

**MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

**Law Court Docket No. CUM-21-31**

PORTLAND REGIONAL CHAMBER OF COMMERCE;  
ALLIANCE FOR ADDICTION AND MENTAL HEALTH SERVICES, MAINE; SLAB, LLC;  
NOSH, LLC; GRITTY McDUFF'S; and  
PLAY IT AGAIN SPORTS,

*Plaintiffs-Appellants*

v.

CITY OF PORTLAND and JON JENNINGS, in his official  
Capacity as City Manager for the City of Portland,

*Defendants-Appellees*

and

CALEB HORTON and MARIO ROBERGE-REYES,  
*Intervenors-Cross-Appellants*

**On Appeal from Cumberland County Superior Court  
Docket No. CV-2020-518**

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**Brief of Amici Curiae Maine AFL-CIO, Maine Center for  
Economic Policy, The Proper Cup, Maine State  
Building & Construction Trades Council, Southern  
Maine Workers' Center, People First Portland, Maine  
Small Business Coalition, and Portland  
Hunt and Alpine Club**

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Benjamin K. Grant, Bar No. 4328  
McTEAGUE HIGBEE  
Four Union Park  
PO Box 5000  
Topsham ME 04086-5000  
(207) 725-5581

*Attorney for Amici Curiae*

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This case presents a matter of statutory interpretation regarding the City of Portland’s minimum wage ordinance, and Question A, a referendum question passed by Portland voters in November of 2020. The Superior Court, in part, ruled that Question A’s “hazard pay” provision does not take effect until January 1, 2022. This Court should reverse that decision and hold that the hazard pay provision became effective on December 6, 2020.

### **STATEMENT OF AMICI CURIAE**

The Maine AFL-CIO is a federation of unions representing thousands of organized Maine workers, as well as advocating for the interests of all working people of the State. Maine AFL-CIO membership within the City of Portland numbers approximately 1,400 workers organized under the banners of more than twenty-five different Unions. In this capacity, the Maine AFL-CIO maintains a significant interest in matters of broad policy related to the minimum wage and the plight of all workers during the COVID-19 pandemic. As such, the Maine AFL-CIO views the controversy presented in this matter as one of utmost importance to the many workers who have risked personal safety to perform essential work during the COVID-19 pandemic.

The Maine Center for Economic Policy (“MECEP”) is a nonpartisan research and policy organization that provides citizens, policymakers, advocates, and media with credible and rigorous economic analysis that advances economic justice and prosperity for all Maine people. During the pandemic, MECEP’s economic analysis has found that frontline workers in Maine tend to be low-income, people of color, and women. As a result, MECEP has advocated for policies, like hazard pay, that increase economic security for these workers and lessen the disparate impacts of the pandemic. MECEP recently stated: “COVID-19 shows how linked all of us are. Strengthening economic security for front line workers will recognize the critical role they play in our economy and leave them better equipped to face downturns in the future.”<sup>1</sup>

The Proper Cup is a coffee shop in Portland, Maine, with four employees. The Proper Cup enacted the \$18 hazard pay wage at its shop in December because it cares for its employees and recognizes that any public-facing job carries a risk of contracting COVID-19. It has an interest in ensuring that the law passed by voters is enforced against businesses who have refused to pay hazard pay. Despite the Proper Cup’s sales being down

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<sup>1</sup> Austin, Sarah. “Coronavirus relief for frontline workers has big implications for gender and race equity.” Maine Center for Economic Policy: Augusta ME, April 14, 2020. Available at: <https://www.mecep.org/blog/coronavirus-relief-for-frontline-workers-has-big-implication-on-gender-and-race-equity/>

more than 40% since last March, it has used a combination of available resources like PPP Loans, EIDL Loans, and grants to subsidize the extra cost of hazard pay. Because employees know that the Proper Cup is willing to do what it takes to compensate them fairly and keep them safe, employees have been driven to take on more responsibilities to make the business self-sustainable.

The Maine State Building & Construction Trades Council consists of 17 affiliated Trade Unions representing over 5,000 working men and women throughout the state of Maine. Chartered in 1964, the Council's goal is to harness the collective power of its affiliates to stand up for Maine's working class by building careers, building community and building Maine. As an organization who represents workers who have been on the job consistently through this pandemic, the Maine State Building and Construction Trades Council knows that while some workers may be deemed "essential, no workers are "expendable."

