STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-23-83

WAYNE R. JORTNER, RICHARD BENNETT, JOHN CLARK, and NICOLE GROHOSKI,

Plaintiffs/Appellees,

v.

SHENNA BELLOWS,

in her official capacity as
Secretary of State for the State of Maine,

Defendant/Appellant.

On Appeal from Cumberland Superior Court
Docket No. AP-23-07

BRIEF OF AMICUS CURIAE THE SIERRA CLUB

Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 816
Portland, ME 04104
207-387-0820
ben@gaines-law.com
Attorney for Amicus Curiae
The Sierra Club

Table of Contents

Table of Authorities

Cases

Statutes

Constitutional Provisions

Legislative Materials

Other Authorities

Interest of the Amicus

The Sierra Club, founded in 1892, is America's largest and most influential grassroots environmental organization, with more than sixty chapters and over 3.8 million members and supporters. Sierra Club works to address the environmental and public health problems associated with energy generation, and actively advocates for increased use of low-cost renewable energy resources at the local, state, and national levels. The Maine Sierra Club is proud to represent more than 22,000 members and supporters throughout the state, many of whom actively participated in the petition-gathering campaign to initiate "An Act to Create the Pine Tree Power Company" (the "Legislation"). At least 20 different Maine Sierra Club members submitted comments to Secretary of State Shenna Bellows (the "Secretary") regarding her proposed ballot question (the "Question").

Statement of Facts and Statement of Issues

Amicus Curiae, The Sierra Club adopts the statements of the Petitioners and Plaintiffs/Appellees (the "Petitioners") as to the relevant facts and the issues on appeal.

Argument

I. The Court Independently and Without Deference to the Secretary Reviews the Record to Determine Whether the Question is Understandable and not Misleading.

In providing the people with the right to legislate by direct initiative, Maine's constitution requires that the Secretary "concisely and intelligibly" draft the question for presentation to the voters on the ballot. Me. Const. art IV, pt. 3 § 20. The Legislature, in turn, mandates that the Secretary "shall write the question in a clear, concise and direct manner that describes the subject matter of the . . . direct initiative as simply as is possible." 21-A M.R.S. § 906(6)(B) (2022).

In a challenge to the Secretary's drafted question brought by voters named on the initiative application, section 905(2) of Title 21-A provides that the reviewing 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." *Id.* The Court has interpreted this language to mean that "both the Superior Court and [the Court] are 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. Such review subsumes within its standard both the Constitutional requirements and those in section 906(6)(B). *Id.* ¶ 6.

II. The Question Drafted by the Secretary Does not "Describe[] the Subject Matter . . . as Simply as is Possible."

A. The Question cannot satisfy the "understandable" standard unless it "describes the subject matter . . . as simply as is possible."

As the Secretary acknowledged, her drafting of the ballot question is required by statute to comply with a "dual obligation[] to present the question (a) accurately and (b) as simply as possible." (A. 22.) This acknowledgement reflects a key amendment to 21-A M.R.S. § 906(6) passed as an emergency in 2019 as part of legislation titled "An Act to Make Ballot Questions Easier to Read and Understand for Maine Voters." P.L. 2019, ch. 414 (emergency, effective June 30, 2019). The bill's emergency preamble finds that "the ability of voters to make informed choices on ballot questions is essential for the proper functioning of the State's citizen democracy." *Id.*

The nature of the Court's independent review of whether the Secretary's description is "understandable" and "will not mislead" the reasonable voter, therefore now subsumes a further heightened

requirement than the Court confronted in *Olson*, 1997 ME 30, 689 A.2d 605. It is no longer sufficient that the question merely be written in a "simple . . . manner" (*id.*, ¶ 3 n.2 (quoting 21-A M.R.S.A. § 906(6)(B) (Supp. 1996))), but rather it must "describe[] the subject matter of the . . . direct initiative *as simply as is possible*." 21-A M.R.S. § 906(6)(B) (2022) (emphasis added).

B. The Secretary's Question fails because "consumer-owned" is both more accurate and simpler.

1. For nearly 40 years, Maine statute has divided public utilities between the "investor-owned" and the "consumer-owned."

