In the Supreme Court of the State of Vermont
Case No. 25-AP-072

MICHELLE MORIN,
KAREN ROWELL,

Plaintiffs/Appellants,

v.

CITY OF BURLINGTON, VERMONT

Defendant/Appellee

Appeal from Superior Court, Chittenden Unit
Case No. 24-CV-02403

APPELLEE CITY OF BURLINGTON'S OPPOSITION BRIEF

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ISSUE PRESENTED

The issue presented is whether the Superior Court correctly decided that local school board and school budget elections are local elections subject to Section 8a of the Burlington City Charter rather than statewide elections subject to Chapter II, Section 42 of the Vermont Constitution.

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STATEMENT OF THE CASE

This case is about Section 8a of the City of Burlington's (the "City") Charter, which reads in relevant part as follows:

> "(a) … [A] legal resident who is not a citizen of the United States shall be a legal voter at a local City of Burlington or Burlington School District election if the individual meets the following qualifications:
>
> (1) is a legal resident of the United States;
>
> (2) is not less than 18 years of age;
>
> (3) has taken the Voter's Oath;
>
> (4) resides in the City of Burlington as residency is defined in 17 V.S.A. § 2122; and
>
> (5) has registered to vote with the Board of Registration of Voters not later than the deadline established by Vermont law for that election or meeting.
>
> (b) As used in this section, "legal resident of the United States" means any noncitizen who resides on a permanent or indefinite basis in compliance with federal immigration laws.
>
> (c) This section does not change a noncitizen's ability to vote in any State or federal election.
>
> (d) A legal resident voter who is not a citizen may cast a ballot only for local officers and local public questions specific to a ward or City district of which the individual is a resident at the time of voting. …"

24 V.S.A. App., ch. 3, § 8a (hereinafter, "Section 8a").

Section 8a was approved by Burlington voters on Town Meeting Day, March 7, 2023. (PC-20, Complaint at ¶ 20.) The General Assembly subsequently approved Section 8a on May 12, 2023, and later overrode a gubernatorial veto on June 20, 2023. (*Ibid.*) Thus, Section 8a had the support not only of a majority of Burlington voters, but

also of an overwhelming number of the state's democratically elected delegates to both houses of the General Assembly. See Vt. Const. ch. II, § 11 (requiring a two-thirds vote of both houses to override a veto).

Appellants Michele Morin and Karen Rowell ("Appellants") are U.S. citizens and legal voters in the City of Burlington. (PC-17, Complaint at ¶¶ 3, 4.) They are seeking declaratory and injunctive relief to challenge Section 8a pursuant to Chapter II, Section 42 of the Vermont Constitution ("Section 42"), as applied to local school board and local school budget elections. In relevant part, Section 42 reads as follows:

> "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 of this state:
>
> You solemnly swear (or affirm) that whenever you give your vote or suffrage, touching any matter that concerns the State of Vermont, you will do it so as in your conscience you shall judge will most conduce to the best good of the same, as established by the Constitution, without fear or favor of any person. ..."

Appellants observe that Section 8a allows legal resident, non-citizens to vote in local school elections, but Section 42 requires voters to be U.S. citizens. Appellants concede that Section 42 applies only to state elections, and not to local elections. *See Rowell v. Horton*, 58 Vt. 1, 5, 3 A. 906 (1886) (explaining that Chapter II of Vermont's constitution establishes a charter of state government only and not of municipal governments). However, since local school elections have extra-municipal impacts under Vermont's modern education funding scheme, Appellants contend that local school elections touch "any matter that concerns the State", so that they are subject to Section 42.

Montpelier and Winooski previously have adopted similar charter amendments, which were also subject to judicial challenges under Section 42, both filed on September 27, 2021. (PC-22, Complaint at ¶26.) On January 20, 2023, while the Winooski case was still pending, this Court issued its decision in *Ferry v. City of Montpelier*, 2023 VT 4, 217 Vt. 450, 296 A.3d 749 ("*Ferry*"), finding that Montpelier's non-citizen voter charter

provision was facially valid because, as indicated above, Section 42 does not apply to local elections. (PC-23, Complaint at ¶ 30.) Recognizing the historic precedents on point, the plaintiffs in *Ferry* argued that modernly, the line between state and local affairs is no longer clear, so that local elections can involve matters of statewide concern subject to Section 42. *Ferry*, at ¶ 39. The Court rejected this argument, explaining that:

> "The distinction drawn [between local and state elections] is categorical, and we accordingly reject the plaintiffs' contention that [the precedents] create 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. at ¶ 36.

