Vermont Supreme Court
Filed: August 22, 2022
Vermont Supreme Court
Filed: 8/22/2022 12:19 PM

IN THE SUPREME COURT OF THE STATE OF VERMONT
CASE NO. 22-AP-125

Charles Ferry et al.

v.

City of Montpelier

APPEAL FROM SUPERIOR COURT, WASHINGTON UNIT
CIVIL DIVISION
Docket No. 21-CV-02963

Brief for Appellee State of Vermont

STATE OF VERMONT

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ISSUE PRESENTED

Whether Chapter II, Section 42 of the Vermont Constitution applies to municipal elections.

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INTRODUCTION

In 2021, the Legislature amended Montpelier's city charter to permit legal residents who are not U.S. citizens to vote in Montpelier city elections. Plaintiffs, the Republican National Committee, Vermont Republican Party, and others, sued, arguing that the charter change violates Section 42 of the Vermont Constitution.

Section 42, which is titled Qualifications of Freemen and Freewomen, establishes the qualifications of voters in state-level elections—the elections historically referred to as freemen's elections. It requires state-level voters to be U.S. citizens. This Court has already held that Section 42 applies only to state-level elections, and therefore the Legislature is free to allow noncitizens to vote in municipal elections. It has never overruled or limited this holding, and the Constitution has never been amended in a way that affects it. Moreover, the holding that Section 42 applies only to state-level elections finds support in a long line of precedent holding that Chapter II of the Constitution, which Section 42 is in, applies only to state government; it does not apply to municipal government.

Confronted with this wall of adverse precedent, Plaintiffs ask this Court to overrule it. They ask the Court to find that there is now little difference between the State and municipalities because municipalities now exercise state power, so local elections should be carried out subject to the laws applicable to state-level elections. Plaintiffs' proposed rule would appear to require that Vermont's election statutes be rewritten, town meeting traditions ended, local control extinguished, and state-level elections expanded beyond workability. Plaintiffs' proposal should not be adopted in place of Vermont's clear, workable election laws and this Court's just, stable precedents.

STATEMENT OF THE CASE

I. Legal Framework

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.

In 2021, the Legislature amended Montpelier's city charter to allow noncitizen legal residents to vote in Montpelier elections. Specifically, it provides:

> (a) 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.
>
> (b) A noncitizen voter shall not be eligible to vote on any State or federal candidate or question by virtue of registration under this section.

24 App. V.S.A. ch. 5, § 1501. Seventeen V.S.A. § 2121(a) provides generally that "[a]ny person may register to vote in the town of his or her residence in any election held in a political subdivision of this State in which he or she resides who, on election day: (1) is a citizen of the United States." Montpelier's charter change, as "the later-enacted and more-specific" expression of legislative will, operates as an exception to 17 V.S.A. § 2121(a)(1) and is "controlling" with respect to Montpelier. *In re Constr. & Operation of a Meteorological Tower*, 2019 VT 20, ¶ 19, 210 Vt. 27, 210 A.3d 1230.

Plaintiffs argue that Montpelier's charter amendment violates 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." "Freemen," this Court has often noted, denotes the voters in state-level elections. *See Martin v. Fullam*, 90 Vt. 163, 97 A. 442, 444 (1916) (distinguishing between freemen, who may vote in state-level elections, and those who may vote in municipal elections).

Section 42 resides in Chapter II of the Vermont Constitution, "Plan or Frame of Government." Chapter II of the Constitution, this Court has explained, pertains to state government, not municipalities. *Rowell v. Horton*, 58 Vt. 1, 5, 3 A. 906, 907 (1886) ("Chapter 2 of the constitution, with the amendments thereto, relates to the plan or frame of the state government, . . . to the qualification of freemen . . . . It has no reference to the plan and frame of town governments, nor to the qualification of voters therein, nor to the election and qualification of the officers thereof."); *State v. Marsh*, N. Chip. 28, 29, 1789 WL 103, at *1 (Vt. 1789) ("The framers of the constitution were forming a plan for the general government of the State. They do not appear to have had an eye to the internal regulation of lesser corporations.").

Because Chapter II, and Section 42 specifically, do not govern the qualifications of municipal voters and officeholders, this Court has long recognized that the Legislature has the power to establish the qualifications for voters in municipal elections. *See Town of Bennington v. Park*, 50 Vt. 178, 200 (1877) (noting "[t]he Legislature has the undoubted right to prescribe the mode of voting by towns, school districts, and other municipal organizations" and "[t]he qualifications of voters in town meetings are prescribed by the legislature, and they are quite unlike those of freemen in freemen's meetings"). This has meant that over Vermont's history, the qualifications for voters in state elections have often differed from the qualifications for voters in municipal elections—and have differed along axes including sex, land ownership, and citizenship.

