STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. HAN-23-371

MICHAEL GOOD, et al.,

Petitioners-Appellants

v.

TOWN OF BAR HARBOR,

Respondent-Appellee

ON APPEAL FROM SUPERIOR COURT (HANCOCK COUNTY)

BRIEF OF *AMICUS CURIAE* MAINE MUNICIPAL ASSOCIATION

JENNIFER L. THOMPSON, ESQ.
Bar No. 09830
Attorney for *Amicus Curiae*
MAINE MUNICIPAL ASSOCIATION
60 Community Drive
Augusta, ME 04330
(207) 623-8428
jthompson@memun.org

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION
STATEMENT OF INTEREST

Maine Municipal Association ("MMA") is a nonprofit advisory organization which the Legislature has declared to be an instrumentality of its member municipalities. 30-A M.R.S. § 5722(9) (2023). Currently, 480 of Maine's 484 municipalities, including the Town of Bar Harbor ("Town"), are members of MMA.

MMA provides legal advice, training, and technical assistance to its members on a wide array of municipal legal issues, including compliance with state election laws, charter adoption and amendment, and town meeting warrant requirements. MMA participates as *amicus curiae* in the present appeal to represent the interests of its municipal members and to communicate the foreseeable impacts of the Law Court's decision on municipalities throughout the State. MMA urges this Court to vacate the decision of the Superior Court's order granting Appellees' motion for summary judgment and denying the Town's cross-motion for summary judgment.

FACTUAL AND PROCEDURAL HISTORY

MMA hereby accepts and incorporates the factual and procedural history as presented in the Brief of Appellant, the Town.

ISSUES PRESENTED

1. Whether the Home Rule Act required that the Charter modifications be presented to voters as a single up or down vote rather than as separate questions, and if so, whether this "materially and substantially" affected the modifications under 30-A M.R.S. § 2108(3).
2. Whether the Superior Court abused its discretion in invalidating the Charter modifications adopted by voters in November 2020 rather than ordering that they be resubmitted to voters as permitted by 30-A M.R.S. § 2108(4).

SUMMARY OF ARGUMENT

This brief is submitted in support of the Town.

The Appellees' interpretation of Maine's Home Rule Act, 30-A M.R.S. §§ 2101-2109 (hereinafter, the "Act") in this case evidences a fundamental misunderstanding of the plain language of the statute that, if affirmed, will significantly disenfranchise Maine's municipalities and voters in matters involving local governance and control.

Contrary to Appellees' urging and the Superior Court's conclusions below, the reference in Section 2105(1)(A) of the Act to "minor modifications" does not signal the Maine Legislature's creation of two different categories of charter modifications within a "larger genus of revisions in the Home Rule Act." (A. 20-

21.) There is not, as the Superior Court suggests, an as-yet-unanswered call for this Court to "interpret how to further distinguish between 'major modifications and minor modifications'" to existing municipal charters. *Id.* Rather, and as the Town correctly notes in its brief, under the plain language of Section 2105, where a municipal charter has already been adopted and revisions to that charter proposed by a charter commission, there are but two categories of "revision" that are of consequence when it comes to voting procedure: 1. a whole-cloth rewrite of the entire charter (constituting a full "revision"); or 2. a piecemeal revision of discrete portions of the existing charter ("minor modifications"). *See* Appellant's Br. at 19. As outlined in Section 2105(1), when a charter commission has proposed the former, the entire revision is presented to voters as a single question for approval or rejection. Conversely, when, as here, a charter commission proposes the latter, it may opt to present the proposed changes to the existing charter either collectively as a single question or in as many separate questions as the commission deems appropriate. *See* 30-A M.R.S. § 2105(1)(A).

Although the Town has aptly outlined the proper interpretation and application of Section 2105 to the facts of this case, MMA writes separately as *amicus curiae* to further emphasize the correct statutory construction and to underscore the importance of upholding the voting procedures outlined in Section 2105 from the perspective of Maine's municipalities.

ARGUMENT

I. THE CHARTER MODIFICATIONS WERE PROPERLY PRESENTED TO VOTERS AS SEPARATE QUESTIONS PURSUANT TO 30-A M.R.S. § 2105(1)(A).

