (1886). The qualifications of voters in municipal elections, like all other municipal matters, are the sole prerogative of the General Assembly.

B. The City's Charter Amendments Override the Default Voter Qualification Set Forth at 17 V.S.A. § 2121(a)(1).

Plaintiffs do not allege that Montpelier's charter violates 17 V.S.A. § 2121. However, to the extent they aver that the intent of this statute overrides or conflicts with the Charter, they would be incorrect.

"In construing statutes to give effect to legislative intent, courts seek 'to harmonize statutes and not find conflict if possible.'" Athens Sch. Dist., 2020 VT 52, ¶ 30 (quoting Gallipo, 173 Vt.

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at 235). "If that is not possible, specific and more recent statutes regarding the same subject matter control over more general and older statutes." Id. Here, in enacting this statutory charter change over the Governor's veto, the Legislature explicitly acknowledged the conflict between the charter amendment and the requirement of U.S. citizenship set forth in 17 V.S.A. § 2121(a)(1), and it unequivocally indicated that the charter amendment would control. See 24 App. V.S.A. § 1501(a) ("Notwithstanding 17 V.S.A. § 2121(a)(1), any person may register to vote in Montpelier City elections who on election day is a citizen of the United States or a legal resident of the United States provided that person otherwise meets the qualifications of 17 V.S.A. chapter 43.").

The fact that for many years the Vermont General Assembly has chosen to maintain the same voter qualifications for local elections as Section 42 of the Vermont Constitution has prescribed for state elections, see Complaint ¶ 27, does not undermine the Legislature's power to amend those requirements for local elections whenever it sees fit. "Towns are not the creations of the constitution." Rowell, 58 Vt. at 5-6. It is "within the power of the legislature to regulate the right of voting in [municipal] meetings . . . according to their pleasure, and . . . there is nothing in the constitution restraining this exercise." Woodcock, 35 Vt. at 639.

C. No Other Statutes Affect the Constitutionality of the Charter Amendments.

The Complaint also alleges that other Vermont statutes "echo the citizenship requirement" of 17 V.S.A. § 2121(a), citing provisions for registrations at the Department of Motor Vehicles, 17 V.S.A. § 2145a, and provisions for voter registration agencies, 17 V.S.A. § 2145b. But these generic, statewide registration forms bear no weight on the question of whether the Legislature may authorize a noncitizen to vote in purely local elections, not touching on matters of statewide or federal concern. So too with the provisions of Title 17, Section 2146 authorizing a municipal board of civil authority or a town clerk to reject a voter application for failure to meet any of the four requirements of Section 2121(a), because those would have been the generic requirements. Here, where the Legislature has authorized different voting eligibility requirements

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on matters of purely local concern, notwithstanding the requirements of Section 2121(a), provisions based directly on Section 2121(a) must be read harmoniously. Vt. Agency of Natural Res. v. Parkway Cleaners, 2019 VT 21, ¶ 16, 209 Vt. 620 ("All relevant parts of the applicable statutory scheme are to be construed together to create, if possible, a harmonious whole.").

It may be that registration via the Department of Motor Vehicles or at a voter registration agency may no longer be as straightforward as it once was. But this too does not bear on constitutionality; rather, it bears on the more practical concerns of efficiency of process. Determining who may vote on municipal matters is a purely legislative choice, and the Legislature has spoken clearly.

Conclusion

The amendments to the charter for the City of Montpelier authorizing noncitizen voting on matters of purely local concern is not only constitutional, but it is good policy. As the Supreme Court eloquently stated in 1863:

> It has been the policy of our government to encourage emigration from abroad, and, at as early a period as may be, to extend to such emigrants all the rights of citizenship, that their feelings and interests may become identified with the government and the country. While awaiting the time when they are to become entitled to the full rights of citizenship, it seems to us a wise policy in the Legislature to allow them to participate in the affairs of these minor municipal corporations, as in some degree a preparatory fitting and training for the exercise of the more important and extensive rights and duties of citizens. It is of the greatest importance that the children of such persons should be educated, at least to the extent for which opportunity is afforded by our common schools, and that the parents should be induced to send their children to school, and it seems to us that they would be much more likely to do so, and to take interest in their attendance and improvement, if allowed to participate in their regulation and management, than if wholly excluded. We cannot see the threatened danger to our institutions from the allowance of this right, while they are excluded from all influence and participation in the law-making power of the government, or in the general elections, or the general public administration of the laws of the country.

Woodcock, 35 Vt. at 640-41. Encouraging local engagement among those who have chosen to make Montpelier their home supports noncitizen investment in local concerns and the democratic

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principles cherished by Vermont and the United States. This good policy has been the undercurrent of Vermont law since at least the mid-1800s, and it is no less true today than it was then.

WHEREFORE, for the above reasons, Plaintiffs' Complaint must be **DISMISSED** in its entirety for lack of subject matter jurisdiction, V.R.C.P. 12(b)(1), and for failure to state a claim, V.R.C.P. 12(b)(6). Plaintiffs' Complaint against John Odum, in his official capacity as the City Clerk for the City of Montpelier, must also be **DISMISSED** based on the clear statutory instruction of 24 V.S.A. § 901(a).

Dated at Montpelier, Vermont, this 12th day of November, 2021.

DEFENDANTS
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