STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NUMBER 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,
DEFENDANTS/APPELLEES,

and

CALEB HORTON and MARIO ROBERGE-REYES,
INTERVENOR/CROSS-APPELLANTS.

ON APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF AMICI CURIAE AMERICAN CIVIL LIBERTIES UNION OF MAINE FOUNDATION AND LEAGUE OF WOMEN VOTERS OF MAINE IN SUPPORT OF INTERVENOR/CROSS-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Constitutional Provisions

INTEREST OF THE AMICI

The League of Women Voters of Maine (the "League") is a nonpartisan political organization that encourages informed and active participation in government, works to increase understanding of major public policy issues, and influences public policy through education and advocacy. The League is an affiliate of the League of Women Voters of the United States ("LWV-US"), which was founded in 1920 as an outgrowth of the struggle to win voting rights for women. In 2020 the League released an extensive study of citizen initiatives in Maine. *See* https://www.lwvme.org/CIStudy. The League has four local chapters and over 700 members in Maine.

The American Civil Liberties Union of Maine Foundation ("ACLU of Maine") is a nonprofit, nonpartisan organization founded in 1968 to protect and advance the civil rights and civil liberties of all Mainers. The ACLU of Maine strives to ensure that rights guaranteed and secured by the Maine and United States Constitutions, including the right to participate in the political process, are protected.

STATEMENT OF THE FACTS AND PROCEDURAL HISTORY

Amici adopt the Statement of Facts and Procedural History set forth in the Brief of Cross-Appellants.

QUESTION PRESENTED

Whether the Maine Constitution permits the inhabitants of a municipality to use the initiative process coextensively with the scope of the ordinance power afforded to that municipality by the Legislature?

SUMMARY OF THE ARGUMENT

"All power is inherent in the people." Me. Const. Art. I, § 2. Through two 20th Century amendments to Maine's Constitution, the electors and inhabitants of Maine's cities and towns reclaimed rights to local self-governance that had been previously delegated entirely to the Legislature. One amendment, in 1908, created a municipal initiative process at the local level without further authorization from the legislature. *See* Me. Const. Art. IV, Pt. 3, § 21 (municipal initiative authority). The second amendment, in 1969, authorized municipal home rule. Me. Const. Art. VIII (home rule). These rights are retained by individual voters and employed collectively as the local bodies politic.

The Superior Court properly applied principles of constitutional interpretation to conclude that the scope of the constitutional municipal initiative provision is "coextensive" with the legislative power possessed by the municipality under its home rule authority. Plaintiff-Appellants, the Portland Regional Chamber of Commerce, *et al.* (hereinafter "PRCC") now ask the Court to do what no Maine Court has ever done: to withhold from the people some of the powers conferred on municipalities, and to do so based upon an ad hoc and political judgment of what concerns are sufficiently local and beyond state interest. Not only is this argument at odds with basic principles of constitutional interpretation, but, if adopted, it would devastate the local initiative power and violate constitutionally protected rights.

Such an argument flies in the face of the history and interpretation of both the municipal initiative power and the municipal home rule power contained in Maine's constitution. It would import an outdated and flawed home rule concept with no basis in Maine law. And most concerning, it would sow confusion, burden the First Amendment freedoms of Maine's municipal inhabitants, and undermine citizens'

confidence in our democratic process. The Court should therefore affirm the Superior Court's well-informed decision on this question.

ARGUMENT

On behalf of *amici* and their members, this brief provides background and analysis regarding (i) basic principles of constitutional interpretation, (ii) the history of participatory democracy in Maine, (iii) the development of municipal home rule in Maine, (iv) comparison with a model of municipal home rule used in other states, and (v) implications for First Amendment freedoms of expression and participatory democracy. For the reasons discussed below, the Court should reject PRCC's arguments, and should affirm the Superior Court's decision that the municipality's authority to allow local initiatives is coextensive with the scope of its authority under municipal home rule.

