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

Reply Brief of Cross-Appellants Caleb Horton and Mario Roberge-Reyes

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Shelby H. Leighton, Bar No. 6228
Valerie Z. Wicks, Bar No. 5606
David G. Webbert, Bar No. 7334
JOHNSON, WEBBERT & GARVAN, LLP
160 Capitol Street, Suite 3
Augusta, Maine 04330
(207) 623-5110

Attorneys for Cross-Appellants

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Statement of Issue Presented for Review

This Court has held that the people's constitutional power to enact municipal ordinances by direct initiative must be liberally construed and is coextensive with the discretion granted to municipalities to pass local laws. The Legislature has given municipalities the discretion to enact a local minimum wage and to respond to emergencies. Did the superior court correctly decide that the Constitution does not prohibit Portland voters from enacting, by direct initiative, an emergency local minimum wage?

Summary of Argument

For nearly a century, this Court has defined the constitutional power of municipal voters to pass ordinances by direct initiative as coextensive with the power granted to the municipality under state law. This bright-line rule is easy to understand and easy to administer, thereby facilitating the people's exercise of their democratic rights. Now, Portland Regional Chamber of Commerce (PRCC)[1] asks the Court to upend that settled rule—and the dozens of ordinances passed under

[1] This brief will continue the convention of referring to Appellants collectively as "PRCC" used by the superior court and Cross-Appellants' opening brief.

it—and adopt a new constitutional standard based on whether the subject of an initiative is inherently "municipal." The superior court properly rejected that approach to defining municipal power as both unworkable and contrary to this Court's precedent, and this Court should do the same for several reasons.

First, PRCC turns on its head this Court's directive that the grant of initiative and referendum powers to city voters in Article IV, part 3, § 21 of the Constitution ("Section 21") must be "liberally construed," arguing for a construction of the municipal initiative power that is so narrow as to render it effectively nonexistent. In doing so, it also transgresses the fundamental rule that initiatives enjoy "a heavy presumption of constitutionality." Indeed, PRCC's narrow construction of the Constitution would not only render the hazard pay provision at issue here unconstitutional; it would likely lead to the demise of dozens of citizen-initiated ordinances across the State.

Second, in every single case addressing the validity of a municipal initiative or referendum, this Court has looked to the powers of the municipality under state law. And it has expressly held that "municipal affairs" in Section 21 means the affairs over which the municipality

"has discretion to do as it wishes" under state law. In other words, if the Legislature gives a municipality the discretion to enact a law, this Court has held that Section 21 allows the municipality to grant its voters the right to enact the same law by initiative. The superior court correctly applied that common-sense rule to uphold the hazard pay provision.

PRCC tries to twist this Court's precedent to argue that city voters should be held to a much stricter standard, while city councils and voters in towns should continue to enjoy broad discretion to pass laws on any topic not preempted by state law. But singling out city voters for second-class voting rights is contrary to the purposes of Section 21. And PRCC's standard for city voters—to the extent it has articulated one—is unworkable and vague, thus chilling city voters' First Amendment rights.

PRCC's public policy concerns about ordinances with extraterritorial effects do not support its position that only city voters, and not city councils, should be prevented from legislating on matters that affect people outside the city. Rather, PRCC's parade of horribles applies equally to the powers that have been exercised by city councils

and town voters for decades. Indeed, PRCC's effects-based test would perversely silence voters in Maine's largest cities because their initiatives are more likely to have extraterritorial effects. But direct democracy is not just for voters who live in small towns.

Third, the hazard pay provision is constitutional because the City of Portland has discretion to set an emergency local minimum wage, and therefore it is a "municipal affair" over which voters have initiative power. The hazard pay provision meets even PRCC's vague effects-based standard because it applies only within the limits of Portland to businesses located in Portland, not to the inhabitants of the State "as a whole." And contrary to PRCC's contention, a city minimum wage is not of "statewide concern" any more than a state minimum wage is of national concern.

Fourth, PRCC raises for the first time on appeal the argument that the Portland City Code's requirement that initiatives concern "municipal affairs" creates a separate limit on voters' initiative powers. That argument is waived because it was not raised below. Even if it were not waived, it falls apart due to the same fundamental defect. By using the same phrase—"municipal affairs"—as in the Constitution,

Portland intended to give voters the full scope of their constitutional powers, which this Court has held are coextensive with the City's authority under state law.

Argument

I. The Municipal Initiative Power in Article IV, Part 3, § 21 of the Constitution is "Liberally Construed" to Facilitate the Exercise of Direct Democracy.

Citizen initiatives "enjoy[] a 'heavy presumption' of constitutionality," and "it is the burden of the party challenging the statute to establish that it is unconstitutional," a burden which must be met "beyond a reasonable doubt." *Opinion of the Justices*, 2017 ME 100, ¶59, 162 A.3d 188.[2]

In general, constitutional provisions are "accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." *Opinion of the Justices*, 2017 ME 100, ¶ 58, 162 A.3d 188, 209 (internal

[2] This Court reviews "issues of constitutional interpretation de novo." *Bouchard v. Dep't of Pub. Safety*, 2015 ME 50, ¶8, 114 A.3d 92 (internal quotation marks omitted). Likewise, the Court reviews "the entry of a summary judgment de novo, viewing the evidence and any reasonable inferences that may be drawn therefrom in the light most favorable to the non-prevailing party to determine whether the summary judgment record supports the conclusion that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law." *Drilling & Blasting Rock Specialists, Inc. v. Rheaume*, 2016 ME 131, ¶14, 147 A.3d 824.

quotation marks omitted). And this Court has specifically held that Section 21 is "liberally construe[d] . . . so as to 'facilitate, rather than to handicap the people's exercise of their sovereign power to legislate.' " *Friends of Cong. Sq. Park v. City of Portland*, 2014 ME 63, ¶9, 91 A.3d 601 (internal quotation omitted).[3] Section 21 must be construed liberally because "[t]he broad purpose of the direct initiative is the encouragement of participatory democracy." *Id.* (internal quotation omitted).

Ignoring these fundamental principles and precedents, PRCC interprets Section 21 so narrowly that, not only would Portland's entire minimum wage initiative be unconstitutional, many other initiatives throughout the state would also likely have to be struck down as unconstitutional.[4] It argues that, by granting city councils the right to

[3] Courts use the term "liberal construction" to mean "a broad interpretation of a text in light of the situation presented" and "usually with the object of effectuating the spirit and broad purpose of the text." Black's Law Dictionary at 979 (11th ed. 2019).

