STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-257

RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

On Appeal from Business and Consumer Court
Docket No. BCDWB-CV-2020-00029

REPLY BRIEF OF APPELLANTS/CROSS-APPELLEES CENTRAL MAINE POWER COMPANY AND NECEC TRANSMISSION LLC

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INTRODUCTION

The central question in this case concerns whether Maine law permitted BPL to issue the 2020 Lease without first seeking legislative approval or, rather, as Plaintiffs contend, whether BPL lacked such authority and was required to seek a two-thirds vote of the Legislature. This appeal thus calls on the Court to determine the scope of the executive branch's authority to lease public reserved lands and its subordination, if at all, to the Maine Legislature with respect to such leasing decisions.

In settling these questions, the Court should consider that neither the Maine Constitution nor the specific statutory provision authorizing BPL to lease public reserved lands, 12 M.R.S. § 1852, requires BPL to obtain legislative approval before issuing leases of public reserved land for transmission lines. BPL and the Legislature have for decades been of accord with each other with respect to this authority, with the Legislature acquiescing without objection to BPL's decision to grant hundreds of leases of public land without first seeking supermajority legislative approval, including prior leases for electric utility infrastructure, all of which BPL has reported to the Legislature. Plaintiffs cannot dispute one central fact in this regard: There does not exist even one prior instance where the Legislature approved of a lease granted by BPL under 12 M.R.S. § 1852 as a result of Article IX, section 23 of the Maine Constitution. Indeed, the Legislature previously considered imposing a two-thirds vote requirement on BPL's leasing authority under section 1852 and responded by issuing a formal parliamentary ruling not only that Article IX, section 23 did not

compel such a requirement, but that such a requirement fell outside the scope of the amendment. In short, until the NECEC Project became a political flashpoint, the Legislature consistently made its view clear: BPL may lease public lands for electric transmission lines and other specified uses without seeking legislative approval.

The Court should consider the nature of Plaintiffs' lawsuit against the foregoing backdrop. Despite the clear implications this case presents for the boundary of legislative authority, and despite Plaintiffs' putative efforts to expand the scope of that authority, the Legislature has declined to become a party to this litigation, despite ample opportunity to seek intervention, and has declined even to file an amicus brief supporting Plaintiffs' position. Joined by private citizens with no interest in the leased land, Plaintiffs and their supporting amici consist of a rump group of only 16 legislators, out of a body of 186 members, who ask the Court to upend decades of relations between the executive and legislative branches of Maine government. Not only do Plaintiffs lack standing to mount such an effort, but the laws enacted by the Legislature itself, whether in the form of constitutional amendments or statutes, do not support it.

For all of these reasons, the Court should approach the very nature of Plaintiffs' claims with great skepticism and, ultimately, reject them. The Court should affirm BPL's long, settled practice of issuing leases without legislative approval, reverse the decision of the Superior Court, and affirm the validity 2020 Lease.

ARGUMENT

I. Plaintiffs' statement of facts presents a number of statements that are misleading or irrelevant.

Plaintiffs' discussion of the relevant factual background concerns itself with largely irrelevant matters, including Plaintiffs' persistent efforts to cast aspersions on BPL staff, each of the last two gubernatorial administrations, and the Attorney General's office.[1] Nevertheless, certain of Plaintiffs' statements require a response.

First, Plaintiffs point to BPL's alleged "post-constitutional amendment decisions to seek legislative approval for similar and even smaller transmission lines." Red Br. at 6. Plaintiffs seek to leave the misleading and erroneous impression that BPL departed from its historical practice with respect to transactions involving public reserved lands when it granted CMP leases in 2014 and 2020 without first seeking legislative approval. But Plaintiffs' examples only serve to confirm that BPL acted in accord with its historical practices and the legal positions BPL has advocated in this case. Specifically, the conveyances for each of the three transmission line projects[2] to

[1] Plaintiffs clearly wish the Court to believe that the 2014 Lease and 2020 Lease resulted from improper conduct by executive branch officials, acting against the wishes of the Legislature. The Superior Court found otherwise, however, holding that Plaintiffs failed to demonstrate any "bad faith" with respect to the issuance of the leases, a point which Plaintiffs have not disputed on appeal to this Court. *See* NECEC Blue Br. at 38 n.18. Nor is there any evidence BPL departed from required procedures or historical practice before granting the leases, nor any dispute that BPL notified the Legislature of the lease in accordance with its statutory obligations. *See* ARVII0158 (annual report to Legislature); *see also* 12 M.R.S. § 1853 (requiring annual report to Legislature).

[2] One of the three so-called transmission line projects Plaintiffs identifies—the TransCanada line—does not appear to be a "transmission line" at all but, rather, a generator interconnection facility under 35-A M.R.S. § 3132(1-B), to which the easement instrument refers, ARVI0099, as undersigned

which Plaintiffs point consisted of easements of infinite duration, not leases for limited durations issued under 12 M.R.S. § 1852. *See* ARVI0020; ARVI0049; ARVI0098. As BPL explained, it consistently has interpreted Maine law to require BPL to obtain legislative approval of the grant of easements, but not leases. *See* BPL Blue Br. at 22-32, 36-39. Accordingly, BPL has issued hundreds of leases of public reserved land, including for utility facilities, without first seeking legislative approval, a fact Plaintiffs avoid mentioning in their brief, let alone attempt to address. *Id.* at 38. The closest Plaintiffs come to acknowledging BPL's practice of leasing public land for transmission lines without legislative approval comes at footnote seven of their brief. *See* Red Br. at 7 n.7. Notwithstanding their efforts to suggest BPL previously sought legislative approval for all transactions involving transmission lines, the transaction described in footnote seven concerns a lease for a power line for which BPL never sought or obtained legislative approval. Plaintiffs' examples thus confirm BPL's long-standing practice to seek legislative approval for easements but not for leases.

Second, Plaintiffs claim the record contains no "findings of fact" or any evidence that BPL gave consideration to issues concerning the impact of the lease on the land or its surrounding environment. *See* Red Br. at 9-10. The latter point is incorrect, as NECEC LLC previously has discussed. *See* NECEC Blue Br. at 13-14. As to the

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counsel could locate no evidence the Maine Public Utilities Commission ("PUC") ever issued a certificate of public convenience and necessity ("CPCN") for any such project, as would have been required for the construction of a transmission line. *See* 35-A M.R.S. § 3132(1-B).

former point, while it is true BPL made no formal written findings in connection with the 2014 Lease, no statute or rule required BPL to do so and no evidence exists that BPL ever has done so previously. Again, Plaintiffs make this point to suggest BPL acted inappropriately in 2014, but the example fails to demonstrate BPL deviated from any required or historical practice, which it did not.

