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,
Plaintiffs-Appellants,

v.

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

and

CALEB HORTON and MARIO ROBERGE-REYES,
Intervenor-Appellees.

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

BRIEF OF DEFENDANT-APPELLEES CITY OF PORTLAND AND JON JENNINGS, IN HIS OFFICIAL CAPACITY AS CITY MANAGER FOR THE CITY OF PORTLAND

Dawn M. Harmon, Esq., Bar No. 9612
PERKINS THOMPSON, P.A.
One Canal Plaza, P.O. Box 426
Portland, ME 04112-0426
(207) 774-2635

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

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

In September 2015, the City Council implemented a Minimum Wage Ordinance, effective January 1, 2016, which established that the "regular minimum wage for all Employees, including but not limited to, Service Employees, shall be raised to $10.10 per hour," beginning on the effective date. The Ordinance provided for incremental increases to the minimum wage. (A. 99.)

On July 13, 2020, voters submitted a petition with at least one thousand five hundred (1,500) signatures in support of an initiative to increase the City of Portland's minimum wage rate (the "Initiative"). (A. 99.) The Initiative amends subsection (b) of the Ordinance, in relevant part, as follows:

(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.

The Initiative further amends the "Tip Credit" provision of the Ordinance as follows:

(c) Tip Credit:

(i) An Employer may consider tips as part of the wages of a Service Employee toward satisfaction of the Minimum Wage established by this ordinance, in accordance with 26 M.R.S. § 664(2) and until such time as the tip credit is eliminated under state law. Such a tip credit shall be no greater than half the Minimum Wage rate established by this ordinance.

Finally, the Initiative amends the Ordinance by adding a new section, subsection (g)

(the "Emergency Provision"), which 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

(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. 100-01.)

On November 3, 2020, the City of Portland held its general municipal election and voters voted in favor of the Initiative. (A. 39.) On November 6, 2020, the City of Portland certified that the Initiative had been approved by the vote of the electors. (A. 39.) The City of Portland will not enforce the Emergency Provision until its effective date of January 1, 2022. (A. 101.)

In response to the COVID-19 pandemic, the City of Portland declared a state of emergency for the municipality on March 4, 2020. The emergency proclamation has been amended and extended a number of times by order of the City Council; most recently on January 4, 2021, extending the State of Emergency to May 10, 2021. (A. 101.)

On or about December 1, 2020, Plaintiffs filed a three-count Verified Complaint, naming the City of Portland and Jon Jennings, in his official capacity as City Manager for the City of Portland (together, hereinafter the "City"), seeking a declaratory judgment, arguing that: (1) the Emergency Provision of the Initiative exceeded the initiative power reserved to municipal voters under the Maine Constitution; (2) the Emergency Provision violated section 9-36(a) of the Portland City Code because it is administrative rather than legislative in nature; and (3)

alternatively, the Emergency Provision was not operative until January 1, 2022 (the "Verified Complaint"). (A. 101.)

On or about December 3, 2020, Caleb Horton and Mario Roberge-Reyes (together, "Intervenors") filed an Unopposed Motion to Intervene with Supporting Memorandum of Law, which the Court granted on that same day (the "Motion to Intervene"). (A. 101.) In addition to granting the Motion to Intervene, the Order set forth an answer and dispositive motion schedule for all parties. (A. 102.)

On December 10, 2020, Intervenors filed an Answer to the Verified Complaint and a Cross-Claim against the City and City Manager (the "Cross-Claim"). (A. 102.) The Cross-Claim alleged that the Emergency Provision should go into effect no later than January 1, 2021. (A. 102.) It further alleged that the City's position that it would not enforce the Emergency Provision until January 1, 2022 violated Article V, section 33-9(a)(i) of the Portland City Code. (A. 102.) The Cross-Claim sought a declaratory judgment that the Emergency Provision was both valid and went into effect on December 6, 2020. The Intervenors also sought an injunction requiring the City and City Manager to immediately begin enforcing the Emergency Provision. (A. 102.) While seeking different results, in essence, Intervenors' Cross-Claim and Count III of Plaintiffs' Verified Complaint asked the Court for the same relief: a declaratory judgment relating to the effective date of the Emergency Provision. (A. 102.)