I. The Superior Court Correctly Applied Basic Principles of Constitutional Interpretation.

At issue in this case is the interpretation of a provision of the Maine Constitution authorizing "municipalities to reestablish a direct initiative process in regard to 'municipal affairs.'" Op. at 10 (quoting

Me. Const. Art. IV, Pt. 3, § 21).[1] This Court's "construction of the Maine Constitution depends primarily on its plain language, which is interpreted to mean whatever it would convey to 'an intelligent, careful voter.'" *Opinion of the Justices*, 2017 ME 100, ¶ 58, 162 A.3d 188, 209, as revised (Sept. 19, 2017) (quoting *Opinion of the Justices*, 673 A.2d 1291, 1297 (Me. 1996)). "Constitutional provisions are accorded a liberal interpretation in order to carry out their broad purpose, because they are expected to last over time and are cumbersome to amend." *Id.* (quoting *Opinion of the Justices*, 673 A.2d at 1297).

When interpreting a statute, the Court considers "the whole statutory scheme . . . so that a harmonious result . . . may be achieved," *Costain v. Sunbury Primary Care, P.A.*, and "the same principles . . .

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[1] Section 21 provides in full:

> **City council of any city may establish direct initiative and people's veto**. 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, provided that the ordinance establishing and providing the method of exercising such direct initiative and people's veto shall not take effect until ratified by vote of a majority of the electors of said city, voting thereon at a municipal election. Provided, however, that the Legislature may at any time provide a uniform method for the exercise of the initiative and referendum in municipal affairs.

Me. Const. Art. IV, Pt. 3, § 21.

hold true in the construction of a constitutional provision," *Payne v. Sec'y of State*, 2020 ME 110, ¶ 17, 237 A.3d 870, 876.

The Superior Court correctly applied these principles when interpreting the municipal initiative provision "as coextensive" with the broad municipal home rule authority.[2] Op. at 11; *see also generally* Op. at 6-13. As the Superior Court explained, the meaning of "municipal" in Art. IV, Pt. 3, § 21, must be interpreted in light of the "broadened legislative authority of the city council." *Id.* at 11. The people first enlarged the City's legislative authority "in 1969 with the Home Rule Amendment to the Constitution, Art. 8, Pt. 2 § 1," and it was expanded "in 1987 with the Legislature's enactment of 30-A M.R.S. § 3001," narrowing implied preemption of municipal home rule.[3] *Id.* at 9.

PRCC nevertheless insists that the meaning of "municipal" appearing in the municipal initiative provision, Me. Const. Art. IV, Pt. 3, § 21, and the home rule provision, Art. VIII, Pt. 2, § 1, must be

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[2] The Superior Court held that, unless carved out by the municipal charter or code, "the municipal initiative power under Art. 4, Pt. 3 § 21 [is] coextensive" with the city council's home rule authority. Op. at 11. The court further clarified that the initiative power may be limited "in those areas which the municipal code or charter has excluded," Op. at 9—an issue that PRCC no longer contests on appeal.

[3] In rejecting PRCC's interpretation, Op. at 6-7, the court emphasized that the plain language of "[t]he constitutional text does not modify municipal affairs with the word 'exclusively.'" Op. at 10.

"analyzed separately" and thus read to conflict. (PRCC Br. at 25-26). But this argument ignores the basic rule that all relevant constitutional provisions should be "read together . . . to harmonize their provisions." *McGee*, 2006 ME 50, ¶54, 896 A.2d at 947 (citing *Estate of Footer*, 2000 ME 69, ¶ 8, 749 A.2d 146, 148-49); *see also State v. Hamlin*, 86 Me. 495, 502, 30 A. 76, 79 (1894) (even where one is amended 55 years later, constitutional provisions "must be construed together, to determine their scope and extent."); *McCulloch v. Maryland*, 17 U.S. 316, 406 (1819) (interpreting the United States Constitution "depend[s] on a fair construction of the whole instrument").

