

MARY BURKE PATTERSON, *et al.*,
Plaintiffs
v.
THE BONNET SHORES FIRE DISTRICT,
Defendant

WC-2020-0130

**MEMORANDUM OF FACT AND LAW OF
ACLU OF RHODE ISLAND AS AMICUS CURIAE
IN SUPPORT OF PLAINTIFFS’ MOTION FOR SUMMARY JUDGMENT**

The American Civil Liberties Union of Rhode Island (“ACLU-RI”), appearing as amicus curiae, submits the within Memorandum in support of Plaintiffs’ Motion for Summary Judgment.

Mary Burke Patterson, *et al.* (“Plaintiffs”) have brought this action against The Bonnet Shores Fire District (“the Fire District” or “BSFD”) to challenge the constitutionality of certain provisions of the BSFD Charter which, as stated in Plaintiffs’ Memorandum in Support of Summary Judgment at 1, “limit the franchise to owners of property within the District who hold \$400 or more in equity and whose interests are recorded for over 90 days. This limitation in the charter denies the franchise to residents. This limitation also expands the franchise to non-residents, in turn diluting the votes of residents and permitting the governance of BSFD to be controlled substantially by a class of non-resident owners with minimal ties to the District.”

**Interest of the American Civil Liberties Union of Rhode Island
to Appear as Amicus Curiae**

The American Civil Liberties Union of Rhode Island, with over 5,000 members, is the Rhode Island affiliate of the American Civil Liberties Union, a nationwide, non-profit, nonpartisan organization. ACLU-RI, like the national organization with which it is affiliated, is dedicated to

vindicating the principles of liberty embodied in the Bill of Rights to the U.S. Constitution, including the right to seek office, the right to vote and to ensure that access to the franchise is not inappropriately limited, restricted, or diluted. One of the ACLU's core missions is the protection of the voting rights of all individuals regardless of race, wealth, political affiliation or any other potentially discriminatory basis.¹ In furtherance of those goals, ACLU-RI cooperating attorneys have successfully challenged numerous attempts by the State and local subdivisions to restrict those rights. *See, e.g., Common Cause RI v. Gorbea*, 970 F.3d 11 (1st Cir. 2020), *stay denied*, 141 S.Ct. 206 (2020); *Acosta v. Restrepo*, 470 F.Supp.3d 161 (D.R.I. 2020); *Fontes v. City of Central Falls*, 660 F.Supp.2d 244 (D.R.I. 2009); *Block v. Mollis*, 618 F.Supp.2d 142 (D.R.I. 2009).

ACLU-RI has a strong, documented, and consistent record spanning over 50 years of battle to obtain and preserve the right to vote in Rhode Island. Because the BSFD Charter, restricting the right to vote to “property holders,” undermines those rights, and instead is a vestige of past restrictions and limitations on who may be eligible to participate in our governments, ACLU-RI files this Memorandum as amicus curiae in support of Plaintiffs’ motion for summary judgment.

The presentation which follows is intended to supplement, but not duplicate, the arguments developed by the Plaintiffs in their Motion for Summary Judgment.

Introduction: Despite its exercise of broad governmental powers, the Bonnet Shores Fire District determines the right to vote based on property ownership.

The Bonnet Shores Fire District exercises broad government powers, including imposition of property taxes and establishing ordinances whose violation may be punished with fines and

¹ *See*. ACLU, 2019 VRA Report, “The Case for Restoring and Updating the Voting Rights Act,” submitted to the U.S. House Judiciary Committee, November 8, 2019 at 1 (“The right to vote is an essential act of self-determination – indispensable to the promise of ‘government of the people, by the people, and for the people.’”). Available at <<https://www.aclu.org/report/aclu-report-voting-rights-act>>. Accessed June 1, 2021.

terms of imprisonment. *Bonnet Shores Fire District Charter*, Sections 5 and 8. With this broad suite of authority, BSFD power reaches more than just a narrow cross-section of the community. It is not a business enterprise addressing an issue of local concern.