The Court went on to note that notwithstanding any blurring of the lines, municipal governments still exist in Vermont, they still deal in local issues, and they remain answerable to local residents, not to the citizens of the state as a whole. *Id*. at ¶¶ 44-46. The Court also specifically rejected the argument Appellants make in the instant matter that the language of the voter oath in Section 42 should be taken to mean that local elections with extra-municipal impacts should be treated as subject to Section 42's citizenship requirement. *Id.* at ¶¶ 41-42, 48. On this point, the Court elaborated that the "'purely local' test that the plaintiffs were asking the court to adopt "is vulnerable and not grounded in history." *Id*. at ¶ 43.

Citing *Martin v. Fullam*, 90 Vt. 163, 97 A. 442 (1916) ("*Martin*") and *Slayton v. Town of Randolph*, 108 Vt. 288, 187 A. 383 (1936) ("*Slayton*"), the Court accepted that there may be a hypothetical class of elections conducted at the municipal level that are "traditionally in the province of 'freemen' in substance that cannot avoid § 42." However, the Court was not called upon to determine the contours of that hypothetical class because the plaintiffs had brought a facial challenge rather than an as-applied challenge. *Ferry*, at ¶ 50.

After this Court issued its judgment in *Ferry*, the Winooski plaintiffs dismissed their lawsuit. They filed a subsequent suit in March 2023 to test Winooski's charter provision as applied to local school elections. The crux of their argument related to the fact that in the 1990s, the General Assembly adopted a statewide system of school

funding, so that local school budgets have extra-municipal impacts.[1] The Winooski plaintiffs asserted that these extra-municipal effects fundamentally altered the nature of local school issues so as to render them freemen's issues in substance. That lawsuit was dismissed on grounds of *res judicata*.

Appellants then brought this litigation in an attempt to make the same as-applied argument that the Winooski plaintiffs made. (PC-24, Complaint at ¶¶ 33-35.) On July 9, 2024, the City moved to dismiss Appellants' lawsuit. (PC-27.) The City first argued that Section 8a is entitled to deference because it is a legislative enactment. (PC-31.) Then it argued that the issues Appellants seek to litigate were already decided in *Ferry* and that, insofar as Appellants seek to rely upon the Court's dicta in reference to *Martin* and *Slayton*, the facts here bear no resemblance to those in *Martin*, and *Slayton* actually supports the City's position. (PC-32 to PC-34.) Next, the City argued that even if the sliding-scale test Appellants seek to impose on Section 42 were the law, school budget and school board elections are principally local in character. (PC-34 to PC-36.) Finally, the City noted that insofar as noncitizens have already been granted the right to vote in local school elections, and insofar as alienage is a suspect classification and voting is a fundamental right, taking away a previously granted right to vote raises serious equal protection questions, so that the doctrine of constitutional avoidance militates in favor of upholding Section 8a as applied. (PC-36 to PC-39.)

Appellants opposed the City's motion on September 9, 2024. (PC-41.) The City replied on October 2, 2024. (PC-74.) Among other matters, the City's reply brief clarified the historic distinction between "freeman's" meetings and town meetings and noted that in *Woodcock v. Bolster*, 35 Vt. 632, 638-641 (1863), this Court explained that school elections are local elections not subject to Section 42's antecedent in the state constitution at the time.[2] (PC-77 to PC-81.) On November 22, 2024, the Attorney General filed a brief in support of the City's motion to dismiss. (PC-87.) Appellants

[1] Much of Appellants' opening brief is devoted to demonstrating these effects. The City does not dispute the assertion of extra-municipal effects but maintains that *Ferry* already decided that the presence of extra-municipal impacts is irrelevant.

[2] The City is using the terms "freeman" and "freemen" throughout this brief because those terms have special historical significance in the context of Section 42 as denoting a person enjoying all the civil and political rights belonging to the people under a free government, including the right to vote in state elections and to hold state office. *Ferry*, 2023 VT 4, at fn. 5, 217 Vt. 450, 296 A.3d 749; *id.* at ¶¶ 33, 36. The term is not gender inclusive and should be read to include the freewomen of the state.

responded on December 13, 2024 (PC-95), and the Attorney General replied on December 20, 2024 (PC-105).

