STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-21-212

CHRISTOPHER J. CAIAZZO,

Appellant

v.

SHENNA BELLOWS, in her capacity as Secretary of State for the State of Maine, and THOMAS SAVIELLO,

Appellees

On Appeal from the Cumberland County Superior Court
Docket No. AP-21-13

BRIEF OF APPELLANT CHRISTOPHER J. CAIAZZO

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INTRODUCTION

Petitioner-Appellant Christopher J. Caiazzo ("Appellant" or "Representative Caiazzo") requests that the Court vacate the decision by Secretary of State Shenna Bellows (the "Secretary") to write a single ballot question for the direct initiative entitled "An Act To Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands and Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region" (the "Initiative"). Section 906(6)(A) of Title 21-A of the Maine Revised Statutes requires the Secretary to prepare a separate ballot question for each issue in an initiative. As indicated by its title, the Initiative addresses three issues by (1) requiring legislative approval of "high impact electric transmission lines" anywhere in Maine; (2) requiring legislative approval of all transmission lines and certain other projects on public reserved lands; and (3) prohibiting the construction of high impact electric transmission lines in a single region of Maine. Because the Initiative addresses three issues, the Secretary violated Section 906(6)(A) by preparing a single, compound question.

STATEMENT OF FACTS

The NECEC Project. The New England Clean Energy Connect Project ("NECEC" or "Project") is a high voltage direct current transmission line that will bring 1,200 megawatts of clean hydropower from Québec into the Maine and New England power grid. *See NextEra Energy Res., LLC v. Pub. Utils. Comm'n*, 2020 ME 34,

¶¶ 1, 3, 227 A.3d 1117. The NECEC will lower the cost of electricity in Maine and across New England, and remove over 3.6 million metric tons of carbon emissions annually from the atmosphere by decreasing New England's reliance on fossil fuels. *Id.* ¶¶ 30 & n.14, 38. Despite approval by the Maine Public Utilities Commission ("MPUC") in an order affirmed by this Court, out-of-state electric generators that burn fossil fuels oppose the Project because it will reduce reliance on the more expensive and dirtier electricity they produce. *Id.* ¶¶ 5 n.5, 10-11, 43.

Efforts to Bar Construction of the NECEC Project. [1] Opponents of the NECEC have sought to bar construction of the Project via direct initiative.

In August 2019, Intervenor-Appellee Thomas Saviello filed an application for an initiative (the "2020 Initiative") that would have directed the MPUC to revoke the Certificate of Public Convenience and Necessity for the Project. App.22, ¶ 11. This Court, however, found the 2020 Initiative unconstitutional, and it was not placed on the ballot. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 2, 39, 237 A.3d 882.

Intervenor Saviello then filed an application for the present Initiative. App.41-44. The proponents' stated objective is to bar construction of the NECEC. App.60;

[1] The facts set forth herein include certain facts attested to in the Verified Petition. App.19-32. Petitioner filed a Motion for Additional Evidence requesting that the Superior Court supplement the record with the undisputed, verified facts stated in paragraphs 11, 14-16, 18-19, and 21 of the Petition, because the Secretary (1) was not required to conduct an adjudicatory hearing, and (2) failed to create a record that would permit effective judicial review, including particularly regarding the intent of petitioners, *see* 21-A M.R.S. § 906(6)(A)(3), by issuing a summary decision unsupported by factual findings. 5 M.R.S. § 11006(1)(D). The Superior Court properly found that it was appropriate to supplement the record under such circumstances. App.3; *see Blue Sky West, LLC v. Me. Revenue Svcs.*, 2019 ME 137, ¶ 21 & n. 11-12, 215 A.3d 812 (affirming decision to accept additional evidence by stipulation where the administrative record was "devoid of any factual findings" and the agency's decision was "stated summarily"). No party appealed this decision.

see App.24, ¶ 18 (stating that the Initiative is designed to "stop Central Maine Power's 145-mile transmission line"); App.23, ¶ 15 (stating that the Initiative allows Mainers "to express their choice about this project"); App.23, ¶ 16 (stating that the Initiative will give Mainers "a say when it comes to this for-profit project"); App.24, ¶ 19 (stating that the Initiative was launched to "stop CMP's . . . corridor project"); App.24-25, ¶ 21 (stating that the Initiative will give voters "the final say on CMP's . . . NECEC Corridor"). Consistent with the Initiative's title, App.50, proponents have described the Initiative as having "three parts" that would:

> "1. Require legislative approval for any high impact electrical transmission line (more than 50 miles). (Retroactive to 9/16/2020)
>
> 2. Put a geographic prohibition on building high impact electrical transmission lines in the Upper Kennebec region. (Retroactive to 9/16/2020)
>
> 3. Reaffirm the Maine Constitution's requirement that the Legislature approve leases, like CMP's, to cross public lands if they significantly alter the use of those lands. (Retroactive to 9/16/2014)"

App.24-25, ¶ 21; *see* App.24, ¶ 18. The Initiative will be placed on the ballot for the November 2021 election. App. 54-56; *see* Me. Const. art. IV, pt. 3, § 18.

The Initiative. As evidenced by the Initiative's title and summary as well as the statements of the Initiative's proponents, the Initiative, if enacted, would amend Titles 12 and 35-A of the Maine Revised Statutes in three major respects.

First, it would amend 12 M.R.S. § 1852(4) to require legislative approval of leases of public reserved lands by the Bureau of Parks and Lands ("BPL") for certain

uses. Section 1 of the Initiative would mandate that any lease of public reserved land by the BPL for transmission lines, landing strips, pipelines and railroad tracks is deemed to substantially alter the use of the lease land within the meaning of article IX, section 23 of the Maine Constitution and therefore requires 2/3 legislative approval. App.47. This requirement would apply retroactively to September 16, 2014. *Id.*

Second, it would amend 35-A M.R.S. § 3132 to require legislative approval for construction of "high impact electric transmission lines." Section 4 of the Initiative would mandate that high impact electric transmission lines may not be constructed anywhere in Maine without obtaining legislative approval, and that for any such lines crossing public lands designated by the Legislature pursuant to Title 12, section 598-A, such approval would require a 2/3 vote by the Legislature. App.47-48. This provision would apply retroactively to September 16, 2020. *Id.*

Third, Section 5 of the Initiative would amend 35-A M.R.S. § 3132 to ban the construction of "high impact electric transmission lines" in the "Upper Kennebec Region," an area, as defined in the Initiative, which includes approximately 43,300 acres of land in Somerset and Franklin Counties. App.48. This requirement would also apply retroactively to September 16, 2020. *Id.*[2]

These changes are described in the Initiative's summary, provided by the Revisor of Statutes and approved by the Secretary pursuant to 21-A M.R.S. § 901(5):

[2] The two major changes to Title 35-A are accompanied by another minor change, removing two references to a repealed statute relating to "high impact electric transmission lines." *See* App.47 (sections 2 and 3).

> This initiated bill requires the approval of the Legislature for the construction of high-impact electric transmission lines and provides that high-impact electric transmission lines crossing or utilizing public lands must be approved by 2/3 of all the members elected to each House of the Legislature. This initiated bill also prohibits the construction of high-impact electric transmission lines in the Upper Kennebec Region. These provisions apply retroactively to September 16, 2020, the date of filing of this initiative.
>
> This initiated bill also requires the approval of 2/3 of all the members elected to each House of the Legislature for any use of public lands for transmission lines and facilities and certain other projects. This provision applies retroactively to September 16, 2014.

App.48. Thus, the official summary describes the Initiative as having three parts.