[4] As the superior court found, although PRCC "curious[ly]" challenges only the hazard pay provision, its arguments about the limited scope of the initiative power apply with equal force to the rest of the minimum wage initiative. A. 20. Indeed, a group of Portland landlords is already challenging Portland's rent control initiative as not concerning "municipal affairs." *See S. Me. Landlord Ass'n v. City of Portland* (Me. Super. Ct. 2021). Other recent ordinances that likely would be subject to challenge under PRCC's strict "municipal affairs" definition include: Rockland's minimum wage ordinance, Portland's "green new deal" establishing building standards for new real estate development, Portland's ban on facial recognition technology, and South Portland's ban on certain short-term rentals.

confer on their voters initiative powers concerning "municipal affairs," the Constitution actually means only affairs that are *exclusively* municipal. PRCC strictly defines "exclusively municipal" as matters over which the State has no interest whatsoever and that "alone concern the inhabitants of the municipality." Blue Br. 8, 9, 12, 14. But as the superior court pointed out, "[t]he constitutional text does not modify municipal affairs with the word 'exclusively.' " A. 22. Thus, the superior court correctly concluded that, by rewriting Section 21's "municipal affairs" language to add the "exclusively" limitation, PRCC defied this Court's directive to give Section 21 a liberal construction to promote the exercise of direct democracy. *See* A. 22.

PRCC's addition of the word "exclusively" also runs counter to this Court's settled rule of statutory interpretation that courts must "decline to superimpose a limitation which does not appear on the face of the statute." *Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶26, 157 A.3d 223 (internal quotation marks omitted); *see also Opinion of the Justices*, 2015 ME 107, ¶35, 123 A.3d 494 ("[T]he same principles employed in the construction of statutory language hold true in the construction of a constitutional provision"). That general rule is

especially important in light of this Court's specific directive to give the words in Section 21 a broad construction.

II. The Superior Court Correctly Held that the Municipal Direct Initiative Power Extends to any Issue within the Legislative Discretion of the Municipality.

The superior court correctly concluded that "it is logical to interpret the municipal power under Art. 4, Pt. 3, § 21 as coextensive with the broadened legislative authority of the city council except in those areas which the municipal code or charter has excluded." A. 23. This reading of the Constitution is consistent with this Court's precedents, comports with the history, structure, and purpose of Section 21, and avoids a result that would be difficult to administer and chill free speech.

A. This Court's precedents establish that "municipal affairs" in Section 21 means affairs within the municipality's discretion under state law.

In every case addressing the scope of municipal voters' direct initiative powers, this Court has decided the question by equating voters' powers with the municipality's authority to enact local legislation under state law. First, in *Burkett v. Youngs*, 135 Me. 459, 199 A. 619 (1938), this Court held that a proposed referendum was

unconstitutional because, if passed, it would put the city in violation of state laws mandating certain minimum appropriations by city governments. *Id.* at 622.[5] Given that the city did not have authority to repeal the appropriations at issue, its voters did not either. *Id.* at 622.

In reaching that conclusion, this Court rejected the view that municipalities have inherent sovereign powers.[6] Instead, *Burkett* emphasized that cities are "subordinate to the State" and that "[t]he Legislature may, at any time, revise amend, or even repeal any or all of the city charters within the state." 199 A. at 622. Thus, the Court's holding was based not on its idea of what was inherently a "municipal affair," but on the powers granted to the municipality by the state. That reading is reinforced by the Court's reliance on cases from other

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[5] In particular, the Court emphasized that the Maine "Legislature defines, in minimum requirement, what amount of money must be raised and expended" for common schools, and that state tax "is required to be added to the local taxes, assessed and collected locally, and paid to the State." *Burkett*, 199 A. at 621. If the appropriations resolution passed by the City Council were repealed, the City would be in violation of those requirements.

[6] As amici League of Women Voters and the ACLU of Maine cogently explain, PRCC's proposed test for "municipal affairs" resembles a view of municipal authority, known as *imperium in imperio*, that categorizes some matters as inherently municipal and beyond statewide control. ACLU Br. at 23. An extreme version of that theory is reflected in the brief of amicus curiae Maine State Chamber of Commerce, which likens the powers of a municipality to the "sovereignty" of a nation or state. MSCC Br. at 4-5. That approach was squarely rejected in *Burkett*, which quoted case law criticizing the *imperium* approach, stating that "[a]s well might we speak of two centers in a circle as two sovereign powers in a state." *Burkett*, 199 A. at 622 (quoting *State v. Thompson*, 149 Wis. 488, 137 N.W. 20, 26 (1913)). Instead, the Court adopted a "grant" approach to municipal power under which municipal powers are not inherent but are delegated by state law. ACLU Br. 24-25.

jurisdictions that equate "municipal affairs" with the scope of a municipality's powers under state law. *See, e.g., State v. White*, 136 P. 110, 111 (Nev. 1913) ("If the ordinance would be void if adopted by the city council, the infirmity would not be cured by its adoption by the vote of the electors of the city"); *Fragley v. Phalen*, 58 P. 923, 925 (Cal. 1899) (stating that "[a] municipal affair pertains to something which may be done by the municipality").

The second time this Court examined the scope of municipal voters' direct initiative power was in *Farris ex rel. Anderson v. Colley*, 145 Me. 95, 73 A.2d 37 (1950). There, it invalidated a citizen initiative setting minimum wages for patrolmen in Portland's police force. *Id.* This Court explained that the threshold question was "whether *under the existing charter the city has . . . power*" to set the wages and hours for patrolmen, or whether patrolmen's wages must be set by the Legislature. *Id.* at 40. After concluding that the charter did not authorize the City Council to set patrolmen's wages, this Court held that it was "not a proper matter for submission to voters." *Id.* Once again, this Court did not analyze whether the initiative was inherently municipal, but instead looked to the city's discretion to legislate,

invalidating the initiative because, like the referendum in *Burkett*, it would have exceeded the scope of the city's powers.

Next, in *City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160, 164 (Me. 1988), this Court was asked to decide whether Portland voters had the authority to pass an initiative that applied retroactively. As in *Farris* and *Burkett*, this Court looked to whether the City would have the discretion to enact such an ordinance. Concluding that no state law "expressly or impliedly prohibit[s] municipalities from applying ordinances retroactively," it held that municipal voters likewise could enact a retroactive ordinance. *Id.* at 164. On remand, the superior court explicitly rejected the argument that the substance of the initiative violated Section 21, concluding that the language in *Burkett* relied on by the PRCC here was "dictum" and that *Burkett* "is best confined to its facts" because it "precedes Maine's constitutional adoption of Home Rule in Article VIII, Part 11, Section 1, which greatly broadened the concept of municipal affairs." *City of Portland v. Fisherman's Wharf Assocs. II*, No. CV-87-555, 1991 Me. Super. LEXIS 15, at *4-5 (Me. Super. 1991).

