STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Cum-23-83

WAYNE R. JORTNER et al.
Petitioner-Appellee

v.

SECRETARY OF STATE
Respondent-Appellant.

On Appeal from the Superior Court
Cumberland County

BRIEF OF THE SECRETARY OF STATE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Rules

Introduction

In this Rule 80C appeal, Petitioners Wayne Jortner, Richard Bennett, John Clark, and Nicole Grohoski (collectively "Petitioners") challenge the Secretary of State's ("the Secretary") wording of a ballot question for a citizen initiative that would create a new public body—called the "Pine Tree Power Company"—run by elected officials and their appointees to acquire and operate a portion of Maine's electricity infrastructure. Petitioners insist the current question's descriptor of this body as a "quasi-governmental power company"—a phrase carefully chosen by the Secretary to best reflect the substance of the initiative—should be replaced with their preferred, but less appropriate descriptor: "consumer owned transmission and distribution company."

Despite Petitioners' complaints, the proposed "Pine Tree Power Company" has all the hallmarks of a quasi-governmental entity, including statutory powers of rulemaking and eminent domain. And the new entity's customers will not "own" it any more than they own any other public agency from which they receive services. Because "quasi-governmental" is an objectively more accurate descriptor of the new

entity than "consumer owned," the Petition would fail under any standard of review.

But even if Petitioners were not proposing language that is less reflective of the citizen initiative's substance, their challenge falls well short of the high showing this Court has required to invalidate the wording of a ballot question. The Maine Constitution delegates the power to draft ballot questions for citizen initiatives to the Secretary, not the initiative's applicants. So long as the language selected by the Secretary "is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes"—a standard that this Court has long held grants the Secretary wide latitude in constructing the ballot question—the Secretary's choice of language must be upheld.

Here, the Secretary drafted a ballot question that easily exceeds this Court's permissive standard of review. In striking down the wording of the question, the court below erred by failing to correctly apply that standard. Instead, it effectively substituted its own judgment for the Secretary's as to the best wording for the question.

Accordingly, the Superior Court's decision should be vacated, and the ballot question upheld.

Statement of Facts

Factual Background

On August 13, 2021, Petitioners filed a citizen initiative application entitled "An Act to Create the Pine Tree Power Company, a Not-for-Profit Utility to Deliver Lower Rates, Reliability and Local Control for Maine Energy Independence." App. at 38-50. If enacted, the citizen initiative would create a "body corporate and politic" for the purpose of electricity transmission and distribution. *Id.* at 26 (§ 12 at §4002(2)). The new body, called the Pine Tree Power Company ("Pine Tree Power"), would be charged specifically with acquiring and operating, with the assistance of a contracted non-governmental entity, the Maine-based transmission and distribution assets of Maine's two large investor-owned utilities, Central Maine Power and Versant. *Id.* at 28-30 (§ 12 at §4003(3) & (6)).

Pine Tree Power would be governed by a board of directors (the "Board") that would consist of 13 members. *Id.* at 26 (§ 12 at §4002(2)). The Board would be classified in statute as a "general government" board. *Id.* at 23 (§ 1); *see* 5 M.R.S.A. § 12004-G (Westlaw March 21, 2023).

Seven Board members would be elected by Maine voters, with the remaining six members to be appointed by the elected members. *Id.* at 26 (§ 12 at §4002(2)). Each of the elected Board members would represent five State Senate districts. *Id.* (§ 12 at §4002(2)(A)). Candidates for the Board would be nominated by petition according to the same procedures applicable to unenrolled candidates for county, state, and federal offices, and be placed on the biennial general election ballot, with election results determined by ranked-choice voting. *Id.* at 27 (§ 12 at §4002(2)(E)). Candidates would be subject to Maine's campaign-finance laws and would be eligible to seek Maine Clean Election Act funds. *Id.* (§ 12 at §4002(2)(C) & (D)). The initiated bill does not require either candidates or voters to be actual customers of Pine Tree Power. *Id.* (§ 12 at §4002(2)).

Pine Tree Power would operate as a creature of statute and could be terminated only by "authorization of law."[1] *Id.* at 34 (§ 12 at §4009). Its purposes, powers, and duties are all fixed by statute. *Id.* at 26, 32 (§ 12 at §4002(1); § 12 at §4003). Among those powers would be the use of

[1] Although the title of the legislation refers to a "not-for-profit utility" and Petitioners implied below that Pine Tree Power would be categorized as a "nonprofit," *see, e.g.*, Pet. Super. Ct. Br. at 4, Pine Tree Power does not qualify as a non-profit under Maine law. Non-profits are defined under Maine law at 13-B M.R.S.A. § 102 and specifically exclude a "body politic and corporate" from the definition.

eminent domain, if necessary, to acquire "all utility facilities in the State owned or operated or held for future use by any investor-owned transmission and distribution utility," as well as other property. *Id.* at 29 (§ 12 at §4003(6)). Unlike other transmission and distribution utilities, *see* 35-A M.R.S.A. § 3136 (Westlaw March 21, 2023), Pine Tree Power would not need approval of the Maine Public Utilities Commission to exercise this eminent domain power. *See* App. at 32 (§ 12 at §4003(12)(B) (listing sections of Title 35-A applicable to Pine Tree Power)).

Pine Tree Power would also share other standard features of governmental entities. It would have the authority to adopt rules having the force of law under the Maine Administrative Procedure Act. *Id.* (§ 12 at § 4003(10)). Its corporate records, with certain exceptions, and its corporate proceedings would be public records under Maine's Freedom of Access Act. *Id.* at 34 (§ 12 at §4010). Various state agencies, including the Office of Treasurer and Office of Attorney General, would be authorized to provide it with assistance and counsel. *Id.* at 33 (§ 12 at § 4003(13)). And it would be categorized as a "quasi-municipal corporation" for purposes of debt liability. *Id.* (§ 12 at §4008(2)).