The Ballot Question. On April 13, 2021, the Secretary released proposed language for the ballot question related to the Initiative. App.57. As required by 21-A M.R.S. § 905-A, the Secretary accepted public comments regarding the question's form and content for a 30-day period. *Id.* The Secretary received 119 comments on the proposed ballot question. App.40. Consistent with the Initiative proponents' stated intent, various comments made it clear that the purpose of the Initiative is to stop the NECEC. *See* R.66 ("The ongoing campaign to reject the corridor has always been 'No Corridor.' Therefore, the language on the ballot ought to reflect as much."), 104 ("Do you want the clean energy connect power line to run though the state of maine [*sic*] while our other southern border states have declined to do so. Yes or no?"); *see also id.* at 23, 28, 65, 75, 80, 85, 92, 98, 114, 119, 129, 139, 141, 175.

Representative Caiazzo submitted comments requesting that the Secretary prepare separate questions for the Initiative, because the plain language of 21-A

M.R.S. § 906(6)(A) requires the Secretary to prepare separate questions for a single initiative if the initiative addresses multiple issues.[3] App.58-60. He observed that separate questions are necessary because the Initiative involves three issues, when analyzed in light of the factors set forth in Section 906(6)(A). App.59-60. Finally, he provided the Secretary with proposed wording for three separate questions. App.60.

On May 24, 2021, pursuant to 21-A M.R.S. § 905-A, the Secretary released the final wording for the ballot question related to the Initiative. The Secretary prepared a single question. The Secretary determined that the question will be as follows:

> *Do you want to ban the construction of high-impact electric transmission lines in the Upper Kennebec Region and to require the Legislature to approve all other such projects anywhere in Maine, both retroactively to 2020, and to require the Legislature, retroactively to 2014, to approve by a two-thirds vote such projects using public land?*

App.40. The Secretary issued no explanation addressing Petitioner's proposed questions, or explaining the rationale for her determination. *Id.*

Subsequent proceedings. After Representative Caiazzo appealed, the Superior Court affirmed the Secretary's determination. App.5-18. The Superior Court interpreted Section 906(6)(A) as simply requiring the Secretary to suggest to initiative petitioners that there should be a separate question for each issue in an initiative, and granting initiative petitioners the unfettered right to decide whether the

[3] Other commenters also requested separate questions because the Initiative presents "3 separate issues." R.54; *see id.* at 69 ("The question is confusing. It sounds like you are asking for at least 3 separate things. I should be able to vote for part 1, against part 2, and not vote at all on part 3. Make this one question per issue to allow a constitutionally valid vote."); *id.* at 113 ("I do not like the fact that the specific banning of the electric transmission lines is lumped in with the voting on projects that use public lands. I would prefer them to be separate.").

initiative will in fact be presented to voters via separate questions. App.14. Representative Caiazzo filed a timely notice of appeal of the Superior Court's order.

STATEMENT OF ISSUES PRESENTED

I. Whether the plain language of 21-A M.R.S. § 906(6)(A) not only requires the Secretary to give an initiative applicant notice of the possibility that separate questions may be necessary but also requires the Secretary to then prepare separate questions for each issue in the initiative, consistent with the Secretary's constitutional and statutory obligation to prepare the form of ballots and write ballot questions?

II. Whether the Initiative addresses three issues, thus requiring separate questions, as described in the Initiative's title, summary, and text as well as the statements of the Initiative's proponents?

SUMMARY OF ARGUMENT

Under the plain language of Section 906(6)(A), the Secretary is required to prepare separate ballot questions for each issue addressed in an initiative. The Secretary construes Section 906(6)(A) as giving initiative petitioners the unrestricted right to reject the use of separate questions for an initiative – even though the obligation to prepare ballot questions is lodged with the Secretary, not initiative petitioners, by the Constitution and by statute. This constitutes an error of law. Because of this error, the Secretary never considered the criteria set out in Section 906(6)(A) for determining when an initiative addresses multiple issues (and thus requires separate questions). Her *post hoc* assessment of those criteria suffers from

additional legal flaws. The Court must correct these errors, and enforce the important voter protections provided by Section 906(6)(A), which – properly construed – guarantees voters the right to consider each issue in an initiative on its own merits.

Section 906(6)(A) unambiguously requires the Secretary to take two actions: (1) provide notice to a voter applying for an initiative petition if it is possible that separate questions may be required, based on the draft language of the initiative; and (2) subsequently prepare separate questions for each issue in the initiative, after the initiative language is finalized. The first sentence of subsection 6(A) states: "[T]he Secretary of State shall advise petitioners that the proper suggested format for an initiative question is a separate question for each issue." 21-A M.R.S. § 906(6)(A). This sentence requires the Secretary to provide notice to the voters applying for an initiative petition if the Secretary believes the proposed initiative language may require separate questions. This notice is to be provided during the statutorily-mandated process for revising the initiative, at a time when the need for separate questions is still "suggested" – that is, not yet more than a possibility. The second sentence then provides criteria to use "[i]n determining whether there is more than one issue, each *requiring* a separate question." *Id.* (emphasis added). This sentence provides that the Secretary must prepare separate questions if there is more than one issue in the initiative, as finally worded. The word "requiring" is mandatory, leaving no option as to whether to prepare separate questions if an initiative addresses multiple issues. This language is not reasonably susceptible to different interpretations, and the

Secretary's interpretation – which essentially reads Section 906(6)(A) out of the law by giving unreviewable discretion to initiative petitioners – thus constitutes legal error.

Because the Secretary believes that initiative proponents can exercise a veto over the use of separate ballot questions, it is apparent that the Secretary never assessed the criteria set forth in Section 906(6)(A). Applying those criteria as written supports the conclusion that the Initiative addresses multiple issues. As evidenced by the Initiative's title, summary, text, and the proponent's own statements, the Initiative has three major aspects. A voter would reasonably have different opinions on these three parts of the Initiative; having more than one question would help voters better understand the legal changes wrought by the Initiative; and the Initiative's three major provisions are severable and can be enacted or rejected separately without negating the proponent's intent to stop construction of the NECEC. Accordingly, the Secretary erred by failing to prepare three questions for the Initiative.

ARGUMENT

I. The Court reviews the Secretary's legal conclusions *de novo*, and no deference is due when the agency chooses not to make factual findings.

As a challenge to the Secretary's determination regarding the wording of a ballot question, this action is "conducted in accordance with the Maine Rules of Civil Procedure, Rule 80C, except as modified by [Section 905]." 21-A M.R.S. § 905(2). Rule 80C provides that this Court reviews the agency action pursuant to 5 M.R.S. § 11007(2)-(4). *See* M.R. Civ. P. 80C(c). Under Section 11007(4), reversal or

modification of the agency order is appropriate if, among other reasons, it is "[i]n violation of constitutional or statutory provisions," "[a]ffected by . . . error of law," "[u]nsupported by substantial evidence on the whole record," or "[a]rbitrary or capricious or characterized by abuse of discretion." 5 M.R.S. § 11007(4)(C).[4]

Because the Superior Court acted as an intermediate appellate court, this Court employs these standards to review the Secretary's decision directly. *See McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933; 21-A M.R.S. § 905(3). The Court reviews the Secretary's decision for "abuse of discretion, error of law, or findings not supported by the evidence." *Bankers Life & Cas. Ins. Co. v. Sup't of Ins.*, 2013 ME 7, ¶ 15, 60 A.3d 1272. "Questions of law are subject to de novo review." *Doe v. Dep't of Health & Human Servs.*, 2018 ME 164, ¶ 11, 198 A.3d 782. An agency abuses its discretion if it "exceeded the bounds of the reasonable choices available to it, considering the facts and circumstances of the particular case and governing law." *Stein v. Me. Criminal Justice Acad.*, 2014 ME 82, ¶ 23, 95 A.3d 612 (quotation marks omitted). Misapplication of the law to facts is reversible error. *Sinclair Builders, Inc. v. Unemployment Ins. Comm'n*, 2013 ME 76, ¶ 10, 73 A.3d 1061. Moreover, when an agency chooses not to make factual findings because it believes it has no legal

[4] As the Superior Court concluded, Section 905 does not modify this framework for purposes of this case. App.10. Section 905 does establish a test governing challenges to the *clarity* of ballot questions. *See* 21-A M.R.S. § 905(2) (establishing that the ballot question must be understandable and not misleading). This standard, however, does not apply to challenges to the *number* of ballot questions under Section 906(6)(A). Otherwise, the requirements of Section 906(6)(A) would be entirely subsumed by Section 905(2). Petitioner does not challenge the clarity of the ballot question under Section 905(2), but only brings a challenge to the number of ballot questions under Section 906(6)(A). The standards of Rule 80C therefore apply.

obligation to act, there is no cause to apply deference for the simple reason that there are no findings to which to defer. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943) (courts review an agency decision based on the actual grounds for the decision).