Third, Plaintiffs discuss a memorandum authored by Assistant Attorney General ("AAG") Lauren Parker, which Plaintiffs endow with the melodramatic moniker "The Parker Memorandum." AAG Parker's memorandum postdates the 2014 Lease by four years, predates the 2020 Lease by two years, and, on its face, addresses BPL's authority to lease another parcel of land. *See* A.509-15. Although it does not concern the lease at issue and is irrelevant to these proceedings, Plaintiffs refer to the memorandum, and AAG Parker personally, throughout their brief in an effort to suggest, again, that BPL acted contrary to typical practice when it issued those leases. But the so-called "Parker Memorandum" is neither law, nor a statement attributable to BPL,[3] nor even a formal opinion of the Office of the Maine Attorney General. "The Parker Memorandum" does not bind BPL, any more than undersigned counsel's private memoranda bind NECEC LLC. Plaintiffs' efforts to use "The Parker Memorandum" reflect their repeated and misguided litigation strategy of attacking AAG Parker's credibility, to which the Court should pay no heed. The

[3] Indeed, the memorandum runs counter to BPL's consistent and historical practice of issuing leases without legislative approval, including the 2014 Lease issued to CMP.

memorandum should play no role in the Court's consideration of this appeal.

Fourth, Plaintiffs' discussion of the so-called "legislative response" to the 2014 Lease omits crucial history and ultimately draws the wrong conclusion. *See* Red Br. at 12-13. BPL disclosed the 2014 Lease to the Legislature's Agriculture, Conservation, and Forestry ("ACF") Committee in BPL's statutorily-mandated 2015 annual report. ARVII0158. In response, neither the ACF Committee nor the Legislature took any action whatsoever. Plaintiffs' discussion of a legislative response to the 2014 Lease accordingly does not pick up until 2019, more than five years after BPL issued the lease. Even then, the sum of the "response" to which Plaintiffs point consists of a public hearing on a single bill the Legislature never enacted and which would not have been necessary had the law been what Plaintiffs now contend it to be. That the Legislature *failed* to pass a law that adopts Plaintiffs' position in this litigation cannot lead to an inference that the Legislature *agrees* with Plaintiffs' position.

Fifth, Plaintiffs suggest BPL issued the 2020 Lease to remedy its alleged prior error in issuing the 2014 Lease before the PUC issued a CPCN for the NECEC Project. As an initial matter, the charge, even if true, is irrelevant to the matters before the Court, as Plaintiffs have not sought to invalidate the 2020 Lease on the basis of its relationship to the PUC's issuance of a CPCN.[4] In any event, Plaintiffs

[4] Although Plaintiffs initially sought to invalidate the 2014 Lease on that basis, Plaintiffs dropped that claim when they amended their complaint. *See* NECEC Blue Br. at 17-18. Other than a passing reference, Plaintiffs' brief similarly fails to provide any meaningful response to Appellants'

premise their argument on the claim that the "only notable change in the lease" that bears on the substantial alteration issue from 2014 to 2020 was a change to the title of the document. But this shows nothing: neither the nature of the leased land, nor the nature of CMP's intended use of that land, changed between 2014 and 2020, and so there was no need for BPL or CMP to revisit those issues in 2020.

II. Maine law authorized BPL to grant the 2020 Lease without first obtaining legislative approval.

The Maine Legislature's longstanding acquiescence of BPL's issuance of hundreds of leases of public reserved lands without legislative approval, over a period of nearly three decades, comports with the constitutional and statutory provisions governing BPL's authority. Plaintiffs resort to knocking down straw men and a steadfast avoidance of the definition of "substantially altered" to argue otherwise.

A. Appellants do not argue section 1852 is "exempt" from Article IX, section 23.

Section II of Plaintiffs' brief incants the phrases "exempt" and "exemption," casting Appellants as having argued that the Legislature "exempted" leases issued under 12 M.R.S. § 1852 from the application of Article IX, section 23. *See* Red Br. at 20-25 (using "exempt" or "exemption" in three section headings). Plaintiffs begin this discussion by stating that BPL argues "the Legislature made a policy decision to exempt transmission line leases" from the amendment, citing page 30 of BPL's brief.

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arguments concerning the 2014 Lease, waiving them accordingly, while expressly acknowledging the Superior Court declined to take any action concerning the 2014 Lease. *See* Red Br. at 16, 51.

But BPL's brief does not use the word "exempt" on page 30 or anywhere else, either expressly or impliedly. Nor has NECEC LLC made any such argument. And nor would any such argument make any sense: of course the Legislature cannot "exempt" statutes from compliance with the Constitution.[5] Plaintiffs' misleading characterization of Appellants' arguments reflects an effort to knock down a straw man, revealing their inability to address the controlling legal authority in this case.

The plain terms of Article IX, section 23 leave many questions unanswered, including the precise public lands to which the amendment applies and the definition of "substantially altered." This was by design, as the Legislature that drafted and passed the amendment intended to enact subsequent implementing legislation to address these issues, expressly referring to that forthcoming implementing legislation in the amendment. In keeping with its intentions, the same Legislature that drafted and enacted the amendment passed such implementing legislation immediately after the voters ratified the amendment in the 1993 general election. That implementing legislation—the Designated Lands Act—identified the public lands to which the amendment would apply and defined the term "substantially altered." In doing so, the Legislature acted within its power to implement Article IX, section 23 through

[5] Plaintiffs similarly mislead where they characterize BPL as arguing that the starting point for the relevant analysis in this litigation starts with Maine statutes, rather than the Maine Constitution. *See* Red Br. at 20 (citing BPL Blue Br. at 22). But in the cited language BPL merely stated that Maine statutes provide the basis for granting BPL authority to lease public lands. BPL did not state or suggest that Maine statutes are somehow superior to the Maine Constitution, and no party in this litigation ever has advanced such an argument.

appropriate legislation, just as the amendment expressly contemplates. *See, e.g., United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000) ("political branches have a role in interpreting and applying the Constitution").[6]

To resolve this case, the Court must determine whether the 2020 Lease "substantially altered" the uses of the land at issue within the foregoing statutory framework.[7] While any specific legislation may violate the Maine Constitution depending on its terms, there is no reason to conclude the Designated Lands Act does

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[6] Plaintiffs' Nebraska authority does not support their "exemption" argument. NECEC LLC does not disagree that "the Legislature cannot abrogate or contradict an express constitutional provision and (2) the legislative definition must be reasonable, and cannot be arbitrary or unfounded." Red Br. at 21 (citing *State ex rel. Stenberg v. Omaha Exposition & Racing, Inc.*, 644 N.W.2d 563, 570 (2002) (quoting *MAPCO Ammonia Pipeline v. State Bd. of Equalization & Assessment*, 471 N.W.2d 734, 739 (1991)). When the Legislature chose to authorize leases of public reserved land without legislative approval, it did not abrogate or contradict a constitutional provision, as Article IX, section 23 does not define substantial alteration, nor address leases at all. Indeed, the specifics of the cited cases provide a useful contrast with the facts at hand. *Stenberg* addressed a conflict between a statute and a very specific constitutional term—"within a licensed racetrack enclosure"—that left little room for Legislative interpretation, unlike Article IX, section 23. *Stenberg*, 644 N.W.3d at 569-70. In *MAPCO Ammonia Pipeline*, the Legislature had "attempted to define and designate as a 'fixture' that which is, in fact and in truth, personal property." 471 N.W.2d 734, 740 (1991). In so doing, the Legislature "arbitrarily declared the personal property owned by an unfavored group of taxpayers [to be] presumably taxable." *Id.* The Court nonetheless recognized that "[t]he power of classification rests with the Legislature and cannot be interfered with by the courts unless it is clearly apparent that the Legislature has by artificial and baseless classification attempted to evade and violate provisions of the Constitution." *Id.* at 741 (quoting *State ex rel. Douglas v. Marsh*, 300 N.W.2d 181, 187 (1980)). The Designated Lands Act, by contrast, constitutes reasonable legislation necessary to fill the gaps in a constitutional provision of barely seventy words.