This Court made clear its coextensive approach to defining "municipal affairs" in *Albert v. Town of Fairfield*, 597 A.2d 1353, 1355 (Me. 1991), holding that an initiative or referendum concerns "municipal affairs" under Section 21 if its subject is an area "in which the municipality has been given the discretion to do as it wishes" by the Legislature. *Albert* involved a referendum repealing the town's acceptance of a private road as a town way. *Id.* at 1354. Finding that a state statute delegated discretion to municipalities to accept dedications of private property, the Court held that, "[b]ecause the legislature has committed the decision to accept a town way to the legislative discretion of a municipality, such an action is exclusively a municipal affair,[7] and the right of referendum exists pursuant to the Maine Constitution." *Id.* at 1355.

The coextensive standard from *Albert* was reiterated most recently in *Friends of Congress Square Park*, which again stated that,

[7] PRCC puts the weight of its argument on the Court's use of the word "exclusively" in this sentence, concluding that only "exclusively municipal" matters are subject to the direct initiative power. But the Court did not use "exclusively" to modify "municipal" in the manner PRCC asserts, to mean that the subject of the initiative pertains only to the inhabitants of the municipality. Instead, the Court meant that the decision at issue was "exclusively" within the town's discretion under state law, rather than being a decision over which the state had veto power or joint control like that in *Burkett*. Indeed, it would have been absurd for the Court to say that the decision to create a public road would affect only the inhabitants of the municipality, when it would affect anyone who travels on the road.

"where a 'municipality has been given the discretion to do as it wishes . . . the action of the municipality's legislative body is subject to the referendum procedure.' " 2014 ME 63, ¶12.[8]

Thus, this Court has *never* applied a static definition of "municipal affairs" as PRCC proposes it should. To the contrary, it has consistently analyzed municipal voters' initiative power as coextensive with the municipality's discretion under state law, a standard that it clearly articulated in *Albert*. The superior court correctly applied that standard to find that the hazard pay provision here is constitutional.

B. Municipal voters' direct initiative powers have expanded in tandem with municipalities' legislative powers under state law.

Ignoring this Court's consistent history of defining "municipal affairs" in Section 21 as coextensive with municipal legislative power under state law, PRCC relies on dicta from the 1938 *Burkett* decision to assert a narrow and inflexible definition of "municipal affairs." *Burkett*

[8] PRCC makes much of the reference in *Friends of Congress Square Park* to this statement as "dicta." But *Friends* was about whether an initiative was "legislative" or "administrative," while *Albert* was about whether an initiative concerned "municipal affairs," with only a passing reference to the "legislative" nature of an initiative also turning on the town's discretion under state law. Thus, this Court correctly identified as dicta *Albert*'s reference to the "legislative" standard, but *Albert*'s definition of "municipal affairs" was integral to its holding and was not dicta.

quoted a contemporary treatise defining "local matters" as "those public affairs which alone concern the inhabitants of a locality as an organized community apart from the people of the state at large, as supplying purely municipal needs and conveniences and the enforcement of bylaws and ordinances of a strict local character limited to the interests of the city residents." 199 A. at 622 (quoting McQuillin, Municipal Corporations, § 196 (2d ed. 1928)). But rather than prescribing a controlling definition of "municipal affairs" in Section 21, this quote simply described one view of the limited powers of local governments at that time.

When *Burkett* was decided, city charters were conferred by the Legislature and could only be amended by the Legislature, not the city or its voters. *See* 199 A. at 622. To pass ordinances not specifically authorized by their charter, cities needed special permission from the Legislature. *Id.* The State retained any power not specifically granted to a municipality in its charter or through special legislation. *See Phillips Vill. Corp. v. Phillips Water Co.*, 104 Me. 103, 71 A. 474 (1908) (stating that municipality "had only such powers as were conferred by statute expressly or by necessary implication"). Thus, *Burkett* was decided

when the scope of municipal legislative power was at its lowest ebb, and the statements in the opinion reflect the limitations on what was then a "local matter."

As the superior court here recognized, however, since *Burkett* was decided more than 80 years ago, "municipalities have been granted vastly more authority." A. 21. In 1969, the home rule amendment was added to the Constitution, guaranteeing for the first time that "[t]he inhabitants" of municipalities could amend their charters without seeking approval from the Legislature. Me. Const. art. VIII, pt. 2, § 1; *see Fisherman's Wharf Assocs. II*, 1991 Me. Super. LEXIS 15, at *4-5 (stating that constitutional home rule "greatly broadened the concept of municipal affairs"). And the following year, the Legislature passed the "Home Rule Enabling Act," allowing municipalities to exercise "any power or function, which the Legislature has power to confer upon it, which is not expressly denied or denied by clear implication." 30 M.R.S. § 1917 (West 1970).

Most recently, in 1987, the Legislature expanded municipal power even further by creating a rebuttable presumption "that any ordinance enacted under [the Home Rule Enabling Act] is a valid exercise of a

municipality's home rule authority" and providing that implicit preemption applies only when "the municipal ordinance in question would frustrate the purpose of any state law." 30-A M.R.S. § 3001. Thus, because "municipal affairs" in Section 21 is coextensive with the legislative discretion a municipality has under state law, and because the discretion granted to municipalities by the Legislature has increased dramatically since *Burkett* was decided, the Court's reference to a limited definition of a "local matter" is no longer accurate or relevant.

PRCC erroneously asserts that the Court "reaffirmed" *Burkett*'s "test" in *Albert*, which was decided after the powers of municipalities were significantly expanded. Although *Albert* quotes in dicta some of the language from *Burkett* about what constitutes a matter of "statewide concern," it does *not* carry forward *Burkett*'s outdated definition of "a local matter" that PRCC attempts to resurrect as the controlling definition of "municipal affairs" under Section 21. Blue Br. 30. And the holding of *Albert* is clear: the controlling standard is whether the municipality has "the discretion to do as it wishes" on the matter the voters seek to address by initiative; if it does, it is a

"municipal affair" under Section 21 that is properly subject to direct initiative. 597 A.2d at 1355.

PRCC also wrongly contends that the superior court's decision improperly allows the Legislature to amend Section 21 by delegating more power to voters. Blue Br. 21-22. Because municipalities have only the powers granted under state law, this Court appropriately looks to municipal legislative power as granted by the Legislature to give the phrase "municipal affairs" in Section 21 meaning. It is undisputed that the Legislature has the power to delegate more or less legislative discretion to municipalities. Indeed, "a state is free to delegate any power it possesses to its political subdivisions." *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993). Thus, Section 21 allows city councils to delegate more authority to their voters as the Legislature delegates more legislative authority to the city itself.[9]

[9] Indeed, divorcing the definition of "municipal affairs" from the home rule powers delegated by state law would lead to absurd results. Imagine, for example, if the Legislature were to limit a city's authority to enact ordinances on a topic that meets PRCC's definition of "exclusively municipal." Under PRCC's reading, the Legislature would be powerless to stop voters from continuing to pass initiatives and referenda on that topic even though it had decided to take that authority away from the municipality. Instead, because the definition of "municipal affairs" in Section 21 is coextensive with the discretion delegated to the municipality by the Legislature, voters' authority to pass laws is extinguished as soon as the municipality's authority is extinguished under state law.

