

In the Supreme Court of The State of Vermont
Docket No. 22-AP-125

CHARLES FERRY,
MAURICE MARTINEAU,
DEBORAH BILLADO,
CHRISTOPHER BRADLEY,
THERESA BURKE,
SUZANNE BUTTERFIELD,
WENDY KALANGES,
LINDA KIRKER,
JAY SHEPARD,
DOUGLAS WESTON,
THE VERMONT REPUBLICAN PARTY, *and*
THE REPUBLICAN NATIONAL COMMITTEE,

Plaintiffs-Appellants,

v.

THE CITY OF MONTPELIER, VERMONT,

Defendant-Appellee.

Appeal From
Superior Court, Washington Unit
Docket No. 21-CV-2963

BRIEF OF APPELLANTS

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ISSUES PRESENTED

- I. Section 42 of the Vermont Constitution states, “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 ... shall be entitled to all the privileges of a voter of this state.” Montpelier has amended its City Charter to permit individuals who are not “citizen[s] of the United States” to vote in municipal elections. Is Montpelier’s charter amendment unconstitutional under Section 42? (pp. 7-17)

- II. The superior court, relying on *State v. Marsh*, N. Chip. 28, 1789 WL 103 (Vt.), and *Woodcock v. Bolster*, 35 Vt. 632 (1863), held that Section 42 categorically does not apply to municipal elections. Did the superior court err when it held that Section 42 categorically does not apply to municipal elections, and that therefore citizenship is never a requirement to vote in municipal elections, even if those elections have extra-municipal implications? (pp. 7-17)

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INTRODUCTION

Section 42 of the Vermont Constitution says that only United States citizens are “entitled to” exercise “the privileges of a voter of this State.” Despite this restriction, Montpelier recently amended its charter to allow noncitizens to vote in municipal elections, claiming Section 42 can never apply to these elections. This claim fails not only as a matter of basic textual interpretation, but also because municipal elections in the modern era are no longer the kinds of purely local affairs that this Court excluded from Section 42’s requirements in the 1800’s. Today, Montpelier elections routinely have significant extra-municipal and statewide impacts. According to this Court, such votes are freeman and freewoman issues, which Section 42 limits to United States citizens. The superior court’s judgment should be reversed, and Montpelier’s charter amendment should be vacated.

STATEMENT OF THE CASE

I. Voting Rights in Vermont.

A. Constitutional and Statutory Background.

Since 1777, the Vermont Constitution has prescribed different qualifications for voting in Vermont. For example, Vermont’s first Constitution entitled “[e]very man of the full age of twenty-one years, having resided in this State for the space of one whole year, next before the election of representatives, and who is of a quiet and peaceable behaviour, and will take the [voter’s] oath (or affirmation) ... to all the privileges of a freeman of this State.” Vermont Constitution of 1777, § VI. A constitutional convention convened again in 1793, shortly after Vermont’s admission to the union. The new constitution contained the same qualifications provision. Vermont Constitution of 1793, § 21. Those qualifications changed in the early 19th century when citizenship was added to the qualifications clause.

In 1827, the Vermont Council of Censors¹ convened a committee “to inquire whether the right of suffrage can legally be exercised in this state by persons not owing allegiance to the government of the United States, and whether it be expedient to recommend any alteration of the constitution or existing statute on that subject.” *Journal of the Council of Censors, at their Sessions at Montpelier and Burlington in June, October, and November 1827* (“Journal”), 5-6

¹ The Council of Censors was an elected body that existed until 1870 to recommend constitutional changes and amendments.

(1828). The committee report recommended that the State amend the qualifications provision—what was then Section 21 of the state constitution and is now Section 42—because the plain text of the section was “objectionable, inasmuch as it admits two different and opposite constructions” about whether noncitizens were eligible to vote. *Id.* at 21. The report explained that the original clause was capable of being interpreted to allow voting by noncitizens, who had “resided in the state one full year.” *Id.* at 21-22. Although “general political principles” and a proper interpretation of the voting provision should have prevented noncitizen voting, the Council concluded “*the manifest impropriety and danger of*” noncitizen voting “as well as its repugnancy to the provisions of the constitution of the United States” necessitated clarification. *Id.* at 21-22 (emphasis added).

The committee observed the “gross impropriety of admitting those to participate in the elective franchise, who owe no allegiance to the country,” *id.* at 46, but acknowledged “different practices ha[d] prevailed in different parts of the state” about whether noncitizens were eligible to vote under the existing constitutional language, *id.* at 22. Accordingly, it recommended the addition of an “explanatory phrase” to section 21 to clarify that:

no person not a native born citizen of this or some one of the United States, shall be entitled to exercise the right of suffrage, unless naturalized agreeably to the acts of Congress.

Id. This citizenship amendment recommended by the committee was approved for a public referendum on November 27, 1827.

