IN THE SUPREME COURT OF THE STATE OF VERMONT
CASE NO. 25-AP-072

Michele Morin et al.

v.

City of Burlington

APPEAL FROM SUPERIOR COURT, CHITTENDEN UNIT
CIVIL DIVISION
Docket No. 24-CV-02403

Brief for Appellee State of Vermont

STATE OF VERMONT

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ISSUE PRESENTED

Are local school board and school budget elections municipal elections and therefore not subject to Chapter II, Section 42 of the Vermont Constitution?

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INTRODUCTION

STATEMENT OF THE CASE

I. Legal Framework

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 opponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 Vt. 68, ¶ 20.

The Vermont Constitution authorizes the Legislature to "grant charters of incorporation" and "constitute towns, borroughs, cities and counties." Vt. Const. ch. II, § 6. Vermont is a "Dillon's Rule" State, which means that municipalities have "only those powers and functions specifically authorized by the legislature, and such additional functions as may be incident, subordinate or necessary to the exercise thereof." *City of Montpelier v. Barnett,* 2012 VT 32, ¶ 20, 191 Vt. 441, 49 A.3d 120 (quotation omitted). Accordingly, municipal charters and amendments thereto require legislative approval to take effect. Once a municipal charter is "approved and adopted by the Legislature," it "has the force and effect of a statute as it applies to the specified municipality." *Handverger v. City of Winooski*, 2011 VT 130, ¶ 9, 191 Vt. 556, 38 A.3d 1153.

II. Background

In June 2021, over the Governor's veto, the Vermont Legislature approved charter changes to the City of Montpelier Charter allowing noncitizen legal residents to vote in municipal elections, including elections for school board seats and school budgets. *Ferry v. City of Montpelier*, No. 21-CV-2963, 2022 WL 1242688, at *1 (Vt. Super. Ct. Apr. 01, 2022). The Vermont Republican Party and the Republican National Committee challenged the constitutionality of that charter change in *Ferry v. City of Montpelier*, 2023

VT 4, ¶ 4, 217 Vt. 450, 296 A.3d 749. This Court concluded in *Ferry* that Chapter II, § 42 does not prohibit noncitizens from voting in municipal elections and affirmed dismissal of the action. *Id.* ¶¶ 36–53. It held that because *Ferry* involved a facial challenge, this Court did not need to define the line between a "local" or "statewide" issue, acknowledging that "[a] vote municipal in name, but traditionally the province of 'freemen' in substance, could not avoid the requirements of § 42." *Id.* ¶ 50.

In May 2023, again over the Governor's veto, the Legislature amended Burlington's city charter to allow certain noncitizen legal residents to vote in Burlington elections. That charter change, which was nearly identical in effect to the Montpelier charter change, requires non-citizen voters to meet certain criteria. For example, they must be a legal resident of the United States and take the Voter's Oath. 24 App. V.S.A. ch. 3, § 8a ("Section 8a").

Plaintiffs, two Burlington residents and voters, challenge the charter amendment, arguing that as applied to school board and school budget elections Section 8a is unconstitutional because those are "statewide" rather than "municipal" issues.

III. Procedural History

Plaintiffs filed this action in June 2024. In July, the City moved to dismiss the Complaint for failure to state a claim because the elections at issue are municipal elections as a matter of law and therefore not restricted by § 42. The State intervened 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). On February 7, 2025, the superior court granted the City's motion to dismiss. Plaintiffs timely appealed to this Court.

SUMMARY OF ARGUMENT

Even as applied to school board and school budget elections, Section 8a does not violate Section 42 of Chapter II of the Vermont Constitution. Section 42 provides that "[e]very 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" who takes the voter's oath "shall be entitled to all the privileges of a voter of this state." Vt. Const. ch. II, § 42. Section 42 is titled

"Qualifications of Freemen and Freewomen." This Court has held "a 'freeman' is an individual with the ability to vote in statewide elections in Vermont." *Ferry v. City of Montpelier*, 2023 VT 4, ¶ 36, 217 Vt. 450, 296 A.3d 749. "Therefore, under § 42, to exercise the 'privileges of a freeman in this State' is to vote in statewide elections." *Id.*

Plaintiffs' challenge in this case is nearly identical to the unsuccessful facial challenges decided in *Ferry v. Montpelier*, 2023 VT 4, and *Weston v. Winooski* (Weston I), 22-AP-261, and the subsequent as-applied challenge in Winooski that was dismissed on res judicata grounds. *Weston v. Winooski*, No. 23-CV-00998, 2023 WL 8718882 (Vt. Super. Ct. Nov. 6, 2023) (Weston II).[1] Plaintiffs try again here, this time arguing—as the plaintiffs did in all three of the previous challenges—that the charter amendment violates Section 42 because it allows individuals who are not U.S. citizens to vote on matters involving school boards and school budgets, which are funded through the state education fund.