[7] The parties do not dispute that the Designated Lands Act resolves the question of the lands to which Article IX, section 23 applies, as the Act makes clear all public reserved lands are subject to the amendment, such that all efforts to "substantially alter" the uses of public reserved lands require legislative approval. 12 M.R.S. § 598-A(2-A)(D). That observation merely brings the Court back to the question: What does it mean to "substantially alter" the uses of public reserved lands? As discussed throughout, the terms of the Designated Lands Act, the history of public reserved lands in Maine, and the Legislature's consistent approach to the issue all point in the same direction: leases of public reserved lands for the installation of electric transmission lines do not "substantially alter" the uses of public reserved lands.

so, where it was enacted by the same Legislature that drafted Article IX, section 23 for the intended purpose of implementing and complementing the amendment. Accordingly, the statutory definition of "substantially altered" serves both to inform the meaning of that phrase as a matter of constitutional interpretation—*i.e.*, we know what the drafters of the amendment meant when they used the phrase "substantially altered"—and as a valid and independent act of legislative authority.[8]

In short, whether BPL should have sought legislative approval of the 2020 Lease has nothing to do with whether the Legislature "exempted" legislation from any provision of the Constitution. Instead, to answer whether legislative approval was required, the Court must determine the meaning of "substantially altered" uses and decide whether the 2020 Lease falls within it or not. Plaintiffs' efforts to avoid engaging with this straightforward framing reveals the weakness of their position.

B. Plaintiffs fail to engage with the definition of "substantially altered."

Notwithstanding the centrality of the phrase to this litigation, Plaintiffs never state what they contend "substantially altered" uses means, much less identify any

[8] Even a purely constitutional interpretation of "substantially altered" unmoored from the definition provided in the Designated Lands Act results in an understanding of that phrase that permits for leases of public reserved lands for electric transmission lines without legislative approval. As discussed in both the amicus brief of the Maine Forest Products Council and NECEC LLC's opening brief, the historical status of Maine's public reserved lands and the historical legal regime governing those lands, dating back before Maine's separation from Massachusetts, confirms that these lands always have been put to productive uses and that Maine committed in the Articles of Separation to continue putting them to productive uses. Me. Forest Prods. Coun. Amicus Br. at 9-22; NECEC Blue Br. at 1-3. An interpretation of "substantially altered" at odds with that historical approach would conflict with the Articles of Separation. Plaintiffs fail to address these issues.

authority supporting their proposed reading of that phrase. At one point, *see* Red Br. at 24, Plaintiffs use the word "changed" as an apparent synonym for the phrase, without explanation or citation to any authority. And it is not until pages 28 through 30 of their brief that Plaintiffs address the statutory definition provided by the Designated Lands Act, and even then they misread and misstate the law.

Plaintiffs point to the definition of "substantially altered" in 12 M.R.S. § 598(5), which states that "substantially altered" means the land is "changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." The same paragraph explains that the "essential purposes" of public reserved lands are "the protection, management and improvement of these properties for the multiple use objectives established in section 1847." Section 1847(1), in combination with 12 M.R.S. § 1845, in turn provides the scope of the multiple use objectives for public reserved land, a broad standard that both recognizes a wide variety of land uses, including uses for "public purposes," and reflects the Legislature's admonition that BPL must avoid "impairing the productivity of the land," undoubtedly a reference to Maine's historical practice, and legal obligation under the Articles of Separation, to put public reserved lands to productive uses.[9] *See supra* n.8. The breadth of the statutory multiple use standard more than encompasses leases for transmission lines (especially those, like the NECEC Project,

[9] Rather than address the statutory definition of "multiple use," Plaintiffs assert the term has a "common understanding," in reliance on an obscure website. *See* Red Br. at 29 n.15.

found to serve a public need), such that leasing public reserved lands for that purpose cannot "frustrate the essential purposes" for which such lands are held and, accordingly, cannot "substantially alter" the uses of that land.

The history of the foregoing provisions supports this conclusion, although Plaintiffs fail to discuss it. When the Legislature enacted the Designated Lands Act, the current Chapter 220 of Title 12, now containing sections 1845, 1847, and 1852, did not exist, with all of the relevant provisions concerning public reserved lands then appearing in Chapter 202-B, which the Legislature since has repealed.[10] At that time, 12 M.R.S. § 585 contained both the multiple use standard for public reserved lands, now found in sections 1845 and 1847, and the authorization to lease public reserved lands, now found in section 1852. *See* NECEC Blue Br. at 33-34. It defies common sense to conclude, as Plaintiffs do, that the Legislature would have authorized the executive to lease public reserved lands in the same statute where it stated the multiple use standard if the Legislature believed such leasing authority could "frustrate" the multiple use standard. Plaintiffs respond to this by arguing that just because *some* leases for transmission lines may accord with the multiple use standard, some may not and, thus, that the issuances of leases under 12 M.R.S. § 1852 "require[s] a determination of whether they frustrate the 'essential purposes' of the public lots."

[10] Plaintiffs' statement that "section 1852's leasing authority predates the constitutional amendment by decades" is incorrect. Red Br. at 23. As NECEC LLC described in its opening brief, the Legislature did not create section 1852 until 1997, and, when it did so, purposefully declined to tie that provision to section 598-A. *See* NECEC Blue Br. at 6-7.

Red Br. at 30. If that were the case, however, one would have expected the Legislature to have required BPL to make such a determination (it hasn't) or to have objected at some point over the past three decades while BPL issued hundreds of leases under section 1852 without first seeking legislative approval (again, it hasn't).[11] As discussed below, the Legislature consistently has made clear its view that no such determination is required.

C. The Legislature's actions consistently demonstrate its determination that leases for transmission lines do not require legislative approval.

Until the political controversy around the NECEC Project, each legislative action taken after the adoption of Article IX, section 23 confirms the Legislature always has understood leases of public reserved lands not to constitute a "substantially altered" use of that land. Plaintiffs' fail to explain these actions away all fail.

1. The BPL Act evidences the Legislature's understanding that leases of public land do not give rise to a substantially altered use of that land.

