STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-20-159

FAIR ELECTIONS PORTLAND, INC. *ET AL.*

Appellants

v.

CITY OF PORTLAND

Appellee

On Appeal from Cumberland Superior Court
Docket No. AP-19-33

BRIEF OF APPELLANTS FAIR ELECTIONS PORTLAND, INC., *ET AL.*

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

MUNICIPAL CHARTER PROVISIONS

CONSTITUTIONAL PROVISIONS

LEGISLATIVE DOCUMENTS

INTRODUCTION

This case calls upon the Court to safeguard municipal residents' constitutional right to amend their charters and to enforce unambiguous Maine statute requiring local officials to place certified charter amendment proposals on the ballot.

The City of Portland ("the City") found that appellants' petition for a charter amendment satisfied all requirements for ballot placement, including certification of the requisite number of valid signatures and submission of the statutorily required opinion on the legality of the measure. Nevertheless, a majority of the City Council ignored the mandate to place the charter amendment on the ballot. The Court should reverse that error and order the City to place the measure before the public for a vote.

FACTS

The Petition. In April 2019 Portland voters concerned about the financing of candidates for municipal office submitted the following proposed charter amendment to the Portland City Clerk:

> The city council shall establish and fund a mechanism providing public campaign funds to qualified candidates for mayor, city council, and school board. The mechanism must provide sufficient funds to allow candidates who meet qualifying criteria to conduct competitive campaigns, must be voluntary, must limit the amount of private funds a candidate may raise, must only be available to candidates who demonstrate public support, and must be limited to candidates who enter into a binding agreement not to accept private contributions other than those allowed by the public funding program. The mechanism must be available by the 2021 municipal elections.

(A. 43-44, ¶ 35; A. 256.)

The measure proposed to establish a program to provide public funding to candidates for municipal office, similar to the Maine Clean Election Act, 21-A

M.R.S. § 1121 *et seq*. The details and amount of funding are left to later discretion of the City Council. Aware that the Maine Constitution guarantees their power to alter or amend their municipal charter, Me. Const. art. VIII, pt. 2, § 1, the Petitioners' Committee decided to submit the measure as an amendment to Portland's charter. (A. 42, ¶ 230.)

Qualifying for the Ballot. After submission, the City Clerk provided the petition forms required for collecting signatures. Supporters then organized a campaign to collect the 6,816 signatures required to allow Portland voters to vote on the question in the November 2019 election. (A. 39, ¶ 11.) In just 120 days, advocates collected over 8,500 signatures on forms provided by the Clerk. (A. 38, ¶ 3.) As instructed by the City, on August 2, 2019 proponents submitted the executed and notarized petitions to the Clerk. (A. 44, ¶ 36.) Ten days later the Clerk certified the signatures and found the petitions sufficient under the Home Rule Act ("the Act"), 30-A M.R.S. § 2104. (A. 259.)[1]

Proceedings Before Portland Municipal Officers. The proposed amendment appeared on the agenda of the August 12, 2019 Special City Council meeting as "Order 23-19/20 Setting a Public Hearing for Citizen Initiative Amendment to the Portland Charter re: Public Campaign Funding for Municipal Officials." The Council scheduled a public hearing[2] on the measure for September 4, 2019 in compliance with § 2104(5)(A).

[1] Unless otherwise noted, all statutory citations hereinafter refer to Title 30-A (2019).

[2] While a charter amendment requires a public hearing, no hearing is held when citizens initiate the process to re-open the entire charter – called a "revision of the municipal charter." *See* § 2102(1).

On August 29 Corporation Counsel issued a memorandum raising a question[3] whether the measure "constitutes a charter revision and is the type of fundamental change that a Charter Commission must review." (A. 260.)[4]

The next day, appellant Fair Elections Portland ("FEP"), the campaign vehicle organized by proponents, provided the City with a memorandum explaining why the measure falls within the constitution's grant of power allowing inhabitants of the municipality to seek changes on "all matters . . . local and municipal in character," Me. Const. art. VIII, pt. 2, § 1, and why the City must place it on the ballot as intended by the voters who signed the petition. (A. 257.)[5] The FEP memorandum included the opinion of an attorney in satisfaction of the requirements of § 2104(5)(B).[6] (A. 263.)

Following the September 4 public hearing, a member of the Council moved to send the measure directly to the voters as an amendment. (A. 177.) The motion failed, and the Council postponed further consideration to allow Corporation Counsel to

[3] At no time has the City challenged the validity of the measure on the grounds that it exceeded a single subject, *see* § 2104(2)(A), was not local or municipal in character, or otherwise contained any provision prohibited by the general laws, the United States Constitution or the Constitution of Maine, *see* Me. Const. art. VIII, pt. 2, § 1.

[4] The memorandum erroneously asserted that petition forms provided by the Clerk and signed by voters contained optional language, as provided in § 2104(4), requesting "that if the municipal officers determine that the amendment set out below would, if adopted, constitute a revision of the charter, then this petition shall be treated as a request for a charter commission." (A. 261.) None of the petition forms contained such language. (A. 118-119, 122-123, 135-136; A. 251; A. 253.)

[5] The FEP memorandum also corrected the Corporation Counsel's error, reminding the Council that the optional language was not included on the petitions provided by the Clerk. (A. 268, n. 5.)

[6] Amendments to the charter must be accompanied by a "written opinion, as attorneys admitted to the bar of this State, that the proposed amendment does not contain any provision prohibited by the general laws, the United States Constitution or the Constitution of Maine." § 2104(5)(B).

research the consequence of the City's mistaken belief that certain wording had been included on the petition forms. (A. 171-175.)

On September 16, 2019 Corporation Counsel advised the Council that "[t]here is no language in the statute or elsewhere that mandates placing all petitions on the ballot," while omitting any mention of § 2104(2) ("the municipal officers . . . *shall* provide that…amendments . . . be placed . . . .") (emphasis added) or § 2104(5)(C) ("the municipal officers *shall* order . . . .") (emphasis added). (A. 276.) This memorandum repeated the incorrect claim that the petitions lacked the "written opinion by an attorney admitted to the bar of this State" required by § 2104(5)(B) and insisted that the measure therefore could not be presented to voters for consideration. (A. 277.) FEP had provided the written opinion more than two weeks earlier.

At its September 16 meeting, a second motion to place the measure on the ballot as a charter amendment failed to secure a majority of the Council. (A. 218.) In its final action on this matter, the Council voted to indefinitely postpone the petition, effectively terminating the measure. (A. 218.)

During deliberations among City Councilors and colloquies between the Council and their attorney, a new standard emerged by which the City would determine whether to allow ballot placement for the certified initiative petition. Despite skepticism of individual Councilors,[7] the City accepted the advice of its Counsel that because the City

[7] "It's just, again, a very tricky situation." (A. 200) (Councilor Batson) "I mean, since I'm standing, I'll just say like

Council has exclusive "authority to determine what is in the best interests of the city," (A. 261), "as a matter of law" no citizen-initiated charter amendment can obligate "one cent" of spending, (A. 147),[8] or in any way "t[ie] the hands" of the Council, (A. 209), or disrupt its conduct of business (A. 261).

The Council did not issue an order or ruling; its decision and rationale are only discernible through transcripts of proceedings of the two meetings, two memoranda provided by its attorney, and minutes of Council proceedings.

Proceedings in Superior Court. Four days later – September 20, 2019 – Plaintiffs, including FEP and 13 individual Portland voters who had each either signed or circulated the petitions, filed their complaint and requested emergency injunctive relief. (A. 9.) The complaint, as amended on October 4, 2019, includes four Counts: (1) Rule 80B Appeal of the City's refusal to place the measure directly before voters as required by the constitution and the Act; (2) Petition for declaratory relief pursuant to § 2108(2) and Title 14, chapter 707; (3) Civil action for deprivation of rights arising out of state law under 42 U.S.C. § 1983; and (4) Civil action for deprivation of rights arising out of federal

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I want this to be an amendment. I feel like I was pretty clear about that at the last meeting, but I have a nursing degree. I don't have a law degree. I'm hearing pretty clearly from our Corporation Counsel that that is not what we should be doing, and there's legal consequences for that . . . ." (A. 205) (Councilor Batson).

