STATE OF VERMONT

SUPERIOR COURT Washington Unit	CIVIL DIVISION No. 21-CV-2963
CHARLES FERRY et al., Plaintiffs, v. CITY OF MONTPELIER and JOHN ODUM, MONTPELIER CITY CLERK Defendants.	

RULING ON THE CITY'S MOTION TO DISMISS

On June 24, 2021, over the Governor's veto, the legislature approved a change to the City of Montpelier's charter permitting legal residents who are in compliance with federal immigration rules but who are not United States citizens (noncitizens) to vote in Montpelier City elections. 2021, No. M-5; 24 App. ch. 5 §§ 1501–1504; see also 2021, No. M-6 (doing the same for the City of Winooski). This legislation operates as an exception to 17 V.S.A. § 2121(a)(1), which generally requires municipal voters to be U.S. citizens. Plaintiffs, several U.S. citizens and Vermont voters, the Vermont Republican Party, and the Republican National Committee ask this court to enjoin any such noncitizen voting, claiming that it is unconstitutional under Vermont Const. ch. II, § 42. The City has filed a motion to dismiss arguing that all plaintiffs lack constitutional standing to bring this case and, in any event, noncitizen voting in municipal elections is not unconstitutional.[1] The State has intervened pursuant to V.R.C.P. 24(d) in support of the constitutionality of noncitizen voting.[2]

Standing

Plaintiffs do not lack standing. Constitutional standing requires that a plaintiff in a suit against the government "must have suffered a particular injury that is attributable to the defendant and that can be redressed by a court of law." *Parker v. Town of Milton*, 169 Vt. 74, 77 (1998). "The standing doctrine protects the separation of powers between the branches of government by ensuring that courts confine themselves to deciding actual disputes and avoid intervening in broader policy decisions that are reserved for" the other branches. *Paige v. State*, 2018 VT 136, ¶ 8, 209 Vt. 379. "Standing . . . focuses directly on the question whether a particular interest or injury is adequate to invoke the protection of judicial decision." 13B Wright & Miller et al., Federal Practice & Procedure: Juris. 3d §

[1] Mr. Odum (city clerk) was named as a defendant in his official capacity only. As such, his appearance in the caption is simply another name for the City itself. Nevertheless, the City sought his dismissal under 24 V.S.A. § 901(a). Plaintiffs consent to his dismissal, which is granted on that basis.

[2] The State takes no position on the City's standing argument.

3531.12. If any of the plaintiffs has standing, they all do because they all raise the same issues. See *Secretary of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984).

Two plaintiffs are Montpelier voters. They claim that noncitizen voting dilutes their municipal votes, and that the U.S. Supreme Court generally finds vote-dilution a sufficient injury for standing purposes. The City responds that Plaintiffs failed to assert this injury in the complaint and, in any event, it is a general grievance that does not distinguish them from the public as having a sufficient personal stake to warrant permitting them to litigate this case, implying that they are inappropriately trying to involve the court in a political dispute.

While Plaintiffs did not expressly state the vote-dilution injury in the complaint, it is reasonably inferable, and the court reads the complaint so as to do substantial justice. V.R.C.P. 8(f). Vermont cities and towns, including the City of Montpelier, are quite small, increasing the impact of each vote cast and, correspondingly, increasing the dilution of each vote cast when the pool of voters increases. The U.S. Supreme Court generally has found an injury for standing purposes when a voter's vote is diluted, and it has not dismissed such injuries as general grievances simply because the dilution happens to all similarly situated voters. See *Gill v. Whitford*, 138 S.Ct. 1916, 1931–32 (2018); *Dep't of Commerce v. U.S. House of Representatives*, 525 U.S. 316, 331–32 (1999); *Baker v. Carr*, 369 U.S. 186, 207–08 (1962).

Standing is "supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). This case is at the pleading stage. The court is satisfied for pleading purposes that the two plaintiffs who are Montpelier voters have adequately asserted standing. Because they have done so, it is unnecessary to examine the circumstances of any of the other plaintiffs.

Constitutionality of municipal, noncitizen voting

Plaintiffs bring a facial challenge to 24 App. ch. 5 §§ 1501–1504. "In a facial challenge, a litigant argues that 'no set of circumstances exists under which [a statute or regulation] [c]ould be valid.'" *In re Mt. Top Inn & Resort*, 2020 VT 57, ¶ 22, 212 Vt. 554 (citation omitted). They argue that the plain language of Vermont Const. ch. II, § 42 bars noncitizen voting in municipal elections across the board. By its terms, they argue, § 42 extends to any issue that concerns the State, and municipal officials and elections increasingly affect State interests. They also argue that the court should eschew any interpretation to the contrary because citizenship has long been one of the required qualifications of municipal voters.