On September 24, 2021, the language of the initiated bill was finalized and accepted by the initiative's lead petitioner, Wayne Jortner, who also appears as a Petitioner in this action. Admin. R. at 18-37. The Secretary issued the petition form for the initiative on October 22, 2021, with an 18-month expiration date set for April 22, 2023. App. at 51. The initiative's supporters submitted the petition to the Secretary within approximately 12 months, and the Secretary determined on November 30, 2022, that the initiators had submitted sufficient signatures for the initiative to be submitted to the Legislature and, if not enacted without change, sent to Maine's voters. Admin. R. at 46-47; *see* Me. Const. art. IV, pt. 3, § 18(2).

Upon validating an initiative petition, the Secretary is required under 21-A M.R.S.A. § 905-A to formulate a draft ballot question and offer the public an opportunity to comment on the wording of the question. Thus, on December 21, 2022, the Secretary announced the following draft ballot question:

> Do you want to create a new quasi-governmental owned power company governed by an elected board to acquire and operate existing electricity transmission and distribution facilities in Maine?

Admin R. at 48. The public was invited to submit comments on the question via an online form, email, mail, or in-person through January 20, 2023. *Id.* at 48-49. All in all, the Secretary received just under 200 comments supporting or critiquing various words she chose for the draft ballot question. *Id.* at 50-255.

Ten days after the comment period ended, on January 30, 2023, the Secretary issued to the lead petitioner her final determination and explanation of the language to be used for the finalized ballot question. App. at 19-22. The final language selected by the Secretary is similar, but not identical, to the draft language set for public comment, reading:

> Do you want to create a new quasi-governmental power company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine?

Id. at 19.

In great detail, the Secretary's explanation described why she chose certain language for the ballot question, including the terms "quasi-governmental" and "for-profit," as well as why she did not include certain terms such as "consumer owned," "non-profit," "reliable, affordable energy," and "foreign owned." *Id.* at 19-22.

For all of the language that the Secretary chose, she explained why the chosen language was superior and more accurate than alternative language supported by various commentors. For example, regarding the term "quasi-governmental," the Secretary stated that:

> Commenters were split on whether the entity to be created by the initiated bill can or should be described as "quasi-governmental." Proponents of phrases such as "consumer owned" or "nonprofit" pointed out that those terms are used in the proposed legislation and current law. Proponents of "quasi-governmental" argued that it better reflected nature of the proposed entity. After considering these arguments, I conclude that "quasi-governmental" is the descriptor that will enable voters to best understand the choice presented by the initiative. The new entity is defined in the Act as a "body corporate and politic," a phrase used in the Maine Revised Statutes in establishing other quasi-governmental entities. It would be classified within Title 5, § 12004-G, which lists "general government" entities. The new entity would be permitted to borrow under provisions applicable to quasi-municipal entities. A majority of the board of directors are elected in statewide elections governed by Title 21-A of the Maine Revised Statutes, with candidates eligible to seek Maine Clean Election Act funds. The entity will be subject to the Freedom of Access Act and may adopt regulations having the force of law under the Maine Administrative Procedure Act. All of the above factors indicate that the entity is properly understood as "governmental" in nature. Moreover, because the entity will function as an enterprise, with its day-to-day operations conducted by a nongovernmental entity contracted by the board, it is appropriate to characterize it as "quasi" governmental.

Id. at 20.

Similarly, she explained why "consumer owned" was an inferior and less accurate choice of language for the ballot question:

> I recognize that "consumer owned" is a phrase that is used in current statute and that the initiative would amend the definition of that phrase to include the new entity. *See* 35-A M.R.S. § 3501. Although I accept that the phrase would become an accurate descriptor of the entity as a legal matter should the initiative be enacted by definition, I am concerned that the phrase would nevertheless suggest to voters that consumers would be acquiring shares or some other formal ownership stake in the new entity. Because "quasi-governmental" is an accurate descriptor with no such potentially misleading connotations, I have concluded it is preferable to "consumer owned."

Id.

Likewise, the Secretary provided explanations for why she did not think it was necessary or appropriate for the ballot question to provide additional details regarding costs or logistics of how Pine Tree Power would operate. *Id.* at 22. The Secretary also acknowledged that in addition to the specific comments addressed in her written explanation, she considered all other comments submitted during the comment period and determined that none warranted additional changes to the wording of the ballot question. *Id.*

All in all, the Secretary confirmed that she was upholding her twin obligations of selecting language that is 1) accurate; but also 2) constructed as simply as possible. *Id.*

Procedural History

On February 9, 2023, Petitioners initiated this Rule 80C action, challenging the Secretary's choice of wording for the ballot question and asking the Court to modify the question to Petitioners' preferred language. *Id*. at 17.

Briefing before the Superior Court was completed on March 6, 2023. The Superior Court did not hold oral argument. Three days later, the Superior Court (*Kennedy, J.*) issued its decision, concluding that the ballot question constructed by the Secretary would not be "understandable" to reasonable voters and could "mislead" reasonable voters to cast a ballot contrary to their wishes. *Id.* at 7-9.

This appeal followed.

Statement of the Issues

This appeal raises two issues:

1. Did the Superior Court err in concluding that the phrase "quasi-governmental power company" was not understandable to reasonable voters who have discharged

their civic duty to educate themselves about the citizen initiative?

2. Did the Superior Court err in concluding that the phrase "quasi-governmental power company" will mislead reasonable voters who understand the proposed legislation into voting contrary to their wishes?

Because the Superior Court—on both issues—failed to properly apply this Court's precedent in *Olson v. Secretary of State*, 1997 ME 30, 689 A.2d 605, the answer to each question is "yes."

