STATE OF VERMONT

SUPERIOR COURT
CHITTENDEN UNIT

CIVIL DIVISION
DOCKET NO. 23-CV-00998

DOUGLAS WESTON, MICHAEL MYERS, THE VERMONT REPUBLICAN PARTY, THE REPUBLICAN NATIONAL COMMITTEE,
Plaintiffs,

v.

THE CITY OF WINOOSKI, VERMONT,
Defendant.

DEFENDANT'S MOTION TO DISMISS

The City of Winooski respectfully moves to dismiss Plaintiffs' Complaint pursuant to V.R.C.P. 12(b)(1) and 12(b)(6). Plaintiffs claim that that an amendment to Winooski's charter, codified at 16 App. V.S.A. ch. 23, § 11, violates Chapter II, Section 42 of the Vermont Constitution because it permits non-citizen lawful Winooski residents to vote in municipal elections on school boards and budgets, despite their alleged "statewide concern." This is the same claim Plaintiffs recently lost -- twice. In *Ferry v. Montpelier*, 2023 VT 4, the Supreme Court affirmed that Section 42 categorically does not apply to municipal elections. In *Weston v. Winooski* (*Weston I*), 22-AP-261, Plaintiffs stipulated to the dismissal of this claim in light of *Ferry*. Plaintiffs don't get a third bite at the same apple by adding one new Winooski voter to the caption and attaching a new label to the same failed claim. Plaintiffs' new Complaint is barred by *res judicata* and fails on the merits. And the organizational plaintiffs lack standing under the new standing rule established in *Ferry*.

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MEMORANDUM OF LAW

Pursuant to V.R.C.P. 12(b)(1), dismissal is appropriate where a plaintiff lacks standing to bring the claim. *Wool v. Office of Professional Regulation*, 2020 VT 44, ¶ 8, 212 Vt. 305 (citation omitted). Pursuant to V.R.C.P. 12(b)(6), a complaint must be dismissed for failure to state a claim when it appears beyond a doubt that there exist no facts or circumstances consistent with the complaint that would entitle Plaintiffs to relief. *Id.* (citation omitted). On both Rule 12(b)(1) and 12(b)(6) motions, the Court assumes as true all well-pleaded factual allegations and accepts all reasonable inferences that may be drawn from those facts. *Id.*[1]

BACKGROUND

The State of Vermont has submitted a *Memorandum of Law in Defense of the Constitutionality of 16 App. V.S.A. Ch. 232, § 11, and in Support of Defendant's Motion to Dismiss*. The "Background" section of the State's Memorandum (pp. 2-4) is adopted and incorporated into the City's Memorandum of Law.

ARGUMENT

A. The Organizational Plaintiffs Lack Standing

Standing is a "jurisdictional prerequisite" to bringing any claim. *In re Bruyette*, 2022 VT 3, ¶ 6. "The gist of the question of standing is whether [the] 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. To establish standing, a petitioner must show (1) injury in fact, (2) causation, and (3) redressability. *Hinesburg Sand & Gravel*

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[1] The City reserves its right to dispute those allegations and assert other defenses if this Motion does not result in the complete dismissal of the action.

Co., 166 Vt. 337, 341 (1997). Injury in fact is the "first and foremost requirement," *Ferry*, ¶ 13, and requires the "invasion of a legally protected interest." *Hinesburg Sand & Gravel Co.*, 166 Vt. at 341. "[A] party who is not injured has no standing to bring suit." *U.S. Bank Nat'l Ass'n v. Kimball*, 2011 VT 81, ¶ 12, 190 Vt. 210. A plaintiff must allege facts sufficient to establish standing "[o]n the face of the complaint." *Paige v. State*, 2018 VT 136, ¶ 10, 205 A.3d 526 (citation omitted).