[8] This exchange was typical:

COUNCILOR COSTA: Yeah. And that's my point, that as a matter of law, certainly not as a matter of finance, but as a matter of law, we can't distinguish between those things, so even if the writing here was one cent, we would still be committed to the proposition as a matter of law that that constituted a revision –

COUNSEL WEST-CHUTHA: Correct.

(A. 147.)

law under 42 U.S.C. § 1983. (A. 9.) Plaintiffs' emergency motion sought a decision in time to place the measure on the November 5, 2019 ballot. (A. 9.)[9] On October 25, 2019 the City moved to dismiss the complaint.[10] (A. 10.)

Following additional proceedings including briefing of the 80B appeal, on May 13, 2020 the Superior Court issued its Order on the City's motion to dismiss. The Court concluded that "[t]here can be no doubt that municipal citizens have a constitutional right to alter or amend their municipal charter," (A. 14) and that city officials "have a non-discretionary duty . . . to order that a certified citizen-initiated charter amendment appear on the ballot as written . . . ." (A. 15.) (italics omitted) Nonetheless, the Court found that Portland's elected and unelected officials have the power to decide that a proposal advanced by citizens as a charter amendment is not in fact a charter amendment, but is instead a "revision of the charter," effectively terminating the citizen-initiative process. Appellants filed this appeal on May 27, 2020.

STATEMENT OF ISSUES

This appeal presents the following issues:

1. Whether the City erred as a matter of law by granting to itself the power to deny ballot placement for a measure that qualified for the ballot pursuant to the

[9] When filing the complaint, plaintiffs simultaneously petitioned the Court for leave to seek declaratory judgment and moved to specify a course of proceedings that would allow expedited resolution of the matter. (A. 1.) Plaintiffs filed a second motion to specify the course of proceedings on November 19, 2019. (A. 3.)

[10] On October 21, the City by its own authority pursuant to § 2102(1) ordered a question placed on the June 9, 2020, municipal ballot asking the voters whether to establish a charter commission. (A. 9-10.) The City's Motion to Dismiss was based in part on an argument that ordering that question had rendered Appellants' claims moot. (A. 10.) The Superior Court rejected this argument. (A. 14, n. 11.)

requirements of the Home Rule Act?

2. Whether the measure was a valid exercise of municipal inhabitants' power to amend their City Charter, and the City therefore erred as a matter of law by excluding it?

3. Whether the Superior Court erred in dismissing constitutional claims asserting the deprivation of rights arising under state and federal law?

SUMMARY OF THE ARGUMENT

When the people ratified the 111th Amendment to the Maine Constitution, they re-claimed for themselves power over municipal charters. This power allows municipal inhabitants to 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.

The legislature has prescribed in great detail the procedures by which the people may exercise that power. Once appellants satisfied each of those prerequisites, the plain language of the Home Rule Act requires municipal officials to place certified measures on the ballot, with no exception. The purpose and legislative history of the constitutional home rule provision confirm the plain language of the statute and demonstrate that municipal officials have a nondiscretionary duty. The structure of the Home Rule Act, including its heavy procedural burden, its restriction on municipal officials' review to cases where the signatories request such review, and its express delegation of enforcement authority to the judiciary, shows definitively that the municipal officials' role is limited to that of election administrators. The City Council and its attorney are not discretionary "gatekeepers."

Even if the City did not err in authorizing itself to decide whether or not to place the measure on the ballot, it erred in adopting a standard so draconian as to prohibit all but the most trivial proposals. A standard properly grounded in constitutional and statutory authority would have allowed the measure to be recognized as a valid exercise of Appellants' rights to amend their municipal charter. The City, in error, ignored the statutory command that the right of municipal inhabitants to initiate amendments to their charter must be liberally construed to facilitate and not to hinder that right. The City's failure to apply the statute and its invented "one cent" standard would stand alone as a distinct outlier among jurisdictions with Home Rule. It is also inconsistent with the legal tradition that would have informed Legislators' intent in using the terms "amendment to the charter" and "revision of the charter" or with consistent usage before and since enactment of the Home Rule Act. And the City's argument that the measure would conflict with the City's existing Charter is error of law.

The Superior Court erred as a matter of law in dismissing Appellants' independent constitutional claims. Claims brought under 42 U.S.C. § 1983 for violations of the right to freedom of speech and wrongful violations of substantive due process are supplemental to any brought under state law, and relief offered cannot be duplicative.

The Court should reverse the Superior Court, order the City to place the measure on the ballot, declare that the measure sets forth a valid amendment to the Portland City Charter, and restore Appellants independent claims.

ARGUMENT

I. ALL ISSUES PRESENTED ARE SUBJECT TO *DE NOVO* REVIEW.

This case presents questions regarding the constitutional power of municipal inhabitants to alter and amend their charter under the Act, the authority of municipal officers to review proposed changes and prevent their placement on the ballot, and the relief afforded appellants' independent claims. All are purely legal issues subject to *de novo* review. The Court "review[s] questions of law, including issues of statutory and constitutional interpretation, de novo." *In re M.B.,* 2013 ME 46 ¶ 26, 65 A.3d 1260 (quotation marks omitted). Likewise, "[t]he interpretation of a municipal charter is a question of law reviewed de novo." *McGettigan v. Town of Freeport*, 2012 ME 28 ¶ 13, 39 A.3d 48. "On de novo review, we examine the entire record before us for errors of law." *Bangs v. Town of Wells*, 2000 ME 186, ¶ 9, 760 A.2d 632 (quotation marks omitted).

The Court "will not look beyond clear and unambiguous statutory language." *State v. Edward C*, 531 A.2d 672, 673 (Me. 1987) (citation omitted). But, "[t]o determine legislative intent when there is an ambiguity in the statute, the court may look beyond the words themselves to the history of the statute, the policy behind it, and contemporary related legislation." *Id.* "[T]he legislative intent of any statutory enactment is determined wholly as a matter of law, not fact." *Wawenock, LLC v. Dep't of Transp.* 2018 ME 83, ¶ 13, 187 A.3d 609. The Court "liberally construe[s] grants of initiative and referendum powers so as to 'facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate.'" *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 9, 91

A.3d 601, 604 (Me. 2014), quoting *Allen v. Quinn*, 459 A.2d 1098, 1102–03 (Me. 1983). "[T]he power of the people to enact their laws shall be given the scope [they] intended . . . ." *Farris, Att. Gen. v. Goss*, 143 Me. 227, 231 (1948).

> When constitutional rights are implicated. . . we must construe a statute to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible. Thus, when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, we will adopt that interpretation, notwithstanding other possible interpretations of the statute that could violate the Constitution.

Nader v. Maine Democratic Party, 2012 ME 57, ¶ 19, 41 A.3d 551 (citations omitted).

II. THE CITY ERRED WHEN ASSERTING AUTHORITY TO EXCLUDE A CERTIFIED MEASURE FROM THE BALLOT.

The City's action blocking the certified measure from the ballot was erroneous as a matter of law because (1) the plain language of the Act mandates ballot placement for an initiated amendment that satisfies all procedural requirements; (2) the purpose and legislative history of the constitutional grant of power reinforce the plain meaning; and (3) the structure of the Act compels the conclusion that ballot placement is not subject to municipal officials' discretion.

A. The plain meaning of the Home Rule Act requires municipal officials to place certified measures on the ballot with no exception.

Upon receipt of a fully certified citizen-initiated charter amendment, § 2104 requires municipal officers to promptly submit the measure to the voters. Section 2104(2) is plain and unambiguous, providing that, "[o]n the written petition of a number of voters . . . the municipal officers, by order, shall provide that proposed amendments to the municipal charter be placed on a ballot . . . ." Section 2104(5)(C) reiterates this

mandate and imposes a deadline: "the municipal officers shall order the proposed amendment to be submitted to the voters at the next regular or special municipal election held within that year . . . ." "The most fundamental rule of statutory construction is the plain meaning rule." *Merrill v. Sugarloaf Mountain Corporation*, 2000 ME 16, ¶ 11, 745 A.2d 378. "When statutory language is plain and unambiguous, there is no need to resort to any other rules of statutory construction." *Id.*, *citing State v. Harris*, 1999 ME 80, ¶ 3, 730 A.2d 1249. Where proponents satisfy the "written opinion" requirement of § 2104(5)(B) and provide the requisite signatures, this should be the end of the analysis.[11]

The gravamen of this case is the City's claim that it has discretion to withhold ballot placement where a petition falls within the scope of the constitutional grant of initiative powers and complies with all statutory requirements. But that claim violates the clear and mandatory language of the Act. "We have consistently held that 'the word shall is to be construed as must,' and that such statutory language indicates a mandatory duty for the 'purpose of sustaining or enforcing an existing right.'" *Maine School Administrative District No. 37 v. Pineo*, 2010 ME 11, ¶ 18, 988 A.2d 987 (citations omitted).[12]

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[11] In the proceedings before the City Council, this was the end of the analysis. Perhaps unaware that she had the document in her possession, Corporation Counsel denied receipt of the written opinion on September 4 (A. 138.), in her memorandum (A. 272.), and during proceedings of September 16, 2019. (A. 177.) Corporation Counsel initially advised the Council that only the City's own attorney could provide such an opinion, not counsel for the measure's proponents. (A. 138.) In her September 16 memorandum, corporation counsel instructed the Council, "[h]ere, the petitions lack the procedurally required attorney sufficiency letter . . . and so the Council is not mandated to send the proposed Charter amendment to the voters for review in November." (A. 272.)

