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-2021-58

BRIEF OF APPELLEES BUREAU OF PARKS AND LANDS, MAINE PUBLIC UTILITIES COMMISSION, MAINE HOUSE OF REPRESENTATIVES, AND MAINE SENATE

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Introduction

The more than 200 pages of briefing submitted by the appellants in this matter, which stretch well beyond the "question[s] of law" properly before this Court on a Rule 24(c) report, fail to call into doubt the core legal conclusions of the Business Court concerning the appellants' unlikelihood of success on the merits of their claims. None of the appellants adequately explain how the anachronistic "vested rights" concept can apply to a state law after this Court indicated in *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986), that litigants must invoke specific constitutional provisions to challenge retroactive statutes. None demonstrate that NECEC Transmission LLC and its parent Avangrid Networks, Inc. (together, "NECEC") could have acquired a vested right to construct the New England Clean Energy Connect transmission line (the "Corridor") despite taking a calculated risk to start construction while their necessary permits were still undergoing agency and judicial review and with full knowledge of a well-organized effort to stop the Corridor at the ballot box. None demonstrate that a law that makes major prospective changes to the regulation of linear infrastructure projects—and which bears no resemblance to the targeted initiative struck down in *Avangrid Networks, Inc. v. Secretary of State*, 2020 ME 109, 237 A.3d 882—could nevertheless usurp judicial or executive power merely because it may have practical effects on prior executive or judicial actions.

Because the Business Court's determinations on these and the other legal questions before it are sound, the Court should affirm those determinations.

Statement of Facts

The Corridor

The Corridor is primarily a 145.3-mile long high voltage direct current transmission line running from Beattie Township at the Canadian border to Lewison. A20. The Corridor is divided into five segments. *Id.* The first and most controversial of those segments, Segment 1, is a 53.1-mile long transmission line that will run from Beattie Township to the Forks Plantation. *Id.* Segment 1 "must be cut through commercial timberland," and will "cross hundreds of wetlands and waterways as well as bird habitats and vernal pools." *Id.* Segments 2 and 3 of the Corridor will require widening of approximately 92 miles of existing power line corridors. *Id.* Segments 4 and 5 connect the Corridor from Lewiston to Wiscasset. *Id.*

Lease of Public Reserved Lands

A portion of Segment 1 of the Corridor passes through parcels of the State's public reserved lands at West Forks Plantation and Johnson Mountain Township, which is managed by Appellee Bureau of Parks and Lands (BPL). A21. On June 23, 2020, pursuant to 12 M.R.S. § 1852(4)(A), BPL and Central Maine Power (CMP) entered an amended and restated lease agreement for a 300-foot-wide transmission line corridor through this parcel (the "BPL Lease"). A21, 26, 136. The BPL Lease requires that 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] in connection to its use of the Premises." A142, ¶ 6(m). The

BPL Lease further provides that BPL shall have the right to request amendment of the Lease "if any Lease term is found not to comply with Maine state law regarding public reserved lands." A145, ¶ 14.

On June 23, 2020, Senator Russell Black filed an action in Superior Court. *Black v. Cutko*, CV-2020-29, 2021 WL 3700685, at *5 (Me. B.C.D. Aug. 10, 2021). The complaint, as amended, sought judicial review of the issuance of the BPL Lease, claiming among other things that it required two-thirds approval of the Legislature pursuant to Article IX, § 23, of the Maine Constitution. *Id.* In a decision dated August 10, 2021, the court reversed BPL's decision to issue the BPL Lease. *Id.* at *15. An appeal of that decision is pending before this Court (Docket No. BCD-21-257).

Agency Proceedings Regarding the Corridor

NECEC has participated in various agency proceedings to obtain permits and other permissions needed for the Corridor, including the following:

Public Utilities Commission (PUC) Permit. A company seeking to build a transmission line of 69 kilovolts or more must obtain a certificate of public convenience and necessity (CPCN) from the PUC. 35-A M.R.S.A. § 3132 (Westlaw March 29, 2022). CMP filed a petition for a CPCN with the PUC on September 27, 2017. A21. On May 3, 2019, the PUC issued the CPCN. *Id.* This Court affirmed the PUC Order on March 17, 2020. *See NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117.

Department of Environmental Protection (DEP) Permit. NECEC was also required to

obtain a permit from DEP (the "DEP Permit"). *See* 38 M.R.S.A. §§ 480-C, 483-A (Westlaw March 29, 2022). NECEC submitted its application to the DEP in September 2017. A22. Thirty-nine parties participated in the review, which involved six days of evidentiary hearings and two days of public testimony. *Id.* On May 11, 2020, the DEP Commissioner approved NECEC's permit application with 38 conditions.[1] *Id.*

Board of Environmental Protection (BEP) Appeal. NextEra Energy Resources, LLC, the Natural Resources Council of Maine (NRCM), and a group of intervenors led by West Forks Plantation appealed the DEP's decision to the Board of Environmental Protection (BEP). A22. Their appeals remain pending before the BEP. A23.

Army Corps of Engineers Permit. NECEC applied for a permit from the Army Corps of Engineers (the "ACE Permit") on September 29, 2017. *Id.* After various proceedings, the Corps issued a permit on November 6, 2020. A23. On October 27, 2020, several groups filed suit in U.S. District Court for the District of Maine, seeking to halt construction of the project. *Id.* As the result of an injunction pending appeal issued in that case, NECEC was prohibited from starting construction of Segment 1 until May 13, 2021. A24. Although the injunction was lifted, litigation remains pending in District Court, and has been expanded to challenge the Presidential Permit

[1] On November 23, 2021, the DEP Commissioner suspended the DEP Permit unless and until NECEC obtains a preliminary injunction in this case or, if no injunction is granted, NECEC prevails on the merits. A23.

issued on January 14, 2021. *Id.*

Citizen Initiatives

On August 29, 2020, a group of voters filed an application for a citizen's initiative that directed the PUC to reopen the order granting the CPCN, make new findings of fact, and reverse the decision. A27, 202. The Secretary of State certified the initiative for the November 2020 ballot. A27. Avangrid challenged the initiative as an improper exercise of the initiative power. *See Avangrid*, 2020 ME 109, 237 A.3d 882. On August 5, 2020, this Court held that the initiative was "not legislation" because it required the PUC to "reverse its findings and reach a different outcome in an already-adjudicated matter." *Id.* ¶ 36.

Around September 15, 2020, a group of voters filed their application for the citizen's initiative at issue here (the "Initiative" or "IB 1"). A27. The Secretary of State issued the petition, allowing for signature gathering to begin, on October 30, 2020. *Id.* On the same day, Avangrid Networks' parent company filed its 10-Q report with the Securities and Exchange Commission (SEC). A30. In discussing the Corridor, the 10-Q disclosed to investors that the application had been filed and that the company "[could] not predict the outcome of this citizen initiative." *Id.*

On February 22, 2021, the Secretary of State certified that the proponents of the Initiative had gathered enough signatures for submission of the initiative to the Legislature. A28.

On March 1, 2021, Avangrid Network's parent filed its 10-K with the SEC for

2020. A30. Avangrid disclosed to investors "strategic risk factors" relating to the Corridor including "new legislation or citizen referendums or ballot initiatives" which could "have an adverse effect on the success of the [Corridor] and our financial condition and prospects." *Id.*

On November 2, 2021, roughly 59% of voters approved the Initiative. *Id.* The ballot question made clear to voters that the Initiative would apply retroactively. *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 7, 256 A.3d 260. The initiative took effect on December 19, 2021. A30.

