In the Supreme Court of The State of Vermont
Docket No. 22-AP-125

CHARLES FERRY,
MAURICE MARTINEAU,
DEBORAH BILLADO,
CHRISTOPHER BRADLEY,
THERESA BURKE,
SUZANNE BUTTERFIELD,
WENDY KALANGES,
LINDA KIRKER,
JAY SHEPARD,
DOUGLAS WESTON,
THE VERMONT REPUBLICAN PARTY, *and*
THE REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

v.

THE CITY OF MONTPELIER, VERMONT,

Defendant-Appellee.

Appeal From
Superior Court, Washington Unit
Docket No. 21-CV-2963

REPLY BRIEF OF APPELLANTS

Patrick N. Strawbridge (*Pro Hac Vice*)
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617)227-0548
patrick@consovoymccarthy.com

James F. Hasson (*Pro Hac Vice*)
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703-243-9423
james@consovoymccarthy.com

Brady C. Toensing
DIGENOVA & TOENSING, LLP
1775 Eye Street NW, Suite 1150
Washington, DC 20006
(202) 297-4245
Brady@diGToe.com

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INTRODUCTION

Montpelier and the State attack Plaintiffs' claim on separate fronts: the City asserts that Plaintiffs lack standing, and the State argues that Section 42 of the Vermont Constitution does not apply to any election that is conducted by a municipality or involves municipal officers. Both positions are without merit. As the Superior Court accurately noted, vote dilution is a quintessential constitutional injury. And contra the State, Section 42 plainly applies to any election with a statewide or extra municipal impact. This Court has affirmed that baseline principle on multiple occasions. In short, Plaintiffs have standing to challenge Montpelier's charter amendment extending the franchise to noncitizens, and the charter amendment is unconstitutional. The Superior Court's order should be reversed.

ARGUMENT

I. Plaintiffs have standing.

Plaintiffs have standing because the City's unlawful expansion of the voter pool (the "noncitizens voting law") dilutes their votes. When a citizen's "votes will be diluted," he or she "undoubtedly satisfies the injury-in-fact requirement of Article III standing." *Dep't of Commerce v. House of Representatives*, 525 U.S. 316, 331-32 (1999).[1] The United States Supreme Court has reiterated this holding time and again. Voters have standing based on their "interest in maintaining the effectiveness of their votes," *Baker v. Carr*, 369 U.S. 186, 208 (1962), and they present "a justiciable controversy subject to adjudication by federal courts" when they allege that their votes will be "diluted," *Reynolds v. Sims*, 377 U.S. 533, 556 (1964). Despite what the City suggests, the Supreme Court hasn't departed from these cases and it has never created any exceptions to the rule that voters "plainly" have "standing to maintain [a] suit" based on the "impairment of their votes." *Baker*, 369 U.S. at 207-08.

Baker is the "seminal" case on vote-dilution standing. City Br. 6. There, the plaintiffs challenged a state's allocation of representatives because it "impair[ed]" and "dilut[ed]" their voting power. *Id.* at 208. The Supreme

[1] The parties agree that Vermont applies the same standing requirements as federal courts. *Baird v. City of Burlington*, 2016 Vt. 6, ¶ 13 (2016); *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 Vt. 81, ¶12 (2011); City Br. 3;. A plaintiff therefore has standing when he has an "injury in fact" that's traceable to the defendant and redressable by the court. *Dep't of Commerce*, 525 U.S. at 329. And because all Plaintiffs bring the same claim, this Court has jurisdiction so long as one of the Plaintiffs has standing. *See, e.g.*, *Bowsher v. Synar*, 478 U.S. 714, 721 (1986); *Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 264 (1977); *Sec'y of the Interior v. California*, 464 U.S. 312, 319 n.3 (1984).