Despite its authority over the local community, BSFD restricts the right to participate in voting based on property “ownership,” including non-resident property owners among those entitled to exercise the right to vote and excluding residents who do not “own” property from the franchise.

BSFD limits voting rights to those individuals who hold title to property worth more than \$400 in equity which has been recorded for at least 90 days. *Id* at Section 2. This means that individuals who rent residential property within the Fire District, or are spouses or adult children of title holders, or are an otherwise established resident of the Fire District, are excluded from voting for the individuals who run the Fire District in which they live. It also means that non-resident title holders of both commercial and residential property are entitled to vote.

In restricting the right to vote to certain “property owners,” the BSFD follows in a long, justifiably discredited, history in this country and state in restricting the right to vote to a favored class. The history of voting rights in the United States is a story of power. It reflects who holds power at any given time, as well as who is being kept out. These determinations have historically been tied to wealth, race, and gender. That they were countenanced in the past is no reason to validate their continued use in Rhode Island.

I. Historical Restrictions on Suffrage in the United States

Prior to independence, the right to vote in the American colonies was restricted. All thirteen colonies had property qualifications leading up to the American Revolution. Stanley L. Engerman

and Kenneth L. Sokoloff, *The Evolution of Suffrage Institutions in the New World*, 65 *Journal of Economic History* 891, 898 (2005).

The voting franchise varied significantly from colony to colony but was reserved generally to white men with non-trivial real estate holdings. The property ownership requirements resulted in a limited population being eligible for civic participation. *Id.* at 899. The logic behind the restriction in the voting franchise stemmed primarily from the belief that only land ownership gave someone a long-term interest in the welfare of the community. *Id.* at 900. The colony was analogous to a corporation where landowners are the shareholders. *Id.* at 901.

During the Colonial Period, the right to vote was central to the evolving notion of the rights to self-governance and the exercise of legitimate state power. In tension was whether individual characteristics, *e.g.*, property ownership, tax payments, or race/sex, should be the source of enfranchisement, or if it should be based on what is best for society as a whole. As the North American colonies continued to grow and urban centers developed, the property ownership requirements disqualified white men who otherwise should be participants in a functioning civil society. *Id.* at 897 – 898. An undercurrent of this tension was the widespread political theory that only property owners were sufficiently independent to have a voice in collective governance. *Id.*

Following the American Revolution, eight of the thirteen original colonies adopted substantially rewritten constitutions and provided voting rights on factors besides land ownership. By the middle of the 1820s, all but three states, Rhode Island, Virginia, and North Carolina, had eliminated property qualifications for voting, though most states retained some tax-based requirements well into the mid nineteenth century. *Id.* This evolution tracked the rise of a working class reliant on labor rather than property. This working class contributed to their government and was affected by its policies, and, as such, began to be recognized to have a legitimate voice in

those policies. Alexander Keyssar, *The Right to Vote: The Contested History of Democracy in the United States*, 45 (2000).

This shift was not without criticism. The two emerging theories on political enfranchisement placed a different emphasis on either who can be trusted to exercise political power or who has a stake in government due to being taxed and impacted by the policies of that government. *Id.* In the time period between the Revolution and the Civil War, there was a great concern among those holding the franchise with allowing the propertyless, who are dependent on their employers, to be numerically dominant on the theory that they would be influenced by their employers. *Id.* at 43.

Gouverneur Morris, a Pennsylvania delegate to the Constitutional Convention, presented this argument in consideration of establishing uniform national suffrage in the United States.

“The aristocracy will grow out of the House of Representatives. Give the votes to people who have no property, and they will sell them to the rich... We should not confine our attention to the present moment. The time is no distant when this country will abound with mechanics and manufacturers, who will receive their bread from their employers. Will such men be the secure and faithful guardians of liberty? Will they be the impregnable barrier against aristocracy?”

Id. at 56, quoting Jonathan Elliot, *Debates on the Adoption of the Federal Constitution*, vol. 5 at 386 (1859).

