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

Brief of Cross-Appellants

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Statement of Facts and Procedural History

Caleb Horton and Mario Roberge-Reyes work on site at the Whole Foods store in Portland. Appendix ("A.") 109. Throughout the COVID-19 pandemic, they and their fellow frontline coworkers have bravely and selflessly stepped up to the challenge and made it possible for other residents of Portland to buy food and necessaries. With no additional compensation, Caleb and Mario's jobs suddenly transformed from relatively safe jobs to unusually dangerous ones, requiring them to take on major safety risks every day. A. 100-111, 162, 242-45, 247-49. They not only risk serious sickness and death for themselves, but also for their loved ones. A. 162-63. By stark contrast, those fortunate enough to be able to work safely from home can hunker down while waiting for this once-in-a-century public health disaster to end.

As COVID-19 cases skyrocketed in late 2020 and early 2021, more than 13 employees of the Portland Whole Foods store had tested positive for COVID-19 by mid-January. A. 110-11, 165, 168. But despite working for one of the richest companies in the world, Whole Foods workers have not seen any increase in their pay to compensate them for

the extreme and unforeseen dangers of their jobs. A. 110, 163, 169, 242, 246.

In response to the unfair and disproportionate risks borne by low-wage frontline workers like Caleb and Mario, a group of Portland voters decided that something had to be done to give these workers a raise during the pandemic. A. 114, 267-68, 276-77. A citizen initiative to raise the minimum wage in Portland was already in the works when the pandemic struck, but after seeing the enormous burdens placed on frontline workers, the drafters decided to add a section providing that all workers who work in person at a workplace in Portland must be paid 1.5 times the local minimum wage during a declared state of emergency ("the hazard pay provision"). A. 276-77. The hazard pay provision was designed to immediately address the ongoing pandemic and the resulting economic inequities and public health and safety threats. A. 267-69, 272, 276-77. The simple solution was to increase the then-$12 an hour minimum wage to $18 an hour for essential workers beginning in December 2020 until the declared emergency ended. A. 269.

After the authors of the initiative gathered sufficient signatures, the initiative was placed on the ballot for the November 2020 municipal

election. A. 106, 112, 250. Leading up to the vote on the initiative, supporters and opponents of the hazard pay provision made widely publicized appeals to voters. Businesses and business groups like Appellant Portland Regional Chamber of Commerce (PRCC) invested more than $100,000 in a political action committee to oppose the initiative.[1] They strongly argued that businesses already struggling due to the pandemic would not survive an increase to $18 an hour in December 2020. A. 113-14, 263-264. Supporters mounted a grassroots campaign, pointing to the substantial risks to frontline workers due to the pandemic and the need to take immediate action to provide relief for those workers. A. 115, 277-78, 280.

But there was one thing on which both supporters and opponents agreed: the initiative would go into effect in December 2020 and would raise the minimum wage from $12 an hour to $18 an hour. A. 114-115. Likewise, local newspapers and TV outlets reported extensively on the November 3 ballot questions, consistently describing the hazard pay provision as going into effect in December 2020 and raising the then-

[1] According to publicly available finance reports, We Can't Do $22 raised $127,622 to oppose the initiative. *See Filed Finance Reports*, PortlandMaine.gov, http://www.portlandmaine.gov/1952/Filed-Finance-Reports (last visited March 11, 2021).

$12 an hour minimum wage to $18 an hour during the declared emergency caused by the pandemic. A. 113-14.

When voters received their ballots, they confirmed what supporters, opponents, and the news media had told voters in the weeks leading up to the election: the hazard pay provision would increase a $12 an hour minimum wage to $18 an hour during a declared emergency like the ongoing COVID-19 pandemic. A. 250. Despite the organized and well-funded opposition by PRCC[2] and others to the pay increase for frontline workers, more than 62% of Portland's voters voted in favor of the initiative. A. 112.

After their arguments against the initiative lost at the ballot box, and facing the imminent December 2020 effective date, PRCC did an about-face. Contrary to what it had asserted before, during, and after the election, PRCC filed this action against the City of Portland seeking to invalidate the hazard pay provision and asking the court to rule that the hazard pay provision does not go into effect until January 2022. But the City sided with PRCC and supported its argument that the effective

[2] This brief has adopted the superior court's shorthand collective reference to Appellants as "PRCC."

date of the hazard pay provision should be delayed. A. 115, 206-207, 281. And the City also refused to defend its voters' right to pass the ordinance in the first place. A. 206-207, 210. Therefore, the superior court granted Mr. Horton and Mr. Roberge-Reyes's motion to intervene to defend the hazard pay provision approved by 62% of the voters. A. 7. Mr. Horton and Mr Roberge-Reyes then filed a cross claim against the City seeking immediate enforcement of the hazard pay provision. A. 160-182.

