STATE OF VERMONT

SUPERIOR COURT — CIVIL DIVISION
Chittenden Unit Docket — No. 23-CV-00998

DOUGLAS WESTON et al.,
Plaintiffs,
v.
CITY OF WINOOSKI,
Defendant.

**THE STATE OF VERMONT'S MEMORANDUM OF LAW IN DEFENSE OF THE CONSTITUTIONALITY OF 16 APP. V.S.A. CH. 23, § 11 AND IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**



Having just lost nearly identical facial challenges in *Ferry v. Montpelier*, 2023 VT 4, and *Weston v. Winooski (Weston I)*, 22-AP-261, Plaintiffs have repackaged their losing arguments into this nominal as-applied challenge. Plaintiffs argue—as they argued in *Weston I*—that an amendment to Winooski's charter, codified at 16 App. V.S.A. ch. 23, § 11, violates Chapter II, Section 42 of the Vermont Constitution. Section 42 lays out the qualifications for voting in state-level elections. Plaintiffs claim—as they claimed in *Weston I*—that the charter amendment violates Section 42 because it allows individuals who are not U.S. citizens to vote in "city meetings and municipal elections that determine the City of Winooski's annual school budget," which is funded through the state education fund. *See* 16 App. V.S.A. ch. 23, § 11 (adopting voter requirements of 24 App. V.S.A. ch. 19, § 202 for Winooski School District elections). The State intervenes in this

matter as of right to defend the constitutionality of an act of the Legislature and in support of Defendant's motion to dismiss. *See* 3 V.S.A. § 157; V.R.C.P. 24(d).[1]

The Vermont Supreme Court's recent decisions in *Ferry* and *Weston I* foreclose Plaintiffs' claim. The Court expressly held that "§ 42 does not apply to municipal elections as a matter of law." *Ferry*, 2023 VT 4, ¶ 9. Plaintiffs' repackaging of their claim into an as-applied challenge does not change the outcome.

## BACKGROUND

Plaintiffs the Vermont Republican Party and the Republican National Committee, along with several Vermont residents, filed complaints in September 2021 asserting constitutional challenges nearly identical to that in this case. They argued that changes to the Montpelier and Winooski city charters, which permit noncitizens to vote in municipal elections, violate § 42 on their face. The superior court dismissed each complaint for failing to state a claim, and the plaintiffs appealed to the Vermont Supreme Court. *See Ferry et al. v. Montpelier et al.*, No. 21-CV-2963, 2022 WL 1242688 (Vt. Super. Ct. Apr. 1, 2022); *Weston et al. v. Winooski et al.*, No. 21-CV-02965 (Vt. Super. Ct. Sept. 1, 2022).

In their briefing, Plaintiffs made the same argument they are making here—that Section 42's requirements apply to Winooski municipal elections because "noncitizens in Winooski are voting for school budgets for which the entire state is obligated to pay." Appellant's Br. 13, *Weston I*, 22-AP-261, 2022 WL 18912844.

[1] This memorandum does not address whether Plaintiffs have standing to bring a claim.

In January 2023, the Supreme Court issued a decision in *Ferry*, in which it held that § 42 does not apply to municipal elections. 2023 VT 4, ¶ 52. The Court considered the text of the constitution, the historical context of § 42, and longstanding precedent in concluding that the Montpelier charter amendment does not, on its face, violate the Vermont Constitution. *Id*. ¶¶ 26-52. The Court then issued an order in *Weston I*, requesting that the parties show cause why the Winooski case should not be dismissed in light of the *Ferry* decision. Plaintiffs consented to the dismissal of their appeal, and the Court dismissed the appeal by entry order in February 2023.

In the current matter, *Weston II*, Plaintiffs argue that the Winooski charter change is unconstitutional "as applied" to elections determining school board members and the City's education budget. *See* 16 App. V.S.A. ch. 23, § 11 ("The qualifications of a voter in the [Winooski School] District shall be the same as the qualifications of a voter in the City of Winooski."); 24 App. V.S.A. ch. 19, § 202 (including noncitizens among voters in City of Winooski elections). Plaintiffs note that board members create the City's education budget, which is ratified by Winooski voters, and that budget is funded through the state education fund. *See* 16 V.S.A. § 4011(c) ("Annually, each school district shall receive an education spending payment for support of education costs."). Because such votes, which "determine the allocation of state funds[,] necessarily involve statewide, or 'freemen,' issues," Plaintiffs argue these elections are "governed by Section 42 and are reserved for Vermont residents who are United States citizens." Compl. ¶ 42.