II. Pursuant to Section 906(6)(A), the Secretary must prepare a separate question for each issue in an initiative.

The Secretary is required by law to prepare the wording of a ballot question for a direct initiative according to certain requirements. *See* 21-A M.R.S. § 906. For instance, the Secretary must "write the question in a clear, concise and direct manner," *id.* § 906(6)(B), and must phrase the question "so that an affirmative vote is in favor of the initiative," *id.*§ 906(6)(C). Moreover, the Secretary must also prepare multiple ballot questions for initiatives involving multiple issues. Section 906(6)(A) states:

> **Wording of ballots for people's veto and direct initiative referenda.** Ballots for a statewide vote on a people's veto referendum or a direct initiative must set out the question or questions to be voted on as set forth in this subsection.
>
> A. The Secretary of State shall advise petitioners that the proper suggested format for an initiative question is a separate question for each issue. In determining whether there is more than one issue, each requiring a separate question, considerations include whether:
>
> (1) A voter would reasonably have different opinions on the different issues;
> (2) Having more than one question would help voters to better understand the subject matter; and
> (3) The questions are severable and can be enacted or rejected separately without negating the intent of the petitioners.

Id. § 906(6)(A). As discussed below, the wording of Section 906(6)(A) is clear: each issue in a direct initiative "requir[es] a separate question." *Id.*

A. When interpreting a statute *de novo*, the Court must construe the language of that statute according to its plain meaning.

This case presents a question of first impression regarding the interpretation of Section 906(6)(A).[5] In an 80C proceeding, courts interpret statutes *de novo* as a matter of law to give effect to the intent of the Legislature. *Reed v. Sec'y of State*, 2020 ME 57, ¶ 14, 232 A.3d 202. Interpretation "begin[s] with the statutory terms," *Corinth Pellets, LLC v. Arch Specialty Ins. Co.*, 2021 ME 10, ¶ 21, 246 A.3d 586, viewed in the statute's context, *Sunshine v. Brett*, 2014 ME 146, ¶ 13, 106 A.3d 1123. Where the statute's meaning is plain, the inquiry is at an end: the court must "construe the statute in accordance with its plain meaning." *State v. Adams*, 2014 ME 143, ¶ 8, 106 A.3d 413; *see NextEra*, 2020 ME 34, ¶ 22, 227 A.3d 1117. A statute is ambiguous only if it is "reasonably susceptible to more than one interpretation." *NextEra*, 2020 ME 34, ¶ 22, 227 A.3d 1117. Accordingly, if a court, "employing traditional tools of statutory construction," finds that the statute has a single reasonable meaning, that meaning "must be given effect." *Cobb v. Bd. of Counseling Prof'ls Licensure*, 2006 ME 48, ¶ 13, 896 A.2d 271 (quotation marks omitted).

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[5] Section 906(6)(A) has not previously been construed by Maine courts. It was raised in *Lockman v. Secretary of State* but not applied because that case dealt with a competing measure; Section 906(6)(A) has "no application to a competing measure." 684 A.2d 415, 420 n.10 (Me. 1996). It is not known whether any Secretary of State has ever applied Section 906(6)(A), or whether any voter has asked the Secretary to do so. Accordingly, while the Secretary has noted that no prior initiative has ever been presented in the form of multiple questions, the reasons for that anomaly are unknown. It is entirely possible that the office of Secretary of State has simply failed to apply the law; the Secretary has identified no instance in which it has provided the notice to initiative applicants that even she concedes is required under the statute, and (as discussed *infra*) it is apparent that former Secretary of State Dunlap did not follow the law for this Initiative by providing such notice to Intervenor. Moreover, while the Secretary has baldly asserted that prior initiatives have involved multiple issues, she has not presented any analysis on whether those initiatives satisfy the criteria of Section 906(6)(A).

Thus, "[i]f the statute is unambiguous, [courts] do not defer to the agency's construction, but . . . interpret the statute according to its plain language." *Cobb*, 2006 ME 48, ¶ 13, 896 A.2d 271; *see Lippitt v. Bd. of Certification for Geologists and Soil Scientists*, 2014 ME 42, ¶ 17, 88 A.3d 154. When the statute is ambiguous, courts will "defer to the interpretation . . . by an agency charged with its implementation" – but only "as long as the agency's construction is reasonable." *Conservation Law Found. v. Dep't of Envtl. Prot.*, 2003 ME 62, ¶ 23, 823 A.2d 551; *see also Houlton Water Co. v. Pub. Utils. Comm'n*, 2014 ME 38, ¶ 33, 87 A.3d 749 (declining to defer to agency interpretation); *Fuhrmann v. Staples Office Superstore East, Inc.*, 2012 ME 135, ¶ 29, 58 A.3d 1083 (same).

B. Section 906(6)(A) plainly requires the Secretary to present separate questions to voters when an initiative addresses multiple issues.

The plain language of Section 906(6)(A) unambiguously requires the Secretary to prepare separate questions for each issue in a direct initiative. Section 906 places on the Secretary – and no other party – the obligation to prepare ballots for initiative questions. 21-A M.R.S. § 906 ("The Secretary of State shall prepare the ballots for referendum questions . . . ."). Subsection 6 then sets out certain parameters, including not only clarity and phrasing requirements, *see id.* § 906(6)(B), (C), but also a separate question requirement, *see id.* § 906(6)(A). It unequivocally contemplates multiple questions for a single initiative by stating that "[b]allots for a statewide vote on . . . *a* direct initiative must set out the question *or questions* to be voted on as set forth in this subsection." *Id.* § 906(6) (emphasis added). In turn, subsection 6(A) provides that the

Secretary *must* prepare a separate question for each issue in an initiative. Subsection 6(A) first requires the Secretary to provide notice to the petitioners of the potential need to prepare "a separate question for each issue in an initiative," *id.* § 906(6)(A) (requiring the Secretary to advise petitioners of "the proper suggested format" for the ballot), and then provides criteria for "determining whether there is more than one issue, *each requiring a separate question*," *id.* (emphasis added). Section 906(6)(A) thus requires – not just permits – separate questions for a multi-issue initiative.[6]

Read in this straightforward manner, Section 906(6)(A) serves as an important voter protection provision. The "broad purpose of the direct initiative is the encouragement of participatory democracy," *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983), and statutes must be construed liberally to facilitate that right, *see Payne v. Sec'y of State*, 2020 ME 110, ¶ 29, 237 A.3d 870. Because Maine does not have a single subject requirement for initiatives, *see Lockman*, 684 A.2d at 420, ensuring that voters are presented with a separate question for each issue in an initiative protects the rights of voters to be informed of, and have a say on, each issue included in an initiative. Including multiple issues in a single question, without the opportunity for separate consideration, disenfranchises voters by subjecting them to logrolling and thereby forcing them to consider distinct legal changes as a single undifferentiated whole.

[6] This requirement is consistent with the Maine Constitution, which contemplates multiple questions for one initiative and authorizes enabling legislation. Me. Const. art. IV, pt. 3, § 20 (providing that the "full text of *a measure* submitted to a vote of the people . . . need not be printed on the official ballots" but that "the Secretary of State shall prepare the ballots in such form as to present the question *or questions* concisely and intelligibly"). Section 906(6)(A) is a valid exercise of the authority delegated to the Legislature.