Court held that vote dilution was an injury-in-fact because all citizens have "a plain, direct and adequate interest in maintaining the effectiveness of their votes." *Id.* (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). And the form of the vote dilution was irrelevant: A voter could protect his vote against any "impairment by state action," regardless of whether "such impairment resulted from *dilution by a false tally*, or by a refusal to count votes from arbitrarily selected precincts, or by a *stuffing of the ballot box*." *Baker*, 369 U.S. at 207-08 (internal citations omitted) (emphases added).

Any doubts about the *Baker* doctrine were put to rest by *Department of Commerce*, which the City doesn't discuss. The voter-plaintiffs there challenged a new census method because it would cause "vote dilution." 525 U.S. at 332. The Supreme Court held that a plaintiff who was an Indiana resident "undoubtedly satisfie[d] the injury-in-fact requirement of Article III standing" because as a result of the new census method, "Indiana residents' votes will be diluted." *Id.* Next, it held that plaintiffs who lived in certain counties in other states "established standing" because as a result of the new census method, they would "suffer vote dilution in state and local elections." *Id.* at 333, 334, n.3. The Court concluded in clear terms: "vote dilution satisfies the injury-in-fact, causation, and redressability requirements." *Id.* at 334.

Here, Plaintiffs' injuries fall comfortably within this line of precedent. The individual Plaintiffs are Vermont residents and voters—two of whom reside and vote in Montpelier. AV-179. The City's unlawful charter amendment expands the Montpelier voting pool to include noncitizens and therefore dilutes these Plaintiffs' votes. AV-186-87. Like the plaintiffs in *Baker*, they assert "a plain, direct and adequate interest in maintaining the effectiveness of their votes." 369 U.S. at 208. And like the plaintiffs in *Department of Commerce*, they allege that they will "suffer vote dilution in … local elections." 525 U.S. at 333. Therefore, as the superior court concluded, "the two plaintiffs who are Montpelier voters have adequately asserted standing" because "when the pool of voters increases," that causes a "dilution of each vote cast." AV-24.

The City counters with a pleading objection. City Br. 4-5. In the complaint, two Plaintiffs alleged that they "reside[] in Montpelier," AV-179, that they are "registered voter[s] in the city of Montpelier," AV-179, and that the City unlawfully "expanded its electorate to include noncitizens," AV-187. The City faults these Plaintiffs for not going further to allege that they "ever voted or plan[] to vote." City Br. 4. But this case is at the motion-to-dismiss stage. So this Court will "construe th[e] facts in the light most favorable to [the plaintiffs]," and "assume the truth of *all reasonable inferences* that may be derived from the pleadings." *Vasseur v. State*, 260 A.3d 1126, 1130, 2021 VT 53, ¶10 (2021) (emphasis added). Because it is a reasonable inference that two

"registered voter[s]" in Montpelier, AV-179, have "ever voted or plan[] to vote," City Br. 4, the pleadings suffice.[2]

The City also raises three substantive counterarguments. Each falls short. First, the City argues that although a plaintiff generally has standing to challenge illegal vote dilution caused "by a false tally" or "a stuffing of the ballot box," an exception exists when the illegal vote dilution is "sanctioned by the Legislature." City Br. 7. But that argument runs headlong into the Supreme Court's decision in *Baker*, which held that the plaintiffs had standing *based on vote dilution sanctioned by the legislature*. 369 U.S. at 195. That may explain why the City's leading case, *Bognet v. Secretary of Pennsylvania*, 980 F.3d 336, 359 (3d Cir. 2020), was vacated by the Supreme Court, *see Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021). Vacatur is an "extraordinary remedy," *U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship*, 513 U.S. 18, 26 (1994), that the Supreme Court takes pursuant to its equitable powers only when it needs to "prevent a judgment, unreviewable because of mootness, from spawning any legal consequences." *United States v. Munsingwear*, 340 U.S. 36, 41 (1950). If anything, the *Bognet* vacatur underscores that the Supreme Court meant what it said when it held in *Baker* that voters had "standing" based on their "allegations of impairment of their votes by [a state statute.]" 369 U.S. at 208.