Plaintiffs' Complaint misleadingly construes *Ferry* as holding that all the plaintiffs in that related litigation had standing. *Ferry* actually holds to the contrary. *Ferry* specifically holds that a plaintiff alleges an injury in fact and thus has standing to sue under Chapter II, § 42 when "the law changes the qualifications for voters as defined in § 42 *and the plaintiff is voter within the voter pool for which those qualifications have been changed*." *Ferry*, ¶ 21. The present Complaint does not, and obviously could not, plausibly allege that either of the organizational plaintiffs meet this threshold requirement for standing. The *Ferry* Court did *not* hold that the organizational plaintiffs had standing. It merely stated that since one of the individual plaintiffs had "voter" standing under the new rule stated above, "we need not address the standing of the remaining plaintiffs" to reach the merits of the case. *Ferry*, 2023 VT 4, ¶ 25. The City respectfully submits that this Court nevertheless *should* hold that the organizational plaintiffs lack standing under *Ferry* and dismiss *their* claims for lack of jurisdiction. Parties should not be casually permitted to litigate claims they lack standing to assert or maintain.[2]

[2] The political party plaintiffs' claimed interest in the present case is particularly troubling, given that Winooski municipal elections are, *by design*, non-partisan. See 24 App. V.S.A. c. 19 § 205: "Nominations for the office of Mayor and Councilor shall be made by petition, prepared and filed in accordance with the provisions of 17 V.S.A. §§ 2681 and 2681a. **The petitions shall contain no party designations**." (Emphasis added).

The *Ferry* Court's conclusion that it "need not" consider the standing of the other plaintiffs derives from a footnote in *Turner v. Shumlin*. *Ferry*, ¶ 25. The *Turner* footnote, in turn, cites no authority for the "need not consider" principle, and a reasonable search of Vermont statute and caselaw has revealed no such authority. The *Turner* footnote cited in *Ferry* is, at best, dicta. *See Zebic v. Rhino Foods, Inc.*, 2021 VT 35, ¶ 27, n. 3, 214 Vt. 573 (defining dicta as "judicial comment made while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.").

While its usage in Vermont appears limited to *Ferry* and *Turner*, the "one good plaintiff" notion does appear with some frequency in federal court decisions, with apparent origins as a court-made rule of convenience. *See, e.g., Baggett v. Bullitt*, 377 U.S. 360, 366 n. 5 (1964) (early Supreme Court use of the rule); *see generally One Good Plaintiff is Not Enough*, 67 Duke L. J. 481 (Aaron-Andrew P. Bruhl). But the *Ferry* Court made plain that, Vermont's standing law is "ultimately determined by the Vermont Constitution" and Vermont courts are not bound by any federal court's standing precedents, "particularly where those developments have occurred without discussion or mention in [Vermont] caselaw." *Ferry*, 2023 VT 4, ¶¶ 14-15 (citing *Hinesburg Sand & Gravel Co.*, 166 Vt. 337, 341 (1997); *ASARCO Inc. v. Kadish*, 490 U.S. 605 617 (1989); *Constitutionality of House Bill 88*, 115 Vt. 524, 529 (1949)). "It is therefore essential that the incremental development of Vermont standing law be fastidiously pursued through reason rather than assumption." *Ferry*, ¶ 16.

No discussion or fastidious pursuit by reason has accompanied the pernicious incursion of the "one-good-plaintiff-is-enough" rule into Vermont standing jurisprudence, and it should be held in check rather than being allowed to advance unchallenged. For example, prevailing parties in a civil case in Vermont are entitled to recover costs. V.R.C.P. 54(d)(1). Parties who do

not have standing but are nonetheless allowed to piggy-back on a proper plaintiff may, depending on the outcome, still recover their costs. The impact is not restricted to the party without standing, either–a losing defendant could be forced to bear costs or even attorneys' fees accrued by a plaintiff with no standing, who should never have been able to bring the case in the first place. As a matter of judicial efficiency and fundamental fairness, none of this makes any sense.

The Court should evaluate standing for all plaintiffs, particularly in cases like the present case as to which the Court has articulated individual voter standing requirements which organizational plaintiffs cannot possibly satisfy, and should not permit parties with no standing to remain in the case. The organizational plaintiffs lack standing to assert the claim asserted in this case, and the Court should not hesitate to so hold.