The Superior Court properly considered the meaning of "municipal" as the term is used throughout the Maine Constitution. *See* Me. Const. Art. IV, Pt. 3, § 21; Me. Const. Art. VIII, Pt. 2, § 1. In doing so, the Court also respected the "broad" initiative authority as interpreted by this Court. Op. at 10 (citing *Friends of Congress Square Park v. City of Portland*, 2014 ME 63 ¶ 9, 91 A.3d 601; *Allen v. Quinn,* 459 A.2d 1098, 1102-03 (Me. 1983); *McGee v. Sec'y of State,* 2006 ME 50 ¶ 25, 896 A.2d 933). By harmonizing all of these overlapping provisions, the Superior Court afforded these constitutional provisions "a liberal

interpretation in order to carry out their broad purpose." *See Opinion of the Justices*, 2017 ME 100, ¶ 58, 162 A.3d at 209. Indeed, constitutional provisions "are expected to last over time," *id.*—including through the fluctuations in municipal authority that are bound to occur over the course of more than 100 years. *See infra* Section II (explaining that the municipal initiative authority was adopted by the voters in September, 1908).

In sum, taking all of these authorities together, the Superior Court correctly ruled that, unless carved out by the municipal charter or code, "the municipal initiative power under Art. 4, Pt. 3 § 21 [is] coextensive" with the city council's home rule authority. *Id.* at 11.

II. The nature of initiative powers supports a broad interpretation of the municipal initiative provision.

The history of participatory democracy in Maine supports a broad interpretation of the municipal initiative power. The analysis begins with the "familiar" and "unquestioned" constitutional rule that "[a]ll proper governmental power is inherent in the people. *Burton v. Kennebec Cty.*, 44 Me. 388, 409–10 (1857) (Davis, J., concurring) (citing

Me. Const. Art. 1, § 2[4]). On top of this threshold authority, in 1907, a group of constitutional amendments were proposed to "establish[] a people's veto through the optional referendum, and a direct initiative by petition and at general elections." Res. 1907, c. 121 (73rd Legislature 1907). With an overwhelmingly favorable referendum vote, these new initiative provisions were enacted into the Maine Constitution, Me. Const. Art. IV, Pt. 3, §§ 16-22. Among these amendments was the municipal initiative provision allowing a city council, by ordinance, to create a local system of initiative and referendum "for the electors of such city in regard to its municipal affairs . . . ." Me. Const Art IV, Pt 3, Sec 21.

Through these initiative amendments, the people of Maine "made a fundamental change in the existing form of government," reserving "to themselves" powers that they had previously vested in the Legislature. *Farris, Att. Gen. v. Goss*, 143 Me. 227, 230 (Me. 1948); *see*

[4] Article I, § 2 of the Maine Constitution provides:

> **Power inherent in people**. All power is inherent in the people; all free governments are founded in their authority and instituted for their benefit; they have therefore an unalienable and indefeasible right to institute government, and to alter, reform, or totally change the same, when their safety and happiness require it.

also Allen v. Quinn, 459 A.2d 1098, 1098 (Me.1983) (in equal measure, "the people took back to themselves part of the legislative power that in 1820 they had delegated entirely to the legislature."). This fundamental change has since inspired a wealth of voter participation and policy innovation. In 1911, Maine's first citizen-initiated bill provided for nomination of candidates by primary election, removing control of the ballot from party machines. *See* P.L. 1913, ch. 221. The League has sponsored first-of-their-kind measures to enhance the power of the voters in the democratic process by adopting the Maine Clean Elections Act in 1996 (I.B. 1995, ch. 1) and ranked choice voting in 2016 (I.B. 2015, ch. 3). At the local level, a Portland ordinance initiative to legalize recreational use and possession of marijuana in 2013 (Portland, Me., Code § 17-113, et seq. (Nov. 5, 2013)) led to a successful statewide campaign in to do the same in 2016 (I.B. 2015, ch. 5), and even a failed initiative campaign to raise the municipal minimum wage in 2015 led to *both* City Council action in the form of a compromise ordinance (Portland, Me., Code § 33.1, et. seq. (Sept. 9, 2015)), and a successful statewide initiative campaign (I.B. 2015, ch. 2).