While a property requirement was not adopted, neither was universal suffrage mandated for white men. Instead, the constitutional compromise in US Constitution Art. I, Section 2, was to grant the right to vote for a member of the House of Representatives (the only branch popularly elected at that time) to all individuals allowed to vote in the election for the most numerous branch of the state legislature. Thus, the precedent was that citizenship in the new United States was

divorced from the right to vote, creating compounding political and civil repercussions that echo through history to today. *Id.* at 59.

It took a Civil War and several constitutional amendments to secure the federal right to vote to black men,² women,³ 18-20 year-olds,⁴ and to prohibit wealth qualifications.⁵

II. Rhode Island's History of Voting Restrictions

Rhode Island shares the country's unenviable history of limiting the franchise on the basis of race, gender, and wealth. Rhode Island's property qualifications were not addressed until the adoption of its first state Constitution in 1842. Engerman, *supra*, at 898.

It was not until the Dorr Rebellion in 1841-1842 that the political disenfranchisement inherent in property qualifications boiled over into civil unrest. This was the local continuation of the fear that broader enfranchisement would shift political power away from the land-holding rural elites to an urban, more predominantly immigrant population. Keyysar, *supra*, at 118-119. The demand for political power played out in the election of two competing General Assemblies and Governors, and while the movement for increased suffrage lost this bloodless revolution, it did result in the drafting and ratification of the 1842 Constitution. *Id.*

The 1842 Constitution limited suffrage to male citizens, at least twenty-one years of age, who resided in the state for one year. R.I. Const. of 1842, art. II, §1. However, in order to vote in a municipal election, they were required to own real estate or pay rent of a certain value, or certain

² US Constitution, Amendments 14, ratified in 1868, and 15, ratified in 1870.

³ US Constitution, Amendments 19, ratified in 1920.

⁴ US Constitution, Amendments 26, ratified in 1971.

⁵ US Constitution, Amendments 24, ratified in 1964.

tax payments to vote in the City of Providence. *Id.* at §1 and §2. Foreign- born citizens and African Americans were only allowed to vote if they also held property. Keyysar, *supra*, at 65.

Keyysar provides the following chart tracing the history of expansion of voting rights in Rhode Island:

Notable Amendments to Rhode Island Voting Rights

<u>Date</u>	<u>Legal Authority</u>	<u>Restriction or Enfranchisement</u>
1663	Royal Charter	Voting restricted to landowners.
1842	Constitution	Voting restricted to those with real estate worth \$134 or renting an estate for \$7/year. Voting requires \$1 registration tax or military service.
1842	Constitution	Paupers excluded from voting.
1842	Constitution	Voting based on property requires 1 year in state and 6 months in municipality. Voting based on taxes requires 2 years in state and 6 months in municipality.
1842	Constitution	Narragansett Tribe specifically excluded.
1888	Constitution	No property requirements for state elections. Local elections require taxes paid on real estate valued at \$134 or greater.
1896	Statute	Repeal of the registration tax requirement.
1912	Statute	Naturalized citizens required to present naturalization papers to be allowed to vote.
1917	Statute	Women allowed to vote in Presidential elections.

Keyysar, *supra*, at 507 – 582. Information compiled from Tables A.1 – A.19.

It was not until 1928 that the General Assembly repealed municipal property requirements limiting the right to vote in municipal elections. *Id.* at 194. With such restrictions in place, the Rhode Island electorate continued to be effectively dissected by class and ethnic boundaries leading to political apathy and lack of participation. *Id.* at 123.

III. Precedent for Voting Rights Protections

The purpose of this historical review is to recognize the real-world context behind the legal principle at issue in this case. The standards set forth by the United States Supreme Court and the Supreme Court of Rhode Island exist to give force to the evolving concept of what it means to be a citizen of a nation, state, municipality, school district, and yes, even fire district. The limitation of voting rights to the favored “propertied” classes represents a throwback to earlier, long-discredited notions of who is entitled to participate in our state and local government.

Regardless of whether the election in question is for President of the United States or a member of the local fire district, the rationale does not change. At issue is the ability to exercise governmental power over fellow citizens, whether it is collecting taxes, setting traffic rules, or declaring war. It is how we make collective decisions that are binding upon each person in a community, not the substance of the decision itself. Across the wide range of representative governments operating in the United States it is our elections that are supposed to give us assurance that we have selected those who hold power in the public’s trust.

