STATE OF 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,
Plaintiff-Appellants

v.

CITY OF PORTLAND AND JON JENNINGS, in his official capacity as City Manager for the City of Portland
Defendant-Appellees

CALEB HORTON AND MARIO ROBERGE-REYES,
Intervenor-Appellees

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

BRIEF OF APPELLANTS

March 12, 2021

John J. Aromando, Bar No. 3099
James R. Erwin Bar No. 1856
Joshua D. Dunlap, Bar No. 4477
Sara A. Murphy, Bar No. 5423
PIERCE ATWOOD LLP
Merrill's Wharf, 254 Commercial Street
Portland, Maine 04101
jaromando@pierceatwood.com
jerwin@pierceatwood.com
jdunlap@pierceatwood.com
smurphy@pierceatwood.com
(207) 791-1100

Attorneys for Plaintiff-Appellants 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

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INTRODUCTION

This appeal concerns the validity, and if valid, the effective date, of a municipal citizens' initiative purporting to require employers in the City of Portland to pay an escalated minimum wage during periods of state- or city-declared emergencies. The Superior Court (Warren, J.) upheld the validity of the emergency wage under the Maine Constitution and the Portland City Code, but ruled that the emergency wage provision does not take effect until January 1, 2022. Appellants appeal the Superior Court's ruling on the validity and constitutionality of the initiative's emergency wage provision; Intervenor-Appellees cross-appeal the Superior Court's ruling on when that provision, if valid, takes effect.

STATEMENT OF THE FACTS[1]

I. Factual Background

The outer boundary of municipal voters' initiative power is fixed by the Maine Constitution: municipalities "*may* establish the direct initiative and people's veto for the electors of such city" but only "in regard to its *municipal affairs*." Me. Const. art. IV, pt. 3, § 21 (emphases added). Pursuant to this constitutional authority, in 1950, the City of Portland adopted an Initiative and Referendum Ordinance, which granted municipal voters initiative power as to "legislative matters on municipal affairs."

[1] The facts set forth herein are drawn from the undisputed material facts in the summary judgment record, supplemented with the relevant history of constitutional, statutory, and ordinance enactments. *Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 13 n.7, 187 A.3d 609 ("'evidence' of legislation history is not offered or admitted" and "the court's review of any and all legislative history information in the course of its own evaluation of the law is not any more limited than a court's review of precedent identified by the parties").

LaFleur ex rel. Anderson v. Frost, 146 Me. 270, 80 A.2d 407, 409-12 (1951); Portland Code § 102.1 (1957). Although Portland has changed the process for exercising the initiative power over the years, the scope of authority granted by Portland to its voters through its Initiative and Referendum Ordinance is no different today than when adopted in 1950. It still provides that municipal initiatives must concern only "legislative matters on municipal affairs." Portland Code § 9-36(a) (2021). Otherwise, Portland's inhabitants have vested complete control over the City's municipal affairs in its elected nine-member body, the City Council. Portland Charter, Art. I, § 2 ("All other powers now or hereafter vested in the inhabitants of such city, and all powers granted by this charter . . . shall be vested in the city council.").

In September 2015, the City Council enacted Portland's Minimum Wage Ordinance, codified at Chapter 33 of the Portland Code, which gradually raised the minimum wage payable by Employers to their Employees in Portland, as those terms are defined by the Ordinance, to $10.10 per hour beginning on January 1, 2016, with another increase to $10.68 per hour effective January 1, 2017. (A. 99, ¶ 1 (citing Portland Code § 33.7(b)(i) – (ii) (2016); A. 117; ¶ 1.) Thereafter, the minimum wage increased in accordance with the Consumer Price Index for All Urban Consumers. Portland Code § 33.7(b)(iii) (2016). This phased approach of incremental wage increases allowed businesses time to adjust to the corresponding increase in expenses. The Minimum Wage Ordinance further provided that, if the minimum wage rate established by the State under 26 M.R.S. § 664 was equal to or greater than the

minimum wage established by the Ordinance, then the state minimum wage would control. *Id.* § 33.7(b)(iv). At the commencement of this action, the state minimum wage was $12.00 per hour. 26 M.R.S. § 664(1).

On July 13, 2020, Portland voters submitted a petition with at least 1,500 signatures in support of an initiative to amend the Ordinance and increase the City's minimum wage (the "Initiative"). (A. 99, ¶ 2; A. 117, ¶ 2.) On November 3, 2020, the City held its general municipal election, and Portland voters approved the Initiative. (A. 101, ¶ 3; A. 119, ¶ 3.) The City certified the vote in favor of the Initiative on November 6, 2020. *Id.* Pursuant to Portland's Charter, and absent an emergency, no ordinance takes effect until thirty (30) calendar days after the declaration of the official election results, unless a later effective date is provided for within the ordinance. Portland Charter, Art. II, § 11; Portland Code § 9-42.

The Initiative purports to amend the City's Minimum Wage Ordinance in two material ways.

First, the Initiative strikes Section 33.7(b) of the Minimum Wage Ordinance, which established a local minimum wage rate starting on January 1, 2016, and sets a new increased minimum wage payable by Employers to their Employees within Portland starting on January 1, 2022. (A. 94, ¶ 15; A. 98, ¶ 15; A. 106, ¶ 15; A. 66-68.) Thereafter, the Initiative provides gradual yearly increases to the minimum wage payable to Employees (A. 66-68 § 33.7(b)), consistent with the Ordinance's stated

purpose to allow businesses time to adjust to the resulting increases in expenses, (A. 56 § 33.1).[2]

Second, and at the core of Appellants' constitutional challenge, the Initiative provides for a sharply-escalated minimum wage during periods of Governor- or City-declared states of emergency (the "Emergency Provision"). The Emergency Provision states:

> (g) *Effect of Emergency Proclamation.* For work performed during a declared emergency, the effective Minimum Wage rate established by this ordinance shall be calculated as 1.5 times the regular minimum wage rate under subsection (b) above. A declared emergency under this ordinance shall include the period of time during which:
>
> (i) A proclamation issued pursuant to Chapter 2, Sec. 2-406, of this code declares an emergency to exist, if such emergency proclamation is geographically applicable to the Employee's workplace; or

---

[2] Specifically, the Initiative provides:

(b) *Minimum Wage rate:*

(i) Beginning on January 1, 2022, the regular Minimum Wage for all Employees, including, but not limited to, Service Employees, shall be raised to $13.00 per hour;

(ii) Beginning on January 1, 2023, the regular Minimum Wage for all Employees, including, but not limited to, Service Employees, shall be raised to $14.00 per hour; and

(iii) Beginning on January 1, 2024, the regular Minimum Wage for all Employees, including, but not limited to, Service Employees, shall be raised to $15.00 per hour; and

(iv) On January 1, 2025 and each January 1st thereafter, the minimum hourly wage then in effect must be increased by the increase, if any, in the cost of living. The increase in the cost of living must be measured by the percentage increase, if any, as of August of the previous year over the level as of August of the year preceding that year in the Consumer Price Index for All Urban Consumers, CPI-U, for the Northeast Region, or its successor index, as published by the United States Department of Labor, Bureau of Labor Statistics or its successor agency, with the amount of the minimum wage increase rounded to the nearest multiple of 5¢. If the state minimum wage established by 26 M.R.S. § 664 is increased in excess of the minimum wage in effect under this ordinance, the minimum wage under this ordinance is increased to the same amount, effective on the same date as the increase in the state minimum wage, and must be increased in accordance with this ordinance thereafter.

(A. 66-67.)

> (ii) A proclamation issued pursuant to 37-B M.R.S. § 742 declares an emergency to exist, if such emergency proclamation is geographically applicable to the Employee's workplace.
>
> A declared emergency under this ordinance shall not apply to work performed under a teleworking arrangement, as defined under 5 U.S.C. § 6501, allowing the Employee to work from home.

