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 MCDUFFS; AND PLAY IT AGAIN SPORTS,

Plaintiffs-Appellants

v.

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

Defendants-Appellees,

and,

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

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

BRIEF OF AMICUS CURIAE MAINE STATE CHAMBER OF COMMERCE

Dated: March 26, 2021

Gerald F. Petruccelli, Esq., No. 1245
Petruccelli, Martin & Haddow, LLP
Two Monument Square, Suite 900
Portland, Maine 04101
(207) 775-0200
gpetruccelli@pmhlegal.com
Attorney for Amicus Curiae
Maine State Chamber of Commerce

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STATEMENT OF FACTS AND STATEMENT OF ISSUES

Amicus Curiae, the Maine State Chamber of Commerce accepts the statements of the Appellants and Cross-Appellants as to the relevant facts and the issues on appeal.

SUMMARY OF ARGUMENT

In Maine, sovereignty is in the people. It is well understood that the people in turn have exercised their sovereignty through their constitution. In their constitution, the people have reserved to the voters of a municipality the authority to legislate by way of initiated referendum only with respect to that municipality's own "municipal affairs." The initiated referendum that is the subject of this appeal ("the Initiative") is constitutionally unauthorized and correspondingly unenforceable because it does not relate to "municipal affairs" but instead to business affairs. The businesses affected are not confined to Portland but operate in many locations and some are state-wide. The Initiative apparently presumes that the regulated business affairs are the wages and emergency wages of persons working in Portland, regardless of where they, or their employers, or their customers or clients may reside. In many instances, neither the employer nor the worker nor the customers or clients will be residents of Portland. The Initiative fails because it is not limited to affairs that are municipal as distinguished from other affairs. It rests instead on an erroneous and overbroad interpretation of municipal affairs never before adopted by this Court. It amounts to

a claim that municipal affairs are any and all transactions, whether or not the municipality is a party, if some aspect of the completely private transaction occurs in Portland.

The Initiative also fails because its substantial extraterritorial effects cannot seriously be disputed. Those extraterritorial effects would defeat the Initiative even if the affairs to be regulated were deemed to be municipal in character. Multiple examples of the kinds of businesses affected are discussed in the body of the brief, such as on-call repair technicians employed by companies based outside Portland.

Finally, if this Initiative is upheld, the voters in every town or city in Maine will be able to enact similar but different ordinances, creating a multitude of inadministrable and inconsistent obligations for many businesses operating in more than one municipality. The prerogatives of the voters in other municipalities cannot be any greater or any lesser than the prerogatives of the voters of Portland.

ARGUMENT

I. Interest of Amicus Curiae Maine State Chamber of Commerce

The Maine State Chamber of Commerce ("Chamber") is a statewide membership organization working, speaking, and advocating for approximately 5,000 Maine businesses on issues affecting those businesses and, more broadly, affecting the Maine business climate. The Chamber respectfully submits this Brief in support of

the Plaintiffs-Appellants to provide context concerning the breadth of the operational and territorial implications of this Initiative for many businesses.

II. Subject Matter Limits on Municipal Initiated Referenda

The authority of the voters in a municipality is limited by the Maine Constitution to municipal affairs. Me. Const. art. IV, pt. 3, § 21. Under ordinary principles of drafting and interpretation, the term "municipal" is a term of limitation on the scope of the authority. The term "municipal affairs" means "the internal business of a municipality" and "only those ordinances and resolves that are municipal legislation." *Albert v. Town of Fairfield*, 597 A.2d 1353, 1354 (Me. 1991) (citing *Burkett v. Youngs*, 135 Me. 459, 464, 199 A. 619, 621 (1938)). The Initiative before the Court does not relate to the organization or conduct of municipal affairs at all. It is instead a regulation of the activities of businesses, inside *and* outside Portland's borders, i.e., regional, or even statewide business affairs. It is municipal in no sense whatsoever except that it is inaccurately asserted to be applicable only in Portland. It would be an unprecedented substantial expansion—indeed distortion and misuse—of the term of limitation "municipal affairs" for it now to be applied not only to the internal organization and governmental activities of the municipal government, but also to all employment arrangements or other business activities by any private enterprise. The Initiative must be seen for what it is—not related to truly municipal matters—but related to private economic judgments by private actors,

whether those judgments are made within or without the city limits. A straightforward textual analysis of the constitutional language is entirely consistent with the Court's approach in *Albert*. The affairs being regulated are not municipal; they are the operational business affairs of non-municipal private enterprise.