As the Vermont Supreme Court has explained, "statutes are presumed to be constitutional and are presumed to be reasonable. We have often observed that the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367 (citations omitted). When interpreting the Vermont Constitution, we avoid "excessive reliance on a plain meaning approach . . ., even if a plain meaning can be found." *Chittenden Town Sch. Dist. v. Dept. of Educ.*, 169 Vt. 310, 327 (1999). Often, "an understanding of [a] constitutional provision's historical context [is the]

most helpful tool for determining the meaning of the provision." *State v. Hance*, 2006 VT 97, ¶ 10, 180 Vt. 357. Such is the case here.

Vermont has had three constitutions, the first two preceding statehood. The first, adopted in 1777, was modeled after the Pennsylvania constitution of 1776. In 1786, the constitution of 1777 was substantially "revised." In 1791, Vermont became the 14th state and, two years later, in 1793, it adopted its third and, with amendments, current constitution. All three are structured into Chapter I, "A Declaration of the Rights of the Inhabitants of the State of Vermont," and Chapter II, the "Plan or Frame of Government." Each has had a provision in its Chapter II describing the qualifications of *state* voters, until recently called freemen and freewomen, and before that simply freemen.

Vermont Constitution (1777) ch. II, § 6 provides as follows:

> 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 behaviour, 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 any 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 of any man.

This provision was included in the 1786 Constitution at ch. II, § 18. It appeared originally in the 1793 Constitution at ch. II, § 21.

Despite Vermont having become a state, no express citizenship requirement to the qualifications of freemen was added to the original 1793 Constitution. In 1827, the Council of Censors took note, appointing a committee "to inquire whether the right of suffrage can legally be exercised in this state by persons not owing allegiance to the government of the United States, and whether it be expedient to recommend any alteration of the constitution or existing statute on that subject." Journal of the Council of Censors at their Sessions at Montpelier and Burlington, in June, October, and November 1827 at 5–6.[3]

The Committee reported as follows:

> The committee who were directed to inquire whether the right of suffrage can legally be exercised in this state by persons not owing allegiance to the United States, respectfully report, that the existing provision of the constitution, defining the qualifications of a freeman, is, in the opinion of

[3] The Journal is available at https://www.google.com/books/edition/Journal_of_the_Council_of_Censors_at_The/nFcpAAAAYAAJ?hl=en&gbpv=1&dq=vermont+journal+of+council+of+censors+1827&printsec=frontcover. For more on the historical role of the Council of Censors in amending the Vermont constitution, see Paul Gillies and Gregory Sanford (eds.), Records of the Council of Censors of the State of Vermont at xi–xvii (1991), available at https://sos.vermont.gov/media/4aamkeww/council_of_censors.pdf.

your committee, objectionable, inasmuch as it admits of two different and opposite constructions. A literal construction of the clause would certainly extend the right of suffrage indiscriminately to all who, under any circumstances, should have resided in the state one full year. The manifest impropriety and danger of such a rule, as well as its repugnancy to the provisions of the constitution of the United States, seems to require that, if the clause in question be susceptible of such a construction, it should be altered or explained. At the same time a different and more liberal mode of construction might be adopted, and one in the opinion of your committee more correct, which, depending not so much on the precise import of particular phraseology as upon general political principles and a reference to the nature and object of the provision in question, would exclude all who do not, in the strictest sense, owe allegiance to the general government of our country. But, whatever may be the true construction, it is well known that a difference of opinion has existed among those whose opinions are entitled to consideration, and that a different practice has prevailed in different parts of the state. Your committee, therefore, considering that no important provision of the constitution should be left liable to constructions so different, recommend that an explanatory clause should be proposed to be added to the twenty-first section of the plan or frame of government, of the following tenor:

Provided, That no person, not a native born citizen of this or some one of the United States, shall be entitled to exercise the right of suffrage, unless naturalized agreeable to the *acts of Congress*.

Id. at 21–22. The Council eventually proposed the following article of amendment: "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." *Id*. at 37. The amendment was adopted at the Constitutional Convention of 1828, becoming the first amendment to the Constitution of 1793. Paul Gillies and Gregory Sanford (eds.), Records of the Council of Censors of the State of Vermont at 323 (1991).

In 1913, ch. II, § 21 was renumbered to ch. II, § 34.

In 1924, § 34 was amended to give women the vote. It then read:

Every person of the full age of twenty-one years, who is a natural born citizen of this or some one of the United States or who 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:

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.

In 1974, § 34 was amended to reduce the lawful voting age to 18, to drop the "natural born" provision, and to leave the length of residency up to the legislature. The qualifications language of § 34 then read: "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 freeman of this state." The Freeman's Oath was not modified. Also in 1974, ch. II, § 34 was renumbered to its current location, ch. II, § 42.