This 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. It concluded that the distinction between local and state elections "is categorical," and explicitly rejected the argument 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.

Plaintiffs' repackaging of the claims rejected in *Ferry* and *Weston I* into an as-applied challenge does not change the outcome. Municipal elections, even those that might impact statewide expenditures, are not subject to § 42 as a matter of law and therefore the Vermont Constitution does not prohibit noncitizen voting in those elections. This Court should affirm.

[1] The court in *Weston II* did not reach the merits of the Plaintiffs arguments because the court concluded the case was sufficiently similar to *Weston I* such that res judicata barred the as applied challenge that could have been raised in the first litigation. *Weston v. Winooski*, No. 23-CV-00998, 2023 WL 8718882 (Vt. Super. Ct. Nov. 6, 2023).

STANDARD OF REVIEW

Acts of the Legislature "are presumed to be constitutional" and "presumed to be reasonable." *Badgley v. Walton*, 2010 VT 68, ¶ 20, 188 Vt. 367, 10 A.3d 469. 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 (quotation omitted). Accordingly, "the proponent of a constitutional challenge has a very weighty burden to overcome." *Badgley*, 2010 VT 68, ¶ 20.

Although "this Court is not a slavish adherent to the principle of stare decisis," it "will not deviate from policies essential to certainty, stability, and predictability in the law absent plain justification supported by our community's ever-evolving circumstances and experiences." *State v. Carrolton*, 2011 VT 131, ¶ 15, 191 Vt. 68, 39 A.3d 705. Therefore, a party asking this Court to overrule its own precedent must show that the challenged precedent "undermined the public welfare, wrought individual injustice, or impeded the administration of justice." *Id.* (quotation omitted).

ARGUMENT

I. Section 42 does not apply to municipal school board elections, regardless of actual or potential state-wide impacts.

Plaintiffs' claim that § 42 prevents noncitizens from voting in school board and school budget elections fails because "§ 42 does not apply to municipal elections as a matter of law." *Ferry*, 2023 VT 4, ¶ 9. This Court has already rejected the premise on which Plaintiffs' argument relies: that § 42 applies to any election that might impact the entire state. In support of their argument, Plaintiffs misconstrue language in *Ferry* and cite to cases establishing that education funding decisions have statewide impacts. Yet neither *Ferry* nor the cases cited support a finding that Section 8a is unconstitutional.

A. The test to determine whether an election is a statewide or municipal election does not consider the impacts of the vote.

Plaintiffs argue that this Court held in *Ferry* "that Section 42 applies to municipal elections that concern statewide matters." Plaintiffs' Br. 16. But the Court expressly declined to frame § 42's application as contingent on the

impacts of the election. It held that 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. The election here was not a state-wide election. Only Burlington residents could vote and were voting on the Burlington school board and the Burlington school budget. How that budget is ultimately funded is not an issue decided in the vote.

Plaintiffs nonetheless argue that the results of the election could have statewide financial impacts. But again, the *Ferry* Court expressly declined to adopt a test based on the *impacts* of a local election. It rejected the idea— advanced by Plaintiffs here— that there is 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. In other words, Section 42 applies to statewide elections; it does not apply to all issues of statewide concern.

What this 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); *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 municipal election with state-wide effects. Thus, the Court recognized only it may review whether "a specific vote is properly municipal or statewide." Ferry, 2023 VT 4, ¶ 50.

Martin v. Fullam illustrates the exceptional circumstances 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; the voters in every town and city in Vermont voted on the measure; and the aggregate votes state-wide determined the outcome. Thus, the Court concluded that the Legislature had 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.

The vote in *Martin* did not "involve a statewide issue" in a general sense, but was rather a statewide popular vote on a specific referendum required by legislative enactment—"Shall an act of the general assembly of 1915, entitled 'An Act to provide for primary elections,' become a law March 20, 1916?"'—that the legislature determined would be voted on at municipalities annual meetings. *Id*. Thus, despite being part of the municipal election, the issue voted on was a state level issue.

Plaintiffs' argue that "the connection to state-level issues here is even stronger than the connection in *Martin*, which involved only a referendum on the effective date of two statutes." Appellant's Br. 22. That the referendum in *Martin*, in Plaintiffs' view, would have little statewide *impact* illustrates not that the elections at issue here are statewide elections but instead that the test is not concerned with impacts. The "categorial" test between municipal and state elections is concerned with nature of the issue the voters are voting on and not the strength of the connection between the outcome of the vote and a state-level issue. In *Martin* the issue was a statewide referendum regarding state statutes. Here, the issue is school board members and a school budget for the City of Burlington. There is nothing in the *Martin* decision, or the treatment of that decision in *Ferry*, that even suggests the "cumulative effect" of municipality's educational funding decisions somehow converts those decisions from municipal votes to statewide votes.