Then at the Constitutional Convention of 1828, Vermont amended its constitution to specify that eligible voters must be a United States citizen or already a freeman of Vermont. The amendment read, “No person, who is not already a freeman of this State, shall be entitled to exercise the privilege of a freeman, unless he be a natural-born citizen of this or some one of the United States, or until he shall have been naturalized agreeably to the acts of Congress.” *See* Amend. 1, Articles of Amendment to the Vermont Constitution (1828). The citizenship requirement remains in effect today.

Vermont’s “voter[] qualifications” are now set forth in Chapter II, Section 42 of the Vermont Constitution, which states in relevant part:

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. . . .

The qualifications provision was last amended in 2010 to allow otherwise eligible voters who would be 18 by the date of the general election to vote in a primary election.

B. Early Distinctions Between Voting as a Constitutional Right and Voting as a Property Right.

Historically, local elections governed matters of strictly local concern and impact. Voting in local elections was limited to property owners, while voting in other elections was available to any “freeman.” Throughout the 19th century, only property owners could participate in town meetings “to protect and manage the common assets” of the community. *See* D. Richardson, *Memorandum to Burlington City Council Democratic Caucus re: Non-Citizen Voting Right Amendment 6* (Dec. 3, 2011), bit.ly/3gMGvto. During this era, these distinctions differentiated between local issues with strictly local impact and freeman issues with statewide impact. *See Woodcock v. Bolster*, 35 Vt 632, 639 (1863) (noting differences then existing between local and freeman issues to observe constitution did not restrain legislature’s ability to regulate town or school meetings) (dicta).

These distinctions between local and other elections, however, no longer exist. The town meeting still exists. *See* 17 V.S.A. § 2640; *Town Meeting & Local Elections*, Vt. Secretary of State, bit.ly/3yqGdPk. But today, the qualifications for “any election,” including local elections and town meetings, are the same. 17 V.S.A. §§ 2121(a), 2656. Vermont has universal suffrage for citizens who are 18 years or older in all elections; property ownership and poll taxes are no longer required; and many local elections are procedurally indistinguishable from state elections. Citizens register to vote, be it for statewide or local elections, by way of a single form. 17 V.S.A. §2144a; *see Vermont Application for Addition to the Checklist*, bit.ly/2VvZikl. And the names and addresses of registered voters are kept on a single “checklist.” 17 V.S.A. § 2141 *et seq.*; *id.*, §§ 2656, 2705.

C. Failed Attempts at Noncitizen Voting.

Amending city charters to allow noncitizens to vote has been considered—and rejected—before. City officials rejected them because they

concluded that such changes would likely be unconstitutional. In 2011, counsel to the Burlington City Council Democratic Caucus evaluated the issue and determined that allowing noncitizens to vote in local elections would likely violate the Vermont Constitution and “would be open to challenge in . . . the courts.” Richardson, *supra*, at 6. The “weight of [the City’s] burden” of proof when defending the proposed changes, counsel concluded, “may be unbearable.” Richardson, *supra*, at 6. Counsel opined that the qualifications clause of Section 42, “by its plain language, appears to extend voting rights as a general proposition only to United States citizens.” *Id.*

Burlington revisited the issue of noncitizen voting in 2014, asking the City Attorney to provide a second opinion about the constitutionality of allowing noncitizens to vote in local elections. The Burlington City Attorney reached the same conclusion as the 2011 Democratic Caucus memo. She advised the city council that Section 42 of the Vermont Constitution “essentially foreclosed the extension of the right [to vote] to [people] who do not meet [its] requirements.” E. Blackwood & G. Bergman, *Memorandum on Noncitizen Voting*, 3-4 (Sept. 30, 2014) bit.ly/3zp469B.

Based on the City Attorney’s opinion, Burlington scrapped a referendum on amending the city charter to authorize noncitizen voting; instead, it asked voters this advisory question on the 2015 ballot:

Shall the Vermont Constitution be amended to give residents of Vermont who are not currently citizens of the United States of America the right to vote in municipal and school elections?

Voters rejected the proposal. A. Burbank, *Burlington to be polled on noncitizen voting*, Burlington Free Press (Oct. 21, 2014).

II. Montpelier’s charter amendment allowing noncitizens to vote in violation of the Vermont Constitution.

Nonetheless, in 2018, the Montpelier City Council placed a proposed charter amendment on the ballot to allow noncitizens to vote in Montpelier City elections. The Montpelier voters approved the charter amendment on November 6, 2018, and it went to the General Assembly. On May 21, 2021, the General Assembly approved the amendment. 24 App. V.S.A. § 5.1501(a). The General Assembly’s authorization was vetoed by the Governor on June 1, 2020, but the veto was overridden on June 24, 2021.

