STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-416

NECEC TRANSMISSION LLC, et al.,
Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,
Defendant-Appellees

On Report from Business and Consumer Court
Docket No. BCD-CIV-2021-0058

BRIEF OF CALPINE CORPORATION, VISTRA CORPORATION, HOLLY BRAGDON, AND BRIAN AHERN AS AMICI CURIAE

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INTRODUCTION

Avangrid Networks[1]—a subsidiary of a power conglomerate headquartered in Spain—seeks to build a massive transmission line through undeveloped and ecologically significant forest land in western Maine. The line is heavily subsidized by Massachusetts. If built, it would harm Maine's environment and economy.

On November 2, 2021, Maine voters overwhelmingly—by a vote of nearly 60%—endorsed a ballot initiative designed to preserve Maine's forests.[2] Among other things, the Initiative prohibits the construction of high-impact electric transmission lines in the Upper Kennebec Region. A69-A70.

Avangrid attempted to defeat the Initiative at the polls by helping fund the most expensive ballot campaign in the State's history.[3] After losing badly at the ballot box, Avangrid sued the next day, seeking to have the courts in-

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[1] Plaintiffs in this case were Avangrid Networks, LLC and its wholly owned subsidiary NECEC Transmission LLC. We refer to the two plaintiffs in this action collectively as "Avangrid." H.Q. Energy Services (HQUS), The Maine Chamber of Commerce, and the Industrial Energy Consumer Group (IECG) intervened in support of Avangrid below. For simplicity, we refer to these five parties collectively as "Appellants."

[2] *See Full Results for Nov. 2, 2021 Election Posted Online*, Maine Dep't of the Sec. of State (Nov. 16, 2021), perma.cc/UZ9G-C9QY.

[3] Eric Russell, *At $289 per Vote, Question 1 Opponents Spent Three Times as Much as Supporters, and Still Lost*, Portland Press Herald (Nov. 5, 2021), perma.cc/7C9E-HMGN.

validate the clear will of Maine voters. Avangrid immediately moved for a preliminary injunction, which the business court denied.

The business court was well within its discretion to deny Avangrid's motion for a preliminary injunction. Below, Avangrid trumpeted that it had rushed ahead with construction and already clear-cut some forestland, suggesting that this conduct somehow provided it a constitutional right to disregard the will of Maine voters. The business court was correct to reject this argument.

When construction began, Avangrid knew its investment was at risk. At that time, a federal judicial injunction *barred* completion of the project. Avangrid knew that there was a significant—and, to date, successful—challenge to the lease of state lands. And Avangrid certainly knew that Maine voters would soon be casting ballots on the Initiative.

Avangrid nonetheless chose to accept this cumulative, ongoing legal risk and initiate construction. Maine law holds—consistent with the consensus view from around the country—that a developer's decision to forge ahead with construction does not provide it a constitutional right that trumps the ongoing political and legal processes. Rather, when a developer builds despite a known risk of pending litigation or legal changes, the vested rights doctrine offers no protection.

Apart from Avangrid's likelihood of success on the merits, the business court correctly concluded that myriad factors counsel against a preliminary injunction. Avangrid cannot show irreparable injury; its mere preference to short-circuit legal proceedings and rush forward with construction notwithstanding the popular vote is not sufficient. And an injunction would have been especially inappropriate because allowing Avangrid to proceed with construction now would enable the very harm—clear-cutting of forest lands—that Maine voters overwhelmingly sought to prevent.

Appellants' displeasure with the electoral outcome is no basis to set aside the democratic process. Elections have consequences. The Court should reject Appellants' effort to invalidate the vote.[4]

ARGUMENT

The Business and Consumer Court properly exercised its discretion to deny Avangrid's most extraordinary motion, which requests a preliminary in-

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[4] *Amici* Calpine Corporation and Vistra Corporation are independent power producers who own and operate generation facilities in New England. These facilities employ many Maine citizens, pay substantial property taxes, and support the local economy. The facilities also enhance local power system reliability by generating power used throughout Maine. Brian Ahern is the Plant Manager of Vistra's generation facility in Veazie, Maine. Holly Bragdon is the Plant Manager of Calpine's Westbrook Energy Center, located in Westbrook, Maine. Ahern and Bragdon each voted "Yes" on Question 1 in the November 2, 2021 election—supporting the Initiative to preclude construction of transmission lines in the Upper Kennebec Region.

junction that would set aside a duly enacted ballot initiative. In fact, Avangrid asks the courts to allow, as a *preliminary* matter, the very harms that motivated Maine citizens to act—the mass clearcutting of Maine forests and the construction of high-power electrical lines along those corridors. That is not an appropriate exercise of the judiciary's equitable powers.

In order to obtain an injunction, Avangrid needed to "demonstrate that it ha[d] a 'clear likelihood of success on the merits,'" and further "'that (1) it [would] suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; and (3) the public interest will not be adversely affected by granting the injunction.'" *All. for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 11, 240 A.3d 45 (alteration omitted) (quoting *Bangor Historic Track, Inc. v. Dep't of Agric., Food & Rural Res.*, 2003 ME 140, ¶ 9, 837 A.2d 129). This Court reviews the denial of a preliminary injunction motion for abuse of discretion. *Littlefield v. Adler*, 676 A.2d 940, 942 (Me. 1996).

I. AVANGRID DID NOT DEMONSTRATE A LIKELIHOOD OF SUCCESS ON THE MERITS.

Avangrid is not likely to win on the merits because its assorted legal claims each fail. No theory of vested rights provides Avangrid a constitutional

right to disregard the will of the people; the Initiative does not violate any separation-of-powers principle; and there is no Contracts Clause violation.

In evaluating these issues, the Court must apply the "heavy presumption of constitutionality" that attaches to legislative initiatives. *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996). In such a challenge, "[b]efore legislation may be declared in violation of the Constitution, that fact must be established to such a degree as to leave no room for reasonable doubt." *Id.* at 771-772. Appellants cannot carry that heavy burden here.

A. The business court correctly held that Avangrid is unlikely to succeed on the merits of its vested rights claim.

Avangrid's primary contention is that the Initiative supposedly infringes its vested rights in the NECEC project. But the vested rights doctrine does not apply here at all, and even if it did, Avangrid cannot make the demanding showing that is required.

1. The vested rights doctrine does not foreclose the State's exercise of its essential police powers.

The business court properly rejected Avangrid's central argument because the vested rights doctrine does not gut the State's ability to employ traditional police powers, the exercise of which are essential to serve the public welfare. A36-A41.

To start with, it is established that Maine economic laws may apply retroactively if the Legislature so intends. Thus, "[i]f the Legislature intends for a statute to apply retroactively, … the statute will be so applied unless a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature." *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1060 & n.5 (Me. 1986).

As the business court correctly noted, the Initiative is plainly intended to have retroactive effect. A37. The text of the Initiative itself makes that clear. Section 1 states that, "[n]otwithstanding Title I, section 302 or any other provision of law to the contrary, this subsection applies retroactively to September 16, 2014." A69. Similarly, Section 6 dictates that "subsections 6-C and 6-D apply retroactively to September 16, 2020 and apply to any high-impact electric transmission line the construction of which had not commenced as of that date." A70. The same language appears in the printed version of the Initiative that was transmitted to the Legislature. A37. As the business court held, "[t]here is thus no question of Legislative intent." A37.

The Initiative must therefore be deemed to have retroactive effect unless "a specific provision of the state or federal constitution is demonstrated to prohibit such action by the Legislature." *Norton*, 511 A.2d at 1060 n.5. De-

spite Appellants' contrary arguments, the vested rights doctrine does not provide such a restraint on legislative power—for two reasons.

First, the Law Court has consistently described vested rights in this context as providing protection against only local, municipal action. Most directly, the Court in *Peterson v. Town of Rangeley* held that "[t]he circumstances when rights vest … occur when a *municipality* applies a *new ordinance* to an existing permit." 1998 ME 192, ¶ 12 n.3, 715 A.2d 930 (emphasis added). When the Court adopted its modern vested-rights test in *Sahl v. Town of York*, it used the same language to describe the outer limits of the doctrine before enumerating several exceptions when rights do *not* vest. 2000 ME 180, ¶ 12, 760 A.2d 266.