Contrary to PRCC's contention, the superior court's coextensive definition of "municipal affairs" is consistent with this Court's holding that Section 21 sets the "maximum scope of the initiative and referendum" power. *LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 80 A.2d 407, 283 (1951). Section 21 creates a ceiling because city councils cannot give voters any more power than the city itself has under state law. On the other hand, the city council can limit voters' powers to less than the full scope of the city's powers. *See id.* at 283-84 (stating that a city can "limit the operation of the initiative and referendum to a selected segment of municipal affairs by inclusion or exclusion"). For example, Portland has limited its voters' power to "legislative matters" and has carved out some specific matters that cannot be the topic of an initiative or referendum. *See* Portland City Code § 9-36(a)-(b).

In short, when the Legislature granted municipalities the discretion to enact ordinances on any matter not preempted by state law, it expanded the scope of affairs that are "municipal," and Section 21 allows municipal voters to pass initiatives as to any of those affairs.

C. The purposes, history, and context of Section 21 support the superior court's conclusion that "municipal affairs" means municipal power granted by state law.

When the meaning of a word in a constitutional provision is ambiguous, this Court "must determine the meaning by examining the purpose and history surrounding the provision." *Opinion of the Justices*, 2015 ME 107, ¶39. The overarching purpose of Section 21 was "the encouragement of participatory democracy." *Friends of Cong. Sq. Park*, 2014 ME 63, ¶9. It was viewed as a "means to enable citizens to express more directly and promptly their opinion of proposed legislation," whether at the state or local level.[10] As a principal sponsor of the amendments put it: "If there is a need for initiative in the state, there is also need of it in the cities" because "the taxpayer should never surrender as he does from year to year the right to call in question the municipal acts of his servants."[11]

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[10] Address of Governor William T. Cobb to the Maine Legislature, Acts and Resolves of the Seventy-Third Legislature (1907), 1555, 1562. *See also* Legis. Rec. 834 (1905) ("[I]f we should pass the bill for the initiative and referendum we are simply making each individual of our constituents an essential part of the entire working machine of legislation, we are simply placing each individual voter in our cities and towns in a position where he can have something to say about legislation.").

[11] Rep. Cyrus W. Davis, *Referendum Argument: Details of the Hearing on this Important Subject*, Lewiston Evening Journal (Feb. 8, 1905), at 2.

It would contravene this purpose of Section 21 to construe it as limiting city voters to "call into question" only a fraction of the ordinances passed by their elected city officials, leading to no accountability to voters on the very issues that would affect voters the most. Indeed, the municipal initiative was intentionally included as a means of giving voters control over issues like municipal ownership of utilities and taxation,[12] which would hardly meet PRCC's strict definition of "municipal affairs." Thus, the superior court correctly adopted an interpretation that comports with the purpose of Section 21 by allowing for full voter participation in municipal lawmaking.

Another key purpose of the municipal initiative provision was to bring the rights of voters in cities in line with those of voters in towns, who already had direct democracy in the form of town meetings. *See* Legis. Rec. 834 (1905) ("Are not the people of the cities entitled to the same guaranty that is given to the people of the small towns?"); Legis. Rec. 829 (1905) (explaining that the initiative "is something that we always have had in our towns in the management of our town affairs").

[12] *Id.* (citing "the great questions of municipal ownership of public utilities and of taxation" as the reason a municipal initiative process is necessary).

It would be contrary to that purpose for the drafters to give city voters inferior rights to town voters, who could exercise the full legislative power of their town. And given the significant expansion of municipal authority since that time, it would further obstruct the drafters' purpose to limit city voters to a narrow list of "exclusively municipal" topics while town voters can enact laws on any matter not preempted by state law. *See* 30-A M.R.S. §§ 3001-3002.[13]

Reading Section 21 in the context of the statewide direct initiative provisions added to the Constitution at the same time further supports the conclusion that the phrase "municipal affairs" is coextensive with a municipality's powers under state law. *See Opinion of the Justices*, 2015 ME 107, ¶40 (stating that "context is critically important" for interpreting constitutional provisions). This Court has held that the people's statewide initiative power is coextensive with the Legislature's power because the initiative "is simply a popular means of exercising

[13] This unequal interpretation of a fundamental constitutional right would also reinforce the history of systemic racism against Mainers of color, who disproportionately live in larger cities. *See* Robert Long, "Maine slowly gaining cultural diversity, but 3 largest cities still some of the whitest in the US," *Bangor Daily News* (Sept. 10, 2012), https://bangordailynews.com/2012/09/10/news/bangor/maine-slowly-gaining-cultural-diversity-but-3-largest-cities-still-some-of-the-whitest-in-the-us/ (citing 2010 U.S. census data showing "Lewiston-Auburn and Portland to be quite a bit more racially diverse than Maine as a whole").

the plenary legislative power." *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996).[14] The most logical and harmonious construction of the initiative provisions in the Maine Constitution is that Section 21 creates the same relationship between municipal initiatives and the legislative power of municipalities as exists between statewide initiatives and the State legislative power.[15]

Likewise, reading the municipal direct initiative provision harmoniously with the home rule provision in Article VIII, Part 2, § 1 of the Constitution supports the conclusion that the municipal voters' initiative powers are coextensive with the municipality's powers under state law. *See Opinion of the Justices,* 2015 ME 107, ¶40 (stating that one constitutional provision should "not be allowed to defeat another if

[14] The state minimum wage is an example of how this works in practice. At the time the statewide initiative amendments were passed, the State could not enact a minimum wage law due to the Supreme Court's *Lochner* decision. Now, federal law does allow the state to enact a minimum wage, so voters also had the power to pass the 2016 initiative raising the minimum wage.

[15] PRCC cites authority from other jurisdictions for the proposition that the initiative power is not coextensive with the state's legislative power. Blue Br. at 25 n.14. But, as described above, this Court has rejected the holdings of these foreign precedents based on the text of the Maine Constitution, which expressly reserves to the people the "power to propose laws and to enact or reject the same at the polls independent of the Legislature" and to "reject at the polls any Act, bill, resolve or resolution passed by the joint action of both branches of the Legislature." Me. Const. art. IV, pt. 1, § 1; *see also Opinion of the Justices*, 275 A.2d 800, 803 (1971) (stating that "by the initiative amendment the people, as sovereign, have retaken unto themselves legislative power").

by reasonable construction the two can be made to stand together" (internal quotation omitted)); *see also* Scalia & Garner, *Reading Law: The Interpretation of Legal Texts* (2012), at 180 (noting that the "imperative of harmony among provisions is more categorical than most other canons of construction"). The home rule provision gives the "inhabitants" of cities broad authority to alter or amend their charters and to pass municipal legislation, and it would conflict with that provision to read Section 21 as severely limiting the extent to which city voters can decide how to govern their own affairs by reserving to themselves the direct initiative power.