On February 7, 2025, the trial court issued an order granting the City's motion to dismiss (PC-3), and judgment was entered accordingly on February 10, 2025 (PC-108). According to the Court:

> "The fundamental distinction of consequence here is between local and statewide elections, not issues: "[Relevant] precedents draw a distinction between statewide and local *elections* for purposes of the Vermont Constitution's voting requirements. The distinction drawn is categorical, and we accordingly reject plaintiffs' contention that these cases create 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. These cases dictate that § 42 does not apply to municipal elections." *Id.* at ¶ 36 (emphasis added).
>
> …
>
> The *Ferry* Court plainly rejected the argument the identification of extra-municipal impacts is sufficient on its own to render an election one properly characterized as addressing a statewide rather than a local matter. If extra-municipal impacts alone – and that is the only argument Plaintiffs raise here – be sufficient, they presumably would have to be so substantial as to reflect that the municipal voters effectively are deciding statewide rather than local matters.
>
> This is not what happens when Burlington voters cast their votes in school district elections. Such elections are addressing distinctly local matters: who will be their school board members, and whether to support the budget, and all the distinctly local priorities it represents, as recommended by the board. Board members' duties are distinctly local in nature. See generally 24 App. V.S.A. ch. 3 §§ 163-170

(school commissioners). Nor in adopting a budget are they in fact adopting a budget for any other municipality.

Burlington voters in these elections have no say in how the school funding scheme adopted by the legislature operates, and they are not in any meaningful sense responsible for how that system affects them in relation to non-Burlington voters and municipalities. In short, Plaintiffs identify extra-municipal impacts, but they do not identify extra-municipal impacts that transform a local election into a statewide election in any meaningful sense under Vermont case law. School district elections have always been considered municipal, rather than statewide, in nature. See *Woodcock v. Bolster*, 35 Vt. 632,638 (1863) (voters in school district elections not required to be freemen).

…

Plaintiffs focus exclusively on extra-municipal impacts related to educational funding. Any such impacts are indirect and, as to their specifics, out of Burlington voters' hands. Burlington school district elections address traditional local issues not in the province of freemen. The legislature thus was free under *Ferry* to determine the eligibility criteria for voters in such elections.

(PC-6 to PC-8.)

STANDARD OF REVIEW

The City has no fundamental disagreement with Appellants' statement of the standard of review. However, despite the fact that the standard of review is *de novo*, the question on appeal is whether Section 8a violates Section 42 as applied. This is significant because statutory acts are presumed valid. *Ferry*, 2023 VT 4 at ¶ 51, 217 Vt. 450, 296 A.3d 749. Thus, while the trial court's decision may not be entitled to any

special deference, the General Assembly's adoption of Section 8a ***is*** entitled to deference, and Appellants have a heavy burden to overcome in demonstrating otherwise.[3]

SUMMARY OF THE ARGUMENT

Appellants are asking this Court to create a rule that extra-municipal impacts of local decisions can turn an election held at the local level into a state election in substance. Such a rule would be directly contrary to the Court's holding in *Ferry* that the distinction between state and local elections is categorical and is not subject to a context-specific, sliding-scale, or purely local rule. In support of their position, Appellants cite *Stowe Citizens for Responsible Government v. State of Vermont*, 169 Vt. 559, 730 A.2d 573 (1999) ("*Stowe Citizens*"), for the proposition that local school elections have extra-municipal effects. But the Court in *Stowe Citizens* held that local school budget elections are ***not*** an exercise of state lawmaking, which undercuts Appellants' position to the contrary. On that basis alone, Appellants' proffered rule fails.

Appellants also rely on dicta in *Ferry* based on *Martin* and *Slayton* that an election conducted at the municipal level but properly in the province of freemen in substance cannot escape Section 42. But the circumstances in *Martin* are inapposite. And to the extent that the circumstances here resemble those in *Slayton*, the Court decided that the election at issue there truly was a local election. Thus, Appellants' attempt to rely on the Court's dicta as an end-run around *Ferry*'s central holding is unavailing.

Even if this Court were to engage in the type of sliding-scale analysis that it disapproved of in *Ferry*, local school board and school budget elections are still local in character. Not only are they conducted at the local level, but they also decide fundamentally local priorities. And even if there were any ambiguity, to avoid significant federal constitutional questions, that ambiguity should be resolved in favor of upholding the right to vote that Burlingtonians and the General Assembly have already extended on the basis of alienage.