Although the Secretary acknowledges that, under the Legislation, Pine Tree Power Company ("PTPC") would be defined as "consumer-owned," she fails to acknowledge *why* this is the case: because for nearly forty years, Title 35-A (and Title 35 before it) has described a broad category of "consumer-owned" utilities as distinct from those that are "investor-owned." *See e.g.* P.L. 1985, ch. 481, § 74 (defining and separately regulating "consumer-owned electric utilities"). For example, when Maine deregulated electric utilities in the late 1990s, "investor-owned" electric utilities were required to divest themselves of existing power generating facilities, but "consumer-owned" utilities were given

the option of remaining in the generation business. *See generally* 35-A M.R.S. §§ 3204, 3207 (2022); *see also Competitive Energy Servs. LLC v. Pub. Utils. Comm'n*, 2003 ME 12, ¶ 2, 818 A.2d 1039. Nor are the "consumer-owned" and "investor-owned" categories unique to Maine. *See e.g. Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 19-20 (1st Cir. 1990) (distinguishing investor-owned utilities from consumer-owned utilities); *see generally* Jim Lazar et al., *Electricity Regulation In The US: A Guide 11-12* (2d ed. 2016), https://perma.cc/2WNN-3SC9 (last visited Mar. 22, 2023) (describing an industry structure divided into investor-owned utilities, or IOUs, and consumer-owned utilities, or COUs).

The general purpose of the proposed Legislation includes changing the ownership of transmission and utility providers from the "investor-owned" category to the "consumer-owned" category. The legislators and citizens who drafted the Legislation did not pull "consumer-owned" out of thin air, but deliberately chose to situate the new company within an existing body of law applicable to "consumer-owned transmission and distribution utilities." *See* (R. 226 (comments from the Sierra Club Maine Chapter noting that "consumer-owned is clearer, and is already

used 55 times in Maine Law.")); *see also* 35-A M.R.S. §§ 3501-3504 (chapter applicable to "Consumer-Owned Transmission and Distribution Utilities").

2. "Consumer-owned transmission and distribution utilities" are currently defined to include several existing entities that *might* alternatively be described as "quasi-governmental" but are not.

The Secretary explained that her decision to use the term "quasi-governmental" rather than "consumer-owned" was based, at least in part on her conclusion that (1) the Legislation describes PTPC as "a body corporate and politic," a phrase used in legislation establishing other entities that she characterizes as quasi-governmental; and (2) the phrase "consumer-owned" might "suggest to voters that consumers would be acquiring shares or some other formal ownership stake in the new entity." (A. 20.) But the phrase "body corporate and politic" is hardly unique to quasi-governmental entities; it is also applied to entities described by Maine statutes as "consumer-owned." *See e.g.* P. & S. L. 1951, ch. 53 (incorporating "a body politic and corporate" as the Kennebunk Light and Power District); 35-A M.R.S. § 3501 (2022) (defining the term "consumer-owned transmission and distribution utilities" to include Kennebunk Light and Power District). Nowhere in

statute or its governing documents is Kennebunk Light and Power District (the "District") defined as "quasi-governmental."

Crucially, the customers of consumer-owned Kennebunk Light and Power have never acquired shares in the company, nor otherwise any transferable "formal ownership stake," except — as with PTPC — through the corporate governance of its publicly elected board.[1] Yet, prominently on its website, the District describes itself as "one of eight *consumer owned*, not-for-profit electric utilities in the state of Maine." *A Maine Electric Company with History*, Kennebunk Light & Power District, https://klpd.org/index.asp?SEC=85CABB91-7946-4CC0-8E99-436D0B505AAD (last visited Mar. 22, 2023). Elsewhere, the website explains that, "[a]s a consumer-owned not for profit electric distribution company the District is accountable only to the residents and the customers it serves." *History of KLPD*, Kennebunk Light & Power District, https://klpd.org/index.asp?SEC=5A5E134A-DC02-401D-BDF1-FC292E20B160 (last visited Mar. 22, 2023). The Secretary's insistence on a "formal ownership stake" fundamentally misconstrues the nature

[1] As would be the case with PTPC, voters of the Town of Kennebunk are entitled to vote for the Board of Trustees of Kennebunk Light and Power, whether or not they are technically bill-paying customers of the company. P. & S. L. 1951, ch. 53, § 9.

of a consumer-owned utility. Consumer-owned utilities issue no stock and have no shareholders. Customers own the utility collectively, not as individual shareholders.

