In the Superior Court of the State of Vermont

Chittenden Unit

Docket No. 23-CV-00998

DOUGLAS WESTON,

MICHAEL MYERS,

THE VERMONT REPUBLICAN PARTY, *and*

THE REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs,

v.

THE CITY OF WINOOSKI, VERMONT,

Defendant.

BRIEF OF AMICUS CURIAE OF IMMIGRATION REFORM LAW INSTITUTE IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

LEGAL STANDARD 1

ARGUMENT 1

I. Noncitizen Voting Violates the Federal Equal Protection Clause. 3

II. The Winooski Charter Amendment Violates the Common Benefits Clause of the Vermont Constitution. 8

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Badgley v. Walton, 2010 VT 68, 188 Vt. 367, 10 A.3d 469 (2010).....10

Baker v. State, 170 Vt. 194 744 A.2d 864 (1999).....9, 10, 12

Bock v. Gold, 2008 VT 81, 184 Vt. 575, 959 A.2d 990 (2008). 1

Brigham v. State, 166 Vt. 246, 692 A.2d 384 (1997).....10

Brigham v. State, 166 Vt. 246, 692 A.2d 384 (1997) (per curiam).....3

Brown v. Bd. of Comm'rs, 722 F. Supp. 380 (E.D. Tenn. 1989) 4

Cabell v. Chavez-Salido, 454 U.S. 432 (1982) 6, 8

Colby v. Umbrella, Inc., 2008 VT 20, 184 Vt. 1, 955 A.2d 1082 (2008) 1

Day v. Robinwood W. Cmty, Improvement Dist., 693 F. Supp. 2d 996 (E.D. Mo. 2010)...4

Duncan v. Coffee Cty., 69 F.3d 88 (6th Cir. 1995) 4

Dunn v. Blumstein, 405 U.S. 330 (1972).....8

Ferry v. City of Montpelier, 2023 VT 4 (2023).....1, 2, 3

Fisher v. Univ. of Texas, 570 U.S. 297 (2013).....7

Foley v. Connelie, 435 U.S. 291 (1978).....6, 8

Foucha v. Louisiana, 504 U.S. 71 (1992) 7

Graham v. Richardson, 403 U.S. 365 (1971).....5

Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966).....6

In re Duncan, 139 U.S. 449 (1891).....8

In re Hodgdon, 2011 VT 19 189 Vt. 265, 19 A.3d 598 (2011).....10, 11

In re Town Highway No. 20, 2012 VT 17, 191 Vt. 231 45 A.3d 54 (2012) 9

L'Esperance v. Town of Charlotte, 167 Vt. 162 704 A.2d 760 (1997).....9

May v. Town of Mt. Vill., 944 F. Supp. 821 (D. Colo. 1996) 5

Nyquist v. Mauclet, 432 U.S. 1 (1977) 5

Plyler v. Doe, 457 U.S. 202 (1982) 7

Putter v Montpelier Pub. Sch. Sys., 166 Vt. 463 697 A.2d 354 (1997) 3

Roman Catholic Diocese v. Cuomo, 141 S. Ct. 63 (2020).....7

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).....5

Shapiro v. Thompson, 394 U.S. 618 (1969) 10

Veilleux v. Springer, 131 Vt. 33, 300 A.2d 620 (1973).....10

Statutes

17 V.S.A. § 2121(a).....2, 8

24 App. V.S.A. § 19-202(b) 2

Other Authorities

Phillip B. Scott, *Veto Letter* (June 1, 2021).....12

Winooski Charter Commission,

All Resident Voting Fact Sheet,

https://www.winooskivt.gov/DocumentCenter/View/3640/Fact-Sheet-final-English

.....7, 11

Constitutional Provisions

U.S. Const. Amend. IV.....4

VT. CONST. CH. II, SEC. 42 2

LEGAL STANDARD

The Vermont Supreme Court has made clear that the threshold for defeating a motion to dismiss for failure to state a claim is "exceedingly low" and that "[m]otions to dismiss for failure to state a claim are disfavored and should be rarely granted." *Bock v. Gold*, 2008 VT 81, ¶ 4, 184 Vt. 575, 576, 959 A.2d 990, 991-92 (2008). Accordingly, "[d]ismissal under Rule 12(b)(6) is proper *only* when it is beyond doubt that there exist no facts or circumstances consistent with the complaint that would entitle the plaintiff to relief." *Id*. *See also Colby v. Umbrella, Inc.*, 2008 VT 20, ¶ 5, 184 Vt. 1, 5-6, 955 A.2d 1082, 1086-87 (2008) ("In determining whether a complaint can survive a motion to dismiss under Rule 12(b)(6), courts must take the factual allegations in the complaint as true, and consider whether it appears beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.") (quotation marks and citation omitted). Such motions are "review[ed] . . . without deference," and the court "assume[s] as true the nonmoving party's factual allegations and accept[s] all reasonable inferences that may be drawn from those facts." *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 8 (2023).