Who gets to participate in an election is one of the most critical threshold questions to ask. The Supreme Court described the right to vote as the one right that is preservative of all others. *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). Sadly, the converse also holds. The restriction on the right to vote is preservative of all other inequalities.

The Supreme Court established the principle of “one person, one vote” to henceforth govern state and local elections: “[t]he conception of political equality from the Declaration of Independence, to Lincoln’s Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing – one person, one vote” would be the foundation of all

United States legislative bodies. *Reynolds v. Sims*, 377 U.S. 533, 558 (1964), citing *Gary v. Sanders*, 372 U.S. 368, 381 (1963).

Thus, any governmental restriction on this fundamental principle requires the closest scrutiny and must be viewed with the greatest skepticism. As Rhode Island's history demonstrates, those who hold power over others will not quietly acquiesce to allowing new people and a changing society to easily take over the reins of political power. First, the restrictions were justified by claiming others were incapable of exercising independent judgement. Then, it was because they had insufficient ties to the community. Now, the underlying motive is not hidden behind political theory, as the national standard of equal representation in government is set. The motive is a desire to accrete power at the expense of others' voices, and the consequence is the erosion of the public's trust in its cornerstone institutions.

The controlling standards and their application in this case are ably presented by the Plaintiffs in the Memorandum in Support of Summary Judgment at 5-20 and will not be restated here. Amicus seeks to focus on one aspect of the public information pertinent to the Fire District: the absurdity of who gets to vote and who does not get to vote demonstrates the utter lack of satisfaction of any level of scrutiny demanded by the voting rights case law.

IV. A Review of Public Records Demonstrates the Absurdity and Irrationality of BSFD's Voting Eligibility Requirements

The public records of Bonnet Shores identify who is able to vote. Voting rights are extended to all property owners, not just residents. Thus, commercial interests such as the Bonnet Shores Beach Club can exercise its vote through an authorized representative, while Plaintiff Melissa Jenkins, an actual person, is unable to cast a ballot. Additionally, the 4,948 joint owners of the 930 "cabanas" and "bathhouses" of the Bonnet Shores Beach Club *each* have a vote,

regardless of how many times—if any—they visit BSFD during the year. These owners may be individuals, realty companies, limited liability companies, family trusts, or any other “person” as broadly defined in law. Thus, many for-profit commercial enterprises have a greater say in who is setting local property taxes and traffic rules than those who live in BSFD and are subject to those ordinances. These “cabanas” are not residences with many not being large enough to meet minimum housing requirements.⁶ In contrast, Plaintiff Jenkins, a year-round resident, is denied the right to vote. And the exercise of the vote by the cabana owners who are not otherwise residents of BSFD mathematically dilutes and weakens the impact of the vote cast by the plaintiff voting-eligible residents of BSFD.

One of the most profound impacts of systemic disenfranchisement is what Rhode Island learned following the Dorr Rebellion. It leads to political apathy and distrust. An institution deemed to be illegitimate does not engender participation. It becomes a source of pain and loss, a possibility that cannot come to fruition. It is a bastion of those who seek to rule over rather than work with. To the outside world the institution may stand, but its core legitimacy has been hollowed out.

The charter of the Bonnet Shores Fire District appears caught in a time loop that has ignored the evolution of voting rights in the United States and Rhode Island since it was first enacted in 1932. This relic of a period of widespread disenfranchisement is unconstitutional and cannot endure.

⁶ See Bonnet Shores Beach Club, “About Us.”

Available at <https://www.bonnetshoresbeachclub.com/about>. Accessed on June 1, 2021. For example, a “Bathroom Unit” is four feet by four feet, sixteen square feet. Each one could have up to four membership deeds. With 407 “bathrooms,” these units-- that fall far short of minimum dwelling standards and are used primarily for equipment storage—create as many as 1,628 eligible voters.

Respectfully submitted,

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