For example, women gained equal rights in municipal elections long before the Vermont Constitution was amended to include them in the definition of freemen (and hence to make them eligible to vote in state-level elections). The

Vermont Constitution originally limited the vote in state-level elections to men. *See* 1777 Vt. Const. ch. II, § 6; 1793 Vt. Const. ch. II, § 21. It was not amended to extend the franchise to women until 1924. Art. Amend. 40 (1924). By 1880, however, the Legislature had passed a law providing that "[w]omen shall have the same right to vote as men have in all school district meetings, and in the election of school commissioners in towns and cities, and the same right to hold offices relating to school affairs." 1880 R.L. tit. 10, ch. 30, § 524. Because at the time municipal voters (although not state voters) had to be tax-paying property owners, this meant that women who were tax-paying property owners could vote and run in school-district elections. *Sch. Dist. No. 1 v. Town of Bridport*, 63 Vt. 383, 22 A. 570, 571 (1891). Women also gained equal rights to vote on and hold local offices such as town clerk, treasurer, and school director before they gained the right to vote in state elections. *See State v. Foley*, 89 Vt. 193, 94 A. 841, 843–44 (1915) (upholding election of woman to school-district office).

The limitation of the right to vote to tax-paying landowners was another early difference in the qualifications for municipal- and state-level voters. The right to vote in state-level elections in Vermont was never conditioned on land ownership and taxpaying. For a long time, however, the right to vote in municipal elections was. *See Martin*, 90 Vt. 163, 97 A. at 446 (holding freeman who had not paid his taxes and so was ineligible to vote in town meeting still eligible to vote on statewide referenda).

The Legislature has also previously allowed noncitizens to vote in municipal elections even though the Vermont Constitution prohibited them from voting in state-level elections. Initially, Vermont's Constitution contained no citizenship restriction on voting. *See* 1777 Vt. Const. ch. II, § 6 ("Every 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 behavior, and will take the following oath (or affirmation), shall be entitled to all the privileges of a freeman of this State."); 1793 Vt. Const. ch. II, § 21 (substantively same); *Woodcock v. Bolster*, 35 Vt. 632, 638 (1863) ("Under this provision of the constitution an alien might become a freeman of this state, and entitled to vote for representatives to the legislature and for state officers, without being

naturalized according to the acts of Congress, by residing one year in the state and taking the freeman's oath.").

In 1828, however, the Vermont Constitution was amended to add a citizenship requirement for freemen's elections. The amendment read: "No person, who is not already a freeman of this state, shall be entitled to exercise the privileges 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." Records of the Council of Censors of the State of Vermont 311 (Paul S. Gillies & D. Gregory Sanford eds., 1991). That provision became Section 42. *Id*. at 322-23.

By statute, however, any taxpaying, land-owning man remained entitled to vote in municipal elections. *See Woodcock*, 35 Vt. at 638. This Court subsequently confirmed in *Woodcock* that the Constitution's citizenship requirement for voters in state-level elections did not apply to voters in municipal elections. *Id*. at 639.

II. Procedural History

Plaintiffs filed this action in September of 2021, arguing that Montpelier's charter change violates Section 42 of the Vermont Constitution because it permits noncitizens to vote. AV-177. Montpelier moved to dismiss. It argued, among other things, that the charter change is constitutional. AV-154. The State of Vermont intervened pursuant to Rule 24(d) of the Vermont Rules of Civil Procedure for the limited purpose of defending the constitutionality of the charter change. AV-151. The State filed a memorandum of law in defense of the charter change's constitutionality. AV-138. The trial court granted the City's motion, recognizing that this Court's precedent, including *Woodcock*, forecloses Plaintiffs' claims. AV-23.

SUMMARY OF ARGUMENT

This Court has already held that the Vermont Constitution's restriction of voting in state-level elections to U.S. citizens does not apply to municipal elections. Therefore, it held, the Legislature is free to permit noncitizens to vote in municipal elections. The Court has never overruled or limited that holding. The Constitution has never been amended in any way that

diminishes its applicability. Moreover, this holding fits neatly into a long line of precedent holding that Chapter II of the Vermont Constitution, which Section 42 is in, applies to state government only, not municipal government. Under this Court's precedent, therefore, Montpelier's charter change is constitutional.