Standard of Review

On both issues, the standard of review is *de novo*. Specifically, this Court is "required to independently determine whether the ballot question is understandable and not misleading." *Olson v. Sec'y of State*, 1997 ME 30, ¶ 4, 689 A.2d 605.

As detailed below, although the Court owes no deference to the Secretary's specific word choice, she nevertheless enjoys substantial discretion in how she decides to phrase the ballot question. *See id.* ¶ 11.

Summary of the Argument

When drafting the ballot question at issue in this suit, the Secretary took great care to use language that most accurately describes the subject matter of the citizen initiative that Maine voters will be asked to decide

in the fall referendum election. Her choice of the phrase "quasi-governmental power company" best reflects the nature of the entity to be created, which would be run by elected officials and be imbued with the powers and duties of an arm of the State.

But even if "consumer owned" were also a plausible description of the new entity, the question facing the Court is not whether the Secretary's question is the *most accurate* or *best* question that could have been written. Instead, the standard that the Secretary must meet was supplied by this Court in *Olson* over a quarter-century ago. Specifically, this Court must determine whether the ballot question is "understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes."

What constitutes a "reasonable voter" is crucial to this inquiry. As this Court laid out in *Olson*, reasonable voters are people who have fulfilled their civic duty to familiarize themselves with the substance of the proposed legislation. Reasonable voters are not people who walk into voting booths as blank slates. Rather, they are voters who have consulted external sources and are steeped in the public debate regarding the

citizen initiative. Therefore, they are expected to have formed an opinion on whether the citizen initiative should be adopted in advance of reading the ballot question.

With such reasonable voters in mind, the Court is tasked with determining whether such voters can 1) understand that the ballot question is asking about the substance of the proposed citizen initiative; and 2) whether the ballot question is written in a manner as to not mislead such voters into casting a ballot opposite their preference on whether the citizen initiative should be approved.

This is not a close case. Whatever the merits of the phrase "consumer owned" as a descriptor of Pine Tree Power, there is no doubt that the ballot question as drafted by the Secretary can be understood by reasonable voters and that voters who have exercised their civic duty to form an opinion on the substance of the citizen initiative will not be misled by the ballot question's wording into casting a vote opposite their true preference.

Petitioners were able to prevail in the Superior Court by convincing the Superior Court to misapply the law set forth by this Court in *Olson*. Rather than ask whether the ballot question comports with *Olson*'s two-

part test, the Superior Court erroneously compared the ballot question's wording to Petitioners' preferred language and substituted its judgment for that of the Secretary's to conclude that Petitioners' wording was superior.

But faithful application of this Court's precedent requires upholding the Secretary's construction of the ballot question. The decision of the Superior Court should be vacated with instructions to dismiss the 80C Petition.

Argument

Pine Tree Power would plainly be a governmental entity that engages in private enterprise and is thus best described as "quasi-governmental." But even if Petitioners were correct that "consumer-owned" is a better descriptor for Pine Tree Power—despite the fact that its structure does not fit the current statutory definition for a consumer-owned utility—their appeal would still fail.

Any suggestion that the Secretary could have used better language in her choice of wording for the ballot question is not only inaccurate, but irrelevant. To prevail, Petitioners need to demonstrate either that the ballot language selected by the Secretary would not be 1) understandable

to reasonable voters who have discharged their civic duty to educate themselves about the citizen initiative; or 2) that it could mislead reasonable voters who understand the proposed legislation into voting contrary to their wishes. Petitioners cannot meet this high threshold.

I. Petitioners Cannot Meet Their Burden to Show that the Secretary's Wording of the Ballot Question Is Either Unintelligible or Would Mislead an Informed Voter.

The standard of review is critical for both properly analyzing the substance and determining the outcome of this challenge.

Below, the Secretary agreed with Petitioners that section 905(2) of Title 21-A supplies the statutory standard of review for a Rule 80C challenge to the language for a ballot question related to a citizen initiative:

> In reviewing the decision of the Secretary of State, the court shall determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes.

21-A M.R.S.A. § 905(2) (Westlaw March 21, 2023). She further agreed with Petitioners that *Olson* is the seminal Law Court decision construing this language. *See* Pet. Super. Ct. Br. at 7-8.

The Secretary likewise concurred with Petitioners below that *Olson* clarified that the Constitutional requirement that the question be presented "concisely and intelligibly" and the additional statutory requirement that the language be drafted "in a clear, concise and direct manner that describes the subject matter of the" initiative "as simply as possible" are both subsumed by the language quoted above in 21-A M.R.S.A. § 905(2). *See* Pet. Super. Ct. Br. at 8 (quoting Me. Const. art. IV, pt. 3, § 20 & 30-A M.R.S.A. § 906(6)).

As Petitioners pointed out below, courts review *de novo* whether the ballot language is understandable to reasonable voters and will not mislead such voters into casting a ballot contrary to their preference. *See Id.* (citing *Olson*, 1997 ME 30, ¶ 4, 689 A.2d 605). And as Petitioners pressed below, they are technically correct that courts owe no formal deference to the words chosen by the Secretary. *Id.*

But Petitioners failed to acknowledge below that, even though the Secretary is entitled to no formal deference, she does enjoy substantial discretion as to which words she chooses for the ballot question.

Although the Secretary consistently endeavors to do so—and in fact has successfully done so regarding this ballot question—she need not

choose the best or ideal language for the ballot question to comport with her statutory and constitutional obligations. Rather, the Secretary's choice of words must be upheld so long as she has selected language that is "understandable" and "will not mislead" reasonable voters. *Olson*, 1997 ME 30, ¶ 6, 689 A.2d 605. To use a football analogy, to pass muster the Secretary is not required to kick the ball perfectly centered through the two uprights, so long as it passes somewhere between them.