B. Burlington's school board and budget elections are municipal elections.

Vermont's statutes, precedents of this court, and common sense all support the conclusion that Burlington's school board and budget elections are municipal and not statewide elections.

School-district elections are subject to the statutes governing school district elections—not those governing state-level elections. *Compare* 24 App. V.S.A. ch. 3, §§ 4, 164 (Burlington charter provisions governing school commissioner elections); 16 V.S.A. ch. 9 (school districts) *with* 17 V.S.A. chs. 45 (General Election Political Parties), 51 (General Election Conduct of Elections), 53 (General Election Vacancies). It is the Burlington School District electorate that has the authority to elect school board commissioners. See 16 V.S.A. § 562(10); 24 App. V.S.A. ch. 3, §§ 4, 164. It is the Burlington School Board that has the duty to "prepare and distribute annually a proposed budget." 16 V.S.A. § 563(11)(A); 24 App. V.S.A. ch. 3, §168. And it is the Burlington School District electorate that has the authority to vote on the proposed budget. See 16 V.S.A. § 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)); 24 App. V.S.A. ch. 3, § 168 (establishing procedure for voters to vote on approving the school budget at the annual City meeting).

As recognized in *Ferry*, this Court's decision in *Woodcock v. Bolster* holds that constitutional restriction of state-level voting to citizens does not apply to municipalities, including "in town and school district meetings." *Ferry*, 2023 VT 4, ¶ 34 (*citing Woodcock v. Bolster*, 35 Vt. 632 (1863)). The *Woodcock* Court held that "even if there had been . . . agreement between the requirement of the old constitution as to the qualification to become a freeman, and that of the statutes defining the qualifications of voters in town or school meetings," the Court would still "fail to see how it would follow that a change of the constitution in relation to the qualifications of freemen should work a corresponding change in the statutes regulating voting in town and school meetings." *Woodcock*, 35 Vt. 632. *Woodcock*, thus, forecloses Plaintiffs' claims. This Court has never overruled or limited this holding. The holding is clear that school elections are municipal elections not subject to § 42.

Plaintiffs argue that despite this holding, "[m]odern school board and school budget elections decide statewide appropriations, impose statewide tax obligations, and are systematically intertwined with the state government. They therefore concern statewide matters and are subject to Section 42." Appellant's Br. 20. But this Court's decision in *Brigham* did not fundamentally alter the nature of municipal school decisions or the State's obligation to ensure individuals' right to an equal education.

In *Brigham*, this Court concluded that the way in which education was funded at that time failed to meet the State's constitutional obligations. The Court recognized that "[i]ndividual school districts may well be in the best position to decide whom to hire, how to structure their educational offerings, and how to resolve other issues of a local nature" but found that the funding system was not meeting the State's constitutional obligations or "necessary to foster local control." *Brigham v. State*, 166 Vt. 246, 265–66, 692 A.2d 384, 396 (1997). In fact, the Court concluded that the system at the time "plainly [did] not enhance fiscal choice for poorer school districts." *Id.*

Far from concluding that school board and school budget decisions were "statewide" issues, the analysis in *Brigham* is grounded in the conclusion that these are local decisions and that for municipalities to have equality in those local decisions the education funding mechanism needed to change. School board and school budget elections remain local decisions even if education is funded, in part, through state expenditures.

Finally, 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 school district elections are in fact state-level elections because they affect the state education fund, every Vermonter entitled to vote in state-level elections should be entitled to vote every school district election throughout the State. *See Slayton*, 108 Vt. at 290–91 (explaining that the *Morin* 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"). This absurd result illustrates why the elections at issue here are properly categorized as local and not statewide elections.

Plaintiffs may try to waive that problem away by arguing that every Vermonter will have an opportunity to vote in *some* school district election. But that does not make those elections *statewide* rather than local elections. Unlike the election at issue in *Morin*, for example, voters would not even be voting on the same question. The vote would turn on the locality in which a person is voting and would not result in direct impacts on statewide policy. A Vermonter who wishes to see overall per-pupil expenditure increase across the state, for example, but who lives in a municipality with a proposed school budget that is substantially below average in per-pupil spending would have no opportunity to vote on the issue of statewide education appropriation in a manner consistent with that Vermonter's beliefs. A vote for any particular school budget is therefore not the same as a vote on statewide appropriations.

CONCLUSION

For the foregoing reasons, the State of Vermont respectfully requests that this Court affirm the superior court's decision that 24 App. V.S.A. ch. 3, § 8a is constitutional.

Dated: June 3, 2025

STATE OF VERMONT

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CERTIFICATE OF COMPLIANCE

Ryan Kane, Deputy Solicitor General and Counsel of Record for Appellee the State of Vermont, certifies that this brief complies with the word count limit in V.R.A.P. 32(a)(4). According to the word count of the Microsoft Word processing software used to prepare this brief, the text of this brief contains 3,168 words.

/s/ Ryan Kane
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