Because existing precedent squarely forecloses their claims, Plaintiffs argue that all local elections in Vermont now decide statewide issues, so this precedent should be overruled and local elections should be governed by the laws applicable to state-level elections. Plaintiffs' proposed rule, which would seemingly require that Vermont's election laws be rewritten, local control abolished, and statewide elections vastly expanded, would upend the certainty, stability, and workability of Vermont's elections laws and this Court's precedents and should not be adopted.

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.

Next, 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. As this Court has already ruled, Section 42, like the entirety of Chapter II, does not apply to municipal elections.

This Court's precedent forecloses Plaintiffs' claim. First, this Court ruled in *Woodcock v. Bolster* that the Legislature may permit noncitizen municipal voting because the constitutional restriction of state-level voting to citizens does not apply to municipalities. Next, a long line of precedent holding that Chapter II of the Vermont Constitution, which Section 42 is in, applies only to the State and not to municipal government reinforces *Woodcock*.

A. This Court has already ruled that Section 42 does not apply to municipal elections, so the Legislature is free to allow noncitizens to vote in such elections.

In *Woodcock*, this Court held that the Vermont Constitution allows the Legislature to give noncitizens the right to vote in municipal elections. The plaintiff there had argued that, under the constitutional provision that is now Section 42, only U.S. citizens could hold municipal offices. Specifically, he argued that his property taxes were improper because they were assessed by a municipal official who was not a U.S. citizen. 35 Vt. at 637. This Court recognized that the question was an important one because the right to vote in municipal elections and hold municipal office "depend alike on the answer." *Id*. at 637-38.

At the time, the state statute setting the qualifications to vote in municipal elections contained no citizenship requirement. *Id*. at 639. The Vermont Constitution had also initially included no citizenship requirement for "freemen," or state-level voters. In 1828, thirty-five years before *Woodcock*, the Constitution was amended to add a citizenship requirement for voting in freemen's elections. *Id*. at 638.

The *Woodcock* plaintiff argued that when the Constitution was amended to add a citizenship requirement to vote in freemen's elections, "it worked the same change in the qualification of voters in town and school meetings." *Id*.

This Court disagreed. It held that the constitutional requirements for voting in state-level elections did not apply to municipal elections. It noted

that over the course of the State's history, the qualifications for voting in municipal- and state-level elections had often differed, and "[i]t has not been questioned but that it is actually within the power of the legislature to regulate the right of voting in [town and school] meetings, and the right of holding office, according to their pleasure, and that there is nothing in the constitution restraining its exercise." *Id.* at 639. "But," the Court added, "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." *Id.*

Woodcock forecloses Plaintiffs' claims. This Court has never overruled or limited this holding. Nor has the Constitution been amended in a way that alters the outcome. Section 42 has been amended to expand state-level voting privileges to women, Art. Amend. 40 (1924), eighteen-year-olds, Art. Amend. 47 (1974), and seventeen-year-olds who will be eighteen by the next general election, Art. Amend. 54 (2010). No constitutional amendment, however, has ever expanded its reach to municipal elections.[1]

B. This Court has likewise consistently held that Chapter II of the Vermont Constitution, which Section 42 is part of, does not apply to municipal government.

Woodcock is anchored in an unbroken line of case law holding that Chapter II's restrictions on government apply only to the State, not to municipalities. For example, in *Rowell v. Horton*, this Court held that the oath of office for "every officer, whether judicial, executive, or military, in

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[1] This is not to suggest that there are no constitutional restrictions on municipal-level voting. Constitutional provisions including the U.S. Constitution's Fourteenth, Fifteenth, Nineteenth, and Twenty-Sixth Amendments and the Vermont Constitution's Common Benefits Clause constrain the Legislature's power to determine who may vote in municipal elections. U.S. Const. Amends. 14, 15, 19, 26; Vt. Const. ch. I, art. 7.

authority under this state," laid out in Chapter II (now at Section 56), did not apply to municipal officers. 58 Vt. 1, 4–6, 3 A. 906, 906–08 (1886). It explained that "Chapter 2 of the constitution . . . relates to the plan or frame of the state government" and "has no reference to the plan and frame of town governments, nor to the qualification of voters therein, nor to the election and qualification of the officers thereof." *Id.* at 5, 3 A. at 907. The Court later reaffirmed this ruling, holding that a town constable is not a state officer and so need not take the oath of office required by Chapter II. *Bixby v. Roscoe*, 85 Vt. 105, 81 A. 255, 259 (1911).

