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

Reply Brief for Cross Appellant / Appellee City of Montpelier

CITY OF MONTPELIER

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I. Plaintiffs do not have standing.

Plaintiffs offer nothing to support an argument that the Organizational Plaintiffs would have standing, and instead focus their efforts on the Individual Plaintiffs under a theory of vote dilution. But vote dilution under Baker v. Carr, 369 U.S. 186 (1962), Department of Commerce v. House of Representatives, 525 U.S. 316 (1999), or any of the other apportionment cases, simply does not mean what Plaintiffs say it means. Vote dilution under this precedent does *not* mean a voter's power is reduced by the inclusion of new voters. It does not mean that a person whose voting power is mathematically reduced by the inclusion of new voters has suffered an individualized grievance sufficient to establish Article III standing. Neither Baker nor Department of Commerce say that.

Plaintiffs cherry pick language from Department of Commerce and Baker to make it appear as if the U.S. Supreme Court has held any person has the right to challenge any voting scheme whenever that person's voting power may be reduced. Plaintiffs' Reply at 1. But those cases did not say that. Those snippets are inaccurate representations of what the U.S. Supreme Court held.

Baker involved a long-simmering and constitutional problem with Tennessee's failure to reapportion voting districts as required by the state constitution and thus there was a resultant disproportionate representation amongst voting districts. This problem resulted in standing to sue because some districts were irrationally favored vis-à-vis other districts, and thus a concrete and particularized injury. And that is what is missing in Plaintiffs' challenge to the Montpelier charter amendment. There is nothing that harms them in comparison to anyone else by simply allowing more people to also participate in local elections.

Standing was found in Baker because there was a direct, plain, and obvious point of comparison between the plaintiffs and others, which was specific to them, and which could be compared and understood to find injury. Here, in contrast, there is no disparate voting district at issue; no irrationally favored voter class; no increase to the voting power of one voter at the expense of another. And, accordingly, no injury. The Montpelier charter

amendment simply authorizes additional potential voters to participate in the City's civic life. Plaintiffs point to nothing suggesting that the increase in the scope of those who are authorized to vote could somehow impact the value of their vote. One vote cast by an authorized voter in the City of Montpelier remains valued precisely as it was before—as one vote.

Plaintiffs' reliance on Department of Commerce is equally flawed. Department of Commerce involved two challenges to the Department of Commerce's plan to use statistical sampling in an upcoming decennial census. Dep't of Commerce, 525 U.S. at 327-28. The first challenge was brought in the Eastern District of Virginia by four counties across Georgia, Pennsylvania, and Illinois, and residents of 13 states, claiming that the Department's statistical sampling plan to apportion Representatives among the States violated the Census Act and the Census Clause of the Constitution. The second challenge was brought by the United States House of Representatives in the District of Columbia, arguing that use of the statistical sampling plan to apportion members of the House of Representatives violated the Census Act and the Census Clause of the Constitution. Id.

Each district court found the challengers had standing and that the statistical sampling plan was unlawful. Id. Relevant here, the Supreme Court affirmed the respective district courts' standing conclusions. In the first challenge, the Supreme Court explained that the evidence before the district court was sufficient to show that under the statistical sampling plan, Indiana was likely to lose a Representative seat, and that "[i]n the context of apportionment," the "expected loss of a Representative to the United States Congress undoubtedly satisfies the injury-in-fact requirement of Article II standing." Id. at 331. On the second challenge, the Supreme Court relied on the evidence that showed certain of the plaintiffs who resided in various counties "have a strong claim that they will be injured by the Bureau's plan because their votes will be diluted vis-à-vis residents of counties with larger 'undercount' rates" and "this expected intrastate vote dilution satisfies injury-in-fact, causation, and redressability requirements." Id. at 333-34.

The two fact patterns in Department of Commerce—the loss of a Representative to Congress and the reduction in voting power of certain

counties vis-à-vis other counties—are not reflective of the context of this case. The inclusion of the newly authorized voters in the singular Montpelier voting district does not remove a representative from the previously authorized voters in the City, nor does it diminish the voting power of the Montpelier voting district in contrast with another voting district. It merely allows new voters to participate alongside the previous voters in the same voting district. One vote in the City of Montpelier still equals one vote.

Plaintiffs paint over the critical facts in Baker and Department of Commerce to manufacture a holding that the Court never made. Those cases were about the interests of voters whose power was reduced *in comparison with* voters of other jurisdictions. In Baker, voters of some Tennessee districts suffered reduced voting power in the Tennessee legislature, in comparison with voters of other Tennessee districts. In Department of Commerce, Indiana voters suffered reduced voting power in Congress, in comparison voters from other states; and voters in certain counties suffered reduced voting power in Congress, in comparison with voters from other states. In neither case did the U.S. Supreme Court set forth a rule that reduced voting power, experienced in the same way for each voter within the same district, constitutes "vote dilution" sufficient to support Article III standing. See Liu v. United States Congress, 834 F. App'x 600, 602 (2d Cir. 2020) (citing Baker and Department of Commerce and explaining vote dilution as existing when a plaintiff alleges his vote has been diluted in comparison with voters of other districts).

The kind of discriminatory voting scheme that could give rise to an injury-in-fact of vote dilution simply does not exist here. Plaintiffs neither allege nor experience any *comparative* disadvantage. Their situation is in no way different from that of any other voter. Simply allowing more people to participate in Montpelier's elections does not constitute vote dilution under federal precedent, or any other injury-in-fact.

Contrary to Plaintiffs' read of the City's argument, the City is not arguing that the sheer number of those allegedly harmed somehow renders their grievance generalized. Rather, it is that no plaintiff in this case has any injury that is specific and particular to them. Plaintiffs' argument, that the inclusion of new voters harms them because now more people can vote in the

same election, is shared by every single voter in the City of Montpelier, and is thus generalized and not specific or particularized. See, e.g., Martel v. Condos, 487 F. Supp. 3d 247)(D. Vt. 2020) (rejecting standing in challenge to Vermont's mail-in ballot program because "[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").

This should not be controversial proposition, and indeed it is not. Plaintiffs do not, and cannot, distinguish the litany of cases from around the country which have come to this same conclusion, and which the City cited in its principal brief at 8-9. It is notable that Plaintiffs do not cite a single state, federal district, or federal circuit court case which had the outcome they assert should be dictated by Baker and Department of Commerce. Plaintiffs' only counterargument, buried in a footnote, is that somehow Baker and Department of Commerce overcome all of this nationwide case law. But Baker and Department of Commerce are not new, and there is no reason to think that all of these other courts somehow mysteriously overlooked them in concluding that those cases' respective plaintiffs had no standing. The reality, of course, is that Baker and Department of Commerce do not compel the outcome Plaintiffs desire, as set forth in the City's briefing.

In arguing there is a point of comparison here—the "citizen group" and the "noncitizen group," both within one voting district—Plaintiffs stretch the concept of vote dilution beyond its breaking point. See Plaintiffs' Reply at 3. Plaintiffs cite no cases in which a court has compared two internal, informal "groups" within one jurisdiction to find vote dilution. All votes by voters of Montpelier are counted exactly the same, whether the person voting is old or young, Republican or Democrat, wealthy or poor, a U.S. citizen or a legal, nonresident voter. There are no groups, Montpelier elections are non-partisan by statute, there is no point of comparison, and there is no vote dilution. The argument has no merit.

CONCLUSION

Accordingly, the Superior Court's decision that Plaintiffs' have standing to bring this suit must be reversed.

Dated: 10/24/22

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 1492 words.

Dated: 10/24/2022

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