(A. 67-68.) Emergency declarations in response to the COVID-19 pandemic that would trigger the Emergency Provision of the Initiative, if operative, are currently in effect. (A. 94, ¶ 18; A. 98, ¶ 18; A. 107, ¶ 18.)[3]

Appellants are "Employers" who employ "Employees" or "Service Employees"[4] within the city limits of Portland, as those terms are defined by the Ordinance, with at least one Employee or Service Employee who at the commencement of this action was paid less than $18.00 or $9.00 per hour, respectively—1.5 times the minimum wage rate required under state law, 26 M.R.S. § 664. (A. 91-93, ¶¶ 1-12; A. 97-98, ¶¶ 1-12; A. 103-106, ¶¶ 1-12.) Regardless of whether Appellants complied or failed to comply with the Emergency Provision beginning on December 6, 2020—thirty calendar days from the final certification of the vote on the Initiative—Appellants are suffering and will continue to suffer adverse

[3] While this case was pending before this Court, Governor Janet Mills extended the state of emergency originally proclaimed on March 15, 2020, through March 18, 2021. (A. 107, ¶ 18; Proclamation to Renew the State of Civil Emergency (Feb. 17, 2021).) On March 16, 2020, the City of Portland declared a state of emergency in relation to the COVID-19 pandemic, which the City Council renewed by order dated January 4, 2021 through May 10, 2021. (A. 101, ¶ 4; A. 120, ¶ 4.)

[4] Employers may use tips received by customarily tipped workers ("Service Employees") as a credit against their minimum wage obligations to such employees, up to a certain amount. The Initiative also amends the "Tip Credit" provision of the Ordinance. (A. 67 § 37.7(c).)

consequences as a result of the Initiative. (A. 95, ¶ 22; A. 99, ¶ 22; A. 108, ¶ 22; A. 123, ¶ 22.) Employers who fail to pay the increased wages to their Employees or Service Employees, $18.00 or $9.00 per hour, respectively, remain at risk of exposure to both the Emergency Provision's enforcement by the City Manager, the officer charged with enforcement of Portland's ordinances, and private causes of action brought by their Employees as authorized by the Ordinance. (A. 95, ¶ 23; A. 99, ¶ 23; A. 108-109, ¶ 23; A. 63-64 § 33.9(c).) Alternatively, Employers who pay the escalated wage pending the final outcome of this action have no practical recourse to recover those sums paid to Employees if the Emergency Provision is later declared invalid or not yet in effect. (A. 95, ¶ 24; A. 99, ¶ 24; A. 109, ¶ 24; A. 124, ¶ 24.)

II. Procedural Background

On December 1, 2020, Appellants filed their Verified Complaint in Superior Court seeking declaratory relief as follows: in Count I, that the Emergency Provision of the Initiative exceeds the initiative power reserved to municipal voters under article IV, part 3, section 21 of the Maine Constitution; in Count II, that the Emergency Provision of the Initiative exceeds the initiative power granted to municipal voters under Portland's Code; and alternatively, in Count III, that the Emergency Provision, if valid, is not operative until January 1, 2022. (A. 32-68.) On December 3, 2020, Caleb Horton and Mario Roberge-Reyes ("Intervenor-Appellees") intervened to oppose Appellants' claims and cross-claimed against the City and the City Manager alleging that the Emergency Provision was effective as of December 6, 2020, and

seeking an injunction to require the City Manager to immediately enforce the Emergency Provision. (A. 147-182.) Thus, both Appellants and Intervenor-Appellees sought declaratory judgment regarding the Emergency Provision's effective date. (A. 48, 182.)

Appellants moved for summary judgment on all claims of their Verified Complaint on December 21, 2020. (A. 69.) After expedited briefing and argument, by Order dated February 1, 2021, the Superior Court (Warren, J.) entered judgment in favor of Intervenor-Appellees on Counts I and II of Appellants' Verified Complaint, concluding that the Emergency Provision is not unconstitutional under article IV, part 3, section 21 of the Maine Constitution or otherwise invalid under the Portland Code; entered judgment in favor of Appellants on Count III of the Verified Complaint, concluding that the unambiguous language of Portland's Minimum Wage Ordinance, as amended by the Initiative, establishes that the Emergency Provision does not become effective until January 1, 2022; and dismissed Intervenor-Appellees' cross-claim in light of the effective date of the Emergency Provision. (A. 31.)

Appellants timely appealed from the Superior Court's Order on February 3, 2021, and Intervenor-Appellees cross-appealed on February 4, 2021. (A. 11.)

STATEMENT OF THE ISSUES

1. Whether the Emergency Provision of the Initiative exceeds the scope of Portland voters' initiative power, established by article IV, part 3, section 21 of the

Maine Constitution, and by the City's Initiative and Referendum Ordinance, because it is not limited to matters that are exclusively municipal in nature?

2. Whether the Emergency Provision, if valid, becomes effective January 1, 2022—the earliest date by which there is a local minimum wage rate established by the City's Minimum Wage Ordinance—under the plain and unambiguous language of the Minimum Wage Ordinance, as amended by the Initiative?

SUMMARY OF THE ARGUMENT

The Emergency Provision fails for a fundamental reason: The Constitution limits the municipal initiative power to exclusively municipal affairs, and the Emergency Provision addresses issues that are not strictly local in character. Portland voters have chosen to vest all powers with municipal government—the City Council—retaining only the limited initiative power authorized by the Constitution. The Legislature, by enacting home rule legislation expanding the powers of municipal government, could not and did not expand the Constitution's earlier grant of municipal initiative power to municipal voters. Likewise, the City's Initiative and Referendum Ordinance could not, and did not, authorize the exercise of municipal initiative power over anything other than exclusively municipal affairs. Because it does not address matters of purely local concern, the Emergency Provision is *ultra vires*. Even if the Emergency Provision was valid, the plain language of the Initiative establishes that it does not become effective until January 1, 2022.

The Emergency Provision exceeds the limit of municipal initiative power established in article IV, part 3, section 21 of the Constitution. *See* Me. Const. art. IV, pt. 3, § 21 ("The city council of any city may establish the direct initiative . . . in regard to its municipal affairs."). As this Court has consistently held, as recently as 1991, municipal voters may avail themselves of the initiative process if, and only if, the proposed initiative is *exclusively* municipal in character—touching upon only that narrow subset of matters that relate solely to local concerns. Without satisfying this constitutional prerequisite, municipal voters cannot avail themselves of the initiative power. Were they permitted to do otherwise, 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 pursuant to their separate constitutional direct initiative authority.

This constitutional grant of power to municipal voters has not been expanded by municipal "home rule," including specifically the supplemental municipal authority codified in section 3001 of Title 30-A. The Home Rule Amendment to the Constitution, enacted sixty years after the provision authorizing municipal initiatives, narrowly circumscribes the areas in which a municipality may act to those local in nature. *See* Me. Const. art. VIII, pt. 2, § 1. The Home Rule Amendment, unlike the municipal initiative amendment, created a floor, not a ceiling, that the Legislature could raise because municipalities are political subdivisions existing at the pleasure of the State. In Title 30-A, the Legislature in fact delegated additional legislative powers

to municipalities in areas otherwise not preempted by state law. *See* 30-A M.R.S. § 3001. Because municipal voters are not creatures of State,[5] the Legislature has no comparable authority to expand the scope of municipal initiative power in Maine, nor has it ever attempted to do so. Municipal voters' power lies in selecting their form of local government. Here, Portland voters adopted a representative form of government, vesting powers in the City Council with the narrow exception of initiatives regarding exclusively municipal affairs.

Even if the Constitution permitted municipal voters to exercise broader initiative powers, Portland's Initiative and Referendum Ordinance does not. That Ordinance – substantively unchanged since its enactment in 1950 – only authorizes initiatives dealing with "legislative matters on municipal affairs." Nothing in the Ordinance supports the notion that it expanded to encompass either later-enacted legislative grants of authority to municipalities or, more generally, all matters not preempted by state law under 30-A M.R.S. § 3001.

In this case, the unavoidably extra-territorial effect of the Emergency Provision, calling for a minimum wage more than 1.5 times that applicable elsewhere in the State during a state of emergency, implicates statewide concerns. It therefore exceeds the scope of the municipal initiative power granted by the Maine

[5] Indeed, the most basic tenet of the founding of the United States as a constitutional republic, enshrined in the Constitutions of both the United States and the State of Maine, is that this works the other way around. U.S. Const. preamble; U.S. Const. amend. X; Me. Const. preamble; Me. Const. art. I, § 2.