And, in each of the Law Court's cases examining a developer's vested rights in a project, the Court has expounded the doctrine only as it relates to municipal ordinances. *See, e.g.*, *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183 (considering retroactive application of a zoning ordinance to a developer's application); *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779 (Me. 1989) (considering retroactive application related to a moratorium enacted by the Town of Porter); *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160 (Me. 1988) (considering retroactive application of amendments to the City of Portland's zoning ordinance); *Thomas v. Zoning*

Bd. of Appeals of Bangor, 381 A.2d 643, 647 (Me. 1978) (considering retroactive application of Bangor's new zoning ordinance).

This is consistent, moreover, with the approach taken by other states. In *Sahl*—Avangrid's leading authority—this Court incorporated analysis from the Court of Appeals of New York. *See* 2000 ME 180, ¶ 12, 760 A.2d 266 (quoting *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1064 (N.Y. 1996)). The New York court earlier explained that, for a claim to accrue, "[t]he landowner's actions relying on a valid permit must be so substantial that *the municipal action* results in serious loss rendering the improvements essentially valueless." *Town of Orangetown*, 665 N.E.2d at 1065 (emphasis added). Maryland also describes the vested rights doctrine as confined to the municipal context. *See, e.g.*, *Maryland Reclamation Assocs., Inc. v. Harford County*, 994 A.2d 842, 868 (Md. 2010) (describing doctrine as allowing developers to "obtain a vested right in an existing zoning use that will be protected against a subsequent change in a zoning ordinance prohibiting that use") (quoting *Powell v. Calvert County*, 795 A.2d 96, 102-03 (Md. 2002)).

Similarly, Arizona law provides that "the governing body of the city or town" may modify an otherwise-vested development right plan "[o]n the enactment of a state or federal law or regulation that precludes development as approved in the protected development right plan." Ariz. Rev. Stat. Ann. § 9-

1204(A)(4). California law also provides that local governments may condition or deny permits, even once rights have otherwise vested, if "[t]he condition or denial is required in order to comply with state or federal law." Cal. Gov't Code § 66498.1(c)(2). And the Washington Supreme Court has recently clarified that the state's "vesting statutes were intended to restrict municipal discretion with respect to local zoning and land use ordinances" as opposed to "state and federal law." *Snohomish County v. Pollution Control Hearings Bd.*, 386 P.3d 1064, 1077 (Wash. 2016) (en banc).

Second, this Court has made clear that the vested rights doctrine—whatever its historic origin—does not bar the State's exercise of essential police powers aimed at preserving the public welfare. *See* A39-A40. In circumstances regarding "the public health, safety, or morals," "the power of the state to control under its police powers is supreme and cannot be bargained or granted away by the Legislature." *Baxter v. Waterville Sewerage Dist.*, 146 Me. 211, 218, 79 A.2d 585, 589 (1951). In this context, as the Law Court explicitly held, "[t]he exercise of the police power …violates no constitutional guarantee against the impairment of vested rights or contracts." *Id*. "[A] contrary rule would enable individuals by their contracts, or contractual relations, to deprive the State of its sovereign power to enact laws for the public health and public welfare." *Id.*

That holding—which is a concrete limitation on the scope of any applicable vested rights doctrine—governs here. The business court rightly distinguished the statewide Initiative, an exercise of core state police powers, from municipal zoning boards, which act only within their statutorily-prescribed authority. *E.g.*, *Town of Windham v. LaPointe*, 308 A.2d 286, 290 (Me. 1973) ("A municipality in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the Legislature or as necessarily implied from those expressly so conferred."). This distinction is crucial because "[m]unicipal corporations have no inherent authority to interfere with, or to regulate the use of, private property." *Spain v. City of Brewer*, 474 A.2d 496, 498 (Me. 1984). Developers simply cannot frustrate the ability of the State to govern through the exercise of historic and essential police powers.[5]

Third, it is not clear that Avangrid has a sufficient property interest in the *public lands* at issue to give rise to vested rights in the first instance. In *Fuller-McMahan v. City of Rockland*, No. 05-58PH, 2005 WL 1645765 at *10 n.4 (D. Me. July 12, 2005), the court rejected a developer's claim of vested

[5] To be sure, this says nothing of the Takings Clause. If Avangrid believes that the State has taken some property right it possesses, it can request *compensation* for that action. But Avangrid has not done so here, and is likely barred from doing so for a host of contractual, legal, and policy reasons.

rights, noting that Maine law "cannot be read to support the conclusion that Maine law recognizes a business lease as a property interest protected by the state or federal constitution." Indeed, it does not appear that Maine courts have ever recognized a developer's vested interest in the use of land that it rents rather than owns. *See*, *e.g.*, *Kittery Retail Ventures*, 2004 ME 65, ¶ 14, 856 A.2d 1183; *Fisherman's Wharf Assocs. II*, 541 A.2d at 161 (noting the purchase-sale agreement); *Thomas*, 381 A.2d at 647 (discussing circumstances in which the rights of a "property owner" vest). That is especially true as to public lands.

Avangrid cites no authorities holding that the vested rights doctrine may negate the *state*'s exercise of essential police powers over public lands. In *Fournier v. Fournier*, the Court considered a claim arising from a divorce in which one party argued that a revised statute infringed her "vested right in a particular statutory procedure governing the disposition of property upon divorce." 376 A.2d 100, 102 (Me. 1977). But the Law Court *denied* the appeal, holding that the statute did not infringe on vested rights—it thus had no reason to pass on the broader question. And *Fournier* certainly did not suggest that the "vested rights" doctrine can wholesale supplant the State's ability to exercise its traditional police powers on public lands. Nor do the Court's generalized statements about legislative enactments shed any light on this ques-

tion, as municipal ordinances are an exercise of municipal legislative power. *See, e.g.*, *Inhabitants of Otisfield v. Scribner*, 129 Me. 311, 151 A. 670 (1930). The business court was thus correct to hold that the vested rights doctrine does not immunize developers from plainly retroactive changes in state law.[6]

2. Because the NECEC project was at risk at the time Avangrid undertook construction, it cannot invoke the vested rights doctrine.

Even if applicable, the vested rights doctrine provides no basis for Avangrid to challenge the Initiative. In order to prevail under a traditional vested rights theory, a developer must meet at least three requirements:

> 1) there must be the actual physical commencement of some significant and visible construction;
>
> 2) the commencement must be undertaken in good faith … with the intention to continue with the construction and carry it through to completion; and
>
> 3) the commencement of construction must be pursuant to a validly issued building permit.

Sahl v. Town of York, 2000 ME 180, ¶ 12, 760 A.2d 266.[7]

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[6] For these reasons, the business court was further right to hold that, at most, the Initiative must withstand rational basis review. *See* A39-40. As that court explained, challenges to the State's exercise of police power through the adoption of economic regulation are, save implication of a fundamental right, subject to rational basis review. *Id*.

[7] Below, Avangrid argued that it had also acquired vested rights under an equitable theory, on the basis of bad faith on the part of the *voters* who enacted the Initiative. *See Kittery Retail Ventures,* 2004 ME 65, ¶ 25, 856 A.2d

Avangrid cannot make the required showing here. As the business court correctly recognized—and overwhelming case law confirms—a developer cannot acquire vested rights in a project by commencing construction when it knows that pending litigation or changes to the underlying legal structure may preclude the project. Courts have explained that a contrary conclusion would lead to harmful results: Developers could race to construct in order to foreclose valid legal challenges. That is not—and should not become—the law. Because Avangrid knew that its project was "at risk" throughout construction, Avangrid cannot invoke the vested rights doctrine.

1183. Appellants have expressly (and sensibly) abandoned this argument on appeal. NECEC Br. 17 n.6; Chamber Br. 6. Unsurprisingly, "parties have had difficulty in proving the requisite bad faith or discriminatory enactment." *Kittery Retail Ventures*, 2004 ME 65, ¶ 25, 856 A.2d 1183. In fact, to our knowledge, no Maine court has *ever* found that rights vested on this theory. And it would be extraordinary to hold that *voters* have engaged in bad faith by means of voting. Generally applicable initiatives that have the predictable effect (and even the intent) of prohibiting a development project have been regular occurrences on Maine's ballots. *See, e.g.*, L.D. 1619, I.B. 1 (107th Legis. 1976); 2 Legis. Rec. S-B1267 (1975) (creating a nature preserve in order to block the development of a private ski resort), https://perma.cc/3B48-E69R; L.D. 719, I.B. 1, § 5 (1991) (disallowing the long-planned widening of the Maine Turnpike); L.D. 20, I.B. 1 (113th Legis. 1987); *see also* L.D. 20, Summary (113th Legis. 1987) ("The intended effect of this legislation would be to close the Maine Yankee nuclear power station at Wiscasset, Maine."), https://perma.cc/X779-3M7D. *See generally* Kathy Harbour, *Turnpike Vote May Have Far-Reaching Effects, Debaters Say*, Bangor Daily News (July 20, 1991) ("The referendum … would … call a halt to plans to widen the turnpike in southern Maine."), https://perma.cc/V79Z-5G8P.

a. The timeline of events reveals that Avangrid undertook construction with full knowledge that its project was in grave legal jeopardy. Avangrid claims that it began construction on the project on January 18, 2021. See A31; A114; NECEC Br. 25. This is the earliest date on which rights possibly could have vested—the project did not receive necessary permits from the Department of Energy until January 14, 2021, including a required Presidential Permit and environmental impact permits. A31; A94. As the Law Court has long held, the mere application for or issuance of permits, coupled with "preliminary expenditures," is insufficient to create vested rights. *Thomas*, 381 A.2d at 647. Actual construction is required, and Avangrid acknowledges that no construction occurred until January 18, 2021, when Avangrid strategically began construction at the earliest opportunity.