The City now concedes that the above statements were made in error, and that appellants provided the required attorney sufficiency letter. (A. 9, n. 6.) (Def.'s Reply Mot. Dis. 11.) ("[T]here is no dispute that the opinion submitted by Plaintiffs' counsel would satisfy Section 2104(5).")

In contrast, the Act uses the permissive term "may" when authorizing officials to place their own measure directly on the ballot. § 2104(1) (when acting on their own initiative, absent certified petitions, "the municipal officers may order the proposed amendment to be placed on a ballot . . . ."). The choice of auxiliary verb is highly significant. *See Fitzpatrick v. McCrary*, 2018 ME 48, ¶ 17, 182 A.3d 737 (contrast between 'may' and the mandatory verb 'must' within the same section demonstrates clear intent); *see also Lopez v. Davis*, 531 U.S. 230, 241 (2001) ("[U]se of the permissive 'may' . . . contrasts with the legislators' use of a mandatory 'shall' in the very same section."). Here, language and structure serve as strong evidence of intent to ensure that voters rights are no less than those of officials. *See Attorney General v. Sanford*, 2020 ME 19, ¶¶ 16-18, ___ A.3d ___ (nearly identical statutory language demonstrates the Legislature's intent to establish beneficial rights judged on equivalent terms).

B. The purpose and legislative history of the constitutional home rule provision confirm the plain meaning of the statute as a nondiscretionary requirement on municipal officials.

Should the Court find it necessary to look beyond the plain language and consider the constitutional provision's purpose and legislative history, it will find confirmation that the municipality must place a certified measure on the ballot. The City's interpretation of

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[12] Ironically, when interpreting the language of the measure itself, Corporation Counsel recognized that the use of "shall" always creates a requirement:

> COUNSEL WEST-CHUTHA: I guess I would – something along those lines. I'm not sure I would say it exactly that same way, but yeah, something along those lines where it's more of a soft requirement, *not such a hard requirement like "shall."*

(A. 154) (emphasis added).

the Home Rule Act—claiming power to review the substantive validity of a citizen-initiated charter amendment—cannot be reconciled with the municipal inhabitants' constitutional "power to alter or amend their charter on all matters . . . ."

The legislative history and purpose of the constitutional provision confirms an intent to extend the full scope of legislative power to municipal inhabitants. Protecting this power from interference of local officials is not merely an incidental feature, but fundamental to the purpose for which this provision was ratified by the people. As with the initiative and referendum, with the 1969 Home Rule amendment to the Maine Constitution "the people took back to themselves part of the legislative power that in 1820 they had delegated entirely to the legislature," *Allen v. Quinn*, 459 A.2d 1098, 1098 (Me.1983). The purpose of all citizen-initiative powers is "to afford the people the ability to propose and to adopt . . . provisions that their elected public officials had refused or declined to adopt." *Perry v. Brown*, 52 Cal.4th 1116, 1140, 265 P.3d 1002 (Cal. 2011).

The constitutional amendment authorizing citizen-initiated municipal charter amendments was conceived and drafted by the Maine Intergovernmental Relations Commission on Home Rule. The Commission's initial draft vested "the exclusive power to alter and amend their charters on all matters which are local and municipal in character" in the municipal corporations themselves. The Maine Intergovernmental Relations Commission, Report on Home Rule at 2 (1968). However, before the amendment was put to the voters, the Legislature re-worded the proposal to vest this power in the "[t]he inhabitants" rather than the "municipal corporations." House Amend.

A to L.D. 451, No. H-416 (104th Legis. 1969); Resolves 1969, ch. 29. Entrusting individuals, not the municipal officials, with this power more accurately fulfilled the intention of the Commission, which in its final report wrote:

> After the amendment has been secured, the Legislature will be called upon to enact enabling legislation so the municipalities will be provided with charters that safeguard the rights of the individuals in the community. An example would be a provision in the enabling legislation that provides for referendums in the municipality if a charter is to be altered or amended.

Commission Report at 3.

The purpose of the amendment and the enabling legislation is therefore to "safeguard the rights of individuals in the community" to alter or amend their charters. This history confirms the objective of guaranteeing these rights constitutional protection against the passing whims of the legislature and the self-interest of municipal officers. The constitutional provision is at the heart of appellants' case: that municipal inhabitants, not elected or unelected officials of the municipal government, hold the constitutional power.[13]

Like the direct initiative amendments, Maine's constitutional home rule provision "reserves to the people the *right* to legislate by direct initiative if the constitutional conditions are satisfied." *McGee v. Secretary of State*, 2006 ME 50, ¶ 25, 896 A.2d 933, 941 *(emphasis in original)*. The Court emphasized the primacy of citizen initiative authority decades ago. *Farris, Att. Gen. v. Goss*, 143 Me. 227, 231, (Me. 1948) (initiatives are not a

[13] A reviewing Court should give effect to the clear intent of such an amendment. *See City of Augusta v. Inhabs. Town of Mexico*, 141 Me. 48, 51, 38 A.2d 822 (1944) (deletion of words by amendment "raises an inference that a change in the law was intended.")

grant of power by the legislature, but instead are the citizen's 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"); *League of Women Voters v. Sec. of State*, 683 A.2d 769 (Me. 1996) (citizen initiative power is to be construed liberally in order to facilitate the people's exercise of their sovereign power to legislate); *McGee v. Secretary of State*, 2006 ME 50, 896 A.2d 933 (Me. 2006) (with citizen initiatives, the people have reserved for themselves a powerful tool for shaping and creating legislation).

The teachings of *Farris*, *McGee*, *Allen*, and *League of Women Voters* – that the people are sovereign and that their power to legislate is fundamental to democracy in Maine – apply with the same force to citizen-initiated charter amendments. The City's action in this case cannot be reconciled with this longstanding principle.

C. The structure of the Home Rule Act shows that the municipal officials' role is limited to that of election administrators and not "gatekeepers" with discretionary power.

In 1970 the Legislature enacted the Home Rule Act, 30-A M.R.S. § 2101 *et seq.* in fulfillment of the 111th Amendment's directive to "prescribe the procedure" by which municipal inhabitants may alter or amend their charters. Me. Const. art. VIII, pt. 2, § 1. Three aspects of the Act's structure confirm the mandate described above, and the legislature's intent to impose a nondiscretionary duty, not empower municipal officers as gatekeeper over citizens' initiative power: (1) the heavy burden imposed by the Act before a measure can be placed on the ballot; (2) the requirement in § 2104(4) that only upon a

request from signatories may municipal officials re-classify a measure; and (3) the decision in § 2108 to entrust enforcement and review to the judicial branch, not municipal officials.

1. The heavy burden to obtain ballot placement confirms that inhabitants' powers are substantial and not illusory.

Because Maine elections are administered by municipalities[14] pursuant to state laws,[15] the legislature entrusted local officials to administer the process by which inhabitants exercise their power "to alter and amend their charters." The Act establishes extensive and detailed prerequisites, including signatures needed for ballot placement, § 2104(2); the form and process for petitioning, §§ 2102(3) and 2104(3)[16]; the written opinion of an attorney, § 2104(5)(B); deadlines for ballot placement, § 2104(5)(C); ballot language, §§ 2105(1) and (2); and the quorum requirement §2105(4).[17] Although these procedures and requirements are onerous, nothing in § 2104 impermissibly constrains the legislative power of municipal inhabitants. Each provision only "prescribe[s] the

[14] *See, e.g.* Me. Const. Article IV, Part First, Section 5 (elections of Representatives are carried out by "qualified officials of the several towns and cities . . . .")