1. The first sentence of Section 906(6)(A) requires the Secretary to notify an initiative applicant regarding the proper suggested format for the ballot question.

The first sentence of Section 906(6)(A) is unambiguous: at the time the Secretary reviews the initiative language, the Secretary must give petitioners notice that, based on that draft language, the ballot format may include more than one question for the initiative. 21-A M.R.S. § 906(6)(A) (the Secretary must "advise petitioners that the proper suggested format for an initiative question is a separate question for each issue"). Under Maine law, a voter must submit a written application to the Secretary of State for an initiative. 21-A M.R.S. § 901. The Secretary is then required to review the proposed law, and may either reject the application under certain circumstances or modify the initiative language. *Id.* § 901(3-A). The applicant may then submit a revised draft, and must give final consent to the initiative language for a petition to be issued for signature gathering. *Id.* The first sentence of Section 906(6)(A) works seamlessly with this statutory review process. When the Secretary reviews and revises the proposed law, the Secretary must – if the initiative appears to address multiple issues – also provide notice that it is possible that the ballot will include "a separate question for each issue." *Id.* § 906(6)(A).[7]

[7] This is the only logical time for notice to be provided, as it otherwise would have no practical effect; the initiative language would already be final. While former Secretary Dunlap failed to provide the required notice, App.45-46, that failure does not render separate questions improper. The applicant is "presumed to know the law," *Burggraff v. Baum*, 1998 ME 262, ¶ 8, 720 A.2d 1167, including Section 906(6)(A). It would make no sense to conclude that the initial failure excuses the need for separate questions, because that would permit the Secretary to render Section 906(6)(A) of no effect by simply not providing notice. This failure would not be generally known and may be preferred by initiative proponents, and thus may never be

Contrary to the Superior Court's conclusion, App.13, this reading gives full meaning to the word "suggested." The primary definition of "suggest" is "to mention or imply as a possibility." *See Suggest*, Merriam-Webster Dictionary, https://www.merriam-webster.com/dictionary/suggest. At the time of the notice, the Secretary would simply be mentioning a *possible* format – *i.e.*, the "proper suggested format" – of the ballot for two reasons. First, the applicant has the opportunity to revise the draft initiative language to narrow it to a single issue. The "suggested" format may never be used because the applicant may avoid it through revision. Second, at the time the Secretary provides notice, the format of the ballot question is not final – it is possible, tentative, or, as the statute states, "suggested." The Secretary might change her view regarding the scope of the initiative between the time notice is provided to the applicant and the time the ballot format is finalized.[8]

Thus, the first sentence of Section 906(6)(A) need not be read to render the use of separate questions discretionary, at petitioners' choice. Indeed, for the reasons explained in Parts II.B.2-3 below, Appellant's interpretation is necessary because it both gives meaning to the word "requiring" in the second sentence of subsection 6(A) and provides the only reasonable interpretation of subsection 6(A) as a whole.

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challenged. If the Secretary's failure to provide notice is such a fundamental error that it undermines the entire petition process, then the appropriate remedy would be to permit Intervenor to start the process again.

[8] The fact that the statute does not require the Secretary to provide petitioners with suggested *wording* of the statute, just the suggested *format*, does not mean that Appellants' reading renders the word "suggested" mere surplusage. App.13. Neither the ballot's wording nor its format are final at the time a voter files an initiative application. When the Secretary prepares the final language of the ballot question(s), the Secretary also determines the proper format for the ballot by determining the number of questions.

2. The second sentence of Section 906(6)(A) requires the Secretary to prepare a separate question for each issue.

When the first sentence of Section 906(6)(A) is correctly understood, the meaning of the remainder of the statute is plain. The second sentence of Section 906(6)(A) states that, "[i]n determining whether there is more than one issue, each *requiring* a separate question, considerations include" three criteria. 21-A M.R.S. § 906(6)(A). This language places an obligation on the Secretary to determine whether there are multiple issues in an initiative and, if there are, mandates separate questions.

First, contrary to the Superior Court's conclusion, the second sentence of Section 906(6)(A) contemplates that the Secretary, not petitioners, must determine whether an initiative addresses more than one issue. *See* App.13-14. Section 906 states that the "*Secretary of State* shall prepare the ballots for referendum questions according to" the statute's requirements, including subsection 6(A). 21-A M.R.S. § 906 (emphasis added). Thus, it is clear that Section 906 governs the Secretary's preparation of the ballot, unless otherwise stated, and does not delegate ballot preparation to any other party. Further, there is no question that subsection 6(A) addresses how ballots are prepared. Subsection 6, titled "[w]ording of ballots for people's veto and direct initiative referenda," states: "Ballots for a state wide vote on a . . . direct initiative must set out the question or questions to be voted on as set forth in this subsection." *Id.* § 906(6). This prefatory language relates not only to paragraphs (B), (C), and (E), but also (A). Subsection 6(A), therefore, governs the

form and wording of ballots. In context, the second sentence of Section 906(6)(A), although using the passive voice, addresses how the Secretary prepares ballots.

Second, if an initiative addresses more than one issue, the second sentence of subsection 6(A) imposes a mandatory obligation on the Secretary to prepare separate questions. Maine law treats the word "requirement" as mandatory. Section 71(9-A) of Title 1 equates the word "require" with the words "must" or "shall" by defining the latter two words as a "requirement." 1 M.R.S. § 71(9-A) ("'shall' and 'must' are terms of equal weight that indicate a mandatory duty, action *or requirement*" (emphasis added)). Other authorities are in accord. *See Alcala v. Marriott Int'l, Inc.*, 880 N.W.2d 699, 707 (Iowa 2016) ("'require' is mandatory"); *State v. Ratchford*, 457 N.E.2d 878, 882 (Ohio Ct. App. 1982) (same); *Coates v. Coates*, 355 S.W.2d 260, 262 (Tex. Civ. App. 1962) (same); *Requirement*, Black's Law Dictionary (11th ed. 2019) ("1. Something that must be done because of a law or rule; something legally imposed, called for, or demanded; an imperative command"); *Require*, Merriam-Webster Dictionary, https://merriam-webster.com/dictionary/require ("to claim or ask for by right and authority" or "to impose a compulsion or command on"). Thus, if the Secretary concludes that there are multiple issues, separate questions become necessary.[9]

[9] This requirement cannot be rendered contingent by reading into the statute a two-step process that involves determining, first, whether there is more than one issue and, second, whether each issue requires a separate question, as the Secretary argued below. That is not how the statute is written. If it were a two-part determination, the sentence would read: "[I]n determining whether there is more than one issue, and whether each issue requires a separate question, considerations include whether . . . ." It does not so read. Instead, the sentence, when read as a whole, makes it plain that the sole determination to be made is "whether there is more than one issue," and that each such issue "requir[es] a separate question." 21-A M.R.S. § 906(6)(A).

Moreover, giving the word "requiring" full effect as a mandatory term is not undermined by fact that the word "suggested" is used in Section 906(6)(A), but not Section 906(6-A). App.15-16. Section 906(6)(A) governs the Secretary's determination whether to prepare separate questions for direct initiatives, while Section 906(6-A) governs the Legislature's determination whether to prepare separate questions for statutory referenda. 21-A M.R.S. § 906(6)(A), 906(6-A). The word "suggested" was used in subsection 6(A) and not in subsection 6-A for a simple reason: advance notice of the separate question requirement must be provided by the Secretary to an applicant during the initiative process because it is the Secretary rather than the applicant who writes questions for initiatives, but the Legislature need not provide notice to anyone because the Legislature itself writes the statutory referenda questions. *See Lockman*, 684 A.2d at 418. Because the Legislature has no need to give notice to itself, it is unnecessary for the first sentence of subsection 6-A to require preliminary notice. By contrast, there is good reason to require notice of the possibility of separate questions early in the initiative process. Accordingly, a comparison between Section 906(6)(A) and Section 906(6-A) does not support the inference that the former is discretionary while the latter is mandatory.