The superior court upheld the hazard pay provision against PRCC's arguments that it violated the Maine Constitution and the Portland City Code. A. 15-25. The court acknowledged that the ballot question presented to voters may have led voters to believe that the hazard pay would go into effect during the existing pandemic emergency. A. 29. But it ultimately concluded it could not consider the ballot question or other evidence of voter intent at all because it felt constrained by this Court's precedent to look only to the unambiguous language of the initiative and to disregard the language that was actually in front of voters when they voted. A. 27-28. As a result, the court adopted PRCC's U-turn theory about the effective date, namely

that the initiative had implicitly but unambiguously "repealed" the City's local minimum wage until January 1, 2022, and that this *sub silentio* repeal meant the hazard pay could not go into effect until that date. A. 26. The court also concluded that its ruling on the effective date of the hazard pay provision "necessarily requires that [Mr. Horton and Mr. Roberge-Reyes's] cross claim be dismissed." A. 30.

PRCC filed a timely appeal of the court's ruling upholding the hazard pay provision, and Horton and Roberge-Reyes filed a timely cross-appeal of the court's ruling on the effective date and their cross claim. A. 11.

Statement of Issue Presented

This Court has ruled that interpretation of a citizen initiative requires examination of the ballot question and favors a result consistent with the ballot question and the voters' intent. The superior court found that the hazard pay ballot question indicated an immediate effective date, which was also the consensus public understanding of the

initiative before the vote. Should the initiative be interpreted consistently with the ballot question and the intent of voters?

Summary of Argument

In the weeks leading up to Portland's November 2020 municipal election, PRCC and its allies invested more than $100,000 in a political action committee (PAC) opposed to the hazard pay provision.[3] The PAC ran a campaign emphasizing that the hazard pay provision would increase the minimum wage too soon and would hurt businesses during the pandemic. A. 114, 263-264. As their press release put it, "[j]umping to a $18 minimum wage in December" would "only make tough times tougher for Portland small businesses and employees." A. 264.

Now, despite what PRCC told Portland voters before, during, and after[4] the election, it insists that its scare campaign about an $18 minimum wage in December was *not* actually the decision put to voters.

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[3] *See Filed Finance Reports*, PortlandMaine.gov, https://www.portlandmaine.gov/1952/Filed-Finance-Reports (last visited March 11, 2021). The PRCC kicked off donations to the PAC with a $15,000 cash donation and a $10,000 loan. *See* Randy Billings, *Business group rallies opposition to Portland referendum proposals*, Portland Press Herald (October 7, 2020), https://www.pressherald.com/2020/10/07/chamber-rallies-opposition-to-portland-referendum-proposals/.

[4] After the election, PRCC put out a press release stating, "Portland will now have the highest minimum wage in the entire country at $18 per hour during a state of emergency – which could take effect as early as December 3, 2020." A. 266.

Indeed, it now claims its own interpretation of the initiative before the election was unreasonable and that the only possible meaning the initiative could have is that the hazard pay provision does not go into effect until January 2022, after the pandemic emergency will likely be over. That new reading of the initiative is contrary to the initiative's plain language, the ballot question put to voters, and the public understanding of the initiative's meaning during the election.

First, the superior court's holding that the hazard pay provision of the initiative unambiguously goes into effect in January 2022 was based entirely on its erroneous conclusion that the plain language of the initiative implicitly but unambiguously "repealed" the local minimum wage altogether until that date. A. 26. To the contrary, the initiative kept the provision of the ordinance setting the local minimum wage by cross-reference to the state minimum wage, under which the 2020 local minimum wage was $12 an hour. *See* Portland City Code § 33-7(b)(iv) (2021); A. 67. [5] So, after the initiative was passed, the minimum wage

[5] The current version of the Portland City Code includes the minimum wage ordinance as amended by the initiative. *See* Portland City Code, Chapter 33, *available from* https://www.portlandmaine.gov/DocumentCenter/View/11371/Chapter-33-Minimum-Wage---Revised-1132020. The version of the City Code at page 55-64 of the appendix is no longer in effect.

under the City's ordinance continued to be $12 an hour, and the hazard pay provision went into effect in December to increase that wage to $18 an hour for essential workers.

Importantly, reading the initiative to keep, rather than repeal, the local minimum wage has the virtue of being consistent with the provision in the initiative stating that the local minimum wage will be "raised" to $13 an hour in 2022, as well as other provisions referencing the minimum wage under the ordinance. By contrast, the lower court's interpretation that there is no minimum wage before 2022 cannot be reconciled with the plain meaning of the word "raised," which only makes sense if there is a minimum wage already in effect.