The Southern Maine Workers' Center ("SMWC") is a member-led organization committed to creating a grassroots, people-powered movement that improves the lives, working conditions, and terms of employment for working-class and poor people in Maine. SMWC represents several hundred members in the Portland area. SMWC has also fielded over 300 calls from

frontline workers to our Worker Support Hotline and Legal Clinic during the COVID-19 pandemic, with the majority from the Portland area. Many of SMWC's members, as well as callers to our hotline, are low wage workers who have experienced risks to personal safety on the job.

People First Portland ("PFP") is a Ballot Question Committee, formed to draft, initiate, and pass five citizen initiated ordinances, including Question A, the "Act To Raise the Minimum Wage," at issue in this case. PFP intended that the Act take effect thirty days after the measure was certified. Over the course of the campaign, PFP engaged hundreds of small donors and volunteers, distributed tens of thousands of pieces of literature through mail and canvassing, texted or called thousands of households, and ultimately, despite being vastly outspent, won an overwhelming victory. In a year of record turnout, 25,251 Portlanders voted to support Question A, totaling over 62% of the electorate. This was the second largest vote total on a municipal ballot in at least two decades. PFP has an interest in the Court recognizing the intent of the campaign, its organizers and volunteers, and the voters of who supported their work.

The Maine Small Business Coalition (MSBC) is a group of over 4,000 small business owners across the State of Maine, including hundreds of small business owners in Portland. MSBC advocates for policies that

promote responsible economic development, environmental stewardship, and investment in community. Because MSBC believes that what is good for workers is good for small businesses, in December 2020, a number of MSBC members chose to begin paying their workers at or above the \$18 an hour hazard pay wage that was overwhelmingly passed by Portland voters. The MSBC has an interest in ensuring that the hazard pay provision is given the meaning that was understood by small businesses and workers alike when it was passed.

The Portland Hunt + Alpine Club is a restaurant and bar in Portland, Maine with nine employees. The Portland Hunt + Alpine Club enacted the \$18 hazard pay wage at its location in December because it cares for its employees and recognizes that any public-facing job carries a risk of contracting COVID-19. It has an interest in ensuring that the law passed by voters is enforced against businesses who have refused to pay hazard pay. Despite the Portland Hunt + Alpine Club's sales being down more than 60% since last March, it has used a combination of available resources such as PPP Loans, EIDL Loans, and grants to subsidize the extra cost of hazard pay. Because employees know that the Portland Hunt + Alpine Club is willing to do what it takes to compensate them fairly and keep them safe, there has been nearly no employee turnover during the pandemic, and employees



have been driven to take on more responsibilities to make the business self-sustainable.

## **STATEMENT OF FACTS**

In 2015, the City of Portland adopted an ordinance creating a minimum wage for workers within the City. The minimum wage established by the new ordinance was \$10.10/hour, which at the time was \$2.60/hour higher than the minimum wage maintained under State law. The City minimum wage ordinance also provided that if the State minimum wage ever exceeded the new City minimum wage, the City minimum wage would increase automatically to match the State minimum wage.

In 2016, the voters of Maine approved a citizen's initiated ballot question gradually increasing the statewide minimum wage. The Maine AFL-CIO substantially supported this campaign, co-chairing the Mainers for Fair Wages steering committee.

Pursuant to the 2016 referendum, the State minimum wage increased to \$9/hour on January 1, 2017 - so the City rate remained higher and was unchanged. On January 1, 2018, the State minimum wage increased to \$10/hour, again leaving the City rate higher. Then on January 1, 2019, the State minimum wage rose to \$11/hour per hour, thus triggering Portland Code §33.7(b)(iv), and elevating the City minimum wage to the same

amount. The State and City minimum wage rates again increased in tandem and automatically on January 1, 2020, and January 1, 2021.

In March of 2020, both the State of Maine and the City of Portland declared states of emergency due to the COVID-19 pandemic. The extent to which day-to-day life was changed at the moment surely needs no explanation to this Court, or to any citizen of Maine. Despite the unprecedented government actions deemed necessary to curtail the spread of the disease, many elements of life were deemed “essential” and allowed to continue – everything from certain health care services to grocery stores to delivery trucks. These essential activities are performed by ordinary workers, despite an extraordinary escalation of personal risk. It is estimated that 50 million workers in the United States qualify as “frontline workers,” and as a group they earn lower wages, have lower levels of formal educational attainment, and are more likely to be people of color than national averages.<sup>2</sup> In Maine, the risk to workers has been borne out by the 3,000+ first reports of injury related to COVID exposure that have been filed with the Maine Workers’ Compensation Board.<sup>3</sup>