[15] *See* 21-A M.R.S. 621 *et seq.*

[16] Below, Appellees relied heavily on the earlier Superior Court (York County, *Brennan, J.*) judgment in *Karytko v. Town of Kennebunk*, No. AP-06-24, 2006 Me. Super. LEXIS 209 (Oct. 10, 2006), but that case involved a defective petition embracing more than one subject and brought in the form and under the procedures of § 2522. The Superior Court's review was therefore over action the Board of Selectmen had taken in its discretionary legislative capacity under § 2102(1). *See* Plaintiffs' Rule 80B Brief Exhibit A, *Id.;* Defendant's Rule 80B Brief Attachment A, *Id.*; *see also* (Pls.' Reply on Rule 80B Br., Ex. A).

[17] The Court in *Avangrid Networks, Inc. v. Sec'y of State* referred to the analogous role played by the Secretary of State as "a limited gatekeeper function" conferred by the election statutes. 2020 ME 109, ___ A.3d ___ at ¶ 9, n. 4 (Me. 2020).

procedure by which the municipality may so act."[18] If inhabitants' power were limited to fixing typographical errors in a charter, these extensive requirements would not be necessary. But taken together, they confirm that the power safeguarded by the legislature should be seen as real and not illusory.

a) The signature burden and quorum requirement.

The Act sets a threshold requiring demonstrated support from a number of locally registered voters equal or exceeding twenty percent of the turnout at the most recent gubernatorial election. This threshold entails twice as many signatures (per-capita) as needed for a statewide citizen initiative and allows less than one-third the time to collect them. *See* §§ 2102(3)(B)(2), 2104(2); Me. Const. art. IV, pt. 3, § 18(2).

For those proposed charter amendments that obtain the necessary signatures to secure ballot placement and secure a majority vote of the electorate, the Act imposes an unusual "quorum" requirement: if the total vote for and against the measure does not exceed thirty percent of the vote in the preceding gubernatorial election, the measure fails. *See* § 2105(4). That the legislature erected such substantial hurdles demonstrates its understanding that the power wielded by local inhabitants under the Act is substantial and not trivial or conditional.

b) The requirement of a written opinion of an attorney.

The legislature adopted an elegant yet effective means of ensuring compliance

[18] The legislature did not subject charter amendments proposed by municipal officers to the written opinion requirement.

with the constitution's limitations on permissible subject matter for inhabitants' exercise of their power to "alter and amend." Rather than entrusting municipal officials to vet measures that directly impact their powers, the statute instead requires an independent authority to make this attestation. § 2104(5)(B) (requiring "a written opinion by an attorney admitted to the bar of this State that the proposed amendment does not contain any provision prohibited by the general laws, the United States Constitution or the Constitution of Maine.") Here, advocates of the proposed charter amendment satisfied this "written opinion" requirement prior to the City Council's first deliberation over the measure. (A. 262-263.)

This requirement protects against the proliferation of obviously flawed measures[19] that might otherwise clog both municipal ballots and the state courts, without unduly burdening inhabitants' initiative powers.[20] The role of local officials is limited to verifying the presence of an opinion and the credential of its attorney-author.

2. Section 2104(4) confirms that inhabitants hold ultimate control over classifying their proposal as an amendment to the charter or a revision of the charter.

Section 2014(4) allows municipal officials to reclassify a proposed amendment to

[19] As the Court instructed in *Nasberg v. City of Augusta*, 662 A.2d 227 (Me. 1995), holding that a municipality is not obligated to provide such an opinion, "[t]he intent of the requirement for an attorney's letter is to prevent clearly unconstitutional provisions from being placed on municipal ballots." *Id.* at 229.

[20] This reasonable approach also satisfies the federal constitutional rule that, where a state chooses to endow citizens with the initiative power, it cannot place undue burdens on the exercise of that power. *Meyer v. Grant*, 486 U.S. 414 (1988). To more precisely achieve the state interest, it eliminates conflict laden unduly burdensome review entrusted to municipal officials themselves, in favor of certification delivered by any attorney in good standing. *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (invalidating burdensome Colorado requirements where other provisions "more precisely achieve[d] the State's . . . objective.").

the charter as a revision of the charter, but *only upon request of all those who sign the petition.* Without such a request, municipal officials lack the power to re-classify the proposed charter amendment. The Act makes clear that part of the legislative role of petition signatories is to decide on this classification, and that it cannot be changed unless they make a request to do so. Section 2104(4) confirms that in the first instance, the power to choose whether a measure is an amendment to the charter or a revision of the charter lies with the measure's proponents and those who signed the petitions, not with municipal officials:

> **4. Amendment constituting revision.** At the request of the petitioners' committee, the petition form shall also contain the following language:
>
> > "Each of the undersigned voters further requests that if the municipal officers determine that the amendment set out below would, if adopted, constitute a revision of the charter, then this petition shall be treated as a request for a charter commission."
>
> Upon receipt of a petition containing this language, the municipal officers, if they determine with the advice of an attorney that the proposed amendment would constitute a revision of the charter, shall treat the petition as a request for a charter commission and follow the procedures applicable to such a request.

§ 2104(4). This requirement of a request from signatories confirms that local officials lack unilateral power to make this change. Absent an express request of the voters, this vital element of the legislative power—its very nature as an amendment—remains firmly in the hands of the measure's supporters, as the constitution requires.[21] Critically important here, all of the supporters—the voters who read the petition and attested their support by affixing their signatures—hold that power, not just the measure's formal

[21] Likewise, the section's second, limited provision relating to attorney review of a proposed charter amendment, conducted by the municipal officers at the express request of petition signers, was not triggered because this language did not appear on the petitions.

proponents. *See LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 286-288 (1951) (once they have affixed their signatures to a petition, the people have assumed the power to legislate under a citizen initiative and that power transcends the power of those who initiated the petition).[22] Had the legislature truly empowered local officials to serve as "gatekeeper" with plenary power to review an amendment's substantive validity, it would not have been conditioned on the signatories' request.

Since the legislature specifically provided that city officials cannot reclassify a charter amendment without signatories' request, the plain language of the Act required the municipal officers to place the measure on the ballot, and any other interpretation does violence to the statutory language that municipal officers "shall provide" ballot placement and "shall order" that the proposal be put before voters at the next election. §§ 2104(2) and 2104(5)(C).

This case illustrates the dangers of a contrary rule. Upon the flimsiest of pretexts—that a City can reclassify any measure incurring "one cent" of financial burden—the City has rendered meaningless an express constitutional right. Since by their nature, local charter amendment proposals are likely to be unwelcomed or undesired by local officials, removing this power from inhabitants and granting it to local officials would have the practical effect of significantly weakening the constitutional provision

[22] As noted above, n. 4, there is no dispute that none of the 284 petition sheets nor any of the 6,816 validated petition signatories requested this re-classification.

empowering residents to advance citizen-initiated charter amendments. Me. Const. art. VIII, pt. 2, § 1. This cannot be the law.

3. The statute entrusts independent review to the judicial branch, not to local officials.

The City concluded that its authority to close the gate on an unwanted charter change was authorized as a "procedure" pursuant to Me. Const. art. VIII, pt. 2, § 1 ("The Legislature shall prescribe the procedure by which" charter amendments may be enacted.) But apart from the independent written opinion of counsel requirement described above, substantive review of an initiative is reserved for the judiciary, and only allowed after a measure has been approved by the voters. *See Wagner v. Sec'y of State*, 663 A.2d 564, 567-568 (Me. 1995); *Lockman v. Secretary of State*, 684 A.2d 415, 420 (Me. 1996). Even the Court may only withhold a measure from the ballot when it exceeds the scope permitted by the constitutional legislative power, in this case: "all matters municipal and local in character." *Avangrid Networks, Inc. v. Sec'y of State,* 2020 ME 109, ___ A.3d ___.[23]

Moreover, aside from the narrow case of §2104(4)—which the City agreed is not applicable[24]—nowhere does the statute set forth any procedure allowing municipal

[23] The Court's August 13, 2020 *Avangrid* decision confirmed that judicial review of a pending ballot question is limited to whether the measure "is within the scope of the people's right to initiate legislation." p 16 ¶ 22. Here, neither the City nor the Court below argue that the measure is outside the scope of the right to initiate such a measure, as it is both "not prohibited by Constitution or general law" and "local and municipal in character." The basis for the City's decision to block the measure—to which the Court below deferred—was attributed to an entirely different source: the structure of election administration procedures enacted to effectuate the powers granted by the Act. Such heavy reliance on an implication from the structure of a state statute exceeds the foundation for pre-election review and contravenes the standard articulated in *Avangrid*.