Second, the superior court fundamentally erred in concluding it was constrained by this Court's rules of statutory interpretation to look only to the language in the four corners of the initiative when interpreting its meaning. That narrow approach contradicts this Court's directives that, when it comes to interpreting voter-approved legislation, "we cannot examine [it] apart from the question placed before the voters when [it] was adopted by referendum" and we should examine "the language of the [initiative] to ascertain whether it may be

fairly construed so as not to produce a result inconsistent with the [ballot] question." *Opinion of the Justices*, 283 A.2d 234, 235 (Me. 1971). That is because, as this Court has repeatedly and emphatically stated, a citizen initiative "presented to the voters by means of a question which is clearly misleading is void and of no effect." *Lockman v. Sec'y of State*, 684 A.2d 415, 419 (Me. 1996) (quoting *Common Cause v. State*, 455 A.2d 1, 14 (Me. 1983)).

The ballot question presented to voters stated that the hazard pay provision would have the effect of raising a $12 an hour minimum wage to $18 an hour during a declared emergency like the COVID-19 pandemic, and it did not tell voters they were voting to repeal the existing local minimum wage. Indeed, the superior court concluded that this ballot question language supported voters believing that the hazard pay would apply immediately during the pandemic. Thus, the only reasonable interpretation of the language of the initiative that is consistent with the ballot question is that it did not repeal the local minimum wage and that the hazard pay provision went into effect

during the pandemic to raise the $12 an hour minimum wage to $18 an hour.

Third, if any doubt remains as to the intent of the voters in passing the initiative after reading the plain language of the initiative and the ballot question, the materials publicly available to voters when they voted put that doubt to rest. Supporters and opponents of the initiative agreed that it would take effect immediately to give frontline workers a raise during the pandemic. And the copious news coverage of the initiative before the election repeatedly and unequivocally stated that it would take effect in December 2020 and raise the wage for essential workers to $18 an hour. Thus, any Portland voter would have gone into the voting booth believing that they were voting on whether to give hazard pay to workers in 2020, not in 2022, and the initiative should be construed to give effect to that "will of the people." *Wawenock LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 16, 187 A.3d 609.

Standard of Review

Interpretation of a municipal ordinance is a question of law that this Court reviews *de novo*. *See Fitanides v. City of Saco*, 2015 ME 32, ¶ 13, 113 A.3d 1088.

In interpreting the language of an ordinance or statute, the Court's "single goal" is to effectuate the legislative intent. *Dickau v. Vermont Mut. Ins. Co.*, 2014 Me 158, ¶ 19, 107 A.3d 621. Here, because the ordinance was enacted by citizen initiative, the Court's goal is to give effect to "the will of the people." *Wawenock LLC*, 2018 ME 83, ¶ 16, and the language of the ordinance "must be 'liberally construed to effectuate the purpose' of the initiative." *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996). Thus, when interpreting the language of a citizen initiative, the Court "cannot examine the [initiative] apart from the question placed before the voters when [it] was adopted by referendum," and must "ascertain whether [the initiative] may be fairly construed so as not to produce a result inconsistent with the [ballot] question." *Opinion of the Justices*, 283 A.2d at 235.

The plain language of an ordinance is "among the many sources [the Court] may consult to determine that legislative intent," but "[a] court can even ignore the literal meaning of phrases if that meaning thwarts the clear legislative objective." *Dickau*, 2014 ME 158, ¶ 20 (quoting *Doe v. Reg'l Sch. Unit 26*, 2014 ME 11, ¶ 15, 86 A.3d 600); *see*

also id. ("It is a well-established canon of statutory construction that a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." (quoting *Bob Jones Univ. v. United States*, 461 U.S. 574, 586 (1983))). The Court "examine[s] the entirety of the [ordinance], giving due weight to design, structure, and purpose as well as to aggregate language." *Dickau*, 2014 Me 158, ¶ 22 (internal quotation marks omitted). To the extent any language of an ordinance is ambiguous, it "must be construed reasonably with regard to both the objects sought to be obtained and to the general structure of the ordinance as a whole." *Adams v. Town of Brunswick*, 2010 ME 7, ¶ 11, 987 A.2d 502.

Argument

I. The superior court erred in concluding that the language of the initiative unambiguously repealed any local minimum wage or hazard pay until January 1, 2022.

Under the Portland City Code, an initiative passed by Portland voters "shall take effect thirty (30) calendar days from the declaration of the official canvass of the return of such election," unless "the question approved by voters" "specifically provide[s] for" an earlier effective date. Portland City Code § 9-42. Nonetheless, the superior court concluded

that neither the minimum wage provisions nor the hazard pay provision of the minimum wage initiative go into effect until January 1, 2022, leaving Portland without any local minimum wage and disregarding the clear will of the voters. A. 26.