This standard is both pragmatic and prudent. The purpose of 21-A M.R.S.A. § 905(2) is not to authorize challengers to second-guess whether the Secretary has selected the *best* language for any single ballot question, as such a subjective standard would vary from voter to voter. If the Secretary's construction of a ballot question could be invalidated whenever a court is persuaded that the wording could be slightly improved, the Secretary's constitutional authority and duty to craft ballot questions, *see* Me. Const. art. IV, pt. 3, § 20, would be effectively usurped.

Moreover, this Court's docket would risk being inundated with litigation initiated by every voter from Kittery to Madawaska dissatisfied with any gerund, participle, or comma selected by the Secretary. Rather, 21-A M.R.S.A. § 905(2) serves as a backstop to assure that reasonable

voters who understand the substance of a citizen initiative can effectively cast an up-or-down vote on the proposed legislation.

As this Court has pointed out, the standard for whether a ballot question is "understandable to a reasonable voter" does not require that the question convey to voters every complexity or nuance of the proposed citizen initiative. Instead,

> [t]he procedure is designed to ensure that voters, who may be reading the question for the first time in the voting booth, will understand the subject matter and the choice presented. It is assumed that the voters have discharged their civic duty to educate themselves about the initiative.

Id. ¶ 11 (emphasis added); *see also Casinos No! v. Gwadosky*, No. AP-03-16, 2003 WL 21018862, at *2 (Me. Super. Ct. Apr. 4, 2003).

In fact, this Court has explicitly "reject[ed] the notion that section 905 requires that the description be understandable to a voter who is reading both the question and the legislation for the first time." *Id.* Rather, the question is to be reviewed for whether it is understandable to reasonable voters who access "external sources" and are familiar with the "context of political debate on the initiative." *Id.*

This Court has also concluded that the Secretary enjoys similarly broad latitude in assuring that the question "will not mislead a

reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." 21-A M.R.S.A. § 905(2) (Westlaw). In *Olson*, this Court cautioned that Petitioners can win on this point only if they "demonstrate that the question will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes. Merely demonstrating that the question creates a misleading impression about the legislation is not enough." 1997 ME 30, ¶ 7, 689 A.2d 605 (emphasis added); *see also Casinos No!*, 2003 WL 21018862, at *2.

To put it simply, the Court must conduct an independent review of the Secretary's choice of language to make sure that it is "understandable" and "will not mislead" a "reasonable voter." But in applying its independent review, the Court starts with the presumption that reasonable voters 1) have already discharged their civic duty to educate themselves about the underlying citizen initiative; and 2) are aware of the ongoing political debate regarding the citizen initiative.

Only if the Secretary's question cannot be understood by such informed voters as described above—or if it would lead such voters familiar with the proposed legislation's substance to vote incorrectly—should the ballot question be rejected.

Here, the ballot question at issue does not merely meet the standard set forth in *Olson*, but comfortably exceeds it.

II. The Phrase "Quasi-Governmental Power Company" Is Understandable to a Reasonable Voter Reading the Ballot Question for the First Time

For a voter already familiar with the underlying citizen initiative, there is no aspect of the phrase "quasi-governmental power company" that could render the ballot question unintelligible. As outlined above, the Court must determine whether reasonable voters—that is, voters who have already discharged their civic duties to educate themselves about the citizen initiative by engaging external sources and the ongoing political debate—can understand what the ballot question is asking.

As this Court has explained, "[i]t is inevitable that ballot questions will reflect the ambiguities, complexities, and omissions in the legislation they describe. Voters are not to rely on the ballot question alone in order to understand the proposal." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 (emphasis added). That said, in this circumstance the Secretary's choice of language is not merely an adequate descriptor, but the best one, for what voters are being asked to decide—whether voters have chosen to familiarize themselves with the substance of the citizen initiative or not.

A. No reasonable voter familiar with the citizen initiative would find the phrase "quasi-governmental power company" to be unintelligible.

Far from being unintelligible, the Secretary explained in her final agency action why the use of the phrase "quasi-governmental" is the best descriptor for Pine Tree Power: "[t]he new entity is defined in the Act as a 'body corporate and politic,' a phrase used in the Maine Revised Statutes in establishing other quasi-governmental entities."[2] App. at 20.

Further, Pine Tree Power's Board would be classified within Title 5, § 120004-G of the Maine Revised Statutes, alongside other "general government entities." *Id.* Moreover, Pine Tree Power would be permitted to borrow money under provisions applicable to quasi-municipal entities. *Id.* And a "majority of its board of directors would be elected in statewide elections governed by Title 21-A of the Maine Revised Statutes, with candidates eligible to seek Maine Clean Election Act funds." *Id.* Additional governmental features include the fact that Pine Tree Power "will be subject to the Freedom of Access Act and may adopt regulations

[2] Such examples include the Loring Development Authority, *see* 5 M.R.S.A. § 13080 (Westlaw March 21, 2023); the Maine Space Corporation, *see* 5 M.R.S.A. § 13201 (Westlaw March 21, 2023); Connect Maine Authority, *see* 35-A M.R.S.A. § 9203 (Westlaw March 21, 2023); and the Finance Authority of Maine, *see* 10 M.R.S.A. § 964 (Westlaw March 21, 2023).

having the force of law under the Maine Administrative Procedure Act."[3] *Id.*

Nevertheless, Pine Tree Power retains some features of a private enterprise, specifically that its "day-to-day operations [would be] conducted by a nongovernmental entity contracted by the board [of directors]." *Id.* It therefore constitutes a quasi-governmental, rather than wholly governmental entity. Indeed, the "quasi" governmental nature of the entity is recognized in the legislation itself, which categorizes the entity as "quasi-municipal" for purposes of debt liability. App. 33 (§ 12 at §4008(2)).