Yet, three days *before* construction began, on January 15, 2021, the U.S. Court of Appeals for the First Circuit issued a preliminary injunction barring Avangrid from constructing an integral part of the NECEC—Segment 1. *Sierra Club v. U.S. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021). That injunction remained in place until May 13, 2021—and the underlying district court litigation is still pending. *Id.*

Contrary to Avangrid's claim now, it categorically could not have had a good faith intent, as of January 18, 2021, "to continue with the construction

and carry it through to completion." NECEC Br. 24. When construction started, the First Circuit injunction *legally barred* that result. A party may not, in good faith, intend to complete that which an injunction flatly prohibits.

What is more, challengers filed suit to contest the validity of Avangrid's lease in *Black v. Cutko* in June of 2020 (A26)—more than seven months before Avangrid began construction. That ultimately led to a judgment reversing the grant of the BPL Lease on August 10, 2021. A26. This litigation too put the project at risk.

And, if that were not enough, when construction began, Avangrid had full knowledge that the Initiative may end the project. Maine voters filed for the Initiative on September 16, 2020. A69. The Initiative Petition—with sufficient signatures to proceed—was submitted to the Office of the Secretary of State on January 21, 2021. *See Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 4, 256 A.3d 260. On February 22, 2021, the Secretary of State determined that the petition was valid. *Id*. The Legislature adjourned *sine die* on March 30, 2021, leading the Governor to issue a proclamation which submitted the initiated bill to the voters on November 2, 2021. *Id*. ¶ 5.

Appellants were surely aware of the existential risk that the Initiative posed. Public records indicate that the Avangrid corporate family spent in excess of $48 million opposing the ballot initiative. *See* Maine Question 1, Elec-

tric Transmission Line Restrictions and Legislative Approval Initiative (2021), Ballotpedia, perma.cc/L9KX-9W6R.[8] That spending is clear evidence that Avangrid knew the Initiative could foreclose the project.

In fact, in Avangrid's 10-Q, filed on October 30, 2020, Avangrid recognized that the Initiative, "if enacted into law and found to be constitutional, would, among other things, require a two-thirds affirmative vote of each of the Maine state house of representatives and Maine state senate to approve high-impact transmission line construction and the lease by the Bureau of Parks and Lands of public reserved lands for transmission lines and similar linear projects." Avangrid, Inc. 10-Q at 56 (Oct. 30, 2020), https://perma.cc/AN4E-6QDE.

The facts are incontrovertible: When construction commenced on January 18, 2021, pending litigation sought to cancel a necessary public lease.

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[8] Appellants contend that the Initiative had not progressed through enough of the required validation process to be "sufficiently concrete to preclude vesting of rights" at the time they began construction. NECEC Br. 30. That is wrong on several counts. To start, Maine law requires assessment of Avangrid's "knowledge of the situation." *Kittery Retail Ventures*, 2004 ME 65, ¶ 27, 856 A.2d 1183. Avangrid's own actions confirm that it knew the Initiative was an existential threat to the project. In any event, Avangrid's timing quibbles are ultimately irrelevant. Because of both the First Circuit injunction in *Sierra Club* and the pending *Black* litigation, Avangrid certainly knew its project was at risk on January 18, 2021, even apart from the Initiative. Then, prior the lifting of the First Circuit injunction, the Governor directed a popular vote on the initiated bill.

More, an injunction from the First Circuit flatly barred completion of the project. And, while that injunction was in place (if not earlier), Avangrid knew that the Initiative was going to be on the ballot. Thus, when construction began, Avangrid knew that the project was at risk based on pending legal actions and proposed changes to prevailing law.

b. Maine law is clear that a developer's rights in a project can vest only if the developer commences construction in "good faith." *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. Appellants argue that the "good faith" requirement requires nothing more than that it begin construction "with the intention to continue with the construction and carry it through to completion." NECEC Br. 24 (quoting *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266); Chamber Br. 35. But, as the Law Court has squarely held, a developer cannot develop a good faith intent to complete the project when pending legal actions or changes to the law would preclude completion of the project.

When a developer seeks an equitable remedy (including injunctive relief) based on a theory of vested right, the developer's "knowledge of the situation must be taken into account." *Kittery Retail Ventures*, 2004 ME 65, ¶ 27, 856 A.2d 1183. Thus, as one example, "[v]ested rights do not accrue … when the rezoning occurs during the pendency of appellate proceedings which seek to establish that at the time of the initial action the applicant was entitled to

a permit." *Thomas*, 381 A.2d at 674. In all, the Court has held that a developer's knowledge of challenges or pending permit appeals undermines the finality required for rights to vest. Developers who commence construction with knowledge that legal proceedings remain ongoing thus act at their own risk. *Kittery Retail Ventures*, 2004 ME 65, ¶ 27, 856 A.2d 1183.

There is no shortage of precedent applying this principle. In *Kittery Retail Ventures*, 2004 ME 65, 856 A.2d 1183, for example, a developer had received approval from the Town's planning board to construct a shopping mall. *Id.* ¶ 2. A group of citizens filed a petition for a referendum amending the Town's zoning ordinance to prohibit such projects. *Id.* ¶ 3. The referendum passed (*id.* ¶ 4) and was succeeded by a second referendum which made it retroactive (*id.* ¶ 6). In its analysis, the Court explored the several ways in which Kittery Retail Ventures was actually or should have been on notice that the public was opposed to its project and of proposed legislative changes. *Id.* ¶ 27. The "knowledge of the pending ordinance changes"—coupled with a lack of bad faith by the voters—precluded the vested rights claim. *Id.* ¶ 31.

Similarly, in *City of Portland*, 541 A.2d at 161, a group of citizens proposed an initiative seeking to "limit the development of the Portland waterfront to marine related uses." A developer then sought permits to develop property along the waterfront. *Id*. After the developer filed for permits, the

initiative passed, including a retroactivity provision. The developer sued, arguing that it had obtained vested rights in the property. The Law Court rejected this claim, holding that vested rights had not attached "considering [the developer]'s knowledge of the contents of the proposed ordinance and its retroactive provisions prior to acquiring title to the property in question." *Id.* at 164.

Appellants seek to distinguish *Kittery Retail Ventures* and *Fisherman's Wharf* on the basis that the developers had not yet begun construction. *See* NECEC Br. 28; Chamber Br. 25. But these cases establish a premise that resolves this case: When a developer acts with full knowledge of proposed legislative changes resulting from public opposition to the project, the developer assumes the risk that those changes will frustrate the completion of the project. And rightly so. A contrary holding would wrongfully empower developers to intentionally evade imminent zoning changes or other legal amendments that would otherwise apply simply by rushing headlong into construction. It is hard to imagine why, if the initiatives in *Kittery Retail Ventures* or *Fisherman's Wharf* were valid and could apply retroactively, the developers there should be allowed to dictate the outcome of the case simply based on their willingness to defy the voters.

Maine's law is thus in accord with the many other jurisdictions, which hold that developers who begin construction in an effort to evade contemplated zoning changes do not act in good faith. *See* 4 American Law of Zoning § 32:5 (5th ed. 2021). In *Hanchera v. Bd. of Adjustment*, 694 N.W.2d 641, 646 (Neb. 2005), for example, the Nebraska Supreme Court rejected a developer's claim to vested rights where it was aware of "developing regulations which would hinder, if not prohibit, its … operations," but nonetheless began construction in "an attempt to circumvent the applicability of the regulations." Nebraska thus aligned itself with "[a] number of courts" that hold "good faith" lacking where a developer commences construction "with knowledge of the pendency of an ordinance which prohibited such construction." *Id*.