B. Plaintiffs' Complaint is Barred by Res Judicata

The doctrine of *res judicata* "bars the litigation of a claim or defense if there exists a final judgment in a former litigation in which the parties, subject matter and causes of action are identical or substantially identical." *Lamb v. Geovjian*, 165 Vt. 375, 379-80 (1996) (citations and internal quotation marks omitted). "When the claims are identical or sufficiently similar, the doctrine applies to claims that were or should have been raised." *Sutton v. Purzycki*, 2022 WL 56, ¶ 21. It "advances the efficient and fair administration of justice" and "flows from the fundamental precept that a final judgment on the merits 'puts an end to the cause of action, which cannot again be brought into litigation between the parties upon any ground whatever.' " *Id.* (Citations omitted). ¶ 14. To determine whether two causes of action, including one not raised in an earlier proceeding, are "sufficiently similar for claim preclusion purposes," we focus on whether the claims arise "from 'all or any part of the [same] transaction, or series of

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connected transactions.' . . . Some factors we weigh when making this determination include " 'whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.' " . . . " '[N]o single factor is determinative.' " *In re Burns 12 Weston Street NOV*, 2022 VT 37, ¶ 12 (citations omitted).

The parties, subject matter and causes of action in *Weston I* and the present case are identical or substantially identical. In *Weston I*, the plaintiffs claimed that Section 42 precludes non-citizens from voting in Winooski's local elections. The Superior Court's holding in *Weston I* is as plain as plain comes: "The Vermont Supreme Court has made clear that Chapter II, § 42 of the Vermont Constitution does not apply to local elections. … . As Plaintiffs' challenge rests entirely on the assertion that § 42 precludes the Legislature from extending the franchise to non-citizens, this observation is fatal to their claims." *Weston et al. v. Winooski et al.*, No. 21-CV-02965 (Vt. Super. Ct. Sept. 1, 2022). Accordingly, the *Weston I* trial court dismissed Plaintiffs' claim and entered judgment in favor of the City. When Plaintiffs dismissed their appeal in *Weston I*, this judgment became final for purposes of *res judicata*. *See Littlefield v. Town of Colchester*, 150 Vt. 249, 251 (1988) (voluntary dismissal of appeal with prejudice treated as adjudication on the merits).

Plaintiffs' current Complaint complains that "the amendment resulted in permitting noncitizens to vote in school district elections, including those related to the school budget," and "to vote for the School District's governing at large 'Board of Five Trustees" who "present the school 'budget for the following fiscal year' at the annual District Meeting, followed by a vote of the qualified voters on adoption of the budget." Complaint, ¶ 25. Plaintiffs allege that "school budgets and school funding in Vermont are statewide, freeman issues." Complaint, ¶ 26. This is

the same claim that was litigated and disposed of in *Weston I*, where Plaintiffs claimed that because "municipal voters approve education budgets that are expended through State expenditures," Ch. II, Section 42 requires them to be United States citizens.[3]

Plaintiffs' characterization of the present case as an "as applied" challenge rather than the "facial" challenge disposed of by *Weston I*, is immaterial. As the State demonstrates in its Memorandum, the present complaint is the same facial challenge to the charter amendment that was disposed of in *Weston I*. To the extent it is styled as a different claim, it is nevertheless one that is substantially the same, and should have been brought in *Weston I* and is therefore barred by res judicata. *See, e.g., Monahan v. New York City Dept. of Corrections*, 214 F.3d 275, 290 (2d. Cir. 2000) (plaintiffs could not avoid *res judicata* "merely by invoking legal terms of art with constitutional mystique.").

Plaintiffs also do not evade *res judicata* by adding a new plaintiff to the caption (Michael Myers). *Res judicata* bars claims by parties in the prior action and those in privity with them. A privity relationship exists when a party is "so identified in interest with the other party that they represent one single legal right. *Id.* The existence of privity is determined by comparing the interests of a party in the initial action with a non-party and evaluating whether that non-party's interests were protected in the first action. See *Bain v. Hofman*, 2010 VT 18, ¶ , 187 Vt. 605 (citing *State ex rel. Barksdale v. Litscher*, 2004 WI App. 130, ¶ 14, 275 Wis.2d 493).