Likewise, in *State v. Marsh*, a criminal defendant argued that he was not guilty of assaulting a constable because the constable had been illegitimately elected by voice vote. At the time, Chapter II required that "All elections, whether by the people, or in the General Assembly, shall be by BALLOT, free and voluntary." 1789 WL 103, at *1. The Court held that the ballot requirement applied only to state-level elections and was inapplicable to elections of town officers like constables. It noted that "[t]he framers of the constitution were forming a plan for the general government of the State" and "do not appear to have had an eye to the internal regulation of lesser corporations." *Id. Woodcock* is therefore consistent with a long line of case law holding that Chapter II and its election requirements bear only on state, not municipal, government.

Plaintiffs' argument that Section 42 should be read to apply to municipal elections cannot be squared with these precedents. Appellants' Br. 9. Both *Rowell* and *Marsh* concerned provisions in Chapter II of the Constitution. *Rowell* addressed Chapter II of the modern Vermont Constitution. *Marsh* addressed Chapter II of the 1777 Constitution, which followed the same structure as the modern Constitution, with a first chapter laying out a Declaration of the Rights of the Inhabitants of the State of Vermont and a second chapter laying out the Plan or Frame of Government. *See* Vt. Const.; 1777 Vt. Const. Both the provisions at issue in *Rowell* and *Marsh* read as all-encompassing—they applied to "every officer" and "all elections," respectively. And yet, this Court held, the language "every officer" and "all elections" did not encompass municipal officers and municipal elections. The reason: Chapter II does not apply to municipal government. The voter

requirements in Section 42, like the rest of Chapter II, do not apply to municipal government.

C. The text of Section 42 confirms that it applies only to state-level elections.

Section 42 explicitly governs only the qualifications to vote in state-level elections. It is titled "Qualifications of Freemen and Freewomen." Vt. Const. ch. II. "Freemen," and by extension "freewomen," refers *only* to voters in state-level elections. *See Slayton v. Town of Randolph*, 108 Vt. 288, 187 A. 383, 384 (1936) (distinguishing between those qualified to vote as freemen in state-level elections and those qualified to vote in town meetings); *Martin*, 90 Vt. 163, 97 A. at 444 (likewise distinguishing between qualifications of freemen and municipal-level voters).

Additionally, up until 1994, Section 42 read: "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 *freeman* of this state." (Emphasis added.) In 1994, the Vermont Supreme Court changed references to "freeman" and "freemen" in the Vermont Constitution to gender-neutral "voter" and "voters," except for Section 42's title, to which it added "AND FREEWOMEN." *See* Letter from Chief Justice Frederic W. Allen to Secretary of State Donald M. Hooper 11 (Feb. 14, 1994), https://tinyurl.com/z9zkae95 (certification of draft of Vermont Constitution in gender-inclusive language from Vermont Supreme Court to Vermont Secretary of State, with changes marked). The Court made these changes pursuant to Chapter II, Section 76 of the Vermont Constitution, which authorized it to revise the Constitution in gender-neutral language. The revisions did "not alter the sense, meaning or effect of the sections of the Constitution." Vt. Const. ch. II, § 76. As its meaning remains unchanged, the body of Section 42 therefore still explicitly lays out the qualifications for freemen, or state-level voters.

Section 42's heading and body therefore explicitly apply to voters in state-level elections, or the voters known as freemen and freewomen. *Slayton*, 108

Vt. 288, 187 A. at 384 ("freemen" are those qualified to vote in state-level elections).

Although Plaintiffs argue that Section 42 applies on its face to both state- and municipal-level elections because it contains no limiting language, they reach this result only by way of six errors.

First, Plaintiffs ignore the constitutional text specifying that Section 42 lays out the qualifications for "Freemen and Freewomen." The constitution's text, specifying that Section 42 lays out the qualifications of freemen, or state-level voters, undergirds this Court's decision in *Woodcock* and cuts squarely against Plaintiffs.

Second, Plaintiffs ignore the fact that no matter how all-encompassing the language of Section 42 is, the provisions of Chapter II encompass only state—not municipal—government. *See Rowell*, 58 Vt. at 4–6 (requirement in Chapter II for "every officer" applied only to state officers); *Marsh*, 1789 WL 103, at *1 (requirement in Chapter II for "all elections" applied only to state elections). No matter how plainly Section 42 said it applied to "all elections," it would still only apply to all state-level elections.