PRCC argues that "voters select their form of government," and that "voters may petition for their local government to authorize the use of the municipal initiative power." Blue Br. 25. But under their definition of "municipal affairs" in Section 21, voters *cannot* select to have initiative and referendum powers over more than a fraction of the matters over which the city has discretion to legislate. On the other

hand, reading the Section 21 to permit cities to grant voters their full legislative power would harmonize it with the home rule provision.[16]

PRCC raises two other points about the history and structure of Section 21 that it asserts support its stingy reading of "municipal affairs," but neither stands up to scrutiny. First, PRCC emphasizes that Section 21 allows cities to set their own procedures for municipal initiatives but provides detailed procedures for statewide initiatives. From that distinction, it jumps to the non sequitur that the municipal initiative is "a narrow permissive right." Blue Br. 19. It is true that Section 21 permits, but does not require, city councils to establish an initiative and referendum process for their voters, allowing the city councils to establish the contours of that process. But it does not follow that city councils cannot give voters initiative powers that are coextensive with the city's powers under state law. To the contrary, city councils' broad discretion comports with a reading of Section 21 that allows the city council to delegate any of its powers to its voters.

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[16] This was recognized by Legislature's Judiciary Committee in a 1974 report analyzing the initiative process. The Committee concluded that, although the direct initiative provision gave the Legislature authority to enact procedures for municipal initiatives and referenda, it would violate "the spirit" of the home rule provision if it did so. Judiciary Committee Report on the Initiative and Referendum Process (1974), 29.

Moreover, it makes sense that the Legislature, in drafting the initiative amendments, chose to dictate statewide procedures but not municipal ones. The statewide initiative provisions are self-implementing. If the Legislature did not include any procedures in the Constitution, voters would have the initiative right, but would have no means to exercise it until the Legislature passed a separate law dictating procedures. On the other hand, Section 21 is not self-implementing; city councils could enact future initiative and referendum ordinances if they so chose, at which time they could also provide procedural mechanisms.[17]

Second, PRCC asserts that "[t]he lack of controversy" over the municipal initiative provision suggests a limited scope. But to the extent the municipal initiative was less controversial than the statewide initiative, it was certainly not perceived as being less important. As described above, it was viewed as essential by proponents of the initiative power to advance local control over issues such as utility ownership and taxation. But even accepting PRCC's argument that it was not controversial because it codified "the same right already

[17] That the statewide initiative procedure is "uniform," while the municipal procedure is "varied," Blue Br. 16, is also not surprising given that there is only one state of Maine but numerous Maine municipalities.

available in the form of the New England town meeting," that understanding contradicts—not supports—PRCC's contention that the initiative right was narrowed to "purely local affairs." Voters in towns already had the right to pass any legislation that their town could enact under state law, whether it met PRCC's narrow test or not.

D. PRCC's "exclusively municipal" test is unworkable and will chill voters' First Amendment rights.

PRCC cannot consistently describe its own proposed test for the scope of municipal voters' initiative powers, shifting among descriptors such as "exclusively municipal," "purely municipal," "purely local," or "exclusively local." This vacillating municipal-plus standard has no basis in the language of Section 21 and relies on an improvised combination of municipal authority frozen in time as of 1938 and a speculative extraterritorial effects test. To say the contours of PRCC's "exclusively municipal" test are hazy is an understatement. To take one formulation, PRCC says the hazard pay provision does not meet its test because it does not "alone concern the inhabitants" of Portland and it "impact[s]" people who "are *not* all Portland residents." Blue Br. 30,

35.[18] It is difficult to imagine any ordinance that would satisfy PRCC's standard that it "alone concern the inhabitants" of Portland and not impact a single person who is not a Portland resident. In short, this version of PRCC's test would, for all practical purposes, render the direct initiative power a dead letter. *See Fisherman's Wharf Assocs.*, 1991 Me. Super LEXIS 15, at *4 ("If any municipal problem in which the State also has an interest is thereby classified not 'municipal' for Section 21 purposes, then that portion of the State constitution granting municipalities the power to initiate ordinances is rendered all but meaningless.").

And if PRCC's test *does* allow for some effects outside the City, the question then becomes where to draw the line. How many non-inhabitants must be affected by an initiative before it is no longer "municipal"? And how are the effects measured before a law goes into effect? As one scholar put it, defining municipal affairs in this way "strongly tends to dump political questions into the laps of the courts."

[18] *See also, e.g.*, MSCC Br. at 7-9 (arguing that the initiative "is insufficiently limited to the City of Portland" because it regulates businesses that may have employees outside of Portland or be based outside of Portland); MACSP Br. at 11 (arguing that the initiative violates the Constitution "because its effects extend far beyond the city itself").

ACLU Br. at 24 (quoting Robert W. Bower, Jr., *Comment, Home Rule and the Preemption Doctrine*, 37 Me. L. Rev. 313, 330 n.98 (1985)).

Not only would PRCC's "exclusively municipal" standard be difficult for courts to administer and lead to increased litigation, but, as amici ACLU and League of Women Voters explain, it would also have a chilling effect on voters' First Amendment rights. *See* ACLU Br. at 26-28. Municipal voters wishing to place an initiative or referendum on the ballot would be unable to confidently determine whether it concerned an "exclusively municipal" topic, thus deterring them from spending time and money on gathering petition signatures only to have their initiative rejected as insufficiently municipal. It is for this reason that due process protects voters from laws that are "overly vague," and that a "greater degree of specificity" is required when a law touches on First Amendment rights to "avoid chilling the exercise of First Amendment rights." *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 62 (1st Cir. 2011).[19]

[19] A law is void for vagueness if its terms are "so uncertain that persons of average intelligence would have no choice but to guess at its meaning and modes of application." *Nat'l Org. for Marriage*, 649 F.3d at 62. PRCC's exclusively municipal test meets that standard.

Further, municipalities would face the unwelcome task of deciding which initiatives were sufficiently "exclusively municipal" to make it on the ballot. Without an objective or administrable standard, it would be all too easy to reject politically unpopular initiatives under the guise that they were not "exclusively municipal." And even if political biases did not in fact influence the outcome, it would be difficult to avoid the appearance of bias, causing voters to lose even more trust in the political system when that level of trust is dangerously low.

E. PRCC's "exclusively municipal" test is not needed to prevent municipal voters from passing laws that municipalities already cannot pass.