Effect of the Initiated Bill

IB 1 contains two main parts. *See* A69–70. Section 1 amends the statute governing BPL's authority to lease public reserved lands. Under prior law, BPL could issue leases of public reserved land for terms of 25 years for various utility projects, including transmission lines, with no statutory requirement for legislative approval. 12 M.R.S.A. § 1852(4) (2011), *amended by* I.B. 2021, ch. 1 (effective Dec. 19, 2021). IB 1 amends that statute to provide that certain leases, including transmission-line leases, must receive two-thirds legislative approval, retroactive to September 16, 2014.

IB 1 also adds three new provisions to the statute administered by the PUC governing electric transmission lines, 35-A M.R.S. § 3132. Section 4 provides that construction of a high-impact electric transmission line must receive legislative approval, with two-thirds approval required if the line uses or crosses public lands. Section 5 bans construction of high-impact electric transmission lines in a defined

region of Franklin and Somerset Counties. Section 6 provides that these new restrictions on transmission lines are retroactive to September 16, 2020.

Construction

NECEC commenced clearing and construction activities on Segments 2–5 of the Corridor on January 18, 2021, and on Segment 1 on May 15, 2021. A31. NECEC has not engaged in any clearing or construction on the public reserved lands. A32.

Procedural History

NECEC filed a verified complaint and motion for preliminary injunction (PI) on November 3, 2021. The complaint alleged that IB 1, as applied, violated NECEC's "vested rights," violated the separation of powers, and impaired the BPL Lease in violation of the Contracts Clause of the Maine and U.S. Constitutions. Several parties were granted intervenor status as plaintiffs and defendants, and all were given the opportunity to file briefs supporting or opposing the PI motion. The Business and Consumer Court heard argument on December 15, 2021 and issued a 52-page decision denying an injunction on December 16, 2021. A16–67.

In its carefully reasoned decision, the Business Court concluded that NECEC was unlikely to prevail on the merits of its claims. It held that the "vested rights" doctrine did not apply to state legislation enacted under the police power and, further, that NECEC's knowledge of IB 1 and the fact that its permits remained under judicial and agency review would prevent vesting of rights in any event. A36–50. The court further held that IB 1 does not infringe executive or judicial power because it is a law

of general applicability that establishes public policy and does not purport to reverse any agency or judicial decision. A50–55. And it held that IB 1 did not substantially impair the BPL Lease and was, in any event, an appropriate and reasonable method of advancing a significant and legitimate public purpose. A55–58. The court then determined that each of the other preliminary injunction factors—irreparable injury, balance of harms, and public interest—disfavored entry of an injunction. A58–67.

On December 28, 2021, the Business Court granted NECEC's motion to report the case to this Court under M.R. App. P. 24(c).

Statement of the Issue

Whether the Business Court, in declining to enter a preliminary injunction, erred in its resolution of a question of law that is of sufficient importance and doubt to warrant immediate appellate review under M.R. App. P. 24(c).

Summary of the Argument

Rule 24(c) of the Maine Rules of Appellate Procedure is intended to allow the Court to resolve questions of law that are of sufficient importance and doubt to warrant interlocutory review. Some of the issues raised by the appellants in their briefs do not meet this standard and should not be reviewed by this Court, either because they involve application of well-defined legal standards to factual findings or because they were not briefed below.

As the Business Court recognized, NECEC's claim that IB 1 impairs its "vested rights," attempts to import a common-law doctrine applicable only to

municipal land-use disputes into a dispute over the constitutionality of a retroactive state statute. This Court made clear in *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (1986), *abrogated on other grounds by DeMello v. Department of Environmental Protection*, 611 A.2d 985 (Me. 1992), that challenges to retroactive state statutes must be brought under a specific constitutional provision. It follows that such challenges must be resolved under modern legal standards for the relevant constitutional provision and not the anachronistic common-law "vested rights" rubric.

The Business Court correctly held that NECEC's vested rights claim is not likely to succeed even if that municipal doctrine applies. At the time it commenced construction, NECEC's DEP permit was undergoing *de novo* agency review before the BEP and its ACE permit was undergoing judicial review. NECEC was also aware of the campaign to enact IB 1 via direct initiative. Its commencement of construction despite these significant legal obstacles to completion of the project was a calculated risk that does not entitle NECEC to claim vested rights under any legal theory.

The Business Court correctly rejected NECEC's separation of powers claims. IB 1 is not targeted legislation like the initiative in *Avangrid*, but is a generally applicable law with wide-ranging effects. That it may have the practical effect of preventing construction of the Corridor despite the issuance and affirmance of the CPCN does not mean it is equivalent to a law requiring the PUC to reopen and reverse the CPCN or a law requiring reversal of this Court's decision in *NextEra*.

The Business Court correctly held NECEC is not likely to succeed on its

Contracts Clause claim. Even putting aside that the subject contract, the BPL Lease, could shortly be vacated by this Court, future regulation of transmission lines passing through public land was highly foreseeable and the BPL Lease contains express language requiring NECEC to comply with future law changes. IB 1 thus cannot be said to substantially impair the contract. In any event, IB 1 is reasonable and necessary to achieve an important state purpose.

Finally, the Court should reject the various arguments of H.Q. Energy Services (U.S.) Inc. (HQUS), which attack, among other things, the two provisions of IB 1 that deem certain linear infrastructure projects to substantially alter the uses of designated public land for purposes of Article IX, § 23 of the Maine Constitution. The legislative power includes the ability to give reasonable meaning to undefined constitutional terms, especially where, as here, the relevant constitutional provision grants implementing authority to the Legislature. In addition, the argument by HQUS and others that IB 1 is inseverable was not preserved below and, in any event, is contrary to the strong presumption in Maine law in favor of severability of statutes.

Argument

I. The Court Should Limit its Consideration of the Report to Legal Questions of Sufficient Importance and Doubt

This matter is not before this Court as an appeal, but as a report under M.R. App. P. 24(c). The purpose of a Rule 24(c) report is to allow this Court to resolve, on an interlocutory basis, "questions of law" that are "of sufficient importance *and* doubt

to justify the report." *Despres v. Moyer*, 2003 ME 41, ¶ 14, 827 A.2d 61 (emphasis in original) (quoting *Toussaint v. Perreault*, 388 A.2d 918, 920 (Me. 1978)). This Court has rejected reports "when the issue is not novel, when it can be resolved by applying well established rules of law, and when it does not require statutory interpretation." *Id.*

The State Defendants agree that NECEC's PI motion raised certain important and novel legal questions. The applicability of the vested rights doctrine to state legislation is one such question. The appellants' claims that retroactive regulation of transmission lines and public-lands leases violates the separation of powers is another.

But NECEC and the intervenors do not stop with seeking review of such novel questions of law. They ask the Court to review the entirety of the Business Court's PI decision, including matters such as whether NECEC will suffer irreparable harm and whether the public interest favors an injunction. *See, e.g.*, NECEC Br. at 50–55. These are not "question[s] of law" at all, *see* M.R. App. P. 24(c), let alone novel ones. Rather, they involve application of well-worn legal standards to the facts established in the PI record. In an ordinary appeal, the trial court's determinations of these factors would be reviewed for abuse of discretion or, in the case of findings relating to irreparable injury, clear error. *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 11, 837 A.2d 129. But on a Rule 24(c) report, there is no reason for the Court to review them at all. *See* 4 M.R.S.A. § 57 (Westlaw Mar. 29, 2022) (Law Court's jurisdiction is to review "questions of law arising on reports of cases").

Another problem with certain of NECEC's and Intervenors' arguments in this

report is that they were never raised before the Business Court. Most notably, NECEC, HQUS, and IECG all argue for the first time in this report that various provisions of IB 1 are inseverable, so that if one provision is struck down, they all must fall. NECEC Br. 41 n.22; HQUS Br. 14–18; IECG Br. 27–28. Similarly, HQUS argues here for the first time that IB 1 is constitutionally infirm because it was enacted by the voters and not the Legislature. Because the Business Court was never presented with these questions and did not rule upon them or consider whether they warranted reporting, they should not be considered by this Court. *See* A15 n.1 (noting that the legal questions for the report are "embodied in this Court's Order").