Similarly, in *Biggs v. Town of Sandwich*, 470 A.2d 928, 931 (N.H. 1984), the New Hampshire Supreme Court held that plaintiffs who had begun construction with full knowledge of a pending ordinance took a "calculated risk," and so did not meet the good faith requirement of the vested rights inquiry. *Accord Piper v. Meredith*, 266 A.2d 103 (N.H. 1970). As the North Carolina Supreme Court has similarly explained:

> "[G]ood faith" … is not present when the landowner, with knowledge that the adoption of a zoning ordinance is imminent and that, if adopted, it will forbid his proposed construction and use of the land, hastens, in a race with the town commissioners, to make expenditures or incur obligations before the town can take its contemplated action so as to avoid what would otherwise be the effect of the ordinance upon him.

Town of Hillsborough v. Smith, 170 S.E.2d 904, 910 (N.C. 1969).

Further examples abound. *See, e.g.*, *City of Tucson v. Arizona Mortuary*, 272 P. 923 (Ariz. 1928) (rejecting a claim of vested rights where, prior to completion of a material amount of construction, the landowner was advised of a pending ordinance); *Kuaui County v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Hi. 1982) (rejecting a claim of vested rights where a public referendum had been certified that would have invalidated the proposed use); *Tim Thompson, Inc. v. Village of Hinsdale*, 617 N.E.2d 1227, 1237 (Ill. Ct. App. 1993) (holding that rights did not vest where a developer had "notice of the proposed zoning change" prior to commencing work); *Glickman v. Jefferson Parish*, 224 So. 2d 141, 145 (La. Ct. App. 1969) (holding that rights did not vest when buyer purchased property with "actual knowledge" of a study for possible zoning reclassification); *cf. Town of Cross Plains v. Kitt's Field of Dreams Korner, Inc.*, 775 N.W.2d 283, 295 (Wis. Ct. App. 2009) ("The fairness analysis is significantly altered when the owners know before they undertake to establish a new use that an ordinance amendment will soon prohibit the

use in that zoning district."); *Clackamas County v. Holmes*, 508 P.2d 190, 193 (Or. 1973) (holding that the vested interest test must consider "whether or not [the landowner] had notice of any proposed zoning or amendatory zoning before starting his improvements"); *Penn Township v. Yecko Bros.*, 217 A.2d 171, 173 (Pa. 1966) (holding that a landowner must demonstrate that he obtained a valid permit "in good faith—that is to say without 'racing' to get it before a proposed change was made in the zoning ordinance"); *H.R.D.E., Inc. v. Zoning Officer of City of Romney*, 430 S.E.2d 341, 346 (W. Va. 1993) (incorporating into the vested rights inquiry "whether the landowner had notice of the proposed zoning ordinance before starting the project at issue").

These cases demonstrate a consistent principle: A developer who is aware of a pending legal impediment that would prevent the completion of his project cannot preempt state action merely by beginning construction. Rather, when the developer commences work with knowledge of a potential impediment that places the project at risk, he takes a "calculated risk" that is his to bear. *See, e.g.*, *Spindler Realty Corp. v. Monning*, 53 Cal. Rptr. 7, 12 (Cal. Dist. Ct. App. 1966); *Bosse v. City of Portsmouth*, 226 A.2d 99, 107 (N.H. 1967) ("[A developer] took a 'calculated risk' in going ahead with construction after the plaintiffs had twice sought restraining orders and the Trial Justice had warned it that it would be proceeding at its peril.").

Such legal uncertainty can arise either from pending changes to the prevailing law or from pending litigation, including regulatory appeals. In either case, a developer knows that its project is at risk. Thus, the Nebraska Supreme Court has explained that a developer did not act in good faith when it knew of a pending lawsuit challenging its proposed use of the land, because such a suit indicated that "a substantial question existed" as to the project's legality. *Omaha Fish & Wildlife Club, Inc. v. Community Refuse Disposal, Inc.*, 329 N.W.2d 335, 339 (Neb. 1983). Similarly, North Carolina courts have recently explained that rights did not vest where a developer "took a calculated risk to proceed with construction while litigation challenging her project's approval was pending." *Letendre v. Currituck County*, 817 S.E.2d 73, 106 (N.C. Ct. App. 2018). *Letendre* reasoned that "*actual* litigation challenging the plan is a far stronger factor in eliminating the landowner's reasonable expectations than the landowner's knowledge of a pending rezoning proposal." *Id.* at 104; *see also Village of Chestnut Ridge v. Town of Ramapo*, 953 N.Y.S.2d 75, 82 (N.Y. App. Div. 2012) (holding that where a preliminary injunction from a lower court lapsed and plaintiffs sought an injunction from the appellate court, the developer was put "on notice that construction was undertaken at its own risk").[9]

[9] Similarly, Maine courts have recognized that commencement of construc-

Appellants' reliance on a single contrary precedent from an out-of-state intermediate appellate court is misplaced. The argument they advance is that, because this Court (in *Sahl*, 2000 ME 180 ¶ 12, 760 A.2d 266) cited an intermediate Maryland appellate decision (*Town of Sykesville v. West Shore Communications, Inc.*, 677 A.2d 102 (Md. Ct. Spec. App. 1966)), all of the reasoning in *Town of Sykesville* is somehow binding here. But, in *Sahl*, this Court cited *City of Sykesville* for a broad legal statement regarding the scope of vested rights generally. It certainly did not adopt *everything* in *City of Sykesville*. For its part, *Sahl* said nothing at all about whether a developer can obtain vested rights by rushing ahead with construction when it knows that its investment is at risk.

Avangrid's suggestion that *Sahl* silently adopted analysis from *Town of Sykesville* is incompatible with *Kittery Retail Ventures* and *Fisherman's Wharf*. Maine law holds instead—consistent with the nationwide majority view—that a developer's knowledge is directly relevant to the good-faith in-

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tion during timely administrative appeals cannot give rise to vested rights. *See Conservation Law Foundation, Inc v. Maine*, No. AP-98-45, 2002 WL 34947097, at *3 (Me. Super. Ct. Jan. 28, 2002); *accord Thomas*, 381 A.2d at 674 ("Vested rights do not accrue … when the rezoning occurs during the pendency of appellate proceedings which seek to establish that at the time of the initial action the applicant was entitled to a permit."). Appellants are flatly incorrect to suggest that "[t]he fact that there are ongoing appeals does not preclude vested rights." NECEC Br. 35.

quiry. *Kittery Retail Ventures*, 2004 ME 65, ¶ 27, 856 A.2d 1183. And the commencement of construction does not cause rights to vest when appeals are pending. *Thomas*, 381 A.2d at 627.

Applying these principles, the Maine Superior Court held that when a developer "elected to proceed with the construction of his pier, completing the same after [appeals] were filed," the developer had "no firm basis to believe he had an unassailable vested right." *Conservation Law Foundation*, 2002 WL 34947097, at *3. To hold otherwise would allow a developer to "debase the statutory process." *Id.* Maine law—and the robust consensus of authority from around the country—makes plain that a developer does not gain vested rights through construction when it *knows* that its project is at risk at the time it builds.

Appellants' contention that they needed to begin construction to stick with their schedule is entirely beside the point. *See* NECEC Br. 25-26; Chamber Br. 27, 29. The cases make clear that when a developer knowingly commences construction in the face of legal obstacles that threaten the finality of its permits, the developer assumes the risk. It does not matter *why* the developer chooses to do so—though, presumably, a desire "to realize Project benefits, and ensure the Project's financial viability" are common motives.

NECEC Br. 26. A previous commitment or a desire to earn money does not itself cause some right to vest, overriding the governing legal processes.

When Avangrid engaged in construction, it knew its project was at risk. It was aware of—and actively contesting—the numerous administrative and legal challenges to its permits. It was aware of the Initiative, which it knew posed existential risk. And it was subject to a judicial injunction barring the program's completion. Because Avangrid assumed the risk that it would be unable to complete the NECEC project, it categorically cannot invoke the vested rights doctrine to escape application of the Initiative.

B. The Initiative is consistent with the constitutional separation of powers.

The business court was further correct to conclude that Avangrid is not likely to prevail on its assorted separation-of-powers arguments.