3. Interpreting Section 906(6)(A) to give petitioners a veto over the preparation of separate ballot questions is unreasonable.

Section 906(6)(A) does not mean that the Secretary must simply give petitioners the opportunity to decide whether to accept separate questions. Such an

unfettered veto power would be subject to abuse, as it would empower initiative proponents to shoehorn multiple issues into a single initiative while simultaneously barring Maine voters from considering each issue on its own merits. The people's legislative power should not be so handicapped. Because of the importance of the right of popular legislation, *see McGee*, 2006 ME 50, ¶ 25, 896 A.2d 933, the initiative process must be protected. The Secretary plays a key role in protecting that process, including by preparing ballot questions. *See id.* ¶ 57 (Clifford, J., concurring). Delegating this responsibility to initiative proponents would improperly privilege their political calculations over Maine voters' right to meaningfully exercise their lawmaking powers. In any event, this interpretation fails for several reasons.

a. The Secretary's interpretation would conflict with the Constitution and other statutes.

A statute must be interpreted, if possible, in harmony with the Constitution and other statutes. *See MacImage of Me., LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 26, 40 A.3d 975 (courts must adopt "a reasonable interpretation of a statute that will satisfy constitutional requirements"); *Preti Flaherty Beliveau & Pachios LLP v. State Tax Assessor*, 2014 ME 6, ¶ 11, 86 A.3d 30 (statutes must be read together "to obtain a harmonious result"). The Secretary's and Superior Court's interpretations violate this rule.

The power to write ballot questions is constitutionally vested in the Secretary, as part of the Secretary's gatekeeping function in protecting the integrity of the initiative process. *See* Me. Const. art. IV, pt. 3, § 20 ("[T]he Secretary of State shall

prepare the ballots in such form as to present the question or questions concisely and intelligibly."). This constitutional provision does not *just* require concise and intelligible questions, as the Superior Court assumes, *see* App.16; more fundamentally, it also delegates to the Secretary full responsibility for ballot preparation. This delegation has been effectuated by statute. 21-A M.R.S. § 901(4) ("The ballot question for an initiative . . . must be drafted by the Secretary of State."); *id.* §§ 905-A, 906. The Secretary's interpretation, however, would give initiative proponents a veto power over separate questions – a critical determination in preparing the ballot form and ballot questions – although she purports to reserve the power to ultimately decide whether multiple questions are appropriate. Even more starkly, the Superior Court's interpretation would give the Secretary *no* oversight over this determination. *See* App.14. Neither conclusion can be harmonized with the vesting of the obligation to prepare ballots and write questions in the Secretary of State.

The decision whether to write separate questions is an election administration function of the type delegated to the Secretary. In preparing separate questions, the Secretary is neither altering the initiative language – the Secretary still must send the entire initiative to the ballot, Me. Const. art. IV, pt. 3, § 18(2) – nor undermining the voters' right to consider the entire initiative. It is the voters, not the Secretary, who decide whether to enact or reject the initiative as a whole or piecemeal[10] through their

[10] The issue regarding what happens if less than all questions are approved by voters is not presented in this case, and is not ripe for adjudication.

votes on the separate questions. Further, by preparing separate questions, the Secretary would not be making a substantive change to the law without petitioners' input. As set forth above, the plain language of the first sentence in Subsection 906(6)(A) requires notice to the petitioners, and such notice can be provided *at a time when petitioners can change the language of the initiative*. The applicant has the choice at that time to change course, or proceed on the understanding that the Secretary may later make the final determination that separate questions are required.

Moreover, because the responsibility to prepare the ballot is vested in the Secretary, reading the statute as granting petitioners the right to exercise a veto over the use of separate questions cannot be rationalized on the basis that it gives petitioners the same power as the Legislature. The adoption of the initiative amendment did not vest in the people all powers vested in the Legislature. *See Avangrid Networks, Inc.*, 2020 ME 109, ¶ 28, 237 A.3d 882. As is relevant here, the initiative power does not include the power to determine the form of ballots. Me. Const. art. IV, pt. 3, § 20. Thus, the Constitution dictates that the Legislature has greater power to draft ballot questions than initiative proponents.

b. The Secretary's interpretation would render Section 906(6)(A) of no effect and lead to absurd results.

Interpreting Section 906(6)(A) as giving petitioners discretion over the use of separate questions would not only conflict with the Constitution and other statutes, but would also render the provision meaningless. A statute must be construed to

avoid such a result. *See Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 13, 17 A.3d 667; *Schaefer v. State Tax Assessor*, 2008 ME 148, ¶ 13, 956 A.2d 710. If Section 906(6)(A) means that petitioners can simply choose not to utilize separate questions, both the word "requiring" and the criteria provided in the second sentence of that subsection are superfluous. The Secretary would have to make a suggestion to petitioners, but to no real purpose. The Secretary could simply fail to give the required notice (the Secretary did not give notice here, and it is not clear whether any Secretary has ever done so), and that failure would have no consequence and would effectively be non-reviewable. And even if the Secretary did give notice, there is no enforcement mechanism to ensure that petitioners consider whether to allow separate questions, much less that they properly apply the statute's criteria if they chose to do so. Practically, therefore, separate questions would no longer be required even if the criteria are satisfied. The statute would be reduced to complete irrelevance. This is not a reasonable interpretation of a legislative enactment.[11]

The interpretation urged by the Secretary and adopted by the Superior Court would also result in patently absurd results. In the Superior Court, the Secretary proposed a hypothetical initiative that, in her view, addresses multiple issues – namely, an initiative that regulates the construction of transmission line projects and also

[11] The same flaw would exist if Section 906(6)(A) were interpreted to give the Secretary, as opposed to petitioners, complete discretion to prepare separate questions – as Intervenor Saviello urged below. Absent the need to even consider the statutory criteria in determining whether to prepare separate questions, the Secretary's discretion would be essentially unreviewable. This interpretation must be avoided, as it would render all the text following the first sentence of Section 906(6)(A) meaningless.

modifies the minimum wage. Notably, however, under the Secretary's interpretation of Section 906(6)(A), the Secretary *could not* prepare separate questions even for that hypothetical initiative if the proponents declined to accept separate questions. It is unreasonable to conclude that the Secretary's important role in protecting the vitality of the initiative process is so easily evaded. *See McGee*, 2006 ME 50, ¶ 57, 896 A.2d 933 (Clifford, J., concurring) (noting the Secretary's significant role "at every step of the initiative process"). The statute must have meaning.

c. The Secretary's reading would lead to the conclusion that Section 906(6)(A) has been implicitly amended.

The Secretary's interpretation also artificially creates tension with other provisions in Title 21-A. The Secretary argued below that the enactment of Section 905-A in 2007 – after the adoption of Section 906(6)(A) in 1993 – created a conflict with Section 906(6)(A). There is no real tension, however, because the timing of finalizing the ballot question, which changed in 2007, has never been relevant to the Secretary's two obligations under Section 906(6)(A). Not only is the purported tension artificial, but interpreting the statutes to conflict would lead to the improper conclusion that, in adopting Section 905-A, the Legislature both implicitly amended and, as a practical matter, implicitly repealed Section 906(6)(A).

As an initial matter, there is no need to read Section 905-A as being in conflict with Section 906(6)(A). When the current version of Section 906(6)(A) was enacted in 1993, the Secretary was required to finalize the ballot question(s) for an initiative

within 10 days of the applicant's consent to the final language of the initiative and was further required to print the ballot question(s) on the initiative petitions. In 2007, the law was changed to require the Secretary to finalize the ballot question later, after the Secretary certifies the initiative and submits it to the Legislature and the Legislature adjourns *sine die* without adopting it. *See* P.L. 1983, ch. 410, § 2; P.L. 2007, ch. 234, §§ 2, 6. The Secretary argued below that the 2007 change renders the operation of Section 906(6)(A) problematic because (1) the Secretary no longer provides early notice to the applicant regarding the ballot question, and (2) voters are no longer provided notice that they were being asked to support an initiative that would be presented via separate questions. Both arguments are erroneous.