Despite the broad initiative authority and the parallels with the constitutional provisions on home rule, *see infra* Section III, PRCC reads "municipal affairs" as a restrictive term of art. PRCC Br. at 11-37. This reading, however, cannot be supported by the rules of construction applicable to initiatives. "The broad purpose of the direct initiative is the encouragement of participatory democracy." *Allen*, 459 A.2d 1098, 1102 (Me. 1983). Initiatives under the Constitution are not a grant of power by the legislature, but instead are the citizens reclaiming their own sovereign prerogative, and therefore "the power of the people to enact their laws shall be given the scope which their action in adopting this amendment intended them to have." *Farris*, 143 Me. at 231. Each of these amendments "must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *McGee v. Secretary of State*, 2006 ME 50, ¶ 25, 896 A.2d 933; *see also League of Women Voters v. Sec. of State,* 683 A.2d 769, 771 (Me. 1996). "It is in accordance with this principle of liberal construction to avoid potential abridgement, or impairment, of the plenary exercise of legislative power by the people" that the Court evaluates the

constitutional provisions at issue. *Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971).

Other courts have applied similarly expansive principles when interpreting initiative provisions. In one case, a New Jersey court explained that the local initiative "is a check on the exercise of local legislative power, fostering citizen involvement in the political affairs of the community." *In re Ordinance 04-75*, 192 N.J. 446, 459 (N.J. 2007). Moreover, the Supreme Court has acknowledged that initiatives and referenda give citizens "a voice in decisions that will affect the future development of their own community." *James v. Valtierra*, 402 U.S. 137, 143 (1971). Contrary to these fundamental principles, PRCC's argument would impermissibly and narrowly construe the term "municipal" *only* for the initiative and referendum power, but not for other local powers, robbing citizens of their vital role in local affairs and eroding public confidence in the government.

III. A constitutionally cabined municipal initiative power is fundamentally inconsistent with Maine's home rule scheme.

The reference to "municipal affairs" in the municipal initiative provision, Me. Const. Art. IV, Pt. 3, § 21, must be read in harmony with

the municipal home rule provision elsewhere in the same document, Me. Const. Art. VIII, Pt. 2, § 1, and the adoption of home rule legislation in 30-A M.R.S. § 3001. The history behind these provisions confirms that direct participation by the local citizenry was an intended component of expanded home rule authority.

Courts have traditionally applied the same definition of "municipal affairs" to local initiatives and acts of the city or town councils. Before the home rule amendment in 1969, the same narrow strictures that applied to the municipal initiative authority also applied to other municipal acts. Indeed, the general rule presumed that municipalities lacked authority to act—either legislatively or through citizen initiative—unless explicitly granted by the state. *See, e.g.*, *Phillips Vill. Corp. v. Phillips Water Co.*, 104 Me. 103, 106, 71 A. 474, 475 (1908) (stating that the scope of municipal affairs included "only such powers as were conferred by statute expressly or by necessary implication); *see also* Robert W. Bower, Jr., *Comment, Home Rule and the Preemption Doctrine: The Relationship Between State and Local Government in Maine*, 37 Me. L. Rev. 313, 333-342 (1985). The Legislature's control over all municipal powers was, "absolute and all-

embracing except as expressly or by necessary implication limited by the Constitution." *Opinion of the Justices*, 133 Me. 532, 535, 178 A. 613, 615 (1935). Contemporaneous cases reviewing municipal initiative powers focused on the same narrow scope of municipal authority. For example, in *Anderson v. Colley*, 145 Me. 95, 73 A.2d 37 (1950), the court held that when Portland voters tried to use the initiative to pass an ordinance setting a minimum salary for police officers, "[t]he controlling issue is whether . . . . the proposed ordinance [may] legally be adopted by the city."[5] *Id.* at 96. As the Court explained:

> We need not enter into a discussion whether the proposal is legislative or administrative in nature, or whether the initiative operates in one case and not in the other, or whether the Constitution prohibits the exercise of the initiative on the proposal here presented. . . . Our problem is *not* whether by act of the Legislature or provision of the Constitution *the power* to adopt such an ordinance and to establish the policy expressed therein *may be granted* to the city but whether *under the existing charter the city now has such power*.