There is no dispute in this case that the "Home Rule Act specifically identifies three categories of charter changes, namely, adoptions, revisions, and amendments." (A. 6) (*citing* 30-A M.R.S. §§ 2102, 2104 & 2105). There is similarly no dispute that, substantively, the charter changes at issue here constitute "revisions." (A. 8). As the Superior Court correctly explained in its decision, "a revision is a 'general and thorough rewriting of a governing document' . . . that . . . 'makes a profound and fundamental alteration in the essential character or core operations of municipal government' . . .." *Id.* (*quoting Fair Elections Portland v. City of Portland*, 2021 ME 32, ¶¶ 29, 32, 252 A.3d 504).

Given the shared understanding and agreement that, as a threshold matter, the charter changes proposed by the Bar Harbor Charter Commission are properly characterized as "revisions" due to their substantive scope, the fundamental question presented in this appeal is whether the reference to "minor modifications" in 30-A M.R.S. § 2105(1)(A) either expressly or impliedly creates two "different species" of charter modifications within a "larger genus of revisions in the Home Rule Act." (A. 20-21.) According to Appellees and the Superior Court, the answer to this question is in the affirmative. However, nothing in the language of Section

2105(1)(A) supports that conclusion. On the contrary, the statutory interpretation urged by Appellees' runs counter to the express language of the statute, its clear legislative purpose, and to well-established principles of statutory construction.

A. Under the plain language of Section 2105(1)(A), revision of less than all of an existing charter may be presented to voters as separate questions, regardless of the substantive scope of the proposals.

This 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). "The 'fundamental rule' in statutory construction is that the legislative intent as divined from the statutory language controls the interpretation of the statute." *State v. Edward C.*, 531 A.2d 672, 673 (Me. 1987) (citations omitted). "Unless the statute reveals a contrary intent, the words must be given their plain, common and ordinary meaning." *Id.* (internal citations and quotation marks omitted). When conducting its review, this Court does not "look beyond clear and unambiguous statutory language." *Id.*

MMA will not repeat here the arguments made by the Town in its brief. In MMA's view, the Town has clearly and correctly demonstrated why, under the plain and unambiguous language of Section 2105(1)(A), any proposed charter change short of a whole-cloth rewrite, constitutes a "minor modification" that may be presented to voters in as many separate questions as a charter commission deems appropriate. However, it is worth noting that, in addition to the fact that Appellees'

interpretation of Section 2105 runs counter to the well-established principles of statutory construction identified in the Town's brief, the interpretation of Section 2105(1) urged by Appellees would, from a practical perspective, lead to absurd results and drastically undermine municipalities' ability to amend their charters as guaranteed by the Maine Constitution. *See* Me. Const. Art. VIII, pt. 2, § 1.

As this Court clarified in *Fair Elections Portland*, the distinction between charter amendments and charter revisions is both foundational and substantive in nature. The distinction between amendments and revisions is foundational insofar as the nature of a particular charter change will determine whether that change may be directly initiated by municipal officers and/or voters or will, instead, require the formation and deliberation of a charter commission. *See* 30-A M.R.S. §§ 2102 & 2104. That threshold determination required under Sections 2102 and 2104 is also necessarily substantive because it depends entirely on a qualitative assessment of the breadth and depth of the change being proposed. *See Fair Elections Portland*, 2021 ME 32, ¶ 32, 252 A.3d 504, 514.

However, once that threshold determination has been made and is to the effect that a revision is needed/contemplated, the charter commission process is triggered. *Id.* ("[W]e agree that the differing processes for the adoption of charter amendments and charter revisions mean that the critical question is whether the proposed change is significant enough to require a (potentially) years-long inquiry into all aspects of

the municipality's government.") At that point (assuming approval of the commission process by voters), any proposed changes to the charter must be developed and proposed by a majority of a duly convened charter commission. *See id.*; and 30-A M.R.S. §§ 2102 & 2104.

Importantly for the purposes of this case, following the initial "gatekeeping"[1] decision under Sections 2102 and/or 2104(4), further inquiry into the substance or scope of the proposals is neither contemplated by the statute nor authorized. Unlike Section 2104(4), which expressly contemplates a threshold "determination" by the municipal officers as to whether a proposal constitutes an amendment or a revision for the purposes of determining the process for developing proposed charter language, Section 2105 is concerned only with the voting procedures that should be followed when presenting those eventual proposals to voters.

> Section 2105(1) reads, in relevant part:
> . . .
> 1. Charter revision or adoption. Except as provided in paragraph A, in the case of a charter revision or a charter adoption, the question to be submitted to the voters shall be in substance as follows:
> "Shall the municipality approve the (charter revision) (new charter) recommended by the charter commission?"
> A. If the charter commission, in its final report under section 2103, subsection 5, *recommends that the present charter continue in force* with only minor modifications, those modifications may be submitted to the voters in as many separate questions as the commission finds

[1] *Fair Elections Portland*, 2021 ME 32, ¶ 24, 252 A.3d 504, 511 ("[Section 2104(4)] . . . expressly contemplates review by municipal officers to determine whether a proposed amendment would in fact "constitute a revision of the charter.")