As enacted, the Montpelier charter statute now states,

Notwithstanding 17 V.S.A. § 2121(a)(1), any person may register to vote in Montpelier City elections who on election day: is a citizen of the United States or a legal resident of the United States, provided that person otherwise meets the qualifications of 17 V.S.A. chapter 43.

Id. The statute defines “legal resident of the United States” as “any noncitizen who resides in the United States on a permanent or indefinite basis in compliance with federal immigration laws.” *Id.* § 5.1504(1). And it instructs the City Clerk to maintain a separate checklist from that maintained for State and federal elections. *Id.* § 5.1502.

Noncitizens are now able to vote on numerous issues and offices with extra-municipal impact. Montpelier’s mayor, who is also a member of the City Council, is elected by the “qualified voters of Montpelier.” *Id.* § 5.401. The mayor is the “chief executive officer of the City,” whose control includes taking care of the “finances of the City” to ensure they are properly managed. *Id.* § 5.402. Mayoral power also extends to calling “special meetings of the City Council at any time” with proper notice. *Id.* § 5.308.

Montpelier voters also elect a City Council member from each district to serve a term of two years. 24 App. V.S.A. § 5.509. “All powers of the City shall be vested in the City Council.” 24 App. V.S.A. § 5.301(a). The Council performs “general oversight of the affairs and property of the City not committed by law to the care of any particular officer.” *Id.* § 5.301(b). Another power of the City Council is to “adopt, amend, repeal, and enforce any bylaw, regulation, or ordinance which it may deem necessary and proper for carrying into execution the powers granted by this chapter and State law or for the well-being of the City.” 24 App. V.S.A. § 5.701.

The City Council also has “the authority to set the budget submission date” for decision by City voters, 24 App. V.S.A. § 5.902. and the City Council “may add or increase budget programs or amounts and may delete or decrease any programs or amounts, except expenditures required by law.” 24 App. V.S.A. § 5.903.

The Montpelier charter also allows for special meetings to be held if called for by the City Council or 10 percent of the voters. 24 App. V.S.A. §

5.503. The qualifications to vote in a special meeting “shall be the same as the qualifications of voters at annual City meetings.” 24 App. V.S.A. § 5.1107.

Montpelier’s City Clerk is elected by the City’s voters for a term of three years. 24 App. V.S.A. § 5.509. The City Clerk and the Board of Civil Authority conduct all City elections, including elections for statewide and federal offices. 24 App. V.S.A. § 5.505. Both also “manage voter qualification, registration, checklist, and absentee balloting” for all of these elections. 24 App. V.S.A. § 5.506.

Not only do the Montpelier voters decide who holds the City’s controlling officer positions, but they also have the power to authorize “public improvements and the incurring of debt to pay for the same.” 24 App. V.S.A. § 5.502.

III. Proceedings Below.

Plaintiffs filed this suit on September 28, 2021 to challenge Montpelier’s authorization of noncitizen voting. Plaintiffs include Charles Ferry and Maurice Martineau (the “Voter Plaintiffs”), who are United States citizens and registered voters in Montpelier, *see* AI179 at ¶¶3-4, as well as a number of other citizens who are registered voters from throughout the state, *see* AI179-80 at ¶¶5-12. Montpelier’s expansion of the electorate to include noncitizens necessarily dilutes the weight of citizen votes. The Charter Amendment thus decreases the power of Mr. Ferry’s and Mr. Martineau’s votes on issues ranging from city budgets to referendums on municipal spending proposals and indebtedness. The Vermont voters who reside outside of Montpelier are harmed because noncitizen votes will impact the state budget and their towns’ ability to compete for finite state resources. Elected Montpelier officials will also impact the governance of their towns by serving on regional government boards.

Plaintiffs also include the Republican National Committee and the Vermont Republican Party (the “Organizational Plaintiffs”), *see* AI180 at ¶¶13-14. Plaintiffs alleged that Montpelier’s expansion of the electorate to include noncitizens necessarily dilutes the weight of the Voter Plaintiffs’ votes and forces the Organizational Plaintiffs to spend additional time and resources to elect their preferred candidates.

The City moved to dismiss Plaintiffs’ complaint, claiming that Plaintiffs lacked standing and failed to state a claim. *See* AI154-70. The City argued that Section 42 imposes no voter eligibility requirements for municipal elections,

and that the legislature can expand the electorate to any class of persons it wishes. AI160-67. The State of Vermont exercised its statutory right to intervene in the case, AI151-52, and likewise filed a motion to dismiss, *see* AI138-50. The State adopted the City’s argument on the merits but took no position on the City’s claim that Plaintiffs lacked standing. *See* AI138 n.1.

The superior court held a hearing on March 31, 2022, and issued a ruling the next morning. It properly held that Plaintiffs had standing to challenge the charter amendment, rejecting the City’s argument that Plaintiffs’ vote-dilution claims asserted only generalized injuries that were common to the public. The court noted that “the U.S. Supreme Court generally has found an injury for standing purposes when a voter’s vote is diluted, and it has not dismissed such injuries as general grievances simply because the dilution happens to all similarly situated voters.” AI24.

