Vermont Supreme Court
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IN THE SUPREME COURT OF THE STATE OF VERMONT
CASE NO. 22-AP-125

CHARLES FERRY ET AL.,
Plaintiffs Appellants / Cross Appellee

v.

CITY OF MONTPELIER,
Defendant Cross Appellant / Appellee

APPEAL FROM SUPERIOR COURT, CIVIL DIVISION,
WASHINGTON UNIT
Docket No. 21-CV-02963

Brief for Cross Appellant / Appellee City of Montpelier

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ISSUES PRESENTED

1. Whether Chapter II, Section 42 of the Vermont Constitution applies to municipal elections.

2. Whether Plaintiffs have standing under a theory of vote dilution.

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STATEMENT OF THE CASE

The subject of this litigation is an amendment to the Montpelier charter to allow noncitizen, legal permanent residents of the United States who reside in the City to vote in Montpelier City elections as to Montpelier questions and candidates.

On November 6, 2018, Montpelier City voters approved a resolution to seek authorization from the Vermont Legislature to amend the Montpelier charter as stated above.

On May 21, 2021, the General Assembly approved a charter change to that effect, allowing, in addition to United States citizens, "any noncitizen who resides in the United States on a permanent or indefinite basis in compliance with federal immigration laws," 24A V.S.A. § 5-1504(1), to vote only on "City questions and candidates," id. § 5-1503; see also id. § 5-1501(a). The amendment acts as a legislatively recognized exception to Title 17, Section 2121(a)(1), which generally requires United States citizenship to register to vote in Vermont. The Legislature also authorized a similar charter amendment to the Winooski City charter. See 24A V.S.A. § 19-202(b). The Montpelier City charter amendment expressly prohibits noncitizen voting on any state or federal question or candidate, id. § 5-1501(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.

The Governor vetoed this legislation. But on June 24, 2021, the General Assembly overrode the Governor's veto, and the charter change was effective immediately.

Thereafter, Plaintiffs, consisting of several individuals residing in municipalities across the State (only two from the City of Montpelier), the Vermont Republican Party, and the Republican National Committee, filed suit seeking declaratory and injunctive relief that the Montpelier City charter amendment violates Chapter II, Section 42 of the Vermont Constitution. AV-177. The City filed a motion to dismiss, arguing Plaintiffs lacked standing and the charter amendment did not violate the Vermont Constitution. AV-

154. The State of Vermont intervened for the limited purpose of defending the constitutionality of the charter amendment. AV-151.

The court held oral argument on the motion to dismiss on March 31, 2022. On April 1, 2022, the court granted the motion to dismiss. The court reasoned in its written decision that the City was incorrect in arguing that Plaintiffs lacked standing, but the City was correct in asserting the charter amendment was constitutional. AV-23-31.

Subsequently, Plaintiffs appealed the court's decision. The City cross-appealed on the standing issue. The City asserts the Superior Court erred as a matter of law in holding that Plaintiffs did not lack standing. AV-23-24.

The City of Montpelier also adopts and incorporates herein the Summary of the Case presented by the Brief for Appellee State of Vermont in its entirety.

ARGUMENT

I. Chapter II, Section 42 of the Vermont Constitution does not apply to municipal elections and the amendments to Montpelier's charter permitting legal residents who are not U.S. citizens to vote in Montpelier elections is valid.

The City of Montpelier adopts as its own the arguments presented by the Brief for Appellee State of Vermont in their entirety and incorporates them herein. The City joins the State in respectfully urging this Court to reject Appellants' arguments and to affirm the decision of the Civil Division that the Legislature has the power to permit noncitizen voting in Montpelier City elections notwithstanding Chapter II, Section 42.

II. None of the Individual Plaintiffs nor Organizational Plaintiffs have standing to litigate their challenge to the City's charter amendment.

This case presents a straightforward application of the law of Article III standing to both the Individual Plaintiffs as well as the Organizational Plaintiffs. The City of Montpelier moved to dismiss Plaintiffs' Complaint for failure to state a claim, which is the subject of Plaintiffs' appeal to this Court and addressed in Section I, and for lack of standing, which is the subject of the City's cross-appeal, and which is addressed here in Section II. See AV-

154. The question of standing was fully briefed and argued before the Superior Court, and Judge Mello issued a ruling concluding that the two Montpelier City resident Plaintiffs have standing, and that because they have standing, "it is unnecessary to examine the circumstances of any of the other plaintiffs." AV-23-24.