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<sup>2</sup> <https://www.brookings.edu/research/to-protect-frontline-workers-during-and-after-covid-19-we-must-define-who-they-are/>

<sup>3</sup> [https://www.maine.gov/wcb/Departments/administration/2021\\_TROIKA\\_FINAL.pdf](https://www.maine.gov/wcb/Departments/administration/2021_TROIKA_FINAL.pdf)

In the summer of 2020, Petitioners collected the requisite number of signatures to initiate a city-wide referendum question designed to further increase the minimum wage and implement a hazard pay rate. The basic elements of the proposal were to (a) gradually increase the minimum wage from the then-current rate of \$12/hour to \$15/hour by 2025, and (b) create a “hazard pay” premium of 1.5x the minimum wage to apply only during declarations of emergency like that declared during the COVID-19 pandemic.<sup>4</sup> The measure was approved by Portland voters on November 3, 2020, certified on November 6, 2020, and by its own terms took effect thirty days later.

This measure joined dozens of other similar enactments around the United States to address the inadequacy of pay for frontline workers during the pandemic. Pennsylvania, Vermont, Louisiana, Maryland, New Hampshire, Virginia and Michigan enacted versions of hazard pay raises.<sup>5</sup>

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<sup>4</sup> The ballot question included the following language: “For instance, if the minimum wage were \$12/hr, and the State of Maine or the City of Portland issued emergency proclamations such as the emergency orders declared during the COVID-19 pandemic, work performed during that emergency would be paid at 1.5 times the minimum wage rate, or \$18/hr.”

<sup>5</sup> <https://www.brookings.edu/research/the-covid-19-hazard-continues-but-the-hazard-pay-does-not-why-americas-frontline-workers-need-a-raise/>

Twenty-two localities have enacted hazard pay increases for grocery and retail workers.<sup>6</sup>

This dispute arose over three issues: (a) the voters' constitutional authority to enact the hazard pay provision by citizen initiative, (b) whether or not the initiative was properly "legislative" in nature<sup>7</sup>, and (c) the effective date of the "hazard pay" provision.

The first two issues are thoroughly and adequately articulated by the Intervenors. Amici offer this brief regarding the third issue – the effective date of the hazard pay increase.

## **ISSUE**

Did the lower Court err in finding that the "hazard pay" provision becomes effective on January 2, 2022, rather than on December 6, 2020, thirty days after the certification of the election results on November 6, 2020?

## **ARGUMENT**

Plaintiffs ask the Court to bless a truly extraordinary proposition: The people of Portland, in the midst of the greatest public health crisis in over 100 years that continues to cause substantial limitations on normal life

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<sup>6</sup> <https://www.brookings.edu/blog/the-avenue/2021/01/27/local-covid-19-hazard-pay-mandates-are-doing-what-congress-and-most-corporations-arent-for-essential-workers/>

<sup>7</sup> Plaintiffs have dropped this issue on appeal.

around the globe, decided to grant hazard pay to low-wage, essential workers during a future, hypothetical crisis – but not during the present one. Plaintiffs would have this Court believe that a careful textual skewering of Portland’s ordinances reveals language so clear and unambiguous that no evidence of voter intent can even be considered. Plaintiffs had to take this position, frankly, because **any** study of the context or public debate of this issue, or application of common sense, shows overwhelmingly that the voters’ intent contradicts Plaintiffs’ preferred interpretation. If this Court does not reverse the decision below on this point, it will ratify a manifestly absurd result.

Fortunately, the Court need only follow its own, long-held guidance to avoid this fate. The Court begins its analysis of the statutory terms by determining whether they are ambiguous. *Dickau v. Vt. Mut. Ins. Co.*, 107 A.3d 621, 627 (Me. 2014). A term is ambiguous only if it is "susceptible to different meanings." *Mainetoday Media, Inc. v. State*, 82 A.3d 104 (Me. 2013). "A plain language interpretation should not be confused with a literal interpretation, however." *Dickau* at 627. The Court will not close its inquiry if a literal interpretation of the statute's language would lead to illogical or absurd results. *Wawenock, LLC v. Dep't of Transp.*, 187 A.3d 609, 612 (Me. 2018) (quotation marks omitted). The Court will instead expand the

scope of the inquiry to the "context of the whole statutory scheme" to divine the Legislature's intent. *State v. Mourino*, 104 A.3d 893, 896 (Me. 2014).