First, the Secretary incorrectly assumes that the change to the date for finalizing ballot questions means that the Secretary no longer has to engage with the applicant regarding the ballot question format prior to circulation of the initiative. To the contrary, Section 906(6)(A) has always been, and remains, predicated on the notion that notice must be provided to the applicant during the process of revising the initiative language – which occurs before the petition forms for the initiative are circulated. The 2007 change thus had no practical impact on the Secretary's obligation under the first sentence of Section 906(6)(A). Both before and after 2007, the format of the ballot question would have been tentative at the time of the notice. Accordingly, the Secretary has at all times made a final determination as to whether separate questions are required after notice is given – a determination that is now

completed later, but that still allows for input by the initiative applicant. P.L. 2007, ch. 234, §§ 2, 6. In short, the only difference post-2007 is the precise timing that the Secretary's preliminary judgment is made final, and that timing is irrelevant, because notice of the potential for separate questions is to be provided earlier in the process.

Second, the Secretary's argument that the two statutes conflict improperly imbues the pre-2007 requirement to print the final ballot questions on the initiative petitions with great significance, when in fact that requirement has always been irrelevant to Section 906(6)(A). As the Secretary conceded below, at the time the Legislature adopted Section 906(6)(A), the requirement to give notice to "petitioners" only required notice to the applicant. Sec'y Br. at 19. Indeed, before 2007, the decision to use more than one question would have been made before initiative petitions were circulated. Thus, although the Secretary was once required to inform petition signatories that separate questions would be used by placing the ballot questions on the petition form, that knowledge had no statutory relevance because the requirements of Section 906(6)(A) would have already been fulfilled by notice to the applicant during the initiative revision process. Likewise now, the intent of petition signatories has no statutory relevance, because the requirements of Section 906(6)(A) are *still* fulfilled prior to circulation of the initiative petitions by notice to the applicant.

Because there is no real tension between Section 905-A and Section 906, it is unnecessary to read such tension into the statute by now insisting that notice must be given to *all* signatories of an initiative petition, or that the intent of *all* signatories is

relevant to the criteria in Section 906(6)(A). That assertion would rest on the notion that the 2007 change to Title 21-A implicitly amended Section 906(6)(A). Implied amendment is disfavored. *See* 1A Sutherland, *Statutory Construction* § 22:13 (7th ed.). "[T]he intent of the legislature to amend a statutory provision by implication must be clear and manifest, and . . . implied amendments cannot arise merely out of supposed legislative intent in no way expressed." 82 C.J.S. *Statutes* § 291. As has been observed, the Secretary has admitted that, when Section 906(6)(A) was enacted, the only "'petitioner' whose intent needed to be considered under 6(A)(3) was that of the applicant." Sec'y Br. at 19. In adopting Section 905-A, the Legislature did not express any intent – much less clear intent – to amend Section 906(6)(A) to require notice to all petition signatories, or to require consideration of all signatories' intent. Accordingly, even after 2007, it is still only the applicant that matters.

This conclusion is reinforced by the fact that, as a practical matter, reading Section 905-A to amend Section 906(6)(A) would result in implicit statutory repeal of Section 906(6)(A). Implied repeal, like implied amendment, is strongly disfavored. *MSAD 6 Bd. of Dirs. v. Town of Frye Island*, 2020 ME 45, ¶ 27, 229 A.3d 514 ("Repeal of legislation by implication is disfavored, and we do not apply the concept of implicit repeal in doubtful cases. . . . Implicit repeal will not be found if the statutes can be read in harmony with one another."). The Secretary frankly acknowledged below that her interpretation likely would never allow for separate questions because, if the intent of all petition signatories is now relevant, the fact that voters will *always* sign the

petition without seeing separate questions on the form will *always* mean that they prefer a single question. But there is no need to effectively abrogate Section 906(6)(A)'s requirement that separate questions be prepared for multi-issue initiatives if one simply adopts the reasonable, straightforward interpretation that – from its adoption in 1993 to the present – the first sentence of Section 906(6)(A) refers to notice provided to the applicant during the initiative revision process.

4. The history of Section 906(6)(A) confirms its plain meaning.

Because Section 906(6)(A) is unambiguous, it is unnecessary to consider any legislative history. *Pennings v. Pennings*, 2002 ME 3, ¶ 13, 786 A.2d 622 (legislative history "should only be relied on when the meaning of the statute cannot be divined from its words"). Nevertheless, it is significant that giving Section 906(6)(A) its plain reading does no violence to the statute's manifest purpose to require separate questions for each issue presented in an initiative. *See Sunshine*, 2014 ME 146, ¶ 13, 106 A.3d 1123 (statute should be given plain meaning if not illogical). The history of Section 906 demonstrates that the Legislature made the Secretary's obligation under Section 906(6)(A) parallel to the Legislature's obligations under Section 906(6-A). In both instances, the Legislature has required a separate question for each issue.

Prior to 1993, Section 906 did not allow for multiple questions, but instead required one question in a standard format. As amended in 1987, Section 906 provided: "With respect to initiative referenda, the question shall be presented to the voters in substantially the following form: 'Do you favor the changes in Maine law

concerning (the subject matter of the law) proposed by citizen petition?"' P.L. 1987, c. 119. Thus, the statute expressly precluded the use of separate questions, and granted the Secretary no discretion in how to present the single initiative question.[12]

Section 906(6)(A) was adopted in its present form in 1993. The Legislature made two significant changes to Section 906 via L.D. 1488: it gave to the Secretary responsibility to prepare the question or questions, while requiring multiple questions for initiatives involving multiple issues. As originally proposed, Section 3 of L.D. 1488 delegated to the Secretary of State the responsibility to write a ballot "question or questions" for "a direct initiative." L.D. 1488, § 3 (116th Legis. 1993). It did not contain any criteria for determining whether separate questions must be prepared. Section 4 of the bill, by contrast, provided that "[t]he proper format for a statutory referendum enacted by the Legislature is a separate question for each issue" and established criteria for determining whether a referendum included "more than one issue." *Id.* § 4. The bill was then amended to make Section 3 (dealing with direct initiatives) mirror Section 4 (dealing with statutory referenda). The amendment introduced language requiring the Secretary to notify the proponents of an initiative that the Secretary must "prepare a separate question for each issue," utilizing the criteria used in Section 4 for determining whether "there is more than one issue, each

[12] The 1987 bill revised Section 906(6). The first version of Section 906(6) appeared in 1985, when the Legislature recodified the election laws. As adopted in 1985, Section 906 contemplated that the Secretary would draft a single question. Subsection 6 stated that "[b]allots for a statewide vote on people's veto and initiative questions must set out the question to be voted on in clear, concise and direct language." P.L. 1985, c. 161. The Secretary was given responsibility for preparing the question. *Id.*

requiring a separate question." Comm. Amend. A. to L.D. 1488, No. H-497 (116th Legis. 1993). The Legislature enacted the bill as amended. P.L. 1993, c. 352.