II. The Business Court Correctly Held that NECEC Is Unlikely to Succeed on its Vested Rights Claim

NECEC, the Chamber of Commerce, Cianbro, and IBEW argue that the Business Court erred in its vested rights analysis. NECEC Br. 17–36; Chamber Br. 5–38; Cianbro/IBEW Br. at 11–25. The Business Court's holdings should be affirmed.

A. "Vested Rights" Is a Municipal Land-Use Doctrine with No Applicability to State Legislation

The phrase "vested rights" appears nowhere in the Maine Constitution. The phrase is frequently used in court decisions from the nineteenth and early twentieth century, eras in which robust understandings of the Contracts Clause and "substantive due process" made courts generally skeptical of government regulation. *See, e.g.*, *Inhabitants of Otisfield v. Scribner*, 129 Me. 311, 151 A. 670, 671 (1930); *Oriental Bank v. Freese*, 18 Me. 109, 109 (1841); *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 295

(1823). As the New Jersey Supreme Court has explained, the vested rights doctrine of that time was grounded in a variety of sources, including the Contracts Clause, state constitutional law, and "the equitable power of state courts." *Nobrega v. Edison Glen Assocs.*, 772 A.2d 368, 380–81 (N.J. 2001).

Following the end of the *Lochner* era in the 1930s, judicial review of economic legislation underwent a sea change. "[S]ubstantive due process analysis in the area of retroactive economic legislation began to be framed in terms of reasonableness, drifting away from the *Lochner* era's strict protection of economic freedom and vested rights." *Honeywell, Inc. v. Minnesota Life & Health Ins. Guar. Ass'n*, 110 F.3d 547, 554 (8th Cir. 1997) (en banc). Decisions of the U.S. Supreme Court such as *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984) began analyzing retroactive legislation not by determining whether the legislation interfered with "vested rights," but by asking whether the legislation "is supported by a legitimate legislative purpose furthered by rational means." *Id.* at 729. Other courts followed suit. *See Honeywell, Inc.*, 110 F.3d at 554; *Est. of Brooks v. Comm'r of Revenue Servs.*, 159 A.3d 1149, 1167 (Conn. 2017) ("Vested rights no longer form the touchstone of the analysis of economic regulation."); *Nobrega*, 772 A.2d at 381 ("the 'vested rights' doctrine does not reflect the current understanding of anti-retroactivity principles implicit in the concept of due process"); *Powell v. State ex rel. Oregon Dep't of Land Conservation & Dev.*, 243 P.3d 798, 803 (Or. Ct. App. 2010) ("we decline plaintiff's invitation to rouse the 'ghost of *Lochner*' through a 'vested rights' analysis of economic regulation."); *see also*

James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 122 (1993) (contrasting the "categorical logic of vesting" employed in the 19th century with modern due process jurisprudence requiring "substantive review of legislative policy").

This Court has followed this trend toward modern constitutional analysis. In 1941 it noted "the swing of the pendulum . . . to increasing liberality in constitutional construction favorable to validity in legislative action over an ever broadening range." *Inhabitants of Town of Warren v. Norwood*, 24 A.2d 229, 236 (Me. 1941). In *Baxter v. Waterville Sewerage District*, 79 A.2d 585, 590 (Me. 1951), the Court recognized that a claim of "vested rights" could not overcome a state law enacted under the police power. In that case, city residents claimed that a state law establishing a sewerage district that would charge fees for sewage disposal violated their "vested rights" in their prior arrangement with the city. In rejecting this claim, this Court explained:

> Where the public health, safety, or morals are concerned, the power of the state to control under its police powers is supreme and cannot be bargained or granted away by the Legislature. **The exercise of the police power in such cases violates no constitutional guaranty against the impairment of vested rights** or contracts.

Id. (quoting *In re Searsport Water Co.,* 108 A. 452, 455 (Me. 1919)) (emphasis added).

Following *Baxter*, parties litigated vested rights increasingly in the context of

municipal land-use disputes,[2] although this Court occasionally referenced a prohibition on "[t]he legislature" impairing vested rights. *See, e.g.*, *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981).

But in its 1986 *Norton* decision, this Court clarified that there is no free-floating constitutional prohibition against the Legislature impairing "vested rights." 511 A.2d at 1060 n.5. Specifically, the *Norton* Court explained that, if it is clear that the Legislature intended that a statute apply retroactively, "the statute must be so applied unless the Legislature is prohibited from regulating conduct in the intended manner." *Id.* Furthermore, "such a limitation upon the Legislature's power can only arise from the United States Constitution or the Maine Constitution." *Id.*

The Court in *Norton* noted "confusion in this area" arising from its prior decisions. *Id.* It singled out prior statements that asserted that the Legislature cannot impair vested rights "without identifying the source of the asserted constitutional prohibition." *Id.* The Court concluded that "[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." *Id.*

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[2] *See, e.g., Sahl v. Town of York*, 2000 ME 180, ¶ 4, 760 A.2d 266 (town zoning ordinance); *Waste Disposal Inc. v. Town of Porter*, 563 A.2d 779, 780 (Me. 1989) (town moratorium on landfill construction); *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 162 (Me. 1988) (city ordinance); *Thomas v. Zoning Bd. of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978) (town zoning ordinance).

Norton thus made clear that litigants challenging retroactive state laws cannot rely on antiquated caselaw asserting that the Legislature cannot impair vested rights. Rather, they must invoke a specific constitutional provision, and then establish—using the modern legal standard for determining a violation of that constitutional provision—that the retroactive application of the statute violates their rights.

This Court applied *Norton*'s framework in *State v. LVI Group*, 1997 ME 25, 690 A.2d 960. In that case, the plaintiff holding company ("LVI") challenged the Legislature's decision to retroactively amend the definition of "employer" in a severance pay statute for the specific purpose of abrogating a Law Court decision that held that LVI was not an "employer" under the statute. *Id.* ¶¶ 1–7. In analyzing LVI's claim, the Court explained that, in *Norton*, "we clarified the proper analysis concerning the retroactive application of statutes." *Id.* ¶ 9. The Court quoted *Norton*'s exhortation that limitations on the Maine Legislature's power to regulate retroactively "can only arise from the United States Constitution or the Maine Constitution." *Id.* (quoting *Norton*, 511 A.2d at 1056 n.5).

The Court then analyzed *LVI*'s claims not as a matter of "vested rights," but under the specific constitutional provisions potentially applicable to retroactive legislation, including the Due Process and Takings clauses of the Maine and United States Constitution, applying the modern legal standards for each claim. *Id.* ¶¶ 9–16. Most notably, in analyzing LVI's claim under the Declaration of Rights in the Maine Constitution, the Court described the gravamen of the claim as "really due

process, that the Maine Constitution forbids *interference with vested rights*." *Id.* ¶ 15 (emphasis added). The Court resolved the claim not by applying the vested rights analysis advocated by NECEC, but by simply cross-referencing its earlier due-process analysis, in which it considered whether the retroactive statute was "enacted to further a legitimate legislative purpose by rational means." *Id.* ¶ 9 (quoting *Tompkins v. Wade & Searway Const. Corp.*, 612 A.2d 874, 877 (1992)). The dissent confirms *LVI*'s abandonment of the pre-*Norton* vested rights doctrine, implicitly criticizing the majority for failing to apply that doctrine. *Id.* at ¶¶ 22–23 (Glassman, J., dissenting).

Thus, as the Business Court correctly recognized, *LVI* and *Norton* together make clear that there is no longer a stand-alone "vested rights" doctrine that allows challenges to retroactive statutes enacted by the Legislature (or citizens acting pursuant to their co-equal legislative powers). Rather, a statute with retroactive effect must be challenged under a specific constitutional provision and the resulting analysis must apply the modern legal standard applicable to that constitutional provision.