Plaintiffs assert that their Complaint states "an as-applied claim challenging the application of Winooski's charter amendment to school board and school budget elections of the sort left open in *Ferry*." *Id*. ¶ 36.

## ARGUMENT

### I. Legal standard

Acts of the Legislature "are presumed to be constitutional." *Badgley v. Walton*, 2010 VT 68, ¶¶ 20, 38, 188 Vt. 367, 10 A.3d 469; *see also State v. Misch*, 2021 VT 10, ¶ 48, 256 A.3d 519 ("[W]e presume the reasonableness and constitutionality of an act of the Legislature."). Under the Vermont Constitution, the Legislature may "pass measures for the general welfare of the people" and is "itself the judge of the necessity or expediency of the means adopted." *State v. Curley-Egan*, 2006 VT 95, ¶ 11, 180 Vt. 305, 910 A.2d 200. Accordingly, "the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 VT 68, ¶ 20.



When construing a provision of the Vermont Constitution, courts should attempt "to discover and protect the core value that gave life to" the provision by looking first to its text, "understood in its historical context," and the case law of the Vermont Supreme Court. *Misch*, 2021 VT 10, ¶ 9 (quotation omitted).

"In an as-applied challenge . . . a party claims that a statute or regulation is invalid as applied to the facts of a specific case," and the scope of the remedy is not necessarily to invalidate the contested law in its entirety. *In re Mountain Top Inn & Resort*, 2020 VT 57, ¶ 22, 212 Vt. 554, 238 A.3d 637. "In a facial challenge, a litigant

argues that no set of circumstances exists under which a statute or regulation could be valid," and the remedy is that the court will invalidate the law. *Id.* (alterations omitted) (quotation omitted). The distinction, in other words, "goes to the breadth of the remedy." *Id.* And "merely characterizing constitutional challenges as facial or as-applied does not make them so." *In re Investigation to Review the Avoided Costs that Serve as Prices for Standard-Offer Program in 2019*, 2020 VT 103, ¶ 42, 213 Vt. 542, 251 A.3d 525.

Plaintiffs' claim is, in reality, a facial constitutional challenge. Plaintiffs allege that the application of Winooski's charter amendment, "as applied" to school district elections, violates § 42 of the Vermont Constitution. The Winooski charter amendment permitting noncitizens to vote in municipal elections is established by 24 App. V.S.A. ch. 19, § 202. And the voter qualifications for Winooski School District elections are established by 16 App. V.S.A. ch. 23, § 11, which provides: "The qualifications of a voter in the District shall be the same as the qualifications of a voter in the City of Winooski." Plaintiffs' argument is that 16 App. V.S.A. ch. 23, § 11, violates § 42 of the Vermont Constitution by permitting noncitizens to vote in school district elections, and their requested remedy is to render this provision "devoid of any legal force or effect." Compl. ¶ 44(a).



## II. The Vermont Supreme Court has squarely rejected Plaintiffs' argument that § 42 must apply to municipal elections that implicate statewide issues.

Plaintiffs' claim that § 42 prevents noncitizens from voting in municipal elections fails because "§ 42 does not apply to municipal elections as a matter of

law." *Ferry*, 2023 VT 4, ¶ 9.[2] The Vermont Supreme Court has already rejected the premise on which Plaintiffs' argument relies: that § 42 applies to any issue that concerns the state of Vermont. Plaintiffs cite to no other basis that would support finding 16 App. V.S.A. ch. 23, § 11 unconstitutional.

To try to get around *Ferry*, Plaintiffs misconstrue its holding. They argue that "while the Supreme Court rejected the argument that *all* municipal elections are now subject to Section 42, it held that specific municipal votes would require United States citizenship if those votes were of statewide concern." Compl. ¶ 34. The Court held no such thing and in fact denied framing § 42's application as being based on the issues in an election. Rather, the Court held there is "a distinction between statewide and local elections for purposes of the Vermont Constitution's voting requirements," and that distinction "is categorical." *Ferry*, 2023 VT 4, ¶ 36.

In particular, the Court rejected Plaintiffs' contention—which they attempt to advance again here—that there was a "flexible, case-specific sliding scale for identifying local versus statewide issues and therefore what voter eligibility requirements must be met for any given election." *Id.* ¶ 36. It held that "we do not agree with plaintiffs that some extra-municipal impact, no matter how tenuous, constitutes a statewide issue subject to the requirements in § 42." *Id.* ¶ 48. In other words, Section 42 applies to all statewide *elections*; it does not apply to all *issues* of statewide concern.



[2] School districts are municipalities. 1 V.S.A. § 126.