This history supports the plain meaning of Section 906(6)(A). As the 1987 and 1993 amendments to Section 906 show, the Legislature understands how to require a single ballot question for an initiative, but has chosen instead to require separate questions for multi-issue initiatives. The change to permit separate questions was significant, as the Legislature in 1987 had specified that only one question was permitted. Further, in 1993, the Legislature deliberately chose to make the process for preparing initiative questions consistent with the process for drafting statutory referendum questions by adopting the same criteria for both. In both instances, if the criteria supports the conclusion that there is "more than one issue, each requir[es] a separate question." *Id.* § 906(6)(A), 906(6-A). The Legislature's choice to make the first sentence of the two sections slightly different, through use of the word "suggested," simply reflects the fact that, for direct initiatives, the proposed statute and the related ballot question(s) are prepared by different actors and the possibility of separate questions must therefore be communicated at an early stage, unlike statutory referenda. *See supra* Part II.B.1. Ultimately, the second sentence of each section makes separate questions mandatory by using the word "requiring."[13]

[13] The Committee Amendment's Statement of Fact is consistent with this reading. It states that the amendment requires "the Secretary of State to advise petitioners on the proper suggested format for questions *following the outline of section 4 of the bill*." Comm. Amend. A to L.D. 1488, No. H-497, Statement of Fact (116th Legis. 1993) (emphasis added). This sentence makes it clear that the amendment was intended to

III. Because the Initiative addresses three issues, the Secretary erred by failing to prepare separate ballot questions.

Section 906(6)(A) establishes three criteria for "determining whether there is more than one issue, each requiring a separate question": whether (1) "[a] voter would reasonably have different opinions on the different issues," (2) "[h]aving more than one question would help voters to better understand the subject matter," and (3) "[t]he questions are severable and can be enacted or rejected separately without negating the intent of the petitioners." 21-A M.R.S. § 906(6)(A)(1)-(3). All three criteria unequivocally support the conclusion that the Initiative addresses more than one issue. Indeed, consistent with the title and summary of the Initiative, the Initiative's proponents have publicly stated that it has "three parts." App.24, ¶ 21.

Nevertheless, the Secretary prepared a single ballot question. App.40. This result cannot be justified under the statute's criteria. Recognizing this, Intervenor made no argument below that the criteria support preparing a single question.[14] The Secretary has, but only by articulating a rationale that is so skewed that it would never result in multiple ballot questions for an initiative. The Secretary's argument, notably, is purely *post hoc* – the Secretary declined to prepare separate questions because of her erroneous interpretation of the statute, not because she assessed these criteria. Thus,

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(1) provide notice to the applicant if multiple questions may be necessary, and (2) create mandatory criteria for the Secretary to make that determination, in the same manner section 4 of the bill did for the Legislature.

[14] Because Intervenor only referred to intent in his statement of facts and did not argue that the Initiative addresses a single issue, Intervenor has waived the argument. *See Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 906 A.3d 290 ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived." (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir. 1990)).

there are no factual findings for the Court to review deferentially. *See Chenery*, 318 U.S. at 87. In any event, the Secretary's *post hoc* rationale misapplies Section 906(6)(A), and thus constitutes error. *Sinclair Builders, Inc.*, 2013 ME 76, ¶ 10, 73 A.3d 1061.

A. A voter would reasonably have different opinions on the different issues addressed in the Initiative.

The first criterion under Section 906(6)(A) supports separate questions. The legal standard under this criterion is whether "*a* voter would *reasonably* have different opinions on different *issues*" in the Initiative. 21-A M.R.S. § 906(6)(A)(1) (emphasis added). As this language makes clear by referring to "a" voter's "reasonable" views, this is an objective, reasonable voter test. It does not require weighing of the relative likelihood that numerous voters *actually* have different opinions. Moreover, according to the statute's plain language, this test focuses on the actual "issues" in the Initiative, *i.e.*, the substance of the Initiative's provisions. Thus, the focus of this criterion is the actual legal changes proposed in the Initiative, not the intent of the Initiative's proponents – a separate issue addressed in the third criterion. *See id.* § 906(6)(A)(3).

This test leads to a straightforward conclusion: a reasonable voter would have different opinions on the Initiative's different changes to Maine law. For example, a reasonable voter may support ensuring that the Legislature approves the use of public reserved lands for certain purposes (such as transmission lines, pipelines, and landing strips) while at the same time opposing a ban on the construction of a new transmission line in the Upper Kennebec Region that would provide economic or

environmental benefits to Maine. The converse may also be true. Or, a reasonable voter may have a different opinion regarding the requirement for a 2/3 vote to approve the construction of any transmission line projects or certain other projects on public reserved lands than they might have regarding the requirement for a 2/3 vote to approve high impact electric transmission line projects on all public lands listed in Title 12, section 598-A. Likewise, a reasonable voter may have different views on requiring legislative approval for all high impact electric transmission lines *anywhere* in Maine than on prohibiting construction of a transmission line in one specific region.[15] Because each of the Initiative's three aspects will variously affect future projects, it is reasonable for a voter to approve of some but not of all of those provisions.

The fact that the bill could be construed as having more than three parts – because it has six sections[16] – does not undermine this conclusion. As evidenced by the title of the Initiative, the summary of the Initiative, proponents' own statements, and the Initiative language itself, it is apparent that there are three primary parts to the bill. At the very least, there is no reasonable basis for concluding – as the Secretary would – that there is only *one* issue in the Initiative.

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[15] Unsurprisingly, therefore, the record reflects that some actual voters wish to vote differently on each issue. R.69 ("I should be able to vote for part 1, against part 2, and not vote at all on part 3. Make this one question per issue to allow a constitutionally valid vote."); *see supra* at 6 n.3.

[16] Sections 2 and 3 of the Initiative include changes relating to the term "high-impact electric transmission line," a term used in both Sections 4 and 5 of the Initiative. Section 6 provides a retroactive date for both Sections 4 and 5. Splitting the question into three parts would not leave these sections of the Initiative in limbo. Sections 2 and 3 of the bill are closely related to Sections 4 and 5 because they address the definition and approval of "high-impact electric transmission lines" – the subject of Sections 4 and 5 – and would thus become effective if Sections 4 and 5 are approved. The same is true of Section 6.

Finally, based on the plain language of the statute, it is not necessary to determine how many voters actually have or are likely to have different opinions on the three major portions of the bill. To the extent the Secretary has concluded that few voters would have separate opinions, it is mere speculation that projects the Secretary's assumptions onto voters. Maine voters are sophisticated, and would not necessarily view each provision the same simply because each serves the objective of barring the NECEC. As discussed above, the statute requires analysis of the Initiative's legal provisions, not its purpose. A Maine voter would reasonably have different views on the various provisions in the Initiative given the very different scope of the Initiative's various limitations on future projects in Maine.

B. Having more than one question would help voters better understand the subject matter of the Initiative.

The second criterion also supports multiple questions. The inquiry under this criterion is whether separate questions would "help voters to *better* understand the *subject matter*" of the initiative. 21-A M.R.S. § 906(6)(A)(1) (emphasis added). Much like the first criterion, by referring to the initiative's "subject matter," this directs the inquiry to the substantive legal changes wrought by the Initiative, not the proponent's subjective intent.[17] Again, the proponents' intent is expressly made relevant only in

[17] Otherwise, the Secretary would be required to prepare a question like the following: "Do you want to stop the NECEC?" The Secretary has implicitly recognized this point by in fact preparing a question that attempts to summarize the three parts of the Initiative, not the purpose of the Initiative. The Secretary cannot now shift the inquiry under this prong from the substance of the Initiative to the proponent's objective. Indeed, doing so would (again) wrongly prioritize the proponents' interests over the rights of Maine voters by

the statute's third criterion. *Id.* § 906(6)(A)(3). Moreover, under this standard, it is unnecessary to show that a single question is *un*clear; rather, because the statute refers focuses on whether separate questions would help voters "better" understand the initiative. The question is whether multiple questions would be *more* clear. This criterion thus requires an analysis regarding whether separate questions would improve voters' understanding of the substance of the proposed legislative revisions.

Having separate questions addressing each of the proposed changes to Maine statutes would help voters better understand the subject matter of each change proposed in the Initiative. The single ballot question proposed by the Secretary attempts to combine all three issues included in the Initiative, resulting in a compound question. *See* R.54 (noting that the Initiative includes "3 separate issues"); *see id.* at 113. This compound question in turn creates a lack of clarity that would not exist if separate questions were used. *Id.* at 69 (stating "The question is confusing. It sounds like you are asking for at least 3 separate things."). For instance, the Secretary's ballot question wording does not clearly delineate between the ramifications of the 2/3 vote requirement for public reserved lands contained in Section 1 of the Initiative and the 2/3 vote requirement for all public lands in Section 4. Indeed, reading the Secretary's question, a voter would not know that the 2/3 vote requirement for public reserved lands in Section 1 applies to a wide range of projects while the 2/3 vote requirement

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requiring questions to be framed in light of the proponents' overarching objectives instead of the actual amendments to state law presented by the language of the initiative.

for public lands in Section 4 only applies to "high-impact electric transmission lines" as defined in the Initiative.[18] The issues presented by the Initiative would therefore be clarified by presenting three separate questions, as set forth below in Part IV.

