

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

MICHELE MORIN,
KAREN ROWELL,

Plaintiffs-Appellants,

v.

THE CITY OF BURLINGTON, VERMONT,

Defendant-Appellee.

Appeal From
Superior Court, Chittenden Unit
Docket No. 24-CV-02403

REPLY BRIEF OF APPELLANT

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INTRODUCTION

The City and State characterize Plaintiffs' claim as a carbon copy of *Ferry v. City of Montpelier* that contains “nearly identical” arguments in support of “repackage[ed] ... claims.” State-Br.3; *see* City-Br.17-18 (alleging that Plaintiffs attempt “to create an end-run around [this Court’s] decision in *Ferry*”). Those comparisons are inaccurate and a transparent attempt to argue via shortcut. For example, after referencing *Ferry* and the other two cases that terminated early, the State claims that 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.” State-Br.3 (emphasis added). Yet as this Court knows well, the plaintiffs in *Ferry* brought a facial challenge that never mentioned education funding as an argument in favor of applying Section 42. *See* Appellant’s Br in *Ferry v. City of Montpelier*, No. 22-AP-125 (July 11, 2022); Appellant’s Reply Br. in *Ferry v. City of Montpelier*, No. 22-AP-125 (Sep. 19, 2022). In short, the Court should lend those efforts no credence.

As previously noted, this case requires the Court to resolve a fundamental question: what is the test for distinguishing between “local” and “statewide” issues for purposes of Section 42? *See* Pls-Br.1; *Ferry v. City of Montpelier*, 2023 VT 4, ¶150, 217 Vt. 450, 275 A.3d 155; *see also* City-Br.14 (“At the heart of the parties’ disagreement is the question of how we define state and local elections.”). The City and State offer different answers to that question; they cannot agree on a common distinction between City and State elections. Moreover, the tests put forth by each government cannot be reconciled with other aspects of state governance. For instance, neither the City nor the State can identify any statewide expenditure votes in Vermont history that were exempt from Section 42, despite having ample opportunity to do so. *See* Pls-Br.21. The distinguishing test offered by Plaintiffs, by contrast, produces outcomes that are consistent with the traditional understanding of the obligations of state government and align with this Court’s jurisprudence in education cases.

Finally, this case presents no equal protection issues and thus provides no occasion for the Court to confront “the doctrine of constitutional avoidance” raised by the City. The Court should reverse.

ARGUMENT

I. School elections are subject to Section 42 because education budgets are a statewide issue.

The core disagreement in this case is about the scope of this Court’s decision in *Ferry*. None of the three parties advances identical constructions of that case. Compare City-Br. 17-18, 22 (dismissing as “dicta” Court’s observation in *Ferry* that a “vote municipal in name, but traditionally the province of ‘freemen’ in substance, could not avoid the requirements of §42”),¹ with State-Br.4-5 (citing quote for proposition that “the Court recognized only it may review ‘whether a specific vote is properly municipal or statewide’”). However, the City and State both contend that *Ferry* categorically forecloses any circumstance in which Section 42 might apply to an election that is organized and conducted locally.

The City and State offer different standards for distinguishing local elections from state elections under Section 42. “In the City’s view, the distinction generally depends simply upon the level of government at which an election is held.” City-Br.14. That is, the City understands an election to be “a local election in substance, not a state election” when the results produce “the opinion of the town as such.” City-Br.16-17. For the City, then, it is immaterial that the outcome of the town’s school elections has a direct effect on statewide property tax burdens—it is a local election because it reflects the decision of the “town as such,” regardless of the real and palpable effects on the pocketbooks of Vermonters living elsewhere. City-Br.17. But if the City’s definition were correct, then the general elections in which each Vermont locality chooses its state senators and representatives to the state legislature should also be considered “local” in nature. After all, in these elections the local voting population chooses one of its own to speak on behalf of the “town as such” to the representatives of other localities around the State. And senatorial and representative districts, like municipalities, are creatures of the General Assembly. See Vt. Const. ch. II §§13, 18. Of course, like Section 42,

¹ The City repeatedly dismisses *Ferry*’s reference to local elections that cannot “avoid the requirements of §42” as “dicta,” but it ignores the Court’s express reliance on *Slayton v. Town of Randolph* and *Martin v. Fullam* when making this statement. See *Ferry*, 2023 VT 4, ¶50 (citing *Slayton v. Town of Randolph*, 108 Vt. 288, 290-91, 187 A. 383 (1936), and *Martin v. Fullam*, 90 Vt. 163, 170, 97 A. 442 (1916)).

the constitutional provisions that discuss the election and qualification of state representatives and senators appear in chapter II, which addresses statewide issues.