1. The Initiative is an exercise of legislative, not executive, power.

Appellants' first argument—that the Initiative "usurps [the] executive power by reversing final agency approval of the NECEC" project (NECEC Br. 39; HQUS Br. 45; IECG Br. 8)—is fundamentally incorrect. As the Court has explained, "[l]egislative power is, at its core, the 'full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to [the Maine] Constitution, nor to that of

the United States.'" *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 27, 237 A.3d 882 (quoting Me. Const. art. IV, pt. 3, § 1). That is, "[t]he power granted to the Legislature of the State of Maine is plenary and subject only to those limitations placed on it by the Maine and United States Constitutions." *League of Women Voters*, 683 A.2d at 771; *see also Baxter*, 146 Me. at 215, 79 A.2d at 588 (similar). And "[t]he exercise of initiative power by the people is simply a popular means of exercising the plenary legislative power" normally wielded by the Legislature. *League of Women Voters*, 683 A.2d at 771.

The Initiative is a proper exercise of this plenary power to "make and establish all reasonable laws." Me. Const. art. IV, pt. 3, § 1. In arguing to the contrary, Appellants rely on the Law Court's decision last year in *Avangrid*, which held that a different initiative aimed at the NECEC (the "2020 Initiative") was non-legislative and therefore improper—but Appellants disregard the critical distinctions between that initiative and this one.

The Law Court in *Avangrid* held that the 2020 Initiative "is not legislation" for one very specific reason: that "although labeled a 'resolve,' [it] *directs the Commission*, in exercising its executive adjudicatory powers, to reverse its findings and reach a different outcome in an already-adjudicated matter." *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882 (emphasis added); *see also id.*

¶ 35 ("The initiative at issue here is not legislative in nature because its purpose and effect is to *dictate the Commission's exercise* of its quasi-judicial executive-agency function in a particular proceeding.") (emphasis added). The 2020 Initiative expressly directed that the Public Utilities Commission ("PUC") "shall amend" the final order in a specific proceeding, and that "[t]he amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project." A201.

That is why this Court concluded that the 2020 Initiative was non-legislative in nature: because, as the Law Court made explicitly clear, "[d]irecting an agency to reach findings diametrically opposite to those it reached based on extensive adjudicatory hearings and a voluminous evidentiary record, affirmed on appeal, is not 'mak[ing] and establish[ing]' a law." *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882 (quoting Me. Const. art. IV, pt. 3, § 1).

As the business court correctly recognized, the Initiative at issue here, by contrast, does nothing of the sort. A52. It does not "direct[] an agency" to do *anything*, nevermind "reverse its findings and reach a different outcome in an already-adjudicated matter." *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882; *cf. also id.* ¶ 35 ("[T]he Legislature would exceed its legislative powers if it

were to *require the Commission* to vacate and reverse a particular administrative decision the Commission had made.") (emphasis added).

Instead, the core provision of the current Initiative enacts a new law of general applicability, which precludes construction of the NECEC independent of any PUC action: "[A] high-impact electric transmission line may not be constructed in the Upper Kennebec Region." A69. And enacting generally applicable laws is the epitome of proper legislative action. *See* Me. Const. art. IV, pt. 3, § 1; *Avangrid*, 2020 ME 109, ¶ 30, 237 A.3d 882 (explaining that "characteristics of acts considered to be legislative" include that the act "makes new law"; "proposes a law of general applicability;" and "relates to subjects of a permanent or general character."); *Pierce v. Kimball*, 9 Me. 54, 56-59 (1832) (recognizing that a law retains its generally-applicable character, and is not beyond the legislative power, just because it applies only in a particular geographical area).

Of course, one *practical* outcome of the current Initiative is the same as would have resulted from the 2020 Initiative: The NECEC project cannot be built. But in suggesting that this practical parallel between the two initiatives somehow poses a constitutional problem for the current Initiative, Appellants mistake the proper judicial inquiry. A52-A53.

As Appellants recognize (NECEC Br. 38; HQUS Br. 37), "separation of powers issues must be dealt with in a formal rather than functional manner." *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985). The Law Court in *Avangrid* took issue with the 2020 Initiative precisely because it found the initiative overstepped the legislative role, as a formal matter, by "directing an agency" to "vacate and reverse a particular administrative decision." *Avangrid*, 2020 ME 109, ¶ 35, 237 A.3d 882. The current Initiative, by contrast, does not; although it achieves the same result, it does so through generally applicable law—a proper legislative function. *See* A52 ("There is nothing in the plain language of the Initiative that suggests it is anything other than a statute of general applicability affecting various linear projects and regulating high-impact electric transmission lines in Maine.").

Grubb v. S.D. Warren. Co., 2003 ME 139, 837 A.2d 117, is not to the contrary (*see* NECEC Br. 39; HQUS Br. 42; IECG Br. 12). There, the Law Court held only that the Legislature may not require an agency to reopen finalized *adjudications* through retroactive changes in the law. *Id.* ¶ 11. In so holding, however, the Court relied on *State v. L.V.I. Grp.*, 1997 ME 25, ¶ 13, 690 A.2d 960, in which it affirmed that the Legislature "of course, has the power has the power to amend a statute that it believes" has been "misconstrued." Moreover, the Law Court held that the Legislature can "make such a

change retroactive and thereby undo what it perceives to be the undesirable past consequences of a misinterpretation." *Id*. Appellants are therefore incorrect to suggest that every retroactive law that would cause an agency to reevaluate its decisions necessarily violates the separation of powers.

Because the Initiative does not direct any agency to change its adjudicative judgment in a concluded proceeding—and instead simply expresses the overriding *legislative* judgment of the people of Maine that no "high-impact electric transmission line" may "be constructed in the Upper Kennebec Region" (A69)—*Avangrid* is unavailing to Appellants here. The Initiative, which proposes laws of general applicability that have now been duly enacted by a strong majority of Maine voters, is an exercise of legislative power.

2. The Initiative does not trench on the judicial power.

Nor does the Initiative improperly "usurp[] judicial powers" by supposedly overturning the Law Court's judgment in *NextEra*. *Cf.* NECEC Br. 42; HQUS Br. 42; IECG Br. 17. Notably, Appellants made this very same argument about the 2020 Initiative, but failed to convince the Law Court. *See Avangrid*, 2020 ME 109, ¶¶ 11, 35, 237 A.3d 882 (acknowledging Appellants' argument that the 2020 Initiative "usurps … judicial functions").

Appellants' argument mistakes the *Lewis*/*Plaut* doctrine. *Cf.* NECEC Br. 42 (citing *Lewis v. Webb*, 3 Me. 326 (1825), and *Plaut v. Spendthrift Farm,*

Inc., 514 U.S. 211, (1995)); HQUS Br. 42 (citing *Lewis*); IECG Br. 18. That authority holds that a legislature "may not 'retroactively command … courts to reopen final judgments.'" *Bank Markazi v. Peterson*, 578 U.S. 212, 226 (2016) (quoting *Plaut*, 514 U.S. at 219); *see also Lewis*, 3 Me. at 332 (holding unconstitutional a resolve that permitted a special appeal from a long-final probate judgment, because "the legislature, by a mere resolve, [cannot] set aside a judgment or decree of a Judicial Court"). But, as the business court correctly held, the Initiative does not implicate this rule, for at least two reasons.

First, and most obviously, the Initiative does nothing to reopen the *NextEra* judgment as a formal matter. *See generally* A69-A70. Nor does it undermine the Law Court's actual ruling in that case. The issue before the Law Court in *NextEra* was not whether Avangrid and CMP are *entitled* to clear-cut Maine forests to build the NECEC. Instead, as the business court noted, it was only whether the PUC's issuance of a certificate of public convenience and necessity ("CPCN")—which does *not* confer a private property right (*see* pages 36-37, *infra*)—"result[ed] from a reasonable exercise of discretion and [was] supported by substantial evidence." *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n*, 2020 ME 34, ¶ 38, 227 A.3d 1117 (quoting *Pine Tree Tel. & Tel. Co. v. Maine Pub. Utils. Comm'n*, 634 A.2d 1302, 1304

(Me. 1993)); *see* A54. Nothing about the Law Court's judgment that the PUC acted reasonably is affected by the Initiative's independent outlawing of high-impact transmission lines in the Upper Kennebec Region.