> practicable. The determination to submit the charter revision in separate questions under this paragraph and the number and content of these questions must be made by a majority of the charter commission.
>
> > (1) If a charter commission decides to submit the charter revision in separate questions under this paragraph, each question to be submitted to the voters shall be in substance as follows:
> >
> > "Shall the municipality approve the charter modification recommended by the charter commission and reprinted (summarized) below?"
>
> 30-A M.R.S. § 2105(1) (emphasis added).

Under the plain language, the critical question whenever a charter commission has deliberated and is recommending charter revisions does not, as Appellees assert, relate to the substantive scope or breadth of each discrete proposal. Rather, the critical question is whether the charter commission "recommends that the present charter continue in force with only minor modifications[.]" 30-A M.R.S. § 2105(1)(A). By its express terms, therefore, Section 2105(1) is focused primarily on whether a charter commission is proposing a full replacement/rewrite of the whole of an existing charter or whether it is recommending that the existing charter remain in place, subject to whichever discrete proposed modifications voters might adopt.

Contrary to Appellees' urging, Section 2105 simply does not contemplate, much less mandate, a determination by the commission as to the nature and scope of the change the commission ultimately proposes. The only "determination" for a commission under Section 2105 relates to whether it will break individual modifications into separate questions or not. *Id.* Accordingly, the Appellee's

assertion and the Superior Court's conclusion that Section 2105(1)(A) required the Bar Harbor Charter Commission to conduct a substantive analysis as to the nature of its proposed charter changes are wholly unsupported by the plain language of Section 2105(1)(A).

B. The Superior Court's interpretation of Section 2105(1)(A) will disenfranchise voters and lead to absurd results.

In addition to being patently erroneous as a matter of law, the Superior Court's interpretation and application of Section 2105 would, if permitted to stand, be entirely unworkable and undermine the ability of municipalities to meaningfully change their home rule charters. The troubling consequences of Appellees' interpretation and of the Superior Court's decision should it remain in place, are readily apparent when one considers their practical application from the perspective of a municipality or a municipal charter commission.

First, the Superior Court's conclusion that Section 2105 limits the presentation of separate questions only to substantively insignificant proposals muddies an otherwise clear and uncomplicated view of a charter commission's statutory charge. Afterall, there can be no dispute that, under the Act, a duly convened charter commission is not in any way limited in terms of the substantive scope or breadth of the changes it is empowered to propose. *See generally* 30-A M.R.S. §§ 2101-2109. The Act does not, for example, prohibit a charter commission from considering any particular topic or purport to limit a commission's proposals only to those changes

that are so substantively significant as to constitute "revisions." *See id.* § 2102. Rather, under the Act, once a charter commission has been established, it is free to consider and propose whatever charter changes or new provisions it deems advisable and to propose those to voters - regardless of their scope, breadth, or depth – so long as they are "not prohibited by Constitution or general law [and] . . . are local and municipal in nature." Me. Const. Art. VIII, pt. 2, § 1. In other words, although the charter commission process is not required when relatively minor charter amendments are contemplated, when more robust revisions are implicated and a charter commission convened, its deliberations and ultimate proposals may run the gamut in terms of complexity and scope, whether or not any particular change would, on its own, have warranted the convening of a charter commission in the first instance. *See id.*

Given the unrestricted breadth of a charter commission's drafting authority, the suggestion that the voting procedures it must follow when presenting its proposals to voters depend on a substantive review and ranking of "minor" and "major" changes is patently absurd. If Section 2105 is read as Appellees urge, not only would charter commissions be required to substantively evaluate the "scope and breadth" of every proposal they develop before determining the process for presenting those proposals to voters, the very flexibility and voter choice at the heart of Section 2105(1)(A) would be entirely eroded. Afterall, if proposals amounting

"only" to charter amendments or, under Appellees' interpretation, a slightly more robust but still amorphously "minor" revision, may be presented to voters as separate questions, the work of municipal charter commissions will become immeasurably more difficult.

By allowing individual proposals to be broken down into separate questions regardless of substantive significance, Section 2105(1) helps to ensure the overall success of the charter commission process by empowering voters to adopt the changes they prefer and reject those they don't. Because the existing charter remains in place pursuant to Section 2105(1)(A), the individual modifications approved by voters become incorporated into it and those that are rejected, do not.