The superior court based its ruling on its conclusion that the language of the initiative was unambiguous in repealing any minimum wage until January 2022. A. 26. But the plain language of the initiative— including both the provision setting the local minimum wage by cross-reference to the state minimum wage and the reference to the minimum wage being "raised" in January 2022 to $13 per hour— unambiguously compels the opposite conclusion to that reached by the superior court. Alternatively, even if the initiative is not unambiguous, it is clearly susceptible to the reasonable interpretation that coincides with the meaning widely understood by Portland voters, the proponents and opponents of the initiative, and even PRCC itself. *See, e.g.*, A. 113-115, 263-264, 266.

a. The plain language of the initiative unambiguously provides for hazard pay starting in December 2020.

The hazard pay provision does not specifically provide for an effective date other than the date provided by the City Code, and therefore, by operation of the City Code, it went into effect 30 days from the certification of the election, on December 6, 2020. *See* Portland City Code § 9-42. The superior court did not take issue with that conclusion, but instead focused on the hazard pay provision's calculation of the rate of hazard pay by reference to "the regular minimum wage rate under subsection (b)" of the City's minimum wage ordinance. A. 26; Portland City Code § 33-7(g). The Court looked to subsection (b) of the ordinance, as amended by the initiative, concluding that, because the first enumerated minimum wage increase under that subsection does not take place until January 1, 2022, the initiative implicitly but unambiguously repealed the local minimum wage until then. And without a local minimum wage until January 2022, the hazard pay provision was left with no reference point. A. 26. That interpretation ignores that, even though subsection (b) does not provide for an enumerated minimum wage increase until January 2022, it *does* set a

current minimum wage rate that is the subject of the hazard pay provision.

The superior court's analysis went off track when it erroneously stated that "the Initiative repealed the provisions of the existing minimum wage ordinance that would have taken effect on January 1, 2021." A. 26. But there were no "provisions" of the existing minimum wage ordinance that would have taken effect on January 1, 2021. The last enumerated increase in the minimum wage set by the existing ordinance was in January 2018. A. 59-60. After that, the City's minimum wage was set by subsection (b)(iv) of the ordinance, which provided that the City's minimum wage "shall be raised to equal the State Minimum Wage" if the state minimum wage was higher than the City's minimum wage. A. 60. As a result, because of the cross-reference in the City's minimum wage ordinance to the state minimum wage, which was $12 in November 2020, the City minimum wage was also $12 an hour.

The initiative passed by voters continued to provide in the same subsection, (b)(iv), that the City minimum wage must equal at least the State minimum wage, just as it had before the initiative was enacted.

See A. 67. Although it made changes to the language, it did not implicitly "repeal" subsection (b)(iv). So the City's "regular minimum wage rate under subsection (b)" continues to be set by cross-reference to the state's wage,[6] and the hazard pay provision applies to that wage.

The superior court concluded that subsection (b)(iv) of the initiative does not currently set a local minimum wage because it provides that the City minimum wage will increase only if the state minimum wage increases above "the minimum wage in effect under this ordinance," and, in the Court's view, there was no "minimum wage in effect under this ordinance." A. 26-27. But that circular reading is based on the Court's erroneous conclusion that the initiative implicitly repealed altogether the City's minimum wage, which it did not. It simply continued to set the City's minimum wage by cross-reference to the state statute. Because the initiative did not repeal the provision setting the city minimum by cross-reference to the state minimum

[6] Setting a wage rate by cross-reference to another statute is far from unusual. *See, e.g.*, 26 M.R.S. § 664(3) (defining overtime rate by reference to 29 U.S.C. § 207(e)). The superior court erred by concluding that, by using the cross-reference mechanism instead of enumerating a wage rate, the initiative implicitly repealed the local minimum wage. And this hostile approach to the use of cross-references in legislation is inconsistent with judicial deference to all reasonable forms of legislative drafting.

wage, the "minimum wage in effect under this ordinance" continued to be the same as under the prior version of the ordinance: $12 an hour.[7]

Reading subsection (b) of the initiative to continue to provide for a local minimum wage between December 2020 and January 2022 is also preferrable to the superior court's implicit repeal interpretation because it is consistent with the language used in subsection (b)(i) to describe the January 2022 wage: "the regular minimum wage rate . . . shall be *raised* to $13.00 an hour." Portland City Code § 33-7(b)(i) (emphasis added). If no minimum wage is in effect under the ordinance as the superior court found, then that provision should simply have said that the minimum wage "shall be $13.00" on January 1, 2022. The addition of the word "raised" conveys the ordinary meaning that a minimum wage is already in effect. *See Joyce v. State*, 2008 ME 108, ¶ 11, 951 A.2d 69 ("It is a fundamental rule of statutory interpretation that words in a statute must be given their plain and ordinary meanings." (quoting *In re Adoption of M.A.*, 2007 ME 123, ¶ 14 n. 3, 930 A.2d 1088)).