[3] Below, Appellants argued that the City's Charter is not a statutory enactment. It is axiomatic that charters are granted by act of the General Assembly in Vermont, and Appellants' own complaint concedes that Section 8a was enacted by the General Assembly. (See PC-20, Complaint at ¶ 20.)

ARGUMENT

I. Appellants' Reliance upon *Stowe Citizens* Undercuts Their Argument.

At the outset of their opening brief, Appellants cite *Stowe Citizens* for the proposition that Vermont's modern system of school funding has extra-municipal impacts. This point is irrelevant because, as indicated above and as noted by the trial court, this Court has already decided in *Ferry* that extra-municipal impacts do not turn a local election into a state election subject to Section 42. *Ferry*, 2023 VT at ¶¶ 41-42, 217 Vt. 450, 296 A.3d 749. But *Stowe Citizens* ***is*** relevant to show that when Burlington voters elect a school board and vote on a local school budget, they are not enacting state legislation, which fundamentally undercuts the Appellants' argument to the contrary.

As this Court knows, Vermont is a Dillon's Rule state, meaning that local governments derive their power from the General Assembly, and not directly from the people or the state constitution, as in home rule states. *Compare Montpelier v. Barnett*, 2012 VT 32 at ¶ 20, 191 Vt. 441, 49 A.3d 32 (2012) with Cal. Const., art. XI, § 7 ("A county or a city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."). Thus, in essence, every issue of every kind in Vermont is a primary responsibility of the state, including education. But the General Assembly may create local agencies by statute and delegate functions to them for the better administration of the state. Specifically, according to *Stowe Citizens*, the General Assembly may vest local agencies with power over matters of purely local concern and with authority and discretion to implement state laws. What the General Assembly may not do, however, is delegate its power to make state laws to local agencies. *Stowe Citizens*, 730 A.2d at pp. 575-576.

In *Stowe Citizens*, a group of citizens challenged Act 60, the first in a series of acts following *Bringham v. State* 166 Vt. 246, 692 A.2d 384 (1997), which attempted to equalize local education funding in response to this Court's mandate in that decision. The crux of the argument in *Stowe Citizens* was effectively the same as Appellants' argument here, i.e., that because local decisions in approving local school budgets under Vermont's modern education funding scheme have extra-municipal effects, those decisions are tantamount to enacting statewide legislation. Thus, in the citizens' view, by enacting Act 60, the General Assembly improperly delegated its legislative authority to communities. *Stowe Citizens*, 730 A.3d at p. 575.

This Court rejected that argument. According to the Court, all the details of the school funding scheme were worked out by legislation. Local voters were merely executing the law at the local level by exercising the discretion over local school budgets properly delegated to them by the General Assembly. Thus, to the extent their decisions affected other communities, that was not their choice so that they were not legislating matters for other communities. *Id.* at p. 576.

This is exactly why the trial court in the instant matter decided that by voting on local education matters, Burlington voters are not exercising a statewide function. Again, according to the court:

> "Burlington voters in these elections have no say in how the school funding scheme adopted by the legislature operates, and they are not in any meaningful sense responsible for how that system affects them in relation to non-Burlington voters and municipalities. In short, Plaintiffs identify extra-municipal impacts, but they do not identify extra-municipal impacts that transform a local election into a statewide election in any meaningful sense under Vermont case law. School district elections have always been considered municipal, rather than statewide, in nature."

(PC-8.)

Thus, Appellants' reliance on *Stowe Citizens* undercuts their case. The case shows that the existence of extra-municipal effects does not render local education elections an exercise of statewide lawmaking authority. And since the whole basis for Appellants' argument is that local voters are exercising such authority so that local school elections should be treated as statewide elections subject to Section 42, Appellants' argument necessarily fails. On that basis alone, the Court should deny their appeal and uphold the trial court's dismissal.

II. The Trial Court Correctly Held that Vermont's Current System of Education Funding Has Not So Fundamentally Altered Circumstances as to Make School Elections in the Province of Freemen in Substance.

Another way to understand the trial court's decision is that Vermont's modern education funding scheme has not so fundamentally altered the state of affairs to render

local school elections in the province of freemen in substance. As indicated above, in *Ferry*, this Court decided that Section 42 does not apply to local elections. *Ferry*, 2023 VT 4, at ¶ 52, 217 Vt. 450, 296 A.3d 749. This is because Section 42 is part of Chapter II of the state constitution, which was intended as a charter of state government and not as a plan of local governance. *Id.* at ¶ 33. In Vermont, traditionally school elections have been regarded as local elections, not state elections. *See Woodcock v. Bolster*, 35 Vt. 632, 638-641 (1863) (deciding that Section 42's antecedent does not apply to school elections because school elections are local).