Id. at 101 (emphasis added). Prior to 1969, decisions construing the scope of municipal legislative and initiative authority presumed none

[5] This, despite the *Burkett* Court's admonition that "policemen . . . act as conservators of the public peace, the peace of the state, not the peace of the city alone." *Id.* at 466.

existed without express permission from the state legislature, but this presumption was obliterated by the new home rule regime.

Home rule flipped the presumption in favor of municipal legislation, while leaving intact the rule that the scope of municipal initiative authority equals that of the municipal legislative body. *See* Me. Const Art VIII, Pt. 2, § 1. Starting with the language of the amendment itself, the provision reserves to "[t]he *inhabitants* of any municipality . . . 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." Me. Const Art VIII, Pt. 2, § 1 (emphasis added). By enacting this provision, control over the form and process of local governance was removed from the legislature and reclaimed by the people—the inhabitants of the municipality.

The judicial analysis of the new home rule authority applies equally to municipal initiatives. In *Bird v. Old Orchard Beach*, the Court explained that the home rule constitutional amendment and enabling legislation restored to municipal inhabitants the "broad powers of legislation and administration of their affairs, provided there exists no express or implied prohibition by the Constitution or the

general law." *Bird v. Old Orchard Beach*, 426 A.2d 370, 372 (Me. 1981) (citing 30 M.R.S. 1917 (1970), predecessor to 30-A M.R.S. § 3001). In describing this new authority, the Court uses the term "municipal affairs"—the very constitutional language provided in the municipal initiative provision, Me. Const., Art. IV, Pt. 3, § 21:

> "[R]eading the constitutional and statutory provisions together, . . . municipalities in local and *municipal affairs* may exercise any power or function granted them by the State Constitution, the general law or the municipal charter, not otherwise prohibited or denied expressly or by clear implication by the constitution, the general law, or the charter itself."

Bird, 426 A.2d at 372 (emphasis added).

Since the expansion of home rule authority, moreover, other decisions have affirmed that the municipal initiative power includes the expanded grant of authority. *See Albert v. Town of Fairfield*, 597 A.2d 1353, 1355 (Me. 1991) (defining municipal affairs as, "those areas in which the municipality has been given the discretion to do as it wishes."); *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, 91 A.3d 601 (same).[6] Another case likewise rejected a narrow

[6] PRCC misunderstands the import of this Court's ruling in *Friends*, 2014 ME 63, ¶ 12, 91 A.3d 601. *See* PRCC Br. at 15. Contrary to PRCC's argument that *Friends* prohibits municipal initiatives for areas with shared State control, *id.*, the holding

reading of the municipal initiative authority, explaining that the Court's pre-home rule opinion in *Burkett v. Young* "is best confined to its facts, which are not on point with the present case, if for no other reason than that *Burkett* precedes Maine's constitutional adoption of Home Rule in Article VIII, Part 11, Section 1, which greatly broadened the concept of municipal affairs." *City of Portland v. Fisherman's Wharf Ass'n II*, 1991 Me. Super. LEXIS 15, *5 (citing *Burkett v. Young*, 135 Me. 459, 199 A. 619 (1938)).

In sum, even if "municipal affairs" was once interpreted narrowly, such a reading is no longer tenable after the home rule amendments to the Constitution in 1969 and the Legislature's subsequent adoption of broad home rule legislation, first in 1970, and again in 1987. *See* Op. at 9. The Court should not now upset precedent and in so doing throw the entire municipal initiative power into chaos.