That is, *regardless* of whether the PUC reasonably issued a certificate of public convenience and necessity—the only issue decided by the Law Court in *NextEra*—Section 5 of the Initiative states a freestanding prohibition that independently precludes construction of the NECEC: "[A] high-impact electric transmission line may not be constructed in the Upper Kennebec Region." A69. In other words, the Initiative "neither nullifies nor reopens a prior court order; rather, it simply reverses the *effects* of a court order through prospective relief." *Chrysler Grp. LLC v. Fox Hills Motor Sales, Inc.*, 776 F.3d 411, 431 (6th Cir. 2015) (emphasis added). It is therefore within the legislative power. *Id.*; *see also id.* ("Though the integrity of the 'Judicial Power of the United States' … forbids congressional or executive interference with the final judgments of courts, it does not forbid the granting of prospective relief intended to mitigate the perceived negative effects of a court order.") (citation omitted) (citing *Plaut*, 514 U.S. at 223-224). As the business court correctly noted, "[w]here a piece of legislation has wide effect and is an expression of public policy, it does not usurp the court's adjudicatory function" simply because it "impacts a court decision." A54.

Second, the *Lewis*/*Plaut* doctrine has no application in the first place to the determination of "public rights" like a certificate of public convenience and necessity. As the United States Supreme Court has put it, "the *private* right of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation," but that rule "does not apply to a suit brought for the enforcement of a *public* right, which, even after it has been established by the judgment of the court, *may be annulled by subsequent legislation*." *Hodges v. Snyder*, 261 U.S. 600, 603 (1923) (emphases added) (citing, *inter alia*, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421 (1855)); *accord, e.g.*, *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1168 (10th Cir. 2004) ("Even when the judiciary has issued a legal judgment enforcing a congressional act … it is no violation of the judicial power to change the terms of the underlying substantive law.") (extensively discussing *Wheeling Bridge*).

The Supreme Court's *Wheeling Bridge* case—which "has remained a fixed star in the Supreme Court's separation of powers jurisprudence" (*Biodiversity Assocs.*, 357 F.3d at 1166)—provides an instructive parallel. There, a bridge across the Ohio River had been held to be "an obstruction of the navigation of the river," in "violation of the right secured to the public by the constitution and laws of congress," and a private plaintiff obtained a court judg-

ment requiring "that the obstruction be removed." *Wheeling Bridge*, 59 U.S. (18 How.) at 429-430. After the judgment issued, however, Congress passed a new act, which "declared" the bridge "to be [a] lawful structure[] … anything in the law or laws of the United States to the contrary notwithstanding." *Id.* at 429. In the Supreme Court, the holder of the earlier judgment argued "that the act of congress cannot have the effect and operation to annul the judgment of the court already rendered, or the rights determined thereof in favor of the plaintiff." *Id.* at 431.

The Supreme Court disagreed. The Court explained that when a "private right to damages," for example, ripens into a final judgment, "the right to these [damages] would have passed beyond the reach of the power of congress." *Wheeling Bridge*, 59 U.S. (18 How.) at 431; *see also id.* (When "the *private* rights of parties … have passed into judgment the right becomes absolute, and it is the duty of the court to enforce it.") (emphasis added). But the judgment requiring removal of the bridge was of a different character, since "[i]ts interference with the free navigation of the river constituted an obstruction of a *public* right secured by acts of congress." *Id.* at 431. The Court explained that because such rights are held by the people as a whole, if the underlying "right has been modified by the competent authority [*i.e.*, Congress], so that the bridge is no longer an unlawful obstruction, it is quite plain the

decree of the court cannot be enforced," since "[t]here is no longer any interference of the enjoyment of the public right inconsistent with law." *Id.* at 431-432. The plaintiff was therefore entitled to enforce the attorney fee award entered in the prior action (a private right), but could not require the bridge to be destroyed, because the underlying public right had been altered by Congress. *Id.* at 431.

The same result obtains here. Just as Congress, legislating on behalf of the people of the United States, altered the underlying right of free navigation to be consistent with the existence of the bridge, so too have the people of Maine, legislating directly via initiative, altered the public rights respecting "high-impact electric transmission lines," providing that none may be constructed in the Upper Kennebec Region.

Nor can there be any doubt that the CPCN upheld by the Law Court in *NextEra* concerns public, rather than private, rights: A "certificate of public convenience and necessity"—which ultimately assesses "the public's needs"—is a quintessential public right. *Bangor Hydro-Elec. Co. v. Pub. Utils. Comm'n*, 589 A.2d 38, 43 (Me. 1991). *See also* 35-A M.R.S. § 3132(6) ("If the commission finds that a public need exists, … it shall issue a certificate of public convenience and necessity for the transmission line."). And a CPCN does not confer a private property right:

> A certificate of public convenience and necessity is in the nature of a personal privilege or license, which may be amended or revoked by the power authorized to issue it, and *the holder does not acquire a property right*. Such certificate is issued for the purpose of promoting the public convenience and necessity, and not for the purpose of conferring upon the holder any propriety interest.

Dennis Melancom, Inc. v. City of New Orleans, 703 F.3d 262, 270 (5th Cir. 2012) (emphasis added) (quoting *Hutton v. City of Baton Rouge*, 47 So.2d 665, 668-669 (La. 1950)). *See also Tlingit-Haida Reg'l Elec. Auth. v. State*, 15 P.3d 754, 765 (Alaska 2001) (holding that, because the public utilities commission "could modify or revoke a certificate of public convenience and necessity," "the certificate grants a utility … no vested right against the commission's exercise of this regulatory power").[10] For this independent reason as well, the Initiative does not impermissibly "usurp[] the judicial power." NECEC Br. 42; *accord* HQUS Br. 42.

3. No legislative veto issue precludes the Initiative.

Appellants tangentially argue that Section 4 of the Initiative amounts to an unconstitutional legislative veto because it "deprives the Governor of the executive powers" by providing for legislative approval of high-impact

[10] In Maine as well, the PUC "has broad authority to rescind, alter, or amend any order it has made." *Verizon N.E., Inc. v. Pub. Utils. Comm'n*, 2005 ME 16, ¶ 11, 866 A.2d 844. And the PUC itself recognizes that this authority includes the power to rescind a CPCN. *See Formal Investigation into Hampden Tel. Companys Affiliate Transactions*, No. 92-295, 1994 WL 16963181 (Me. P.U.C. Jan. 19, 1994).

transmission lines "without satisfying the presentment requirement" of the Maine Constitution. NECEC Br. 41 n.22. That is quite incorrect.

First, Section 4 does not expressly remove the Governor from the approval process. Section 4 may be appropriately read to require *both* a vote in the Legislature *and* presentment to and signature by the Governor. Indeed, the Justices have interpreted Article IV, Section 14 of the Maine Constitution to require this procedure for the issuance of new bonds, even though—like Section 4 of the Initiative—the constitutional text does not mention the Governor at all, and speaks only of "the Legislature" and "2/3 of both Houses." Me. Const. art. IX, § 14; *see Opinion of the Justices*, 571 A.2d 1169, 1179-81 (Me. 1989). The same interpretation can be applied to Section 4 of the Initiative—and should be, if doing so would avoid constitutional concerns. *See, e.g.*, *State v. Legassie*, 2017 ME 202, ¶ 13, 171 A.3d 589 ("[W]e must construe a statute to preserve its constitutionality, or to avoid an unconstitutional application of the statute, if at all possible.").

As the *Opinion of Justices* (1989) makes plain, the best understanding of article IV, part 3, § 2 of the Maine Constitution is that it requires presentment whenever both Houses adopt a "bill or resolution, having the force of law." If, as Appellants maintain, the action contemplated by Section 4 qualifies within this language, the upshot of this constitutional provision is that,

prior to adoption, the action must be presented to the Governor for potential veto. This provision is no basis to invalidate legislation.

Second, even if Section 4 *were* unconstitutional (it is not), the result would be that the offending provision would be severed from the rest of the Initiative, which would remain in force and prevent the construction of the NECEC. Title 1, Section 71(8) provides that "if any provision of the statutes or a session law is invalid … such invalidity does not affect other provisions or applications which can be given effect without the invalid provision." 1 M.R.S. § 71(8). Thus, "the Law Court has explained that if a provision of a statute is invalid, that provision is severable from the remainder of the statute as long as the rest of the statute 'can be given effect' without the invalid provision, and the invalid provision is not such an integral part of the statute that the Legislature would only have enacted the statute as a whole." *Opinion of the Justices*, 2004 ME 54, ¶ 23, 850 A.2d 1145. This severability analysis applies equally to citizen-initiated legislation like the Initiative here. *See generally id.* (applying severability analysis to ballot initiative).