It is true, of course, that Maine courts continue to apply a vested rights analysis to municipal land-use disputes. *See, e.g.*, *Sahl*, 2000 ME 180, 760 A.2d 266. That is because *Norton* and *LVI* did not abolish the vested-rights doctrine, but rather made clear that it was not a constitutional doctrine. The doctrine lives on in the common law. *See Heber v. Lucerne-in-Maine Vill. Corp.*, 2000 ME 137, ¶ 10, 755 A.2d 1064 (observing that "[a]t common law, an individual has a vested right in an accrued cause

of action").[3] As the Business Court observed, municipalities have more limited legislative powers than the Legislature. A40. Most notably, municipalities are constrained by the "general law," which presumably includes Maine's common law. *See* Me. Const. art. VIII, pt. 2, § 1. The Legislature, in contrast, is free to abrogate common law by clear legislative enactment. *See Ziegler v. Am. Maize-Prod. Co.*, 658 A.2d 219, 222–23 (Me. 1995); *see also Foss v. Maine Tpk. Auth.*, 309 A.2d 339, 342 (Me. 1973) (recognizing that the Legislature can authorize municipalities to regulate property in a manner that would otherwise make municipalities liable for nuisance or trespass). In enacting the expressly retroactive IB 1, the citizens acting as Legislature did just that.

NECEC takes issue with the Business Court's conclusion that vested rights do not apply here by pointing to the same outdated caselaw that *Norton* criticized as creating "confusion," including even a case that *Norton* specifically singled out for criticism. NECEC Br. at 19 (citing *Merrill*, 430 A.2d at 560 n.7); *see also* Chamber Br. at 18–21. Only one of these cases, *Heber*, 2000 ME 137, 755 A.2d 1064, postdates *Norton*. And *Heber*, citing "common law principles," applied the vested rights doctrine

[3] *See also Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs of Yamhill Cty.*, 264 P.3d 1265, 1277 (Or. 2011) (analyzing whether ordinance affected developer's "common law vested right."); *Andalucia Dev. Corp. v. City of Albuquerque*, 234 P.3d 929, 937 (N.M. Ct. App. 2010) (distinguishing statutory rights from "common law vested rights"); *Villa at Greeley, Inc. v. Hopper*, 917 P.2d 350, 355 (Colo. App. 1996) (noting that legislative enactment contained language indicating that it did not supplant or supersede "the common law doctrine of vested rights or equitable estoppel"); *Est. of Kadin v. Bennett*, 557 N.Y.S.2d 441, 442 (N.Y. App. Div. 1990) (city ordinance "does not codify or abolish the common-law doctrine of vested rights").

to a public law that did not contain a retroactivity provision, concluding that its repeal of a statute did not extinguish an already-accrued cause of action. *Id.* ¶¶ 5, 12. Nothing in *Heber* suggests that the Court should apply vested rights as a constitutional doctrine to invalidate a state statute with express retroactivity provisions.

NECEC also seeks to minimize *Norton*'s discussion of vested rights by arguing that it was narrowly targeted at a since-abandoned distinction between retroactive procedural laws and retroactive substantive laws. NECEC Br. 20. This argument underplays the significance of *Norton*'s holding. While the procedural/substantive distinction was the launching point for *Norton's* discussion, the holding in *Norton* sweeps more broadly than that. *Norton* makes clear that the claim that a retroactive statute "impairs vested rights or imposes liabilities" is not by itself a constitutional claim. 511 A.2d at 1060 n.5. The litigant must point to a "a specific provision of the state or federal constitution" on which the claim is based. *Id.*

If, as NECEC suggests, a vested rights claim is simply a type of due process claim, NECEC Br. at 19, *Norton*'s admonition makes little sense. Why would a litigant need to identify a "specific provision" of the constitution if the applicable provision for a vested rights claim were always the same? The only reasonable reading of *Norton* is that the Court is not requiring litigants to engage in an empty exercise in taxonomy, but was requiring them to proceed under a recognized, modern constitutional theory as to why the statute is unconstitutional. "Vested rights" is not such a theory.

NECEC also argues that *Sahl*, 2000 ME 180, 760 A.2d 266, sets forth the

proper analysis for vested rights claims, and that therefore the more deferential modern analysis for retroactive legislation set forth in cases like *LVI Group* should not apply. NECEC Br. 21–22; *see* Chamber Br. at 23. In *Sahl*, this Court held that the plaintiff had acquired vested rights in a construction project and therefore had the right to continue the project despite a change in a town zoning ordinance during construction that would have prevented completion of the project. 2000 ME 180, ¶ 14, 760 A.2d 266. But *Sahl*, like all of this Court's other post-*Norton* vested rights cases (save *Heber*, discussed above), involves municipal land-use restrictions, not state statutes. *Sahl* may describe the common-law standard that determines whether amendments to zoning ordinances apply to ongoing construction projects. But it does not describe a constitutional standard that applies to retroactive state legislation. Indeed, *Sahl* contains not a single mention of any applicable constitutional provision.

B. The Business Court Correctly Concluded that NECEC's Rights Did Not Vest

Even if the municipal vested rights doctrine could be applied to a state law, the Business Court correctly determined that the doctrine would not immunize NECEC from the retroactive provisions of IB 1. Specifically, the Business Court correctly held that NECEC's awareness of ongoing efforts to defeat the project and the ongoing agency and judicial review of its various permits at the time it started construction prevented vesting. A43–A50. As the Business Court put it, these were "flashing red light[s]" that placed NECEC on notice that the project remained rife with legal

uncertainty. A46 n.24.

1. *NECEC's Rights Did Not Vest Because It Took a Calculated Risk to Begin Construction While Its Permits Were Still Under Review*

Under the *Sahl* test for vested rights, the developer must commence construction "pursuant to a validly issued building permit." 2000 ME 180, ¶ 12, 760 A.2d 266. The Business Court correctly held that this requirement is not satisfied where the developer commences construction while needed permits are still undergoing agency or judicial review, regardless of whether permits allow for construction to commence in the meantime.

Here, at least two necessary permits were undergoing direct agency or judicial review at the time it commenced construction. Most significantly, the DEP Permit remains on appeal to the BEP. That appeal is a *de novo* proceeding in which the BEP need not defer to either the DEP's factual findings or its legal conclusions. 38 M.R.S.A. § 341-D(4)(A); *Champlain Wind, LLC v. Bd. of Env't Prot.*, 2015 ME 156, ¶ 14, 129 A.3d 279. Meanwhile, the ACE Permit was challenged in court before commencement of construction and the outcome of that challenge remains pending. A24. Indeed, at the time it began construction, NECEC was enjoined from working on a key portion of the Corridor due to that litigation. *Id.* NECEC will be unable to complete the Corridor if there is an adverse decision in either proceeding.

NECEC does not even suggest that its commencement of construction could vest its rights against the BEP or a court revoking or vacating the ACE or DEP

permits on direct review. A decision of the Superior Court, *Conservation Law Foundation, Inc., v. Maine*, No AP-98-45, 2002 WL 34947097 (Me. Super. Jan. 28, 2002), confirms as much. There, the holder of a contested DEP permit for a pier constructed the pier after favorable determinations by the DEP and BEP but while Rule 80C appeals of those decisions were pending. *Id.* at *2. In rejecting the vested rights claim, the court explained that recognizing a vested right to the permit would allow the permittee to "go ahead and act on that permit and retain the benefit so conferred as a matter of right, even though it is subject to a timely and legally sanctioned process to attack its issuance." *Id.* at *3.