[7] At the very least, when the state minimum wage increased to $12.15 an hour on January 1, 2021, that was more than any "minimum wage in effect under this ordinance," so the City minimum wage increased to $12.15 an hour, which triggered the hazard pay rate of $18.23 as of January 1, 2021.

And the superior court's reading of the initiative—to repeal the local minimum wage until January 2022—would also render several other provisions of the ordinance ineffective and mere surplusage because they rely on the local minimum wage set by the ordinance, which would no longer exist under the court's reading.[8] *See Dickau*, 2014 ME 158, ¶ 22 ("We reject interpretations that would render some language mere surplusage."); *Adams v. Town of Brunswick*, 2010 ME 7, ¶ 11, 987 A.2d 502 ("The provisions of the Ordinance 'should be construed harmoniously so as not to render ineffective particular provisions.' "); *see also Bates v. Director of Office of Campaign and Political Finance*, 762 N.E.2d 6, 27 (Mass. 2002) ("We will not impute to the voters . . . an 'intention to pass an ineffective statute.'") (internal quotation marks omitted).

[8] For example, the detailed tip credit provisions of the ordinance rely extensively on "the minimum wage rate established by this ordinance" to calculate the tip credit. Portland City Code § 33-7(c). And another section of the ordinance requires employers to provide new employees with a notice of "the Minimum Wage under this ordinance," *id.* § 33-8(d), a notice that the City has continued to provide to employers despite its position that there is no minimum wage under the ordinance. *Compare* City of Portland, *January 2021 Minimum Wage Notice*, https://www.portlandmaine.gov/DocumentCenter/View/29879/2021-Minimum-Wage-Notice, *with* City of Portland, *January 2020 Minimum Wage Notice*, https://www.portlandmaine.gov/DocumentCenter/View/26925/2020-Minimum-Wage-Notice.

b. Alternatively, if the language of the initiative is not unambiguous, it can reasonably be read to provide for a December 2020 effective date.

The language of a statute or ordinance is ambiguous if it is "reasonably susceptible to different interpretations." *Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 14, 157 A.3d 223. Assuming for the sake of argument that the effective date of the initiative is not unambiguous, then it at the very least can be plausibly read to continue the minimum wage rate in effect under the previous ordinance (i.e. the state minimum wage of $12 an hour) and provide for hazard pay based on that wage. As explained above, this interpretation is reasonable because it comports with the decision not to repeal the cross-reference to the state minimum wage in subsection (b)(iv) and the use of the word "raised" in subsection (b)(i), as well as the clear intent of the voters.

Indeed, it would be most curious to say that interpreting the hazard pay provision to go into effect in December 2020 is unreasonable given the overwhelming facts showing that residents of Portland, elected officials, and even PRCC itself interpreted the language of the initiative to mean exactly that when it was voted on. A. 112-115, 263-264, 266; *see also Coultas v. City of Sutherlin*, 871 P.2d 465, 468 (Or.

1994) (explaining that courts should use caution in concluding that language of a citizen-initiated enactment is unambiguous because "[i]t is an unusual case in which the text and context of a[n initiated] constitutional provision reflect the intent of the voters so clearly that no alternative reading of the provision is possible.").

II. The superior court erred by failing to construe the language of the initiative in harmony with the ballot question presented to voters.

Even if the superior court correctly concluded (which it did not) that the plain language of the initiative, standing alone, unambiguously repealed the local minimum wage, it erred when it held that it could not look to the language of the question presented to voters on the ballot to construe the plain language. As this Court has made clear, "[a] referendum 'presented to voters by means of a question which is clearly misleading is void and of no effect.'" *Lockman*, 684 A.2d at 419 (Me. 1996) (quoting *Common Cause*, 455 A.2d at 14). At the same time, "[a]fter the electorate has acted, every reasonable intendment will be indulged in favor of the validity of the vote." *Common Cause*, 455 A.2d at 14. Together, these two rules mean that the court "cannot examine the [initiative] apart from the question placed before the voters when

[it] was adopted by referendum." *Opinion of the Justices*, 283 A.2d at 235; *see also Dickau*, 2014 ME 158, ¶ 20 ("Like all other rules of statutory construction, the plain language rule is no more than an aid in efforts to determine legislative intent." (internal quotation marks and alternations omitted)). Thus, under this Court's precedent, the analysis of voter-approved legislation requires an examination of "the language of the [initiative] to ascertain whether it may be fairly construed so as not to produce a result inconsistent with the [ballot] question." *Opinion of the Justices*, 283 A.2d at 235; *see also Wright's Case*, 156 N.E.3d 161, 113 (Mass. 2020) (declining to adopt an interpretation of an initiative that is "contrary to the [ballot] summary's plain language"). That is consistent with the general rule that "a court should go beyond the literal language of a statute if reliance on that language would defeat the plain purpose of the statute." *Dickau*, 2014 Me 158, ¶ 20 (internal quotation marks omitted); *see also Int'l Feder'n of Prof. & Tech. Eng'rs v. City of San Francisco*, 76 Cal App. 4th 213, 224-25 (Cal. Ct. App.