Constitution, and it does not fall within the scope of authority granted to the voters by the City itself through Portland's Initiative and Referendum Ordinance.

Alternatively, even if this Court determines that the Emergency Provision is constitutional and otherwise valid, it is not operative until January 1, 2022—the earliest date by which there is any wage "established by" Portland's Minimum Wage Ordinance, as amended by the Initiative.

ARGUMENT

I. All Issues Presented Are Subject To *De Novo* Review.

Appellants raise solely questions of law on appeal, all of which are reviewed *de novo*. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 13, 237 A.3d 882 (*de novo* review of interpretations of the Maine Constitution); *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 7, 91 A.3d 601 (*de novo* review of interpretations of municipal code).

II. The Emergency Provision Exceeds The Scope Of Portland Voters' Initiative Power, Which Is Limited To Exclusively Municipal Affairs.

The Superior Court erred in concluding that the Emergency Provision of the Initiative does not exceed the power reserved to Portland voters. Specifically, the Superior Court made three critical errors: (1) it misapplied precedent from this Court, including a case decided as recently as 1991, affirming that article IV, part 3, section 21 of the Maine Constitution limits the scope of municipal initiatives to exclusively municipal affairs; (2) it conflated a municipality's home rule authority, which springs

from a distinct constitutional provision and plenary legislative grant of authority to *municipalities*, with the initiative power granted to municipal *voters*; and (3) it failed to recognize that the Portland Ordinance itself limits the scope of municipal initiative authority granted the electors to "municipal affairs." In fact, the scope of the municipal initiative power has remained unchanged under both the Constitution and Portland's Initiative and Referendum Ordinance since their adoption, and only encompasses purely local matters. Contrary to the Superior Court's order, the Emergency Provision is *ultra vires*.

A. Municipal Voters' Initiative Power Is Limited To Exclusively Municipal Affairs By Article IV, Part 3, Section 21 Of The Constitution.

Article IV, part 3, section 21 of the Maine Constitution provides: "The city council of any city may establish the direct initiative and people's veto for the electors of such city *in regard to its municipal affairs* . . . ." Me. Const. art. IV, pt. 3, § 21 (emphasis added). As this Court has held, supported by the history of the constitutional amendments concerning both statewide and municipal initiatives, the permissible scope of municipal initiatives under the Constitution is limited to those matters that are exclusively local in nature, *i.e.*, a narrow subset of matters limited to the internal affairs of the city. *Albert v. Town of Fairfield*, 597 A.2d 1353, 1355 (Me. 1991); *Burkett v. Youngs*, 135 Me. 459, 199 A. 619, 621-22 (1938).

Although this Court "liberally construe[s] grants of initiative and referendum powers so as to facilitate . . . the people's . . . sovereign power to legislate," *Friends*,

2014 ME 63, ¶ 9, 91 A.3d 601 (internal quotation marks omitted), the plain language of the relevant constitutional and legislative provisions must control, *Avangrid*, 2020 ME 109, ¶¶ 15, 25-31, 36-37, 237 A.3d 882 (noting that initiative powers must be liberally construed, but holding that initiatives must be within the scope of the Constitution). Municipal voters' "sovereign power to legislate" is defined and limited by article IV, part 3, section 21 of the Constitution, and cannot exceed the parameters set forth in that provision.

1. This Court's precedent establishes that the municipal initiative power is limited to exclusively municipal affairs.

This Court has repeatedly recognized that article IV, part 3, section 21 of the Maine Constitution limits the subject matter of municipal voters' initiative power to matters that are exclusively local in nature. It did so in 1938, before the 1969 Home Rule Amendment to the Constitution and enabling legislation, *see Burkett*, 199 A. at 621–22; and it did so again in 1991, after the Home Rule Amendment to the Constitution and enabling legislation, *see Albert*, 597 A.2d at 1355.

In the first case analyzing section 21, *Burkett v. Youngs*, this Court struck down a municipal referendum addressing an appropriation resolve enacted by the city council of Bangor for a property tax to fund schools, reasoning that such an action was not just a local matter. 199 A. at 621–23. The Court held that "[t]he distinction is between State affairs and local affairs": the former may not be addressed by municipal initiative while the latter may. *Id.* at 622. Acknowledging that "it may not

always be easy to distinguish local administration from State administration," *id.*, this Court concluded that section 21 reaches only "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 . . . of a strict local character limited to the interests of the city residents," *id.* (quoting McQuillin, *Municipal Corporations* § 196 (2d ed.)). That is, "[m]unicipal affairs . . . comprise the internal business of a municipality." *Id.* at 621. In contrast, municipal affairs do not include matters with which "[t]he State at large is equally concerned"; "matters which relate, in general, to the inhabitants of the given community and the people of the entire State, are the prerogatives of State government." *Id.* at 622. Only "completely municipal" matters fall within section 21 – even though "there are comparatively few" such matters. *Id.* at 622-23.[6]

More recently, in *Albert v. Town of Fairfield*, this Court reaffirmed the exclusively municipal test adopted in *Burkett*. There, citizens of the Town of Fairfield invoked the municipal referendum process to overturn the town council's acceptance of a town way. 597 A.2d at 1353. Once again defining "municipal affairs" as "compris[ing] the internal business of a municipality," this Court held that acceptance

[6] Although, as the Superior Court noted, the Constitution does not use words such as "completely," "solely," or "exclusively" to modify "municipal affairs" (A. 22), the limitation of initiatives to such matters is meant to exclude matters that are broader in scope. *See Burkett*, 199 A. at 622-23 ("Where the manifest intention of the Constitution is that, in relation to cities, the referendum shall be limited to municipal affairs, that intention must prevail."); *see also Violette v. Leo Violette & Sons, Inc.*, 597 A.2d 1356, 1358 (Me. 1991) (applying the maxim "expressio unius est exclusio alterius est").

of a town way was "exclusively a municipal affair, and the right of referendum exist[ed] pursuant to the Maine Constitution and the municipal charter." *Id.* at 1354-55 (first alteration in original).

In ruling that the Emergency Provision does not exceed the parameters set by article IV, part 3, section 21 of the Constitution as interpreted by this Court, the Superior Court misconstrued both *Burkett* and *Albert*. First, the Superior Court erroneously relied on dicta in *Albert* to support its conclusion that the municipal initiative power may exceed exclusively municipal affairs and encompass all areas where "a municipality has been given the discretion to do as it wishes." (A. 20 (quoting *Albert*, 597 A.2d at 1355).) As recently articulated in *Friends of Congress Square Park v. City of Portland*, the "holding" of *Albert* was that "the acceptance of land for a town way was a municipal affair subject to referendum powers, *as opposed to a state affair*." 2014 ME 63, ¶ 12, 91 A.3d 601 (emphasis added). Thus, *Albert*'s holding as described by this Court reaffirms that municipalities may not purport to grant local voters the authority to affect matters over which the State has shared control. *Albert*, 597 A.2d at 1354-55; *Burkett*, 199 A. at 621; *see Friends*, 2014 ME 63, ¶ 12, 91 A.3d 601. Such measures, including the Emergency Provision, as described in Part II(D), *infra*, exceed the "maximum scope of the initiative and referendum" power. *LaFleur*, 146 Me. at 283, 80 A.2d at 414. Second, contrary to the Superior Court's view, neither *Burkett* nor *Albert* turned on preemption issues. (A. 23.) *Burkett* noted that state law set certain minimum school funding requirements, but only in noting the statewide

implications of the proposed referendum. 199 A. at 620-22. It never engaged in a preemption analysis, but instead focused on the distinction between state and local affairs. *Id.* Similarly, there was no potential conflict with a state-wide concern in *Albert*, where the acceptance of a town way for a local highway was a purely municipal affair. 597 A.2d at 1355. Accordingly, contrary to the Superior Court's conclusion, *Burkett* and *Albert* support the same narrow view of "municipal affairs."

2. The history of the constitutional amendments pertaining to initiative powers evidences the narrow scope of article IV, part 3, section 21.