On December 21, 2020, Plaintiffs filed a Motion for Summary Judgment. Within the Motion's first argument, Plaintiffs contended that the Emergency Provision exceeded the initiative power because the Provision violated the "exclusively municipal requirement of Article IV, Part 3, Section 21" of the Maine Constitution. (A. 79.) This is because, as Plaintiffs argued, the Governor holds plenary power over regulating employee wages and the Provision "impinges upon the Governor's authority and obligation to effectively manage statewide emergencies." (A. 82.)

In response to Plaintiffs' Motion for Summary Judgment, the City filed their Opposition to the Motion on January 11, 2021, in which the City asserted that, to the extent that Plaintiffs argued that the City did not have the authority to regulate municipal wages or to enact an emergency provision during an emergency, the Motion for Summary Judgment must be denied. (A. 210-15.) However, the City took no position with respect to the other arguments raised in Sections I and II of Plaintiffs' Motion for Summary Judgment. (A. 210.) The City asked that the trial court deny Intervenors' request for an injunction requiring the City (and the City Manager) to immediately begin enforcing the Emergency Provision because the unambiguous language of the Emergency Provision established an effective date of January 1, 2022. (A. 219.)

On January 11, 2021, Intervenors also filed an Opposition to Plaintiffs' Motion for Summary Judgment, contending, among other things, that the Emergency Provision went into effect in December 2020, according to the text of the Provision. (A. 236.)

The trial court entered a final judgment on February 1, 2021. (A. 13.) The court held that the Emergency Provision was "not invalid" under the Maine Constitution and dismissed Count I of Plaintiffs' Complaint. (A. 31.) Similarly, the Emergency Provision was held not invalid under the Portland City Code, resulting in a dismissal of Count II of Plaintiffs' Complaint. (A. 31.) Next, the trial court entered a declaratory judgment that the effective date of the Emergency Provision is January 1, 2022. (A. 31.) This necessarily required a dismissal of Intervenors' Cross-Claim against the City requesting an injunction to compel the City (and City Manager) to immediately enforce the Emergency Provision. (A. 31.)

Both Plaintiffs and Intervenors have appealed this Order to the Law Court. For the reasons set forth below, the City argues that this Court should: (1) affirm the trial court's proper dismissal of Count I of Plaintiffs' Complaint, to the extent that the trial court concluded that the Emergency Provision is a proper exercise of municipal authority; (2) affirm the trial court's declaratory judgment that the effective date of the Emergency Provision is January 1, 2022; and (3) affirm the dismissal of Intervenors' Cross-Claim against the City and City Manager.

ISSUES PRESENTED

I. Did the trial court properly dismiss Count I of Plaintiffs' Complaint, concluding that the Emergency Provision is a proper exercise of municipal authority?

II. Did the trial court properly enter judgment on Count III of Plaintiffs' Complaint, declaring judgment that the effective date of the emergency minimum wage provision is January 1, 2022?

III. Did the trial court properly dismiss Intervenors' Cross-Claim against the City of Portland?[1]

SUMMARY OF THE ARGUMENT

Under Title 30-A, Section 3001, the Legislature effectuated a "plenary grant of power to municipalities to legislate on matters beyond those exclusively local and municipal." *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993). This power is liberally construed and may not be preempted by state law unless the Legislature has created a comprehensive and exclusive regulatory scheme or the municipal exercise of that power would frustrate the purpose of any

[1] The City takes no position on the trial court's dismissal of Count II of the Complaint. However, during the motion for summary judgment hearing, the City stated its position that the authority to enact ordinances under home rule authority is broader than that through a citizens' initiative, as it relates to both Counts I and II of the Complaint.

state law. *Tisei v. Town of Ogunquit*, 491 A.2d 564, 570 (Me. 1985); *see also* 30-A M.R.S. § 3001(3).

It is undisputed that a municipality has the authority under this broad grant of power to regulate local wages, provided such regulation does not conflict with the statewide minimum wage set by the Legislature. Similarly, it is undisputed that a municipality has authority to declare a local state of emergency and set an increased minimum wage to address resident needs during that emergency and that doing so does not impinge on the Governor's ability to respond to the emergency at the statewide level. To the extent that the trial court held that the City does have such powers, the trial court properly dismissed Count I of Plaintiffs' Complaint.