Plaintiffs provide a tortured explanation for the Legislature's considered decision to identify statutes granting BPL authority to alienate state land as subject to Article IX, section 23, while declining to do the same with respect to statutes authorizing leases. *See* Red Br. at 25-27. According to Plaintiffs, NECEC LLC is

[11] The only exceptions consist of leases issued under 12 M.R.S. § 1852(7), which, unlike the other paragraphs of section 1852, expressly require legislative approval on only a majority basis. While Plaintiffs point to a lease to the federal government that obtained supermajority approval under a 2013 resolve, *see* Red Br. at 38 n.21, that resolve included multiple transactions, included fee conveyances, for which BPL always has sought supermajority approval.

wrong to read any meaning into the fact that section 1852 contains no reference to section 598-A, while the Legislature expressly made portions of the BPL Act governing conveyances of public reserved lands subject to section 598-A.[12] *Compare* § 1852(4) *with* § 1851. Plaintiffs thus ask the Court to step into the Legislature's shoes and amend section 1852 by adding an implied reference to section 598-A, an addition the Legislature chose not to make. But if the Legislature understood leases under section 1852 to be substantial alterations subject to section 598-A and Article IX, section 23, it could, and would, have said so when it enacted the BPL Act.[13] Bedrock principles of statutory interpretation make clear the Legislature intended that leases under section 1852 would not constitute a substantial alteration or, accordingly, require legislative approval under Article IX, section 23. *See Aydelott v. City of Portland*, 2010 ME 25, ¶ 12, 990 A.2d 1024 ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally

[12] Bafflingly, Plaintiffs argue that between 1993 and 1997, the statutes governing state parks did not contain a cross-reference to section 598-A, "so under the Bureau's theory, the Constitution did not apply during those years." Red Br. at 27 n.14. That the Legislature added cross-references in section 1814 to section 598-A through enactment of the BPL Act in 1997 shows only that that the Legislature chose at that time to clarify which activities constituted a substantial alteration of state park lands. In other words, Article IX, section 23 applied beginning in 1993, but not until 1997 did the Legislature provide express cross-references. Importantly, public reserved lands were subject to utility leases before 1993, and the 1997 legislation made "no substantive changes from current law" with respect to public reserved lands. *See* L.D. 1852, Summary, § 4, at 76 (118th Legis. 1997).

[13] Plaintiffs are far afield when they characterize BPL as arguing that Article IX, section 23 authorized the Legislature to "amend the Constitution by negative implication." Red Br. at 25. The Legislature did not purport to, and did not, amend the Constitution when it enacted the BPL Act. The BPL Act was straightforward legislation that identified activities the Legislature understood to constitute a "substantially altered" use under Article IX, section 23. As described above, Article IX, section 23 intended for the Legislature to adopt legislation implementing its terms.

presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (quoting *Russello v. United States*, 464 U.S. 16, 23 (1983)); *Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 17, 905 A.2d 285 ("If the Legislature had intended to make enrollment in the nominating party a qualification of a replacement candidate, it knew how to say so directly as it did in [another section].").

None of the authority cited by Plaintiffs dislodges this well-established Maine law or can even sensibly be applied to interpretation of the BPL Act. For instance, *Zuber v. Allen* actually supports NECEC LLC's position: the Court noted that despite drafting a "comprehensive regulatory scheme" for milk pricing, Congress did not specifically authorize a certain set of payments, where "it would have been a simple matter to include" the payments in the legislation. 396 U.S. 168, 184-85 (1969). So too here: if the Legislature considered utility leases of public reserved lands to be subject to Article IX, section 23, it would have said so. As for *Burns v. United States*, the Court declined to credit "[a]n inference drawn from congressional silence" because it was "contrary to all other textual and contextual evidence of congressional intent," and noted further that the proffered "construction of congressional 'silence' would thus render what Congress has *expressly* said absurd." 501 U.S. 129, 136-37 (1991). Such concerns do not exist here. Likewise, in *Field v. Mans*, the Court recognized "the rule of construction that an express statutory requirement here, contrasted with statutory silence there, shows an intent to confine the requirement to the specified instance," and noted that "the inference might be a helpful one." 516

U.S. 59, 67 (1995). The Court, however, chose not to elevate the argument in the applicable circumstances "to the level of interpretive trump card" because the result would be "so odd, and nothing so odd has ever been apparent to the courts that have previously construed this statute." *Id.* at 68. And *Girouard v. United States* involved a statutory "silence" which Congress later addressed. 328 U.S. 61, 70 (1946) ("Thus the affirmative action taken by Congress in 1942 negatives any inference that otherwise might be drawn from its silence when it reenacted the oath in 1940.").

2. Additional legislative actions confirm Appellants' position.

Plaintiffs provide no meaningful response to the Legislature's 1999 parliamentary ruling, wherein, upon the advice of the Revisor's Office, the Legislature determined that proposed legislation seeking to impose a two-thirds vote requirement on certain leases authorized by section 1852 was not authorized by and would not fall within the terms of Article IX, section 23. *See* NECEC Blue Br. at 9-10. One aspect of this episode eludes Plaintiffs completely: the 1999 legislation would not have been necessary had the Legislature understood leases under section 1852 to already constitute a substantial alteration of use under Article IX, section 23. Plaintiffs otherwise seek to diminish the import of the Legislature's ruling by arguing it merely "restates the truism that a supermajority vote can only be imposed by the Constitution." Red Br. at 38. But the ruling makes clear the Legislature did not believe Article IX, section 23 worked to impose such a requirement, dispositive of Plaintiffs' claims. Relevant authority makes clear the importance of such a

determination to the instant analysis. *See Brown v. Morris*, No. 11-AP-004, 2012 WL 2090879 (Me. Super. May 21, 2012) (relying upon drafting standards from Revisor's Office to interpret statutory language); *Opinion of Justices*, 2015 ME 107, ¶ 40, 123 A.3d 494 (noting importance of "traditions of Maine government and its long-practiced actions" in interpreting constitution). *See also* Jonathan S. Gould, *Law Within Congress*, 129 Yale L.J. 1946, 2022 (2020) ("Courts can thus look to parliamentary precedent … to help them interpret ambiguous statutory provisions.").

