STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DKT. NO. HAN-23-371

MICHAEL GOOD et al.

Plaintiffs-Appellees

v.

TOWN OF BAR HARBOR

Defendant-Appellant

ON APPEAL FROM THE SUPERIOR COURT
HANCOCK COUNTY
DOCKET NO. CV-2020-00045

REPLY BRIEF OF APPELLANT TOWN OF BAR HARBOR

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ARGUMENT

I. The Charter Modifications Were Properly Presented to Voters as Separate Questions Pursuant to 30-A M.R.S. § 2105(1)(A).

A. Plaintiffs' Theory that Modifications Are Less Significant than Amendments Is Contrary to the Statute's Language and Structure.

Plaintiffs argue there is a "hierarchy in descending level of importance of adoption, revision, amendment and minor modifications." (Red Br. 8.) It cannot seriously be contended that a charter amendment is more substantial than a charter modification, as those terms are used in the statute. *See Fair Elections Portland, Inc. v. City of Portland*, 2021 ME 32, ¶ 32, 252 A.3d 504. Not only would this be inconsistent with the language of the statute and the cases interpreting it, which establish that a modification is a manner of presenting a revision (Blue Br. 17-20, 25-27),[1] it would not support Plaintiffs' claims. Amendments not only *can* be presented to voters in separate questions, they *must be* presented to voters in separate

[1] Because modifications are, by definition, a manner of presenting a "revision" that proceeds through the more rigorous Charter Commission process, Plaintiffs' discussion of the alleged significance of the changes adopted by voters is misguided. But Plaintiffs also vastly overstate the significance of the changes in the overall context of the Charter. Article 2 would have streamlined the budget process by eliminating a third layer of review by the Warrant Committee (after the School Committee and Town Council). (A. 261-63.) Article 4 provided a streamlined process for non-substantive corrections to the Land Use Ordinance on supermajority votes by the Planning Board and Town Council amendments. (A. 264-66.) Article 5 allowed the Town Manager to designate a Town Planner, to "emphasize[] the importance of the planning function," and instituted rotating terms for the School Committee, consistent with other bodies. (A. 266-67.) Article 6 removed specific salaries from the Charter and provided that they be set by voters at the Town Meeting as part of the annual budget. (A. 268.) Article 7 streamlined the budget process by allowing simultaneous review by the Council and Warrant Committee. (A. 269-71.) Article 8 made Warrant Committee elections consistent with those of other bodies, and reduced the committee from 22 members to 15. (A. 271-73.) Plaintiffs outright admit that Article 9 is minor, and do not even mention Articles 3 and 10. (Red. Br. 15.) None of these "fundamental[ly] alter[ed] the essential character" of the Town's government, *Fair Elections Portland*, 2021 ME 32, ¶ 32, 252 A.3d 504, or even made any structural change to the existing Charter.

questions. 30-A M.R.S. § 2104(1)-(2) (stating amendments "shall be limited to a single subject"); *see also id.* § 2105(2) (prescribing form for presentation of amendment). It would be wholly incongruous and illogical for the Legislature to *require* that a "more significant" form of change be presented in separate questions, but *prohibit* a "less significant" change from being presented the same way.

Nor would it make sense for the Legislature to create a more procedurally intensive and cumbersome process for adopting changes less significant than amendments. *See Fair Elections Portland*, 2021 ME 32, ¶ 32, 252 A.3d 504 (noting that charter commission is a "(potentially) years-long inquiry into all aspects of the municipality's government"). It is doubtful that the Legislature intended to provide towns a slower, less efficient way to adopt something less than an amendment.

B. Plaintiffs' Preoccupation with Preventing "Inconsistency" Finds No Support in the Statute.

Plaintiffs contend that presenting the modifications as a single up or down vote was necessary to avoid "inconsistent" results, characterize voters' reduction of the size of the Warrant Committee but rejection of a reduction in the Committee's responsibilities as such an inconsistency, and complain that the Committee "may no longer have enough members to staff its subcommittees." (Red Br. 13-14, 18.) There are several problems with this argument.