In 1994, Temporary Provision § 76 was added to the Constitution. It provides: "The Justices of the Supreme Court are hereby authorized and directed to revise Chapters I and II of the Constitution in gender inclusive language. This revision shall not alter the sense, meaning or effect of the sections of the Constitution." Pursuant to § 76, the part of chapter II that includes § 42 was revised to read "Qualifications of Freemen and Freewomen," whereas it had previously referred to Freemen only. The qualifications language of § 42 was revised to read, "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."[4] The Freeman and Freewoman's Oath was not modified.

Finally, in 2010, a new provision was appended to § 42, providing: "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." None of the pre-existing language was modified.

Based on this history, one can infer that there was no citizenship requirement in the Constitutions of 1777 and 1786 because Vermont had not yet joined the Union. When it did so in 1791, and subsequently adopted the Constitution of 1793, no *express* citizenship requirement was adopted. According to the Council of Censors, at least by 1827, confusion had arisen as to whether citizenship was a necessary qualification to exercise the rights of a *freeman*. Whatever confusion may have existed, it was resolved with the amendment to ch. II, § 21 at the Constitutional Convention of 1828, at which point it became clear that one must be a citizen to exercise the rights of a freeman. No amendment since has had any impact on this citizenship requirement.

The question remains, however, whether the citizenship requirement extends to municipal voters or, in other words, what does it mean to exercise the rights of a freeman. Both Plaintiffs and the City look to the "plain" language of the current version of § 42 and see the result they seek. According to Plaintiffs, § 42 says nothing to exempt its provisions from municipal elections, and the oath specifically applies broadly to any vote "touching any matter that concerns the State of Vermont." Whereas Plaintiffs see no exemption, the City sees no inclusion: by its terms, § 42 does not expressly say that it applies to municipal

[4] To be clear, because this revision could not modify "the sense, meaning or effect of the sections of the Constitution," replacing *freemen* with *voter* had no impact on the substance of § 42.

elections.

Two decisions of the Vermont Supreme Court resolve this matter in favor of the constitutionality of noncitizen voting in municipal elections: *State v. Marsh*, N. Chip. 28, 1789 WL 103 (Vt.), and *Woodcock v. Bolster*, 35 Vt. 632 (1863).

Marsh preceded the Constitution of 1793, but it remains sound. In that case, John Marsh sought to void official actions of a town officer, the constable Joseph Marsh, by arguing that he had been elected at a town meeting *viva voce* (by a voice vote) whereas the Constitution of 1786, ch. II, § 31 required that "[a]ll elections . . . shall be by ballot." The Court rejected this argument because chapter II of the Constitution does not apply to municipal elections. It explained,

> Whether the clause in the Constitution insisted on for the defendant extends to the choice of officers in towns and lesser corporations, must be determined, 1st. by considering the subject matter; and 2d. by comparing it with other parts of the Constitution. The framers of the constitution were forming a plan for the general government of the State [in chapter II]. 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."

Id. at 29–30. Thus, chapter II does not apply to municipal elections, and "freemen" refers to that subset of all voters who may vote in state elections.

Chapter II of the Constitutions of 1777, 1786, and 1793 has always addressed the plan or frame of state government. The reasoning in *Marsh* applies equally to the Constitution of 1793.

Woodcock v. Bolster was decided in 1863. By then, the express citizenship requirement had been part of the current Constitution for 35 years. In *Woodcock*, the Court addressed whether a voter or officeholder in a town or school district had to be a *freeman*. The case involved an "unnaturalized Irishman," Patrick Duane, who had been elected as the "prudential committee" of the Winhall school district. Mr. Duane, as the prudential committee, assessed a tax, which Mr. Bolster did not pay, engendering a dispute. Among other things, Mr. Bolster argued that the tax had been illegally assessed because Mr. Duane was not a citizen. The Court noted that the issue was of "considerable practical importance" because the right to vote or hold office in school districts is the same as the right to vote in or hold town office. *Id*. at 637. Statutes at the time required such a person to be a "legal voter" in the school district or town but did not have a citizenship requirement. *Id*. at 638. The crisp question presented thus was whether a municipal voter or officeholder was subject to the citizenship requirement of the Constitution. The Court's answer—an emphatic no—is worth quoting at length:

> Notwithstanding the very plain terms used by the statutes to define

the qualifications of voters in town and school district meetings, the plaintiff insists that none but freemen, who are entitled to vote for representatives to the legislature, and for county and state officers, are really entitled to vote at such meetings. The argument is that the qualification required by the statute is synonymous with that of the old constitution as to freemen, and that when the amendment to the constitution was adopted in 1828, which excluded aliens from becoming freemen of this state, until they had been duly naturalized according to the laws of the United States, it worked the same change in the qualification of voters in town and school meetings.