Plaintiffs' argument that the Legislature has rejected BPL's uninterrupted three-decade interpretation of the law relies on two additional points: that BPL previously has sought approval of three transmission lines, and various legislative activity related to the controversy over the NECEC Project. As discussed above, the former point is misleading and, when properly understood, confirms Appellants' view. *See supra* pp.3-4. With respect to the latter point, Plaintiffs cite two pieces of proposed legislation, L.D. 1893 and L.D. 471, the terms of which Plaintiffs say evidence the Legislature's rejection of BPL's position. But neither piece of legislation would have been necessary were the law what Plaintiffs claim it to be in this litigation. Indeed, the recently enacted initiative, I.B. 1, similarly would have been unnecessary. The Legislature never passed either bill in either event, nor did it pass I.B. 1 when given the chance. As Plaintiffs themselves argued in their brief: "courts caution against

reading too much into a failure to enact or amend legislation." Red Br. at 25.[14]

D. Article IX, section 23 remains alive and well.

Plaintiffs advance the erroneous argument that Article IX, section 23 loses effect if leases of public reserved land for electric transmission lines are not deemed to substantially alter the uses of that land. *See* Red Br. at 23-24, 30-31. In making this argument, Plaintiffs miscast the nature of Article IX, section 23, stating, without citation to any authority, that the amendment was not intended "to maintain the status quo" with respect to public lands. *Id.* at 24. But the plain text of the amendment shows that maintaining the status quo was precisely the intent of the amendment, as it requires a two-thirds vote of the Legislature where the "*uses* [of relevant state land are] substantially altered." (emphasis added.) In other words, the amendment froze in place existing holdings and uses of state land by making it more difficult for the executive to either (a) alienate—*i.e.*, "reduce"—state land holdings, or (b) "substantially alter" the "uses" of state land. Plaintiffs cite to no evidence the amendment sought to *cut back* on the scope of uses permissible on public land.

As the Maine Forest Products Council explained in its amicus brief, and as the broad multiple use standard applied to public reserved lands makes clear, public reserved lands always have been, and remain, used for a wide variety of public

[14] The Joint Resolution of July 19, 2021, stands as the only occasion where the Legislature has objected to any leasing decision by BPL, in contrast to the Legislature's historical actions, including its parliamentary ruling concerning Article IX, section 23. *See* Red Br. at 36.

purposes, in contrast to other types of state lands subject to the amendment, such as Baxter State Park or other state park and historic properties. Me. Forest Prods. Coun. Amicus Br. at 9-22. Accordingly, following the adoption of Article IX, section 23, the executive remains authorized to grant leases of public reserved lands for uses within the traditional scope of uses associated with that land—a scope that clearly included transmission lines—but may not authorize uses of such land outside the same scope without supermajority legislative approval.

Appellants' arguments concerning the executive's ability to lease public reserved lands accord completely with the text and purpose of Article IX, section 23.

III. The Superior Court did not apply appropriate principles of Maine administrative law in the proceedings below.

Plaintiffs' argument fails to shore up the defects in the Superior Court's administration of this litigation. *See* Red Br., Section III.

First, Plaintiffs ignore the long and unbroken line of this Court's precedent requiring a Maine court reviewing an administrative decision to review the agency's written findings or, when those findings do not exist, to remand the matter to the agency to state those findings. *See* NECEC Blue Br. at 39 (citing *LaMarre*). The Superior Court undisputedly failed to do this, a decision that was all the more erroneous given that no statute or rule required BPL to state written findings before issuing a lease and no evidence suggests BPL ever had done so in the past. Faced with a novel and unique challenge to its authority, BPL took the appropriate step to

prepare a document that would facilitate the Superior Court's review of BPL's decision. The Superior Court committed an error of law when it penalized BPL (and NECEC LLC) for this decision; it was extraordinary, unprecedented, and inconsistent with principles of the separation of powers for the Superior Court to review an agency decision without considering any statement from the agency providing a rationale for its decision. *See, e.g., Chapel Rd. Assocs., L.L.C. v. Town of Wells*, 2001 ME 178, ¶¶ 10, 13, 787 A.2d 137 (remanding to municipal board to make findings and noting court "should not embark on an independent and original inquiry" and the "danger of judicial usurpation of administrative functions"). The Court, accordingly, should reverse the Superior Court's error and consider the BPL memo, which clearly supports BPL's decision to grant the 2020 Lease in reliance on materials found in the administrative record.[15] A.475, 481 (discussing continued primary use of the lots for timber management, found in the record at ARII0093, ARII0109).

Second, Plaintiffs' statements that "neither CMP nor the Bureau point to any record evidence of a determination" and that NECEC LLC has waived any related arguments is proven wrong by a review of pages 11 through 15 and 39 through 41 of NECEC LLC's opening brief, where NECEC LLC sets forth the extensive work BPL

[15] Plaintiffs cite *Rhea Lana, Inc. v. U.S.*, 952 F.3d 521 (D.C. Cir. 2019), for the proposition that post hoc materials cannot be considered when reviewing agency action where "the contemporaneous agency record discloses no basis for the agency's determination whatsoever." Red. Br. at 41. But, as NECEC LLC pointed out in its opening brief, contemporaneous documents in the agency record support the findings in BPL's memo and, indeed, BPL's memo discusses those documents at length. NECEC Blue Br. at 37-38, 40-41.

performed in considering how the NECEC Project would impact the current uses of the lots at issue.[16] For Plaintiffs, the fact that BPL's contemporaneous documents do not use the phrase "substantial alteration" serves as evidence BPL never gave the matter any thought. *See* NECEC Blue Br. at 39-40; Red Br. 42. But given the lack of any statutory or administrative requirement that BPL carry out a particular process when reviewing lease applications, there is no reason to expect (much less require) BPL's contemporaneous documents to use that phrase.

Third, the Superior Court not only erred when it failed to remand the case to BPL to state its findings, but it erred again when it failed to remand the case to BPL without vacatur after determining BPL failed to undertake the substantial alteration analysis. As discussed in NECEC LLC's opening brief, remand to the agency is the appropriate approach where a reviewing court has found a procedural error underlying an agency decision.[17] *See* NECEC Blue Br. at 42. Plaintiffs now argue that, had the Superior Court remanded the case to BPL to make the substantial alteration determination, or were this Court to do the same, such a remand should include a vacatur of BPL's decision to grant the 2020 Lease. *See* Red Br. at 43-46. In that regard, Plaintiffs complain about NECEC LLC's citation to *Sugar Cane Growers*,

[16] Plaintiffs' claim that BPL has "conceded … there is no judicially reviewable administrative record," Red Br. at 42, is similarly bizarre and easily disproven by reference to the administrative record in this case spanning 1755 pages, the contents of which Plaintiffs not only have not objected to but which includes materials added at Plaintiffs' request. A.60-62, 69.

[17] Plaintiffs baselessly accuse the professional staff of BPL as intending to "make (up)" findings to support its decision in the event of a remand to the agency. Red Br. at 43.

but decline to mention that the remedy in that case was to remand to the agency *without vacatur*. *Sugar Cane Growers Co-op. of Fla. v. Veneman*, 289 F.3d 89, 98 (D.C. Cir. 2002). Indeed, it is well-established under analogous federal law that, even where the court remands to the agency to cure a procedural defect, the agency action should not be vacated where (1) the agency's defect can be remedied by the agency and (2) the vacatur will prove disruptive. *See Allied-Signal, Inc. v. U.S. Nuclear Regul. Comm'n*, 988 F.2d 146, 150-51 (D.C. Cir. 1993). Because both of those prongs are satisfied, even if this Court finds that BPL failed to engage in some kind of public administrative process, the proper remedy is to remand to the agency without vacating the lease.[18]

Here, "there is at least a serious possibility that [BPL] will be able to substantiate its decision on remand." *Id.* at 151. BPL made findings and conclusions that issuing the lease would not constitute a substantial alteration, which it memorialized in its September 2020 memorandum; whether Plaintiffs like it or not, this is BPL's position based on the record before it. A474-84. Accordingly, there is little doubt that BPL "may be able to explain" its determination that the lease did not constitute a substantial alteration. *See Ne. Maryland Waste Disposal Auth. v. E.P.A.*, 358 F.3d 936, 950 (D.C. Cir. 2004) (remanding emissions rules to EPA without vacating because a "rationale buried in a document published in 1989" may explain decision

[18] Plaintiffs argue only that vacatur is the ordinary practice when a court remands to the agency—which is generally the case—but fail to discuss *Allied-Signal* or even mention its analysis of the disruption that would result from vacatur. *See* Red Br. at 43-45.

made in 2000); *Cent. Me. Power Co. v. FERC*, 252 F.3d 34, 48 (1st Cir. 2001) (remanding without vacatur where "a preliminary assessment suggests that the errors at issue can probably be mended").