Plaintiff Myers' position in this case is "so identified in interest with the other part[ies] as to represent one single right." *Lamb*, 165 Vt. at 380. He does not have his own distinct personal claim separate and apart from the other plaintiffs' claims. His interests and rights are identical to those of the *Weston I* parties and were represented in that litigation, by the same counsel that

[3] Appellant's Br. 13, Weston I, 22-AP-261, 2022 WL 18912844.

represents all the plaintiffs in this action. The alleged dilution effects of admitting noncitizens into the Winooski voter pool applied equally to every voter in Winooski, not just the individual plaintiffs. As a result, Plaintiff Myers is in privity with the *Weston I* plaintiffs, and *res judicata* applies with equal force to him as it does to the other Plaintiffs.

To hold otherwise would eviscerate the doctrine– every time a party loses a case, they need only tack on an additional plaintiff to bring the same case again, and again, ad infinitum. The present Plaintiffs' ability to continue re-litigating the same claim would be limited only by the number of Winooski voters they might persuade to join their cause. See *U.S. ex rel Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 249 (9th Cir. 1992) ("[T]he naming of additional parties does not eliminate the res judicata effect of a prior judgment so long as the judgment was rendered on the merits, the cause of action was the same and the party against whom the doctrine is asserted was a party to the former litigation."); *Sheridan v. NGK Metals Corp.*, 2008 WL 21516718 (E.D. Penn. 2008) ("Addition of new parties, whether they are plaintiffs or defendants, does not negate the *res judicata* effect of the prior litigation…. . If that was the case, a plaintiff could circumvent the claim preclusion doctrine altogether simply by joining another plaintiff or defendant to the action.").[4]

C. Plaintiffs' Complaint Fails to State a Claim upon which Relief may be Granted.

This Court's decision granting the City's Motion to Dismiss in Weston I stated:

> This court has struggled mightily to improve on the work of the *Ferry* court. Ultimately, the court concludes that to undertake such an effort would be, to borrow an oft-misquoted term, "to paint the lily." W. Shakespeare, The Life and Death of King John, Act IV,

[4] For purposes of *res judicata*, the organizational plaintiffs' standing is not a question of *claim* preclusion, but *issue* preclusion, which only bars the subsequent re-litigation of issues that were actually decided in a prior case, where a decision on the issue was necessary to the resolution of the prior action on the merits. *Faulkner v. Caledonia County Fair Ass'n*, 2004 VT 123, ¶ 20, fn. 6. Because Ferry and Weston I expressly did not decide the issue of the organizational defendants' standing, for the precise reason that deciding that issue was not necessary to a decision on the merits, the court is not now precluded from deciding the issue.

> Scene 2. Accordingly, the court concurs with the Ferry decision and adopts is reasoning entirely as the basis for its decision here to grant the motion to dismiss.

Id., at 1. The City respectfully takes the same approach with respect to the State's Memorandum of Law in Defense of the Constitutionality of 16 App. V.S.A. Ch. 232, § 11, and in Support of Defendant's Motion to Dismiss. The City adopts and relies upon the State's Memorandum entirely as though it were the City's own memorandum in support of its motion to dismiss.

As discussed in the State's Memorandum, if school district elections were statewide elections, all "freemen" would be entitled to vote on every school board election and every school budget in the State. Such an absurd result is, fortunately, precluded by Ferry, which holds that:

- Section 42 does not apply to municipal elections as a matter of law;
- The distinction between statewide and local elections is "categorical;"
- The potential for "extra-municipal" impact on issues of "statewide concern" does not make a municipal election into a statewide election;
- Statewide elections are governed by Ch. II, Section 42; municipal elections are not.

Plaintiffs' claim that school-district elections are statewide elections cannot be reconciled with Ferry or with multiple Vermont statutes. Plaintiffs' Complaint fails to state a claim upon which relief may be granted and should be dismissed with prejudice.

CONCLUSION

For the foregoing reasons, Plaintiffs' complaint should be dismissed, with prejudice, as to all claims and all plaintiffs.

DATED at Burlington, Vermont this 17th day of April, 2023.

CITY OF WINOOSKI, VERMONT

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