[24] *See* A. 271 (the Clerk's omission of the optional language "does create a situation in which the Council is not bound or required to follow the statutory revision process . . . ."); A. 181-182 (Corporation Counsel advising City

officials to "close the gate" on measures they find burdensome.[25] Procedural review of an initiative measure is limited to how the measure "identifies itself" "[o]n its face." *Wagner*, 663 A.2d at 567. Moreover, the Act expressly entrusts the resolution of disputes to the courts. Specifically, § 2108 creates a menu of options for any ten voters, even absent specific injury, to seek relief from the Superior Court in the form of enforcement, declaratory judgment, and procedural review.

Indeed, post-election judicial review is precisely what the authors of the constitutional amendment envisioned. Prior to the Act, the Legislature supervised the alteration of municipal charters. The Intergovernmental Relations Commission's final report makes clear that the Courts would do so under the Act. "If the municipality fails to adhere to the law allowing Home Rule, abuses the enacting legislation, or fails to operate under Home Rule in a manner consistent with the philosophy therein, the Courts will be called upon to act." Commission Report at 2. Especially in light of the Legislature's express provision of detailed procedural prerequisites and judicial review, express statutory authorization for the substantive review claimed by the city stands conspicuously absent. For a Court to nonetheless affirm such authority "would be but an assumption by the judicial of the duties of the legislative department." *Swift v. Luce*, 27

Council that Clerk's failure to include optional language justifies City in not applying § 2104(4) to send measure to voters). One Councilor explained voting against sending the measure to voters as a call for a charter commission "because that language was left off the petition, I think we have the leeway to take another route . . . ." (A. 195.)

[25] *Cf. Berent v. City of Iowa City*, 738 N.W.2d 193, 200 (2007) ("Our holding in this case that city officials cannot engage in substantive review beyond that expressly authorized by applicable statutes is thus well within the mainstream of municipal law.")

Me. 285, 286 (1847).[26]

III. EVEN IF THE CITY HAS SOME LIMITED "GATEKEEPER" AUTHORITY, IT ERRED WHEN EXCLUDING THIS MEASURE.

Even if the Court determines that municipal officials may block some certified proposals from the ballot, Appellants should prevail because this measure is a valid exercise of the amendment power under the Maine Constitution and the Home Rule Act. If the Court determines that municipal officers are empowered to review whether or not a measure is in fact an "amendment to the charter," the Court should establish a clear legal standard[27] to guide and constrain that determination lest any "gatekeeper" function devolve into an illegal veto power. When establishing a standard, the Court should be guided by the legislature's directive to liberally construe inhabitants' powers. The Court may also wish to consider analogies from the last six decades of constitutional law in

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[26] *See also Friends,* 2014 ME 63 at ¶ 4 n. 3, 91 A.3d 601 ("The City Clerk does not have express authority to reject citizens' initiative proposals submitted in compliance with the petition procedure in the City Code on grounds that they are not legislative.")

[27] Allowed to stand, the decision below would give municipal officials unlimited discretion when determining what proposals may be advanced by a charter amendment, leaving ballot measure proponents collecting thousands of signatures to guess whether their proposal will be accepted for ballot placement, or an exercise in futility. Such an interpretation chills speech and would plainly violate the federal constitution and petitioners' rights to speak. "[T]he State must be able to articulate some sensible basis for distinguishing what may come in from what must stay out." *Minn. Voters Alliance v. Mansky*, 585 U.S. ___, 138 S.Ct. 1876, 1888 (2018).

As the Court in *Mansky* reasoned, in a case where poll workers were tasked with determining what apparel qualified as "political" and was thus barred from polling places, an objective standard is imperative:

> We do not doubt that the vast majority of election judges strive to enforce the statute in an even-handed manner, nor that some degree of discretion in this setting is necessary. But that discretion must be guided by objective, workable standards. Without them, an election judge's own politics may shape his views . . . [a]nd if voters experience or witness episodes of unfair or inconsistent enforcement of the ban, the State's interest . . . would be undermined by the very measure intended to further it.

Mansky, 138 S.Ct. at 1891.

Maine. These considerations will lead to a standard that is incompatible with the unfounded, extreme, and miserly standard the City here attempted to apply.

A. Section 2109 requires a "liberal construction."

The Home Rule Act must be "liberally construed to accomplish its purposes."[28] The "purpose" of the citizen-initiated charter amendment provision is clear: codifying inhabitants' power to amend their charters and safeguarding their use of that power. One threat from which inhabitants' power must be safeguarded is self-evident: the predictable intransigence or opposition of municipal officials whose failure to act has made it necessary for voters to resort to a citizen initiative. *See Opinion of the Justices*, 673 A.2d 693, 698 (Me. 1996) quoting Op. Me. Att'y. Gen. 86-09. ("[T]he entire initiative process is designed as a means of overcoming a Legislature that refuses to enact the measure itself"). Protecting the citizen-initiated charter amendment process from municipal officials who may be tempted to curtail those rights is its primary reason and justification.[29]

Exceptions to this power—if any exist—must be narrowly construed. *See Moffett v. City of Portland*, 400 A.2d 340, 348 (Me. 1979) ("a corollary to . . . liberal construction . . . is necessarily a strict construction of any exceptions . . . ."). The concept of a municipal

[28] "Liberal construction. This chapter, being necessary for the welfare of the municipalities and their inhabitants, shall be liberally construed to accomplish its purposes." § 2109.

[29] *See*, Geoffrey Herman, *Municipal Charters: A Comparative Analysis of 75 Maine Charters* (Maine Townsman, August 1992), Maine Municipal Association (citizen initiative provisions serve to "check[] the authority previously granted to the electors' representatives.")

charter commission does not appear in the Maine Constitution. Nor does the distinction between an amendment to a charter and a revision of a charter. The decision of the City based on these precepts was without any legal foundation.

The only valid substantive limitation the Act places on charter amendments is that "each amendment shall be limited to a single subject, but more than one section of the charter may be amended as long as it is germane to that subject." §§ 2104(1)(A) and 2104(2)(A). The Court has explained that the purpose of a single subject requirement is "to protect voters from legislative logrolling and from having to vote for a proposal they dislike in order to get one they want." *Common Cause v. State*, 455 A.2d 1, 13 (Me. 1983); *see also Lockman v. Secretary of State*, 684 A.2d 415, 420 (Me. 1996). Here, the Legislature intended the single subject rule to serve as the primary distinction between what could be considered as an amendment and what changes require revision. Indeed, as the only express substantive limitation the Act places on charter amendment, liberal construction requires that this rule be narrowly construed as the only limitation intended by the Legislature. *See Moffet,* 400 A. 2d at 348.

In his leading 1911 treatise on modes of alteration to state constitutions, Walter Farleigh Dodd professes that "the proper rule" reflecting a "liberal attitude" is that "every reasonable presumption, both of law and fact, is to be indulged in favor of the validity of an amendment to the constitution" Walter Fairleigh Dodd, *The Revision and Amendment of State Constitutions* at 215 (1910), quoting *People v. Sours*, 31 Colo. 369 (1903) at

376. Section 2109 required the City to apply a similar rule for the initiated amendment to its charter, and the City erred in its failure.

B. The City's draconian "one cent" standard would stand alone as a distant outlier among the Home Rule states.

Approximately 44 states have adopted at least some form of home rule charter authority.[30] Many of these states have constitutional or statutory provisions addressing the permissible scope of amendments to the charter or revisions of the charter, like Maine's requiring that charters be restricted to matters "local and municipal."

Some state courts have, as the Court is here asked to do, grappled with the distinction between charter changes that may be accomplished by legislative amendment, and those that require revision by a charter commission. These courts have reached an array of conclusions, but none has applied any rule as draconian as the "one cent" standard applied by the City in this case.