"Whether a plaintiff has standing is a legal question, which we review with no deference to the trial court." Taylor v. Town of Cabot, 2017 VT 92, ¶ 9, 205 Vt. 586 (citing Baird v. City of Burlington, 2016 VT 6, ¶ 11, 201 Vt. 112).

"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). "To demonstrate standing, a plaintiff must allege injury in fact, causation, and redressability." Paige v. State, 2018 VT 136, ¶ 9, 209 Vt. 379. "[T]he plaintiff must allege personal injury fairly traceable to the defendant's allegedly 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 & 560 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 in a personal and individual way").

Plaintiffs' challenge to the City's charter amendment fails before it starts for lack of a personal, particularized injury—both for the Individual Plaintiffs and the Organizational Plaintiffs. "The requirement of 'injury in fact' serves multiple purposes. It limits justiciable cases to those controversies which are sufficiently well-defined by injury to the plaintiff that the parties will develop the facts and seek remedies which are responsive to the harm." Martel v. Condos, 487 F. Supp. 3d 247, 251 (D. Vt. 2020). Further, "[t]his 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,

260 A.3d 1126 (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 essential when evaluating a challenge to voting law, which is "the most basic of political rights." See Fed'l Election Comm'n v. Akins, 524 U.S. 11, 25 (1998).

A. Plaintiffs Failed to Allege Injury-in-Fact in Their Complaint.

Plaintiffs did not explicitly allege an injury-in-fact in their Complaint. See AV-177. The City argued in its Motion to Dismiss that, as Plaintiffs had failed to identify any injury-in-fact, it had failed to show standing. AV-154, 156-160. Plaintiffs responded in its Opposition to the Motion to Dismiss that Individual Plaintiffs were injured by way of "vote dilution" and Organizational Plaintiffs were injured by needing to divert resources to Montpelier. AV-104, 108-09. The Superior Court held that an allegation of vote dilution could be reasonably inferred from the Complaint and did not address the purported injury of diverting resources. AV-24.

The facts alleged in the Complaint are: there are certain individuals residing and registered to vote in certain towns, two of whom reside in Montpelier; the local and national Republican committees promote and support Republican positions; and the noncitizen voting provision violates the Constitution. See AV-154. The Complaint provides no allegations that any individual plaintiff ever voted or plans to vote in a Montpelier or other Vermont election; no allegations that the individual plaintiffs are affiliated with the State or National Republican organizations; and no allegations that the Republican organizations have ever utilized or plan to utilize resources in Montpelier local elections, which are nonpartisan by charter absent an affirmative vote by the electorate or decision by the City Council to permit partisan listing. See 17 V.S.A. § 2681a(c) ("No political party or other designation shall be listed unless the municipal charter provides for such listing, the town has voted at an earlier election to provide such a listing or, in the absence of previous consideration of the question by the town, the

legislative body decides to permit listing."); see also Title 24A V.S.A., ch. 5 (Montpelier charter does not provide for partisan listing).

Plaintiffs have failed to allege a particularized injury or facts that give rise to an inference of a particularized injury. See Vasseur, 2021 VT 53, ¶ 9-10; see also Lance v. Coffman, 549 U.S. 437, 441-42 (2007) ("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.").

Construing the Complaint to raise an inference that the power of the two Montpelier residents' votes will be reduced by the inclusion of more voters in the voting pool, Plaintiffs still have not alleged an injury-in-fact. The inclusion of more voters in the voting pool is not a particularized injury sufficient to show standing, as Section B below explains.

B. The Individual Plaintiffs Do Not Have Standing.

The Individual Plaintiffs have explained their purported injury as one of vote dilution: "The Voter Plaintiffs—especially Mr. Ferry and Mr. Martineau—have standing because the City's unlawful expansion of the voter pool necessarily dilutes their votes." AV-90. In other words, Plaintiffs argue they have standing by virtue of the City of Montpelier's including allegedly unconstitutional votes in the total number of votes and thus their votes have a proportionally reduced value along with every other voter. The Superior Court agreed, citing three apportionment or gerrymandering cases: Gill v. Whitford, 138 S.Ct. 1916, 1931-32 (2018); Dep't of Commerce v. House of Representatives, 525 U.S. 316, 331-32 (1999); Baker v. Carr, 369 U.S. 186, 207-08 (1962). See AV-24.