A review of the constitutional history of the initiative power and comparison of the uniform, strict procedures applicable to statewide initiatives (sections 17-20 and 22 of article IV, part 3) versus the varied, flexible processes for municipal initiatives (section 21 of article IV, part 3) supports the narrow scope of the municipal initiative power recognized by this Court in *Albert* and *Burkett*.

Municipal initiatives as constitutionally authorized are both optional and subject to few mandatory safeguards, suggesting that such initiatives are deliberately narrow in scope. Section 21 was added to the Constitution at the same time that the provisions for statewide initiatives were added, effective in 1909. Res. 1907, ch. 121. Although the Constitution guarantees citizens the statewide initiative power, it merely authorizes municipalities to adopt a local initiative process. *See von Tiling v. City of Portland*, 268 A.2d 888, 891 (Me. 1970); *see also* Tinkle, The Maine State Constitution 109 (2d ed. 2013). Unless and until the Legislature establishes a "uniform method for

the exercise of the initiative and referendum in municipal affairs," Me. Const. art. IV, pt. 3, § 21,[7] municipalities are free to establish their own separate processes for exercising the initiative power, *see von Tiling*, 268 A.2d at 891. Unsurprisingly then, the process for exercising the municipal initiative power varies from locality to locality.[8] The low bar set for municipalities to exercise the initiative power is proportional to a narrow municipal initiative power. Statewide initiatives, in contrast, are subject to uniform, strict constitutional and statutory requirements – reflecting a more expansive scope. *See, e.g.*, Me. Const. art. IV, pt. 3, § 18(2) (requiring total petition signatures to equal 10% of the total vote for Governor cast in the last gubernatorial election preceding the filing of the petition); 21-A M.R.S. § 901-A & 1 M.R.S. § 353 (requiring review of the fiscal impact for statewide initiatives); 21-A M.R.S. § 903-A (circulator requirements).

The lack of controversy over the adoption of a constitutional provision authorizing municipal initiatives likewise suggests that such initiatives are limited in scope. Whereas the statewide initiative and referendum provisions took years to adopt given the Legislature's skeptical view that it would "destroy representative

[7] The Legislature has established certain suggested procedures, which municipalities are free to disregard. *See, e.g.*, 30-A M.R.S. § 2528 (establishing municipal referenda procedures for elections of town officers); *von Tiling*, 268 A.2d at 891 ("[T]he cities are free to adopt machinery which appears best suited to their particular needs.").

[8] *Compare* Lewiston Code § 32-27 (initiated by any ten qualified voters of the city and requiring valid signatures on an initiative petition to equal or exceed 7% of the number of voters cast in the city at the last gubernatorial election), *with* Rockland Code § 6-201-203 (initiated by five qualified voters of the city and requiring valid signatures equal to 10% of the number of registered voters as of the date of the last preceding regular municipal election).

government and that the people would be led to excesses," Lawrence Lee Pelletier, The Initiative and Referendum in Maine 10 (Brunswick: Bowdoin College, 1951), adoption of the municipal initiative power in section 21 was uncontroversial. The Legislature merely viewed section 21 as codifying the same right already available in the form of the New England town meeting. *See* Leg. Rec. 829 (1905).[9] There was no debate on permitting municipalities to establish initiative procedures for their constituents concerning their purely local affairs.

The community-specific matters debated and voted upon at traditional New England town meetings exemplifies the narrow scope of section 21. Dating back to the early 1600s, town meetings were where communities would gather to elect town officials, and citizens would debate and vote upon the internal affairs of the town, such as "fire protection, street lights, hydrant rental, accept[ting] new streets, set[ting] the fees for clam licenses, accept[ting] bequests for cemetery care, debate pine blister rust control, and maybe argue about parking regulations and zoning ordinances." John Gould, *New England Town Meeting: Safeguard of Democracy* 16 (Brattleboro, Vt.: Stephen Daye Press, 1940); *see* Joseph Francis Zimmerman, *The New England Town Meeting: Democracy in Action* 15, 104-05 (Westport, CT: Praeger, 1999). This history

[9] *See id.* at 833-34 ("[I]n the different towns of the State any ten voters may call on the board of selectman and have an item inserted in the town warrant so that the voters in those towns can pass judgment upon the proposed legislation. . . . Are not the people in the cities entitled to the same guaranty that is given to the people of the small towns?").

supports this Court's conclusion in *Burkett* and *Albert* that the maximum scope of the municipal initiative power in section 21 is similarly restricted to purely local affairs.[10]

Consistent with this Court's interpretation of section 21's narrow scope, the history of the initiative powers codified in article IV, part 3 of the Constitution plainly provide bifurcated processes. Issues that touch upon statewide policies and concerns are necessarily subject to the stringent statewide requirements of article IV, part 3, sections 17, 18, 19, 20, and 22 of the Maine Constitution, and Chapter 11 of Title 21-A of the Maine Revised Statues. In contrast, issues that relate exclusively to a municipality's internal affairs are subject only to those processes adopted by each locality, as permitted by article IV, part 3, section 21 of the Maine Constitution. Whereas statewide initiatives affecting the broader community are constitutionally guaranteed, section 21 is a narrow permissive right for municipal voters—limiting the availability of that process to exclusively local affairs. *Burkett*, 199 A. at 621-23; *Albert*, 597 A.2d at 1354; *see LaFleur*, 146 Me. at 283, 80 A.2d at 414.

B. Municipal Voters' Initiative Power Granted By The Maine Constitution Is Not Commensurate With The Legislative Grant Of Home Rule Authority To Municipalities Themselves.

The Superior Court erroneously concluded that the scope of the municipal initiative power established in article IV, part 3, section 21 was somehow expanded

[10] The Legislature affords similar treatment to "municipal affairs" as demonstrated by Title 30-A, Part 2, subpart 3 ("Municipal Affairs"), governing subjects such as terms for municipal officials, municipal reports, boundary lines, and fences, among others. *See* 30-A M.R.S. §§ 2501-2966.

when, sixty years after amending the Constitution to permit initiatives, Maine adopted an entirely separate constitutional amendment, codified at article VIII, governing a municipality's home rule authority. Article IV creates a ceiling, not a floor, for the municipal initiative power. *LaFleur*, 146 Me. at 283, 80 A.2d at 414 ("The Constitution does not place limitations upon the minimum but upon the maximum scope of the initiative and referendum. The limitation is that the initiative and referendum must not be established in matters which are not municipal affairs."). Voters are not creatures of the State; therefore, the Legislature cannot delegate legislative powers to municipal voters in excess of the power permitted under the Constitution and granted by the City itself. In contrast, the Home Rule Amendment, lodged in article VIII, created a floor, not a ceiling, for the home rule authority of the municipality itself. *Sch. Comm. of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993) ("The Legislature has the authority to grant municipalities broader home rule powers than are granted in the Constitution's home rule provision."). As political subdivisions of the State, the Legislature is free to delegate additional powers to municipalities, as it did through 30-A M.R.S. § 3001. Simply put, the powers granted to municipal voters and to municipalities are not co-extensive.

1. Both constitutional provisions are narrow in scope, but only the home rule powers of the municipality itself can be legislatively expanded.

The municipal initiative power, granted in 1909, was followed six decades later by a constitutional amendment granting home rule to municipalities. Res. 1907,

ch. 121; Res. 1969, ch. 29.[11] This later Home Rule Amendment did not amend the initiative provisions in article IV, nor did the Home Rule Amendment grant "vastly more authority" to municipalities to legislate. (A. 21.) Like section 21, which permits municipal initiatives for "municipal affairs," the Home Rule Amendment authorizes local legislation only in areas "local and municipal in character." Me. Const. art. VIII, pt. 2, § 1. This Court has described the Home Rule Amendment as limiting a municipality to legislating in areas "*exclusively* 'local and municipal.'" *Town of York*, 626 A.2d at 939 (emphasis added) (quoting Me. Const. art. VIII, pt. 2, § 1).

