SUPERIOR COURT
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CIVIL DIVISION
Case No. 22-CV-04124

Brooke Paige v. State of Vermont et al

Opinion and Order on Motion to Dismiss

In a prior case filed in Orange County Civil Division, pursuant to 17 V.S.A. § 2458, Plaintiff H. Brooke Paige sought broadly to attack various provisions of Act 60, an election law legislation requiring mailed ballots to all voters in general elections, among other things. 2021, Acts & Resolves, No. 60. The Court dismissed that case for lack of standing and other reasons. The Court held that Mr. Paige had not pled any actionable injury, explaining: "The right to vote is individual and personal in nature. Thus, voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage. A citizen's abstract interest in policies adopted by the legislature, [however] . . . is a nonjusticiable general interest common to all members of the public." *Paige v. Condos*, No. 22-CV-2582, slip op. at 7–8 (Vt. Super. Ct. Oct. 7, 2022) (quotation marks and citations omitted). That decision came right on the heels of the same Court's dismissal of a prior suit raising similar issues, also under § 2458, for lack of any injury to support standing (in addition to other grounds). *Paige v. State*, No. 20-CV-307 (Vt. Super. Ct. Sept. 8, 2020).

Undeterred by two holdings that this branch of government cannot hear a grievance for which its proponent lacks any asserted injury within the contemplation of

the standing doctrine, Mr. Paige filed this suit, again, attacking Act 60. This time, he files pursuant to 17 V.S.A. § 2603, rather than § 2458.

The State has filed a motion to dismiss the case, *inter alia*, for lack of standing, focusing again on the lack of any asserted injury. In opposition to dismissal, Mr. Paige does not seek to explain where in the complaint can be found his particularized injury or where else it lurks if not in that submission. Instead, he argues that he is absolved of having to assert any such injury by the plain language of 17 V.S.A. § 2603.

As noted, the complaint contains no allegation of any injury personal to Mr. Paige that might satisfy the standing doctrine, and he asserts none in his substantial argumentation. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" (citation omitted)).

The specific issue thus presented is whether something about § 2603 bypasses the injury requirement of the standing doctrine. In addressing this matter, the Court declines to recite, again, the basic standards and relevant nuances of the standing doctrine and its injury component in particular. They are articulated in detail in the decisions cited above with which Mr. Paige is already familiar.

Mr. Paige purported to bring the first two cases under 17 V.S.A. § 1748. Section 1748 establishes an avenue for seeking an administrative remedy for a violation of Title 17 before the Secretary of State. It then provides: "Any decision of the Secretary may be appealed to the Superior Court in the county where the individual resides." Mr. Paige failed to exhaust administrative remedies in his prior two cases, but standing is an

entirely separate inquiry and, as stated, the Court in each case determined that he lacked standing because there was no personal injury alleged.

Section 2603, by contrast, applies to *election contests* only. It provides: "The result of an election for any office, other than for the General Assembly, or public question may be contested by any legal voter entitled to vote on the office or public question to be contested." 17 V.S.A. § 2603(a). Mr. Paige reasons that he meets all the qualifications listed in this provision, personal injury is not one of them, and, therefore, he has "statutory standing" and need not allege a personal injury.

The Court seriously doubts that the sort of broad challenge against election law legislation that Mr. Paige attempts to assert here is an "election contest" within the contemplation of § 2603. Mr. Paige is not attempting to challenge the outcome of any particular election. Instead, he asserts, for expansive constitutional reasons, that his claims about Act 60 somehow (he does not explain) invalidate all elections Act 60 has touched and for which he otherwise meets the qualifications of § 2603. In that sense only is he contesting any election. But his claims have nothing to do with any particular election, and § 2303 contemplates the sort of particularized claims that will result in a judgment that supersedes a certification of election and can include ordering a recount or new election. 17 V.S.A. § 2603(e). If Mr. Paige truly were contesting any particular election, at a minimum, relevant candidates in those elections would be needed for the just adjudication of this case. Vt. R. Civ. P. 19.