But this misunderstands federal precedent. Federal courts have found standing in "voting dilution" cases where the plaintiff's vote was diluted in comparison with that of more advantaged voting groups—such as in gerrymandering cases. See, e.g., Baker, 369 U.S. at 207-08. But the courts have not found standing where plaintiffs alleged, as Plaintiffs do here, that their votes are diluted simply by a mathematical reduction, in the same way as every other voter. See, e.g., Gill, 138 S.Ct. at 1931-32 (explaining vote

dilution injury is "district specific" and plaintiff must show own district is disadvantaged compared with other districts and rejecting standing based on allegation of statewide injury); Martel, 487 F. Supp. 3d at 253 (rejecting standing where plaintiffs alleged mail-in ballot would lead to voter fraud, resulting in diluted votes proportionate to that of every other voter). A broad allegation that a plaintiff's vote will count less, just like any other person's vote, is not a grievance particular to that plaintiff, and it does not support standing.

Plaintiffs' vote dilution theory appears to hinge on a misunderstanding of the seminal United States Supreme Court case Baker v. Carr, 316 U.S. 186. Baker involved a challenge to Tennessee's reapportionment of seats in its legislature under the Equal Protection clause of the Fourteenth Amendment. It did not involve simply the inclusion of new voters to the voter rolls. The problem in Baker arose because the Tennessee legislature had failed to reapportion districts after over 60 years of population growth and movement with an "irrational disregard to the standard of apportionment prescribed by the State's Constitution," which resulted in severely disproportionate representation. Id. at 191-94, 207.

The Baker Court concluded that the plaintiffs had standing because the injury asserted was "that this classification disfavors the voters in the counties in which they reside, placing them in a position of constitutionally unjustifiable inequality vis-a-vis voters in irrationally favored counties." Id. at 207-08. The Court held that plaintiffs were "asserting a plain, direct and adequate interest in maintaining the effectiveness of their votes, not merely a claim of the right possessed by every citizen to require that the government be administered according to law." Id. at 208 (internal citations and quotations omitted). In other words, there was a point of comparison by which the Baker plaintiffs' injury could be assessed as specific to them—the irrational favoring of voters in one district compared to voters in another. Thus, under Baker, in that context, "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." Id. at 206.

Plaintiffs here cannot escape the divergence of their case from Baker. Unlike Baker, Plaintiffs' purported injury that allegedly unconstitutional

votes should not be counted alongside theirs is "merely a claim of the right possessed by every citizen to require that the government be administered according to law," id. (quotation omitted), and such generalized claims of injury provide no standing. See Lujan, 504 U.S. at 573-74 ("We have consistently held that 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."). There is no claim or allegation, nor can there be, that the amendment to the Montpelier City charter places the individual Plaintiffs at any sort of disadvantage vis-à-vis some other irrationally favored group among City voters because the City's charter amendment creates no such groupings. See Abbott v. Perez, 138 S. Ct. 2305, 2314 (2018) ("The Equal Protection Clause forbids racial gerrymandering, that is, intentionally assigning citizens to a district on the basis of race without sufficient justification. It also prohibits intentional vote dilution—invidiously minimizing or canceling out the voting potential of racial or ethnic minorities." (internal citations, quotations, and alterations omitted)). While the total number of eligible voters and perhaps total votes may vary if any non-citizen resident of Montpelier elects to register and vote under the charter amendment, the impact would be solely the addition of these votes to the final total number of votes cast, and thus the proportional impact would be the same on every voter in the City. Plaintiffs' alleged injury is the epitome of a generalized, non-particularized grievance.

In briefing before the Superior Court, Plaintiffs also relied on the language from Baker that "[a] citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the Constitution, when such impairment resulted from dilution by a false tally . . . or by a stuffing of the ballot box." Baker, 369 U.S. at 208 (internal citations omitted). But casting a vote expressly sanctioned by the Legislature through an amendment to Montpelier's City charter, even if such authorization may be assumed for sake of argument as violative of the Vermont Constitution, "is not equivalent to 'ballot-box stuffing.'" See Bognet v. Sec'y Commonwealth of Pennsylvania, 980 F.3d 336, 359 (3d Cir.