Unlike the municipal initiative power in section 21, however, "[t]he Legislature has authority to grant *municipalities* broader home rule powers than are granted in the Constitution's home rule provision." *Id.* (emphasis added). This power derives from the Legislature's inherent power to delegate legislative authority to "its political subdivisions." *Id.* Pursuant to this authority, the Legislature enacted enabling legislation for municipal governance, now found in Chapter 111 of Title 30-A. *See* 30-A M.R.S. § 2101. In *School Committee of Town of York v. Town of York*, this Court held that "section 3001 [of Title 30-A] constitutes an independent and plenary grant of power to *municipalities*"—as creatures of State—"to legislate on matters *beyond those*

[11] The Home Rule Amendment provides in relevant part:

> The inhabitants of any municipality shall have the power to alter and amend their charters on all matters, not prohibited by Constitution or general law, which are local and municipal in character. The Legislature shall prescribe the procedure by which the municipality may so act.

Me. Const. art. VIII, pt. 2, § 1.

exclusively 'local and municipal,' and is not limited by the Constitution's narrower home rule provision." 626 A.2d at 939 (emphases added). Accordingly, the Legislature – and not the Constitution – broadened the scope of municipal home rule authority. *See* 30-A M.R.S. § 3001. Because municipal voters are not "political subdivisions" of the State, the Legislature cannot, and has not, expanded the scope of the municipal initiative power, through Title 30-A or otherwise.

2. Section 3001 of Title 30-A does not apply to municipal initiatives.

Title 30-A does not apply to municipal initiatives. Section 3001, by its plain terms, applies to "any municipality." 30-A M.R.S. § 3001.[12] A "municipality," in turn, is defined as "a city or town," *id.* § 2001(8), and "voter" is defined separately as "a person registered to vote," *id.* § 2001(21). The Legislature further defined "home rule authority" as the "powers granted to *municipalities* under [section 3001] and the Constitution of Maine." *Id.* § 2001(7) (emphasis added).

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[12] 30-A M.R.S. § 3001 states:

> Any municipality, by the adoption, amendment or repeal of ordinances or bylaws, may exercise any power or function which the Legislature has power to confer upon it, which is not denied either expressly or by clear implication, and exercise any power or function granted to the municipality by the Constitution of Maine, general law or charter.
>
> **1. Liberal Construction.** This section, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to effect its purposes.
>
> **2. Presumption of authority.** There is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority.
>
> **3. Standard of Preemption.** The Legislature shall not be held to have implicitly denied any power granted to municipalities under this section unless the municipal ordinance in question would frustrate the purpose of any state law.
>
> **4. Penalties accrue to municipality.** All penalties established by ordinance shall be recovered on complaint to the use of the municipality.

There is not a single case from this Court analyzing the home rule authority of municipalities under Title 30-A as co-extensive with municipal voters' initiative power under article IV, part 3, section 21. To the contrary, in *Albert*, decided over twenty years after the Home Rule Amendment and the enabling legislation, this Court analyzed the constitutionality of the municipal referendum at issue by applying the exclusively municipal test from *Burkett* – not under section 3001 of Title 30-A.[13] There is good reason why this Court has never conflated municipal initiative and home rule powers.

First, there is nothing in article IV, part 3, section 21 that authorizes the Legislature to broaden the scope of the municipal initiative power. Section 21 only authorizes the Legislature to enact a uniform procedure for exercising the initiative power at the local level, *see* Me. Const. art. IV, pt. 3, § 21; *von Tiling*, 268 A.2d at 891, which it has never actually done. Without constitutional authorization, the Legislature cannot broaden the substantive scope of the constitutionally created municipal initiative power, for to do so would be akin to impermissibly amending the

[13] The Superior Court attempted to distinguish this Court's analysis in *Albert* by concluding that "the acceptance of a town way was so obviously and exclusively a municipal affair under the *Burkett* test that [this Court] had no need to go beyond that test in order to uphold the municipal referendum challenged." (A. 22.) That distinction erroneously assumes a new test—whether the subject of the municipal initiative is preempted under 30-A M.R.S. § 3001—never applied by this Court, and found nowhere in article IV, part 3, section 21. Moreover, even if such an additional test existed, the two tests could not be mutually exclusive as also assumed by the Superior Court. Rather, it would be necessary to determine whether or not the initiative was preempted under section 3001, not just whether it concerned what has traditionally been a "municipal affair." That the *Albert* Court did not engage in that additional preemption inquiry is proof the additional test applied by the Superior Court does not exist.

Constitution. *See* Me. Const. art. X, § 4; *Town of York*, 626 A.2d at 939 (statutes are "restricted by the underlying constitutional provision").

Second, unlike a municipality, municipal voters are not "political subdivisions" of the State to which the Legislature may delegate its legislative powers. *Cent. Me. Power Co. v. Town of Lebanon*, 571 A.2d 1189, 1192 (Me. 1990) ("[A] state is free to delegate any power it possesses to its political subdivisions."); 30-A M.R.S. § 2252 (defining "political subdivision" as "any municipality, plantation, county, quasi-municipal corporation and special purpose district"). Voters do not "exist[] by virtue of the exercise of the power of the state through its legislative department." *City of Worcester v. Worcester Consol. St. Ry. Co.*, 196 U.S. 539, 548 (1905). Nor can the legislature "at any time terminate the existence" of voters. *Id.* at 549. Thus, the Legislature is not "free to delegate any power it possesses" to municipal voters through the application of 30-A M.R.S. § 3001, *Cent. Me. Power Co.*, 571 A.2d at 1192, but rather is limited by article IV, part 3, section 21, *see Town of York*, 626 A.2d at 939.

Third, the separate constitutional and statutory schemes for municipal home rule and the municipal initiative power appropriately balance participatory democracy with the need for the "efficient administration of government." *Friends*, 2014 ME 63, ¶ 17, 91 A.3d 601 (quoting 42 Am.Jur.2d Initiative and Referendum § 8 (2014)). Indeed, where opportunities for debate and deliberation are muted, "[l]imiting the types of issues that may be addressed through direct citizen action reflects an often unspoken policy assumption that the need for efficient government outweighs the

added value of public participation." *Id.* (internal quotation marks omitted). Accordingly, there is a logical reason for granting certain authority to *municipalities* but not to municipal *voters*.[14] The additional deliberative function promoted by representative democracy is better suited than is direct democracy to issues that touch on statewide policies issues, at least where democratic participation is limited to a small subset of the statewide electorate.

Finally, municipal voters are not without power: voters select their form of government, thereby directly choosing where to vest local administrative and legislative powers, 30-A M.R.S. § 2102; voters may petition for their local government to authorize the use of the municipal initiative power, *see* 30-A M.R.S. § 2524; and if authorized, voters may exercise the municipal initiative power pertaining to exclusively local matters, *see Albert*, 597 A.2d at 1355. Here, Portland voters chose a representative form of government, vesting all power over its municipal affairs in an elected nine-member City Council with one exception – reserving to voters an initiative power concerning exclusively municipal affairs. *See id.*

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[14] *Cf. Howard Jarvis Taxpayers Ass'n v. Padilla*, 363 P.3d 628, 646 (Cal. 2016) ("When the people established the Legislature, they conveyed to it the full breadth of their sovereign legislative powers. When they adopted the initiative power in 1911, they restored to themselves only a shared piece of that power. There is nothing incongruous in reading the state Constitution as allocating broader powers to the deliberative body representing the people than to the people directly. Such is the nature of a republic."); *Berent v. City of Iowa City*, 738 N.W.2d 193, 208 (Iowa 2007) ("Removal under the [proposed] amendment does not involve deliberation of elected representatives that is at the heart of representative democracy which our legislature has chosen to prescribe."); *Thomas v. Bailey*, 595 P.2d 1, 8 (Alaska 1979) (striking down an initiative as exceeding the scope of the constitutional initiative power and holding that certain subjects require "the reasoned deliberation" of elected officials).

In sum, the two constitutional provisions—adopted sixty years apart—are distinct and must be analyzed separately by this Court. The Legislature could not, nor has it attempted to, expand the municipal initiative power under article IV. Rather, article IV itself specifies the maximum extent of authority granted to municipal voters under the Constitution, *see LaFleur*, 146 Me. at 283, 80 A.2d at 414, which can be narrowed further by individual municipalities, *see Friends*, 2014 ME 63, ¶ 10, 91 A.3d 601, but not expanded. Municipal "home rule" is not implicated by this case.