Here, there is no question that the other provisions of the Initiative—for example, Section 5's absolute prohibition of high-impact transmission lines in the Upper Kennebec Region—can be given effect without the provision for legislative approval of transmission lines elsewhere in the State. Ap-

pellants are incorrect to suggest otherwise. NECEC Br. 41 n.23; HQUS Br. 14; IECG Br. 27. There cannot be any serious dispute that the Maine voters who approved the Initiative would have intended the other sections to survive if Section 4 were struck down: As alleged at length in the complaint, the Initiative was promoted as an effort to stop the NECEC (*see* A100-A104), and it accomplishes that goal even without Section 4. Thus, even if the Court were to hold Section 4—or any other section of the Initiative—unconstitutional, the remainder of the Initiative must stand. The severability of Section 4 thus precludes Appellants' likelihood of success on the merits, consistent with the business court's denial of the preliminary injunction below.

4. The Initiative does not usurp the other branches' interpretive authority.

Finally, Appellants contend that the Initiative "usurp[s] the executive and judicial authority to interpret and apply the Maine Constitution." HQUS Br. 38.[11] The business court was correct to dismiss this argument out of hand. A54-A55.

[11] HQUS further asserts that the Initiative is unconstitutional because it was "not duly enacted." HQUS Br. 21. But, as HQUS acknowledges, this issue was not presented to the business court and played no role in the business court's decision. HQUS Br. 22 n.10. Of course, "[t]o preserve an issue for appeal, the issue must first be presented to the trial court so that the trial

To start with, the Court need not address this issue for purposes of the posture of this case. As just explained, Section 4 is severable from the rest of the Initiative (*see* pages 39-40, *supra*), so even if its deeming language were struck down (which is only one clause within Section 4), the rest of the Initiative (including both the other prohibition in Section 4 and the other parts of the Initiative) would continue to prohibit construction of the NECEC, independently justifying the business court's rejection of a preliminary injunction here.

In any event, the argument lacks merit. It is commonplace for legislatures to enact statutes and rules that supply content to broader constitutional standards, identifying issues that are *included* within the constitutional provision. Indeed, Appellants themselves acknowledge (HQUS Br. 40) that "the legislature may help provide meaning to the constitution by defining undefined words and phrases." *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 853 (Iowa 2014); *accord State v. Chambers*, 220 P. 890, 892 (Okla. 1923) (upholding the legislature's definition of a constitutional term within the legislature's jurisdiction).

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court has the opportunity to assess and act on the point to which the objection is directed." *In re Anthony R*, 2010 ME 4, ¶ 8, 987 A.2d 532, 534. Appellants "should have presented all [their] arguments to the District Court." *Wolfson v. Menardo*, 573 A.2d 390, 391 (Me. 1990).

If, for example, there is a constitutional procedure governing the adoption of laws relating to taxation, it is certainly not a constitutional violation—and likely a necessary tool for efficient government—for the legislature to spell out the kinds of laws implicating those procedures. A legislature may specify by statute or rule that it will apply those procedures to proposals relating to tax collection, tax assessment, and tax rates. To be sure, it may well violate the constitution if the legislature adopts a statute that conflicts with the constitutional provision—either wrongfully excluding subject matter from its ambit, or by too expansively construing it.

But the real issue is whether the *substance* of the legislature's action accords with the constitutional text. Here, appellants do not argue that the Initiative seeks to expand Article IX, Section 23 of the Maine Constitution beyond its terms.[12] Nor could they, as it fits well within the plain meaning of

[12] At most, HQUS argues that the Initiative is invalid because it improperly codifies a categorical inclusion in what is intended to be a fact-specific inquiry. HQUS Br. 28. But Section 4 of the Initiative does not *supplant* Section 23's fact-specific inquiry—it merely constitutes a legislative finding that certain types of uses satisfy the inquiry. A70. Such heuristics are common features in the implementation of statutes and constitutional provisions with ambiguous or underdefined terms. *See, e.g.*, 29 C.F.R. § 1630.3 (specifying categories of conditions and circumstances that do not meet the fact-specific inquiries for "disability" and "qualified individual" under the ADA).

the text of Section 23. There is thus no basis to claim it derogates from the Constitution.

Nor, as the business court correctly concluded (A55), does the Initiative raise the potential problems that animated the Law Court's discussion in *Wagner v. Sec'y of State*, 663 A.2d 564, 567 (Me. 1995). There, the statute attempted to fully and exclusively define the set of protected classes under Maine law. *Id.* at 566 n.3. The Court did not hold anything unconstitutional, and it allowed the Initiative to go the voters. In all events, the Initiative here—by inclusively identifying topics that fit within Section 23—is nothing like an attempt to *withdraw* issues from a constitutional provision. The business court was thus correct to conclude that the Initiative does not usurp the judiciary or executive branch's interpretive authority. A54-A55.

C. The Initiative does not violate the Contracts Clause.

Appellants' Contracts Clause argument fails for two independent reasons.[13] *First*, there has been no "substantial impairment of a contractual relationship" within the particular meaning relevant to the Contracts Clause. *Sveen v. Melin*, 138 S. Ct. 1815, 1821-22 (2018). And *second*, this "state law is

[13] Because the Maine and federal Contracts Clauses contain identical language, Maine courts have construed the Maine Clause consistent with its federal counterpart. *N.A. Burkitt, Inc. v. J.I. Case Co.*, 597 F. Supp. 1086, 1089 (D. Me. 1984); *accord Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183.

drawn in an 'appropriate' and 'reasonable' way to advance 'a significant and legitimate public purpose.'" *Id*. In such cases, this Court and its federal counterparts have made clear that there is no contractual impairment that would prevent a statute's retroactive application. The business court was thus correct to hold that Appellants cannot succeed on this claim, either.

1. The Contracts Clause inquiry begins with the question of whether "there is a contractual relationship" in the first place. *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (quoting *Gen Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992). In *Black v. Cutko*, 2021 WL 4268206, at *14 (Me. Bus. & Cons. Ct. Aug. 10, 2021) (No. BCD-CV-2020-29), the Business and Consumer Court held that the Maine Bureau of Public Lands ("BPL") "exceeded its authority when it entered into the 2020 lease with CMP, and BPL's decision to do so [was] reversed." The court correctly recognized that the citizens of Maine had expressed their desire to safeguard the State's remaining public lands when they amended the State Constitution in 1993. *Id.* at *1-2 (citing Maine const. art. IX, § 23). To that end, the Maine Constitution requires a determination of whether a proposed land use would reduce or substantially alter the use of public lands. *Id.* at *9-10. If so, the proposal requires approval of two thirds of each house of Maine's legislature to proceed. *Id.* But BPL failed to make the requisite determinations, and it thus "lacked authority to

enter into the 2020 lease." *Id.* at *13. And, without a valid lease, there is no contractual relationship that the Initiative could have impaired. *Cf. City of Belfast v. Belfast Water Co.*, 115 Me. 234, 98 A. 738, 743 (1916) (considering the existence of a "lawful contract," "valid at common law," as a prerequisite for a possible Contracts Clause claim).

Even if there were a valid contractual relationship (again, there was not), this Court has made clear that "when considering whether a party's contractual relationships were substantially impaired," courts must "focus on whether the subject matter of the contract is heavily regulated." *Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183. As the U.S. Supreme Court has explained, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them." *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908); *see also Energy Res. Grp., Inc. v. Kansas Power & Light Co.*, 459 U.S. 400, 411 (1983) ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.").

Directly relevant here, the Law Court has explained that, "[i]n Maine, land use is an area that has traditionally been regulated by the state and municipalities." *Kittery Retail Ventures*, 2004 ME 65, ¶ 39, 856 A.2d 1183. As

the business court correctly observed, "[n]ot only is land use heavily regulated at the state and local level such that new regulations are generally foreseeable, but [Appellants] entered the purported BPL Lease amid intense public scrutiny, legal challenges and a popular ballot initiative to block the Project." A57.

All this is compounded by the fact that the parties to the lease appear to have affirmatively contemplated the possibility of future legal and regulatory obstacles. The lease provides that "Lessee … shall not construct, alter, or operate the described Premises in any way until all necessary permits and licenses have been obtained" and that the "Lease shall terminate at the discretion of the Lessor for failure of Lessee to obtain all such required permits." A142. Here, just as in *Kittery Retail Ventures*, "the parties contemplated that [Plaintiff] may not be able to obtain all necessary permits and approvals." 2004 ME 65, ¶ 40, 856 A.2d 1183. And what is more, the lease specifies that the NECEC "shall be in compliance with all Federal, State, and local statutes, ordinances, rules, and regulations, *now or hereinafter enacted* which may be applicable to [NECEC]." A142 (emphasis added). When a contract concerns a highly regulated field such as land use—and particularly when the contract explicitly recognizes the possibility that one party may fail to obtain all necessary permits or that the project may become impossible due to

changes in the law—subsequent changes in law that frustrate the planned use do not violate the Contracts Clause.