If, however, the Superior Court's interpretation of Section 2105(1)(A) stands, a charter commission could divide only the most substantively insignificant proposals into individual questions. Under that interpretation, where a commission undertakes a more robust or ambitious charter review and revision process and develops more substantively significant changes, each one of those proposed modifications must be presented together with every other modification as a single question. Under that scenario, each discrete change (whether it be a provision adopting a clean elections process, a provision fundamentally changing the structure of governance, or several provisions correcting non-substantive typos or internal inconsistencies) is necessarily beholden to voter approval of every other proposed

change. If Section 2105(1)(A) is read and applied in that way, the likelihood that Maine municipalities will ever be able to effectively change anything but the most superficial provisions in their charters is minimal. Surely, the power of the inhabitants of all municipalities to "alter and amend their charters" guaranteed by Maine's Constitution is more robust. Me. Const. Art. VIII, pt. 2, § 1.

Contrary to Appellees' urging and the Superior Court decision below, the ability to choose between discrete proposals is foundational to voters' ability to effectively enact and amend their charters as they see fit and for Maine's municipalities to exercise their home rule authority. If the Superior Court's decision is permitted to stand, its interpretation of Section 2105 will undermine the rights guaranteed to Maine's municipalities by its constitution and limit the ability of Maine's municipalities and their inhabitants to effectively articulate how they will govern themselves on matters of local concern. As such, MMA respectfully submits that the Superior Court's statutory interpretation and decision in this case constitutes an error of law and must be vacated.

C. To the extent the Court concludes that Section 2105(1) is ambiguous, the legislative history confirms that the term "minor" relates to the quantity of changes, not their substance.

MMA recognizes that the Superior Court's legal interpretation of Section 2105(1)(A) is predicated on its conclusion that the language of the statute and the term "minor modifications" is ambiguous. (A. 22.) Although the express language

of Section 2105(1)(a) is, MMA submits, clear and unambiguous, to the extent this Court is inclined to agree with the Superior Court and conclude that Section 2105(1)(A) is ambiguous, the legislative history supports the Town's interpretation and the Bar Harbor Charter Commission's actions.

As this Court has long made clear, "[i]f the plain language of a statute is ambiguous - that is, susceptible of different meanings - [the Court] will then go on to consider the statute's meaning in light of its legislative history and other indicia of legislative intent." *MaineToday Media, Inc. v. State*, 2013 ME 100, ¶ 6, 82 A.3d 104, 108 (citing *Anastos v. Town of Brunswick,* 2011 ME 41, ¶ 9, 15 A.3d 1279; and *Competitive Energy Servs. LLC v. Pub. Utils. Comm'n,* 2003 ME 12, ¶ 15, 818 A.2d 1039). A review of the legislative history of Section 2105 demonstrates that when the authority to divide proposed charter changes into separate questions was first adopted, the Legislature was specifically focused on the *number* of proposed changes, not on their substance. *See* 30 M.R.S. § 1915 (1985).

Prior to 1985, the statutory precursor to Section 2105, 30 M.R.S. § 1915, did not permit charter revisions to be presented to voters in separate questions. *See* 30 M.R.S. § 1915 (1971). Instead, it mandated that proposed revisions be presented only as a single, up or down, proposal. *Id.* Following an amendment in 1985, however, Section 1915(1)(A) authorized separate questions as follows:

> A. If the charter commission, in its final report under section 1913, subsection 5, recommends that the present charter continue in force

> *with only a few modifications*, those modifications may be submitted to voters in as many separate questions as the commission finds practicable. The determination to submit the charter revision in separate questions under this paragraph and the number and content of these questions must be made by a majority of the charter commission."

30 M.R.S. § 1915 (1985) (emphasis added).

Tellingly, the 1985 bill that amended the Act to authorize the presentation of charter commission proposals as separate questions was entitled "[a]n Act to Increase Citizen Participation in Municipal Charter Revisions." L.D. 930 (112th Legis. 1985). In addition to highlighting the legislative desire to improve voter participation by securing increased voter choice, the original language authorizing a "charter commission to decide, by majority vote, if the charter modifications are to be submitted as separate questions . . .." and its use of the phrase "a few modifications" is plainly focused on the *quantity* of proposed revisions, not on their substantive scope. *See id.*

The focus of L.D. 930 on the *number* of proposed charter changes and its authorization of separate questions when a charter commission proposes less than a whole-cloth revision of an existing charter is, of course, significant in this case because it belies Appellees' suggestion that the ability to present separate questions depends on the substantive scope of a particular proposal and a determination as to whether a proposal is more or less substantively significant that an amendment. Moreover, although the original language of Section 1915 and the phrase "a few

modifications" has since been amended, the original statutory focus on the *number* of proposed revisions does, in fact, remain the proper framework for interpreting Section 2105.