This unwarranted expansion of the subject matter authority of the municipal voters would be textually untenable, absent constitutional amendment, even if it could be confined to the City of Portland. The Chamber's concern, as a statewide organization, is also the impermissible territorial reach of any such expansion.

III. Territorial Limits on Municipal Initiated Referenda

The Chamber seeks to emphasize the critical importance of careful judicial assessment of arguments that the voters in every Maine municipality can enact, by initiated referendum, regulatory legislation that by its nature cannot be operationally confined to that municipality's territorial boundaries.

For centuries, the general principle has been that governments have no authority, no jurisdiction, no sovereignty, no legitimate power beyond their territorial boundaries. Nation states with respect to other nation states have mutually exclusive sovereignty within their respective borders. *R.M.S. Titanic, Inc. v. Haver*, 171 F.3d 943, 957 (4th Cir. 1999) (citing *Pennoyer v. Neff*, 95 U.S. 714, 722, 24 L. Ed. 565 (1877)). To a somewhat attenuated degree so do American states relative to every other state. *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773, 1780-81 (2017) (quoting

World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 293-94 (1980))

(""The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all its sister States.' And at times, this federalism interest may be decisive...")

In the United States, there are familiar tensions between the federal government and the states,[1] or between two states, or between a state and its own internal subdivisions,[2] or between such subdivisions with respect to overlapping or concurrent exercises of certain authority. This is such a case.

It is familiar law that municipal or other state subdivisions have no more authority than has been granted by the state. Such grants of authority may lie in constitutional provisions or constitutionally authorized statutes. The narrower question in Maine is whether the voters in a municipality, by initiated referendum, may constitutionally enact economic regulatory legislation that has substantial impact on businesses whose operations are predominantly elsewhere.

Judicial analysis of such legislation is not a black-and-white, binary, all-or-nothing choice. The operationalized reality of this Initiative has effects too substantial in nature and degree, and too widespread in geographic effect, to be considered sufficiently local. That is true even assuming the limiting term "municipal" is deemed

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[1] *See, e.g., United States v. Gamble,* 694 F. App'x 750, 750 (11th Cir. 2017)(citing *Abbate v. United States*, 359 U.S. 187, 194 (1959))("The Supreme Court has determined that prosecution in federal and state court for the same conduct does not violate the Double Jeopardy Clause because the state and federal governments are separate sovereigns.")

[2] *See, e.g.*, *Burkett v. Youngs*, 135 Me. 459, 466-67, 199 A. 619, 621 (1938)("[T]he trend of the decided cases is that matters which relate, in general, to the inhabitants of the given community and the people of the entire State, are of the prerogatives of State government.")

to be broad enough to include business affairs both inside and outside the city as long as they relate to operations in the city by some company employees some of the time. The problem is not too little effect in Portland; the problem is too much effect in too many other places.

Here, as in every judicial choice where the answer is not "never" and not "always" but "sometimes," the task of identifying which times lie on the permissible or impermissible side of the "sometimes" is one that requires a careful weighing and assessing of the Initiative's extraterritorial effects.

To further refine the question, absent any other constitutional infirmity, if the Initiative before the Court affected only businesses located exclusively within the City of Portland, owned exclusively by residents of the City of Portland, employing exclusively residents of the City of Portland, and primarily or exclusively serving only Portland residents, any extraterritorial effect would be indirect and negligible. As shown in Section IV B below, this Initiative, however, has too much extraterritorial effect to be within the constitutional limit of the voters' authority in a municipal initiated referendum.