Third, Plaintiffs argue that the omission of language limiting Section 42's reach to state-level elections is significant. Appellant's Br. 9. This argument fails both because the Constitution does actually say that Section 42 is the "Qualifications of Freemen and Freewomen," and even if it did not, the Vermont Constitution, as "the shortest . . . constitution in the United States," is not "susceptible to being defined by its omissions." *Chittenden Town Sch. Dist. v. Dep't of Educ.*, 169 Vt. 310, 337, 738 A.2d 539, 558 (1999).

Fourth, Plaintiffs argue that the Legislature does not have the power to set qualifications for municipal elections because "Section 42 does not specify that qualifications for local elections are established separately by the legislature." Appellants' Br. 9. This misunderstands the Constitution. The Constitution is "the boundary power of the legislature." *Anchor Hocking Glass Corp. v. Barber*, 118 Vt. 206, 215, 105 A.2d 271, 277 (1954) (quotation omitted). The Legislature does not need constitutional instruction to set municipal voter qualifications. It may set municipal voter qualifications because the Constitution does not foreclose it from doing so and because the

Constitution vests it with the power to "constitute towns, borroughs, cities and counties" and "all other powers necessary for the Legislature of a free and sovereign State." Vt. Const. ch. II, § 6.

Fifth, Plaintiffs mistakenly rely on the Voter's Oath to interpret the reach of Section 42. Appellants' Br. 9. The Voter's Oath has remained nearly unchanged from the 1777 Constitution to the present. *See* Vt. Const. ch. II, § 42 (voter's oath pledging "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"); 1793 Vt. Const. ch. II, § 21 (same); 1777 Vt. Const. ch. II, § 6 (substantively same). The language Plaintiffs rely on existed when this Court held in *Marsh*, *Rowell*, and *Woodcock* that Chapter II—and the section containing the Voter's Oath specifically—only applies to state government and state-level elections. The Voter's Oath did not change the result in *Marsh*, *Rowell*, or *Woodcock*, and it cannot change the result now.

Sixth, Plaintiffs rely on the opinions of a small handful of lawyers as authority. Appellants' Br. 9-11. Lawyers' opinions are not precedent. *Okemo Mountain, Inc. v. Town of Ludlow*, 171 Vt. 201, 206, 762 A.2d 1219, 1224 (2000) (attorney general opinions "have no binding effect in this Court"); *Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 902 (6th Cir. 2021) ("policy, analogy, and law review articles" are "not precedent").

II. The Court should not overrule its long line of precedent holding Chapter II, and Section 42 specifically, do not apply to municipal government and elections.

Because Plaintiffs' sole claim is under Section 42, the crucial question is whether Section 42 applies to municipal elections. This Court has always held it does not, *Woodcock*, 35 Vt. at 638, and that Chapter II of the Constitution, which Section 42 is in, does not apply to municipal government. *Rowell*, 58 Vt. at 4–6 (requirement in Chapter II for "every officer" applied only to state officers); *Marsh*, 1789 WL 103, at *1 (requirement in Chapter II for "all elections" applied only to state elections).

Plaintiffs' argument that Section 42 governs municipal elections thus depends on this Court overruling this line of precedent. To reach this end,

Plaintiffs argue that there is no longer any difference between state and municipal government in Vermont. They argue that two statutory interpretation cases, *Martin v. Fullam* and *Slayton v. Town of Randolph*, support their argument that the line between state and municipal government is a vague and shifting one. They are wrong. *Martin* and *Slayton* recognized a bright line between state and local elections—a bright line that state statute still embraces. There is no authority in the Court's case law to support Plaintiffs' position. In fact, the Court has recognized that even where a town officer's work has some impact on the State as a whole, the town officer remains a town officer.

Moreover, adopting Plaintiffs' proposed rule—that local elections must now be conducted as statewide elections—would seemingly require rewriting Vermont's elections statutes, ending town meeting traditions, abolishing local control, and ballooning statewide elections far beyond workability. To show that this Court's precedent should be overruled, Plaintiffs would have to show that the challenged precedent "undermined the public welfare, wrought individual injustice, or impeded the administration of justice." *Carrolton*, 2011 VT 131, ¶ 15. They cannot. This Court's precedent is fair and workable. It is Plaintiffs' proposal that is not.