Finally, the initiative creates one—and only one—utility, specifically named the Pine Tree Power Company. *See* App. at 25 (§ 12 at § 4001). No reasonable voter familiar with substance of the initiative would understand that the "quasi-governmental power company" referenced in the ballot question refers to anything other than Pine Tree Power—the sole utility named and described in the proposed legislation.

[3] Petitioners stated in their brief below that "the Company is not at all 'governmental' in that sense. It does not have the power to enact rules or regulations." Pet. Super. Ct. Br. at 18. But that is simply inaccurate. *See* App. at 30 (§ 12 at § 4003(10)) ("Rules. The company may adopt rules pursuant to Title 5, chapter 375, subchapter 2-A for establishing and administering the company and carrying out its duties. Rules adopted pursuant to this subsection are major substantive rules as defined in Title 5, chapter 375, subchapter 2-A.").

B. Petitioners' assertion that reasonable voters familiar with the citizen initiative cannot understand the phrase "quasi-governmental power company" does not pass the smell test.

Below, Petitioners implied that because there is no statutory definition of "quasi-governmental," voters already familiar with the citizen initiative would not be able to understand it. *See* Pet. Super. Ct. Br. at 10-12. They give Maine voters too little credit.

Statutory definitions are merely one of the many "external sources," this Court assumes that civically responsible voters who have educated themselves regarding the proposed initiative will consult. *See Olson*, 1997 ME 30 ¶ 11, 689 A.2d 605. The fact that the concept of a "quasi-governmental" body already exists in Maine statute, *see* App. 19; *see also, e.g.*, 38 M.R.S.A. § 424-C (Westlaw March 21, 2023), even if not specifically defined, bolsters the Secretary's position, not Petitioners.'

Petitioners further suggested below that the term "quasi-governmental" could cause a voter to envision any number of a wide array of entities that are different from Pine Tree Power, such as an entity that resembles a tenant's association, an entity similar to a turnpike authority, an entity more akin to a housing authority, or an entity that functions more like a public university. Pet. Super. Ct. Br. at 11.

True, the term "quasi-governmental" in complete isolation with no other context could conjure any of these entities, as each shares some features of government—many of which are also shared by Pine Tree Power—and some features of a private enterprise. But a reasonable voter is not casting a ballot in the abstract or encountering the term "quasi-governmental" in isolation.

In their argument below, Petitioners overlooked that this Court presumes reasonable voters have educated themselves about the content of the actual proposed legislation. *See Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 ("We reject the notion that section 905 requires that the description be understandable to a voter who is reading both the question and the legislation for the first time.") Any reasonable voter who reads the Secretary's proposed ballot question will understand that "quasi-governmental power company" refers to the singular utility—Pine Tree Power—fleshed out in detail in the proposed legislation.

Petitioners also asserted below that voters' lack of familiarity with the term "quasi-governmental power company" renders it unintelligible. Pet. Super. Ct. Br. at 12-14. Again, Petitioners confuse the standard under which the ballot question must be reviewed. The question is not

whether a voter lacking any context will know what a "quasi-governmental power company" is in the abstract. Rather, the question is whether a reasonable voter familiar with the citizen initiative will understand that the ballot question's reference to a "quasi-governmental power company" is referring to Pine Tree Power as mapped out in the text of the proposed legislation. As explained above, any reasonable voter will of course understand that to be the case.

Nor do dictionary definitions do the Petitioners any good. Below, Petitioners claimed that the definition provided by Merriam Webster's Online Dictionary describes something that is the opposite of Pine Tree Power, because that dictionary defines the term "quasi-governmental" as "supported by the government but managed privately." Pet. Super. Ct. Br. at 14-15. They then erroneously presumed that "supported by the government" must mean "financially" supported by the government, *id.*, which is not at all the case.

Because the initiative creates a utility whose day-to-day operations are managed privately but are overseen by a publicly elected board, even a reasonable voter solely relying upon the Merriam-Webster definition would have no trouble understanding that the phrase "quasi-

governmental power company" refers to Pine Tree Power as established in the proposed legislation, much less a reasonable voter consulting other outside sources and familiar with the political debate regarding the initiative.[4]

C. The Superior Court failed to properly apply the standard set forth in *Olson* when it concluded that the ballot question is not understandable to reasonable voters.

In its decision below, the Superior Court properly quoted parts of the applicable standard from *Olson* in deciding whether the ballot question is understandable to reasonable voters. However, it failed in at least three key ways to properly apply *Olson*'s standards in its analysis.

First, the Superior Court stated that:

> Although the description "body corporate and politic" may be a fair synonym for "quasi-governmental," the Legislation does not define "body corporate and politic." It is unreasonable to expect an average voter to draw the connection between the use of the phrase "body corporate and politic" in the Legislation and "quasi-governmental" in the Ballot Question and emerge with a clear understanding of the meaning of either phrase.

[4] Nor should Merriam Webster be considered the only source of definitions a reasonable voter could consult. As just one example, Black's Law Dictionary defines quasi-governmental agency as "A government-sponsored enterprise or corporation (sometimes called a government-controlled corporation), such as the Federal National Mortgage Corporation." *Quasi-Governmental Agency*, Black's Law Dictionary (11th ed. 2019), *available at Westlaw*. Reasonable voters consulting outside sources would have no trouble identifying the "quasi-governmental power company" as the utility described in the legislative text of the initiative.

App. at 7. Here, the Superior Court seemed to imply that the purpose of the ballot question is to help further define complex terms in the proposed legislation. Not so. As this Court has stated, "[I]t is inevitable that ballot questions will reflect the ambiguities, complexities, and omissions in the legislation they describe." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605.