The court ultimately dismissed Plaintiffs’ complaint, however, because it held that Section 42 categorically does not apply to any elections held at the municipal level, regardless of whether those elections have an impact beyond a town’s borders. *See* AI24-30. Plaintiffs timely appealed. AI20.

SUMMARY OF THE ARGUMENT

Section 42 of the Vermont Constitution requires voters to be United States citizens. The City of Montpelier amended its charter to authorize noncitizen voting in municipal elections and referendums anyway. This constitutional violation dilutes the legal votes of individual citizens in Montpelier, impermissibly allows unlawful voters to help decide matters that affect voters outside of the city and across Vermont, and forces political parties to devote additional time and resources to elect their candidates.

Montpelier and the State wrongly argue that Section 42 is agnostic about noncitizen voting in local elections. *See* AI145-50, 165-69. The text of Section 42 unambiguously forecloses noncitizen participation in local elections: citizenship is a requirement for becoming “a voter of this State,” which the provision (in specifying the voter’s oath) defines as any person who votes on “any matter concerning the State of Vermont.” VT. CONST. CH. II, SEC. 42. The City’s only response is to claim that Section 42 has always been understood to mean something other than what the text says. *See* AI145-50. That argument rests on obsolete governing frameworks and ignores this Court’s precedent finding that matters with extra-municipal impact are subject to Section 42’s restrictions against noncitizen voting. Today, local elections are

governed by Section 42, both under its text and because local elections are now “freemen” affairs with statewide importance.

Local elections in the modern era necessarily implicate statewide issues in numerous ways. Municipalities compete for and administer aid that is funded by taxpayers statewide. Municipal policies also affect State transportation and other expenditures, and local officials serve on inter-municipal boards and regulatory authorities that enforce State law and regulatory policy. Thus, the City’s defense that Section 42 cannot apply to local elections fails because the charter amendment implicates numerous electoral decisions that are not purely local.

Because the charter amendment conflicts with Vermont’s constitutional requirements for elections in ways that materially harm voters in Montpelier and across the State, as well as political parties seeking to elect candidates, this Court should hold the amendment is unlawful.

STANDARD OF REVIEW

This Court reviews superior court rulings on motions to dismiss *de novo*. *Baldauf v. Vermont State Treasurer*, 2021 VT 29, ¶ 8 (2021). “A motion for failure to state a claim” under Vermont Rule of Civil Procedure 12(b)(6) “may not be granted unless it is beyond doubt that there exist no facts or circumstances that would entitle the plaintiff to relief.” *Kaplan v. Morgan Stanley & Co.*, 2009 VT 78, ¶ 7 (mem.) (citations and quotations omitted). In applying this standard, courts “assume that all factual allegations pleaded in the complaint are true, all reasonable inferences that may be derived from plaintiffs’ pleadings, and assume that all contravening assertions in defendant’s pleadings are false.” *Maboney v. Tara, LLC*, 2011 VT 3, ¶ 7.

ARGUMENT

I. Section 42 categorically prohibits noncitizens from voting in Vermont.

Section 42 lists several qualifications an individual must satisfy to be entitled to “the privileges of a voter of [Vermont].” VT. CONST. CH. II, SEC. 42. To qualify as “a voter of this state,” an applicant must:

- be eighteen years or older on election day;
- have lived in the State “for the period established by the General Assembly”;
- be “of a quiet and peaceable behavior”; and
- be “a citizen of the United States.”

Id. The provision is expansive and contains no limiting language. It does not say, for example, that citizenship is required to be “a voter of this state for purposes of state elections” or to be “a voter in statewide elections.” Instead, it categorically describes citizenship as a prerequisite for becoming a Vermont voter. Moreover, Section 42 does not specify that qualifications for local elections are established separately by the legislature, even though it leaves the duration of a voter’s residency to the General Assembly’s discretion.

Section 42 also contains a Voter’s Oath that accompanies the citizenship requirement. The language of the Oath confirms Section 42’s broad sweep: the Oath applies “*whenever*” an individual “give[s] [their] vote” regarding “*any matter that concerns* the State of Vermont.” VT. CONST. CH. II, SEC. 42 (emphasis added); *see also* AI110-11. Decades of local practice reflect a common understanding that Section 42’s reference to “any matter” encompasses local elections. *See* AI183-84 at ¶¶27-31. Contrary to the City’s assertions, AI164-65, Section 42’s application to local elections is both well-accepted and widely acknowledged. In fact, other municipalities considered the exact policy adopted by Montpelier but rejected it on the advice of legal counsel, who seriously doubted its constitutionality. *See* AI185-86 at ¶¶32-35. That is why Burlington’s 2015 referendum asked voters whether “the Vermont Constitution [should] *be amended* to give residents of Vermont who are not currently citizens of the United States the right to vote in municipal and school elections.” AI186 at ¶35 (emphasis added).