ARGUMENT

United States citizenship has been a voter qualification in the Vermont Constitution since 1828. Currently, Chapter II, Section 42, provides:

> 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 in this state. . . .

VT. CONST. CH. II, SEC. 42. The citizenship requirement has also been codified in Vermont election law. The applicable statute requires that a voter (1) is a U.S. citizen; (2) is a Vermont resident; (3) takes the voter's oath; and (4) is at least 18 years old on election day. 17 V.S.A. § 2121(a).

Despite this clear constitutional and statutory language, the City of Winooski amended its charter to allow noncitizens to vote in city meetings and elections. The amendment, which was approved by the General Assembly over the veto of Governor Scott, provides:

> Notwithstanding 17 V.S.A. § 2121(a)(1), any person, including persons who are non-U.S. citizens, may register to vote in any City meeting or municipal election who, on election day: (1) is a legal resident of the City; (2) has taken the Voter's Oath; and (3) is 18 years of age or older.

24 App. V.S.A. § 19-202(b) (the "Winooski Charter Amendment").

A group of plaintiffs brought suit to challenge the Winooski Charter Amendment and a similar charter amendment made in the City of Montpelier. Both cases reached the Vermont Supreme Court, which upheld the lower court's dismissal of plaintiffs' facial challenge to the constitutionality of the charter amendments, explaining that Section 42 of the Vermont constitution, as consistently interpreted by the Vermont Supreme Court, "does not apply to municipal elections." *Ferry v. Montpelier*, 2023 VT 4, ¶ 36 (2023). The Supreme Court left open the question of whether an as-applied challenge would face the same hurdles, and Plaintiffs in the instant case brought such a suit "challenging the application of Winooski's charter amendment to school board and school budget elections." Complaint ¶ 36.

This challenge escapes *Ferry, supra*. As the court in *Ferry* explained, "since 1828, at the latest, citizenship has been required to exercise the privileges of a freeman in this State." *Ferry*, 2023 VT 4, ¶ 32. Because education is "a fundamental obligation of state government[,]" *Brigham v. State*, 166 Vt. 246, 264, 692 A.2d 384, 395 (1997) (per curiam), voting in school board elections is a privilege of freemen, and therefore reserved to citizens.

The Winooski Charter Amendment also violates—irrespective of the state citizenship requirement for voting—both the Fourteenth Amendment to the U.S. Constitution and the Common Benefits Clause of the Vermont Constitution. By expanding the right to vote in municipal school board and school budget elections to noncitizens, the Winooski Charter Amendment necessarily dilutes the votes of every U.S. citizen voter in Winooski, in violation of the equal protection guarantees in both Constitutions.

I. Noncitizen Voting Violates the Federal Equal Protection Clause.

As the Supreme Court of Vermont has recognized, "[t]he United States Constitution protects the right of all qualified citizens to vote in state and federal elections, and to have their votes counted without debasement or dilution." *Putter v Montpelier Pub. Sch. Sys.*, 166 Vt. 463, 468, 697 A.2d 354, 358 (1997). *See also Ferry*, 2023 VT 4, ¶ 21 (explaining that "a person who meets the qualifications has the right to be part of the voter pool" and that "a person legally voting within the pool has an interest in ensuring that the voter pool in which they are participating is constitutionally sound to preserve the effectiveness of their vote.") (citation omitted). Yet, by granting noncitizens

the right to vote in school board elections, the Winooski Charter Amendment automatically dilutes the votes of all eligible U.S. citizen voters, not only in Winooski but also in the entire state of Vermont.

Claims of vote dilution made by those whose votes have been weakened by an expansion of the franchise, such as residents of a city challenging the expansion of the franchise to nonresident property owners, are facially discriminatory against an identifiable group, and thus are analyzed under the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution.[1] *See, e.g., Brown v. Bd. of Comm'rs*, 722 F. Supp. 380, 398 (E.D. Tenn. 1989) (striking down an expansion of the franchise to nonresidents of a city under the Equal Protection Clause); *Duncan v. Coffee Cty.*, 69 F.3d 88, 94 n.3 (6th Cir. 1995) (observing that, "[n]aturally, any time voters are added to the rolls . . . those already on the rolls have had their votes diluted," though not all instances of vote dilution are "*per se* . . . unconstitutional").