The State, in turn, asserts that “[t]he ‘categorical’ test between municipal and state elections is concerned with the 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.” State-Br.6. Plaintiffs agree with the logical corollary to the first part of the State’s formulation, that state elections for purposes of Section 42 are those elections that decide what have historically been considered state issues. That principle is consistent with Plaintiffs’ position throughout this litigation, which has been that decisions about education funding are—and according to this Court, have long been—a state issue. So, too, have matters of statewide taxation—a power that the Constitution vests in the state legislature. *See* Vt. Const. ch. II §14; *see* PC-64-65 (discussing taxation as state issue in opposition to motion to dismiss). In *Brigham*, this Court explicitly rejected the State’s claim that “the primary constitutional responsibility for education rests with the towns of Vermont.” *Brigham v. State*, 166 Vt. 246, 264, 692 A.2d 384, 395 (1997). Importantly, the Court’s opinion in *Brigham* did not create a new relationship between the state and the education system; rather, it merely recognized the State’s preexisting obligation as a longstanding historical feature. *See, e.g., Athens Sch. Dist. v. Vt. State Bd. of Educ.*, 2020 VT 52, ¶51, 212 Vt. 455, 237 A.3d 671 (holding that school district’s claim of primary authority “ignore[d] the ‘long and settled’ principle in Vermont that education is ‘a fundamental obligation of state government.’”).

Plaintiffs offer a simple, logically consistent principle for determining when an election is local and when it is statewide (and thus subject to Section 42): whether the electorate is deciding issues that are normally decided by the state’s government. Among the examples of such elections are those in which, by casting their ballots, voters are exercising state-level authority—such as taxation or appropriation—that has been delegated by the legislature. Along these lines, the City appears to misunderstand Plaintiffs’ purpose for citing *Stowe Citizens for Responsible Gov’t v. State*, 169 Vt. 559, 730 A.2d 573 (1999), in its opening brief. *see* City-Br.1, 12-13. This Court’s decision in that case is relevant here not because it referenced abstract concepts of “extra-municipal impact,” City-Br.13, but because it held that education matters are statewide

by nature and that responsibility for funding lies with the State. The City miscasts Plaintiffs’ argument as claiming local school budget votes “are tantamount to enacting statewide legislation.” City-Br.12. Plaintiffs instead explained that this Court’s holding is instructive because it found that, by entrusting the electorate with the power to approve budgets paid out of state coffers, the legislature had delegated its power to local voters. *See Stowe*, 730 A.2d at 576. Most important, however, are the implications of the State’s delegation. Because serving in the legislature is a state-government office, the power of that office is reserved for United States citizens. *See* Vt. Const. ch. II, §66. It follows, as a matter of course, that such power can only be delegated to other citizens.

The City and State both concede the presence of extra-municipal impacts. *See* City-Br.8 n.1; State-Br.4. Indeed, with property taxes rising 14% last year, driven by locally approved increases in education spending, the point is becoming increasingly difficult to dispute. *See* P. Hirschfield, Vermont Public, *Vermont Property Taxes Could Again Climb By Double Digits*, (Nov. 27, 2024) (“[B]ecause we have a statewide education fund, inputs all around the state have an impact on what happens to yields and statewide tax rates.”). Unlike in *Ferry*, however, Plaintiffs do not allege that “some extra-municipal impact, no matter how tenuous, constitutes a statewide issue subject to the requirements of §42.” *Ferry*, 2023 VT 4, at ¶48.

Instead, Plaintiffs contend that direct extra-municipal influence wielded by an exercise of political power, such as voting in an election, is indicative of the statewide character of the exercise—especially when the topic is one that has historically been reserved for state government, like taxing or spending. Consider the following example, informed by recent events in the State. If the State legislature were to consolidate school districts into four mega-districts that were divided equally in size, but the legislature continued to determine education funding according to the current system, there would be little doubt that the “local” school elections in question were of a state character. The budgets approved by voters in each “local” school district in this case would dictate one-quarter—or perhaps more—of the State’s Education Fund expenditures.

The City and State argue that *Woodcock v. Bolster* forecloses any argument that school budget elections can be subject to Section 42. City-Br.14

(citing 35 Vt. 632 (1863)); State-Br.7 (same). However, this Court’s summary of *Woodcock*, articulated throughout *Ferry*, makes clear that purely local elections are distinguishable from elections with statewide impact—nothing more. *Ferry* explicitly leaves open the possibility that *some* local matters and local elections are, in substance, statewide matters. *See* Pls.Br.5. The City and State concede as much. *See* City-Br.15 (hypothetically, an election held by a municipality could be subject to §42); State-Br.5-6 (describing *Martin* as an example of an “exceptional circumstance in which” an election held by a municipality could be “a state-level vote subject to the requirements of §42”). In this case, the state education budget is undeniably a statewide issue.