Second, the City argues that vote-dilution standing requires a "point of comparison," wherein one group of voters sees its voting power enhanced and the plaintiff group sees its voting power diminished. City Br. 5, 6. But the Supreme Court has never used that language. It seems to have been coined by an Eleventh Circuit panel two years ago in a strange case involving a plaintiff who sought an injunction against *any* certification of election results. *See Wood v. Raffensperger*, 981 F.3d 1307, 1310 (11th Cir. 2020). The Supreme Court, by contrast, has held that voters have standing any time their votes are "impair[ed] by state action," even when "such impairment resulted from dilution by a false tally" or from "a stuffing of the ballot box." *Baker*, 369 U.S. at 207-08. And even if the Supreme Court were to impose such a requirement, there is a "point of comparison" here. The charter amendment enhances the voting power of one group of voters—noncitizens—and diminishes the voting power of another group of voters—citizens.

The City's reliance on *Abbott v. Perez*, 138 S. Ct. 2305 (2018), to support its point-of-comparison theory is even more unhelpful. City Br. 7. *Abbott* was about the substance of the Fourteenth Amendment's Equal Protection Clause,

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[2] If Plaintiffs were required to allege their voting plans in more detail, then leave to amend would be "freely given" because Vermont courts "adhere to a tradition of liberally allowing amendments to pleadings when opposing parties will not be prejudiced." *Id.* 260 A.3d at 1129, 2021 VT 53, ¶7.

not standing. Plaintiffs here don't bring an Equal Protection Clause claim. If anything, the fact that the Fourteenth Amendment makes race-based "vote dilution" unconstitutional, *id.* at 2314, highlights the importance of the Supreme Court's broad vote-dilution standing doctrine.[3]

Third and finally, the City says that the vote dilution is a "generalized grievance" because any other similarly situated voter suffers the same injury. City Br. 7-9. But "[t]he fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 n.7 (2016). Instead, the defendant must show that the impact of the alleged unlawful conduct is "plainly undifferentiated and common to all members of the public," *United States v. Richardson*, 418 U.S. 166, 176-77 (1974). A vote-dilution injury is not a generalized grievance because it is limited to *voters* and those voters must be in the relevant jurisdiction. That is why the *Department of Commerce* Court didn't hesitate to hold that vote-dilution standing in that case extended to *all* voters in "Indiana," as well as all voters in "Forsyth County, Georgia," "Cumberland County, Pennsylvania," "Bergen County, New Jersey," "Loudoun County, Virginia," "St. Johns County, Florida," "Orange County, California," "Maricopa County, Arizona," "Gallatin County, Montana," and "LaSalle County, Illinois." 525 U.S. at 330, 334 n.3; *see also id.* at 365 (Ginsburg, J., dissenting) (agreeing that all "Indiana resident[s]" had standing). As for the generalized-grievance case that the City describes as "conclusive to the case at bar," the Supreme Court never said anything at all about vote dilution in that case. *Lance v. Coffman*, 549 U.S. 437 (2007) (per curiam).

That the noncitizens voting law also dilutes the votes of other similarly situated voters is of no moment. If a claim is rendered a "generalized grievance" simply because non-parties have also been injured, then plaintiffs could never seek redress for widespread injuries. *See, e.g.*, *FEC v. Akins*, 524 U.S. 11, 23 (1998) (to be a generalized grievance, an injury must be "not only widely shared, but … also of an abstract and indefinite nature"); *Liu v. United*

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[3] The City seems to read *Martel v. Condos* to support its point-of-comparison theory, City Br. 9-10, but it didn't speak in those terms. *See* 487 F. Supp. 3d 247 (D. Vt. 2020). Instead, *Martel* rejected plaintiffs' standing to obtain a preliminary injunction to stop the secretary of state from mailing ballots to all Vermont voters only two days before the mailing was scheduled. *Id.* at 250. The court didn't address *Department of Commerce* and only briefly mentioned *Baker*, perhaps because the plaintiffs themselves didn't address *Department of Commerce* and only briefly mentioned *Baker*. *See* Plaintiffs' PI Mem., *Martel v. Condos*, 2020 WL 6577967 (D.Vt. Sept. 4, 2020). The court also cautioned against a broad reading of its holding, 487 F. Supp. 3d at 252, and, of course, no matter how broadly it is read, it still could not displace *Department of Commerce* and *Baker*.