PRCC incorrectly asserts that if its "exclusively municipal" definition of "municipal affairs" is not adopted, "the voters of a single municipality could interfere with state policy and executive functions properly exercised by the Legislature or the Governor, or by the voters of the entire state." Blue Br. at 9. That is false. Citizen-initiated municipal ordinances are subject to the same state law limits as all other municipal ordinances, and thus municipal voters cannot take any action their municipality does not already have the authority to take. That is precisely why interpreting voters' powers as coextensive with

the municipality's powers makes sense: all municipal ordinances are subject to one set of limits, whether they are enacted by initiative or not.

In granting legislative powers to municipalities, the Legislature has already carefully weighed the risks PRCC describes of giving municipalities the power to enact ordinances that will affect people and businesses outside the municipality or address issues in which the State also has an interest. Despite those risks, the Legislature decided to nonetheless grant municipalities the broad power to enact any ordinance not preempted by state law. *See* 30-A M.R.S. § 3001. Thus, the only way to address the policy concerns raised by PRCC and its amici would be for this Court to overrule the decision of the Maine Legislature to give Maine municipalities broad home rule powers.

The Legislature's delegation of broad municipal powers has resulted in municipal ordinances, like the minimum wage increase passed by Portland's City Council in 2016, that create a burden for national and statewide businesses by requiring them to comply with

different laws in different jurisdictions.[20] And it has resulted in local ordinances that affect people from other cities who work in or visit the City, such as Portland's ordinances prohibiting smoking in many public places, Portland City Code § 17-87, 17-91, 17-94. Although PRCC and its amici describe at length the hazards of giving municipalities such broad home rule powers, they do not explain why this Court should second guess the Legislature's decision to grant such powers or why only the *voters* of Portland should have their powers restricted while the Portland City Council continues to pass laws with far-reaching effects. Indeed, there is no serious dispute that the Portland City Council could have passed a law identical to the hazard pay provision.

[20] In particular, amicus Maine State Chamber of Commerce (MSCC) describes the burden on businesses of having to comply with a higher wage in Portland than other cities, stating that they would have to "track[] work done in Portland as opposed to work done out of Portland for purposes of complying" with the law. MSCC Br. at 9. Of course, until recently, Portland had a higher minimum wage than the state minimum wage, and employers *did* have to track when their employees worked in Portland to pay them accordingly. Thus, the problems MSCC describes are not limited to the hazard pay provision but apply equally to ordinances passed by the City Council. The particular hostility of the PRCC and MSCC to *voter*-initiated ordinances appears to be more about their fear that the people may be more pro-worker and less vulnerable to influence by powerful interests and campaign contributions.

III. The Hazard Pay Provision is Within the Scope of "Municipal Affairs" in Section 21.

A. The Legislature has delegated to the City the discretion to set a local minimum wage and to enact emergency ordinances.

As the superior court found, if voters' initiative authority is coextensive with Portland's discretion under state law, it is not a close question whether voters have the "authority to enact or amend minimum wage ordinances" like the hazard pay provision. A. 21. PRCC does not dispute that Portland has the power to set local minimum wages. Nor could they. Title 30-A M.R.S. § 3001 delegates to "any municipality" the authority to "exercise any function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication." Thus, "[m]unicipal legislation will be invalidated only where the Legislature has expressly prohibited local regulation, or where the Legislature has intended to exclusively occupy the field and the legislation would frustrate the purpose of a state law." *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993).[21]

[21] PRCC repeatedly points out that, in *Albert*, the Court did not analyze the municipality's power under 30-A M.R.S. § 3001. But that is simply because a more specific statute delegated authority to the municipality on the precise topic at issue. In *Fisherman's Wharf*

PRCC argues that § 3001 applies only to the municipality and not its voters. That implausible reading of the statute is directly contradicted by 30-A M.R.S. § 3002, which describes the procedure for "a municipality" to "enact ordinances" through direct democracy. In any event, this argument misses the point. The purpose of looking to section 3001 is to determine the discretion the *municipality* has under state law because that defines what is a "municipal affair" under Section 21. It is for that same purpose that this Court in *Albert* looked to the statute providing that "*[a] municipality* may accept a dedication of property or interests therein by an affirmative vote of its legislative body." *See* 597 A.2d at 1355 (quoting 23 M.R.S. § 3025) (emphasis added). This Court did not determine whether the statute delegated authority directly to voters because it simply needed to know whether it gave the municipality "discretion to do as it wishes" on the topic at hand. *Id.*

Section 3001 grants municipalities discretion to enact local minimum wages because there is no state law expressly prohibiting

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Assocs., on the other hand, the Court did look to the predecessor statute to 30-A M.R.S. § 3001 to determine whether voters had the authority to enact a retroactive ordinance because there was no more specific statute. 541 A.2d at 164. Here, the municipality's discretion to adopt an emergency local minimum wage comes from 30-A M.R.S. § 3001. *See* Portland City Code § 33-1 (citing 30-A M.R.S. § 3001 as statutory authority for minimum wage ordinance).

local minimum wages, and enacting a local minimum wage does not frustrate the purpose of any state law. Although Maine has a state minimum wage statute, it is not "intended to *exclusively* occupy the field and thereby deny a municipality's home rule authority to act in the same area." *Town of York*, 626 A.2d at 941 (internal quotation omitted); *see also, e.g.*, *Graco, Inc. v. City of Minneapolis*, 937 N.W.2d 756, 763 (Minn. 2020) (holding that state minimum wage law "does not so fully occupy the field of minimum-wage rates that we can say that it is solely a matter of state concern"). Because the state minimum wage sets a floor, *see* 26 M.R.S. § 664, requiring employers to exceed that floor does not conflict with state law, *see Graco, Inc.*, 937 N.W.2d at 763.

And setting a higher minimum wage in Portland during emergencies would further—not frustrate—the purpose of the state-wide minimum wage statute, which is that "workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered." 26 M.R.S. § 661. That purpose is particularly compelling in Portland given its higher cost of living

compared with the state as a whole,[22] which may require a higher minimum wage to achieve the living-wage purposes of the state statute.[23] And setting a higher minimum wage during emergencies like the pandemic will further the statutory purpose of providing a wage "fairly commensurate with the value of the services rendered" by taking into account the added burdens and health risks on workers. *See* A. 110-111, ¶¶6-9. As a result, the superior court correctly concluded that "municipal minimum wage ordinances do not pose any conflict with state law." A. 23.