The appropriate question is not whether "quasi-governmental" would clarify the meaning of "body corporate and politic" to an average voter. Rather, the question is whether "quasi-governmental power company" can be understood to refer to Pine Tree Power by voters who "have discharged their civic duty to educate themselves about the initiative." *Id.* Because the initiative seeks to establish a single utility with attributes sharing some features with the government and others with private enterprise, there is no doubt that voters familiar with the initiative will understand that the "quasi-governmental power company" referenced in the ballot question is the sole utility created by the citizen initiative.

Second, the Superior Court suggested that the Secretary would require voters to:

> know of existing quasi-governmental entities (and the fact that they are quasi-governmental), consider the features and

> organization of those quasi-governmental entities, and extrapolate that the phrase "quasi-governmental" is intended to suggest that [the Pine Tree Power Company] would be governed by an elected board.

App. at 8. But the Secretary argues no such thing. Instead, the Secretary has merely pointed out, as detailed above, that Pine Tree Power shares attributes with both government and private enterprise.

The Superior Court suggested that describing Pine Tree Power as a "quasi-governmental power company" "is too large of a leap to expect a voter to make on a first reading." *Id.* But the Superior Court seemed to ignore that reasonable voters are assumed not only to have exercised their civic duties and consulted with external sources before entering the voting booth, but that they are steeped "in the context of political debate on the initiative." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605. Because "quasi-governmental power company" accurately and understandably describes Pine Tree Power, the Superior Court's analysis on this point fails.

Third, the Superior Court reasoned that "[t]he structure and function of [the Pine Tree Power Company] are at the core of the Initiative" and that the ballot question "inadequately describes the

subject matter of the Initiative."[5] Super. Ct. Dec. at 5. But the Superior Court's "core of the Initiative" test is found nowhere in the actual standard set forth by this Court in *Olson*.

As this Court prudently laid out, 21-A M.R.S.A. § 905 does not require "that the description be understandable to a voter who is reading both the question and the legislation for the first time" and "[v]oters are not to rely on the ballot question alone in order to understand the proposal." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 (emphasis added). As the Superior Court properly stated in *Casinos No!*, "it is not required that the ballot question include every nuance of the proposed legislation, nor is it within the jurisdiction of [the] court . . . to assess the possible future effect of the proposed legislation." 2003 WL 21018862, at *3.

The Superior Court should not have applied its own test—rather than the test set forth by this Court—in determining whether the ballot question is understandable. When applying the correct standard, there is no doubt the Secretary drafted a ballot question that reasonable voters familiar with the substance of the proposed legislation can understand.

[5] At no point did the Superior Court address the Secretary's point that Pine Tree Power would not constitute a "consumer owned" utility under current Maine law.

III. The Phrase "Quasi-Governmental Power Company" Will Not Mislead Voters Who Properly Understand the Proposed Legislation into Voting Contrary to Their Wishes

For Petitioners to succeed on the second prong of the *Olson* test, they must demonstrate that the Secretary's choice of words "will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes." *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605 (emphasis added); *see also Casinos No!* 2003 WL 21018862, at *2.

Such misdirection might occur through the use of bewildering double-negatives or other confusing language that would cause even reasonable voters—already familiar with the substance of the citizens' initiative—not to know whether to check "yes" or "no" on their ballot. But this Court has made one thing plainly clear: "Merely demonstrating that the question creates a misleading impression about the legislation is not enough." *Id.* (emphasis added).

The Secretary's description of Pine Tree Power as "quasi-governmental" is entirely accurate given the entity's management by elected officials and its many governmental powers and duties. But even if Petitioners' arguments regarding the Secretary's chosen language were persuasive—which they are not—they only amount to an argument that

the ballot question creates a misleading impression about the citizen initiative, not the steeper threshold that requires they demonstrate the language could cause informed voters to make a selection opposite their true preference.

A. The phrase "quasi-governmental power company" will not cause reasonable voters familiar with the subject matter of the citizen initiative to vote opposite their preference.

As the Secretary stated in her determination and explanation of the final agency action, "'quasi-governmental' is the descriptor that will enable voters to best understand the choice presented by the initiative." R. at 20. But even if sensible minds can disagree as to whether "quasi-governmental power company" is the best descriptor, no reasonable voters familiar with the underlying citizen initiative would cast a ballot opposite their preference due to the Secretary's use of the phrase "quasi-governmental power company" in the ballot question.

Again, *Olson* is instructive. In *Olson*, plaintiffs challenged the Secretary of State's choice of ballot language related to an initiative seeking to criminalize the introduction of pesticides into Maine's atmosphere or waters. 1997 ME 30, ¶ 3, 689 A.2d 605. Specifically, plaintiffs argued that the Secretary of State's use of the word "putting"

could mislead voters into thinking that the law would penalize only intentional conduct, rather than both intentional and accidental conduct as envisioned by the proposed legislation.

But because "[m]erely demonstrating that the question creates a misleading impression about the legislation is not enough," this Court approved the Secretary of State's choice of words. *Id.* ¶¶ 7-9. Moreover, the Court noted that "a reasonable voter who underst[ood] that the initiative contain[ed] no express statement on this point [would] not be misled by a ballot question that reflects the same omission."

Here, "quasi-governmental power company" is, for the reasons described above, the most accurate and informative way to describe the new public body that would be created by the initiative's passage. But even if the Court were to disagree, that would not be sufficient to vacate the ballot question designed by the Secretary. Rather, Petitioners would need to show that use of the phrase "quasi-governmental power company" would mislead voters familiar with the substance of the underlying citizen initiative to vote opposite their preference.

The public comments on the Secretary's proposed question underscore the impossibility of such a showing in this specific case. Here,

numerous commentors and petition circulators asked the Secretary to change "quasi-governmental power company" to "consumer owned transmission and distribution utility." *See, e.g.*, Pet. Super. Ct. Br. at 5-6, 21-22. That these citizens knew that "quasi-governmental power company" was meant to refer to the same entity that they prefer to call a "consumer owned transmission and distribution utility" confirms that reasonable voters who have discharged their civic duty to familiarize themselves with the underlying citizen initiative will not be misled into voting against their preferences.