The analysis of the Attorney General's Office—shortly after enactment of the Home Rule Act—summarized case law from around the country reflecting an expansive view of the changes which might be accomplished by amendment. The Attorney General's Office advised the Office of Legislative Research on the "precise scope of the power granted to the inhabitants of municipalities . . . to 'alter and amend their charters'

[30] Jon D. Russell & Aaron Bostrom, *Federalism, Dillon Rule, and Home Rule*, 6 (2016).

on all local matters."[31] The Attorney General's Office memorandum concluded that the power entrusted to inhabitants is very broad.

First, the memorandum relates various definitions of "amend" found in an assortment of court opinions. These definitions establish that an amendment is an addition to an existing law that leaves some part of the original still standing. (S. 3.) The memorandum then reviewed case law discussing the distinction between an amendment and a revision. It described a decision of the Colorado Supreme Court which, as the Assistant Attorney General explained, "held that 'when the word 'amendment' is used without limitation, any matter which is germane to the principal subject, to wit, that of municipal government, is proper to be submitted as an amendment.'" *People ex rel. Moore v. Perkins*, 56 Colo. 17, 137 Pac. 55 (1913) (replacing mayor-council with commission form of government can be accomplished with a mere amendment).

The memorandum found similar law in two cases from Oklahoma. Reviewing the first, the Office of Attorney General proposed that "a change in the plan of governing and administering the municipal affairs of a city from commission to manager form . . . is a valid amendment." (S. 7) (describing *Moore v. Oklahoma City*, 122 Okla. 234, 254 P. 47 (Okla. 1927)). In the second, the Assistant Attorney General related the holding in *Boatman v. Waddle*, 1953 Ok. 368, 264 P.2d 730 (Okla. 1953), where voters submitted an

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[31] Inter-Departmental Memorandum from Charles R. LaRouche, Assistant Attorney General, Attorney General's Office to Samuel H. Slosberg, Legislature Research Dept., October 16, 1970, (on file at the Law and Legislative Reference Library), page 5. This memorandum is reprinted in the Supplement of Legal Authorities. Additional citations to this memorandum refer to the Supplement, and are made in the form (S. #).

initiative petition for a amendment to repeal the existing charter and adopt a new one:

> "Under this broad constitutional authority, a municipal government presently existing under a charter form of government with Commissioners may amend its form of government to a council-manager form of government, or vice versa, or it may amend one or more designated articles or sections of its present charter, or all of them, or it may elect to continue in effect certain ordinances and abolish others, or may retain certain departments of municipal government or abolish others or consolidate them."
>
> ". . .
>
> "We do not agree with protestants that the Initiative Petition which submits a proposition of changing the form of city government from a commission form to a council-manager form is an attempt to revise or adopt a new charter, but is in effect an amendment of the present charter."

(*Id.* at 32-33). The memorandum concluded that inhabitants' "power to alter and to amend seems to be broad enough to permit a change of each and every part of its charter . . . ." (S. 8.)

Other courts also recognize the breadth of inhabitants' powers to amend their charters without an intervening charter commission. In *Denver v. New York Trust Co.*, 229 U.S. 123 (1913) the court considered a case where opponents of an amendment to the Denver municipal charter alleged that it necessarily constituted a revision and could not be achieved by amendment. The measure proposed a new Public Utilities Commission and granted it "all the powers of the city . . . in the matter of constructing, purchasing, condemning and purchasing, acquiring, leasing, adding to, maintaining, conducting and operating a water plant."[32] The court allowed these substantial changes to go forward as an amendment, without a charter commission:

> The section is in form and in substance a mere amendment. It does not alter the form of the city government or make extensive changes in the existing charter, but is confined to matters

[32] Charter of the City and County of Denver: Framed by the Second Charter Convention, February 6, 1904 And Amendments Thereto to December 1, 1911. Containing Also Article XX of the Constitution of the State of Colorado 94 (1911).

> pertaining to public utilities, more especially the acquisition, maintenance and operation of a municipal water plant.

Id. at 143-44.

In *State ex rel. Hindley v. Superior Court*, 70 Wash. 352, 126 Pac. 920 (1912), the Washington Supreme Court allowed the City of Spokane to establish a Mayor-Council system of government through a citizen-initiated charter amendment, even though the City had previously used a charter commission to alter its form of government. The Washington court said, "[i]t would be dangerous indeed for courts to draw a line between amendments, or to classify them in any way; for the whole question is a political one, to be determined by the people themselves." *Id.* at 359.

Similarly, when the City of Orange, Texas adopted a charter amendment changing to a Commission-Manager form of city government without first forming a charter commission, the Texas Court of Civil Appeals held that:

> Since this power of amendment of the Charter . . . is vested in the will of the voters . . . and since they have expressed themselves as favoring such a change or amendment to that Charter, a court has no right to override a clearly expressed desire of the people for such amendments except upon a clear showing that such action does violence to some Constitutional provision.

State ex rel. City of West Orange v. City of Orange, 300 S.W.2d 705, 711 (Tex. Civ. App. 1957).

Other courts, including in cases relied upon by the City, have established an analytical dividing line between amendments and revisions determined by whether the measure results in "fundamental change in the form of municipal government." This standard may imply a limitation not acknowledged by the cases cited above, but it is a limitation that the measure here easily complies with.

In *Kelly v. Laing*, after disposing of a case involving a series of purported charter amendments presented on a single petition (holding that such a petition, embracing more than one subject was not in the proper form), the Michigan Court explained that one of the proposed changes which would have abolished the appointive executive office of city manager and vested its powers and duties in an elected commission, would result in a fundamental change in the form of government requiring revision by a charter commission. 259 Mich. 212, 223-224, 242 N.W. 891 (Mich. 1932) ("Both from the number of changes in the charter and the result upon the form of government, the proposal to abolish the office of city manager requires revision of the charter and must be had by the method the statute provides therefor.")

In *Midland v. Arbury*, the Michigan Court of Appeals applied this reasoning to a proposed charter amendment allowing the city manager to be subjected to popular recall, holding that this "innocuous-appearing proposed charter amendment would effectively destroy the city manager form of government" and could only be had by way of complete revision. 38 Mich. App. 771, 776, 197 N.W.2d 134 (Mich. Ct. App. 1972).

But some courts have approved even substantial changes applying this standard. In *Albert v. City of Laconia*, where citizens had petitioned for a series of changes reducing the number and voting power of at-large elected city councilors and altering the election process for mayor, the New Hampshire Court applied the standard articulated in *Kelly v. Laing*, and held that the amendment "did not violate the 'single subject' requirement" and that the changes were "not of such a fundamental nature as to require a 'convention to

examine the whole subject' and form of Laconia's city government." 134 N.H. 355, 358, 360 (N.H. 1991).

The California Supreme Court, applying such a rule for amendments to its constitution, reviewed a bill imposing legislative term limits and a year-over-year spending cap on the Legislature's staff and expenses. In *Legislature v. Eu*, 54 Cal.3d 492, 508, 816 P.2d 1309 (Cal. 1991), the court held that despite such constraints upon the Legislature's constitutional authority, "the basic and fundamental structure of the Legislature as a representative branch of government is left substantially unchanged."

> To hold that reform measures . . . directed at reforming the Legislature itself, can be initiated only with the Legislature's own consent and approval, could eliminate the only practical means the people possess to achieve reform of that branch. Such a result seems inconsistent with the fundamental provision of our Constitution placing "[a]ll political power" in the people. (Id., art. II, § 1.) As that latter provision also states, "Government is instituted for [the people's] protection, security, and benefit, and they have the right to alter or reform it when the public good may require." (Italics added.)

Id. at 511.

Appellant's proposal for an amendment to the charter would easily satisfy any of these standards. The amendment—three sentences consisting of just 100 words—only creates a system for the public funding of local candidates in their election to municipal office. It is in no way a change in Portland's form of municipal government, nor the least bit comparable to abolishing the office of city manager, or even subjecting it to popular recall. A vast chasm separates the extreme "one cent" standard employed by the City, from a more reasonable standard that would allow charter amendments to proceed to the ballot unless they fundamentally change the form of government.

C. The understanding of "amendment to the charter" and "revision of the charter" prevailing over the last six decades support characterizing the measure as an amendment.