Plaintiffs argue that, after the D.C. Circuit's decision in *Standing Rock Sioux Tribe*, the first *Allied-Signal* factor no longer depends on whether the agency could justify its ultimate decision, but instead hinges on whether the agency could, with further explanation, justify its decision to skip the required procedural step.[19] Red Br. at 44 (citing *Standing Rock*, 985 F.3d 1032, 1052 (D.C. Cir. 2021)). But a key factor in the *Standing Rock* court's reasoning was the agency's failure to adhere to procedures required by NEPA, a "purely procedural statute," meaning that "where an agency's NEPA review suffers from a significant deficiency, refusing to vacate the corresponding agency action would vitiate the statute." *Id.* at 1052 (internal quotations omitted). Here, any administrative process required by Article IX, section 23 is a means to an end, rather than an end unto itself: the purpose would be for BPL to determine whether the lease would substantially alter public reserved land. In other words, the trial court did not order BPL to engage in a public administrative process for the sake of the process itself, but in service of making its substantial alteration decision. In any event, the D.C. Circuit recently reaffirmed the vitality of the original

[19] As discussed throughout these proceedings, BPL does have a good reason for not engaging in the public process demanded by the Superior Court—the Legislature never has enacted any statute requiring such a process, and, instead, has acquiesced to decades of BPL's leasing of public reserved land without any such process.

Allied-Signal rule. *See AT&T Servs., Inc. v. Fed. Commc'ns Comm'n.*, -- F.4th--, 2021 WL 6122734, at *10 (D.C. Cir. Dec. 28, 2021). In *AT&T Servs.*, the D.C. Circuit remanded to the agency without vacating, noting that despite the agency's failure to respond to certain comments raised during the notice and comment process, "[i]t is conceivable that the Commission may be able to explain its" decision. *Id.* (quoting *Allied-Signal*, 988 F.2d at 151).

Additionally, "the consequences of vacating may be quite disruptive." *Allied-Signal*, 988 F.2d at 151. If this Court affirms the vacatur ordered by the trial court, it will not only void the lease issued for the NECEC Project, but signal that *all* leases of public reserved lands—none of which complied with the undefined public process mandated by the trial court—are thus presumptively void. These leases include 288 residential camplots, 10 commercial sporting camps and campgrounds, and 18 utility leases, among others. *See* BPL Fiscal Year 2020 Annual Report (Mar. 1, 2021) at 31, https://www.maine.gov/dacf/parks/publications_maps/docs/2020LandsAnnualReport.pdf (last accessed Jan. 11, 2022). The disruption would be significant and unwarranted. *See* Amicus Br. of Joshua Reynolds at 2-3; *see also California Communities Against Toxics v. U.S. E.P.A.*, 688 F.3d 989, 994 (9th Cir. 2012) (remanding without vacatur because vacatur could result in "economically disastrous" consequences for "billion-dollar venture employing 350 workers").[20]

[20] In fact, one of the very cases relied upon by Plaintiffs ordered remand without vacatur, noting

"[B]ecause of the possibility that [BPL] may be able to justify the [2020 Lease], and the disruptive consequences of vacating," if this Court remands this matter so that it may be remanded to BPL, such remand to BPL should be without vacatur. *Allied-Signal*, 988 F.2d at 151.

IV. Maine law does not expressly or impliedly require BPL to use a "public administrative process" before granting a lease.

Plaintiffs cite no Maine authority holding that a public administrative authority of any kind "arises by implication" from Article IX, section 23. And for good reason: a holding that the executive is required to develop administrative procedures as a result of constitutional terms excises the Legislature from its traditional role of passing statutes that enable rulemaking and disregards the terms of Article IX, section 23, which expressly contemplates the Legislature's role in passing implementing legislation. In fact, the Legislature has spoken by giving BPL authority to lease public reserved lands to utilities without requiring any specific procedures—in contrast to the detailed statute governing the process required for submerged lands. *See* 12 M.R.S. § 1862(2). If the Legislature believed BPL needed to adopt a public administrative process for utility leases, it would have so required through statute.

Plaintiffs echo their legislator amici in arguing that a public process is already

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"some economic harm is concrete, and perhaps irreversible, if vacatur is ordered." *Ctr. for Biological Diversity v. U.S. Forest Serv.*, No. 2:17-CV-372, 2021 WL 855938, at *4 (S.D. Ohio Mar. 8, 2021).

required by 12 M.R.S. § 1803 ("General powers and duties of the bureau").[21] Legislator Amicus Br. at 15-16; Red Br. at 49-50. This statute grants BPL rulemaking authority but does not require any specific rules concerning leasing. *See* 12 M.R.S. § 1803(6). Accordingly, BPL never has adopted such rules in its history, without complaint from the Legislature. While Plaintiffs point to the recently proposed L.D. 1075, which would require BPL to adopt rules governing leasing of public reserved lands, the bill would be unnecessary were the Legislature to understand Section 1803 to already compel BPL to adopt rules concerning leases. In any event, MAPA specifically allows any person to petition an agency for the adoption or modification of any rule and grants a cause of action where the agency has failed to adopt required rules. 5 M.R.S. §§ 8055, 8058. Appellants are unaware of any instance where anyone, including Plaintiffs, has availed themselves of these remedies with respect to BPL.

Plaintiffs argue the "public trust" nature of public reserved lands imply a requirement that the executive adopt specific administrative procedures for leasing decisions, apparently even in the absence of any authorization or requirement by the Legislature. No Maine court ever has so held, and Plaintiffs rely only on far-flung cases from Idaho, Hawaii, and Louisiana, none of which support their position.

In the Louisiana case, the court analyzed a statutory scheme to implement the Louisiana constitution's Natural Resource Article. *Save Ourselves, Inc. v. Louisiana Envtl.*

[21] NECEC LLC has not filed a separate reply to Plaintiffs' supporting amici because that brief does not set forth any "new matter." M.R. App. P. 7A(e)(1)(B).