First, Plaintiffs provide no support for the proposition that section 2105(1) is even intended to prevent "inconsistency" in the first place, either in the text of the

statute or its legislative history. Any time a charter or any other law is changed, there is a potential for conflict. If reducing inconsistency was its goal, the Legislature could have prohibited anything other than a full repeal and replacement. It did not do so. It did the opposite, adding the alternative for presentation in separate questions. *See* P.L. 1985, ch. 224, § 2 (amending predecessor to section 2105(1) to permit presentation of revision in separate questions).[2] Nothing in the statute suggests that whether a proposed change to a charter is presented in a single question or multiple questions is guided by the potential for a conflict between multiple provisions. If a voter-approved change results in a conflict, the remedy is further amendment or revision, not circumvention of the will of the voters through litigation.

Second, there is no inherent inconsistency in the voters' choice to reduce the size of the Warrant Committee despite not altering the Committee's responsibilities. Voters could have determined, for example, that 22 members were simply unnecessary, or that a 22-member committee was too unwieldy and its size actually detrimental to its function.[3] Voters are in no way constrained by the rationales offered by the Charter Commission for a particular measure, and have the right to cast their vote for other reasons, or for no particular reason at all.

[2] The legislative history of the statute is and its recodification from Title 30 to Title 30-A is further discussed in the brief of amicus Maine Municipal Association. (Green Br. 12-16.)

[3] Incidentally, the Town had at times struggled to sustain a 22-member Committee, such as at the 2020 annual meeting, where a slate of only 17 members was elected to the Committee. (A. 129 ¶ 62.)

Third, and relatedly, Plaintiffs' contention that reduction in the Warrant Committee's duties was the Charter Commission's "stated rationale" for reducing the size of the Warrant Committee (Red Br. 13) is incomplete and misleading. The Charter Commission stated in its report:

> These recommended changes reduce the Warrant Committee membership from 22 to 15 to reflect the recommended reduction in duties *and to encourage full involvement of the Committee* as it fulfills its duties to consider, investigate and report upon Warrant Articles. *Much of the Committee's current work relies heavily on subcommittee work by small groups of individuals rather than full review by the whole Committee*.

(A. 126 ¶ 42 (emphasis added).) Plaintiffs therefore not only mischaracterize the Charter Commission's stated rationale for the modification, they turn it on its head and suggest that the Warrant Committee not being able to staff its subcommittees is somehow an "inconsistency," when elimination of those subcommittees, or at least encouraging the Committee to reduce its reliance on such subcommittees, was part of the Charter Commission's rationale for the modification.

C. Plaintiffs Propose an Unworkable Standard that Will Draw the Courts into Political Disputes Regarding Municipal Governance.

As explained in the Town's primary brief, charter modifications are simply a method of presenting a charter revision. (Blue Br. 17-20, 25-27.) The word "minor" must be understood as relative to a full repeal and replacement of a charter. Whether to present the proposed changes as a single revision or a set of modifications is a practical decision to be made by the charter commission, not courts and lawyers

years after the fact.[4] Plaintiffs' interpretation of the statute would take this simple practical determination and turn it into a technical legal exercise that is nowhere evident on the face of the statute. This would make municipal charter commissions' already difficult work immeasurably harder with no appreciable benefit. It would also inevitably invite further litigation against municipalities based on fundamentally harmless procedural errors, subjecting municipal government to needless disruption, and drawing the courts into what are, at bottom, political disagreements as to the proper structure of local government.

Plaintiffs hypothesize a case where a municipality attempts to repeal and replace half of its charter via separate questions. (Red Br. 17.) But that is not this case.[5] Plaintiffs ponder what might happen "if the changes were presented as 15 ballot articles, or 30, or 100." (*Id.*) But the text of the statute expressly provides an answer: "If the charter commission . . . recommends that the present charter continue in force with only minor modifications, those modifications may be submitted to the

[4] To the extent Plaintiffs suggest that the Charter Commission did not make the requisite "finding" (Red Br. 9-10), that is wrong both factually and legally, as explained in the Town's primary brief. (Blue Br. 20-25.) Plaintiffs' attempt to portray the Charter Commission's decision to present the proposed changes to voters as separate modifications rather than as a single revision as an "after-the-fact" invention of the Town (Red Br. 10, 14) is contrary to the record. Plaintiffs' support for this argument is a draft report of the Charter Commission before it went on to take multiple votes to split the changes out into separate questions and wrote its final report accordingly. (Red Br. 10; A. 125-26 ¶¶ 34-41; A. 132-33 ¶¶ 34-41; A. 159, 162, 168, 170-87.) A change made between the draft and final report is, by definition, not "after the fact."