Appellants' application of the terms "alter and amend," "amendment to the charter," and "revision of the charter" is deeply grounded in Maine law and Maine's unique constitutional and legislative tradition.

States tend to apply similar rules to distinguish the processes and powers of amendment and revision whether in the context of a state constitution, or a county or municipal charter.[33] Dodd's treatise explains "the general view is that constitutional conventions are employed for the complete revision of state constitutions or for framing new constitutions, and that, where a general revision is not desired, the regular legislative machinery is used to initiate specific amendments." Dodd, *The Revision and Amendment of State Constitutions* at 258. Although Maine government has changed in fundamental ways since 1820—including adoption of the citizen initiative and people's veto,[34] and abolition of the Executive Council—none of those changes required a constitutional

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[33] In *Citizens Protecting Mich's Constitution v. Sec'y of State,* 503 Mich. 42, 66, 921 N.W.2d 247 (2018), the Michigan Supreme Court, while determining that *Kelly v. Laing,* 259 Mich. 212, 242 N.W. 891 (Mich. 1932) did not provide binding precedent, offered nonetheless that "the Court's opinion does give some insight into the plain meaning of the terms "amendment" and "revision" 24 years after the 1908 Constitution was ratified. *See also Id.* at 78-79 (applying that plain meaning illustration from *Laing*); at 98 n. 168 (supporting its holding by comparison to *Laing*).

See also Camp v. City of Sacramento, No. 34-2009-0006504 (Cal. Super. Ct., Sacramento Cty., January 21, 2010) (applying definitions of "revision" and "amendment" from constitutional context to municipal charter context, invalidating an initiated charter amendment to change the City of Sacramento from a council-manager system to a mayor-council form of government as a revision of the charter)*; People ex rel. Moore v. Perkins*, 56 Colo. 17, 29-30, 137 P. 55 (1913) (applying rules pertaining to amendments to constitutions to the Denver municipal charter).

[34] The Court has twice referred, at least in dicta, to the direct initiative amendment as a "fundamental change in the form of government," yet never suggested such a change should have required a general revision. See Farris, 143 Me. at 230, 60 A.2d 227; McGee, 2006 ME 50, ¶ 24, 896 A.2d 933.

convention.[35] *See* Tinkle, *The Maine State Constitution* 21 (2nd ed. 2013) ("The size, structure, power, and scope of the state's government have changed drastically since 1820," despite never having called a convention for a general constitutional revision.)

This interpretation is also consistent with contemporaneous legislation. *See In re Wage Payment Litig.*, 2000 ME 162, ¶¶ 9, 12, 759 A.2d 217 (contemporaneous legislation may provide guidance in court interpretation); *Mundy v. Simmons*, 424 A.2d 135, 138 (Me. 1980). Prior to home rule, municipal charters were altered through special legislation—usually requiring ratification by municipal voters. Three bills altering Portland's charter confirm the broad application of "amendment" as then understood. In 1961, the Legislature repealed Portland's 1923 Charter and replaced it with an entirely redrafted "total revision," with a bill labelled as a "AN ACT Providing for a Revised Charter for the City of Portland." P. & S.L. 1961, ch. 194. (A. 253.) In 1963, the Legislature passed an "amendment" to Portland's charter creating a permanent cumulative reserve fund, and requiring that "funds shall be appropriated annually." P. & S.L. 1963, ch. 157. (A. 253.) And in 1969, in the form of "AN ACT to Amend the Charter of the City of Portland," the Legislature passed sweeping changes abandoning the existing council-manager system

[35] Me. Const. art. IV, Part Third, Sec. 15 provides only for "the power to call constitutional conventions, for the purpose of *amending* this Constitution" (emphasis added). However:

> "It may be argued . . . that if a constitution specifically provides two methods of alteration, the language employed with reference to the proposal of amendments by the legislative method may, when read with that concerning the convention method, often be construed as an implied prohibition of complete constitutional revision by the legislative method."

Citizens Protecting Mich.'s Constitution v. Sec'y of State, 503 Mich. 42, 75 (Mich. 2018), quoting Dodd at 261.

in favor of a strong mayor system, while maintaining the existing Charter's basic form and structure, P. & S.L. 1969, ch. 185 (referendum failed). (A. 254.)[36] The charter amendment here fits comfortably within these precedents.

This pattern persisted after the passage of the Home Rule Act. That same year, the Office of Attorney General concluded that the Maine Constitution and its enabling legislation endowed municipal inhabitants with "the exclusive broad power to alter and amend their charters as to local and municipal matters, including substitution of charters." (S. 8).

In the years since Home Rule was adopted, inhabitants of Maine cities and towns have used § 2104 to bring forward ballot measures making substantial changes in local government. South Portland allowed its voters to consider and enact a citizen-initiated charter amendment limiting spending increases to a fixed percentage of the existing budget, reducing the budget by hundreds of thousands of dollars annually. South Portland, Me., Charter, Art. V, § 525-A (Nov. 8, 1988) (rp. Nov. 7, 1989). *See* (Pls.' Rule 80B Br. Ex. B). Bangor inhabitants brought forward and enacted a citizen-initiated amendment adding a mandatory referendum section to their charter, prohibiting the City Council from making expenditures on certain capital improvements without prior approval by the voters. Bangor, Me., Charter, Art. VIII, § 19 (Nov. 6, 2012). Hermon, in

[36] The term "revision of the charter" was reserved for extensive, far-reaching changes such as when the Legislature repealed Portland's 1923 Charter and replaced it with an entirely redrafted version. *See* "AN ACT Providing for a Revised Charter for the City of Portland" P. & S.L. 1961, ch. 194 (describing replacement charter as "revision of the charter").

2008, voted on a charter amendment that would have allowed voters to fire the town manager directly, over the objection of selectmen. *See* Complaint Exhibit A, *Mabry v. Town of Hermon*, No. CV-07-289 (Me. Sup. Ct., Pen. Cty., Aug. 21, 2008) (measure failed). After initially rejecting that proposal and refusing to receive the written opinion of an attorney satisfying the requirements of § 2104(5)(B) that had been provided by petitioners, the town was ordered to proceed to a vote. *Mabry*, No. CV-07-289, Order. The Town of York, in 1995, approved a series of charter amendments including one creating a new committee through which school construction projects would be presented to the voters for approval, and another that, "dissolved the Town's [previously independently chartered] Economic Development Council." *See Ruppert v. Inhabitants of the Town of York*, No. CV-95-634, 1994 Me. Super. LEXIS, at *14, n. 4 (Jul. 30, 1996). Each case supports appellants' use of the citizen initiative powers in § 2104 to amend Portland's charter.[37]

D. The City's decision that the charter amendment would conflict with the City's Charter is erroneous as a matter of law.

The City based its decision to reject the citizen-initiated charter amendment in large part on its mistaken conclusion that the proposal would interfere with the Council's Charter-based "authority to control all 'fiscal, prudential, and municipal affairs of the City of Portland.'" (A. 261.) (quoting Charter, Article I, section 2. The City concluded that this

[37] Portland's most recent charter commission (2010) considered a proposal for public funding of elections but decided that enacting such a proposal was more suited for other mechanisms than a charter commission. (A. 263.)

charter provision trumps the inhabitants' constitutional power to propose changes on "all matters . . . local and municipal in nature." Me. Const. art. VIII, pt. 2, § 1. The City's interpretation is wrong because (1) the City's selective quote ignored adjacent charter language that plainly qualifies the scope of matters entrusted to the City Council; and (2) multiple provisions in the charter already constrain city finances, belying the notion that the City Council ever has free reign over all budget matters.

The City's position that its Charter grants the City Council unqualified authority over "all fiscal, prudential, and municipal affairs" is legally erroneous. Numerous provisions of the existing Charter constrain the Council. To be sure, the City Council is the legislating body for the City, and its powers are substantial, touching on the "fiscal, prudential, and municipal affairs" of the City. But the powers of the Council are not unrestricted – as becomes clear when reading this provision in full: "The administration of all the fiscal, prudential, and municipal affairs of the City of Portland, and the government there of . . . *except as otherwise provided by this charter*, shall be and are vested in . . . the city council . . . ." Article. I, § 2 (A. 220.) (emphasis added) The Council's powers have always been constrained by all the provisions of the Charter, including amendments.[38]

Second, the City's finding rests on its claim that there is no precedent within

[38] A city government's latitude to make fiscal and policy decisions is also constrained by the requirements of the state and federal constitutions, collective bargaining agreements and other long-term contracts, and court orders.