IV. The Territorial Reach of Municipal Authority

A. Factor Analysis

The federal courts have a long history of dividing potential cases into those that are sufficiently federal in character to be within the federal question jurisdiction

(28 U.S.C. § 1331) of the district courts and those with non-trivial federal characteristics that are nevertheless insufficiently federal to fall within the federal question jurisdiction. The Supreme Court has wrestled with ways and means of ascertaining whether a particular case is sufficiently federal to lie within the federal question jurisdiction. Compare *Louisville & N.R. Co. v. Motley*, 219 U.S. 467 (1911), *Franchise Tax Bd. v. Constr. Laborers Vacation Tr.,* 463 U.S. 1, 3 (1983), *Merrill Dow Pharmaceuticals v. Thompson,* 478 U.S. 804 (1986) with *Smith v. Kansas City Title & Trust Co.*, 255 U.S. 180 (1921) and *Grable & Sons Metal Prods. v. Darue Eng'g & Mfg.*, 545 U.S. 308 (2005).

A similar process is needed here. The Maine Constitution empowers voters by initiated referendum to enact municipal legislation which by its terms must be "…in regard to *its* municipal affairs…." Me. Const. art. IV, pt. 3, § 21 (emphasis added). Just as the Supreme Court decides whether there is enough subject matter federalness this Court will first have to decide if there is enough subject matter municipalness, and then determine whether this Initiative has enough "localness" as to territorial effects. The constitutional limit "its" is important to protect all municipalities from territorial overreach by any other municipality.

Given the nature of the geography and economy of the Portland metropolitan region, the effects of this Initiative are insufficiently limited to the City of Portland to be constitutionally permissible. It is exceedingly improbable that a truly municipal initiative will have much effect outside the enacting municipality because it will not

directly regulate non-municipal activities of private businesses. In this way the word "municipal" as a term of limitation controls as to both scope of subject matter and scope of territorial reach. But, if there is any give to the word "municipal" as a limitation, the word "its" makes abundantly clear that regulation outside the lines is unconstitutional.

B. Impermissible Extraterritorial Effects

If there is any Maine city with the functional capacity to make law regulating internal governance and employment decisions by private businesses that has effect exclusively within the enacting municipality, Portland is surely not it. The economy of the City of Portland is integrated regionally, not only throughout the State of Maine but throughout the northeast, and to a considerable degree nationally and even globally. It is self-evident that a business may be based in Portland but have multiple locations in the greater Portland area or statewide or even out of state, with employees rostered in Portland as a matter of administrative efficiency, but whose work is entirely or predominantly performed elsewhere, and not at their homes because of the pandemic.[3] The administrative burdens of compliance for work done in Portland is not to be underestimated and that burden may well fall to workers and businesses located outside the city.

[3] The Initiative exempts work that is performed via teleworking, but that creates an entirely different set of problems, such as when two workers may be performing the same job/tasks for the same company, but because one does not have reliable internet at home, the Initiative would require an employer to pay that person 1.5 times that of the co-worker. Such a scenario would also incentivize people to ignore stay-at-home mandates and claim that their work must be done from the office, which can have significant extra-territorial effects from a public health standpoint.

It is equally self-evident that businesses based outside Portland may have satellite locations in Portland and a need to move employees between and among locations inside Portland and outside Portland as business circumstances may require. We are all familiar with the companies providing services at their customers' or clients' locations on a scheduled or on-call basis. This may include any number of routine maintenance services or episodic repair services or personal services of all manner and description (e.g., electricians or plumbers or HVAC technicians, or cleaning services, caterers, home health care or personal care providers, and on and on). It is inevitable that the effects of the Portland ordinance will be experienced outside Portland by such companies. Given the rich variety of commercial enterprises in communities near Portland with employees in Portland and elsewhere, or with employees who on any given day may be in any of the regional municipalities for their work, it is impossible to conclude that this Initiative can operate exclusively, or even sufficiently, within the enacting jurisdiction.

At least two things cannot seriously be doubted or disputed. One is that states of emergency may be national, state, or local, and carefully tracking work done in Portland as opposed to work done out of Portland for purposes of complying with a locally declared emergency is burdensome and difficult. The other, and perhaps more important, for purposes of this submission, will be the difficulties of having differential pay scales among similarly situated employees in a single company based upon where they happen to be assigned to work. That presents a significant

management challenge and a realistic likelihood that wages across the company's entire staff may need to be equalized, even if most of the employees do not enter Portland at all during a pay period.