III. The Meaning of Quasi-Governmental is Uniquely Opaque.

Even if the term "consumer-owned" was not both more accurate and more comprehensible, "quasi-governmental" would still be difficult for a reasonable voter to understand, for three reasons: *first*, a precise definition of the term is quite difficult to obtain; *second*, the term is inherently difficult to define; and *third*, the term is applied to such a disparate array of entities and organizational structures that in the context of the question it is utterly uninformative.

A. Reasonable voters may have no readily available definition for "quasi-governmental."

As explained by the Superior Court (Cumberland County, *MG Kennedy, J.*), "[q]uasi-governmental . . . is not expressly defined . . . in Maine's statutes." (A. 8); *cf. Olson*, 1997 ME 30, ¶ 11, 689 A.2d 605 (holding that "the term 'Class A crime' is readily understood by reference to external sources because it is defined by statute . . . ."). But even beyond a precise statutory definition, a dictionary definition of the term quasi-governmental may elude inquisitive voters. Below, both

Petitioners (citing *quasi-governmental*, https://www.merriam-webster.com/dictionary/quasi-governmental (last visited Mar. 22, 2023) and the Secretary (citing *quasi-governmental agency*, Black's Law Dictionary (11th ed. 2019)), offered dictionary definitions that Petitioners correctly argued were misleading when applied to PTPC. Yet, notwithstanding these two offerings, most current desktop editions of standard English language dictionaries *do not even include entries* for "quasi-governmental," including each of the three standard English language dictionaries most often employed by the Court in recent years: The New Oxford American Dictionary (3d ed. 2010), Webster's New World College Dictionary (5th ed. 2016), and The American Heritage Dictionary of the English Language (5th ed. 2016). *See e.g. State v. Marquis*, 2023 ME 16, ¶ 16, ___ A.3d ___ (quoting from each dictionary); *Convery v. Town of Wells*, 2022 ME 35, ¶ 11, 276 A.3d 504 (same).

And while a law dictionary such as Black's might be the appropriate tool for most of the Court's textual interpretation needs, its specialized contents surely do not reflect what is "understandable to the reasonable voter," nor should the Court assume that such a text is readily available for consideration by even the most conscientious non-

lawyer citizen. *See Allocca v. York Ins. Co.*, No. CV-15-375, 2016 Me. Super. LEXIS 101, at *12 n.6 (June 14, 2016), *aff'd* 2017 ME 186, 169 A.3d 938 (observing that Black's contains "definitions from judicial decisions, not definitions that would be understood by average persons without legal training.").

B. The term "quasi-governmental" is legalistic jargon describing a concept that is inherently difficult to define.

As Sierra Club member Michelle Henkin wrote to the Secretary, "'quasi-governmental' is not a commonly used term and the use of the word 'quasi' gives the average reader the sense that what is being proposed isn't very defined. It's 'sort of this' and 'sort of that.'" (R. 138.) She was correct. The ever-expanding space between what is officially a government agency and what is an entirely private entity makes precisely defining common characteristics of "quasi-governmental" entities inherently difficult. *See* Kevin R. Kosar, Cong. Research Serv., RL30533, *The Quasi Government: Hybrid Organizations with Both Government and Private Sector Legal Characteristics* 2 (2011), https://sgp.fas.org/crs/misc/RL30533.pdf (last visited Mar. 22, 2023) (observing that the quasi-government "virtually by its name alone and the intentional blurring of the governmental and private sectors, is not

easily defined.") Unnecessarily introducing such a nebulous concept to the heart of the Secretary's ballot question only serves to obfuscate, and is the antithesis of "clear, concise and direct . . . ."

C. Any definition of "quasi-governmental" that includes PTPC would be so broad as to be useless for the purpose of informing the voter.