As the Business Court noted, other jurisdictions have recognized that the same principle applies when intervening legislation affects a permit that is on appeal. A47. In *Donadio v. Cunningham*, 277 A.2d 375 (N.J. 1971), the New Jersey Supreme Court considered whether a fast-food restaurant's decision to commence construction after prevailing at the trial-court level in a legal challenge to its building permit immunized it against the town's decision, before expiration of the appeal period, to change its zoning ordinance to prohibit such establishments. *Id.* at 379. The court concluded that existence of the plaintiffs' appeal right at the time of the amendment precluded any such argument, explaining:

> A landowner should not be able to thwart that public interest by a "bootstrap" operation and by winning an unseemly race. This should be so whether or not the issuance of the building permit is subsequently sustained in the litigation. And, of course, an owner can acquire no

> additional rights by starting or continuing construction after an appeal has been taken. What we have said represents the general rule, . . . as well as the holdings and rationale of our own cases.

Id. at 382–83 (citation omitted); *see also Meridian Dev. Corp. v. Edison Twp.*, 220 A.2d 121, 124 (N.J. Super. Ct. 1966) (developer's rights against citizen's initiative did not vest where developer's permit was still undergoing judicial review).[4]

NECEC urges this Court to adopt a contrary view espoused by Maryland's intermediate appellate court in *Town of Sykesville v. W. Shore Commc'ns, Inc.*, 677 A.2d 102 (1996). NECEC Br. at 36. There, the court suggested that construction rights could be vested against changes in law even if they were not vested against judicial review of the permit at issue. 677 A.2d at 127.

Although NECEC points out that this Court cited *Sykesville* with approval in *Sahl*, the Court did not cite it for this illogical proposition. *See* 2000 ME 180, ¶ 12, 760 A.2d 266. For a right to vest, it must be "fixed, settled, absolute, and not contingent upon anything." *Big John's Billiards, Inc. v. State*, 852 N.W.2d 727, 741 (Neb. 2014); *accord Antoon v. Cleveland Clinic Found.*, 71 N.E.3d 974, 982 (Ohio 2016). A right

[4] Intervenors Cianbro and IBEW argue that *Donadio* is distinguishable because the appeal period at issue in that case was "a mere 45 days." Cianbro/IBEW Br. at 16. The length of a given appeal period, and how far into that appeal period the developer began construction, might conceivably be a factor that a court could weigh in the equitable analysis described by the Business Court. But here, NECEC commenced construction not during an appeal period but while *actual appeals* of the various permits were ongoing, one of which was subject to *de novo* review, and another of which had resulted in an injunction against NECEC that would have prevented completion of the Corridor had it become permanent. A24. If anything, NECEC took a greater calculated risk than the plaintiff restaurant in *Donadio*.

that is "purely contingent" is not a vested right. *See Fournier v. Fournier*, 376 A.2d 100, 102 (Me. 1977) (holding that property rights under divorce laws did not vest until the divorce had been granted). Yet any rights NECEC has under the DEP and ACE permits are entirely contingent on the BEP and the relevant federal and state courts upholding the permits. Those rights cannot be said to be "vested."

Indeed, it is precisely because building permits still subject to agency and judicial review can be revoked that courts have held construction expenditures under such permits to be "inherently unreasonable" and a "calculated risk" that do not vest rights. *Ebzery v. City of Sheridan*, 982 P.2d 1251, 1257 (Wyo. 1999).[5] If that is the case, it should not matter whether the developer is relying on its expenditures to derail a Rule 80C appeal of the permit, as in *Conservation Law Foundation,* or to immunize itself from citizen-initiated legislation, as here. Either way, the pendency of ongoing agency or judicial review make the expenditures objectively unreasonable and risky. A rule holding that a developer's inherently unreasonable expenditures in the face of a

[5] *See also Hussey v. Town of Barrington*, 604 A.2d 82, 85 (N.H. 1992) ("landowners who decide to proceed with their projects heedless of serious questions about the legality of their actions may be deemed to have taken a 'calculated risk,' rather than to have relied in good faith [on a zoning variance]"); *Bowman v. City of York*, 482 N.W.2d 537, 546 (Neb. 1992) ("one who builds in accordance with a zoning variance which is appealed take the risk that it will have to tear down what it has built"); *Kauai County v. Pacific Standard Life Ins. Co.*, 653 P.2d 766 (Haw. 1982) (holding that construction is a "speculative business risk" until the developer receives "final discretionary approval"); *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 124 N.W.2d 809, 817 (Wis. 1963) ("Once the appellants received notice of this appeal and the claim that the permit violated the zoning ordinance, they thereafter proceeded at their peril in incurring expenditures in reliance on the permit."); *Columbus Bd. of Zoning Appeals v. Wetherald*, 605 N.E.2d 208, 210 (Ind. Ct. App. 1992) (plaintiff builder "proceeded to build at his own peril prior to a final resolution of the variance issues.").

permit appeal would nonetheless grant that developer immunity from future state legislative changes would be illogical.

Finally, even within Maryland, *Town of Sykesville*'s holding has been called into question. In *Powell v. Calvert County*, 795 A.2d 96, 101 (Md. 2002), the Maryland Supreme Court announced that "until all necessary approvals, including all final court approvals, are obtained, nothing can vest or even begin to vest." *Id.* at 101. Applying this rule, the *Powell* court held that a zoning board should have applied an amended zoning ordinance to a landowner's permit after a court vacated and remanded the permit for further consideration. *Id.* at 98–99. The court reasoned "until all litigation concerning the [permit] is final," persons proceeding under it "are not 'vesting' rights; they are commencing at 'their own risk' so that they will be required to undo what they have done if they ultimately fail in the litigation process." *Id.* at 101.

NECEC suggests that *Powell* is distinguishable because the permit at issue had been vacated at the time the new zoning ordinance was enacted. NECEC Br. at 36 n.18. But *Powell*'s language is broad, stating in absolute terms that one cannot "vest[] rights" in a permit by "proceeding under it prior to finality." 795 A.2d at 101. Moreover, the *Powell* holding does so in the specific context of discussing the "validly issued permit" prong of the vested rights test upon which the Business Court based its ruling. *Id.*

NECEC's effort to distinguish *Powell* also ignores the Business Court's ruling in *Black v. Cutko*. While BPL is currently appealing that decision, and strongly believes it

should be reversed under the law in effect prior to IB 1 and due to its implications for other BPL leases, affirmance of the *Black* decision would result in the same circumstance that was at issue in *Powell*: vacatur of the permit. *Powell* squarely holds that a vacated permit does not immunize the holder against future law changes. *Id.*

Because NECEC's permits are still subject to further agency and judicial review, it cannot succeed in its vested rights claim.

2. *NECEC's Rights Did Not Vest Because It Took a Calculated Risk to Begin Construction with Knowledge of the Initiative*

The Business Court correctly held that NECEC's right to build the Corridor failed to vest for a second independent reason: NECEC knew of the substantial risk posed by IB 1 well before the earliest date upon which it could claim to have started construction. NECEC's knowledge precludes any finding that its commencement of construction was a "good faith change made in reliance on the zoning law in effect at the time of the application." *Thomas*, 381 A.2d at 647.

The Business Court correctly concluded that decisions of this Court make clear that vested right is an equitable concept in which the "totality of the circumstances" must be considered. A44. Moreover, this Court's holdings in *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 27, 856 A.2d 1183, and *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988)—both cases that, as here, involved direct initiatives—make clear that the developer's knowledge of potential changes in the governing law are of key importance in the vesting analysis. In *Kittery*

Retail Ventures, this Court took into account the developer's "knowledge of the pending amendment and opposition to the development," in determining whether the builder had an equitable basis to assert vested rights. 2004 ME 65, ¶ 28, 856 A.2d 1183. And in *Fisherman's Wharf*, the Court considered that the developer had "knowledge of the contents of the proposed ordinance and its retroactive provisions" prior to acquiring title to the property. 541 A.2d at 164.