PRCC also incorrectly contends that the hazard pay provision conflicts with the Governor's broad emergency powers under the Maine Emergency Management Act (MEMA), 37-B M.R.S. § 701, *et seq.*, because it is triggered by a state of emergency. But, as the superior

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[22] *See* Portland City Code, § 33-1 (citing as purpose for enacting a minimum wage that "the cost of living in Portland has increased making life here cost, as a percentage of income, as much as is paid by residents of Chicago, Illinois, Sacramento, California, and other major United States cities where the minimum wage is much higher" and that "rising housing costs, including an increase in the median home price from $125,200 in 2000 to $238,400 in 2012, are pushing low wage workers out of the City").

[23] *See id.* (noting that "[t]he Massachusetts Institute of Technology has calculated that, for a single adult to support him- or her-self in Portland at the current minimum wage, he or she would need to work over 50 hours a week"). In 2018, in order to afford an apartment in Portland at the average fair market rent, a household working 40 hours a week would have to make at least $25.92 an hour, compared to $18.73 an hour for the state as a whole. *See* National Low Income Housing Coalition, "Out of Reach: The High Cost of Housing" (2018), at 111, https://nlihc.org/sites/default/files/oor/OOR_2018.pdf.

court pointed out, "this is an argument that the court would expect to come from the State rather than from PRCC." A. 21.[24] And the hazard pay provision does not require the Governor to take any action whatsoever, let alone act in a manner inconsistent with state law. As the superior court found, "there is no evidence . . . that the presence of the emergency minimum wage provision has had or will have any effect on the actions of the Governor to utilize her state of emergency powers to respond to the pandemic." A. 21. PRCC argues that "[w]hether or not the Emergency Provision *actually* causes the Governor to act differently," it still "carries with it the risk that the Governor" *could* act differently. But that unsupported and implausible speculation is insufficient for the Court to conclude that there is an actual conflict with the Governor's powers under state law.[25]

Nor does the hazard pay provision frustrate the purposes of MEMA, which contemplates a role for cities in responding to emergencies alongside the Governor. *See* 37-B M.RS. § 701 (purposes

[24] Because this was a declaratory judgment action under 14 M.R.S. § 5963, the State was served with the complaint and offered an opportunity "to be heard," but it chose not to participate in the superior court proceeding below or file a brief in this appeal.

[25] That is especially so given the rebuttable presumption under § 3001 that an ordinance "is a valid exercise of a municipality's home rule authority." 30-A MR.S. § 3001(2).

include "[c]onfer[ring] upon the Governor *and the executive heads of governing bodies of the political subdivisions of the State* certain emergency powers") (emphasis added). Indeed, in response to the pandemic, Portland issued its own emergency proclamation, *see* A. 95, ¶19, under which the City Manager has issued numerous orders, including a "stay-at-home order" requiring non-essential businesses to stay closed, a moratorium on evictions, and a prohibition on short-term rentals, *see* A. 111, ¶12. The hazard pay provision no more conflicts with state law than those actions, which also apply only during the declared emergency.[26]

B. The hazard pay provision meets even PRCC's "exclusively municipal" test.

Even applying PRCC's "exclusively municipal" test, it is not true that the hazard pay provision fails that test because it "relates to statewide affairs." Blue Br. 30. The hazard pay provision applies only to work performed in the City at workplaces in the City—it does not

[26] Even if there were an impermissible conflict (which there is not) between the hazard pay provision and the governor's emergency powers, the proper remedy would be to excise the provision linking the hazard pay to the state emergency proclamation, leaving intact the rest of the provision, including the link between hazard pay and the *City*'s declaration of an emergency.

purport to apply to businesses outside the City, and certainly not to the "people of the state at large." *Burkett*, 199 A. at 622.

PRCC and its amici assert that the hazard pay provision does not meet their definition of "exclusively municipal" because it affects companies that do business in Portland and are based elsewhere, and it affects people who work in Portland or receive services in Portland and live elsewhere.[27] But that is no different than ownership of utilities or taxation, which were viewed by the drafters of Section 21 as clearly within the scope of "municipal affairs." Local taxes, in particular, apply to businesses operating in Portland that are based elsewhere, as well as people who work at or frequent those businesses but live in other cities. Thus, PRCC's view that the extraterritorial effects of the hazard pay provision render it unconstitutional under Section 21 is belied by that provision's legislative history.

In addition to applying only within City limits, the hazard pay provision was enacted in response to conditions unique to Portland,

[27] That this argument proves way too much is easily shown by applying it to Maine's minimum wage law. That law indisputably affects companies that do business in Maine and are based elsewhere, employees who work in Maine and live in New Hampshire, or tourists who visit Maine from other states. Under PRCC's reasoning, these out-of-Maine effects would mean that the state minimum wage law is not an appropriate subject for state legislation.

such as a much higher cost of living and greater lack of affordable housing than the rest of Maine,[28] a high concentration of COVID-19 cases, *see* A. 110, ¶¶ 4-5, and racial inequities that disproportionately affect Portland residents.[29] The City and its residents have a strong local interest in minimizing the health hazard that businesses operating in Portland pose to residents. *See City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) (holding that "efforts to protect public health and safety are clearly within the city's police powers"). The hazard pay provision addresses this local health hazard by helping workers afford to stay home when they are sick and by encouraging businesses to let employees work from home when they are not needed on-site.[30]

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[28] *See supra* at notes 22 and 23.

[29] In June 2020, a report found that Black Mainers were "contracting COVID-19 at a rate more than 20 times that of white residents." Kevin Miller, *Maine has nation's worst COVID-19 racial disparity*, Portland Press Herald (June 21, 2020). One key reason for the disparity was that Black Mainers are much more likely to work in low-wage but essential jobs at the frontlines of the pandemic. *See id.* (citing data from the Maine CDC that 300 out of 743 health care workers who tested positive for COVID-19 were Black, and explaining that Black Mainers "comprise a major part of the workforce at many local manufacturing or processing facilities, including at the Tyson Foods plant in Portland that had an outbreak of 52 COVID-19 cases last month").

[30] PRCC and amici raise a number of negative effects that they assert have been created by the hazard pay provision. But, as the superior court recognized, "the court is not ruling on the wisdom of the proposed emergency minimum wage provision or whether its effects will beneficial or harmful." A. 14. PRCC had ample opportunity and funding to put those arguments in front of voters before the election, and it in fact did. With information available to them about the potential effects on employers, voters apparently decided that the interests described above outweighed the potential costs asserted by PRCC and businesses. For example, regarding the concerns raised by the Maine Association of

That the local minimum wage created by the hazard pay provision applies only during city- or state-declared emergencies does not affect its character as an ordinance concerning "municipal affairs" under Section 21. As described above, the Governor has significant emergency powers, while the City also retains discretion to pass City-specific ordinances to address emergencies. *See* 37-B M.R.S. § 781; Portland City Code, § 2-406. Those ordinances, which apply only in Portland, do not become "statewide" simply because the emergency they are addressing also affects the rest of the state.