B. Petitioners mischaracterize the proper standard of review in their assertions that the Secretary's choice of language could mislead reasonable voters.

Below, Petitioners offered three additional theories as to how the phrase "quasi-governmental power company" could mislead reasonable voters. First, they argued that the term "power company" may suggest that the new utility would be a "seller of power" rather than a "transmission and distribution utility." *See* Pet. Super. Ct. Br. at 15-16. Second, they asserted that the language "gives the misleading impression that the Company will be an organ of government that is taxpayer-supported." *Id.* at 16-18. And finally, they complained that the

Secretary's language "misleads voters into thinking the Company will be run by the government." *Id.* at 18-20.

Even if these arguments were relevant to the question before the Court, none have merit. A "power company," in common parlance, is not limited to entities that generate power. After all, the citizen initiative itself creates the "Pine Tree Power Company," not the "Pine Tree Transmission and Distribution Company."[6] App. at 25 (§ 12 at § 4002).

Moreover, while Pine Tree Power may not be taxpayer supported, it would certainly be a governmental body by any reasonable definition. Specifically, it would be run by state officials elected by Maine voters (including voters who are not customers of the company) and those officials' appointees.

If that were not enough, the new company will have the authority to adopt rules having the force of law, the power to exercise eminent domain,[7] and will be subject to FOAA, a law that applies only to records

[6] Petitioners' objection below to the words "power company" is particularly puzzling, as three out of the four Petitioners submitted comments to the Secretary during the public comment period urging her to adopt a ballot question that included the term "power company," while the final Petitioner submitted no comments at all. *See* Admin. R. at 143, 221, 254.

[7] In their Reply below, Petitioners argued that Maine's current investor-owned utilities are also able to exercise the power of eminent domain and therefore this factor should not be considered when assessing whether Pine Tree Power exhibits features of a governmental actor. *See* Super. Ct. Reply Br. at 12 n.10. However, Maine's investor-owned utilities can only

relating to the "transaction of public or governmental business." *See* 1 M.R.S.A. § 402(3) (Westlaw March 21, 2023).

In any event, none of these theories would affect voters assumed to "have discharged their civic duty to educate themselves around the initiative." *Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605. Because "[m]erely demonstrating that the question creates a misleading impression about the legislation is not enough," these arguments should be set aside.[8] *Id.* ¶ 7. "Despite the variation in language, a reasonable voter who understands that the initiative contains no express statement[s] on [these] point[s] will not be misled by a ballot question that reflects the same omission." *Id.* ¶ 9.

C. The Superior Court committed the same error as Petitioners in analyzing whether the Secretary's word choice could mislead a reasonable voter.

The Superior Court correctly quoted the appropriate standard for assessing *Olson*'s "misleading" prong: "Plaintiffs must demonstrate that the question will mislead reasonable voters, who understand the

exercise the power of eminent domain subject to the approval of the Public Utilities Commission, *see* 35-A M.R.S.A. § 3136 (Westlaw March 21, 2023), while Pine Tree Power would be able to exercise this power without such approval, *see* App. at 29 (§ 12 at §4003(6)).

[8] Nor would it be proper to consider the unproven "emotional impact," of the term "quasi-governmental," as erroneously suggested by Petitioners below. *See* Super. Ct. Reply Br. at 10-13.

proposed legislation, into voting contrary to their wishes. Merely demonstrating that the question creates a misleading impression about the legislation is not enough." App. at 8 (quoting *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605).

But the Superior Court failed to correctly apply *Olson*'s analysis to the ballot question at hand. Instead, it faulted the Secretary's choice of language for purportedly creating a misleading impression about the citizen initiative—which is precisely what *Olson* instructs the Superior Court not to do.

The Superior Court specifically criticized the Secretary's word choice by noting that "'quasi-governmental is not a synonym for 'consumer-owned'" and that "the Ballot Question at no point refers to consumer ownership—a core feature of the Legislation." *Id.* at 9. This reasoning wrongly presupposes that "consumer ownership" is both a necessary and appropriate description of the utility at issue in the citizen initiative. But as the Secretary explained, she specifically chose not to use the phrase "consumer-owned" in describing the utility because that phrase already has a specific definition under the current Maine Revised Statutes—one that Pine Tree Power does not conform to.

Finally, just as it did with the "understandable" prong, when the Superior Court analyzed *Olson*'s "misleading" prong it seemed to substitute its own "core feature" test in place of the actual standard set forth by this Court, ultimately concluding that "a reasonable voter who compared the language of the Ballot Question to the language of the Legislation might be unsure whether the Ballot Question is referring to the [Pine Tree Power Company]." *Id.*

The Superior Court is mistaken. As this Court has held, Petitioners "must demonstrate that the question will mislead reasonable voters, who understand the proposed legislation, into voting contrary to their wishes." *Olson*, 1997 ME 30, ¶ 7, 689 A.2d 605 (emphasis added). A voter familiar with the proposed legislation would necessarily understand that the citizen initiative seeks to set up a single utility with a publicly elected board and a principal goal of purchasing Maine's two large investor-owned utilities.

There can be no question that voters who enter the voting booth with that understanding would be clear-eyed when met with the question of whether they would like to "create a new quasi-governmental power

company governed by an elected board to acquire and operate existing for-profit electricity transmission and distribution facilities in Maine."