Thus, to prove their argument that school elections should now be regarded as state elections, Appellants bear a heavy burden in demonstrating that the state's modern education funding system has so fundamentally altered circumstances that school elections are now in the province of freeman. Insofar as they rely on a notion that by adopting school budgets voters are engaged in statewide lawmaking, that argument necessarily fails for reasons described above. Insofar as they attempt to invite this Court to engage in a kind of case-specific weighing and balancing to decide what constitutes a state versus a local election, that is precisely what this Court disapproved of in *Ferry*, holding instead that the distinction between state and local elections is categorical. *Ferry*, at ¶ 36 ("The distinction drawn is categorical, and we accordingly reject plaintiffs' contention that these cases create 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.").

At the heart of the parties' disagreement is the question of how we define state and local elections. According to Appellants, a state election is "any election that affects statewide governance, no matter what level of government organizes it". App. Br. at p. 16. But again, that is exactly the argument this Court rejected in *Ferry*. See *Ferry* at ¶¶ 41, 48. That then begs the question what the distinction is between state and local elections. In the City's view, the distinction generally depends simply upon the level of government at which an election is held.

As explained by the City in the trial court, traditionally both types of elections occurred at the local level in the context of face-to-face meetings in which townsfolk discussed issues and held floor votes. (PC-77 et seq.) Thus, Sections 3 and 4 of the City's Charter discuss the election of City and school officials at annual City meetings generally held on Town Meeting Day. When the need arises for a town meeting at other times of the year, there is provision in the Charter beginning at Section 25 for special

meetings. Meanwhile, Article 11 of the City's Charter, at Sections 28 to 31, speaks of "freem[e]n's meetings" held to elect state and county officers, county senators, justices of the peace, representatives to Congress, and electors of president and vice-president of the United States. These freemen's meetings are what we usually refer to today as "state" or "statewide" elections.

Modernly, state elections occur by Australian ballot rather than by floor vote at a physical congregation of the community. The same is true in many places, including Burlington, for local meetings. Sometimes state elections and special city meetings are even consolidated at the November election as a convenient opportunity to allow voters to vote on local questions. But that does not change the fact that matters traditionally addressed in local meetings can be described as local elections, to which Section 42 does not apply, and matters traditionally addressed at freemen's meetings are state elections, to which Section 42 does apply.

Appellants criticize the City's position that the level of government at which an election occurs determines whether it is a state or a local election. However, from the City's perspective, it is axiomatic that state elections are elections that occur statewide and local elections are elections that occur locally. Appellant's rely on dicta in *Ferry*, in which the court explained that it need not define the line between state and local elections in the context of a facial challenge. According to the Court: "A vote municipal in name, but traditionally the province of 'freemen' in substance, could not avoid the requirements of § 42." *Ferry*, 2023 VT 4, at ¶ 50, 217 Vt. 450, 296 A.3d 749.

To be clear, the Court was not deciding that examples of elections municipal in name but traditionally in the province of freemen necessarily ***must*** exist. It was simply agreeing in principle that a hypothetical election that would traditionally be the kind to be held at a freeman's meeting could not avoid Section 42 by being conducted at town meetings. That this was the Court's intent seems clear from the Court's citation to *Martin.*

In *Martin*, the General Assembly enacted two statewide statutes, one relating to primary elections and the other relating to alcoholic beverage control. The legislation left it to the voters of the state to decide on Town Meeting Day whether the two statutes would take effect later the same month or over a decade later in 1927. The Secretary of State was to provide ballots for the election to town clerks, and the votes were to be aggregated statewide to determine a result. *See Martin*, 90 Vt. 163, 97 A. 442 at p. 443.

The petitioner was prevented from voting in the election because he was not eligible to vote at town meetings since he was delinquent in paying local taxes. However, he was a U.S. citizen otherwise legally eligible to vote at state elections under Section 42's antecedent. The question presented then was whether the vote was a state election in substance even though it was occurring in the context of town meetings.