The lower court’s decision relies upon cases with rationales tied to outmoded concepts – when towns were insular affairs – and ignored on-point Supreme Court decisions that explain when votes in Vermont become

freeman issues, subject to Section 42. It mistakenly held that *State v. Marsh*, N. Chip. 28 (1789), and *Woodcock v. Bolster*, 35 Vt. 632, “resolve this matter in favor of the constitutionality of noncitizen voting in municipal elections.” AI28.

In fact, neither of these cases resolve this matter in Montpelier’s favor. To begin, *Marsh* involved Vermont’s Articles of Confederation-era 1777 constitution (“The Constitution of the Vermont Republic”). The constitutional provision it addressed is unrelated to Section 42, and the clause it interpreted was eliminated when Vermont adopted an entirely new Constitution in 1793, rendering the court’s analysis obsolete.

Woodcock is equally unavailing. That case turned on outmoded distinctions between voting in local elections as an expression of property rights and voting in statewide elections as an expression of citizenship. 35 Vt. At 367; AI185 at ¶¶30-31; *see also Town of Bennington v. Park*, 50 Vt. 178, 200 (1877) (the “right to vote” in town meetings “is grounded in the liability to pay taxes”). That distinction has dissolved over the last century. State and local governments—which in the 1800s could be neatly cleaved in form and function—are now largely intertwined.² *See* AI111-15; AI184-85 at ¶31. These changes and their impact have been widely recognized, including by city attorneys and counsel to the General Assembly. The General Assembly’s legislative counsel, for instance, refused “to say with absolute certainty that the General Assembly may provide qualifications to vote and hold office in local elections,” because “there does not appear to be caselaw adjudicating this question under existing constitutional standards, due to changes in voting rights.” B. Wrask, *Analysis of the General Assembly’s Authority to Control the Qualification to Vote and Hold Office in Local Elections* (Feb. 2, 2019), bit.ly/3ERT28p.

Likewise, two separate analyses conducted by a city attorney and counsel retained by the Burlington City Council Democratic Caucus concluded, *inter alia*, that “things have changed dramatically since *Woodcock*”; that “the distinction drawn by the Court” in that case has “largely disappeared” and could not be used “as a basis for altering local voting practices”; and that the legislature today “does not have free rein to decide

² *Woodcock* is anachronistic in other ways as well. It spoke approvingly of denying suffrage to women and to those who had not paid their taxes, and excluding from elected office citizens who were not freeholders. *Id.* at 637, 639.

who can and cannot vote.” See AI184 at ¶30 & n.2; AI185 at ¶¶32-33 & ns. 4-6; E. Blackwood, *Memorandum on Non-Citizen Voting*, 3-4 (Sept. 30, 2014); D. Richardson, *Memorandum re: Non-Citizen Voting Right Amendment*, 4-6 (Dec. 3, 2011).

The remaining cases relied on by Montpelier rely on the same distinctions present in *Woodcock* and are inapposite for the same reasons. *Rowell v. Horton*, 58 Vt. 1, 7 (1886), held that property tax listers were not required to take the constitutional oath of office because their wholly localized duties—like those of “a surveyor of wood [or] an inspector of leather”—had no bearing on State issues. The Vermont Supreme Court’s decision in *Town of Bennington* likewise turned on the fact that local elections at the time “[were] quite unlike” general elections in both form and substance. 50 Vt. At 200.

Martin v. Fullam, 90 Vt. 163 (1916), and *State v. Foley*, 89 Vt. 193 (Vt. 1916), and are even less helpful to the City. *Martin* analyzed a General Assembly measure that called for a voter referendum and held that a town could not bar a delinquent taxpayer from voting on the referendum because it had statewide implications. *Martin*, 90 Vt. at 169. *Foley* involved a straightforward issue of statutory interpretation. There, the Supreme Court examined a state law authorizing “citizens” to serve as elected school officials and concluded that the legislature’s use of the term “citizen” necessarily included female citizens. *Foley*, 89 Vt. at 199.

At most, *Marsh*, *Woodcock*, and their progeny merely underscore that local elections used to be insular affairs that had no bearing on other communities or the State as a whole. Put differently, they did not involve “any matter” that “concern[ed] the State of Vermont,” or the “freemen” of the state. Vermont has used the term “freemen” to describe matters of statewide interest for which Vermonters had an inherent right as State citizens to vote upon.³ See *Martin*, 90 Vt at 169 (the Constitutional privileges of freemen to vote upon freemen issues “are not to be lost sight of” when determining those rights). Historically, freemen could be prevented from voting in local elections for failing to pay local taxes but could not be prevented from voting on matters of statewide interest, or freeman issues. *Martin*, 90 Vt. at 172; *Slayton v. Town of Randolph*, 108 Vt. 288, 290, 187 A. 383, 384 (1936)

³ In 1994, pursuant to Article of Amendment 52, the Supreme Court when revising the Constitution in gender inclusive language substituted “voter” for “freeman” in Section 42.