In any event, Mr. Paige's argument that the lack of an express injury requirement in § 2603 ends the standing story before it starts is simply wrong. The standing doctrine is one of the fundamental mechanisms by which the separation of powers among the

branches is mediated. *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 11. It is not a matter of legislative grace. As the U.S. Supreme Court has explained repeatedly, Congress can legislate away inquiry into the prudential components of the standing doctrine, but it cannot abridge the core injury, causation, and redressability requirements. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) ("Injury in fact is a constitutional requirement, and '[i]t is settled that Congress cannot erase Article III's standing requirements by statutorily granting the right to sue to a plaintiff who would not otherwise have standing.'" (citation omitted)); *Summers v. Earth Island Institute*, 555 U.S. 488, 497 (2009) ("[T]he requirement of injury in fact is a hard floor of Article III jurisdiction that cannot be removed by statute."); *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979) ("In no event, however, may Congress abrogate the Art. III minima."). If a plaintiff does not establish standing, the Court has no subject-matter jurisdiction over the case. *Severson v. City of Burlington*, 2019 VT 41, ¶ 9, 210 Vt. 365, 370.

The Vermont Supreme Court adopted the federal standing test for purposes of the Vermont Constitution in *Hinesburg Sand & Gravel Co. v. State*, 166 Vt. 337, 341 (1997). *Ferry*, 2023 VT 4, ¶ 11. Recently, it has emphasized that, while it and litigants frequently rely on federal precedent when assaying standing issues, "Vermont courts are not obliged to follow federal standing rules because standing therein is ultimately determined by the Vermont Constitution." *Id.* ¶ 15. Given the bedrock constitutional importance of the standing doctrine and the injury requirement of that doctrine, the Court does not believe the Vermont Supreme Court would depart from its past precedent on the issue that matters here and permit the Legislature to waive the injury

requirement altogether. At a bare minimum, it would require that the Legislature act with precise clarity to waive such a core principle. No such clear signal exists in § 2603.

At the pleading stage, the plaintiff has the burden of alleging facts "clearly" demonstrating each element of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). Any injury alleged must be "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *Turner v. Shumlin*, 2017 VT 2, ¶ 11, 204 Vt. 78 (2017) (citation omitted); *see also Spokeo*, 578 U.S. at 340 ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term—'real,' and not 'abstract.'"). Mr. Paige asserts no injury in this case except to his sense of propriety and his views as to the wisdom of parts of Act 60. The complaint is highly speculative and predicated on perceived risks that Mr. Paige thinks may materialize. These matters are far too abstract and conjectural to support standing. *See Citizen Ctr. v. Gessler*, 770 F.3d 900, 911 (10th Cir. 2014); *Townley v. Miller*, 722 F.3d 1128, 1133 (9th Cir. 2013) (both finding no standing in election challenges where claimed harm was merely conjectural).

Nothing in *Ferry* aids Mr. Paige in this case. In *Ferry*, the Court found that the federal "injury" precedents argued by the parties were a poor fit for the "unique" Vermont constitutional provision at issue, Vt. Const. ch. II, ¶ 42 (voter qualifications). *Ferry*, 2023 VT 4, ¶ 24. Rather than attempt to analogize to those precedents, the Court simply determined on its own what injury meant vis-à-vis the constitutional provision at issue. It did not purport to eliminate altogether the injury element for purposes of standing. *See Ferry*, 2023 VT 4, ¶ 24 ("Relying on federal standing precedents to analogize rather than returning to the origins of the meaning of 'injury in fact' under a

specific claim is workable and applicable for other Vermont law claims, but not this one."); *see id*. (expressly affirming the vitality of relevant Vermont case law). Here, there is no claim under Vt. Const. ch. II, ¶ 42, and *Ferry* otherwise does not change the landscape as to the injury element of standing.

Because Mr. Paige has not alleged any personal injury as demanded by the standing doctrine, he lacks standing, and this Court lacks subject matter jurisdiction over this case. Dismissal is warranted. Given that determination, it is unnecessary to address other matters raised in the briefing.

Conclusion

For the foregoing reasons, the State's motion to dismiss is granted.

Electronically signed on Monday, May 8, 2023, pursuant to V.R.E.F. 9(d).

Timothy B. Tomasi
Superior Court Judge