The record shows that NECEC was well aware of IB 1 from the moment the Secretary of State issued the signature petition to the initiative proponents. NECEC's parent alerted investors to IB 1 in an SEC filing issued on October 30, 2020, the same day the Secretary issued the petition. A30. Evidence in the record also shows that, by the date that NECEC started construction, January 18, 2021, NECEC's political action committee had already spent nearly $2.4 million opposing the signature gathering effort. Bolton Aff., Ex. I. NECEC was surely aware that the proponents of the initiative had previously succeeded in gathering sufficient signatures for an anti-Corridor referendum and were thus likely to succeed again. In short, NECEC knew that IB 1 posed an existential threat to the Corridor well before it commenced construction. A44–45. Given this knowledge, NECEC's decision to nevertheless start construction cannot be viewed as anything other than a calculated risk. The court did not err in considering this fact in its equitable analysis.

NECEC contends that *Kittery Retail Ventures* and *Fisherman's Wharf* are distinguishable because "neither involved any construction." NECEC Br. at 28; *see*

also Chamber Br. at 26–27. But while that may be a factual difference, neither decision indicates that commencement of construction prior to the law change would have changed the outcome. Given the equitable nature of the analysis, construction would have properly been, at most, another factor to consider in the "totality of circumstances." A44. Moreover, while NECEC tries to further distinguish those cases by pointing out that the developers there had "knowledge of a potential change in law *prior* to obtaining property and permits," NECEC Br. at 28, the same is at least partially true here: NECEC did not acquire all of the permits it needed until January 14, 2021, well after the initiative effort was underway. A24.

NECEC also argues, again, that this Court should adopt reasoning found in the intermediate Maryland case, *Town of Sykesville*. NECEC Br. at 27. Given NECEC's heavy reliance on the case, a review of its facts is instructive. There, the plaintiff developer sought to erect a communications tower in the defendant town. 677 A.2d at 103. Concerned that the tower had an insufficient "fall area," the county commissioners proposed an ordinance that would require such towers to have setbacks equal to their heights. *Id.* at 105. When the commissioners deferred action on their proposed ordinance from a Friday afternoon to a Monday morning, the developer flew in a construction crew to commence construction of the tower during the intervening weekend. *Id.* at 107–08. The developer then claimed that it had acquired vested rights that immunized it from complying with the new setback requirement. *Id.* at 108.

The court held that the developer's effort to "seize the day" to thwart the county's safety concerns gave it vested rights against the new ordinance. *Id.* at 118. In a section of its decision titled "Calculated Opportunism Is Not Bad Faith," the court characterized the developer as displaying "'get-up-and-go' or 'gumption.'" *Id.* The court concluded that "[i]t is not bad faith to beat the legislative train to the crossing," but is rather, "the smart thing to do." *Id.* at 120.

This Court should decline to follow *Sykesville*'s Darwinist construction of the vested rights doctrine. Developers that know their projects are the subject of pending legislation intended to protect important public interests should not be able to permanently thwart those public interests by rushing to start construction before the legislation can be enacted. As the *Donadio* court explained, such actions are nothing more than a "a hasty effort to attempt to acquire an unassailable position to which it equitably should not be entitled." 277 A.2d at 383.

Decisions from other jurisdictions are contrary to *Sykesville*. The Supreme Court of North Carolina has observed that good faith is not present where a 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). Similarly, the Supreme

Court of Arizona has held that a builder acquired no vested rights when he learned of a proposed zoning change and then "proceeded [with construction] on the theory either that the ordinance would not be passed, or that, if passed, it was void." *City of Tucson v. Arizona Mortuary*, 272 P. 923, 928–29 (Ariz. 1928). The Court explained that, "having taken that chance, [the builder] may not now be heard to set up any loss to it which arose from its actions after it had knowledge that the ordinance was being considered." *Id.*

NECEC also contends that the alleged bad faith of initiative proponents in pursuing legislation targeting the Corridor should preclude the Court from taking account of NECEC's knowledge of the initiative when it commenced construction. NECEC Br. at 29. Unsurprisingly, NECEC cannot cite a single case for this novel proposition. *Id.* This Court should not adopt a test for vested rights that would require examination of the motives of the citizens who exercise their rights under the direct democracy provisions of the Maine Constitution to seek initiated legislation. Notably, in addressing a similar "bad faith" argument against referendum supporters, *Kittery Retail Ventures* examined only whether *town officials* may have acted in bad faith, implicitly eschewing any inquiry into the motives of the initiative proponents themselves (whose motives were almost certainly to stop particular proposed projects). 2004 ME 65, ¶ 31, 856 A.2d 1183. Here, there is not even an allegation that any governmental official acted in bad faith regarding the Corridor.

Finally, NECEC argues that, if its knowledge of IB 1 is relevant at all, it should

not be relevant until February 22, 2021, the date the Secretary of State certified that the petition had sufficient valid signatures.[6] NECEC Br. at 31. The Business Court correctly held that October 30, 2020, the date the Secretary of State issued the petition, is the relevant date. A45. The date that the petition was issued is significant not only because it informs the developer that signature gathering will commence, but because it finalizes the text of the legislation, allowing the developer to learn precisely what the legislation would do.[7] And, on the facts found here, where it was reasonable for NECEC to expect that proponents of IB 1 would collect sufficient signatures, its knowledge that the petition was issued made its reliance on existing law unreasonable.

For the contrary proposition, NECEC relies on *Kauai County. v. Pacific Standard Life Insurance Co.*, 653 P.2d 766 (Haw. 1982). That decision, which held that a developer failed to vest its rights by starting construction in the face of a pending referendum, on the whole favors the State Defendants. The *Kauai County* court held that "expenditures made toward commencing construction before the referendum vote were not only speculative but also fell short of good faith as manifestations of a race of diligence to undermine the referendum process." *Id.* at 778.

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[6] Even if February 22, 2021, were the relevant date, a factual question would remain as to whether NECEC's construction of only 9 of 832 planned structures by that date, *see* A82 ¶ 31, A117 ¶ 124, was sufficient to vest rights.

[7] The Business Court noted that "the text of LD 1295"—the legislative document that presented the certified initiative to the 130th Legislature—was released "[s]ometime between October 2020 and March 2021." A45. In fact, the Constitution requires that the "full text" of the initiative be set forth on the petition. Me. Const. art. IV, pt. 3, § 20. Thus, the final text of IB 1 was available as of the date of petition issuance, October 30, 2020.

NECEC nevertheless points to *Kauai County*'s conclusion that the developer's reliance ceased to be in good faith as of the date of petition certification. *Id.* at 777. But that portion of its holding—the only portion that supports NECEC—is contrary to *Fisherman's Wharf*. There, the Court rejected the developer's vested rights claim by noting that the developer was aware of the proposed initiative prior to acquiring title to the property in question. 541 A.2d at 164. *Fisherman's Wharf* elsewhere notes that the developer acquired title on February 19, 1987, but the city clerk did not certify the initiative petitions until March 2, 1987. *Id.* at 161. The Court's analysis thus indicates that an initiative effort can defeat developer reliance on existing law even before it is certified.[8] *Id.* at 161. *Fisherman's Wharf* controls over *Kauai County* in this respect.

III. IB 1 Does Not Violate the Separation of Powers

NECEC, HQUS, and IECG argue that the Business Court erred in concluding that IB 1 does not violate the separation of powers. NECEC Br. 37–46, HQUS Br. 36–46; IECG Br. at 8–20. The Business Court's holding should be affirmed.