2020), cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid, 141 S. Ct. 2508 (2021)[1] ("In the first place, casting a vote in accordance with a procedure approved by a state's highest court—even assuming that approval violates the Elections Clause—is not equivalent to 'ballot-box stuffing.' The Supreme Court has only addressed this 'false'-tally type of dilution where the tally was false as a result of a scheme to cast falsified or fraudulent votes. We are in uncharted territory when we are asked to declare that a tally that includes false or fraudulent votes is equivalent to a tally that includes votes that are or may be unlawful for non-fraudulent reasons, and so is more aptly described as 'incorrect.'" (citation omitted)).

As Bognet explains, the United States Supreme Court cases involving "ballot-box stuffing as an injury to the right to vote have arisen from criminal prosecutions under statutes making it unlawful for anyone to injure the exercise of another's constitutional right" and it "would not follow that every such 'false' or incorrect tally is an injury in fact for purposes of an Equal Protection Clause claim." Id.

> Indeed, the logical conclusion of the Voter Plaintiffs' theory is that whenever an elections board counts any ballot that deviates in some way from the requirements of a state's legislatively enacted election code, there is a *particularized* injury in fact sufficient to confer Article III standing on every other voter—provided the remainder of the standing analysis is satisfied. Allowing standing for such an injury strikes us as indistinguishable from the proposition that a plaintiff has Article III standing to assert a general interest in seeing the "proper application of the Constitution and laws"—a proposition that the Supreme Court has firmly rejected. The Voter Plaintiffs thus lack standing to bring their Equal Protection vote dilution claim.

Id. at 360 (emphasis in original) (citation omitted).

The case of Lance v. Coffman, 549 U.S. 437, is instructive and conclusive to the case at bar. There, the only injury alleged was "that the law—specifically the Elections Clause—[had] not been followed," and the

[1] The judgment in this case was ultimately vacated and the case dismissed as moot. Notwithstanding the case being dismissed as moot, the Third Circuit's analysis is no less persuasive.

United States Supreme Court found no standing because "[t]his injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past. It is quite different from the sorts of injuries alleged by plaintiffs in voting rights cases where we have found standing." Lance, 549 U.S. at 442 (citing Baker v. Carr as the type of case with injuries alleged for which there would be standing, in contrast to the generalized injury from the Lance plaintiffs). Lance is directly on point and compels dismissal.

With the foregoing in mind, it should come as no surprise that numerous courts from around the country have dismissed cases based on similar vote dilution theories as presented by Plaintiffs here. In Martel v. Condos, 487 F. Supp. 3d 247, five registered Vermont voters brought a challenge to the State's mail-in ballot program, alleging that "their individual votes will be diluted if the distribution of mail-in ballots leads—as they fear—to mistaken votes or widespread voter fraud." Id. at 250. The Martel plaintiffs' stated concern was "that ballots will be mailed to voters who have moved away, died, or otherwise become ineligible and that these ballots will be used to vote illegally by the ineligible voter or others who acquire the ballots and return them to polling places." Id. at 251. Judge Crawford dismissed for lack of standing, concluding that "Plaintiffs' case begins and ends with the issue of standing." Id. at 253. He explained, "A vote cast by fraud or mailed in by the wrong person through mistake has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged." Id. The same is true in this case.

Other courts are in accord. See, e.g., Wood v. Raffensperger, 981 F.3d 1307, 1314-15 (11th Cir. 2020), cert. denied, 141 S. Ct. 1379 (2021) (no standing based on argument that "inclusion of unlawfully processed absentee ballots diluted the weight of [the plaintiff's] vote"); Mirarchi v. Boockvar, 2021 WL 6197370 (E.D. Penn. Dec. 30, 2021) (plaintiff could not show injury in fact and thus lacked standing because "[h]e claims that he suffered an injury to his right to vote like all citizens who participate in the electoral process" and thus "[t]o the extent [plaintiff] suffered any injury, this injury is indistinguishable from that of any other citizen"); Election Integrity Project

California, Inc. v. Weber, No. 2:21-CV-00032-AB-MAA, 2021 WL 4501998 (C.D. Cal. June 14, 2021) (appeal pending) (no standing where plaintiffs' injury was "vote dilution—that the value of their votes and the candidates' supporters' votes was diminished by Defendants' various actions"); Moore v. Circosta, 494 F. Supp. 3d 289, 311 (M.D.N.C. 2020), appeal dismissed sub nom. Wise v. Circosta, No. 20-2104 (L), 2021 WL 1511943 (4th Cir. Jan. 8, 2021), and appeal dismissed, No. 20-2107, 2021 WL 1511941 (4th Cir. Jan. 11, 2021) (concluding that "the notion that a single person's vote will be less valuable as a result of unlawful or invalid ballots being cast is not a concrete and particularized injury in fact necessary for Article III standing" (emphasis in original)); Paher v. Cegavske, 457 F. Supp. 3d 919, 926 (D. Nev. 2020) ("The theory of Plaintiffs' case, and which is the only alleged injury driving all of their claims, is that the Plan will lead to an increase in illegal votes thereby harming them as rightful voters by diluting their vote. But Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter. Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury.").