Indeed, the holding in *Martin* that a citizen could not be denied the right to vote on referendums of statewide interest for failing to pay local taxes was “because the vote thereon, though taken by towns, was in essence and effect a vote by the freemen of the State.” *Slayton*, 108 Vt. at 290 (citing and summarizing *Martin*). While the *Martin* decision was statutorily-based, the court stated the denial to a freeman of a right to vote on a matter of statewide interest “raises the grave question whether his constitutional rights are not infringed.” *Martin*, 90 Vt. at 169 (citing the precursor to Section 42). In *Slayton*, the court distinguished the challenge of two other tax-delinquent voters who were denied the right to vote on a municipal referendum, because the votes “present[ed] to each town a question of purely local policy.” *Slayton*, 108 Vt. at 290. The court reasoned that where “each town speaks for itself and no one else,” and “the result in one town has no effect at all on any other town or the State at large.” *Id.* (“The questions voted on are of local importance, only”).

A. Municipalities compete for and administer aid that is funded by taxpayers statewide.

Municipalities are the beneficiaries of tens of millions of dollars in funding and grants from state and state-administered federal resources. Applications for these grants are approved by voters at the local level through referendums at town meetings. This non-local money is vital to the functioning of Vermont towns.

The largest share of this state funding goes toward local transportation projects. Today, “[h]ighways and bridges constitute the central responsibility of towns” and expenses for “highway maintenance and repair consume the largest portion of the town budget.” See Paul Gillies, *The State and Local Government*, in VERMONT STATE GOVERNMENT SINCE 1965, 569 (Michael Sherman ed., 1999). The Vermont Agency of Transportation provides municipalities with state-administered revenue and grants, which are funded by state and federal monies. Certain funding is apportioned based on a town’s percentage of class 1, 2, and 3 highways in the state, and selectboard members are responsible for ensuring the money is spent solely on “town highway construction, improvement, and maintenance.” 19 V.S.A. § 306(a)(3). Other funding comes from 18 different types of grants that town officials must apply for as part of a statewide competition for “available transportation money.” Vermont Agency of Transportation, *Show Me the Money! Vermont Agency of Transportation Grants—A guide for Municipalities*, (May 2021) at 1, 2-25, bit.ly/3zuSROD. Funding for these grants is triggered by a local match,

which is usually a small portion of the total cost of the project—only 10 or 20 percent. *Id.* Once approved and awarded, these programs provide significant funding to towns for all aspects of local transportation needs—road repairs and improvement, bridges, bike and pedestrian resources, stormwater mitigation, safety, disaster relief, and development loans.

In Fiscal Year 2022, Montpelier was appropriated more than \$495,000 in state highway aid, which consisted of state and state-administered federal funding. Vermont Agency of Transportation, *FY2022 As Passed*, at 10, 12, 338, bit.ly/3t1tXVM. Statewide, municipalities were appropriated \$80 million dollars for “Town Highway” Programs. Vermont Agency of Transportation, *Agency of Transportation Summary*, at 1, bit.ly/3pZw760. Of the \$80 million dollars, \$59 million came from the state, \$15 million came from the federal government, and \$4.6 million came from local funding. *Id.* Tens of millions of dollars in additional state and state-administered federal aid went to numerous other local transportation projects. *Id.* at 1-5. The list continues with various other State grants to towns.⁴ These grants are then triggered by local votes approving small local contributions and the grants themselves. Once approved and awarded, these grants are administered by locally elected officials or their appointees. Local votes regarding these grants and these officials are of statewide concern and are thus subject to Section 42’s requirements.

B. Vermont’s municipalities are materially subsidized by the State through tax credits, reimbursements for tax exemptions, and other State aid.

When *Woodcock* (1863) and *Rowell* (1886) were decided, towns were responsible for funding nearly every aspect of town life. Today, however, town operations are increasingly subsidized by the State. Of the 70 percent of Vermont homesteaders who receive an income-based reduction in their property taxes, about 30 percent are entitled to additional tax relief called the

⁴ For example, the Vermont Agency of Natural Resources provides millions in state funding and state-administered federal funding for grants and loans to municipalities for stormwater, sewer, solid waste management, emissions reductions, and clean water projects. *Summary of ANR Dep’t of Environmental Conservation Grant and Loan Programs*, bit.ly/3eW4NzA. The Vermont Agency of Commerce and Community Development also awards various grant programs to towns totaling millions of dollars. *See Funding and Incentives*, bit.ly/3ztVRe6.

homeowner rebate. *Introduction to Vermont's Education Finance System*, at 15-16 (January 2019), bit.ly/3HS2sBW. Those with “income[s] under \$47,000 are entitled to” this rebate if their municipal property tax (or their net education tax) exceeds a fixed percentage of their income. *Id.*; 32 V.S.A. §§ 6066, 6067.

