

COMMONWEALTH OF MASSACHUSETTS

APPEALS COURT

20-P-1295

JERRY L. RYAN

vs.

CITY OF SALEM & others.¹

MEMORANDUM AND ORDER

After a nine-day bench trial, a judge of the Superior Court upheld election results in which the plaintiff, Jerry L. Ryan, lost the election to serve as the ward six councilor for the city of Salem (city) by one vote. On appeal, Ryan argues: (1) it was legal error for the judge to refuse to review two rejected absentee ballots while allowing three so-called "facially invalid" absentee ballots to be included in the count²; and (2) it was legal error for the judge to rule that the city acted properly when it denied a voter a ballot for insufficient identification. For the reasons that follow, we dismiss the appeal.

¹ Board of registrars and city clerk of Salem; Megan Riccardi, intervener.

² There were findings and rulings as to other absentee ballot and election materials, but those claims were not advanced in this appeal. As such, these claims are waived. See Haufler v. Zotos, 446 Mass. 489, 499 n.25 (2006) (argument not pursued on appeal is waived); Mass. R. A. P. 16 (a) (9) (A), as appearing in 481 Mass. 1628 (2019) ("The appellate court need not pass upon questions or issues not argued in the brief").

Background. We summarize the facts the judge could have found, reserving some facts for our discussion of the issues.

On November 5, 2019, the city held an election for ward six councilor. The plaintiff lost by one vote to Megan Riccardi.³

The plaintiff timely petitioned for a hand recount, and the results showed the margin of victory remained a single vote, with the plaintiff having lost.

Shortly thereafter, the plaintiff commenced this action seeking a new election and moved for a preliminary injunction requesting that his opponent be enjoined from being sworn in as the duly elected city councilor for ward six until judgment entered in the case. After the city was enjoined from swearing in Riccardi, the case was tried on an expedited basis. At the end of trial, the judge concluded that there was no unlawful or bad faith conduct, and vacated the injunction. Riccardi was sworn in on January 9, 2020. Her term of office as a result of this election has since ended. The plaintiff did not participate in the next election.

Discussion. 1. Mootness. "It is the general rule that courts decide only actual controversies. We follow that rule, and normally do not decide moot cases." Boston Herald, Inc. v. Superior Court Dep't of the Trial Court, 421 Mass. 502, 504

³ Riccardi intervened below and filed a motion to dismiss the plaintiff's appeal in this court.

(1995). A case is moot when "a court can order no further effective relief" (quotation and citation omitted). Branch v. Commonwealth Employment Relations Bd., 481 Mass. 810, 817 (2019), cert. denied sub nom. Branch v. Massachusetts Dep't of Labor Relations, 140 S. Ct. 858 (2020). See Mullholland v. State Racing Comm'n, 295 Mass. 286, 289 (1936) (when "a decision by the court will not be applicable to existing rights, no decision will be rendered" because "[t]he questions originally involved have become moot").

The plaintiff's claims are moot. In this matter, the results of the election were certified, the plaintiff's opponent was sworn in, and her two-year term of office as ward six city councilor has since been fully served, with the position having appeared on the ballot again on November 2, 2021. The election results for a term that has since ended cannot be retroactively voided. See Metros v. Secretary of the Commonwealth, 396 Mass. 156, 159-160 & n.6 (1985). There is nothing we may do with respect to the election concerning a term that has since completed. See, e.g., Lawyers' Comm. for Civ. Rights & Economic Justice v. Court Adm'r of the Trial Court, 478 Mass. 1010, 1011 (2017). See also Lockhart v. Attorney Gen., 390 Mass. 780, 784 (1984) ("We are aware of no case in which this court has been willing to answer a constitutional question that was moot," a "practice . . . consistent with the long tradition of not

unnecessarily deciding constitutional questions" and "judicial restraint").⁴

2. Standing. Even if the plaintiff's claims were not moot, we note additionally that he has no standing with regard to his claim that a voter was wrongfully denied a ballot. Upon arrival at the polls, approximately twenty minutes prior to close, this voter produced an identification, but his identification did not list a Salem address, which the city then required for a first-time voter who registered at a public agency, such as the voter.⁵ See G. L. c. 54, § 76B (b) (1) - (b)

⁴ We also note that the claims here are not capable of repetition because there have been "material changes" in the statutes "on which [the] claim[s are] based." Flint v. Commissioner of Pub. Welfare, 412 Mass. 416, 418-419 (1992). See Peters v. Medford, 324 Mass. 755, 755 (1949). Here, the laws under which the plaintiff claims a voter was improperly denied his right to vote, discussed infra, have been replaced with new laws requiring automatic voter registration. See, e.g., G. L. c. 51, § 42G1/2, as amended through St. 2022, c. 92, §§ 6-7, effective January 1, 2023; G. L. c. 51, § 65, added by St. 2018, c. 205, § 7, effective January 1, 2020. There have since also been significant legislative amendments regarding absentee voting, early voting, and early voting by mail. See, e.g., chapters 45, 92, and 115 of the Acts of 2020 and chapter 20 of the Acts of 2021.

⁵ The city had highlighted the voter's name on the voter list to establish that he needed to produce identification because it was the city's policy to treat voters who registered to vote in person at a public agency as though they were a person who mailed in their registration. Where an individual does not register to vote in person and has never voted at that address before, the city requires proof of residency prior to voting for the first time. These individuals are notified to bring suitable identification to the city clerk at any time to have their status updated or to bring suitable identification to the polls when they vote for the first time.

(3). "As a general matter, 'persons not themselves the victims of illegal government conduct typically lack standing to assert the constitutional rights of others.'" Commonwealth v. Burgos, 462 Mass. 53, 65 (2012), quoting LaFrance v. Bohlinger, 499 F.2d 29, 34 (1st Cir.), cert. denied sub nom. LaFrance v. Meachum, 419 U.S. 1080 (1974). See Blixt v. Blixt, 437 Mass. 649, 661 (2002), cert. denied, 537 U.S. 1189 (2003) ("[o]rdinarily one may not claim standing . . . to vindicate the constitutional rights of some third party" [citation omitted]).

Conclusion. Because we conclude that the appeal is moot, and we decline to exercise our discretion to reach the merits, we dismiss this appeal.

Appeal dismissed.

By the Court (Green, C.J.,
Wolohojian & Henry, JJ.⁶),



Assistant Clerk

Entered: July 19, 2022.

⁶ The panelists are listed in order of seniority.