1999) (stating that a "[l]iteral construction should not prevail if it is contrary to the voters' intent").

The superior court concluded that this Court's ballot question-centered approach in the 1971 *Opinion of the Justices* was consistent with its strict approach to plain language interpretation because, in its view, the language of the initiative in that case was ambiguous. A. 27. But this Court does not first examine the plain language alone and conclude that the statute is ambiguous before looking to the ballot question; it uses the ballot question as an essential part of its construction of the language of the voter-approved provision, searching for an interpretation that "is not in conflict with the language of the question placed before voters." *Id.* at 236. Looking at both the language of the initiative *and* the language of the ballot question and construing them in harmony whenever reasonably possible is necessary to avoid the constitutional due process concerns raised by a misleading ballot question. *See Lockman*, 684 A.2d at 419 (ballot question can be "so misleading as to violate due process rights of voters"); *Desfosses v. City of Saco*, 2015 ME 151, ¶ 8, 128 A.3d 648 (explaining that Court will

interpret ordinance "provisions in a manner that avoids any 'danger of unconstitutionality'").

Here, the ballot question stated that the initiative would "increase the minimum wage in Portland to $15.00 an hour over three years" and that it:

> also requires that employees be paid 1.5 times the minimum wage rate for any work performed during an emergency declared by the state or the municipality if that emergency applies to the employee's geographical workplace. 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, or $18/an hour. This higher rate of pay would not apply to employees being allowed to work from home. A. 250.

The wording of the ballot question directly conflicts with the superior court's interpretation of the initiative in several fundamental ways. First, it states that the local minimum wage will increase to $15.00 an hour over *three years*. That statement conflicts with reading the initiative as repealing the local minimum wage until January 2022, which is only *two* years from the date of the increase to $15 an hour. Second, nowhere does the ballot question mention that the initiative

repeals the existing local minimum wage until January 2022. Indeed, it does not mention January 2022 at all. To the contrary, its repeated references to "the minimum wage" would lead voters to think that the initiative continued to provide for a local minimum wage. Third, the ballot question states that the hazard pay provision would increase a $12 an hour minimum wage to $18 an hour during an emergency like that declared during the COVID-19 pandemic, a scenario that matches exactly what would happen if the hazard pay provision went into effect in December 2020. On the other hand, the illustration in the ballot question would be entirely impossible if the provision could go into effect only in January 2022, when the minimum wage would already be $13 an hour and the pandemic emergency would likely be over.

The superior court found that "the ballot question might have led voters to believe that the emergency wage provision would take effect during the existing state of emergency," but, contrary to this Court's directives, it nonetheless held that it was bound to look only to the literal language of the four corners of the initiative.[9] A. 29. In doing so,

[9] The superior court believed it was constrained by this Court's boilerplate language in *Wawenock, LLC*, 2018 ME 83, ¶ 7, a case involving a citizen-enacted statute, that it would interpret the statute according to its unambiguous language "unless the result is illogical or

it adopted a construction of the initiative that directly contradicted the wording of the ballot question presented to voters, posing serious due process concerns. *See Lockman v. Secretary of State*, 685 A.2d 415 (Me. 1996) (explaining that referendum "presented to voters by means of a question which is clearly misleading is void and of no effect," and ballot question can be "so misleading as to violate due process rights of voters"); *see also Honolulu v. Hawai'i*, 431 P.3d 1228, 1238 & n.17 (Haw. 2018) (invalidating constitutional amendment due to misleading ballot question and explaining that requirement that ballot question not be misleading "inheres in notions of due process").

In short, the language of the ballot question led voters to believe they were voting for hazard pay that would take effect immediately during the pandemic, and, for most voters, the ballot question was likely all that they had in front of them while voting.[10] For that reason,

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absurd." But in that case, the legislative history of the initiative strongly reinforced the Court's interpretation of the plain language, so it did not have to address the due process concerns created by a possibly misleading ballot question as the Court did in the *Opinion of the Justices*. And the Court's approach in the *Opinion of the Justices* is simply a specific application of the "illogical or absurd" exception and the rule that the Court can "ignore the literal meaning of phrases in favor of an interpretation consistent with the legislative intent." *Dickau*, 2014 ME 158, ¶ 20. It would certainly be illogical or absurd for the initiative's language to contradict the ballot question actually presented to voters.