In 2020, Vermont gave Montpelier residents \$422,709 in municipal tax credits and reimbursed Montpelier for these tax credits from the General Fund. Vermont Dep’t of Taxes, *Property Valuation Report Annual Report 2020*, at 73, bit.ly/3nit72T. In total, Vermont provided municipal property tax credits of \$16.6 million and reimbursed municipalities for that lost revenue. *Id.* at 66. Additional rebates are paid out to renters based on an estimate of the municipal property tax burden that is passed on to them. In 2019, Montpelier residents received \$164,814 in renter rebates. Vermont Dep’t of Taxes, *Renter Rebates Report*, 7 (Jan. 2021), bit.ly/3Gn7PJ9. In total that year, Vermont renters received more than \$8 million in rebates. *Id.* Together, homeowner and renter rebates funded nearly \$25 million in municipal operations in 2019. *Id.*

C. Locally elected officials frequently serve on boards with extra-municipal impact.

Today, under Vermont law, municipal officials extensively participate in the administration of regional and statewide government. The City’s premise of a clean dichotomy between state and municipal elections therefore fails for this reason as well.

Vermont law facilitates the creation of a wide range of regional governmental entities that involve affairs beyond the municipality. These regional entities are routinely governed by locally elected officials or their appointees. Towns that decide to unite to offer services regionally form an entity called a Union Municipal District. Gillies, *The State and Local Government*, 568. Under State law, a union municipal district is vested with substantial governmental authority, including the power to “[c]ontract with the State of Vermont,” arrange for “law enforcement services to the union district,” and “[e]xercise *any* ... powers which are exercised or are capable of exercise by any of its participating municipalities....” 24 V.S.A. § 4866 (emphasis added).

Current examples of union municipal districts are abundant. They include the Champlain Water District, the CV Fiber Union Municipal District, the Chittenden Solid Waste District, the Chittenden County Regional Dispatch, the Vermont Communications Union District, and Green Mountain Transit. Notably, the CV Fiber Union Municipal District includes

representatives appointed by locally elected officials of the City of Montpelier. *See Governance*, CVFiber (last visited Jun. 28, 2022), bit.ly/3pOp9Rk. It boasts of working to “get fast, dependable, and affordable Internet to every Vermonter within our member towns.” *See* CVFiber (last visited Jun. 28, 2022), cvfiber.net.

Similarly, Green Mountain Transit includes a representative appointed by locally elected officials of Washington County and over a dozen other municipalities. *See* 24 V.S.A. § 801-6; *About*, Green Mountain Transit (last visited Jun. 28, 2022), bit.ly/3eO8dnK. Green Mountain Transit serves the whole “northwest and central Vermont region.” *Id.* The State legislature has authorized Green Mountain Transit to “acquire by the exercise of the power of eminent domain any real property which it may have found necessary for its purposes” and “enter into contracts, leases, or other transactions with any federal agency, the State, any agency of the State, or with any other public body of the State.” *See id.* § 801-4.

Indeed, transportation funds in Vermont now routinely go to various kinds of Union Municipal Districts. *Show Me the Money! Vermont Agency of Transportation Grants—A guide for Municipalities*, Vtrans, 5, 9, 11, 14, 18, 26 (May 2021). Thus, the local officials who sit on these boards are deciding matters that reach beyond their individual municipalities.

Another familiar entity with widespread power is the Regional Planning Commission. Regional Planning Commissions are a creature of State law and receive State funds. *See* 24 V.S.A. §§ 4341, 4341a, 4346. Vermont has eleven Regional Planning Commissions. *See Regional Planning Commissions*, Department of Environmental Conservation (last visited June 16, 2022), bit.ly/3eLyvH8. These commissions play important and powerful roles in determining grant awards, reviewing Act 250 applications, and prioritizing regional projects based on regional interests. *See* 10 V.S.A. § 1085; 24 V.S.A. § 4345a.

Importantly, local officials appoint Regional Planning Commissioners. *See* 24 V.S.A. § 4343(a) (“Representatives to a regional planning commission representing each participating municipality shall be appointed for a term and any vacancy filled by the legislative body of such municipality”). Regional Planning Commissioners are “chosen by select boards and city councils to represent the municipality.” Gillies, *supra*, at 564. Montpelier’s elected officials thus have the authority to appoint Commissioners to the Chittenden County

Regional Planning Commission. *See Commissioners*, Central Vermont Regional Planning Commission (last accessed Dec. 17, 2021), bit.ly/3mzTPUH.