[5] Plaintiffs' assessment of the breadth of the proposed changes is superficial and overstated. According to Plaintiffs, there are proposed changes on "nearly every page in nearly every section of the [C]harter." (Red Br. 10.) Not so. The version of the Charter reflecting the changes consists of 21 pages. (A. 191-211.) Eight of those pages (more than a third) contain no changes whatsoever. Several more contain very few changes. Only 3 or 4 pages (less than a fifth) have an appreciable number of changes.

voters *in as many separate questions as the commission finds practicable*." 30-A M.R.S. § 2105(1)(A) (emphasis added).

The Legislature clearly stated in 30-A M.R.S. § 2108(3) that only "material[] and substantial[]" errors are sufficient to overturn changes to a municipal charter. Plaintiffs concede that "[t]he Town is rightly concerned about elevating form over substance." (Red Br. 21.) But invalidating changes to a municipal charter on the theory that "voters were given too much choice" is the definition of form over substance where the purpose of the statute at issue is to effectuate the people's right to self-governance. *See* Me. Const. art. VIII, pt. 2, § 1; 30-A M.R.S. §§ 2101, 2109. Plaintiffs remark that the Town's argument "assumes that more granular choice is always a good thing." (Red Br. 19.) But the Legislature clearly felt that it was—that is precisely why it amended the statute to allow charter revisions to be presented in separate questions. *See* P.L. 1985, ch. 224, § 2.

II. Plaintiffs' Alternative Grounds Are Without Merit.

A. The Vote Was Properly Held in June Rather than November.

Plaintiffs contend that the vote on the Charter modifications should have been held in June 2020, rather than November 2020, because 30-A M.R.S § 2103(6) provides that proposed changes shall be submitted to voters "at the next regular or special municipal election held at least 35 days after the final [charter commission] report is filed." (Red Br. 22-23.) Where the Charter Commission's final report was

submitted on April 7, 2020 (A. 126 ¶ 43), Plaintiffs contend that the next regular election at least 35 days after the report was the annual town meeting, which was held in June and July 2020 due to the COVID-19 pandemic (A. 129 ¶ 62).

All that section 2103(6) requires is that (1) the changes be submitted to voters at the "next regular or special municipal election," and (2) the election be at least 35 days after the report is filed. Both of these requirements were satisfied here: the proposed modifications were presented to voters at the next special municipal election on November 3, 2020, which was at least 35 days after the Charter Commission's report. Plaintiffs would have the Court read section 2103(6) as requiring the vote to be held at the "the next regular or special municipal election, *whichever comes first*." However, that is simply not what the statute provides. Rather, it provides that the vote must be held at the "next regular *or special* municipal election," which is exactly what happened here.

It is unclear how holding the vote in November 2020 rather than a few months earlier in July 2020, could somehow be material and substantial, even if it were procedurally incorrect. A plausible argument could be made that if a municipality held a vote on a proposed charter revision less than 35 days after the charter commission's report, it could affect voters' notice of the election or ability to make an informed choice. But Plaintiffs' argument here is that the Town did not hold the vote *fast enough.* In the Superior Court, Plaintiffs argued the timing was material

because voters cannot be trusted to pay attention to local elections when they coincide with federal and state elections. (A. 59-61; Pls.' Reply Memo on Mot. for Summ. Jt. at 12.) That reasoning was wholly speculative, infantilized voters with no evidentiary basis, and flew in the face of common sense and experience that national elections in fact drive greater voter engagement in state and local races. Plaintiffs (wisely) do not repeat that unsupported argument here, but fail to replace it with any other rationale as to why any error was material and substantial.