C. Portland Voters' Initiative Power Is Limited To Exclusively Municipal Affairs By The City's Initiative And Referendum Ordinance.

Even if the municipal initiative provision in article IV had somehow been expanded by the Home Rule Amendment and Title 30-A, the Emergency Provision still exceeds the scope of the initiative power granted to the electorate by the City of Portland. The scope of Portland voters' initiative power is expressly limited by the City's Initiative and Referendum Ordinance. *See LaFleur*, 146 Me. at 283, 80 A.2d at 414 (holding that article IV, part 3, section 21 sets the "maximum scope" of the municipal initiative power); *von Tiling*, 268 A.2d at 891 (holding that the Constitution is permissive and leaving to the City Council and the voters the determination of whether to grant an initiative power); *Friends*, 2014 ME 63, ¶ 10, 91 A.3d 601 (holding that a municipality may limit the areas where the initiative power may be invoked). An initiative that exceeds the scope of the power granted by the Initiative and

Referendum Ordinance is invalid. *See Friends*, 2014 ME 63, ¶ 10, 91 A.3d 601. Such is the case here.

The City's current Initiative and Referendum Ordinance was adopted in 1950,[15] only twelve years after *Burkett* in which this Court determined that "municipal affairs" are affairs of a purely local nature involving only the inhabitants of the municipality "apart from the people of the state at large." *Burkett*, 199 A. at 622. The scope of the City's Initiative and Referendum Ordinance has not been amended or revised since – including after the 1969 Home Rule Amendment, and the enabling legislation now codified in Title 30-A. The scope of "municipal affairs" in the Initiative and Referendum Ordinance cannot be interpreted by reference to laws that did not exist at the time it was enacted.

Portland originally adopted a broad initiative and referendum power by Charter, not limited to "municipal affairs." *See* P. & S.L. 1923, ch. 109 (granting initiative power for "any proposed ordinance, order or resolve"). In 1950, Portland's City Council adopted its current Initiative and Referendum Ordinance, which was ratified by the majority of Portland voters on December 4, 1950 and became effective on January 3, 1951. *LaFleur*, 146 Me. at 273-75, 80 A.2d at 409-10. The Initiative and Referendum Ordinance cabins initiatives more narrowly than both the 1923 Charter

[15] In addressing Appellants' arguments regarding the Initiative and Referendum Ordinance, the Superior Court incorrectly stated that the direct initiative provision was enacted by the Portland City Council and ratified by the voters in 1991. (A. 15.) It was in fact adopted four decades earlier in 1950.

and the Constitution, allowing only proposed ordinances "dealing with legislative matters on municipal affairs . . . ." *Id.* at 278, 80 A.2d at 412. Thereafter, the provision authorizing initiatives in Portland's Charter was repealed pursuant to P. & S.L. 1961, ch. 194.

While Portland has since recodified its Initiative and Referendum Ordinance, *see, e.g.*, Portland Code § 102.1 (1968); Portland Code §§ 9-36 – 9-47 (1983), and has further updated the processes for how the initiative power is invoked, *see, e.g.*, Portland Code § 9-36 (1991),[16] the *scope* of the initiative power granted to voters by the City has remained unchanged since 1950: it still limits the initiative power to only those ordinance proposals "dealing with legislative matters on municipal affairs . . . ." Portland Code § 9-36 (2021). Pursuant to its Charter, the City vests all other legislative and administrative power in its elected body, the City Council. *See* Portland Charter Art. I, § 2.

In determining whether the Emergency Provision of the Initiative exceeded the scope of the authority granted to *municipal voters* by the Constitution and Portland's Code, the Superior Court erred by relying upon the powers granted by the *Legislature* to *municipalities* in Title 30-A. (A. 21-23.) The question is not what power the

[16] For example, the 1991 amendments to the Initiative and Referendum Ordinance changed the number of required signatures from 750 to 1,500; changed the time allowed for petitioners to collect signatures from forty-five (45) days to eighty (80) days; required petitioners to submit a summary of the initiative proposal with the form petition; and established a process for verifying circulator requirements. Portland Code §§ 9-36, 9-37 (1991).

Legislature has granted to municipalities, but rather what power *the City*, to the extent authorized by the Constitution to do so, granted to the *voters* through its Initiative and Referendum Ordinance.

Once that key distinction is made, it is readily apparent that – under the City's Ordinance – Portland voters may only adopt initiatives relating exclusively to municipal affairs. Because the scope of Portland's Initiative and Referendum Ordinance has not changed since it was enacted in 1950, it necessarily follows that the Portland City Council has not granted to Portland voters a broader initiative power than that which it created in 1950. In 1950, *Burkett* had been recently decided, and neither the Home Rule Amendment or the enabling legislation had been enacted—including section 3001 of Title 30-A. Portland voters cannot now rely on a later-enacted *legislative* grant of authority to municipalities derived from 30-A M.R.S. § 3001 to retroactively and unilaterally expand the scope of the initiative power granted to voters *by the City's* Initiative and Referendum Ordinance. While section 3001 of Title 30-A does not limit municipal home rule to "municipal affairs," the City's Initiative and Referendum Ordinance does so limit the initiative power. Accordingly, regardless of how a court would interpret the current scope of the Constitution's municipal initiative provision, the scope of Portland voters' initiative power must be analyzed by reference to the "municipal affair" test of *Burkett* in effect in 1950—not the Home Rule Amendment or section 3001.

D. The Emergency Provision Violates The "Exclusively Municipal" Requirement Set Forth In Article IV, Part 3, Section 21 As Well As The City's Initiative And Referendum Ordinance.

The Emergency Provision fails the exclusively municipal test set forth in article IV, part 3, section 21 of the Maine Constitution as well as the Initiative and Referendum Ordinance, and therefore exceeds the scope of power granted to Portland voters. The sharply-escalated wage required by the Emergency Provision does not "alone concern the inhabitants" of Portland. *Burkett*, 199 A. at 622. Thus, establishing an emergency wage is not a purely municipal affair "as opposed to a state affair." *Friends*, 2014 ME 63, ¶ 12, 91 A.3d 601 (articulating the holding of *Albert*). Rather, the Emergency Provision relates to statewide affairs for two primary reasons. First, the Governor is vested with extensive authority to effectively manage statewide emergencies, such as the COVID-19 pandemic. *See* 37-B M.R.S. § 742 (authorizing action by the Governor in a state of emergency). Second, the State maintains extensive statutory and regulatory authority over employee wages, *see* 26 M.R.S. § 661 (establishing the public policy for the State's minimum wage). Accordingly, as the Superior Court acknowledged, "if the language of the 1938 *Burkett* opinion is still controlling, the emergency minimum wage provision would not qualify as 'exclusively' municipal and would therefore not be a proper subject for a municipal citizen's initiative." (A. 21.) The Superior Court was correct on this point. Applying *Burkett* and *Albert*, the Emergency Provision does not concern exclusively municipal affairs.

1. The Emergency Provision impinges upon the Governor's authority to effectively manage statewide emergencies.

The Emergency Provision addresses issues committed to the Governor's discretion, namely, the swift and effective management of statewide emergencies (including the current pandemic). The Constitution does not permit voters of individual municipalities to implement a patchwork of requirements and policies broadly affecting the State during declared statewide emergencies through the use of an exclusively municipal initiative power.

Pursuant to 37-B M.R.S. § 742, the Governor is vested with the authority to declare a state of emergency. The Governor's proclamation activates the emergency plans applicable to the affected areas and serves as the authority for the deployment of available resources. *Id.* § 742(1)(B). Once declared, the Governor has broad enumerated powers to manage the crisis, including taking "whatever action is necessary to abate, clean up or mitigate whatever danger may exist" within the State. *Id.* § 742(1)(C)(12). Most importantly, the Governor is required to proclaim a state of emergency and direct execution of the State's emergency plan before being eligible to request federal relief and assistance under the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act"), which governs the federal government's response to domestic disasters. 42 U.S.C. § 5170(a). The Stafford Act is intended to provide an orderly means of federal assistance to state governments to alleviate the damage caused by such emergencies, *id.* § 5121(b), including but not limited to

providing individual aid, lost wages assistance; small business loans; and hazard mitigation, *id.* §§ 5170-5189h. The Emergency Provision may impinge upon the Governor's ability to respond flexibly to emergencies that create substantial economic disruption and present substantial health risks – as with the current pandemic. *See, e.g.*, Me. Exec. Order No. 51 (May 6, 2020) (noting that "workers and families, businesses and non-profits, industries and communities across Maine are facing unprecedented economic challenges because of the COVID-19 pandemic").