A. This Court has always recognized a bright line between state and municipal government.

Plaintiffs' proposed merging of state and municipal government has no foundation in Vermont law. *Martin* and *Slayton*, which are both statutory interpretation cases, underscore the bright line between state and municipal government. Both involved voters who had not paid their taxes, which disqualified them from voting in municipal elections. The Court held the election in *Martin* was a state-level election because voters in all towns could vote and the Secretary of State administered the election. It held the vote in *Slayton* was a municipal vote because only one town was voting and the town was administering the election. Neither case held that the distinction between state and local elections is a vague one determined by weighing an election's importance. Likewise, in *Rowell*, this Court held that a town official

is a town official—not a state official—even if their actions have statewide repercussions.

In *Martin*, the Legislature had passed an act to prohibit the sale of liquor. It instructed that a referendum be held at every town and city's next annual meeting on whether the act should take effect the next year or in ten years. 90 Vt. 163, 97 A. 442, 443 (1916). The Legislature instructed the Secretary of State to furnish the town clerks with the necessary ballots. After the annual meeting, the town clerks reported the results to the Secretary of State. The Secretary of State tallied and declared the result. *Id*. The Legislature instructed that town clerks were to generally "perform the same duties in respect to the ballots to be used under this act as are imposed upon said officials by" the statutes governing general elections, and "all regulations provided by law for conducting general elections shall be applicable to the votes provided for in this act." *Id*. "General election" was statutorily defined as the election of state and county officers and Congressmembers. The Court observed that "the term 'general election' is uniformly used to designate what before had commonly been known as 'freemen's meeting.'" *Id*. at 445.

The Court accordingly found the vote was a statewide vote—a freemen's vote—because the Legislature made the regulations governing general elections (or "freemen's meetings") apply to the vote and the Secretary of State, not town clerks, tallied and certified the result. *Id*. at 445-46. It concluded that based on those "considerations, it is manifest that the questions upon which is sought the public opinion by referendum were not placed before the town meeting as such" but rather before the freemen. *Id*. at 446. Therefore, the plaintiff, who was qualified to vote as a freeman, was entitled to vote on the referendum.

In contrast, in *Slayton*, the Legislature had decided to permit each town to hold a vote on whether liquor would be sold within its borders. 108 Vt. 288, 187 A. 383, 384 (1936). The Town of Randolph accordingly held such a vote, and the plaintiff wished to participate. Again, the Court looked to the intent of the Legislature. It held "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.'" *Id*. Therefore, because the vote was put to the voters of the Town of Randolph alone, only those qualified to participate in Randolph town elections could vote. *Id*.

Plaintiffs' portrayal of *Martin* and *Slayton* as freewheeling determinations of whether a vote had enough statewide impact to qualify as a freeman's vote ignores the statutory analysis that controlled each case. Instead, Plaintiffs overread dicta in which the Court emphasized the logic of its holding that a statewide vote affecting statewide policy was a statewide vote, and a town vote setting town policy was a town vote. Appellants' Br. 12. The Court engaged in no freewheeling balancing. Its decisions rested on clean-cut dichotomies: who the Legislature specified could vote—the voters of all towns or the voters of one town—and whether the Legislature directed the Secretary of State to administer the vote statewide or allowed towns to administer a vote if they so chose.

Further rebutting Plaintiffs' assertion that the line between state and municipal government is a flexible one determined by balancing, this Court has held that town officers remain town—not state—officers even if their work touches on statewide concerns. It held that while town listers "act under a general law of the state defining their powers and duties, which is designed to secure uniformity of taxation throughout the state, and to equalize, so far as possible, the burden that must be borne to sustain the existence of our political organization" and "the object so sought is state-wide, and the result to be obtained so desirable, it does not make the listers state officers." *Rowell*, 58 Vt. at 7, 3 A. at 908. In short, this Court recognizes what Plaintiffs do not. Even if town officers' work has aims or effects outside their town, like securing uniform statewide taxation, town officers are elected by the town's voters, are "answerable for their official work only to the towns," and are not statewide officers. *Id*.

B. This Court should not overrule its long line of precedent and hold there are no longer local elections in Vermont.

Plaintiffs claim that "all Vermont elections affect statewide affairs and therefore must be conducted in accordance with the rules that apply to elections touching state affairs." Appellants' Br. 16. In other words, Plaintiffs

claim there should be no local elections in Vermont anymore. To show that *Woodcock*, *Marsh*, *Rowell*, and other cases decided based on a bright line between state and municipal government should be overruled, Plaintiffs would have to show that the hundreds of years of precedent recognizing a bright line between state and municipal government—and state and municipal elections—has "undermined the public welfare, wrought individual injustice, or impeded the administration of justice." *Carrolton*, 2011 VT 131, ¶ 15. They cannot. It is Plaintiffs' proposed rule that would make Vermont government unrecognizable, requiring that Vermont's elections statutes be rewritten, town meeting traditions erased, local government effectively ended, and statewide elections bloated beyond workability.