Like Lance, Martel, and the host of other cases across the country dismissing cases for lack of standing based on theories of vote dilution where the only alleged injury is that the law is not being followed and is no different from that any registered voter could bring, and so is nothing more than a generalized grievance, the individual Plaintiffs here have no standing and the case must be dismissed.

C. The Organizational Plaintiffs Also Have No Standing.

The Organizational Plaintiffs fare no better. "An organization can have standing to sue in one of two ways." New York C.L. Union v. New York City Transit Auth., 684 F.3d 286, 294 (2d Cir. 2012). "It may sue on behalf of its members" or "an organization can 'have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy.'" Id. (quoting Warth v. Seldin, 422 U.S. 490, 511 (1975)).

As set forth above, none of the Individual Plaintiffs have standing, and therefore neither of the Organizational Plaintiffs could have standing to bring suit on behalf of their members. Parker v. Town of Milton, 169 Vt. 74, 78 (1998) ("The standing requirement applies to organizations as well as individuals. An association 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."). Moreover, there is no factual allegation that any of the Individual Plaintiffs are members of the Organizational Plaintiffs, and the Complaint is bereft of any allegation related to non-Plaintiff members, and thus there would be no factual basis for such organizational standing to sue on behalf of their members even if an Individual Plaintiff had standing. See AV-177.

Nor do the Organizational Plaintiffs have standing to bring suit on their own behalf. "Under this theory of organizational standing, the organization is just another person—albeit a legal person—seeking to vindicate a right. To qualify, the organization itself must meet the same standing test that applies to individuals." New York C.L. Union, 684 F.3d at 294 (internal quotations and alterations omitted).

The Organizational Plaintiffs view their standing as follows: "Here, the charter Amendment's expansion of the electorate to include noncitizens necessarily increases the burden upon the Organizational Plaintiffs in supporting and coordinating election strategy by forcing them to divert additional resources to Montpelier due to the expanded voter pool." AV-108-09. This argument fails for two main reasons: (1) Plaintiffs did not plead anything related to expending of resources or participating in Montpelier City local elections—historically, presently, or in the future—in their Complaint, see AV-177; and (2) Montpelier City elections are nonpartisan per its charter absent a determination by the electorate or City Council to permit partisan listing, see 17 V.S.A. § 2681a(c) ("No political party or other designation shall be listed unless the municipal charter provides for such listing, the town has voted at an earlier election to provide such a listing or, in the absence of previous consideration of the question by the town, the

legislative body decides to permit listing."); see also Title 24A, ch. 5 (Montpelier charter does not provide for partisan listing).

With respect to the Organizational Plaintiffs, the Complaint reveals these alleged facts:

> Plaintiff Vermont Republican Party is a major political party in the State of Vermont. It works to promote Republican values and assists Republican candidates in obtaining election to federal, state, and local office.
>
> Plaintiff Republican National Committee is a national political committee, as defined by 52 U.S.C. § 30101, that manages the Republican Party's business at the national level, supports Republican candidates for public office at all levels, coordinates fundraising and election strategy, and develops and promotes the national Republican platform.

AV-180 ¶¶ 14, 15. Other than generic propositions, there are no allegations that either of these Organizational Plaintiffs has ever, is presently, or will ever involve itself in a local Montpelier City election. But given the Montpelier charter provision that elections are nonpartisan absent a change voted on by the electorate or approved by the City Council, this is not surprising. Plaintiffs' proposition is nothing but a conjectural and hypothetical proposition, and cannot form the basis for standing. Liberian Cmty. Ass'n of Conn. v. Lamont, 970 F.3d 174, 184 (2d Cir. 2020) ("As relevant here, the injury in fact must have been concrete and particularized as well as actual or imminent, not conjectural or hypothetical. Allegations of possible future injury do not satisfy the requirements of Article III." (internal citations, alterations, and quotation marks omitted)).