Portland's charter that requires the City to allocate funds. (A. 210.)[39] That is also false. Numerous provisions of the current Charter impose significant legal and financial obligations and constraints on the Council's authority including payment of salaries and other compensation, surety bonds, limits on borrowing and other financial matters.[40]

It is axiomatic that any non-trivial change in the charter will affect the City's freedom to conduct its business. "The charter of the city is the organic law of the corporation, being to it what the constitution is to the state . . . ." *Farris, Atty. Gen. v. Colley*, 145 Me. 95, 99, 73 A. 37 (1950) (citation omitted). The standard adopted by the City—that the only permissible citizen-initiated charter amendment is one that does not disrupt any aspect of the City's business—is tantamount to an unconstitutional ban on citizen-initiated charter amendments. Any interpretation negating the mandatory "shall" of § 2104(5)(C) is to be avoided.[41] *See Attorney General v. Sanford*, 2020 ME 19, ¶ 19, ___ A.3d ___ ("[w]e will not interpret a statute in such a way as to render some words

[39] "I couldn't find anything else in the charter that was that specific and that used that same type of language as requiring funding in this capacity." Counsel West-Chutha. (A. 205.); *see also* A. 271. (The measure constitutes a revision because it "creat[es] new structural elements that did not before exist.")

[40] *See* Portland City Charter. (Article II, § 4 requires payment of a pre-determined minimum salary and benefits to the mayor, and prohibits the Council from changing its own compensation (A. 223); Article III, § 1, requires the Council to compensate each member of the school board (A. 228); Article VI, § 5 (A. 241), Article VI, § 6 (A. 238), Article VII, § 14 (A. 249.) require the City to finance bonds for the city manager, acting city manager, and any other person entrusted with city monies, respectively; Article VII, § 7 prohibits appropriations in excess of estimated revenue (A. 245); Article VII, § 10, limits City borrowing authority and prohibits loans "to any individual, association or corporation" (A. 247); Article VII, § 11, limits the purposes for which the city may issue bonds and requires a supermajority to approve bond issuance (A. 247-248); and Article VII, § 12, constrains the authority of the Council to authorize temporary loans (A. 248.))

[41] In this respect, it is quite similar to the Biddeford charter provision in *Ten Voters of Biddeford v. City of Biddeford*, 2003 ME 59, 822 A.2d 1196, that barred the use of citizen initiative to amend the city charter, where ultimately the Court affirmed the matter as moot after Biddeford simply promised not to enforce the provision.

meaningless").

Denver v. New York Trust Co., 229 U.S. 123 (1913) discussed above, not only held that the extensive obligations of establishing a new public utility did not necessitate a charter commission, it also addressed the legal relationship of an amendment to the charter as it previously existed:

> "It is enough to say that the amendment supersedes pro tanto the original provisions of the charter with which it is not in accord. The purpose in adopting it was to introduce something new, to make a change in existing provisions, and being adopted conformably to the constitutional and charter requirements, the new or changed provisions became at once a part of the charter, thereby supplanting or modifying the original provisions to the extent of any conflict."

Id. at 145. The charter amendment in *Denver* was "confined to matters pertaining to public utilities," while the charter amendment here is confined to matters relating to the financing of elections. *Id.* at 144. Like the amendment in *Denver*, the amendment here "introduce[s] something new" and does so "conformably to the constitutional and charter requirements" now in the law. *Id.* at 145. Like the measure in *Denver*, it should be permitted to proceed to the ballot.

IV. THE SUPERIOR COURT ERRED IN DISMISSING THE INDEPENDENT CLAIMS.

Because the Court should find that the City was not authorized to withhold ballot placement and that the proposal does indeed constitute a valid exercise of Appellants' rights to amend the City charter, the Court should also reverse dismissal of Counts III and IV.[42] It remains true that "[w]hen direct review is available pursuant to Rule 80B, it

[42] If the Court finds that the City was not authorized to withhold the measure from the ballot, it should likewise

provides the exclusive process for judicial review unless it is inadequate." *Gorham v. Androscoggin Cnty.,* 2011 ME 63, ¶ 22, 21 A.3d 115. But, "nothing in the rule prohibits . . . bringing with [an] 80B complaint a constitutional claim." *Graffam v. Harpswell*, 249 F. Supp. 2d. 1, 7 (D. Me. 2002).[43] "[O]verlapping state remedies are generally irrelevant to the question of the existence of a cause of action under [42 U.S.C.] § 1983." *Zinermon v. Burch*, 494 U.S. 113, 124 (1990). In *Zinermon*, the Court identified three types of claims that may be brought under 42 U.S.C. § 1983: (1) violations by state actors of certain rights including freedom of speech, (2) violations of substantive due process through "certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them,'" and (3) violations of procedural due process. *Id.* at 125.

> As to these [first] two types of claims, the constitutional violation actionable under § 1983 is complete when the wrongful action is taken. A plaintiff, under *Monroe* v. *Pape*, may invoke § 1983 regardless of any state-tort remedy that might be available to compensate him for the deprivation of these rights.

Id. (citation omitted). In such cases, "[t]he federal remedy is supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is

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reverse dismissal of Count II as an abuse of discretion. *Cape Shore House Owners Ass'n v. Town of Cape Elizabeth*, 2019 ME 86, 209 A.3d 102 relied upon by the court below stands for the principle that declaratory relief is prospective in nature. Here the declaratory relief sought by Count II would be prospective and unique in nature. The Order below overlooks the Certificate of Service included with Appellants' initial filing in the Superior Court on September 20, 2019, and asserts in error that "[t]here is also no evidence Plaintiffs served the Attorney General with a petition for declaratory judgment, as required by Section 2108(2)(A)." (A. 13, n. 10.) The Order also reads too far into the legislative intent behind service upon the charter commission, overlooking its legislative history. *See* P.L. 1975, ch. 329 (adding service to charter commission in 30 MRS § 1918 after it was entirely omitted from the original Home Rule Act). The Court's recent decision in *Avangrid* demonstrates the value of declaratory relief under exactly these circumstances, especially in light of the fact that the Court here is "considering whether government actors improperly denied ballot access for a citizens' initiative" *Id.* at 14 n.5. *See also id.* at 28, n. 11 ("Ripeness concerns . . . the hardship to the parties of withholding court consideration.")

[43] To that end, Maine courts maintain exclusivity over such actions by allowing independent federal claims to proceed alongside Rule 80B. *Id.; see also Monroe v. Pape*, 365 U.S. 167, 174 (1961) (third aim of § 1983 "to provide a federal remedy where the state remedy, though adequate in theory, was not available in practice.")

invoked." *Id.* at 124, citing *Monroe v. Pape*, 365 U.S. 167, 183 (1961). Here, every allegation in Counts III and IV rests squarely under the first two *Zinermon* prongs, while every case relied upon by Appellee or the Superior Court involved the third.[44] The City's action barring appellants' measure in violation of statute presents not simply cognizable, but *per se* deprivation under both the Maine and United States Constitution. "The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) (citation omitted). *See also Meyer* (holding that the ballot initiative process constitutes "core political speech.") The Superior Court dismissed independent Counts III and IV in error and should be reversed.

CONCLUSION

Allowing local officials to decide which measures citizens may propose for consideration by their fellow voters would "eliminate the only practical means the people possess to achieve reform of that branch." *Legislature v. Eu*, 54 Cal.3d 492, 511 (Cal. 1991). This would be antithetical to the very concept of citizen initiatives and a direct violation of inhabitants' constitutional powers. The Court should reverse the City's decision and order the measure placed on the ballot.

[44] If the adequacy of state law remedies is relevant, counts III and IV uniquely offer, and appellants seek, injunctive and declaratory relief, and 42 U.S.C. § 1988 makes available attorney's fees for the very purpose to allow plaintiffs to vindicate their constitutional rights without suffering significant additional financial burdens. *See Buckhannon Board Care Home v. West Va. D.H.H.R*, 532 U.S. 598, 635-636 (2001) (5-4 decision) (Ginsburg, J., dissenting); *Lefemine v. Wideman*, 568 U.S. 1 (2012).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date a copy of this Brief of Appellant was served upon counsel for appellee by first class mail, postage prepaid, and by email to the addresses below:

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