Control Comm'n, 452 So. 2d 1152, 1154 (La. 1984) ("In implementation of the [constitution's] public trust mandate, the legislature enacted the Louisiana Environmental Affairs Act."). The court *never* held that the state constitution alone impliedly mandated any administrative process, but instead repeatedly referred to the "constitutional-statutory scheme"—that is, to the process specifically created by the statutes that implemented the constitution.[22] *See, e.g., id.* at 1157, 1159 (citing La. Rev. Stat. 30:1141 for proposition that "[t]he agency is required to use a systematic, interdisciplinary approach to evaluation of each hazardous waste project or facility").

In the Idaho case, the court analyzed a state agency's compliance with procedures mandated by statute for leasing submerged lands. *Kootenai Envtl. All., Inc. v. Panhandle Yacht Club, Inc.*, 671 P.2d 1085, 1095 (Idaho 1983) (reviewing compliance by agency with notice and hearing requirements of Idaho Code § 58-147 (currently Idaho Code § 58-1306)). Furthermore, *Kootenai* concerns the "public trust doctrine," a doctrine that restricts the ability of states to alienate submerged lands specifically. *Kootenai*, 671 P.2d at 1088-89 (citing *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387 (1892)). The "public trust doctrine" has long been applied by this Court exclusively to submerged and intertidal lands and, accordingly, it does not apply to this case. *See, e.g.,*

[22] Notably, the Louisiana constitution's "public trust mandate" "does not establish environmental protection as an exclusive goal, but requires a balancing process in which environmental costs and benefits must be given full and careful consideration along with economic, social and other factors." *Save Ourselves, Inc.*, 452 So.2d at 1157.

Norton v. Town of Long Island, 2005 ME 109, ¶ 21, 883 A.2d 889 ("Submerged lands are unique because of their usefulness to the public for fishing and navigation.").[23]

Lastly, in the Hawaii case, the portion of *In re Waiola O Molokai, Inc.* cited by Plaintiffs discussed a state agency's failure to comply with a complex administrative process—specifically prescribed by statute—governing issuance of permits to access groundwater. 83 P.3d 664, 695 (2004) (agency failed to render findings of fact and conclusions of law regarding whether applicant's proposed withdrawals would interfere with existing water rights held for benefit of native Hawaiians). The Hawaiian court never held that the state constitution impliedly mandated any administrative process. Moreover, like *Kootenai*, the Hawaii court's decision rested on the "public trust doctrine," which Hawaii applies to all water resources, including groundwater. *Id.* at 693.

Neither the general statement of legislative policy in 12 M.R.S. § 1846, nor references to the State as "trustee" of public reserved lands in *Cushing v. State*, 434 A.2d 486, 500 (Me. 1981), means the "public trust doctrine" governs Maine's public reserved lands, let alone says anything about required administrative procedures, let alone incorporates or adopts a doctrine whereby the executive is required to adopt administrative procedures without legislative authorization or requirement.

[23] The unique status of submerged lands under the "public trust doctrine" is consistent with the Legislature's enactment of an elaborate statutory scheme governing submerged lands and its grant of rulemaking authority to BPL in furtherance of that statutory scheme. *See* 12 M.R.S. § 1861 *et seq.*; *see also* 01-670 C.M.R. ch. 53.

V. There is no basis for authorizing the Superior Court to usurp BPL's authority to make leasing decisions concerning public land.

Seemingly as an argument advanced under their so-called cross appeal, and despite the fact they seek no alteration or amendment to the judgment, M.R. App. P. 2C(a)(1), Plaintiffs present the extraordinary claim that, in the event this Court vacates the Superior Court's ruling and remands any aspect of these proceedings back to the Superior Court, the Court should instruct the Superior Court to usurp BPL's authority to manage Maine's public lands and make its own decision with respect to the question of substantial alteration. *See* Red Br., Section IV. Plaintiffs cite no Maine case authorizing a Maine court to step into the shoes of an executive agency and exercise discretionary authority committed by the Legislature to that agency. The suggestion tramples on the separation of powers principles set forth in the Maine Constitution, which "bars Maine courts' exercise of executive or legislative power." *Burr v. Dep't of Corr.*, 2020 ME 130, ¶ 20, 240 A.3d 371.

First, Plaintiffs describe Appellants' argument that BPL's leasing decisions should be reviewed pursuant to MAPA and Rule 80C as an "extraordinary position." Red Br. at 51. But there is nothing "extraordinary" about MAPA and Rule 80C, which have provided the exclusive means of challenging an executive agency's final actions for nearly 45 years. *See* NECEC Blue Br. at 21-22.

Second, Plaintiffs conflate the judiciary's role in interpreting Maine's constitution with the question of whether Maine courts should make decisions assigned to the

executive branch by the Legislature. *See* Red Br. at 51-52. It does not follow from the Court's preeminent role in interpreting the Constitution that Maine courts should perform all functions of the executive branch that require the application of constitutional standards. It is axiomatic that the Court interprets the law, while the executive applies it. *See Wayman v. Southard,* 23 U.S. 1, 46 (1825).

Third, Plaintiffs state BPL did not create a "meaningful factual record" or "provide notice to the public" of the 2020 Lease "so that a timely challenge could be brought under MAPA." Again, both statements are demonstrably wrong. BPL undisputedly created an administrative record spanning hundreds of pages, a record which Plaintiffs obtained leave to supplement with documents they found relevant. *See* A.60-62, 69. To the extent Plaintiffs mean that BPL created no contemporaneous findings of fact and conclusions of law, it does not flow from that observation that the judiciary should usurp the executive's role in making discretionary decisions. As set forth above, the remedy for an agency's failure to create such findings consists of a remand to the agency, not a judicial takeover of agency authority. To the extent Plaintiffs claim they never received notice of the 2020 Lease, counsel for BPL emailed that lease to Plaintiffs' counsel a week after BPL executed it, leaving Plaintiffs with the full time allowed under MAPA to challenge BPL's action. *See* Red Br. at 15; A.424 (executed by BPL on June 23, 2020); *see also* 5 M.R.S. § 11002(3).

Fourth, after steadfastly refusing to concede for the duration of this litigation that MAPA must serve as the exclusive procedural vehicle for their challenge to the

2020 Lease, Plaintiffs argue that MAPA empowered the Superior Court to conduct its own determination concerning the substantial alteration question. To be clear: Plaintiffs advanced this argument below, but the Superior Court rejected it after determining Plaintiffs failed to show BPL acted in bad faith. *See* A.66. While MAPA, contrary to Plaintiffs' claims to the contrary, Red. Br. at 51, authorizes a reviewing court to conduct a de novo hearing where there was no adjudicatory hearing below *and* no "reviewable administrative record," 5 M.R.S. § 11006(1)(D), the latter element is not present here, where, again, Plaintiffs themselves helped to create that record. Plaintiffs' citation to *Blue Sky West LLC v. Maine Revenue Service*, 2019 ME 137, 215 A.3d 812, does not support their argument. In that case, both parties, including the executive agency, *consented* to the Superior Court conducting a *de novo* review of the question at issue, and did so after stipulating and agreeing to the relevant facts, none of which occurred here. *Id.* ¶¶ 21-22.