The legislative power, whether exercised through the Legislature or directly by the people is substantial: "the Maine Constitution vests in the Legislature 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 this Constitution, nor to that of

[8] Because the Court's vesting analysis in *Fisherman's Wharf* focused on the date title was acquired, the fact that a permit did not issue until after certification of the petition, *see* NECEC Br. at 31 n.14, is irrelevant.

the United States.'" *MacImage of Maine, LLC v. Androscoggin Cty.*, 2012 ME 44, ¶ 28, 40 A.3d 975 (quoting Me. Const. art. IV, pt. 3, § 1). Moreover, the Court has recognized that "the regulation of public utilities lies with the Legislature and not with the Executive or Judiciary." *Auburn Water Dist. v. PUC*, 163 A.2d 743, 744 (Me. 1960). Although the Legislature has delegated its authority over the regulation of public utilities, it has not "surrendered" that power by doing so. *Id.*; *Avangrid*, 2020 ME 109, ¶ 32, 237 A.3d 882.

A. IB 1 Does Not Exercise Executive Power

NECEC first argues that IB 1 exercises executive power because it would "disrupt" prior actions by the Executive Branch, specifically the PUC's issuance of a CPCN authorizing the Corridor and BPL's issuance of the BPL Lease. NECEC Br. at 39. NECEC points to two decisions it argues support its view: *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882, and *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117. Neither of these decisions support a separation of powers violation here.

Avangrid considered the constitutionality of the 2020 Corridor-related direct initiative, which was styled as a "resolve" requiring the PUC to reopen its CPCN decision, make particular findings of fact against the applicant, and then deny the application. *Id.* ¶ 5. This Court explained that because the purpose and effect of the initiative was to "dictate the Commission's exercise of its quasi-judicial executive-agency function in a particular proceeding," the resolve would interfere with executive power. *Id.* ¶ 35.

The resolve at issue in *Avangrid* would have interfered with the executive power because it would have compelled a quasi-adjudicatory executive body to conclude that particular set of facts met a particular statutory standard. But *Avangrid* has little to say about IB 1. Unlike the prior initiative, IB 1 does not direct the PUC to reopen its decision and reach the opposite conclusion under the same legal standard. Rather, as the Business Court concluded, IB 1 is a "statute of general applicability affecting various linear projects and regulating high-impact electric transmission lines in Maine." A52. The most that can be said about IB 1's effect on the CPCN decision is that it renders it moot.

IB 1 fits nearly every characteristic of a legislative act listed in *Avangrid*. *See Avangrid*, 2020 ME 109, ¶ 30, 237 A.3d 882 (quoting *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 13 n.7, 91 A.3d 601). It "makes new law, rather than executes existing law." *Id.* It "proposes a law of general applicability." *Id.* It "relates to subjects of a permanent or general character." *Id.* It does not "implement[] existing policy" or "deal[] with a small segment of an overall policy question." *Id.* It "requires only general knowledge." *Id.* It does not involve a subject matter that has been delegated "for local implementation." *Id.* It "is an amendment to a legislative act." *Id.* And, while it may not be a "zoning law[]," it has similar characteristics, placing a particular region of the state off-limits for a particular type of project. *Id.*

Appellants' proposed rule that the separation of powers bars even generally applicable laws if they have the practical effect of undoing prior executive action is

flawed because it lacks a limiting principle. Executive Branch agencies routinely make policy within bounds established by statute via mechanisms such as rulemaking and enforcement discretion. If the Legislature is to retain the full scope of its legislative powers—including its ability to protect public health, safety, and similar interests—it must retain the ability to alter or override those policy decisions via legislation if it concludes they are not, or are no longer, in the public interest.[9] While that power does not extend to directing the outcome of particular executive-branch proceedings, it should and does extend to enacting an overall change in state policy, even if that change will have practical effects on prior Executive Branch actions.

A concrete example may be useful. Imagine it is discovered that high-impact electric transmission lines cause some significant public harm that was unknown at the time of the CPCN proceedings. Appellants' position would appear to imply that the Legislature could not enact general legislation to address this new problem to the extent the proposed solution would "disrupt" prior PUC decisions authorizing construction of the lines causing the harm. Such a restriction goes far beyond what is necessary to prevent the sort of legislative intervention in specific proceedings disapproved in *Avangrid*. It would instead tie the Legislature's hands in establishing even generally applicable policy to protect the public from harm. This Court should

[9] Indeed, in the realm of rulemaking, the Legislature has expressly retained such a power over the executive branch by reserving the right to reject proposed rules by agencies designated as "major substantive rules." 5 M.R.S.A. § 8072. These provisions have existed in Maine statutes for decades without any court suggesting they violate the separation of powers.

not endorse such a broad and potentially dangerous proposition.

NECEC also relies on *Grubb*, 2003 ME 139, ¶ 3, 837 A.2d 117. NECEC Br. at 39. But IB 1 differs markedly from the amended workers' compensation statute at issue there. While the injured worker in *Grubb* was seeking to apply the new statute by re-opening and reversing the outcome of a quasi-judicial proceeding, 2003 ME 139, ¶ 5, 837 A.2d 117, IB 1's amendments to 35-A M.R.S. § 3132 do not require the re-opening of the CPCN proceeding. Section 4 of IB 1 requires legislative approval "[i]n addition to obtaining a [CPCN]," and thus cannot be characterized as requiring reopening or reversal of the CPCN. Similarly, § 5 is an outright ban on transmission lines in the Upper Kennebec Region. While it is certainly possible that the CPCN *could* be reopened if, for example, there were some live controversy over whether the Corridor passes through the Upper Kennebec Region, the statute is otherwise a clear-cut prohibition that applies to NECEC regardless of whether it holds a CPCN. Just as no one would claim that they are free to violate a criminal statute unless an authority prohibits them from doing so, NECEC cannot claim that it is free to build within the Upper Kennebec Region despite IB 1 unless and until the PUC revokes the CPCN.

Nor can § 1 of IB 1 be said to infringe upon executive power in the same way as the law in *Grubb*. BPL leases are not issued via a quasi-judicial proceeding, as was at issue in *Grubb*. In any event, language in the BPL Lease requires NECEC to comply with any laws "hereinafter enacted" relating to the leased premises. A142

¶ 6(m). The BPL Lease thus expressly incorporated the possibility of future legislative action imposing additional conditions or obligations on NECEC.[10]

B. IB 1 Does Not Exercise Judicial Power

The Business Court also correctly held that IB 1 does not exercise judicial power merely because it forbids construction of the Corridor after this Court determined in *NextEra*, 2020 ME 34, 227 A3d. 1117, that the PUC's decision was procedurally proper and supported by sufficient record evidence. *Id.* ¶ 43. As the Business Court correctly observed, the "mere fact that a law impacts a court decision does not equate to an exercise of judicial power." A54.

This Court has confirmed this principle in *MacImage of Maine, LLC v. Androscoggin County*, 2012 ME 44, 40 A.3d 975. There, the Law Court considered legislation that retroactively altered the obligations of counties to respond to bulk records requests, enacted following a Superior Court decision against the counties under the previous statute. *Id.* ¶ 14. After observing that "[t]he constitutional separation of powers is not always undermined when the Legislature passes legislation

[10] NECEC also raises in a footnote its argument that IB 1 violates the Presentment requirement of the Maine Constitution because it does not expressly require presentment of any legislative approval to the Governor for signature. To the extent NECEC's footnote is adequate to preserve this argument, it is without merit. Nothing in IB 1 prevents the Legislature from presenting any legislative approval to the Governor. Indeed, when the Legislature applies a similar statute that requires "approval of the Legislature" for certain leases of public reserved land, 12 M.R.S.A. § 1852(7), the Legislature sends the resulting legislative instrument to the Governor for signature. *See, e.g.*, Resolves 2013, ch. 56. There is no reason to expect it will act differently here. And, in any event, even if IB 1 is ambiguous on presentment, the remedy would be to interpret the statute to require it. *See State v. Hutchinson*, 2009 ME 44, ¶ 32, 969 A.2d 923 ("we will seek to interpret any statute in a way that is consistent with the constitution").

that "affects cases that are pending in the judicial system," the Court emphasized that, by characterizing the retroactive legislative action as "an attempt to overturn a decision in a private dispute," the plaintiffs were "underestimat[ing] the *public interests* at stake." *Id.* ¶ 27 (emphasis in original). The Court discussed the broad sweep of the legislation, noting that it "served more broadly to balance the public and private interests involved in fee-setting for counties' electronic copying of registry land records and indexes." *Id.* ¶ 29. It concluded that because the legislation was "policy-based," it did not "usurp the adjudicatory power of the courts." *Id.*; *see also Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 439 (1992) (observing that law affecting pending litigation did not violate separation of powers where it "suppl[ied] new law" rather than "direct[ing] results under old law").