Local officials in Vermont also automatically become eligible to serve on entities with power beyond the jurisdiction that elected them. Consider the Current Use Advisory Board, which the Vermont Legislature has provided must include at least one “representative of local government” and one local “selectboard member.” 32 V.S.A. § 3753(b)(2); *Current Use*, Department of Taxes (last visited June 16, 2022), bit.ly/3F6s8tw. This powerful board affects the property tax value of more than 40 percent of the land in the State. *See id.*; 32 V.S.A. § 3754. Noncitizen voters in Montpelier will directly elect officials who could serve on this State board.

Additionally, local officials directly and automatically exercise State power. Under State law today, every local selectboard member or city council member, upon election, automatically becomes a “control commissioner” under the supervision of the State Board of Liquor and Lottery. 7 V.S.A. § 166. Likewise, every town or county clerk, upon election, becomes a recording officer and clerk of those control commissioners. *Id.* In those capacities, locally elected officials must “administer the rules furnished to them by the [State Board].” *Id.* at § 167(a). Noncitizen voters in Montpelier will now directly elect officials who carry out state law.

In sum, the nature of the modern municipal office often does not stop at a city’s borders. Municipal offices are now inextricably bound up with State and regional power. Because municipal officials exercise State authority and influence regional and State governance, a rigid dichotomy between state and local elections—like that upon which the City’s 1800s precedents were premised—no longer exists. Instead, all Vermont elections affect statewide affairs and therefore must be conducted in accordance with the rules that apply to elections touching state affairs. *See* Vt. Const. Ch. II, § 42 (qualifications, including citizenship, for elections “touching any matter that concerns the State of Vermont”). *Cf. Woodcock*, 35 Vt. at 640 (approving municipal-voting exception only insofar as it would authorize voters to vote so as to affect the “affairs of these minor municipal corporations”). *All* elections in Vermont must be limited to United States citizens under the plain terms of Section 42 and in light of contemporary developments in the relationship between the State and its towns.

The lower court dismissed these significant factual overlaps out of hand, and held that municipal elections categorically cannot implicate Section 42. AI30. As an initial matter, the court held that although “taking the [voter’s] oath is a qualification of a state voter,” the “content of the oath has never determined the qualifications of voters.” AI30. That observation is off point and out of line with how this Court has interpreted Section 42. *See Martin*, 97 A. 442; *Slayton*, 187 A. 383. Plaintiffs never claimed that the Voter’s Oath itself lists the qualifications for voting. Rather, the oath specifies *which types of elections* trigger Section 42’s requirements.

While the trial court recognized that taking the oath is a necessary “qualification” for becoming a “state voter,” AI30, it failed to contend with what it means to be a “state voter” as this Court did in both *Slayton* and *Martin*. The content of the oath itself tells us: someone is a “voter of this state” whenever they “give [their] vote or suffrage[] *touching any matter that concerns the state* of Vermont.” VT. CONST. CH. II, SEC. 42 (emphasis added). Even under the obsolete distinction between voting in state elections as an expression of citizenship and voting in local meetings as an expression of property rights, *see supra* at 3, this Court recognized that Section 42 applies whenever an election has an “effect” on “any other town or the state at large.” *Slayton*, 187 A. at 384.

The lower court further held that the “distinction between state and local” issues “is largely illusory because Vermont is a Dillon’s Rule state,” and as such, “Vermont municipalities exist and function only as ‘specifically authorized by the legislature.’” AI30. Again, this point misunderstands the issue and actually supports Plaintiffs’ arguments. It is undisputed that the state legislature controls localities. *See, e.g., Hinesburg Sand & Gravel Co. v. Town of Hinesburg*, 135 Vt. 484, 486 (1977). The legislature used that control to enact dozens of laws that transformed municipal elections into freemen elections. These laws provide massive subsidies and tax credits that are paid for statewide, and created boards with extra-municipal authority and impact. Furthermore, the will of the legislature (like any other branch) is necessarily subordinate to the demands of the Constitution, and Section 42 prohibits noncitizens from voting on freemen (and freewomen) issues.

At bottom, Section 42 of the Constitution has been long understood to prohibit all forms of noncitizen voting. Because the charter amendment authorizes what the Constitution forbids, the amendment should be vacated.

CONCLUSION

For these reasons, this Court should reverse the superior court's order dismissing Plaintiffs' complaint and hold Montpelier's charter amendment unlawful.

DATED this 11th day of July 2022.

Respectfully submitted,

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Certificate of Compliance

I HEREBY CERTIFY that the Brief of the Appellant, in accordance with V.R.A.P. 32(a)(4)(D), contains fewer than 9,000 words. The brief was written using Microsoft Word software and, according to the software word count total, contains 6,466 words.

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