Whether or not the Emergency Provision *actually* causes the Governor to act differently, it is beyond peradventure that it addresses statewide emergencies – including the current COVID-19 pandemic. The Emergency Provision has broad-ranging effects and addresses statewide issues by intruding upon the calculus the Governor must undertake before declaring a state of emergency and being eligible for federal aid under the Stafford Act and comparable federal programs. That is, the Emergency Provision creates, at best, an additional consideration for the Governor to undertake before fulfilling her statutory obligations to manage the economic, social, and public health impacts resulting from the pandemic, and, at worst, a substantial disincentive for the Governor to declare an emergency because of the resulting economic repercussions. Either way, there is nothing exclusively municipal about an initiative, like the Emergency Provision here, that carries with it the risk that the Governor, acting on behalf of all Maine residents, will act any differently in taking

"whatever action is necessary" to address a statewide crisis given the consequences springing from the Governor's actions. 37-B M.R.S. § 742(C)(12).

Statewide emergencies, such as the COVID-19 pandemic, are simply not exclusively local in character. Municipal voters cannot, through the initiative power, require the Governor to assess the economic burden created by a substantial emergency wage increase in a specific individual municipality before proclaiming a state of emergency pursuant to 37-B M.R.S. § 742. Article IV, part 3, section 21 of the Constitution prohibits the use of the municipal initiative power to address such issues.

2. The Emergency Provision is not exclusively municipal when the State exercises extensive authority to set and regulate wages.

It is also irrefutable that the State exercises extensive authority to establish and regulate a minimum wage. This, too, invalidates the Emergency Provision, which seeks to address the same statewide issue.[17]

Laws affecting wages address public problems impacting the entire community. *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).[18] The State-established minimum wage balances the need for a wage adequate to support employees' basic needs with

[17] The Superior Court was correct to note that because of the statewide implications of minimum wage requirements the entirety of the Initiative's other minimum wage provisions may be infirm. Appellants, however, have not challenged these requirements because their sole concern is with the impacts of the Emergency Provision. Appellants note, however, that if all of the Initiative's minimum wage requirements fail, Portland's Minimum Wage Ordinance would simply revert to its original language. In short, Portland would still retain the minimum wage requirements lawfully adopted by the City Council.

[18] In *West Coast Hotel*, the Supreme Court held that held that the state had a compelling interest in regulating wages given that inadequate wages for workers "casts a direct burden for [those workers'] support upon the community. What these workers lose in wages the taxpayers are called upon to pay." 300 U.S. at 399.

the corollary impacts of raising the minimum wage too high, recognizing the necessary policy tradeoffs between wages on the one hand and employment and economic stability on the other. A wide variety of factors had to be weighed by the Legislature in determining and amending the State minimum wage codified in Title 26, including but not limited to employment rates, demand and prices for goods and services, the impact on small businesses, living standards, and impacts on education.[19] *See, e.g.*, Leg. Rec. H-1391-94 (2d Reg. Sess. 2016).

The Emergency Provision, requiring a minimum wage more than 1.5 times the minimum wage applicable elsewhere in the State, amplifies these effects—both within and outside of Portland's borders—without considering the economic impact on

[19] *See, e.g.*, Employment Policies Institute, *Policy Brief on Fighting $15: An Evaluation of the Evidence and a Case for Caution* (January 2019) (estimating approximately 5,000 lost jobs if Maine adopted a higher minimum wage in 2020), *available at* https://epionline.org/wp-content/uploads/2019/01/EPI_NationalMWDocument.pdf.; Congressional Budget Office, *The Effects on Employment and Family Income of Increasing the Federal Minimum Wage* 12 (July 2019) (stating that raising the minimum wage would increase the economy wide demand for goods and services since families with increased income tend to boost their discretionary spending), *available at* https://www.cbo.gov/system/files/2019-07/CBO-55410-MinimumWage2019.pdf.; David Neumark & William L. Wascher, *Minimum Wages* 207-17 (2008) (detailing studies of young adults abandoning educational pursuits in favor of securing a job that pays a higher wage); Luca, Dara Lee, and Michael Luca, *Survival of the Fittest: The Impact of the Minimum Wage on Firm Exit*, Harvard Business School Working Paper, No. 17-088 (April 2017) (increase in minimum wage causes disproportionate closures of small businesses and restaurants), *available at* https://dash.harvard.edu/bitstream/handle/1/33111775/17-088.pdf?sequence=1.; David Cooper, *Raising the Federal Minimum Wage to $15 by 2024 Would Lift Pay for Nearly 40 Million Workers*, Economic Policy Institute (Feb. 2019) ((concluding that indexing the minimum wage to median wages would increase living standards for low-wage workers and prevent future growth inequality), *available at* https://www.epi.org/publication/15-by-2024-would-lift-wages-for-41-million/; Employment Policies Institute, *Fighting $15: An Evaluation of the Evidence and a Case for Caution* 50-55 (January 2019) (minimum wage increase causes increase in prices of goods and services for consumers, which disproportionately burdens low- and middle-income families), *available at* https://epionline.org/wp-content/uploads/2019/01/EPI_Bookv5.pdf.; *see also e.g.*, Leg. Rec. H-1391-94 (2d Reg. Sess. 2016) ("This is basic economics, folks. When you raise the minimum wage, you're going to lower something else. And that lowering something else means employment." (statement of Representative Fredette)).

persons and organizations outside the City limits and ultimately on the State as a whole. The extra-territorial effects of the Emergency Provision are self-evident:

- Workers whose jobs may be eliminated in Portland based on the impact of the Emergency Provision will affect the State's already over-burdened unemployment system or seek jobs outside of the Portland area, impacting available jobs in nearby localities.

- Restaurants and small businesses that were already struggling to operate during the pandemic may further restrict available services or close entirely, impacting workers who do not live in Portland and non-Portland consumers.

- Community service agencies that rely on state reimbursement to pay workers, based on a formula that does not take local emergency wage provisions into account, may relocate or terminate services entirely because the state system on which they rely is not designed to afford local emergency wage increases.

- Businesses that are able to pay the escalated wage may push those increased operational costs onto consumers, not all of whom live in Portland, limiting the availability for low- or middle-income families to purchase those products or services.[20]

In sum, although the Emergency Provision applies by its terms to Portland-based businesses, the impacted employees and consumers are *not* all Portland residents.[21]

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[20] *See, e.g.*, Peter McGuire, *Portland Businesses Struggle to Keep Up with New $18 Hazard Pay*, PORTLAND PRESS HERALD (Jan. 24, 2021) (addressing a small sampling of the extra-territorial impacts of the Emergency Provision, including layoffs; reduction or termination of services; reduction of workers' hours; increased costs for consumers; relocation of businesses; and the administrative and financial burdens for large employers responding to individual cities and towns' local emergency wages), *available at* https://www.pressherald.com/2021/01/24/portland-businesses-struggle-to-keep-up-with-new-18-hazard-pay/.

[21] The extra-territorial impacts of the Emergency Provision can be illustrated with a simple hypothetical: Consider an Employer, such as a member of Appellant Alliance for Addiction and Mental Health Services, Maine, which has two employees, only one of whom works within the city limits of Portland and neither of whom are residents of Portland. Both employees have identical job descriptions: both provide substance use disorder and mental health services to individuals in the state. Assuming both employees have identical educational backgrounds and experience, the Portland-employee will be paid significantly more than the other

(footnote continued)

Because the Emergency Provision's impact is not limited in any way to Portland's affairs, and has potentially far-reaching statewide consequences, it necessarily follows that an emergency wage, such as that established by the Emergency Provision, is a statewide public policy concern and not an exclusively "municipal affair" that "alone concern[s] the inhabitants of" Portland. *Burkett*, 199 A. at 622. Accordingly, the Emergency Provision cannot survive constitutional scrutiny.