The City defends the “local” nature of school elections by highlighting some of the school board’s other responsibilities that are of a more local character. City-Br.18-20. But those examples are far less significant than the state-funded school budget, which is constructed by the board and ultimately always ratified by voters in a separate vote. In any event, those insignificant examples are not the subject of Plaintiffs’ as-applied challenge in this case and the board may continue to be responsible for them even if Plaintiffs prevail. *See Ferry*, 2023 VT 4 ¶43 (“[I]n a successful as-applied challenge, the party demonstrates that ‘a statute or regulation is invalid as applied to the facts of a specific case’ and the court will grant relief to the parties before it but will ‘not necessarily invalidate the contested law in its entirety.’”).

The State attempts to foreclose as-applied challenges by citing a litany of statutes for the proposition that “[s]chool district elections are subject to the laws governing school district elections—not the laws governing state-level elections.” State-Br. 7. That observation is accurate, but irrelevant. Plaintiffs’ claim is that the Charter Amendment’s *application* to such elections is unconstitutional, because it expands the electorate to include noncitizens to vote on statewide matters reserved for “freemen.” Spotlighting the specific chapter of the state code that authorizes the elections themselves misses that point. It also ignores the statutes that make paying for school budgets, including Burlington’s, the responsibility of every Vermonter. *See* 16 V.S.A. Chapter 133.

Finally, the State attacks “the logical consequences” of Plaintiffs’ claims. As the State sees it, “[i]f 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 in every school district election throughout the State.” State-Br.8. Not so. Keeping noncitizens out of elections that are the province of freemen does not require that all freemen be allowed to vote in every such election. Indeed, most state-level offices are limited to the freemen residents of statutorily-determined districts or towns. Elections for Senators, Representatives, Probate Judges, Assistant Judges, Sheriffs, and State’s Attorneys are limited to the freemen of their respective “districts” and justices of the peace may only be voted on by the freemen “of their respective towns.” Vt. Const. ch. II, §§ 13, 18, 50, 51, 52. Just like with those offices, if Plaintiffs’ arguments prevail, it would mean that only residents of the statutorily determined school districts who are also United States citizens could vote on matters related to the school budget. It would mean only that noncitizens would not be unconstitutionally empowered to impose their will on freemen throughout the state.

II. The Court’s decision will not implicate equal protection concerns in either direction.

The City invokes “the doctrine of constitutional avoidance” as alternative grounds for affirmance. City-Br.20. It cautions the Court that ruling in favor of Plaintiffs will “raise[] significant equal protection questions” by “taking away the right to vote based on alienage.” City-Br.20. The City’s concern is misplaced. This case has no equal protection implications, regardless of whether this Court reverses or affirms. As the Supreme Court has repeatedly held, and the City briefly acknowledges, *see* City-B.20, “it is clear that a State may deny aliens the right to vote.” *Foley v. Connelie*, 435 U.S. 291, 296 (1978); *see also Sugarman v. Dougall*, 413 U.S. 634, 648-49 (1973) (“[C]itizenship is a permissible criterion for limiting [voting] rights.”).

The City nevertheless argues that although the Equal Protection Clause does not provide non-citizens with an affirmative right to the ballot, a decision in Plaintiffs’ favor may nevertheless violate equal protection by depriving noncitizens of a legal or property interest in voting in school elections. *See* City-Br.20-21 (citing *Romer v. Evans*, 517 U.S. 620 (1996)). According to the City, “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 was extended, its deprivation is subject to review under the [Equal Protection Clause].” City-Br.21. Contrary to the City’s assertions, “the Court” will not “take away a currently existing right to vote in local school elections based

upon alienage” if it holds that the City’s charter must comply with Section 42. City-Br.21 (emphasis added). City charters, too, must comply with the Constitution—the City cannot “extend” rights that the Constitution has reserved. Nor does the City have the power to heighten the Court’s standard of review simply by amending its charter. City-Br.21.

In any event, the Supreme Court recently rejected the reliance-based arguments the City advances, so constitutional avoidance is inapplicable here. *See Republican Nat’l Comm. v. Mi Familia Vota*, 24-A-164 (U.S. Aug. 22, 2024) (reinstating state law excluding noncitizens from voting).

CONCLUSION

This Court should reverse the superior court’s order and remand with instructions to enter judgment for Plaintiffs.

DATED this 18th day of June 2025.

Respectfully submitted,

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Rule 32 Certificate of Compliance

I certify that this brief complies with the length limits in Vermont Rule of Appellate Procedure 32(a)(4) because it contains 2,739 words, excluding those parts that can be excluded, and was prepared using Microsoft Word.

/s/ Brady C. Toensing

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