States Congress, 834 F. App'x 600, 604 (2nd Cir. 2020) (rejecting argument that vote-dilution injury was a generalized grievance because the relevant question is the "nature of the harm—not the number of persons who share the harm") (internal quotation marks omitted).

The Superior Court correctly held that the plaintiffs have standing. *See* AV-24.

II. The noncitizen voting law is unconstitutional under Section 42.

A. The plain text of Section 42 limits voting rights to citizens.

The State's attempts at misdirection notwithstanding, Section 42 plainly applies to the noncitizen voting law. *See* Br. 9-10. In defense of the law, the State levels a scattershot attack on the textual merits of Plaintiffs' position. However, none of its textual arguments holds up under scrutiny.

The State purports to identify six different "errors" undermining Plaintiffs' position. State Br. 11. First, the State claims that Section 42 distinguishes between two categories of people: "freemen" voters (who are qualified to vote in statewide general elections) and all other voters (who can vote in municipal elections without any judicial oversight). State Br. 11. As explained below, *see infra* 6-8, the State appears to conflate categories of *voters* with categories of *elections*. Most of the State's other assertions—that Chapter II only addresses statewide government, that Section 42's reference to the "qualifications of freemen and freewomen" necessarily limits its scope to statewide elections, and that the "legislature does not need constitutional instruction to set municipal voter qualifications," *see* State Br. 11—are just creative ways of rephrasing the same argument.

Finally, while the State is correct that the Voter's Oath in Section 42 has remained "nearly unchanged" since *Woodcock*, *see* State Br. 12, that observation is irrelevant. The Oath specifies *which types* of elections are reserved for United States citizens—votes "touching any matter that concerns the State of Vermont." Vt. Const. ch. II, §42. Plaintiffs' argument is not that the *oath* has changed, but that voting structures and local government operations have evolved over the last 160 years so that local elections now often touch matters that concern the State of Vermont. In short, it is the function of those elections—not the body charged with administering them, that matters. *See* Br. 17; *infra* 6-8.

B. The Court has consistently applied Section 42 to elections with extra-municipal impact.

The State's non-textual defense of the noncitizens voting law rests almost entirely on *Woodcock v. Bolster*, 35 Vt. 632 (1863). According to the State, *Woodcock* held that "requirements" listed in Chapter II of the Vermont Constitution categorically "do not apply to municipal elections."[4] *See* State Br. 7. That is incorrect. *See* Br. 10-11. *Woodcock* concerned a law that required municipal voters to be "freeholders" (*i.e.*, landowners) but did not specify whether those voters were also required to be U.S. citizens. 35 Vt. at 639. The Court noted that property ownership had been a prerequisite for voting rights at the local level "from a very early day" in the State's history and emphasized the "importan[ce]" of that requirement under the State's system as it existed at the time. *Id.*

The right to vote in local elections, in other words, was an extension of one's property rights. Conversely, voting privileges in elections that affected the state—not just local property owners—were reserved for citizens, regardless of property ownership. *See id.* (the Vermont Constitution "exclude[s]" noncitizens "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"); *see also Martin v. Fullam,* 90 Vt. 163, 97 A. 442, 444 (1916) (voting based on citizenship because the "people of the whole state are equally interested" in the consequences of the election). In short, *Woodcock* addressed a mid-1800's era municipal election statute in the context of an archaic election framework that no longer exists.