The reason why Plaintiffs' suggested rule would entail so many changes is that unlike Plaintiffs, the Vermont Legislature sees a clear distinction between state and local elections—as, of course, did the framers of Vermont's Constitution. *See Rowell*, 58 Vt. at 4–6, 3 A. at 906–07. The elections statutes define "local election" to mean "any election that deals with the selection of persons to fill public office or the settling of public questions solely within a single municipality." 17 V.S.A. § 2103(18)(A). Plaintiffs' view that local elections set statewide policy therefore contravenes the Legislature's, as the Legislature defines local elections as deciding matters "solely within a single municipality." *Id.*

If this Court adopted Plaintiffs' rule that "all Vermont elections affect statewide affairs and therefore must be conducted in accordance with the rules that apply to elections touching state affairs," Appellants' Br. 16, much of Title 17, which pertains to elections, would have to be rewritten. Chapter 55 of Title 17, "Local Elections," would seemingly have to be repealed, as would the laws governing school board elections, *see* 16 V.S.A. §§ 423, 730. The laws governing statewide elections would instead apply to elections of town moderators, town clerks, town treasurers, selectboard members, listers, town auditors, town constables, town collectors of delinquent taxes, town cemetery commissioners, town road commissioners, town water commissioners, school boards, and surveyors of wood.

Instead of towns being able to hold town meetings where candidates can be nominated from the floor, 17 V.S.A. § 2640(c)(2), towns would apparently have to conduct primary and general elections as for state-level offices. Other procedures unique to municipal voting, like voters being able to instruct the town clerk to cast one ballot for a town officer when there is only one nominee, 17 V.S.A. § 2660(b), would likewise seemingly have to be abolished in favor of following the procedures for state-level elections. Voice votes from the floor and voting at floor meetings by paper ballot would apparently be a thing of the past. 17 V.S.A. § 2481.

The consequences of Plaintiffs' proposed rule would reach beyond ending the hallmarks of town meeting. To take a few examples: Local elections would become partisan. Currently, the default for a local election ballot is that "[n]o political party or other designation shall be listed." 17 V.S.A. § 2681a(c). In state-level elections, party is listed. *See* 17 V.S.A. § 2472(b)(2). Campaign finance laws would have to be rewritten, as there are currently different laws pertaining to state and county versus local elections. *Compare* 17 V.S.A. §§ 2964-67 (state and county election campaign finance laws) *with* 17 V.S.A. § 2968 (local election campaign finance laws). The law governing the provision of absentee ballots, which currently assigns responsibility to the Secretary of State for state-level elections and municipalities for local elections, would seemingly have to be changed. 17 V.S.A. § 2536. The laws for recounts in local elections would have to be changed, as they differ from recounts in state-level elections. *Compare* 17 V.S.A. § 2683 (recounts in local elections) *with* 17 V.S.A. § 2601 (recounts in state-level elections).

Next, every registered Vermont voter might be entitled to vote in every local election if, as Plaintiffs claim, "all Vermont elections affect statewide affairs and therefore must be conducted in accordance with the rules that apply to elections touching state affairs." Appellants' Br. 16. As this Court noted in *Martin*, "to deny a freeman the same right of voting" on a matter of statewide importance "as is given to other freemen of the state for some reason not recognized by the Constitution raises the grave question whether his constitutional rights are not infringed." 90 Vt. 163, 97 A. at 444. Under Plaintiffs' proposed rule, then, every Vermont voter might be constitutionally entitled to vote in every town election—and every town election might have to

be administered statewide.[2] Under such a rule, Burlington residents might be entitled to vote on local questions in Shrewsbury, or for the Weston moderator, Ryegate town clerk, Highgate cemetery commissioner, and so on. They might be entitled to vote for the Montgomery listers or Hardwick surveyor of wood,[3] roles even Plaintiffs concede are "wholly localized." Appellants' Br. 18. Plaintiffs' suggested rule would end local control.