[10] It is undisputed that the full text of the initiative was not provided to voters who voted in person unless they requested it. A. 131.

the language of the initiative should not be interpreted to delay the hazard pay beyond the likely end of the pandemic emergency. *See State v. Brown*, 571 A.2d 816, 818 (Me. 1990) ("[W]e assume that the voters intended to adopt the constitutional amendment on the terms in which it was presented to them."); *Ex Parte Tipton*, 93 S.E. 2d 640, 644 (S.C. 1956) ("It is the ballot . . . with which the voter comes into direct contact. The reasonable assumption is that he reads the question proposed on the ballot, and that his vote is cast upon his consideration of the question so worded.").

III. The superior court erred by interpreting the language of the initiative contrary to the intent of the voters.

As this Court has repeatedly held, the central inquiry in interpreting the language of a citizen initiative is to "ascertain the will of the people." *Wawenock, LLC*, 2018 ME 83, ¶ 16. But the superior court's construction of the statute deviates from the clear will of the voters, adopting an interpretation of the initiative that was not even publicly contemplated until after the initiative was passed.[11] A. 177. In

[11] *See, e.g.*, Randy Billings, *City says it won't enforce emergency wage for Portland workers until 2022*, Portland Press Herald (Nov. 11, 2020), https://www.pressherald.com/2020/11/10/city-says-it-will-not-enforce-emergency-wage-for-portland-workers-until-2022/ (stating that the "hazard pay provision was widely expected to take effect in December"); Randy Billings, *Portland workers: Hazard pay of $18 an hour would be 'incredible'*, Portland Press Herald

such a circumstance, "a [l]iteral construction should not prevail if it is contrary to the voters' intent." *Int'l Feder'n of Prof. & Tech. Eng'rs*, 76 Cal App. 4th at 224-25; *see Dickau*, 2014 ME 158, ¶ 20 ("If necessary, we may ignore the literal meaning of phrases in favor of an interpretation consistent with the legislative intent" (quoting *Me. Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 97 (Me. 1993))).

The Portland voters' intent for the hazard pay provision to go into effect immediately during the pandemic is demonstrated by several sources "available to voters at the time the measure was adopted and that disclose the public's understanding of the measure." *Oregon v. Sagdal*, 343 P.3d 226, 229 (Or. 2015); *see also Alaskans for a Common Language, Inc. v. Kritz*, 170 P.3d 183, 193 (Alaska 2007) ("To the extent possible, we attempt to place ourselves in the position of the voters at the time the initiative was placed on the ballot, and we try to interpret the initiative using the tools available to the citizens of the state at the time.").

(Dec. 6, 2020), https://www.pressherald.com/2020/12/06/portland-workers-hazard-pay-of-18-an-hour-would-be-incredible/ (quoting worker who was surprised by the newly announced reading of the initiative: "It really did seem like everyone thought this was going to happen in December.").

First, statements by supporters and opponents of the initiative leading up to the election reflect their agreement that the hazard pay provision would go into effect in December 2020 and apply to the then-$12 an hour minimum wage. *See Wawenock,* 2018 ME 83, ¶ 18 ("[W]hen we review a ballot initiative, we look to any published arguments made in support or opposition to determine what meaning voters may have attached to the initiative.") (quoting *Alaskans for a Common Language, Inc.*, 170 P.3d at 193); *Commonwealth v. Cruz*, 945 N.E.2d 899, 909 (Mass. 2011) ("We assume that before casting their votes, voters read the arguments 'for' and 'against'").[12]

For example, People First Portland, the group that authored the initiative, described the hazard pay provision in an online petition

[12] In some states, the materials provided to voters for statewide initiatives include short arguments for and against the initiative written by supporters and opponents, and courts consider those materials when determining the intent behind a citizen initiative. *See, e.g.*, *Persky v. Bushey*, 21 Cal. App. 5th 810, 819 (Cal. Ct. App. 2018) (stating that "evidence of the voters' intent may include . . . the ballot arguments for and against the initiative"); *Barbuto v. Advantage Sales & Marketing, LLC*, 78 N.E. 3d 37, 49 (Mass. 2017) (court looks to voter guide, including arguments for and against petition by supporters and opponents); *Roe v. TeleTech Customer Care Mgmt (Colo.) LLC*, 257 P.3d 586, 591 (Wash. 2011) ("the court may look to extrinsic evidence of the voters' intent such as statements in the voters' pamphlet," including statements for and against initiative by supporters and opponents).