Here, Plaintiffs have taken "literal interpretation" to the extreme. All credit to the Plaintiffs for creativity, but their legal entrepreneurship cannot overcome the instruction from this Court in *Wawenock* and its antecedents. The Court cannot become so cocooned in the intricate dissection of language that it becomes blind to what is obvious to those all around it. Fortunately, the Court anticipated this flavor of argument from opponents of citizen initiated laws when it stated, "We liberally construe grants of initiative and referendum powers so as to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983). There could hardly be a better exemplar of the need for this liberal construction than this matter.

Plaintiffs contend that the hazard pay provision does not take effect until January 1, 2022, because the provision establishing hazard pay refers specifically and exclusively to the minimum wage set in "subsection (b) of this ordinance." From there, Plaintiffs argue that subsection b of the initiative sets a City minimum wage that starts on January 1, 2022, so the hazard pay provision can **only** begin at the same time. However, this reading relies on a nonsensical interpretation of the whole minimum wage ordinance.

Specifically, Plaintiff's argument implies that there is *no* minimum wage in the City of Portland *until* January 1, 2022, and thus the hazard pay provision has nothing to modify until that date. This is flatly incorrect, and can be determined as such by reviewing the entire recent history of the minimum wage issue in Maine statute and in the City ordinances.

The minimum wage in Maine was \$7.50/hour in 2015, when the City decided to create a higher minimum wage for Portland. That ordinance set the City minimum wage at \$10.10/hour and, critically, included §33(b)(iv), which provided for an automatic escalation of the City minimum wage to match any future increase to the State minimum wage in excess of the newly established City wage. In 2016, the people of Maine passed a minimum wage increase by statewide referendum, which implemented a \$9/hour minimum wage starting in 2017 and reached \$11/hour on January 1, 2019 – which then triggered the automatic escalation in the City ordinance. By the time of the November 6, 2020, referendum, the State and City minimum wage were set at the same \$12/hour.

This is critical to the instant matter because it establishes that there was, in fact, a minimum wage in the City of Portland at the time the referendum passed on November 3, 2020 – it just so happened that it was exactly the same as the State minimum wage. The upshot is that the City

minimum wage referendum did not **create** a wage where none existed, rather it re-implemented the escalation of a City wage beyond the State wage starting on January 1, 2022, and it re-implemented the automatic “tethering” of the City minimum wage to the State minimum wage if the State minimum wage rose above the City wage at any time. This last point is critical: the automatic escalation clause applies right away to whatever minimum wage exists in the City. It is not purely prospective. Therefore, the hazard pay provision is not tethered to the higher, future wage, but rather it applied to whatever minimum wage was in place at the time of its passage – i.e. the State minimum wage.

At minimum, the issue of the current minimum wage in Portland, and whether or not “this ordinance” establishes it, is ambiguous. This is important because it cuts off Plaintiffs’ primary defense – namely the avoidance of any examination of legislative intent. The reason for this argument should be plain to the Court: there is no way to examine other evidence and conclude that anyone intended the effective date to be January 1, 2022. Plaintiffs’ only recourse is to dig their defenses here, because no other position protects them from the plainly obvious facts about the referendum.

Finally, Amici end where it began this argument: even if the Court deems the language unambiguous, it still must follow its own precedent and



hold that the result sought by the Plaintiffs is absurd. This Court has held that if the statute is unambiguous, the Court interprets the statute according to its unambiguous language, “unless the result is illogical or absurd.” *MaineToday Media, Inc. v. State*, 82 A.3d 104, 108 (Me. 2013). The Court below faults the lack of hard evidence regarding the intent of the hazard pay initiative, but in doing so it ignores the Court’s command that results should be logical. All the evidence needed in this matter can be observed by opening the front door, reading the newspaper, or clicking on the evening news. We are a year into the most consequential public health disaster in over a century. Every Justice, attorney, Court staff, Plaintiff, Defendant and observer of these proceedings knows the evidence: the hour-by-hour, day-by-day curtailment of our lives, added to the fear of a deadly disease that silently circulates in our midst and, too often, targets our essential workers.

## CONCLUSION

For all the foregoing reasons, Amici urge the Court to reverse the lower Court decision and hold that the disputed provision became effective on December 6, 2020, thirty days after the certification of the election results on November 6, 2020.

Respectfully submitted,

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Benjamin K. Grant, Esq.  
Bar No. 4328  
McTeague Higbee  
PO Box 5000  
Topsham ME 04086-5000  
(207) 725-5581

*Attorney for Amici Curiae*