The Court looked to legislative intent and presumed the General Assembly was not seeking the opinion of each town, as such, but rather that of the state's freemen as a whole. If so, then everyone qualified to vote in state elections should have been entitled to vote on the two questions presented. *Id.* at p. 444. In reaching its conclusion, the Court noted that the legislation calling the election indicated that the election should be conducted in the same manner as a "general election", which was synonymous with the term "freeman's meeting". *Id.* at p. 445. Thus, entitlement to vote should depend on an individual's qualification as a "freeman", and not on whether he was eligible to vote on local matters at the town meeting. *Id.* at p. 446.

Stated differently, just as municipalities that vote by Australian ballot sometimes consolidate special town meetings with state elections for the sake of convenience, in *Martin*, the General Assembly effectively consolidated a special state election with local town meetings. And just as legal resident, non-citizen voters in Burlington receive a special ballot when a special meeting is consolidated with a state election, which includes only local questions, the petitioner in *Martin* should have been allowed to vote on the state issues posed at the same time the town meeting was being conducted, even if he was properly prohibited from voting on local questions.

The situation in *Martin* is not the norm, and this Court later limited that case to its facts in *Slayton*. There, the General Assembly enacted a law leaving it to each town to decide at its own town meeting whether it would allow the sale of alcoholic beverages. The petitioner had not paid poll tax, so he was prevented from voting at his town meeting on the question of alcoholic beverage sales. However, like in *Martin*, the question was posed to voters pursuant to a state statute, so the petitioner relied on *Martin* to argue that as a freeman, he should have been entitled to vote. *Slayton*, 108 Vt. 288, 187 A. 383.

This Court disagreed, noting that unlike in *Martin*, ballots were not aggregated statewide, but each town was properly exercising delegated legislative authority to decide the issue for itself. In other words, unlike in *Martin*, by enacting the statute in question

here, the General Assembly ***was*** seeking the opinion of each town as such, making this a local election in substance, not a state election. According to the Court:

> "It seems plain to us that it was the manifest purpose of the Legislature to allow the towns in the state to speak on the liquor questions as towns, and to give expression to their option in 'town meetings' as distinguished from 'freemen's meetings.' It necessarily follows that those whose votes are receivable must be persons qualified to vote in town meetings."

Ibid.

Notably, both *Martin* and *Slayton* were decided as a matter of legislative intent. In *Martin* in particular, the issue was whether the General Assembly intended the election to be a state election even though it was conducted in the several towns on Town Meeting Day. The Court specifically avoided the question whether Section 42's antecedent in the state constitution required the result reached there. *Martin*, 97 A. at p. 445.

The Court need not reach that issue in this case, either, because the circumstances here are nothing like in *Martin*. A statewide election is not being conducted, where votes from across the state will be aggregated to achieve a single election outcome. The question is not one of when particular state statutes should take effect. And the General Assembly has not directed that the rules governing statewide elections should apply. Rather, like in *Slayton*, when Burlington voters elect school board members and vote on their school district's budget, they are deciding matters at the local level properly delegated to them by the General Assembly, just as they always have in Vermont. Accordingly, the state's modern education funding scheme has not so fundamentally altered circumstances as to render school elections within the province of freemen in substance.

Appellants seek to recast *Martin* and the Court's dicta citing that case in *Ferry* as requiring an analysis whether a specific matter being voted on touches and relates to statewide issues. Because local school elections have extra-municipal effects, Appellants invite this Court to use its dicta in *Ferry* as an opportunity to decide that school elections are state elections in substance so that Section 42 applies to them. In other words, Appellants ask the Court to create an end-run around its decision in *Ferry* that the

distinction between state and local elections is categorical. But in the City's view, that is not what the Court was trying to do in its dicta. Instead, the Court's dicta was consistent with the notion that the level at which the election is occurring determines whether it is a state or a local election. The election in *Martin* may have occurred on Town Meeting Day, but it was still a statewide election.

To allow for the sliding-scale analysis proposed by Appellants would not only undercut the entire point of *Ferry*, but it would also create an unworkable rule. It would require us to analyze every question appearing on a ballot to determine if state issues predominate and, if so, to apply Section 42. It is difficult to imagine any modern issue that does not have implications beyond the local community. As such, the application of Appellants' test would create uncertainty and would mean that the classification of different types of elections is not dependent upon history or tradition, but is instead subject to change at any time as circumstances change.

III. Even If the Court Were to Accept Appellants' Untenable Sliding-Scale Rule, the Court Should Still Decide that School Elections Remain Fundamentally Local in Character.