2. Finally, even if there were a substantial impairment of a contract in this case, the business court correctly held that the Initiative *still* does not violate the Contracts Clause. "If there has been a substantial impairment, then the inquiry becomes whether the impairment is justified as 'reasonable and necessary to serve an important government purpose.'" *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)); *see* A57-58.

Maine's Constitution enshrines the State's commitment to the preservation of natural resources and environmental conservation. Maine Const. art. IX, § 23. "[T]he Legislature has enunciated a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine." *Francis Small Heritage Trust, Inc. v. Town of Limington*, 2014 ME 102, ¶ 20, 98 A.3d 1012. And the U.S. Supreme Court has recognized that "promoting resource conservation" is a legitimate state purpose. *Minnesota v. Clover Leaf Creamery Co.,* 449 U.S. 456, 462 (1981); *accord Daley v. Commissioner, Dep't of Marine Resources*, 1997 ME 183, ¶ 5, 698 A.2d 1053 ("There is no dispute that the 1995 Amendments advance legitimate state interests in … the conservation of natural resources."); *U.S. Trust Co. of New York v. New*

Jersey, 431 U.S.1, 28 (1977) (listing "environmental protection" among "goals that are important and of legitimate public concern"). The business court was correct to recognize that the Initiative, which serves to ensure the integrity of Maine's pristine natural forests, serves a compelling governmental purpose.

Most importantly, however, the Initiative *directly* reflects the will of Mainers to prioritize environmental preservation. *See* A58. The U.S. Supreme Court has famously held that "the legislature cannot bargain away the police powers of a succeeding legislature." *Stone v. Mississippi*, 101 U.S. 814, 817 (1880). As such, "the Contract Clause does not require a State to adhere to a contract that surrenders an essential attribute of its sovereignty." *U.S. Trust Co.*, 431 U.S. at 23. Courts have long recognized that a State—Maine in particular—has a "sovereign interest in managing and regulating … natural resources found within its borders." *Maine v. Norton*, 257 F. Supp. 2d 357, 375 (D. Me. 2003). Appellants' argument requires the conclusion that the State can, simply through contract, surrender its sovereign interest in the management of public lands, placing it beyond the reach of even direct democratic action. Such a conclusion is untenable, undesirable, and inconsistent with binding state and federal precedent.

Finally, the measures contained in the Initiative are reasonable and necessary to serve the State's interest in conservation. *Kittery Retail Ven-*

tures, 2004 ME 65, ¶ 38, 856 A.2d 1183. The Initiative does no more than is needed to ensure that Maine's resources are conserved. Most of the challenged portions of the Initiative merely ensure that procedural protections are observed for projects like Avangrid's—they do not themselves modify any substantive rights. And Section 5 of the Initiative, which bans the construction of high-impact electric transmission lines in the Upper Kennebec Region, is precisely aimed at accomplishing the State's legitimate goals of environmental preservation and management of public lands. This is therefore not a case where "an evident and more moderate course would serve [Maine's] purposes equally well." *U.S. Trust Co.*, 431 U.S. at 31. The "adjustment of the parties' contractual rights and responsibilities" (to the extent that the Court finds that such an adjustment occurred, which it did not) is based upon reasonable conditions and of a character appropriate to the purpose of the legislation. *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183.

Appellants' sole response is to insist that "[w]here the State is a contracting party, courts owe no deference to legislative judgments regarding whether the impairment is reasonable." NECEC Br. 49. This argument is inapplicable here, where the State accrues no financial benefit—and indeed may suffer a financial loss from lost payments—through the impairment of a contract. *See* A58 (citing *Seven Up Pete Venture v. Montana*, 114 P.3d 1009,

1023 (Mont. 2005)). Nor does it answer the question before this Court. Even without deference, it is clear that the Initiative is "reasonable and necessary to serve an important government purpose." *United States Trust Co.*, 431 U.S. at 25. The business court was thus correct to conclude that Appellants are unlikely to succeed on any eventual Contracts Clause claim.

II. THE POSTURE OF THIS CASE INDEPENDENTLY WARRANTED DENIAL OF THE PRELIMINARY INJUNCTION.

In addition to success on the merits, a movant seeking a preliminary injunction must also satisfy several other equitable factors. In particular, a movant must demonstrate that it will suffer irreparable injury absent a preliminary injunction; that on balance this harm outweighs any harm to other parties that might come from granting the injunction; and that the public interest will not be adversely affected by granting the injunction. *All. for Retired Americans*, 2020 ME 123, ¶ 11, 240 A.3d 45. The business court correctly held that Avangrid cannot meet this standard.

First, "proof of irreparable injury is a prerequisite to the granting of injunctive relief." *Bar Harbor Baking & Trust Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980). Appellants assert that the prospective harm of being subject to the allegedly unconstitutional Initiative satisfies this requirement. NECEC Br. 51. But alleged, prospective constitutional violations only constitute ir-

reparable harms in an extremely narrow band of cases that are not at all like the harms implicated here. *See Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.*, 896 F.2d 1283, 1285 (11th Cir. 1990) ("The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence."); *Pub. Serv. Co. of N.H. v. Town of West Newbury*, 835 F.2d 380, 382 (1st Cir. 1987) (noting that cases finding irreparable harm from an alleged impending constitutional violation "are almost entirely restricted to cases involving alleged infringements of free speech, association, privacy or other rights as to which temporary deprivation is viewed of such qualitative importance as to be irremediable by any subsequent relief.").

And, more to the point, Appellants failed to demonstrate a likelihood of success on the merits, and thus have not shown that the Initiative is unconstitutional to begin with. In such a circumstance, the business court was correct to dismiss Appellants' contingent allegations of harm. *See Associated Gen. Contractors of Cal., Inc. v. Coalition for Economic Equity*, 950 F.2d 1401, 1412 n.9 (9th Cir. 1991) (declining to reach the issue of irreparable harm based on prospective constitutional injuries where "plaintiff has failed to

demonstrate a sufficient likelihood of success on the merits" of the constitutional claims in the first place).

Nor do Appellants' allegations of economic harms suffice. Maine law defines irreparable injury as "injury for which there is no adequate remedy at law." *Stanley v. Town of Greene*, 2015 ME 69, ¶ 13, 117 A.3d 600. "Where economic damages are the injury relied upon, that economic harm … is not sufficient to constitute irreparable injury." *Dirigo Housing Assocs., Inc. v. Crowley*, 2003 WL 22309103 at *5 (Me. Super. Ct. 2003). This is especially so when Appellants' alleged economic harms are speculative. *OfficeMax Inc., v. County Qwick Print, Inc.,* 709 F. Supp. 2d 110, 113 (D. Me. 2010). As the business court correctly observed, this litigation is occurring at a highly accelerated pace; it is uncertain how much delay (if any) will result from the denial of the preliminary injunction. A62-63. Nor is it clear that Appellants will be unable to recover any economic losses in an action at law if they are harmed and if the Initiative is eventually found to be unconstitutional. In such a circumstance, the business court correctly held that Appellants failed to satisfy their burden to demonstrate irreparable harm.

Second, a preliminary injunction would have done significant harm to Maine's democratic institutions. *See All. for Retired Americans v. Sec'y of State*, 2020 ME 123, ¶ 11, 240 A.3d 45. Maine's Constitution enshrines the

values of democracy by providing the citizenry with a direct tool to shape policy in the State. Me. Const. Art. IV, § 18. And the Constitution demonstrates the importance of this mechanism by limiting the powers of coordinate branches of government to interfere with citizen initiatives. Maine Const. Art. IV, § 19 (limiting the Governor's veto power).

Finally, the public interest substantially weighs against a preliminary injunction. An essential motivation for the Initiative is preservation of Maine's forest lands. Maine citizens overwhelmingly favor this policy goal—to the exclusion of Appellants' project. Allowing the project to proceed would necessarily foil the very policy objective that the voters sought to accomplish. That is, granting Appellants' requested preliminary injunction would have had the destructive result of irreversibly overriding the will of the people, even if the Initiative is ultimately confirmed as lawful—as it must be. Denying the preliminary injunction is thus necessary to the possibility of respecting the will of the people and allowing the Initiative to have practical effect.

CONCLUSION

The Court should affirm the business court's denial of a preliminary injunction.

Respectfully submitted,

Dated at Portland, Maine this 30th Day of March, 2022

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