B. Members of the Charter Commission Were Properly Elected at the Same Town Meeting that Created the Charter Commission.

Plaintiffs next complain that elections for members of the Charter Commission should have been held at the Town Meeting in June 2019, rather than at the same November 2018 election at which voters approved the creation of the Commission. (Red Br. 23-24.) Contrary to Plaintiffs' contentions, the statue expressly permits the process followed by the Town:

> A. Voter members [of a charter commission] must be elected by one of the following methods:
>
> > (1) Six voter members are elected in the same manner as the municipal officers, except that they must be elected at-large and without party designations;
> >
> > (2) One voter member is elected from each voting district or ward in the same manner as municipal officers, except that the voter member must be elected without party designation; or
> >
> > (3) Voter members are elected both at-large and by district or ward, as long as the number of voter members is the same as the

> number of municipal officers on the board or council of that municipality and the voter members are elected in the same manner as the municipal officers, except that they must be elected without party designation.
>
> *Election of voter members may be held either at the same municipal election as the referendum for the charter commission* or at the next scheduled regular or special municipal or state election.

30-A M.R.S. § 2103(1)(A) (emphasis added).

Plaintiffs invite the Court to ignore the plain language of section 2103(1)(A) in favor of a convoluted argument based on the phrase "elected in the same manner as the municipal officers." According to Plaintiffs, that phrase, read together with provisions of the Charter, requires election of Commission members at the annual town meeting. (Red Br. 23-24.) This is a deeply strained reading of the section 2103. The provisions of the statute must be read harmoniously, in accordance with their plain language, without reducing any portions of the statute to mere surplusage. *See, e.g.*, *Mallinckrodt US LLC v. Dep't of Envtl. Prot.*, 2014 ME 52, ¶¶ 17, 20-21, 90 A.3d 428. The plain language of section 2103 permits municipalities to create and elect members to Charter Commissions at the same election. 30-A M.R.S. § 2103(1)(A). It also states that members are to be elected in the same "manner" as municipal officers, specifically referring to matters such as party designations, and whether they are elected by district or at-large. *Id.* § 2103(1)(A)(1)-(3). Read harmoniously, the statute sets the timing of the election, but the "manner" of the election is left to the municipality's procedures for electing municipal officers.

Plaintiffs' reading of section 2103 would require the Court to render the statute's express provision regarding the timing of the election meaningless and without effect, and elevate general provisions of a municipal charter over more specific provisions of state statute. This, it cannot do.

Even if there were some procedural defect here, it would not be material or substantial as required by section 2108. Plaintiffs present no plausible argument as to why electing the members of the Charter Commission at the same election at which voters created the Commission, rather than at the annual Town Meeting a few months later, somehow materially affected the process.[6]

C. The Town Properly Corrected a Scrivener's Error in the Modifications Appearing in the Charter Commission's Report.

Plaintiffs next contend that the Town illegally altered the Charter modifications presented to the voters at the November 2020 Town Meeting. (Red Br. 25-26.) This is not an accurate characterization of the facts or relevant law.

In August 2020, the Charter Commission Chair Michael Gurtler became aware of a scrivener's error in the Commission's report regarding proposed Charter Modifications 2 and 3, which were ultimately presented to the voters as Warrant Articles 3 and 4, respectively. (A. 126 ¶ 44.) Specifically, proposed changes to

[6] Plaintiffs suggest that the Town "change[d] the date of an election to present the matter to a different electorate." (Red Br. 24.) This appears to be a remnant of Plaintiffs' argument that voters are incapable of focusing on local elections when they coincide with federal or state elections. *See* Part II.A, *supra*. They decline to openly repeat that unsupported claim in this Court, but fail to replace it with any other rationale.