Even if the Court were to accept Appellants' sliding-scale rule, having already rejected that rule in *Ferry*, the Court should decide that school elections remain fundamentally local in character. The assertion that school board elections are state elections in substance because Vermont now has a statewide system of school funding assumes that setting a budget is nearly all that the City's school board does. However, the board's powers, which derive from the City's Charter, are far more extensive than this. These powers include the following, identified below with relevant Charter sections cited:

- To exercise care and custody of local school property (§ 167);
- To employ teachers and to fix their compensation (§ 167);
- To exercise general management and control over the City's schools (§ 167);
- To ensure that funds are spent as budgeted (§ 167);
- To exercise final authority over student discipline and termination of staff (§ 166);
- To represent the school district in collective bargaining with unions (§ 166);
- To prepare an annual budget for submission to the voters (§ 168);
- To determine the curriculum (§ 169);

- To hire and oversee a superintendent to act as the district's chief executive (§ 171);
- To appoint truancy officers (§ 173); and
- To exercise control over the sale, purchase, and development of real property owned by the school district (§ 175).

The only one of these functions that Appellants allege touches and relates to a matter of statewide concern is the proposal of an annual budget to voters, and the remaining powers and functions cited above relate predominantly to local management of school programs, personnel, and property. Thus, it seems clear that on balance, the election of school commissioners is essentially local in character. In regard to the budget, in this area the school board's powers are at their weakest since final approval of the budget rests with the voters.

A review of Vermont school finance law demonstrates that the approval of a local school budget also remains essentially local in character. Vermont schools are funded primarily through property taxes. Properties are divided into two classes, homestead and non-homestead. Non-homestead properties pay a uniform statewide rate, which is adjusted for each town by dividing the statewide rate by a local common level of appraisal to adjust for local inequities in assessment practices. 32 V.S.A. § 5402(a)(1), (b)(1). The homestead rate in each school district is adjusted in direct proportion to the size of the local education budget. If voters approve a particularly high local budget, local homeowners will feel the effects of that budget in the amount of property taxes they pay. See *id.* at § 5401(13), 5402(a)(2). Total revenues paid in education taxes statewide are aggregated, and the General Assembly decides how much to reallocate down to each school district. The amount allocated to each district typically equals, and cannot exceed, the total amount of the voter-approved school budget minus non-tax revenues, including reserves carried forward from previous years, federal dollars, grants, and other sources. 16 V.S.A. §§ 4001(6), 4011(c).

Thus, in voting on a local school budget, voters are essentially deciding four things. First, they are approving the use of non-tax revenues for local education, which may involve questions like what private grants to accept or how to use reserves. Second, they are deciding how much owners of homestead properties will pay locally in property taxes. Third, they are determining educational priorities by deciding what gets funded, what does not, and how much funding to commit to specific programs. Finally, they are

setting a maximum amount of educational funding that they may receive from the state, subject to the ultimate control of the General Assembly.

Except for the last of these four determinations, which remains subject to ultimate state control, all of these decisions are local in nature. Therefore, even if this Court were to do what *Ferry* forbade by engaging in a sliding-scale analysis to determine whether school board and school budget elections are matters of statewide or local concern, the answer clearly is local. As such, Section 8a does not violate Section 42, and the City's motion should be granted.

IV. The Doctrine of Constitutional Avoidance Militates in Favor of Upholding Section 8a as Applied to School Elections.

Under the doctrine of constitutional avoidance, laws should be construed to avoid constitutional questions. See *Michaelson v. U.S.*, 266 U.S. 42, 64 (1924) (explaining that a court should construe a statute "if fairly possible, so as to avoid, not just the conclusion that it is unconstitutional, but also grave doubts upon that score"), internal quotation marks omitted; *State v. Curtis*, 157 Vt. 275, 277 (1991) ("Under longstanding practice and precedent, we must not consider constitutional questions unless the disposition of the case requires it."). In the City's view, the prospect of taking away the right to vote in local school elections based on alienage raises significant equal protection questions that the Court would have to entertain if it were to decide that Section 8a violates Section 42 as applied to local elections. Thus, if the Court perceives any ambiguity on the issues raised by this appeal, it should avoid constitutional issues by resolving such ambiguity in favor of upholding Burlington's legal residents' right to vote in school elections.