Finally, it is not clear if Plaintiffs are arguing that all of Chapter II applies to municipal governments now because any distinction between the State and municipalities is "obsolete," Appellant's Br. 7, or that Section 42, unlike the rest of Chapter II, should apply to municipalities because Plaintiffs would like all laws applying to statewide voting to apply to municipal voting. It is not clear what constitutional basis there is to treat Section 42 unlike the rest of Chapter II, as this Court has held Chapter II in its entirety "has no reference to the plan and frame of town governments, nor to the qualification of voters therein, nor to the election and qualification of the officers thereof." *Rowell*, 58 Vt. at 5, 3 A. at 907. If Plaintiffs are arguing all of Chapter II now applies to municipalities, that would seemingly extend the Governor's power "to commission all officers" to municipal officers, Vt. Const. ch. II, § 20, and would allow the House of Representatives to impeach municipal officers, Vt. Const. ch. II, § 58. That would further eviscerate local control. It would also fly in the face of this Court's case law, which holds that "[n]o one would claim that the power given to the governor 'to commission all officers' extended to and included town officers, nor that town officers were subject to impeachment by the general assembly." *Rowell*, 58 Vt. at 6, 3 A. at 907.

The results of Plaintiffs' proposed rule are absurd. The reason why they are absurd is that there is still local government in Vermont. Municipalities

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[2] Offices such as state representative and senator of course touch state affairs. They are elected by districts as dictated by the Constitution. Vt. Const. ch. II, §§ 13, 18.

[3] *See* Warning Town of Hardwick Annual Town Meeting (March 1, 2022), https://hardwickvt.gov/wp-content/uploads/2022/01/2022-Warning-Town-of-Hardwick.pdf (reflecting that Hardwick elects a surveyor of wood annually).

may collaborate on projects that serve their respective residents by, for example, forming water districts or regional transit districts. The State may choose to give municipalities funding for education or roads. That the Legislature has authorized municipalities to collaborate to better serve their residents, or that the Legislature chooses to give municipalities funding, does not turn those municipalities into the State. *See* Appellants' Br. 12-16. The Legislature may always retract that authorization, change the funding available, or, indeed, destroy or reform the municipalities altogether. *Montpelier v. Barnett*, 2012 VT 32, ¶ 20, 191 Vt. 441, 49 A.3d 120 ("Municipal corporations owe their origin to, and derive their powers and rights wholly from, the legislature. . . . As it creates, so it may destroy. If it may destroy, it may abridge and control." (quotation omitted)).[4] Adopting Plaintiffs' proposed rule would reshape Vermont elections and government—eviscerating town meeting, ending local control, and making statewide elections unwieldy. Plaintiffs' rule, which would make Vermont government unrecognizable, is unjustified by the community's "circumstances and experiences." *Carrolton*, 2011 VT 131, ¶ 15. In contrast, this Court's long line of precedent recognizing a bright line between the State and municipalities—a bright line employed throughout the Vermont Statutes—is consistent with and justified by the community's circumstances and experiences.

Finally, to the extent that Plaintiffs argue for a fuzzy, flexible rule—that only *some* local offices or questions are of statewide importance and should be governed by the laws for statewide elections—this is as unworkable as the categorical rule. Under this rule, perhaps local officeholders who exert some sufficient amount of influence regionally would have to be elected in statewide contests. There are no judicially manageable standards for

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[4] Because the Legislature has the constitutional authority to create, reshape, and destroy municipalities, "the state is and always has been responsible for determining" municipalities' "level of control and . . . it is within the province of the Legislature, not this Court, to make policy determinations in that regard." *Athens Sch. Dist. v. Vermont State Bd. of Educ.*, 2020 VT 52, ¶ 54, 212 Vt. 455, 237 A.3d 671. If Plaintiffs believe local government should be abolished in Vermont, their remedy is to pursue legislative changes to that end.

determining when that tipping point is reached. Nor is there a statutory framework in place for putting municipal questions to the voters of the entire state. Adopting such a vague, uncertain rule would substantially curtail local control. It would also put the validity of every local election in doubt, as every local election could be challenged on the grounds that it should have been conducted statewide. This Court "will not deviate from policies essential to certainty, stability, and predictability in the law," such as Vermont's certain, stable, and predictable laws around state and municipal elections, "absent plain justification supported by our community's ever-evolving circumstances and experiences." *Id*. Plaintiffs can offer no such justification.

CONCLUSION

For the foregoing reasons, the State of Vermont respectfully requests that this Court affirm.

Dated: August 22, 2022

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CERTIFICATE OF COMPLIANCE

Rachel Smith, 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 7,296 words.

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