* * *

In entering judgment against Appellants on Counts I and II, the Superior Court erroneously departed from long-standing precedent, conflated two distinct constitutional provisions, and failed to properly analyze the scope of power granted to Portland voters by the City itself. Nevertheless, the Superior Court correctly acknowledged that, if the rule set forth in *Burkett* still controls, the Emergency Provision exceeds the scope of the municipal initiative power. (A. 21.) *Burkett* is controlling under both the Maine Constitution and the City's Initiative and Referendum Ordinance, and the municipal initiative power is therefore expressly limited to "municipal affairs," as interpreted by this Court to mean those few matters "of a strict local character limited to the interest of the city residents." *Burkett*, 199 A. at 622. Under this test, the Emergency Provision is not exclusively municipal. The issues sought to be addressed by the Emergency Provision are complicated issues that

(continued footnote)
employee, disincentivizing individuals from working outside of Portland, where substance use disorder and mental health care is no less critical.

implicate statewide public policy concerns not limited to Portland residents. Appellants are therefore entitled to judgment on Counts I and II.

III. Alternatively, If Valid, The Emergency Provision Is Not Operative Until January 1, 2022.

In granting summary judgment in favor of Appellants on Count III of the Complaint, the Superior Court correctly determined that the plain, unambiguous language of the City's Minimum Wage Ordinance as amended by the Initiative dictates that the Emergency Provision only becomes effective January 1, 2022.[22]

The interpretation of an ordinance is a question of law. *Tryba v. Town of Old Orchard Beach*, 1998 ME 10, ¶ 4, 704 A.2d 403. When interpreting an ordinance, a court "first evaluate[s] the plain meaning of the Ordinance and, if the meaning is clear, [] need not look beyond the words themselves." *Olson v. Town of Yarmouth*, 2018 ME 27, ¶ 11, 179 A.3d 920 (quoting *Fryeburg Tr. v. Town of Fryeburg*, 2016 ME 174, ¶ 5, 151 A.3d 933); *see Swallow v. City of Lewiston*, 534 A.2d 975, 977 (Me. 1987). Thus, when the language of the ordinance is unambiguous, this Court will not consider any other evidence of the ordinance's meaning. *Olson*, 2018 ME 27, ¶ 11, 179 A.3d 920.

As the Superior Court concluded, the Emergency Provision is unambiguous. (A. 26-27.) The Minimum Wage Ordinance as amended by the Initiative provides:

[22] The Superior Court went on to conclude that, even if it had determined the language was ambiguous, the court would consider only the ballot question as evidence of legislative intent, which only "gives an example of how the emergency wage provision would apply . . . [and] does not conflict with the plain language of the initiative." (A. 28.)

> **(g) Effect of Emergency Proclamation.** For work performed during a declared emergency, the effective Minimum Wage rate *established by this ordinance* shall be calculated as 1.5 times the *regular minimum wage rate under subsection (b)* above.

(A. 67 § 33.7(g) (emphases added).) The Emergency Provision plainly states that it operates by providing a multiplier for the "minimum wage rate *established by this ordinance*." *Id.* (emphasis added). Subsection (b) of the Ordinance as amended, however, does not set a "minimum wage rate" until next year, "[b]eginning on January 1, 2022." (A. 66 § 33.7(b)(i) (establishing a minimum wage of $13 per hour beginning on that date).) The Initiative repealed those provisions of the Ordinance setting a minimum wage rate before January 1, 2022. *Id.* Because the "regular minimum wage rate under subsection (b)" does not become effective until January 1, 2022, the Emergency Provision does not either. [23]

Any contrary interpretation would require rewriting the plain, unambiguous language of the Ordinance as amended by the Initiative, as there is no "minimum wage rate established by this ordinance" until that date. Such a re-writing of the statute cannot be justified based on the use of legislative history, given the plain meaning of the statute. *See Scamman v. Shaw's Supermarkets, Inc.*, 2017 ME 41, ¶ 14, 157 A.3d 223 (courts do not look beyond unambiguous language to consider legislative history). Until January 1, 2022, the only minimum wage rate in effect in Portland is

[23] Such a result aligns with the Ordinance's stated purpose of allowing businesses time to adjust and plan for an increase in expenses. (A. 57 § 33.1.)

the wage rate established by the State pursuant to 26 M.R.S. § 664, independent of the amended Ordinance. The Superior Court therefore correctly determined that the Emergency Provision, if valid, is not operative and in effect until January 1, 2022—the earliest date by which there is a "regular minimum wage rate under subsection (b)" of the Ordinance, as amended.

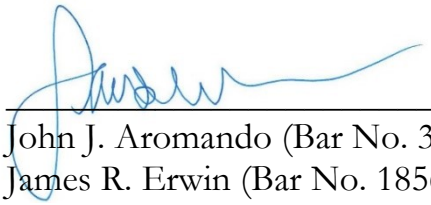
CONCLUSION

The Emergency Provision of the Initiative exceeds the scope of the initiative power reserved to the people under article IV, part 3, section 21 of the Maine Constitution and Portland's Code, because it does not relate exclusively to the internal affairs of the City. Municipal voters, however well intentioned, cannot adopt by initiative new ordinances that address issues of statewide concern – issues that, in this case, implicate the Governor's obligation to manage statewide crises and the balanced wage policies adopted by the Legislature. The significant extra-territorial impacts outside of Portland removes the Emergency Provision from the proper purview of municipal initiatives.

Accordingly, Appellants request that this Court vacate the Superior Court's judgment on Counts I and II and remand for judgment to enter in Appellants' favor declaring that the Emergency Provision exceeds the scope of the municipal initiative power under the Maine Constitution and the City's Initiative and Referendum Ordinance. If the Court grants this relief, it need not address Count III. If this Court does not grant Appellants' requested relief as to Counts I and II, Appellants request

that this Court affirm the Superior Court's judgment on Count III that the unambiguous language of Portland's Minimum Wage Ordinance, as amended by the Initiative, establishes that the Emergency Provision takes effect on January 1, 2022.

Dated this 12th day of March, 2021



John J. Aromando (Bar No. 3099)
James R. Erwin (Bar No. 1856)
Joshua D. Dunlap (Bar No. 4477)
Sara A. Murphy (Bar No. 5423)
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
Tel: (207) 791-1100
jaromando@pierceatwood.com
jerwin@pierceatwood.com
jdunlap@pierceatwood.com
smurphy@pierceatwood.com

Attorneys for Plaintiff-Appellants 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.

CERTIFICATE OF SERVICE

I hereby certify that a copy of Appellants' Brief, was served upon the parties listed below by email only, per agreement of counsel, on March 12, 2021:

Dawn M. Harmon, Bar No. 9612
PERKINS THOMPSON, P.A.
One Canal Plaza, PO Box 426
Portland, ME 04112-0426
Tel: (207) 774-2635
dharmon@perkinsthompson.com

Attorney for Defendant-Appellees City of Portland and Jon Jennings, in his official capacity as City Manager for the City of Portland

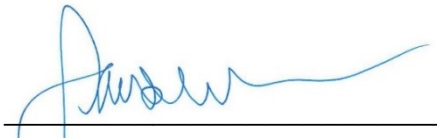
Shelby H. Leighton, Bar No. 6228
Valerie Z. Wicks, Bar No. 5606
David G. Webbert, Bar No. 7334
JOHNSON, WEBBERT & GARVAN, LLP
160 Capital Street
Augusta, ME 04330
Tel: (207) 623-5110
sleighton@work.law
vwicks@work.law
dwebbert@work.law

Attorneys for Intervenor-Appellees Caleb Horton and Mario Roberge-Reyes

Christopher C. Taub, Bar No. 8416
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
Tel: (207) 626-8830
Christopher.C.Taub@maine.gov

Attorney for Aaron Frey in his official capacity as Attorney General for the State of Maine

Dated: March 12, 2021



Sara A. Murphy (Bar No. 5423)
PIERCE ATWOOD LLP
Merrill's Wharf
254 Commercial Street
Portland, ME 04101
Tel: (207) 791-1100
smurphy@pierceatwood.com

Attorney for Plaintiff-Appellants 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.