IV. Petitioners' Preferred Ballot Language Is a Red Herring

Petitioners spent a great deal of briefing below arguing why they believe the phrase "consumer owned transmission and distribution utility" is superior to "quasi-governmental power company." *See, e.g.*, Pet. Super. Ct. Br. at 20-24; Super. Ct. Reply Br. at 10-15. But the Secretary issued a detailed explanation in the Record, spelling out why Petitioners are mistaken, noting among other things that the new utility does not fit the statutory definition of "consumer owned" and will do so in the future only if the Maine Revised Statues is successfully amended by the passage of the citizen initiative. *See supra* at 9, 14; *see also* R. at 20. Additionally, the Secretary explained her reason ned concern that voters might be misguided by the phrase "consumer owned" into believing they would acquire some sort of formal ownership stake in Pine Tree Power, while the phrase "quasi-governmental" is susceptible to no similar misleading impressions.[9] *Id.*

[9] Petitioners also implied below that their preferred language would be understood by 90% of Maine voters over the age of 25, when the Secretary's will not. *See* Pet. Super. Ct. Br. at 14. While it is not at all the Court's role to compare and decide between the Secretary's wording and Petitioners' proposed alternative, there is no evidence that their preferred language is

But even those explanations are beside the point, because the Court's review is not whether better or more favorable language could or should have been selected by the Secretary. The only task for the Court is to "determine whether the description of the subject matter is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to her wishes." *Olson*, 1997 ME 30, ¶ 10, 689 A.2d 605.

Petitioners are asking the Court to force the Secretary to adopt language they view as the ideal wording for the ballot question. And in its decision below, the Superior Court seemed to fall into the trap laid by Petitioners by directly comparing the phrase "quasi-governmental power company" with Petitioners' preferred "consumer-owned transmission and distribution utility." *See* App. at 7-9. But whether consumer ownership is a "core feature" of the legislation is of no import here.

The Superior Court's role was not to directly compare the Secretary's wording with Petitioners' preferred language, but rather to

more readable than the Secretary's, as the question tested in the poll to which Petitioners alluded was entirely different from their preferred wording. *See* Admin. R. at 209-10.

determine whether reasonable voters familiar with the substance of the citizen initiative would understand the thrust of the ballot question and not be misled to cast a ballot opposite their preference on the proposed legislation.

The Secretary adequately explained why her choice of words is superior to those preferred by Petitioners. To put it in terms of the football analogy above, even if sensible minds could disagree as to which constitutes a better choice of words for the ballot question, the Superior Court's role was not to review whether the Secretary's "kick" constituted textbook perfection. Instead, it was only supposed to confirm that the "football" passed somewhere between the uprights. This Court should correct the error below and pronounce the Secretary's kick as "*Good!*"

V. If the Court Finds the Ballot Question Violates 21-A M.R.S.A. § 905(2), the Appropriate Remedy Is Vacatur, Not Adoption of Petitioners' Preferred Language

Below, Petitioners asked the Superior Court to set aside the ballot question as constructed by the Secretary and to instead adopt their preferred wording. *See* Pet. Super. Ct. Br. at 24. The Superior Court effectively granted the Petitioners' request, concluding that the

Secretary's question was flawed because it "at no point refers to consumer ownership." App. at 9.

As set forth above, this Court should vacate the Superior Court's decision and affirm the Secretary's construction of the ballot question. However, if the Court disagrees, the appropriate remedy is not to replace the Secretary's choice of language with Petitioners' preferred language as the Superior Court's decision seems to imply. Instead, the appropriate remedy would be to remand the question to the Secretary with instructions to draft a new ballot question not inconsistent with the Court's decision to strike down her original language.

The Court's review is governed by 21-A M.R.S.A. § 905(2), which provides that the "action must be conducted in accordance with Maine Rules of Civil Procedure, Rule 80C, except as modified by this section." The relevant portion of Rule 80C—which is not modified by 21-A M.R.S.A. § 905(2)—provides the "manner and scope of review of final agency action . . . shall be as provided by 5 M.R.S.A. § 11007(2) through § 11007(4)."

Under 5 M.R.S.A. § 11007(4), a Court may 1) "affirm the decision of the agency," 2) "remand the case for further proceedings," or 3) "reverse

or modify the decision if the administrative findings, inferences, conclusions or decisions" violate a number of tenets of the Maine Administrative Procedure Act.

As described above, 21-A M.R.S.A. § 905(2) grants the Secretary significant discretion to draft a ballot question that "is understandable to a reasonable voter reading the question for the first time and will not mislead a reasonable voter who understands the proposed legislation into voting contrary to that voter's wishes." Moreover, the Constitution delegates to the Secretary—not the judicial branch or Petitioners—the responsibility of drafting ballot questions. Me. Const., art. IV, pt. 3, § 20. If the Court determines that the Secretary's question is inconsistent with § 905(2)—which, to be clear, it is not—the Court should vacate and remand the Secretary's determination with instructions to draft a new question that avoids whatever shortcomings the Court identifies.

The Secretary should be afforded the opportunity to execute the duties delegated to her by the Maine Legislature in 21-A M.R.S.A. § 901(4): "The ballot question for an initiative . . . must be drafted by the Secretary of State in accordance with section 906 and rules adopted in

accordance with the Maine Administrative Procedure Act." (emphasis added).

Conclusion

The Secretary respectfully asks that the Court 1) vacate the decision of the Superior Court; and 2) remand the Petition to the Superior Court with instructions to both dismiss the Petition and to affirm the language of the ballot question drafted by the Secretary as set forth in the final agency action.

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Respectfully submitted,

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Cum-23-83

WAYNE R. JORTNER, et al.,
Petitioner-Appellee

v.

SECRETARY OF STATE,
Respondent-Appellant.

CERTIFICATE OF SIGNATURE AND COMPLIANCE

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f), and conform to the form and formatting requirements of M.R. App. P. 7A(g). For this Certification, I relied on the word count function of the word-processing software used to prepare this brief (Microsoft Word 365), which has counted 8,731 words in this brief.

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