There is no basis to empower the Maine Superior Court to assume the duties of BPL and reach decisions concerning BPL's leasing authority.

VI. Plaintiffs have failed to demonstrate standing.

Plaintiffs' discussion of standing fails to address the fatal flaws in their Complaint, both with respect to those Plaintiffs who are private citizens and those Plaintiffs who serve in the Legislature.

With respect to the former, Plaintiffs attempt to shoehorn their allegations of particularized injury into the Court's precedent in *Fitzgerald v. Baxter State Park*

Authority, 385 A.2d 189 (Me. 1978). But Plaintiffs fail to address the two unique features of that case—that the Court treated the plaintiffs there as having a private property interest in the park by virtue of the trust instrument (a position Plaintiffs undisputedly do not hold here), and that the Attorney General was unable to enforce the terms of the trust creating the park because he was a member of the park authority. *Id.* at 194-96. Plaintiffs nonetheless seek to analogize themselves to the *Baxter* plaintiffs by arguing they have alleged having used the land at issue in such a way as to have suffered a "particularized injury" from BPL's decision to grant the 2020 Lease. But the Plaintiffs' allegations of use are razor thin. Only three Plaintiffs—Buzzell, Caruso, and Towle—allege ever having used the land, but they provide no details concerning that use, such as how many times they used the land, when they used the land, or even whether "the land" refers to the leased area or some other portion of the public lots at issue.[24] Plaintiffs accordingly ask the Court to adopt a rule whereby a plaintiff may challenge a state land use decision through MAPA and Rule 80C where that plaintiff has no direct interest in the land at issue, any abutting land, or even any land set forth in the same municipality, solely on the basis of the plaintiff's allegation that he used the land at least once at some unidentified point in the past. *Baxter* does not reflect any such rule, *Nergaard v. Town of*

[24] For instance, while Plaintiff Buzzell says he has worked as a commercial fishing and whitewater rafting guide "in and around the public reserved lands" at issue, the leased area does not contain any waterbodies. A.115; A.475; ARIII0233 . Plaintiffs' brief states they have used and plan to use the leased area in the future, but their Complaint contains no clear allegation in that regard.

Westport, 2009 ME 56, 973 A.2d 735, rejects it, and it would be difficult to set a lower bar for "particularized injury" under MAPA.

With respect to the legislator plaintiffs, Plaintiffs ask the Court to leap even farther, by recognizing for the first time the right of any legislator, solely by dint of his or her election to public office, to bring a legal action challenging an action of the executive. Plaintiffs cite no authority for the proposition underlying this proposed rule—that individual legislators have a right to vote on certain legislation that is personal to them—and no court, state or federal, ever has recognized it. Plaintiffs pin their argument on *Coleman v. Miller*, 307 U.S. 433, 440-41 (1939), asserting that *Coleman* supports the proposition that the legislators here have "a plain, direct and adequate interest in maintaining the effectiveness of their votes." Red Br. at 59 (quoting *Coleman*). But to the extent *Coleman* remains good law at all,[25] the Supreme Court has expressly limited its reach, explaining: "It is obvious . . . that our holding in *Coleman* stands (at most . . .) for the proposition that legislators whose votes would have been sufficient to defeat (or enact) a specific legislative Act have standing to sue if that legislative action goes into effect (or does not go into effect), on the ground that their votes have been completely nullified." *Raines v. Byrd*, 521 U.S. 811, 823-24 (1997); *see*

[25] There is good reason to believe *Coleman* no longer remains good law. *See*, *e.g., Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 858 (2015) (Roberts, C.J., dissenting) (observing that only two justices joined in *Coleman's* reasoning regarding standing, characterizing the holding as "[a] pretty shaky foundation for a significant precedential ruling . . . , quite arguably nothing but dictum," and concluding, "[t]he peculiar decision in *Coleman* should be charitably ignored").

also Crawford v. United States Dep't of Treasury, 868 F.3d 438, 453–54 (6th Cir. 2017) (discussing the exceptional nature of *Coleman*'s holding). Here, only a handful of members of the Maine Legislature stand before the Court, woefully shy of even the 1/3 vote needed to block the lease under Article IX, section 23.

Nor can Plaintiffs evade the dispositive holding in *Raines* by claiming that case involved votes taken, rather than votes not taken. The distinction is irrelevant: the holding in *Raines* reflected the determination that legislators do not enjoy a personal right to vote on legislation and, accordingly, cannot bring suit with respect to that right. That *Raines* involved Article III standing is of no moment. *See* Red Br. at 59 n.34. The relevant inquiry is identical under both the Maine and federal standing analysis: whether a plaintiff has demonstrated a "particularized injury." *Lindemann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 15, 961 A.2d 538; *Raines v. Byrd*, 521 U.S. 811, 820 (1997). Indeed, the distinction between the federal and state framework cuts against legislative standing here. The *Raines* Court considered the prudential rule that Article III courts should not engage in "amorphous general supervision of the operations of government." *Raines*, 521 U.S. at 829 (quoting *United States v. Richardson,* 418 U.S. 166, 192 (1974)). The Maine Constitution's separation of powers clause, in contrast, mandates an even more restrictive approach. *See State v. Hunter*, 447 A.2d 797, 800 (Me. 1982) ("Because of Article III, section 2, the separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal

government."). The judiciary is not empowered or obligated to review any and all grievances brought by individual legislators. *See Brown v. State, Dep't of Manpower Affairs*, 426 A.2d 880, 884 (Me. 1981) (the judiciary has no "commission to roam at large reviewing any and all final actions of the executive branch.").

The consequences of recognizing legislative standing here are particularly grave, where the Plaintiffs seek to change the Legislature's relationship with the executive branch, without the Legislature's participation in this case. This dynamic casts an important light on the failed bills Plaintiffs discuss throughout their brief: Plaintiffs seek to enact legal rules through this litigation that they failed to pass through the Legislature. This Court should not serve as an alternative forum for failed legislative efforts or allow Plaintiffs to stand in the Legislature's shoes without warrant to do so.

CONCLUSION

The Court should affirm BPL's grant of the 2020 Lease upon finding either that Plaintiffs lack standing to challenge it or that Maine law did not require BPL to obtain legislative approval before granting it. Alternatively, the Court should affirm the 2020 Lease upon finding BPL appropriately determined the lease would not substantially alter the uses of the land at issue. In the event the Court affirms the substance of the Superior Court's orders, it nevertheless should remand the proceedings to BPL to conduct the substantial alteration analysis, without vacating the lease. The Court should not empower the Superior Court to usurp the authority of BPL and make the substantial alteration decision on its own.

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CERTIFICATE OF SERVICE

I, Nolan L. Reichl, Esquire, hereby certify that two copies of this Reply Brief of Appellants/Cross-Appellees Central Maine Power Company and NECEC Transmission LLC was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on January 24, 2022:

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