Charter § C-6(B)(3), relating to amendments to the Land Use Ordinance, which should have been included as part of Article 4, were erroneously included in Article 3 (which concerned electronic voting at Town Meetings) instead. (A. 127 ¶ 45.) Mr. Gurtler reported this error to the Town, and the Town Clerk corrected the error in the Warrant, moving the relevant language concerning Charter § C-6(B)(3) from Article 3 to Article 4. (A. 127 ¶¶ 46, 50.) Both the Warrant Committee and the Town Council were aware of this error and its correction at the time they made recommendations on the proposed Charter modifications. (A. 127-28 ¶¶ 47-48, 51-55.)[7] The voters approved both Article 3 and Article 4. (A. 129 ¶ 61.)

Plaintiffs contend it was illegal for the Town to correct this simple scrivener's error. Plaintiffs rely on 30-A M.R.S. § 2103(6), which provides that "[w]hen the final [charter commission report is filed, the municipal officers shall order the . . . charter revision to be submitted to the voters . . . ." According to Plaintiffs, this is the municipal officers' only power and function, even though, as discussed in Part II.D, *infra*, Plaintiffs in the same breath (incorrectly) argue that the municipal officers should have made *other* changes to the ballot questions. (Red Br. 25-26.)

Plaintiffs' argument is apparently that, despite the error being a mere scrivener's error—simple transposition of language between articles—that was

[7] The Warrant Committee voted on the proposed changes to the Charter after being informed of the error in Articles 3 and 4, but before it was corrected. (A. 127 ¶¶ 47-48.) However, the Committee then considered and voted on Articles 3 and 4 anew after the correction was made. (A. 128 ¶¶ 54-55.)

evident on the face of the Charter Commission's report, the Town was required to present Articles 3 and 4 to voters with this error. This nonsensical result is not and cannot be the law. This is not a situation where the Warrant Committee or the Town Council were deprived of review of the warrant articles as they would be presented to the voters—both bodies were aware of the error and the correction, and made their recommendations on the warrant articles as corrected. Voters were presented with a corrected, internally consistent warrant and ballot, and approved *both* Articles 3 and 4. Respectfully, any deficiency in the procedure followed with respect to Articles 3 and 4 does not come close to being the type of "material[] and substantial[]" error section 2108 contemplates.

D. There Was No Inaccuracy in the Ballot Question for Article 4.

Plaintiffs also appear to argue that the Town Council should have changed the ballot question for Article 4 to "more accurately" describe the change proposed in Article 4. (Red Br. 25-26.) Specifically, Plaintiffs suggest that the Council had the power under 30-A M.R.S. §§ 2103(7) and 2104(6) to change the ballot question associated with Article 4 to tell voters "they were surrendering [the] exclusive power" of the Town Meeting to amend the Land Use Ordinance. (Red Br. 26.)[8] As with Plaintiffs' other contentions, there are several problems with this argument.

[8] In the Superior Court and now again on appeal, Plaintiffs confusingly intermingle this argument with their argument regarding the correction of the scrivener's error in the Charter Commission report, even though the two arguments bear no logical relation. (A. 38-39, 43-44, 62-64.) By conflating these two issues, Plaintiffs appear to insinuate that the "prefatory language" of Charter § C-6(B) was omitted from the ballot

First, section 2104(6) deals with charter *amendments*, not charter revisions, and is therefore irrelevant. Second, nothing in section 2103(7) required the Council to "change the question presented to voters," as Plaintiffs suggest. Rather, section 2103(7) provides that municipal officers "may" substitute a summary instead of the actual text of the proposed charter modification when it determines "that it is not practical to print the proposed charter modification on the ballot and that a summary would not misrepresent the subject matter of the proposed modification."

The Charter Commission's proposed modifications, complete with summaries and rationales, were presented to the voters in the Warrant. (A. 128-29 ¶ 58.) Nothing in the summary of Article 4 in the Warrant and ballot was at all inaccurate as to its effect—permitting the Town Council to make certain minor amendments to the LUO. (A. 129 ¶ 59.) The Warrant also included the actual text of the modification, as well as the Charter Commission's rationale, which explicitly noted: "This recommendation provides a mechanism to amend minor aspects of the Land Use Ordinance without the lengthy process currently in place . . . . *New or substantial amendments would continue to be adopted only by voters through Town Meeting*." (A. 128-29 ¶¶ 58, 60 (emphasis added).) Plaintiffs' argument is without merit.