The City appreciates that legal resident, non-citizens have no constitutionally protected right to vote in this country. However, even where a state is not required to extend some right to a group in the first instance, taking away that right once it has been granted is state action subject to review under the Fourteenth Amendment's Equal Protection Clause ("EPC"). This point was made clear in *Perry v. Brown*, 671 F.3d 1052, 1083-1085 (9th Cir. 2012), vacated on other grounds by *Hollingsworth v. Perry*, 570 U.S. 693 (2013) ("*Perry*"). *Perry* involved Proposition 8, a California state constitutional amendment banning same-sex marriage narrowly approved by California voters after the California Supreme Court extended the right of marriage to same-sex couples in 2008 on state constitutional grounds. At the time *Perry* was decided, the U.S. Supreme Court had not yet reached the same conclusion on federal constitutional grounds, but the Ninth Circuit decided that California voters' actions in depriving the right to marry after it had

already been extended to same-sex couples was state action subject to review under the federal EPC.

In reaching this conclusion, the court relied, in part, upon *Romer v. Evans*, 517 U.S. 620 (1996), in which the U.S. Supreme Court decided that entirely removing sexual minorities from state protection violated the EPC. The court also cited *Reitman v. Mulkey*, 387 U.S. 369 (1967), in which the U.S. Supreme Court held that even though the EPC does not extend to private action, a state constitutional amendment expressly allowing private housing discrimination previously illegal under state law constituted state action subject to review under the EPC.

Here, Appellants ask the Court to take away a currently existing right to vote in local school elections based upon alienage. Under *Perry*'s analysis, even if Burlington voters and the General Assembly had no obligation to extend voting rights to legal resident, non-citizens in the first place, once the right to vote was extended, its deprivation is subject to review under the EPC. Alienage is a suspect classification, and the right to vote is a fundamental right. Thus, strict scrutiny applies. See *Grahm v. Richardson*, 403 U.S. 365, 372 (1971); *Kohn v. Davis*, 320 F.Supp. 246, 250 (D. Vt. 1970).

However, depriving legal resident, non-citizens the right to vote in local Burlington school elections does not even pass muster under rational basis review. The reason voting rights are not constitutionally required to be extended to non-citizens in the first place is that states have a legitimate interest in limiting participation in government to those within the state's basic concept of political community. *Sugarman v. Dougall*, 413 U.S. 634, 642-643 (1973). But Burlington voters made the deeply personal decision to extend their basic concept of political community to include non-citizen voters, and the people of Vermont acting through a super-majority of both houses of their democratically elected legislature concurred.

This decision was fundamentally fair and in line with this nation's founding battle cry, *No taxation without representation*. As indicated above, local school budget votes determine how much homeowners will pay in homestead property taxes. Prior to the enactment of Section 8a, citizens residing in Burlington who do not pay homestead property taxes could vote in local school elections, but non-citizens who do pay homestead property taxes could not. Section 8a removes this inequity by making school elections a truly community-wide affair.

Under these circumstances, the City can conceive of only two possible bases to deprive legal resident, non-citizens the right to participate in local school elections, and neither entails a legitimate governmental interest. The first basis assumes that there is something inherently and fundamentally wrong with letting non-citizens vote in local elections. But a mere animus towards a group never justifies discrimination, even against a non-suspect classification. See *Perry*, *supra*, 671 F.3d at p. 1084, citing *U.S. Dept. of Ag. v. Moreno*, 413 U.S. 528, 534 (1973).

The second basis assumes that non-citizens will be more likely than citizens to vote for a school budget that requests more than the community's fair share of state education dollars, thereby interfering with the interests of voters in towns that do not allow legal resident, non-citizens to vote in local elections. The problem is that this assumption entails exactly the sort of unfounded stereotyping that the EPC exists to protect against. There is no reason to believe that immigrants are more "pro-tax" than citizens. In fact, common experience dictates that fiscally conservative immigrants exist.

As such, the relief Appellants are requesting raises serious federal constitutional questions. The Court can and should avoid reaching these federal constitutional questions, however, because there are ample state law grounds to find that Section 8a is constitutional under the Vermont Constitution.

CONCLUSION

For the foregoing reasons, the Court City asks the Court to deny the appeal and uphold the decision of the trial court to dismiss Appellants' Complaint.

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Attorney Certification

I certify pursuant to Vermont Rules of Appellate Procedure, Rule 32(a)(4)(D) that this brief was drafted using Microsoft Word and contains 6,813 words, excluding its cover, statement of issues, table of contents, table of authorities, signature block, and this certificate of compliance.

/s/ Erik Ramakrishnan