Additionally, the plain, unambiguous language of the Ordinance, as amended by the Initiative, establishes an effective date of January 1, 2022 for the Emergency Provision. Because the text of the Ordinance is unambiguous, this Court "need not look beyond the words themselves." *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909. Furthermore, the Ordinance's plain language does not lead to an illogical or absurd result where the Ordinance evidences a phased-in scheme under which minimum wage gradually increases over time, beginning January 1, 2022. Interpreting the Emergency Provision to similarly take effect in January 2022 is logical. Holding as a matter of law that the effective date of the Emergency Provision is January 1, 2022, the trial court properly entered a declaratory judgment

on Count III of Plaintiffs' Complaint and dismissed Intervenors' Cross-Claim against the City.

ARGUMENT

A. Standard of Review

The Law Court reviews a grant of summary judgment de novo, viewing the evidence in a light most favorable to the party against whom the motion was granted. *Rogers v. Jackson*, 2002 ME 140, ¶ 5, 804 A.2d 379. "When the material facts are not in dispute, this Court reviews de novo the trial court's application of the law." *Oceanic Inn, Inc. v. Sloan's Cove, LLC*, 2016 ME 34, ¶ 26, 133 A.3d 1021.

A trial court's exercise of discretion in granting or denying declaratory judgment is accorded deference; however, the deference accorded "is less than that accorded many other rulings made by a court of first instance, such as findings of historical fact based on testimony or discretionary rulings on the admissibility of evidence." *Waterville Industries, Inc. v. Finance Authority of Maine*, 2000 ME 138, ¶ 24, 758 A.2d 986 (quoting *Perry v. Hartford Accident and Indem. Co.*, 481 A.2d 133, 136 (Me. 1984)).

B. The trial court properly dismissed Count I of Plaintiffs' Complaint, concluding that the Emergency Provision is a proper exercise of municipal authority.

In their Opposition to Plaintiffs' Motion for Summary Judgment, the City argued that, under the City's home rule authority, it has the power to regulate municipal wages and to declare a state of emergency. (A. 211.) To the extent that Count I of Plaintiffs' Complaint alleged that the City did not have such powers, the trial court properly dismissed the Count, holding, as a matter of law, that municipalities have broad home rule authority to regulate local wages and to declare states of emergency.

Under Maine law, "[a]ny municipality . . . 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 . . . ." 30-A M.R.S. § 3001. The Law Court has recognized this as a "plenary grant of power to municipalities to legislate on matters beyond those exclusively local and municipal." *School Committee of Town of York v. Town of York*, 626 A.2d 935, 939 (Me. 1993). This power is liberally construed and "[t]here is a rebuttable presumption that any ordinance enacted under this section is a valid exercise of a municipality's home rule authority." *Id.* § 3001(1), (2). Additionally, there is a standard of preemption by which "[t]he 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." *Id.* § 3001(3). To determine whether a municipality has acted beyond its home rule authority, a court will "focus on the enactments of the

legislature in the area that the municipality is undertaking to regulate. If the legislature intended to create a comprehensive and exclusive regulatory scheme, then the municipal ordinance must fail as a violation of the Home Rule statute." *Tisei v. Town of Ogunquit*, 491 A.2d 564, 570 (Me. 1985).

It is clear that the City has authority to enact a municipal minimum wage ordinance pursuant to its home rule authority. (A. 21.) The Maine state minimum wage statute establishes that "an employer may not employ any employee at a rate less than the rates required by this section" and proceeds to establish the rate. 26 M.R.S. § 664. This sets the floor below which no employee may be paid. Provided that a local minimum wage regulation does not set a wage below the statewide minimum, there is no conflict with the state law. The Ordinance, which sets both regular and emergency wages in excess of the Statewide minimum, does not conflict with state law. (A. 23.)

Municipal minimum wages are also not preempted by state law because the Legislature has not created a comprehensive scheme of wage regulation. In 2015, the Legislature considered a bill that would have foreclosed municipal regulation of minimum wage but ultimately rejected the bill, evidencing its intention to continue to allow municipalities to set a local wage that addresses the unique circumstances of the locality. L.D. 1361 (127th Legis. 2015).[2]

[2] Available at: https://legislature.maine.gov/legis/bills/getPDF.asp?paper=SP0494&item=1&snum=127

The trial court properly held that, under home rule authority, a municipality may enact a minimum wage ordinance provided that that ordinance does not impose a minimum wage that conflicts with state law. (A. 9, 11.)

Similarly, the trial court concluded that it is undisputed that the City has authority to declare a local state of emergency and take local action to respond to that emergency without impeding the State's ability to manage a statewide emergency. (A. 18, 21, 23.) By design, state law contemplates a cooperative effort of both state and local governments to effectively respond to emergencies impacting residents.