IV. PRCC Waived the Argument that the City Code Sets a Stricter Limit on Municipal Initiatives than Section 21.

In its brief on appeal, PRCC argues for the first time that "Portland voters' initiative power is limited to exclusively municipal affairs by the City's initiative and referendum ordinance." Blue Br. 26. It waived that argument by not raising it below. *See, e.g.*, *Cyr. v. Cyr*, 432 A.2d 793, 797 (Me. 1981) ("No principle is better settled than that a

Community Service Providers, voters may have decided to send the message that the State—not workers—should bear the cost of increased risks and responsibilities for direct service provider workers during the COVID-19 pandemic. The question here is not whether the voters made the right decision, but whether their decision must be overruled.

party who raises an issue for the first time on appeal will be deemed to have waived the issue.").

In the superior court, PRCC argued that the hazard pay provision "exceeds the initiative power reserved to municipal voters under Article IV, Part 3, Section 21 of the Maine Constitution." A. 74.[31] It did not argue that the power was further limited by the Portland City Code. Indeed, PRCC *did* argue that the hazard pay provision violated the City Code "because it relates to administrative, not legislative, matters," A. 85, but it did not mention—not even in a perfunctory manner—that it violated that Code's "municipal" requirement. PRCC has now dropped the "administrative" argument, apparently attempting to swap it out for a new one. But this Court's precedent forbids that type of switcheroo on appeal.

Even if PRCC's City Code argument were not waived, it has the same defect as its constitutional argument. By using the phrase "municipal affairs" from Section 21 of the Constitution, Portland

[31] *See also, e.g.*, A. 74 ("Article IV, Part 3, Section 21 of the Maine Constitution Limits Municipal Direct Initiatives to Exclusively Municipal Affairs."); A. 79 ("The Emergency Provision of the Initiative Violates the Exclusively Municipal Requirement of Article IV, Part 3, Section 21.").

demonstrated an intent to make the meaning of its ordinance coextensive with the meaning of the Constitution and to grant its voters the maximum powers allowed by Section 21. Thus, for the reasons explained above, the phrase "municipal affairs" in the City Code means those affairs over which the City has "discretion to do as it wishes," *Albert*, 597 A.2d 1355, which includes setting a local emergency minimum wage.

Conclusion

Contrary to nearly a century of precedent from this Court, including this Court's directive that municipal initiative powers be construed liberally, PRCC asserts that Portland voters should be singled out and prevented from passing even the most routine laws if those laws have *any* effect on *anyone* who lives outside the City. That unworkable rule renders the initiative power essentially meaningless, potentially invalidating dozens of initiatives, and should not be adopted by this Court. Instead, this Court should reaffirm its longstanding, pro-democratic interpretation that voters' initiative rights are coextensive with their city's powers under state law. Mr. Horton and Mr. Roberge-Reyes respectfully request that the Court uphold the constitutionality of

Portland's hazard pay provision and, for the reasons described in their opening brief, hold that the hazard pay provision went into effect in December 2020.[32]

Respectfully submitted,

Date: April 5, 2021

/s/ Shelby H. Leighton
Shelby H. Leighton, Bar No. 6228

/s/ Valerie Z. Wicks
Valerie Z. Wicks, Bar No. 5606

/s/ David G. Webbert
David G. Webbert, Bar No. 7334

Johnson, Webbert & Garvan LLP
160 Capital Street, Suite 3
Augusta, ME 04330
Tel: (207) 623-5110

Attorneys for Cross-Appellants

[32] Consistent with their understanding of the parties' agreed-upon briefing schedule, which was approved by this Court's Order on February 11, 2021, in their opening brief Cross-Appellants addressed only the issues they "appealed from." Their understanding of the scope of their initial brief rested on the plain language of the briefing schedule and the obvious inefficiency of presenting argument on the issues PRCC appealed from without first reviewing the arguments PRCC would raise in support of its appeal. *See also* Fed. R. App. P. 28.1 (providing that in cross-appeals the parties do not brief issues appealed by other parties until the party appealing that issue has filed an opening brief on those issues). Thus, Cross-Appellants now use this reply brief to respond in full to PRCC's opening brief regarding the issues it appealed from, namely the constitutionality of the hazard pay provision. Given the extensive arguments in their opening brief about the effective date issue they appealed from and given that they have not seen the PRCC's or the City's response to those arguments, Cross-Appellants do not see any benefit to adding additional argument on the effective date issues to this brief, especially because none of the amici in support of PRCC addressed the effective date issue.

Certificate of Compliance

As required by M.R. App. P. 7A(g)(1)(A), I certify that this Reply Brief of Cross-Appellants does not exceed the 10,000 word limit set for replies by the Court's February 11, 2021 Order.

Date: April 5, 2021

/s/ Shelby H. Leighton
Shelby H. Leighton, Esq.
Johnson, Webbert & Garvan LLP
160 Capital Street, Suite 3
Augusta, ME 04330
Tel: (207) 623-5110

Certificate of Service

I hereby certify that copies of Cross-Appellants' Reply Brief have been served today by email on the following counsel:

John J. Aromando, Bar No. 3099
Sara Murphy, Bar No. 5423
James R. Erwin, Bar No. 1856
Joshua D. Dunlap, Bar No. 4477
Pierce Atwood, LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101-4664
jaromando@pierceatwood.com
jerwin@pierceatwood.com
smurphy@pierceatwood.com
jdunlap@PierceAtwood.com

Dawn M. Harmon, Bar No. 9612
Perkins Thompson, P.A.
One Canal Plaza, PO Box 426
Portland, ME 04112-0426
Tel: (207) 77 4-2635
dharmon@perkinsthompson.com

Gerald F. Petruccelli, Esq.
Petruccelli Martin & Haddow LLP
Two Monument Square, Ste. 900 PO Box 17555
Portland, ME 04112-8555
gpetruccelli@pmhlegal.com

John R. Brautigam, Esq.
1 Knight Hill Road
Falmouth, ME 04105
johnbrautigam@gmail.com

Benjamin Gaines, Esq.
Gaines Law, LLC
PO Box 5012
Portland, ME 04101
ben@gaines-law.com

Bejamin Grant, Esq.
McTeague Higbee
Four Union Park
Topsham, ME 04096
bgrant@mcteaguehigbee.com

Zachary L. Heiden, Esq.
ACLU of Maine Foundation
PO Box 7860
Portland, ME 04112
zheiden@aclumaine.org

Kasia S. Park, Esq.
Jeana M. McCormick, Esq.
Sara P. Cressey, Esq.
Drummond Woodsum
84 Marginal Way, Ste. 600
Portland, ME 04101-2480
kpark@dwmlaw.com
jmccormick@dwmlaw.com;
scressesy@dwmlaw.com

Date: April 5, 2021

/s/ Shelby H. Leighton
Shelby H. Leighton, Esq.