But the very starting point assumed in this argument is untrue. The old constitution provided that "every man of the age of twenty-one years, having resided in the state for the space of one whole year next before the election of representatives, and 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." *Under this provision of the constitution an alien might become a freeman of this state*, and entitled to vote for representatives to the legislature and for state officers, without being naturalized according to the acts of Congress, by residing one year in the state and taking the freeman's oath. *But this requirement was by no means synonymous with that of a voter in town or school meeting.* A man could be a freeman without being a tax payer, but must have resided in the state a year, while no man could vote in town or district meetings without being a tax payer, but might, though his residence in the state had been less than a year. But even if there had been the agreement between the requirement of the old constitution as to the qualification to become a freeman, and that of the statutes defining the qualifications of voters in town or school meetings which the plaintiff claims, *we 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 meeting*s; and more especially, when the same statutes have several times been re-enacted in substantially the same language, since the amendment of the constitution, and all the while, we believe, under a practical construction entirely different from what the plaintiff claims. *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 its exercise. . . .*

Id. at 638–39; see also *Rowell v. Horton*, 58 Vt. 1, 5 (1886) (Chapter II "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." (emphasis added)); *Town of Bennington v. Park*, 50 Vt. 178 (1877) ("The Legislature has the undoubted right to prescribe the mode of voting by towns, school districts, and other municipal organizations, and has always exercised the right. . . . The qualifications of voters in town meetings are prescribed by the legislature, and they are quite unlike those of freemen in freemen's

meetings").[5] The Court thus has clearly and expressly ruled that the legislature has the power to regulate the qualifications of municipal voters and officeholders, and that power is not limited by ch. II, § 42.

The parties have not identified, and the court has not found, any caselaw modifying this holding from *Woodcock*, which thus is binding on this court. No constitutional amendments draw the holding into question. The legislature has the power to determine the qualifications of municipal voters and thus has the power to exempt voters in a particular municipality from a more broadly applicable statutory citizenship requirement. The legislature has the power to permit noncitizen voting in Montpelier City elections regardless of the citizenship requirement of Vermont Constitution ch. II, § 42.

Plaintiffs' argument that § 42 instead should be interpreted to apply to any vote "touching any matter that concerns the State of Vermont," and that it thus should apply to *contemporary* municipal elections (even if it did not apply to ancient ones) because they more frequently address such issues than they did in the past, has no clear foundation in Vermont law. That provision of § 42 and its predecessors appears in the Freemen and Freewomen's Oath rather than its qualifications language. Taking the oath is a qualification of a state voter, but the content of the oath has never determined the qualifications of voters. Moreover, Plaintiffs' distinction between state and local is largely illusory because Vermont is a Dillon's Rule state. Vermont municipalities exist and function only as "specifically authorized by the legislature." *Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977). This is not a case where a fully qualified *state* voter is somehow being prevented from voting in an election protected by the constitution. See, e.g., *Slayton v. Town of Randolph*, 108 Vt. 288, 290–91 (1936); *Martin v. Fullam*, 90 Vt. 163, 169 (1916) (noting that preventing "a freeman the same right of voting as is given to other freemen of the state for some reason not recognized by the Constitution [would raise] the grave question whether his constitutional rights are not infringed"). The issue is merely whether a noncitizen may vote in a municipal election when the legislature grants that right. Nothing in ch. II, § 42 prevents that.

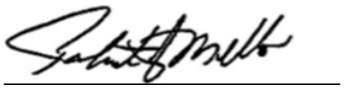
State v. Marsh, N. Chip. 28, 1789 WL 103 (Vt.), and *Woodcock v. Bolster*, 35 Vt. 632 (1863) control the outcome here. To the extent that they apply here, they are not distinguishable on their facts. Their age makes them no less binding on this court. A lower court "does not have the option of disregarding a higher state court's decision that has not been overruled, no matter how old the precedent may be." *State v. Winborne*, 420 P.3d 707, 721 (Wash. Ct. App. Div. 2018). While the Vermont Supreme Court "is not a slavish adherent to the principle of stare decisis," this court is bound to follow binding precedent. *State v. Carrolton*, 2011 VT 131, ¶ 15, 191 Vt. 68. Any refusal to do so would exceed this court's jurisdiction. See *Fireman's Fund Ins. Co. v. Maryland Cas. Co.*, 65 Cal. App. 4th 1279, 1301 (Cal. Ct. App. 1998).

[5] "It was not . . . until 1864 that a voter in a school or town meeting was required to have the additional qualification of citizenship." *State v. Foley*, 89 Vt. 193, 197 (1915). That is, the legislature added the citizenship requirement by statute the year after *Woodcock* was decided.

Order

For the foregoing reasons, the City's motion to dismiss is granted. Counsel for the City shall submit a form of judgment. V.R.C.P. 58(d).

SO ORDERED this 1st day of April, 2022.



Robert A. Mello
Superior Judge