The purpose of Chapter 13 of Title 37-B, the "Maine Emergency Management Act," is multi-layered but includes "authoriz[ing] the creation of local organizations for emergency management in the political subdivisions of the State" and "confer[ring] upon the Governor and the executive heads of governing bodies of the political subdivisions of the State certain emergency powers." 37-B M.R.S. § 701(2), (3). In an emergency, the Governor acts as an outward-facing agent working on behalf of state residents. *See* 37-B M.R.S. § 741(2). The Governor is responsible for representing the State at the national level as well as ensuring coordination within the State, assuming direct control if needed. *See id.* § 741(1). At the local level, each municipality is required to have an agency responsible for emergency management, for which a director is appointed to serve as a liaison to the county or

regional emergency management agency. *Id.* § 781(1). The county agency also has a director who must coordinate with the Maine Emergency Management Agency's director, who represents the Governor in coordinating local efforts. *Id.* §§ 782(1), (4); 704(1), (2). Up and down the chain, various representatives work to meet local needs while coordinating among the municipalities and with the Governor to ensure integration into the statewide response.

Municipalities, as political subdivisions of the State, may take necessary actions, including increasing wages, during an emergency to address the needs of their residents, provided that the municipality acts in concert with statewide efforts. State and municipal law contemplate such a cooperative response to instances of emergency. There is nothing to suggest that an economic measure, such as increasing local wages, would, in and of itself, impinge upon the Governor's ability to manage an emergency. The trial court properly concluded as much, stating, "[t]here is no evidence, and the court is not persuaded, 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.) A municipality may directly address the needs of its residents by both declaring a state of emergency and requiring increased wages without intruding upon the State's emergency powers.

C. The trial court properly entered judgment on Count III of Plaintiff's Complaint, declaring judgment that the effective date of the Emergency Provision is January 1, 2022.

Holding that, as a matter of law, the effective date of the Emergency Provision is January 1, 2022, (A. 29), the trial court properly exercised its discretion and entered judgment on Count III of Plaintiffs' Complaint. The plain, unambiguous language of the Ordinance as amended by the Initiative establishes that the Emergency Provision is not operative until January 1, 2022 and interpreting the Ordinance according to its plain language does not lead to an absurd or illogical result.

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. It is black letter law that courts first evaluate the plain meaning of an ordinance and, if the meaning is clear, the court "need not look beyond the words themselves." *Wister v. Town of Mt. Desert*, 2009 ME 66, ¶ 17, 974 A.2d 903, 909; *see also* 6 McQuillin Mun. Corp. § 20:48 (3d ed.) ("[I]t is not the purpose of construction to find and effect any intention not expressed in the statute or ordinance; so-called 'construction' or 'interpretation' cannot be invoked to amend a statute or an ordinance or to give it a meaning not expressed but which might have been expressed.").

The Ordinance, as amended, includes the Emergency Provision which states that, "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*." Portland City Code § 33-7(g) (emphasis added). The Initiative amended section 33-7(b), replacing the prior subsection (b) and setting forth minimum wage increases beginning in January 2022 only; it does not address the minimum wage rate prior to January 1, 2022. *See* Portland City Code § 33-7(b). Based upon this plain language of the Ordinance, the Emergency Provision is not operative until the date set forth in subsection (b), i.e., January 1, 2022.

If an ordinance is unambiguous, a court will only look beyond the plain language if "the result is illogical or absurd." *Wawenock, LLC v. Department of Transportation*, 2018 ME 83, ¶ 7, 187 A.3d 609. The Ordinance's plain language does not lead to an illogical or absurd result. Minimum wage ordinances often establish a delayed or phased-in implementation scheme to provide business owners an opportunity to adjust their businesses to the increased wages. This specific Ordinance included a phased-in structure under which implementation of the new regular minimum wage would not begin until January 1, 2022 and would gradually increase over a few years' time. It is logical then that the Emergency Provision would also establish a delayed start date that aligns with the phased-in structure of the new regular minimum wage. Rather than creating an illogical or absurd result,

the plain language unambiguously engenders internal consistency and a congruous structure for implementation.

For these reasons, this Court need not look beyond the plain language of the Ordinance to discern the legislative intent. *See Wawenock*, 2018 ME 83, ¶ 12, 187 A.3d 609. The Ordinance unambiguously establishes an effective date of January 1, 2022 for the Emergency Provision and therefore the trial court did not abuse its discretion by entering a declaratory judgment stating so on Count III of Plaintiffs' Complaint.