Usually, expansions of the franchise have received rational-basis review under the Equal Protection Clause. *See Brown*, 722 F. Supp. at 398 ("[T]he equal protection analysis which should be applied here is the traditional 'rational basis' test."); *Day v. Robinwood W. Cmty, Improvement Dist.*, 693 F. Supp. 2d 996, 1005 (E.D. Mo. 2010) ("Courts confronting equal protection claims asserting vote dilution resulting from expansion of the voter base have generally employed . . . rational basis [review]"); *May v.*

[1] "No state shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend. IV.

Town of Mt. Vill., 944 F. Supp. 821, 824 (D. Colo. 1996) ("Where a law expands the right to vote causing vote dilution, the rational basis test has been applied by the vast majority of courts.").

The Winooski Charter Amendment, however, should receive not rational basis review, but strict scrutiny, both because it dilutes the votes of U.S. citizens—a protected class—and because it abridges citizens' fundamental right to self-government.

On the former point, it is uncontroversial that aliens—that is, noncitizens—form a protected class for most purposes under the Equal Protection Clause. *See Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) ("[T]he Court's decisions have established that classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny."); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 105 (1973) (Brennan, J., dissenting) ("The highly suspect character of classifications based on race, nationality, or alienage is well established."); *Nyquist v. Mauclet*, 432 U.S. 1, 7 (1977) ("Alienage classifications by a State that do not withstand this stringent examination cannot stand."). And if aliens—that is, persons *without* United States citizenship—form a protected class, it stands to reason that those *with* United States citizenship should also form a protected class. Otherwise, paradoxically, the United States citizens who established our Constitution would have given lesser protection to themselves, as a group, than to citizens of other countries.

Additionally, the U.S. Supreme Court has repeatedly recognized citizen self-government as a fundamental right. "The exclusion of aliens from basic governmental processes is not a deficiency in the democratic system but a *necessary consequence* of the

community's process of political self-definition." *Cabell v. Chavez-Salido*, 454 U.S. 432, 439-440 (1982) (emphasis added). American citizens comprise the body politic of the United States. *See id.* ("Self-government, whether direct or through representatives, begins by defining the scope of the community of the governed and thus of the governors as well: Aliens are by definition those outside of this community."); *Foley v. Connelie*, 435 U.S. 291, 295-96 (1978) ("The act of becoming a citizen is more than a ritual with no content beyond the fanfare of ceremony. A new citizen has become a member of a Nation, part of a people distinct from others. The individual, at that point, belongs to the polity and is entitled to participate in the processes of democratic decisionmaking. Accordingly, we have recognized a State's historical power to exclude aliens from participation in its democratic political institutions as part of the sovereign's *obligation* to preserve the basic conception of a political community.") (internal citation omitted) (emphasis added); *id.* at 296 ("[A] democratic society is ruled by its people. Thus, it is clear that a State may deny aliens the right to vote, or to run for elective office, for these lie at the heart of our political institutions."); *id.* (holding that such restrictions "represent[] the choice, and *right*, of the people to be governed by their citizen peers.") (emphasis added); *id.* at 297 ("[A]lthough we extend to aliens the right to education and public welfare, along with the ability to earn a livelihood and engage in licensed professions, the right to govern is reserved to citizens.").

Infringements on fundamental rights receive strict scrutiny under the Equal Protection Clause. *See, Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966) ("We have long been mindful that where fundamental rights and liberties are asserted

under the Equal Protection Clause, classifications which might invade or restrain them must be closely scrutinized and carefully confined."); *Plyler v. Doe*, 457 U.S. 202, 217 n.15 (1982) ("With respect to suffrage, we have explained the need for strict scrutiny as arising from the significance of the franchise as the guardian of all other rights.").

The Winooski Charter Amendment cannot withstand the strict scrutiny it should receive on both of the bases explained above. As the U.S. Supreme Court has held, "[s]trict scrutiny is a searching examination, and it is the government that bears the burden to prove that the reasons for any [suspect] classification [are] clearly identified and unquestionably legitimate." *Fisher v. Univ. of Texas*, 570 U.S. 297, 310 (2013) (internal citation and quotation marks omitted). *See also Roman Catholic Diocese v. Cuomo*, 141 S. Ct. 63, 67 (2020) (explaining that "strict scrutiny . . . means that [laws] must be narrowly tailored to serve a compelling state interest."); *Foucha v. Louisiana*, 504 U.S. 71, 115 (1992) ("[L]egislation trenching upon these [fundamental rights] is subject to strict scrutiny, and generally will be invalidated unless the State demonstrates a compelling interest and narrow tailoring.").