Large businesses, and there are several of varying sizes, that operate retail locations throughout southern Maine or throughout all of Maine, confront similar complications. Anyone who travels around Maine is accustomed to seeing familiar company signs in every city and many towns. Some or many such companies undoubtedly have standardized employee manuals concerning compensation, benefits, and working conditions. Many or all will have budgets determined for multiple or all locations on similar assumptions and uniform policies, some of which are nationally set or approved. The only way to prevent the Portland ordinance from having impermissible extraterritorial effect is for the company to undertake the administrative burden, and the risk of deteriorating morale among similarly situated employees, to confine the effects of Portland's Initiative to Portland's borders in ways different from all other locations or even longstanding company-wide practices.

Enterprises of all kinds and sizes have widely differing capacity to fund government mandated increases on the expense sides of their respective budgets. Some large companies have wage and salary budgets imposed from away and will be able to meet the authorized payroll budget only by reducing headcount or reducing hours or making other changes to avoid exceeding the budgetary limit. A regional business that decides, in order to comply with the Initiative and meet budget, that it

must reduce its presence in a neighboring city, to the inconvenience or disadvantage of persons living and/or working there, will prove that the ordinance exceeds the constitutional limit confining each city's popular initiatives to its own municipal affairs. Additionally, a reduction in headcount in any location also affects the unemployment insurance system and presents opportunities for litigation about justifications for terminations.

It also may not be assumed that any given enterprise can pass the additional costs mandated by one municipality through to customers, especially during an emergency when business may already be seriously disrupted by that emergency. Indeed, in an emergency, the companies' ability to withstand decreases in sales will only be further weakened by the obligation to increase wages, at least for those not laid off.

Companies working under long term fixed-price contracts or trying to function in other situations where rates or prices are regulated, as is the case with any enterprise serving individuals eligible for government assistance, cannot raise prices. An enterprise that cannot raise prices because of contract obligation, or governmental regulation, or just market resistance will have to reduce the scope of operations in Portland and elsewhere. The Initiative is not regulation of Portland's municipal affairs but regulation of all sorts of employers' business affairs, when some of their employees are working within the City of Portland, without regard to where the

affected businesses are principally located, and without regard to where else they may be operating.

Companies that are party to a collective bargaining agreement for a bargaining unit that is not geographically coextensive with the City of Portland will now be confronted with a choice between accepting extraterritorial effects to comply with the Initiative or to violate the contract terms to confine the effects of the Initiative to only employees working in Portland. In a collective bargaining situation, that will likely leave companies susceptible to litigation and federal complaints to the NLRB. It will become a "can't-win" situation for those businesses.

Further, many similarly situated workers in other cities or towns within the greater Portland labor market are either assuming or contending that they should also be the beneficiaries of the system adopted in Portland. To say that Portland is not exercising its governmental authority extraterritorially and to say Portland is regulating only its own municipal affairs is to ignore the realities of such situations.

There is no basis for supposing or concluding that the Maine Constitution or any statute is designed to empower any of Maine's municipalities to enact regulatory legislation that materially affects businesses and individuals located outside the municipality, or which creates management, administrative, and morale problems for companies operating regionally or statewide. It is no measure of the validity of this Initiative that it has effect *inside* Portland. If it did not, it never would have been proposed or adopted. The question is not whether it has *sufficient effect in Portland.* The

question is whether it has *excessive effect outside Portland*. As suggested above, as the federal courts have had to determine what is sufficiently federal to support federal question jurisdiction, the Court, on assessing the intended operationalized effect of this Initiative, must recognize that its operationalized effects are not sufficiently local to lie within the constitutional authority of Portland voters.

The business realities identified above are not mere policy disagreements. They are evidence of the wisdom of the constitutional terms of limitation restricting a municipality's use of ballot initiatives to only its own municipal affairs. The Initiative before the Court is neither municipal nor local. It is therefore unconstitutional.