The State acknowledges this evolution, *see* State Br. 3-5, but fails to grasp its significance. The fact that local elections remained accessible only to property owners (whether male or female) after the 1828 amendments to the Constitution does not prove that the Constitution is agnostic about local elections as currently organized—it merely illustrates that, under the framework of government in that era, voting in "freeman" elections and voting in town meetings were not considered to be in the same category of rights. The State's emphasis that *Woodcock* "has never been overruled," *see* State Br. 8, is therefore irrelevant. The salient point is that *Woodcock* simply has no bearing on voter eligibility in the modern era of universal suffrage.

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[4] Ironically, the State concedes that the Common Benefits Clause of the Vermont Constitution constrains the legislature's ability to determine who may vote in municipal elections, but it fails to recognize the parallel constraints that Section 42 imposes on the legislature's ability to determine who may vote in "freemen" elections.

The other three cases the State relies upon are no more helpful than *Woodcock*. Each case involved *purely local* elections in an era where town meetings mostly concerned the collection and distribution of local resources, voting was limited to property owners, and state and municipal functions were unmistakably segregated. *Rowell v. Horton* held that property listers were not required to take the constitutional oath of office because their duties were no different than those of a local "inspector of leather." 58 Vt. 1, 7 (1911). *Bixby v. Roscoe* analyzed the scope of town constables' authority and concluded that they were not state officers because they had no influence on anyone outside town boundaries. *See* 85 Vt. 105, 114 (1911); *see also State v. Hart*, 149 Vt. 104, 106 (1987) (citing *Roscoe* for the proposition that a constable's authority is "limited to the territorial confines of that particular town" and does not extend "outside the town"). And *State v. Marsh* only addressed whether local elections were required to be conducted "by ballot," a requirement in the pre-Republic version of the Constitution that was eliminated more than two centuries ago. *See* Br. 10.

Simply put, there is no "long line of precedent" or "unbroken line of case law," *see* State Br. 8, 12, holding that elections are beyond the scope of Section 42 whenever they happen to be conducted by a municipality. In fact, the opposite is true as shown by *Martin* and *Slayton v. Town of Randolph*, 108 Vt. 288 (1936). *See* State Br. 13-14. Both cases turned on whether an election was purely localized or had broader implications. The State attempts to downplay the Court's distinctions between local issues and extra-municipal issues in *Martin* and *Slayton* as mere "dicta," State Br. 13, but those distinctions formed the core of the Court's reasoning in each. *See, e.g.*, *Slayton*, 108 Vt. at 290-91 (explaining that freemen's rights are implicated when a vote has impacts beyond just the town)

According to the State, the divergent outcomes in *Martin* (where citizenship was required) and *Slayton* (where citizenship was not) turned on the fact that ballots were tallied by the Secretary of State in the former and by the county clerk in the latter. *See* State Br. 13. Unsurprisingly, the State does not present any support from either opinion for that assertion. *See* State Br. 13. In fact, the Court's own summary of *Martin* showed that its decision did not turn on ballot procedures at all. *Slayton*, 108 Vt. at 290 (citing and summarizing *Martin*). Instead, the Court explained that its determination as to whether a vote implicates freemen's rights turns on the nature of the vote and its extra-municipal impact. *Id.* (even though taken by towns, the tax-delinquent resident in *Martin* had a right to vote on question because it "was in essence and effect a vote by the freemen of the State.") And the decision in *Slayton* to deny the right to vote, turned on the fact that the vote was "of local importance only" and "present[ed] to each town a question of purely local policy" where "[t]he result in one town has no effect at all on any other town or the State at large." *Id.* at 291.

Montpelier and the State's protestations notwithstanding, this case is straightforward: Section 42—at a minimum—limits voting privileges on matters with statewide implications to American citizens. *See* Br. 11-12. As Plaintiffs detailed at length, *see* Br. 12-17, Montpelier's noncitizens voting law allows noncitizens to vote on issues that affect everything from regional planning commissions to state budget expenditures. Neither the City nor the State dispute any of this. Instead, they simply ask this Court to hold, for the first time, that the Court has no input on voter eligibility in municipally-administered elections. The Court should decline that invitation.