The reason offered for the Winooski Charter Amendment was "giv[ing] a voice to our neighbors in local matters that affect them, their families, and their lives." Winooski Charter Commission, *All Resident Voting Fact Sheet*, https://www.winooskivt.gov/DocumentCenter/View/3640/Fact-Sheet-final-English. This governmental interest, however laudable, cannot be compelling when measured against the fundamental interest—indeed, right—of all American citizens in governing the country, including all of its constituent parts and their subdivisions, of which they are the sovereign. This

fundamental sovereign interest of American citizens, the "polity" of this country, *Foley*, 435 U.S. at 295, in maintaining democratic control over it outweighs any governmental interest that may be asserted in putting part of that control in the hands of any group of noncitizens, and indeed precludes such a transfer of control. *See In re Duncan*, 139 U.S. 449, 461 (1891) (recognizing that "a republican form of government is guaranteed to every State" and that such government's "legitimate acts may be said to be of the people themselves"); *Dunn v. Blumstein*, 405 U.S. 330, 344 (1972) (explaining that states must "preserve the basic conception of a political community"). As the Supreme Court has repeatedly made clear, America's political community consists of its citizens, and self-government requires that the political community—not those "by definition outside of" it, *Cabell*, 454 U.S. at 439-440—govern the Nation.

Therefore, because the Winooski Charter Amendment must receive, and cannot pass, strict scrutiny under the Equal Protection Clause, it should be struck down.

II. The Winooski Charter Amendment Violates the Common Benefits Clause of the Vermont Constitution.

For similar reasons, the Winooski Charter Amendment also violates the Common Benefits Clause of the Vermont Constitution, which provides:

> That government is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

VT. CONST. CH. I, ART. 7.

In *Baker v. State*, this Court explained that the purpose of the Common Benefit Clause "was . . . the elimination of artificial governmental preferments and advantages. The Vermont Constitution would ensure that the law uniformly afforded every Vermonter its benefit, protection, and security so that social and political preeminence would [not] reflect . . . governmental favor and privilege." *Baker v. State*, 170 Vt. 194, 211, 744 A.2d 864, 871 (1999). *See also In re Town Highway No. 20*, 2012 VT 17, ¶ 30, 191 Vt. 231, 250, 45 A.3d 54, 66 (2012) (explaining that the Common Benefits Clause protects "against governmental favoritism toward not only groups or set[s] of men, but also toward any particular family or single man. [A]t its core, the Common Benefits Clause expressed a vision of government that afforded every Vermonter its benefit and protection and provided no Vermonter particular advantage." (internal citations omitted) (alterations in original).

As this Court has explained, "[t]he rights guaranteed by the Common Benefits Clause are generally coextensive with those protected under the Equal Protection Clause of the United States Constitution. When no fundamental right or suspect class is involved, Article 7 requires that laws must be reasonably related to the promotion of a valid public purpose." *L'Esperance v. Town of Charlotte*, 167 Vt. 162, 165, 704 A.2d 760, 762 (1997). Courts apply a three-part test to determine constitutionality under the Common Benefits Clause, asking "(1) what 'part of the community' is disadvantaged by the legal requirement; (2) what is the governmental purpose in drawing the classifications; and (3) does the omission of part of the community from the benefit of the challenged law bear 'a reasonable and just relation to the governmental purpose?'" *In re*

Hodgdon, 2011 VT 19, ¶ 23, 189 Vt. 265, 281, 19 A.3d 598, 608 (2011) (quoting *Badgley v. Walton*, 2010 VT 68, ¶ 21, 188 Vt. 367, 10 A.3d 469 (2010)). Analysis of the third factor requires the court to consider "the significance of the benefits and protections of the challenged law, whether the omission of members of the community from the benefits and protections of the challenged law promotes the government's stated goals, and whether the classification is significantly underinclusive or overinclusive." *Id*.