In this municipal election, there were no official materials accompanying the ballot, but the positions of the supporters and opponents were made clear through their public statements, which were available to all voters in Portland.

widely circulated to voters as "raising the minimum wage in Portland . . . to $18 an hour for essential employees required to work during the pandemic." A. 115, 280. Likewise, the PAC opposing the initiative issued a press release, which was carried in the local paper, describing how "[j]umping to a $18 minimum wage in December" would be bad for businesses. A. 114, 264. And it posted on its official Facebook page, "If [the initiative] passes it will make tough times tougher with Portland having the highest minimum wage in the country come December." A. 114.

A representative of PRCC, one of the primary backers of the PAC opposing the initiative, emphasized in a video posted by PRCC on its YouTube channel on October 7, 2020 that, "[i]f Question A passes, this proposal would take effect this December, and assuming Maine is still in a state of emergency in December, which we believe to be likely, the Portland minimum wage will go up to $18 per hour."[13] The PRCC's video presentation focused on the economic conditions for businesses

[13] Portland Regional Chamber of Commerce, *Virtual Eggs & Issues: Portland at Risk - What Ballot Referendums Mean for Businesses* (Oct. 7, 2020), https://www.youtube.com/watch?v=fUOV-lQ6CPY.

during the pandemic, concluding that "now is not the time to impose significant new costs on businesses struggling to survive the pandemic."

In short, the supporters and opponents of the initiative agreed on one thing in their messages to voters: the hazard pay wage would apply during the pandemic and would raise the existing minimum wage to $18 an hour. The last thing the courts should do is to interpret a citizen initiative contrary to the public consensus about its meaning when the vote took place.

Second, the hazard pay provision of the initiative and the arguments for and against it were widely discussed in the local press in the weeks leading up to the election. In the absence of an official voter guide, news articles about the initiatives on the ballot are likely where many voters turned to get information about the initiatives. *See Sagdal*, 343 P.3d at 229 (legislative history of citizen initiative includes "contemporaneous news reports and editorials"). These news reports uniformly described the hazard pay provision as going into effect in December 2020 and raising the then-$12 an hour minimum wage to $18 an hour. A. 113-114.

By way of example, the *Portland Press Herald* reported on October 14, 2020 that "[t]he requirement for time and half would take effect in December, meaning the current minimum of $12 an hour would rise to $18 an hour during the state of emergency declared to address the pandemic." A. 113. The *Press Herald* repeated that assertion in articles on October 20, 2020 and October 28, 2020. A. 113. Likewise, on October 12, 2020, the *Bangor Daily News* reported that "[i]nitially [the hazard pay] would be $18 this year and rise to $22.50 in 2024." A. 113. And local CBS affiliate WGME published an article entitled "Here's what voters need to know about Portland's ballot questions," which explained that, under the proposed ordinance's hazard pay provision, "workers could be earning $18 an hour as soon as December." A. 114.

Given this uniform news coverage about the effective date of December 2020, any voter in Portland who sought out information about the ballot initiative from credible sources like their local newspaper, radio station, or television station would have believed the same thing about the timing of the hazard pay provision. Namely, they would have understood that it would give frontline workers a raise during the current pandemic and, for those workers, would raise the

$12 minimum wage to $18 an hour beginning in December 2020. That understanding could only have been reinforced by confirming statements from supporters and opponents and the language of the question presented to them on the ballot.

Thus, this is not a case in which it is a mystery what effective date voters intended when they voted in favor of the initiative. The Court must give effect to that clear intent when interpreting the initiative's meaning, whether or not it finds the initiative's language to be ambiguous. *See Dickau*, 2014 Me 158, ¶ 20 ("Like all other rules of statutory construction, the plain language rule is no more than an aid in our efforts to determine legislative intent." (internal quotation marks omitted)); *League of Women Voters*, 683 A.2d at 773 ("It is fundamental that we look to the purpose for which a law is enacted, and that we avoid a construction which leads to a result clearly not within the contemplation of the lawmaking body." (internal quotation marks omitted)). As this Court has explained, "[s]uch an approach is not judicial legislation; it is seeking and enforcing the true sense of the law notwithstanding its imperfection or generality of expression." *Doe v.*

Reg'l Sch. Unit 26, 2014 ME 11, ¶ 15 (internal quotation marks omitted).

Conclusion

Concluding that the hazard pay provision went into effect in December 2020 is the only reading of the initiative that is consistent with its plain language, the ballot question presented to voters, and the information provided to voters before the election. On the other hand, adopting PRCC's reading would disregard what voters intended and would pose due process concerns about voters being presented with a misleading ballot question. Mr. Horton and Mr. Roberge-Reyes respectfully request that the Court effectuate the will of the people and hold that the hazard pay provision has been in effect since December 6, 2020. Additionally, they request that the Court remand their cross claim for declaratory and injunctive relief for consideration by the superior court in light of that holding.

Respectfully submitted,

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Certificate of Service

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