What the Court acknowledged in *Ferry* is that its decision did not "preclude[] judicial review of municipal elections" and that "[a] vote municipal in name, but traditionally the province of 'freemen' in substance, could not avoid the requirements of § 42." *Id.* ¶ 50 (citing *Slayton v. Town of Randolph*, 108 Vt. 288, 187 A. 383 (1936) and *Martin v. Fullam*, 90 Vt. 163, 97 A. 442 (1916)). Critically, the Court concluded that "freemen" refers to "individual[s] with the ability to vote in statewide elections in Vermont." *Id.* ¶ 36. It does not, as Plaintiffs suggest, refer to "any matter that concerns the State of Vermont." Compl. 2. Thus, what the *Ferry* Court recognized that it may review is whether "a specific vote is properly municipal or statewide." *Ferry*, 2023 VT 4, ¶ 50. If it is a state-level election, § 42 applies; if it is a municipal election, § 42 does not apply.



*Martin v. Fullam* illustrates the exceptional circumstance in which a question could arise as to whether a particular vote is a state-level vote subject to the requirements of § 42 or a municipal-level vote subject to the statutory requirements for municipal elections. 90 Vt. 163, 97 A. 442 (1916). In *Martin*, pursuant to the relevant legislative acts, a vote on a question of statewide policy was to be held at the same time and place as the annual town or city meeting in each Vermont municipality. The petitioner in *Martin* asserted that he was improperly excluded from voting on the measure because even though he was disqualified from voting in his municipal election, he was still qualified to vote in state-level elections based on the requirements of the Vermont Constitution. The Court noted that although the vote was taken at the same time and place as town

meetings, it was subject to the laws and regulations applicable to statewide elections; the Secretary of State administered the vote; and the voters in every town and city in Vermont voted on the measure. Thus, the Court concluded that the Legislature intended it to be a state-level vote; the voting requirements established in the Constitution therefore applied, and petitioner could not be denied the right to vote in a statewide election. *Id*. at 163, 97 A. at 446.

Plaintiffs, of course, aren't claiming that Winooski School District elections in any way resemble the vote at issue in *Martin*. They aren't arguing that voters in every town in Vermont are being furnished the opportunity to vote on the Winooski school budget. Plaintiffs are instead arguing that a vote by the voters of Winooski on the Winooski school budget and the Winooski school board implicates statewide issues and should therefore be considered a state-level vote.



Not only is Plaintiffs' argument that school-district elections should be treated like state-level elections impossible to square with *Ferry*, it is impossible to square with the Vermont Statutes. School-district elections are subject to the laws governing school district elections—not the laws governing state-level elections. *Compare* 16 App. V.S.A. ch. 23 (Winooski Incorporated School District); 16 V.S.A. ch. 9 (School Districts) *and* 17 V.S.A. chs. 45 (General Election Political Parties), 51 (General Election Conduct of Elections), 53 (General Election Vacancies). It is the Winooski School District electorate that has the authority to elect school board directors and other officers, *see* 16 V.S.A. § 562(10); it is the Winooski School Board that has the duty to "prepare and distribute annually a proposed budget," *id*.

§ 563(11)(A); and it is the Winooski School District electorate that has the authority to vote on the proposed budget, *see id*. § 511(a) ("At a meeting legally warned for that purpose *the electorate within an incorporated school district* shall vote such sums of money as it deems necessary for the support of schools." (emphasis added)); 16 App. V.S.A. ch. 23, § 1 (Winooski School District includes the territory of the City and its inhabitants).

The logical consequence of Plaintiffs' argument would be to ignore the dichotomy between state and municipal elections that the Vermont Constitution, *Ferry*, and the Vermont Statutes recognize and instead convert all school-district elections into statewide elections. If Winooski School District elections had to be state-level elections because they affect the state education fund, every Vermonter entitled to vote in state-level elections would be entitled to vote in Winooski School District elections. In fact, every Vermonter entitled to vote in state-level elections would be entitled to vote in every school district election throughout the State. *See Slayton*, 108 Vt. at 290-91, 187 A. at 384 (explaining that the *Martin* Court held that a freeman could not be denied the right to vote where a vote was "in essence and effect a vote by the freemen of the state").



The Vermont Supreme Court held just months ago that § 42 does not apply to municipal elections. Plaintiffs' effort to resuscitate their losing argument by claiming that it's now an as-applied challenge fails. It's still a facial argument. It's the facial argument the Vermont Supreme Court just rejected.

## CONCLUSION

For the reasons set forth above, this Court should find 16 App. V.S.A. ch. 23, § 11 constitutional and dismiss Plaintiffs' complaint.

DATED at Montpelier, Vermont, this 17th day of April 2023.

STATE OF VERMONT

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