As in federal equal protection analysis, where (as here) a suspect class is disadvantaged, or a fundamental right infringed, scrutiny is heightened. In such scrutiny, at the minimum, "statutory exclusions from publicly conferred benefits and protections must be premised on an appropriate and overriding public interest." *Baker*, 170 Vt. at 212, 744 A.2d at 873. *See also Brigham v. State*, 166 Vt. 246, 265, 692 A.2d 384, 396 (1997) ("Where a statutory scheme affects fundamental constitutional rights or involves suspect classifications, both federal and state decisions have recognized that proper equal protection analysis necessitates a more searching scrutiny; the State must demonstrate that any discrimination occasioned by the law serves a compelling governmental interest, and is narrowly tailored to serve that objective.") (citations omitted); *Veilleux v. Springer*, 131 Vt. 33, 40, 300 A.2d 620, 625 (1973) ("Unless such classification which serves to penalize the exercise of that [fundamental] right can be shown to promote a *compelling* governmental interest, it is unconstitutional.") (emphasis original) (citing *Shapiro v. Thompson*, 394 U.S. 618, 634 (1969)). And because, as explained in the previous section, the Winooski Charter Amendment disadvantages a suspect class, and also infringes on a fundamental right, it is subject to strict scrutiny.

The amendment cannot pass such scrutiny. The amendment classifies voters in a way that dilutes the votes of all U.S. citizen voters not only in the City of Winooski but in the State of Vermont as a whole. The reason offered for this classification was "giv[ing] a voice to our neighbors in local matters that affect them, their families, and their lives." Winooski Charter Commission, *All Resident Voting Fact Sheet*, https://www.winooskivt.gov/DocumentCenter/View/3640/Fact-Sheet-final-English. This purpose, however, is not compelling, as the benefits the amendment grants to noncitizen voters in Winooski necessarily come at the expense of the fundamental sovereign interest of the U.S. citizens of Winooski, and of all American citizens, in the democratic self-government of their Nation.

Nor is the amendment narrowly tailored to achieving the purpose of "giv[ing] a voice to our neighbors." Noncitizens living in Winooski already have a "voice," protected under the First Amendment, and government channels, such as special non-binding referenda, could be created for canvassing the opinions of these noncitizens. What the Winooski Charter Amendment does is not give Winooski noncitizens a mere voice, but rather a vote, a share in the power to govern the education budgets in the state of Vermont. And this power to vote necessarily comes at the expense of the right of U.S. citizens in Winooski to citizen self-government. This failure of narrow-tailoring, this overmatching of means to declared ends, makes the amendment, at the minimum, "significantly. . . overinclusive," *In re Hodgdon*, 2011 VT 19, ¶ 23, 189 Vt. at 281, 19 A.3d at 608, even as it makes it fail strict scrutiny.

By granting noncitizens the right to vote in school board and education budget elections and thus diluting the votes of U.S. citizens in Winooski, moreover, the Winooski Charter Amendment disadvantages Winooski residents as compared with other Vermonters. Indeed, Governor Scott vetoed the Winooski Charter Amendment on this basis when it was submitted by the General Assembly, explaining that "[a]llowing a highly variable town-by-town approach to municipal voting creates inconsistency in election policy, as well as separate and unequal classes of residents potentially eligible to vote on local issues." Phillip B. Scott, *Veto Letter* (June 1, 2021). The reason proffered for the amendment is not weighty enough to justify this selective de-privileging of some Vermonters—those who reside in Winooski—compared with others. Rather, this selective disadvantaging of citizen voters exemplifies the "governmental favoritism" the Common Benefits Clause is designed to protect against, and violates the "inclusionary principle at [the Common Benefit Clause's] textual core." *Baker*, 170 Vt. at 209, 744 A.2d at 875.

Because the Winooski Charter Amendment dilutes the votes and abridges the fundamental rights of U.S. citizen voters without serving a "compelling state interest," and also because it disadvantages some Vermonters but not others without a sufficient reason, it violates the Common Benefits Clause and should be struck down.

CONCLUSION

For the above reasons, the Court should declare the Winooski Charter Amendment unconstitutional as applied to school board and school budget elections and enjoin Appellees from enforcing or implementing it in such a manner.

Dated: June 2, 2023

Respectfully submitted,

/s/Matthew D. Hardin
Matthew D. Hardin
Hardin Law Office
43 West 43rd Street, Suite 35
New York, NY 10036
Phone: (212) 680-4938
Email: Matt@MatthewHardin.com

Counsel for Immigration Reform Law Institute

Christopher J. Hajec*
Gina M. D'Andrea*
Immigration Reform Law Institute
25 Massachusetts Ave NW, Suite 335
Washington, DC 20001
202.232.5590
gdandrea@irli.org

**on the brief only*