Regardless, it is not true, as Plaintiffs suggest, that organizational standing is established by a bare argument, or even a bare factual allegation, that the party's operations are affected. In Green Party of Tennessee v. Hargett, cited by Plaintiffs in their Opposition to the City's Motion to Dismiss, the Sixth Circuit upheld standing where the parties demonstrated the challenged law imposed substantial barriers to the plaintiffs' ability to appear on the ballot, and this harm was "unique" and "individualized," "an 'injury peculiar to' them and not 'common to all members of the public.'" 767 F.3d 533, 544-45 (6th Cir. 2014) (quoting Lance, 549 U.S. at 440)); see

also Tex. Democratic Party v. Benkiser, 459 F.3d 582, 586 (5th Cir. 2006) (upholding standing where party demonstrated that individual candidate's replacement would cause the party "economic loss," as it "would need to raise and expend additional funds and resources to prepare a new and different campaign in a short time frame" (quotation omitted)). Here, Plaintiffs present no demonstration through pleading or reasonable inference that the mere expansion of the voter rolls would impose on them any barrier to participating in the nonpartisan Montpelier City elections, let alone that this expansion is somehow a substantial barrier.

In Mecinas v. Hobbs, 468 F.Supp.3d 1186 (D. Ariz. 2020), the U.S. District Court of Arizona held the organizational plaintiffs lacked standing where they claimed a challenged law "frustrate[d] the mission of electing Democrats in Arizona by giving an unfair, arbitrary, and artificial advantage to Republicans" and caused them to "expend resources" in Arizona. Id. at 1204-05. The Court held the former was "not a concrete injury to establish standing, but rather a generalized grievance with the political process that this court 'is not responsible for vindicating.'" Id. at 1204 (quoting Gill v. Whitford, 138 S. Ct. 1916, 1933 (2018)). For the latter, the party failed to show "that they 'would have suffered some other injury if they had not diverted resources to counteracting the problem.'" Id. at 1205 (quoting La Associacion de Trabajadores de Lake Forest v. Lake Forest, 624 F.3d 1083, 1088 (9th Cir. 2010) (alteration omitted)).[2] Plaintiffs' vague argument that they will "divert additional resources to Montpelier" is analogous to the claimed injuries rejected in Mecinas and unlike the situation in Green Party or Texas Democratic Party.

It is unclear why the Organizational Plaintiffs view enfranchising non-citizens as harmful to their organizations. Nothing is pled, and no reasonable inference can be drawn which would suggest a harm to the Organizational Plaintiffs merely because a voter may not be a United States citizen. In

[2] Green Party, Texas Democratic Party, and Mecinas were decided at a different procedural posture than is present here, where the Court required evidence, and not merely allegations. But the cases are nonetheless illustrative of the types of facts that must be alleged to support standing.

Montpelier, candidates for municipal "offices," such as Mayor, City Council, School Board, and others, do not run with any partisan identification. There are no primaries or partisan caucuses to nominate candidates. Once in place on the Council or School Board, there is no partisan divide on issues. Party affiliations are not considered when the Council appoints people to important seats like the Planning Commission, Development Review Board, or other boards, commissions, and committees. This also applies to other elected positions like City Clerk, Parks Commission, Cemetery Commission, and the like. Plaintiffs are conjuring a phantom injury that does not exist, and perhaps cannot exist, within the context of a nonpartisan local election. This disjunction—between Plaintiffs' argument of a frustrated partisan campaign and the nonpartisan nature of Montpelier elections—further underscores the need for, and the lack of, a concrete, particularized injury, properly pled in the Complaint, and why this case must be dismissed.

CONCLUSION

For the foregoing reasons, this Court should affirm the Superior Court's decision to dismiss Plaintiff's Complaint. Like the Superior Court, this Court should hold that the Montpelier charter amendment is constitutional. Unlike the Superior Court, this Court should also hold that Plaintiffs lack standing.

Dated: 8/22/22

CITY OF MONTPELIER

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CERTIFICATE OF COMPLIANCE

I, K. Heather Devine, counsel of record for Appellee and Cross-Appellant City of Montpelier, certifies that this brief complies with the word count limit in V.R.A.P. 32. The brief was written using Microsoft Word software and, according to the Microsoft Word count application, contains 4,976 words.

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