IV. PRCC's Interpretation Derives from an Outdated Home Rule Model Never Adopted in Maine.

PRCC relies heavily on a distinction between "statewide matters" and "local matters" that is deeply problematic analytically and has

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of *Friends* focuses on the distinction between legislative and administrative acts, not between municipal and State.

never been adopted in Maine. PRCC's interpretation resembles a division of municipal and state authority embraced by some states at the turn of the 20th century, known as *imperium in imperio*.[7] This approach involves "a constitutionally mandated division of responsibility between state and local government based on a distinction between statewide and local matters and a constitutionally protected sphere of local affairs beyond state legislative control." Bower, *supra* p. 11, at 325.

The *imperium* system has fallen out of fashion since it was abandoned by the National Municipal League in 1963, in favor of the limitation approach to home rule presently employed in Maine. *Id. See* n. 3, *supra*. This is at least in part because the *imperium* scheme—and its accompanying inquiry into whether a subject is "inherently" or "exclusively" local in nature—has been rightly criticized as "necessarily ad hoc." *City of Tucson v. State*, 273 P.3d 624, 628 (Ariz. 2012) (quoting Lynn A. Baker & Daniel B. Rodriguez, *Constitutional Home Rule and Judicial Scrutiny*, 86 Denv. U.L. Rev. 1337, 1344). Dean Jefferson Fordham, the father of the modern home rule approach, commented

[7] Literally, "a state within a state." Hereinafter, "*imperium.*"

that the *imperium* model, "strongly tends to dump political questions into the laps of the courts." Bower at 330, n. 98 (quoting Fordham, *Home Rule—AMA Model*, 44 Nat'l Mun. Rev. 137, 139 (1955)).[8] The *imperium* approach has long been viewed skeptically by the Court. *Burkett* quotes a lengthy concurrence from Justice Timlin of the Wisconsin Supreme Court, severely critical of the *imperium* inquiry. *State ex rel. Mueller v. Thompson*, 149 Wis. 488, 509 (1912) (positing that adopting such an approach "promises a long period of uncertainty and a multiplication of legal questions and local quarrels and does not seem to possess much advantage over the older system.").

Maine has never adopted the *imperium* approach and should not do so now. Although some commentators have suggested that language in Maine's home rule amendment resembles such a scheme, the Court has wisely avoided the pitfalls inherent in adopting that approach.[9]

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[8] Even under an *imperium* home rule scheme, the legislature may affirmatively delegate municipal authority to enact an ordinance, and legislative delegation thus obviates the need to inquire whether such authority is sufficiently local in nature. *See Ex Parte Braun*, 141 Cal. 204, 212 (1903) (holding that the power to impose a license tax, once "granted by the state to the municipality for municipal purposes, became a 'municipal affair' of the city"). Appellants' amorphous test would necessitate delving into the practical effect of any proposal at issue and thus would be considerably more difficult to administer.

[9] *See City of Lewiston v. Lewiston Educational Directors*, 503 A.2d 210, 212 n.3 (Me. 1985) (avoiding the question of what constitutes a "matter local and municipal in

Instead, Maine previously followed a grant-based scheme in which municipalities could exercise only that authority explicitly granted by the Legislature. *See supra* Section III. Maine now follows a home rule system, in which municipalities exercise all authority not explicitly retained by the Legislature. *See* Me. Const. Art. VIII, Pt. 2, § 1.

PRCC's argument to adopt an *imperium* approach only for citizen initiatives (but not other municipal action) would make an impossible inquiry even worse. PRCC cites no other state that has adopted such a confusing and bifurcated approach. To the contrary, the *imperium* cases cited by *Burkett* are silent on the scope of the initiative power. *See e.g. Sapulpa v. Land*, 101 Okla. 22, 223 P. 640 (1924) (holding that because Oklahoma's Constitution intends that its system of taxation be uniform in operation, municipal charter provisions could not supersede general law); *Fragley v. Phelan* 126 Cal. 383, 386 (Cal. 1899) (the procedures governing election of freeholders to draft a new municipal charter were

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character"); *James v. Inhabitants of Town of West Bath*, 437 A.2d 863, 865 n.3 (Me. 1981) (same); *Bird*, 426 A.2d at 372 (reading the home rule amendment together with its enabling legislation to define what is "local and municipal in character"); *York*, 626 A.2d at 940 (holding that "the "local and municipal in character" limitation does not provide the controlling law in this case."); *but see MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 229 A.3d 514 (Me. 2020) (holding that the choice to withdraw from a regional school unit in contravention of state law was not "local and municipal in character.").

not a "municipal affair" exempt from control by general state law); *People* v. *Chicago,* 51 Ill. 17 (1869) (City of Chicago not required to issue bonds for creation of local park, despite mandate by act of Legislature, because "[t]he question is merely local.")