By one extreme standard, any entity at all that combined at least one legal characteristic of the government with at least one from the private sector would qualify as "quasi-governmental." Kosar, *supra.* at 2 (suggesting the task categorizing hybrid such entities to be "artificial, with porous lines of distinction and differentiation . . . tend[ing] to be imposed upon the disparate entities after the fact.").[2] But such a standard or definition would tell the voter nothing about what PTPC actually does or how it is structured, nor tell the voter anything that distinguishes PTPC from *any other public utility—a distinction which goes to the very heart of the Legislation*.

As Petitioners argued to the Superior Court, the two existing investor-owned transmission and distribution utilities, Central Maine

[2] By at least one method of categorization, PTPC might more aptly be described as a quasi *non*governmental organization, or "quango" than as quasi-governmental. *Id.* (defining a quango as "essentially a private organization that is assigned some, or many, of the attributes normally associated with the governmental sector.")

Power and Versant Power are each—at least in significant part—already owned and controlled by governmental entities: the Nation of Qatar, and the City of Calgary, Canada, respectively. (R. 204-205.) And Maine law already empowers investor-owned transmission and distribution utilities to exercise eminent domain to erect necessary power lines. *See* 35-A M.R.S. § 3136 (2022). These factors therefore say absolutely nothing unique about the entity proposed by the Legislation.

The Superior Court correctly noted that if, in the context of the question, "the phrase 'quasi-governmental' is meant to primarily indicate, as the Secretary suggests, that PTPC will be governed by an elected board . . . the remainder of the question is redundant." (A. 8, n.3.) But the reverse is also true: because the question already mentions PTPC's elected board, the phrase "quasi-governmental" is redundant, and could just as easily be omitted, leaving the entity to be described as a "new power company governed by an elected board."

IV. Quasi-Governmental is also Misleading

Even if "quasi-governmental" were understandable to the reasonable voter, it would still be misleading, for two reasons: *first,* because "quasi-governmental" is applied to such a wide array of

different organization types and organizational structures, most of which are largely dissimilar from PTPC, the associations are overwhelmingly misleading; and *second*, the Question is misleading because it undermines the express intent of petitioners to create a nongovernmental entity.

A. "Quasi-governmental" refers to a melange of organization types and structures, most of which are largely dissimilar from PTPC.

The term "quasi-governmental" has been applied to a broad array of disparate organization types and structures, each with different legal characteristics purportedly qualifying them as "quasi-governmental." Yet, in almost every respect, PTPC does *not* share such characteristics.

For instance, unlike the National Park Foundation, PTPC is not led by an executive appointee or appointees (*compare* (A. 26 (proposed 35-A M.R.S. § 4002(2))) *to* 54 U.S.C.S. § 101112(a) (LEXIS through Pub. L. 117-327)); unlike the Polish-American Enterprise Fund it is not funded by taxpayer dollars (*compare* (A. 33 (proposed 35-A M.R.S. §§ 4004, 4005)) *to* 22 U.S.C.S. § 5421(b) (LEXIS through Pub. L. 117-327)); unlike the Tennessee Valley Authority, it is not staffed by public employees (*compare* (A. 29 (proposed 35-A M.R.S. § 4003(5)) *to* 16 U.S.C.S. § 831b (LEXIS through Public Law 117-327)); unlike the

Federal National Mortgage Association, its debts are explicitly *not* guaranteed by the government (*compare* (A. 33 (proposed 35-A M.R.S. § 4006)) *to* 2 U.S.C.S. § 622(8) (LEXIS through Public Law 117-327)); and, unlike the Maine Turnpike Authority, PTPC would not contribute any surplus revenue out to state departments, ensuring that every dime of customer charges can be spent on fulfilling PTPC's purpose of "deliver[ing] electricity to [its] customer-owners in a safe, affordable, and reliable manner." *Compare* (A. 26 (proposed 35-A M.R.S. § 4002(1)) *to* 35-A M.R.S. § 1961(7) (2022). To the extent that any voter identifies such characteristics or entities as quasi-governmental, the term therefore misleads by falsely associating Pine Tree Power with qualities it does not actually possess.

B. <u>The Secretary's characterization as "quasi-governmental" misleads by undermining the express intent of petitioners to create a nongovernmental entity.</u>

The most pernicious sense in which the term "quasi-governmental" misleads is by implying that PTPC is in fact "governmental," when petitioners expressly sought to create a nongovernmental, *privately* operated, not-for-profit power company. Petitioners intentionally drafted legislation such that it might avoid the

fate of the 1973 Act Creating the Power Authority of Maine, I.B. 1. *See* (R. 95 (comment of former Public Utility Commissioner Harlan Baker).)