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and Warrant when the scrivener's error was corrected. (Red Br. 25-26.) It was not. That language was *never* part of the Charter Commission's proposed language. (*Compare* A. 173-75, *with* A. 263-66.) As discussed above—and as Plaintiffs have admitted for purposes of this appeal (Red Br. 2; Blue Br. 3-5)—that correction simply fixed the inadvertent transposition of certain language between two articles.

III. The Superior Court Abused Its Discretion in Declining to Resubmit the Charter Modifications to Voters as Permitted by 30-A M.R.S. § 2108(4).

Plaintiffs suggest that the Superior Court properly withheld the relief authorized by 30-A M.R.S. § 2108(4) because resubmission of the proposed changes to voters without Article 2—which they rejected—would result in "piecemeal adoption" of the proposed changes to the Charter. (Red Br. 28.) But the statute gives courts authority to craft "curative procedures" appropriate to the circumstances. 30-A M.R.S. § 2108(4). The Town should not be compelled resurrect a defeated measure in order to cure a supposed deficiency in the remaining eight measures, based solely on Plaintiffs' transparent hope that the defeated measure will serve as a poison pill. Such an outcome is neither reasonable, nor required by the flexible remedial mechanism the statute provides. Moreover, if the Superior Court was not inclined to omit Article 2, it could and should have ordered resubmission of all of the articles as a single question. In failing to do so, despite the consequences to the Town,[9] it abused its discretion.

[9] Plaintiffs argue that there is no danger of invalidation of actions taken under the modified Charter since late 2020 because the Charter provides that violations by the Warrant Committee do not invalidate measures approved by the Town Meeting. (Red Br. 29.) But, of course, the rest of the Town's government has also been operating under the modified Charter for more than three years. Plaintiffs' voter approval cure-all is particularly cold comfort given that they seek to invalidate voter-approved measures in this very lawsuit. Plaintiffs also take issue with a footnote in the Town's brief regarding L.D. 2003, which required municipalities to adopt certain changes to their land use ordinances by a given date. (Red Br. 30-32.) By the time of the Superior Court's decision, there was no longer sufficient time for the Town to pass the changes required by L.D. 2003 through the Town Meeting rather than the expedited process created by the modified Charter. (A. 98-99, 279-80, 290-94.) Plaintiffs suggest "it was not clear from the record why this process would have been more expedient." (Red. Br. 31.) This is nonsensical. The express purpose of that change was to expedite the process of amending the Land Use Ordinance by avoiding "the lengthy process currently in place."[9] (A. 105, 116-17, 293, 264-66.) The remainder of Plaintiffs' argument boils

Finally, Plaintiffs appear to suggest that it was within the Superior Court's discretion to deny the Town the relief allowed by 30-A M.R.S. § 2108(4) because there were other alleged violations of the statute that the court did not address—i.e., the alternative grounds addressed in Part II, *supra*. (Red. Br. 32-34.) But the Superior Court could not—and properly did not—deny relief based on violations it *did not find occurred*. (A. 29-31.)

CONCLUSION

WHEREFORE, the Court should vacate the decision and judgment of the Superior Court and remand this matter to the Superior Court for entry of judgment in favor of Defendant Town of Bar Harbor. In the alternative, this Court should remand this matter to the Superior Court with instructions to order resubmission of the Charter modifications to voters in accordance with 30-A M.R.S. § 2108(4).

Respectfully submitted, dated at Bangor, Maine this 25th day of March, 2024.

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down to a suggestion that Town officials could have prioritized this over other pressing issues facing the Town. (Red Br. 31-32.) Respectfully, this is not Plaintiffs' decision to make, and does not at all disprove that there was insufficient time *remaining* without the aid of the modified Charter's expedited process.

CERTIFICATE OF SERVICE

I, Jonathan P. Hunter, certify that I served two copies of this Reply Brief of Appellant Town of Bar Harbor upon the other parties and amicus in this matter by regular U.S. mail, postage paid, with a copy by email, at the addresses below:

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