C. The questions are severable and can be enacted or rejected separately without negating the intent of the petitioners.

The proposed changes to Title 12 and Title 35-A are severable and could be enacted or rejected separately without negating the intent of the proponents of the Initiative. Accordingly, this criterion also supports a conclusion that the Initiative presents multiple issues that must be addressed via separate ballot questions.

1. Each of the Initiative's three provisions is severable.

As the Secretary conceded below, the three proposed changes to Title 12 and Title 35-A are severable. A statutory provision is severable if it is not so integral to the statute as a whole that the statute only would have been enacted as a whole, and, in fact, the other statutory provisions can function without it. *See* 1 M.R.S. § 71(8); *Opinion of the Justices*, 2004 ME 54, ¶ 24, 850 A.2d 1145; *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986). As in the 2004 *Opinion of the Justices*, the provisions of the Initiative are severable because the proposed law contains three key features, each of which creates a substantively different change to the law, and no one provision is so integral to the Initiative as to invalidate the whole. *See* 2004 ME 54, ¶¶ 21, 27-29, 850 A.2d 1145. As described in the Initiative's summary, there are

[18] Confirming this lack of clarity, Intervenor Saviello, the primary proponent of the Initiative, even suggested that it was necessary for the question to address the public lands issue more expressly. App.62.

three separate substantive provisions. App.48. The Legislature (or the people, in exercising their legislative power) might choose to enact any one of these three main provisions – indeed, the Legislature considered adopting one aspect of the Initiative as stand-alone legislation. *See* L.D. 471 (130th Legis. 2021). Moreover, none of the three main provisions of the Initiative are co-dependent. The legislative approval requirements to be added to Titles 12 and 35-A and the ban on transmission lines in the Upper Kennebec Region to be added to Title 35-A could each function without the others. The severability of these provisions support separate questions.

2. Each of the Initiative's three provisions can be enacted or rejected separately without defeating the proponents' intent.

The proposed changes to Title 12 and Title 35-A could be enacted or rejected separately without negating the intent of the proponents of the Initiative. The relevant inquiry is not whether the applicant intended to have a single question, but is instead whether multiple questions would frustrate the legislative intent of the initiative. This is clear for two reasons. First, framing the inquiry as whether the applicant wants a single question would ignore the plain language of the statute, which focuses on whether the petitioner's intent would be frustrated by separate "enact[ment] or reject[ion]." 21-A M.R.S. § 906(6)(A)(3). If the Legislature had meant to direct the inquiry at the applicant's intent to have a single question, it could have easily stated the criterion as whether "the petitioners intend to present a single question." It did not; instead, it focused on whether adoption of less than all

provisions would frustrate the purpose of the initiative. Second, focusing on the applicant's intent to have a single question would give the applicant effective veto power over the form of the ballot question, which conflicts with the Constitution and other statutes as explained above. Here, separate questions would not effectively preclude the legislative intent of the Initiative's proponents.

Based on public statements of the proponents, and as the Secretary conceded below, the intent of the Initiative is to bar construction of the NECEC. App.60; *see* App.8, n.1 (noting that the parties agree that the Initiative is intended to block the NECEC). Intervenor Saviello, who filed the application for the Initiative, had previously pursued an initiative that would have barred the Project by revoking its CPCN. App.22, ¶ 11. After that initiative was struck down as unconstitutional, he began pursuing the present Initiative in furtherance of the same objective. App.23, ¶ 14; App.41-44. Further, as set forth above, Intervenor Saviello and the No CMP Corridor PAC have repeatedly issued statements that the Initiative is designed "stop Central Maine Power's 145-mile transmission line." App.24, ¶ 18; *see, e.g.*, App.24, ¶ 19 (the Initiative was launched to "stop CMP's . . . corridor project"); App.24-25, ¶ 21 (the Initiative will give voters "the final say on CMP's . . . NECEC Corridor"). This objective has been echoed by other supporters of the Initiative. *See, e.g.*, R.66, 104. Thus, the purpose of the Initiative proponents is to kill the NECEC. Each of the three changes proposed in the Initiative targets the NECEC and any one of the

them, individually, would – if lawful and enforceable[19] – bar construction of it because the NECEC (1) requires a lease of public reserved lands for the construction of the transmission line; (2) could constitute a "high impact transmission line" under the definition of this term; and (3) will be constructed in part in the "Upper Kennebec Region." App.60. Because each of the three parts would accomplish Intervenor's objective, separate enactment or rejection would not negate his intent.

IV. Because the Initiative addresses three issues, it must be presented to the voters in three separate ballot questions.

Because the Initiative raises multiple issues, the initiative must be presented on the ballot using separate questions. Consistent with Petitioner's comments to the Secretary, the initiative should be presented in the following three questions:

> *Do you want to require, retroactive to 2014, that the Legislature approve by a two-thirds vote any lease or conveyance of public reserved lands to be used for transmission lines and facilities, landing strips, pipelines, or railroad tracks?*
>
> *Do you want to require, retroactive to 2020, that the Legislature approve the construction of any high impact electric transmission lines in Maine, with a two-thirds vote required if a project crosses public lands?*
>
> *Do you want to ban, retroactive to 2020, the construction of high-impact electric transmission lines in the Upper Kennebec Region?*

R.190. These questions are proper because they separate each of the Initiative's three separate issues and clearly, concisely, and directly explain each issue for the voter.[20]

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[19] This challenge to the Secretary's proposed ballot question does not address any substantive challenge to the constitutionality, in whole or in part, of the Initiative and its enforceability against the NECEC Project. Such a challenge could be pursued in the event a majority of voters approve the Initiative on Election Day.

[20] The Secretary took the position below that multiple questions never describe the subject matter of a direct initiative "as simply as is possible." 21-A M.R.S. § 906(6)(B). But it would be irrational to read Section

Further, each is framed so that an affirmative vote would be in favor of the Initiative. Accordingly, unlike the ballot question wording adopted by the Secretary, these questions satisfy all of the requirements of Section 906(6).

CONCLUSION

Section 906(6)(A) of Title 21-A unambiguously requires a separate ballot question for each issue included in a direct initiative. Any other reading would conflict with the Constitution and other statutes, render the word "requiring" and the statute's criteria superfluous, and effectively nullify the statute. Properly construed, Section 906(6)(A) requires three ballot questions for the Initiative because, as its title and summary make clear, the Initiative addresses three issues. Accordingly, by writing a single ballot question for the Initiative, the Secretary violated Section 906(6)(A). In so doing, the Secretary undermined the voters' right to meaningfully exercise the initiative power by preventing them from having the opportunity to consider each issue in the Initiative separately. Petitioner therefore respectfully requests that the Court vacate the Secretary's determination and remand with instructions to amend the determination to include three separate questions as set forth above.

906(6)(B) to always require a single question. Such an approach would render Section 906(6)(A) meaningless. The Secretary also complained that these questions ignore Sections 2 and 3 of the Initiative, but, notably, the Secretary's question also omits any mention of these sections. Because these sections are closely tied to Sections 4 and 5, they would become effective if the latter were approved by voters.

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CERTIFICATE OF SERVICE

I, Joshua D. Dunlap, Esquire, hereby certify that two copies of this Brief of Appellant Christopher J. Caiazzo was served upon counsel at the address set forth below by email and first class mail, postage-prepaid on July 19, 2021:

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