C. Reversing the Superior Court does not require overruling precedent and will not affect State-local cooperation.

Plaintiffs' argument is simply that municipal elections must likewise be limited to United States citizens and such a rule will likewise and otherwise have no impact on town meeting day or other aspects of local control.

The State miscasts Plaintiffs as arguing that there is "no longer any difference between State and municipal government in Vermont" and that there "should be no local elections in Vermont anymore." *See* State Br. 13, 15-16. For more than 150 years, certain localized elections have been limited to the "freemen" of each town or county while still maintaining local control and traditions. Sheriffs, certain judges, and State's Attorneys are elected by the freepersons of each county. Vt. Const. ch. II, §§ 50, 51. And Justices of the Peace are to be elected only by the freepersons of each town. Vt. Const. ch. II, § 52 (the term "Freemen" was replaced with "voters" in 1994 when the constitution was edited with gender inclusive language).

Montpelier and the State further attempt to redefine the current nature of Vermont elections by blurring the line between local issues and statewide issues. In doing so, they claim that municipal elections can never be subject to judicial scrutiny. Elections, however, are not categorically immune from constitutional scrutiny simply because they are conducted by municipalities. *See* Br. ii (second issue presented). And upholding the Constitution's citizenship requirement for elections that implicate statewide affairs would not force Vermont courts to apply "fuzzy, flexible rule[s]." State Br. 19. The State's citation to this Court's decision in *State v. Carrolton*, 2011 VT 131, 191 (2011), is therefore misplaced.

The constitutional standard is straightforward: if a municipal election does not involve "purely local policy" and affects citizens of other towns or "the State at large," then Section 42's requirements—to include U.S. citizenship—must be satisfied. *Slayton*, 108 Vt. at 290. But, under Defendant's reading, noncitizens could—without constitutional scrutiny—vote to directly

appropriate taxpayer funds from the State Treasury as part of a municipal ballot measure, as long as the legislature passed a bill authorizing it. That is plainly inconsistent with the text of Section 42 and this Court's precedents. It cannot be the case that cloaking a statewide issue in the garb of a municipal election places it beyond the scope of judicial review. Section 42's requirements are not displaced simply because a vote is conducted by a municipality. *Cf. Slayton*, 108 Vt. at 290 ("[T]he vote thereon, though taken by towns, was in essence and effect a vote by the freemen of the State.").

CONCLUSION

The decision of the superior court should be reversed.

DATED this 19th day of September 2022.

Respectfully submitted,

Brady C. Toensing

Digitally signed by Brady C. Toensing
DN: cn=Brady C. Toensing, o=diGenova and Toensing, ou=Attorney, email=Brady@digtoe.com, c=US
Date: 2022.09.19 16:36:54 -04'00'

Brady C. Toensing
DIGENOVA & TOENSING, LLP
1775 Eye Street NW, Suite 1150
Washington, DC 20006
(202) 297-4245
Brady@diGToe.com

Patrick N. Strawbridge*
CONSOVOY MCCARTHY PLLC
Ten Post Office Square
8th Floor South PMB #706
Boston, MA 02109
(617) 227-0548
patrick@consovoymccarthy.com

James F. Hasson*
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
703-243-9423
taylor@consovoymccarthy.com
james@consovoymccarthy.com

**Pro Hac Vice*

Certificate of Compliance

I HEREBY CERTIFY that the Reply Brief of the Appellant, in accordance with V.R.A.P. 32(a)(4)(B)(ii), contains fewer than 6,000 words (this case involves a cross-appeal). The brief was written using Microsoft Word software and, according to the software word count total, contains 3,797 words.

DATED this 19th day of September 2022.

Brady C. Toensing

Digitally signed by Brady C. Toensing
DN: cn=Brady C. Toensing, o=diGenova and Toensing, ou=Attorney, email=Brady@digtoe.com, c=US
Date: 2022.09.19 16:37:27 -04'00'

Brady C. Toensing
diGenova & Toensing
1775 Eye Street, NW
Suite 1150
Washington, DC 20006
202.297.4245
Brady@digtoe.com