V. PRCC's Interpretation Carries Serious First Amendment Concerns and Undermines the Democratic Process.

Most concerning, by imposing the confusing and judicially unadministrable standard *only* to citizen's initiatives, PRCC's proposed interpretation of "municipal affairs" would raise serious First Amendment concerns and undermine confidence in the democratic process. If the Court were to adopt PRCC's argument, Mainers would have no model to tell us what matters are "exclusively" local, carrying a dangerous and chilling effect of the rights of municipal voters. It would also place municipal officials in the unenviable position of regulating the speech of the municipal inhabitants in certain areas where the municipality has otherwise been granted free reign to legislate.

Petitioning and proposing legislation by initiative is an area "in which the importance of First Amendment protections is at its zenith." *Meyer v. Grant*, 486 U.S. 414, 425 (1988). Burdening that speech with a "necessarily ad hoc" inquiry into a "multiplication of legal questions,"

and worse yet, burdening local election administrators with managing its application, would prove nearly impossible. It would chill speech and undermine participatory democracy. *See Minn. Voters Alliance v. Mansky*, 585 U.S. ——, 138 S.Ct. 1876, 1888 (2018) (the administration of content based speech regulations by local election officials, "must be guided by objective, workable standards. . . . [I]f voters experience or witness episodes of unfair or inconsistent enforcement . . . the State's interest . . . would be undermined by the very measure intended to further it.")

This confusion would reach its apex in the municipal application of the people's veto referendum. The municipal officers could enact new municipal policy through its broad discretionary ordinance power. But if that ordinance proved unpopular with any segment of the electorate, and citizens circulated petitions to veto, the municipality would be required to make a determination before the new law could go into effect or the referendum could be placed on the ballot. Municipal officials would be forced to slap the hands of their constituents simply exercising their democratic rights. Citizens would become distrustful observing elected officials determine which acts of municipal legislative

discretion would be sufficiently "municipal" to permit voters to exercise their apparent but illusory constitutional rights. Those considering whether to undertake the time and expense of a local initiative campaign to duplicate an ordinance enacted in a neighboring town would be forced to measure whether the subject of their proposal was exclusively municipal, separate and apart from whether the ordinance was preempted by state law.

Especially as applied to the local exercise of initiative and referendum, this loss in confidence and trust would be catastrophic. Robust use of the initiative process has been statistically demonstrated to increase voter turnout, encourage civic engagement, and to enhance citizens' confidence in the responsiveness of their government. *See* Daniel A. Smith & Caroline Tolbert, *Educated by Initiative: The Effects of Direct Democracy on Citizens and Political Organizations in the American* States 39-49, 66-67 , 83-84 (2004). The Court advises that because "[v]oting is a fundamental right . . . at the heart of our democratic process . . . . the public's trust in the election process is therefore at the forefront of [the Court's] concern." *Opinion of the Justices*, 2017 ME 100 ¶ 49, 162 A.3d at 208 (internal citations

omitted). Here, the Court should weigh heavily this concern to preserve the public trust in local government.

CONCLUSION

For each of the forgoing reasons, Amici respectfully request that the Court affirm the decision of the Superior Court on this question.

Respectfully submitted,

March 26, 2021,

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CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on March 26, 2021, he caused to be sent by email and regular U.S. mail a copy of the above Amici Curiae Brief by emailing a pdf copy of said brief to counsel for Plaintiffs, Defendants, and Intervenors, and by depositing two copies of said brief to them by U.S. mail, first class, at their respective mailing and email addresses:

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