D. The trial court properly dismissed Intervenor's Cross-Claim against the City of Portland.

In their Cross-Claim, Intervenors requested that the court grant an injunction requiring that the City and City Manager immediately begin enforcing the Emergency Provision. The trial court properly dismissed the Cross-Claim on two grounds: (1) the trial court's ruling as to the effective date of the Emergency Provision necessarily required the dismissal of the Cross-Claim; and (2) the pendency of the Cross-Claim did not present grounds to delay the expedited appeal to this Court. (A. 30-31.) In dismissing the Cross-Claim, the trial court did not abuse its discretion.

First, although the Cross-Claim was not the subject of the Plaintiffs' Motion for Summary Judgment, the City properly asserted in its Opposition, and the trial court held, that "declaration [of the effective date of the Emergency Provision] by

the Court will address both Count III of the Plaintiffs' Verified Complaint and the Intervenors' Cross-Claim." (A. 216.) Intervenors' request that the Court grant injunctive relief and require that the City and City Manager immediately enforce the Emergency Provision depended upon a holding that the Emergency Provision, properly interpreted, became immediately operative. For the reasons previously stated, the trial court held that the Emergency Provision has an effective date of January 1, 2022 and therefore "[a]t this point, Intervenors have no basis to seek earlier enforcement." (A. 30.) Answering the legal question of the effective date of the Emergency Provision necessarily foreclosed immediate enforcement and so the Cross-Claim was dismissed.

Second, the trial court held that the pendency of the Cross-Claim did not provide just grounds for delay of the present expedited appeal, particularly where all parties had agreed to the expedited appeal. "The long-standing final judgment rule requires that, with limited exceptions, a party may not appeal a decision until a final judgment has been rendered in the case." *Irving Oil Ltd. v. ACE INA Ins.*, 2014 ME 62, ¶ 8, 91 A.3d 594. "A final judgment is a decision that fully decides and disposes of the entire matter pending before the court . . . leaving no questions for the future consideration and judgment of the court." *Safety Ins. Group v. Dawson*, 2015 ME 64, ¶ 116 A.3d 948 (internal citations and quotations omitted).

Here, the trial court resolved all of Plaintiffs' claims raised in the Complaint and in Plaintiffs' Motion for Summary Judgment. Intervenors' Cross-Claim involved solely a question of law which was properly answered by the trial court's determination of the January 1, 2022 effective date for the Emergency Provision. With no genuine issue of material fact to be decided, no grounds for the relief sought by Intervenors' under the Cross-Claim, and Intervenors' approval of the expedited appeal to the Law Court, the trial court properly dismissed the Cross-Claim.

CONCLUSION

WHEREFORE, Defendant-Appellees City of Portland and Jon Jennings, in his official capacity as City Manager for the City of Portland, request that this Court affirm the trial court's Order: (1) on Count III, entering a declaratory judgment that the effective date of the emergency minimum wage provision is January 1, 2022; and (2) dismissing Intervenor's Cross-Claim against the City.

Dated at Portland, Maine this 11th day of March, 2021.

/s/ Dawn M. Harmon

Dawn M. Harmon, Bar No. 9612
Counsel for Defendants,
City of Portland and Jon Jennings, in his official capacity as City Manager for the City of Portland

PERKINS THOMPSON, P.A.
One Canal Plaza, PO Box 426
Portland, ME 04112-0426
(207) 774-2635
dharmon@perkinsthompson.com

CERTIFICATE OF SERVICE

I, Dawn M. Harmon, Esq., hereby certify that on March 11, 2021, I caused to be served upon the below listed counsel of record via the Brief of Defendant-Appellees City of Portland and Jon Jennings, in his official capacity as City Manager of the City of Portland, in native PDF format, and further certify that the Parties have agreed to waive service of bound paper copies.

John J. Aromando, Esq.
James R. Erwin, Esq.
Sara A. Murphy, Esq.
Pierce Atwood LLP
254 Commercial Street
Portland, ME 04101
jaromando@pierceatwood.com
jerwin@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

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
sleighton@work.law
vwicks@work.law
dwebbert@work.law

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

Christopher C. Taub, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
christopher.c.taub@maine.gov

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

/s/ Dawn M. Harmon
Dawn M. Harmon, Bar No. 9612