V. Other Cities Have Rights, Too

In addition to the foregoing concerns, the Court must consider the broader effect of a decision upholding the Initiative's emergency wage provision. If an enactment of this scope and scale, both as to its subject matter and as to its territorial operation, is constitutionally permissible, then the voters in any Maine city may enact similar provisions. The risk to the interests of the Chamber's constituents lies less in identical replication of this Initiative in every city in Maine than in multiple different ordinances setting different rates under different circumstances elsewhere. If this ordinance is permissible, an ordinance in Lewiston but not Auburn, comparable in style, but choosing different levels of emergency wages or different circumstances for paying them, and similar but different enactments in Bangor but not Brewer, or

Biddeford but not Saco, would raise havoc with enterprises attempting to operate both within and without those municipalities and especially for enterprises operating in all those municipalities. Compound that with varying kinds of emergencies that may be declared locally, such as spring flooding or a gas main leak of perhaps only brief duration, under the ordinances not yet written across Maine and the varying standards for declaring them, and the management problems multiply.

Maine people have demonstrated time and again their fondness for the colonial boundaries of the municipal subdivisions in Maine. Fairly recently, there was an unsuccessful effort to merge the cities of Lewiston and Auburn. There is no reason to anticipate that any annexation or merger activity will become common throughout Maine. The point of boundaries is to determine the geographical reach of the activities of the government of each territory with respect to activities within its territorial boundary. Those boundaries are reciprocally important to the governmental authority and autonomy of the other territories.

The important underlying premise of the constitutional language and the three-letter word "its" modifying "municipal" which in turn modifies "affairs" cannot be overstated here. Wages paid by businesses or not-for-profit organizations are business affairs, not municipal affairs, but if they are now to be deemed municipal affairs by an unprecedented interpretation, they are not the municipal affairs of the enacting city unless they can be operationally confined to the territory of the enacting jurisdiction. If municipal affairs are not territorially limited, the respective reciprocal

local authority of each municipality is vulnerable to encroachment by initiatives in other municipalities. The Maine Constitution wisely recognizes that the boundaries of our municipalities are all important and the governments of each must not encroach upon the powers of the governments, or the liberties of the citizens, of any other.

CONCLUSION

The Maine Constitution authorizes legislation by initiated referendum in a municipality only with respect to exclusively *municipal* affairs and the only fair reading of that term, as this Court has recognized, is its own governmental affairs. Moreover, because the term "its" clearly intends to preclude any referendum that affects another municipality's municipal affairs, the term "municipal affairs" can sensibly be read only as it relates to the organization and operation of the municipal government and not as a plenary grant of authority to regulate the business activities of private enterprises that happen to do some business within Portland's boundaries.

Properly so read, there is little likelihood of impermissible extraterritorial effect. However, even if the term "municipal affairs" should be broadly construed to reach the pay scales of private businesses during emergencies that may be local, state, or national, then the impermissible extraterritorial operational effects are not to be denied and are fatal to the legitimacy of the Initiative because no city has the authority to encroach upon the authority of other municipalities.

The Court should clearly and unequivocally rule that the Initiative is void for transcending the constitutional boundary of municipal affairs and for its unmistakably inevitable extraterritorial effects.

Dated at Portland, Maine this 26th day of March 2021.

Respectfully submitted,

Gerald F. Petruccèlli, Esq., Bar No. 1245
Attorney for Amicus Curiae
Maine State Chamber of Commerce

Petruccelli Martin & Haddow, LLP
Two Monument Square, Suite 900
Portland, ME 04101
(207) 775-0200
gpetruccelli@pmhlegal.com

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, hereby certify that on March 26, 2021, that a copy of the Brief of Amicus Curiae Maine State Chamber of Commerce, was served upon the parties below, by email only, per agreement of counsel on March 25, 2021:

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

Dawn M. Harmon, Bar No. 9612
Perkins Thompson, P.A.
One Canal Plaza, P.O. Box 426
Portland, ME 04112-0426
(207) 774-2635
dharmon@perkinsthompson.com

Counsel for Defendants-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
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

Dated at Portland, Maine this 26th day of March, 2021.

Gerald F. Petruccelli, Esq., Bar No. 1245
Attorney for Amicus Curiae
Maine State Chamber of Commerce

Petruccelli Martin & Haddow, LLP
Two Monument Square, Suite 900
Portland, ME 04101
(207) 775-0200
gpetruccelli@pmhlegal.com