This undesirable characterization seriously undermines the campaign organized by petitioners, including several members of the Sierra Club who expressed their concerns to the Secretary:

> When I collected signatures I made clear to people that this power company would not be part of the State government. The biggest fear I heard from people was that they did not want the state government to run this company. Where did this wording come from? It seems like an effort to inject a red flag to alarm anyone with conservative leanings.

(R. 0095 (Sierra Club member Richard Thomas).)

> I collected signatures on petitions to put this matter on the ballot at a polling place here in Belfast in November 2021. A strong majority of voters quickly signed the petition and they clearly wanted a "non-profit consumer-owned" utility (as stated on the petition) to replace the current, profit-based system. To describe the new system on the ballot as a "quasi-governmental owned power company" is inaccurate and completely misleading. Many Maine voters would not want a "governmental owned power company" and I urge the Secretary of State to remove that language.

(R. 0074 (Sierra Club member Corliss Davis).)

> During my time volunteering for the campaign I have found that the Pine Tree Power Company is not government affiliated and instead would operate more similarly to a non profit. It is important to emphasize that the board would be democratically elected by the people but differentiate publicly elected officials from officials elected and paid for by

> the state. There would be no tax payer money going into the company, and all expenses/ debt would be paid off through electrical expenses. Through petitioning people seem[ed] to want to be reassured that the utilities are not going to become a governmental entity. I believe even having the term quasi governmental will be misleading to people.

(R. 0093 (Sierra Club member Ella Maddi).)

> I don't agree with the "quasi-governmental owned power company" phrase. It is totally misleading and will create confusion for many people who have talked about it being a CONSUMER OWNED UTILITY. Also we intend to only acquire foreign owned electricity and distribution facilities in Maine. This proposed Ballot question doesn't reflect the intention of . . . the original initiative.

(R. 0113 (Sierra Club member Barbara L. Russell).)

The Court has repeatedly instructed that "[t]he broad purpose of the direct initiative is the encouragement of participatory democracy." *NECEC Transmission LLC v. Bureau of Parks & Lands*, 2022 ME 48, ¶ 18, 281 A.3d 618. Accordingly, both the statutes and constitutional provisions providing for it "must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to legislate." *Payne v. Sec'y of State*, 2020 ME 110, ¶ 29, 237 A.3d 870. Such facilitation must naturally encompass protecting the right of petitioners to have their statutory intent faithfully communicated. The Court should not permit reasonable voters to be misled into believing

that legislation specifically and intentionally drafted to create a *nongovernmental* entity would instead create a *government* entity.

Conclusion

For the forgoing reasons, the Court should affirm the Superior Court's opinion and remand to the Secretary to revise the Question such that it is written in a clear, concise, and direct manner that describes the subject matter of the direct initiative as simply as is possible.

Dated at Brunswick, Maine this March 23, 2023.

/s/ Benjamin Gaines
Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 816
Portland, ME 04104
207-387-0820
ben@gaines-law.com
Counsel for Amicus Curiae
The Sierra Club

Certificate of Service

I, Benjamin Gaines, hereby certify that two printed copies of this Brief of Amicus Curiae were served upon counsel for the parties by first-class mail, postage prepaid, and were emailed to the address below on March 23, 2023:

Jonathan Bolton, Esq.
Paul Suitter, Esq.
Office of the Attorney General
6 State House Station
Augusta, ME 04333
paul.suitter@maine.gov
jonathan.bolton@maine.gov

Sean R. Turley, Esq.
Peter L. Murray, Esq.
Murray Plumb & Murray
75 Pearl Street
Portland, Maine 04101
sturley@mpmlaw.com
pmurray@mpmlaw.com

Dated: March 23, 2023

/s/ Benjamin Gaines
Benjamin Gaines
Maine Bar No. 5933
Gaines Law, LLC
P.O. Box 816
Portland, ME 04104
207-387-0820
ben@gaines-law.com
Counsel for Amicus Curiae
The Sierra Club