Although the term "minor" is often used as a substantive category, the legislative history of Section 2105(1)(A) is clear that "minor" as used in that section is purely numerical. According to the legislative history and the evolution of Section 2105, the change from the original phrasing in Section 1915 ("a few modifications") to the current phrasing in Section 2105 ("minor modifications") was expressly and intentionally *non-substantive*.

As the legislative history amply demonstrates, although earlier versions of the Maine's Home Rule Act and the precursor to Section 2105 were originally adopted in 1969, the Act was recodified and included in Title 30-A as part of the larger "Recodification of County and Municipal Laws" accomplished in 1987. According to the Report of the Joint Standing Committee on Local and County Government on the Revision of Title 30, that recodification was accomplished through "3 separate bills[.]" *Id.* at ii.

Specifically, and as noted in the report,

> "[t]he first bill would address only those problems associated with the implementation of municipal home rule. The second bill would attempt to resolve various substantive flaws in Title 30, flaws which could not be corrected in the non-substantive recodification. Finally, the third bill would be the recodification bill itself, which would

> rewrite and reorganize the statutes in Title 30 to clarify their intent and to make the Title easier to use and understand."

Id.

Under this approach, the third "large recodification bill" would "remain[] a 'clean' bill containing no substantive changes in the law." *Id.* at ii-iii. Tellingly, the change from "a few modifications" in Section 1915 to "minor modifications" in Section 2105 was not included in L.D. 36, "An Act to Make Substantive Corrections in the County and Municipal Laws" or L.D. 506, "An Act to Clarify the Home Rule Authority of Municipalities." (113 Legis. 1987). Rather, the amendments to former section 1915 and the adoption of the current reference in Section 2105 to "minor modifications" were included only in the third and final "clean bill" encapsulating the full, *non-substantive* recodification, L.D. 2538, "An Act to Recodify the Laws on Municipalities and Counties." (113 Legis. 1987). As such, the reference in Section 2105 to "minor modifications" is appropriately read to refer to the number of revisions proposed by a charter commission, rather than to require an analysis of their substantive depth and breadth. Given that historical context and insight into the legislative intent, it is evident that Section 2105 must be read consistent with the interpretation urged above and in the Town's brief. Namely, where, as here, a charter commission proposes less than a whole-cloth rewrite of an existing charter (i.e. "a few modifications"), the charter commission may present its proposals in as

many separate questions as it deems appropriate – regardless of their substantive scope.

CONCLUSION

For the foregoing reasons, MMA respectfully requests that this Court vacate the Superior Court's decision and determine, as a matter of law, that 30-A M.R.S. § 2105 authorizes a charter commission to present any number of proposed charter revisions to voters as separate questions when a majority of the commission deems such a presentation appropriate and has recommended that an existing charter remain in place. MMA further requests that this Court remand this matter to the Superior Court for the entry of judgment in favor of Defendant Town of Bar Harbor.

Respectfully submitted, dated at Augusta, Maine this 6th day of March, 2024.

/s/ Jennifer L. Thompson
Jennifer L. Thompson, Bar No. 09830
MAINE MUNICIPAL ASSOCIATION
60 Community Drive
Augusta, ME 04330
(207) 623-8428
jthompson@memun.org

CERTIFICATE OF SERVICE

I, Jennifer L. Thompson, hereby certify that two copies of this Brief of *Amicus Curiae* were served upon counsel at the address set forth below by first class mail, postage pre-paid and one copy via email on March 6, 2024:

Maxwell G. Coolidge
P.O. Box 332
Franklin, ME 04634
attorney.coolidge@gmail.com

Stephen W. Wagner
Jonathan P. Hunter
RUDMAN WINCHELL
84 Harlow Street
P.O. Box 1401
Bangor, ME 04401
swagner@rudmanwinchell.com
jhunter@rudmanwinchell.com

Dated: March 6, 2024

/s/ Jennifer L. Thompson
Jennifer L. Thompson, Bar No. 09830
MAINE MUNICIPAL ASSOCIATION
60 Community Drive
Augusta, ME 04330
(207) 623-8428
jthompson@memun.org