IB 1 is similarly policy based. As the Business Court observed, IB 1 "is rooted in a policy determination by the people of Maine that the disposition or lease of public lands requires heightened scrutiny by the Legislature." A54. It imposes new legislative approval requirements for a whole range of utility projects throughout the State. It bans construction of an entire class of transmission line in a delimited area of the State. It makes various clarifying changes to general PUC statutes. Its retroactivity provisions are thus no more objectionable than the retroactivity provisions upheld in *MacImage*. *See id.* ¶¶ 7, 14. The fact that IB 1 may indirectly affect the CPCN is insufficient to make IB 1 an improper exercise of judicial power.

NECEC argues that *MacImage* is distinguishable because the litigation over the

CPCN had concluded by the time IB 1 was enacted, while the litigation at issue in *MacImage* remained pending when the new law was enacted. NECEC Br. at 43 n.25. But while the pending/final distinction may apply to court decisions that have only retrospective effects, such as judgments requiring payment of money, it does not apply to decisions like *NextEra* that have ongoing effects.

This distinction originates with *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855). There the Supreme Court considered whether Congress had the power to undo a final court judgment in favor of a private individual that ordered Pennsylvania to remove or alter a bridge over the Ohio River. *Id.* at 429. The Court reasoned that, as a result of the new law, the plaintiff's finally adjudicated right to navigate the river free of obstructions "has been modified by the competent authority." *Id.* at 432. Thus, while the prior award of costs to the plaintiff was "beyond the reach of the power of Congress," the order requiring destruction or alteration of the bridge was properly nullified by the new law. *Id.* at 431–32.

Courts have interpreted *Wheeling* and a later Supreme Court decision, *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), as recognizing a distinction between "final judgments without prospective effects, which could not be constitutionally revised through legislation, and final judgments with prospective effects, whose effects could constitutionally be so revised." *BellSouth Corp. v. F.C.C.*, 162 F.3d 678, 692 (D.C. Cir. 1998) (*quoting Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997)).

Although not an injunction, a decision upholding issuance of a CPCN that will

allow construction and decades-long maintenance of a 145-mile high-impact electric transmission through Maine is a decision that has substantial prospective effects. The *Wheeling* rationale therefore ought to apply. The finality of the *NextEra* decision should not preclude legislation of general applicability because such legislation will have the practical effect of disallowing a project after this Court concluded that the PUC did not commit error in issuing a permit for that project.

C. IB 1 Does Not Usurp Executive or Judicial Authority to Interpret the Maine Constitution

Intervenor HQUS makes a different separation of powers claim, which the Business Court correctly rejected. *See* A54–55. It argues that the two-thirds legislative approval requirements in § 1 and § 4 of IB 1 (the "Deeming Provisions") violate the separation of powers because they interpret the Constitution by deeming certain uses of public reserved lands to be substantial alterations of the uses of that land under the Parks Clause (Me. Const. art. IX, § 23). HQUS Br. at 38–42.

HQUS appears to concede, as it must, that the Legislature may enact legislation that interprets constitutional terms. *Id.* at 40. Courts in other jurisdictions have recognized that courts should accord deference to interpretations of constitutional provisions contained in legislation. *See California Hous. Fin. Agency v. Patitucci*, 583 P.2d 729, 731 (Cal. 1978); *Dwyer v. Omaha-Douglas Pub. Bldg. Comm'n*, 195 N.W.2d 236, 241 (Neb. 1972). Such deference is especially warranted here, where the framers of the Parks Clause expressly delegated to the Legislature the power to enact implementing

legislation. Me. Const. art. IX, § 23 (referencing "legislation implementing this section"). Long before IB 1, the Legislature exercised this authority to define key terms in the Parks Clause, including the meaning of "substantially altered." *See* 12 M.R.S.A. § 598 (Westlaw Mar. 29, 2022). IB 1, as a practical matter, slightly modifies this definition—deeming certain uses of designated lands involving linear infrastructure projects to fall within its purview. The Legislature's exercise of a power delegated to it in the Constitution—and which therefore "belong[s]" to it under article 3, § 2 of the Maine Constitution—cannot violate the separation of powers.

IB 1's minor reinterpretation of "substantially altered" thus does not intrude on BPL executive powers, any more than the Legislature's original 1993 definition of the term did. In both cases, BPL is obliged to comply with constitutionality authorized implementing legislation. That IB 1 imposes a hard-and-fast rule with regard to certain projects, overriding the previous standard, should not make a difference. BPL's constitutional role is to "execute" the statute as written.

This is especially so in the context of leases of public lands. The Legislature, not BPL, is ultimately responsible for the management of Maine's public reserved lands. *See Dudley v. Greene*, 35 Me. 14, 16 (1852) (responsibility for determining "mode and manner" of managing public reserved lands rests in the "sound judgment and discretion of the Legislature"). In its administration of those responsibilities, the Legislature has chosen to create a Bureau of Public Lands as its agent. *See* 12 M.R.S.A. § 1802. But, as with the PUC, the Legislature has only delegated power to

BPL; it has not surrendered it. *Cf. Auburn Water Dist. v. Pub. Utils. Comm'n*, 163 A.2d 743, 744 (Me. 1960). The Legislature retains the power to bypass BPL and issue leases directly, *see, e.g.*, P. & S.L. 1927, ch. 113, § 13 (issuing lease to Kennebec Reservoir Co.). The Legislature could, if it wished, repeal 12 M.R.S. § 1852 in its entirety, cutting BPL out of the leasing process, and issue all leases itself. The Legislature cannot intrude on the separation of powers by enacting legislation on how the executive branch should apply a constitutional provision that the Legislature is also responsible for applying directly.

Nor do the Deeming Provisions usurp judicial powers. The judiciary is not the only branch of government that may interpret the Constitution. All three branches can and must do so to fulfill their constitutional roles. The judiciary's unique authority under the separation of powers is that it is the only branch that may definitively resolve justiciable cases or controversies, including controversies that turn on the meaning of constitutional provisions. Nothing in IB 1 suggests that the judicial branch could not, in an appropriate case, review whether a particular application of IB 1 is inconsistent with the Parks Clause.

IV. The Court Correctly Held that NECEC Is Unlikely to Succeed on its Contracts Clause Claim

The Business Court also correctly held that NECEC is unlikely to succeed on its Contracts Clause claim. In order to establish a violation of the Contracts Clause, NECEC must establish three elements. First it must show that IB 1 resulted in a

"substantial impairment of a contractual relationship." *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (quoting *Gen. Motors Corp. v. Romein*, 503 U.S. 181, 186 (1992)). Second, if there is a substantial impairment, the Court must consider whether the impairment is justified as "reasonable and necessary to serve an important public purpose." *Id.* (quoting *U.S. Trust Co. v. New Jersey*, 431 U.S. 1, 25 (1977)). Third, "the adjustment of the parties' contractual rights and responsibilities 'must be [based] upon reasonable conditions' and be 'of a character appropriate' to the purpose of the legislation." *Id.* (quoting *U.S. Trust*, 431 U.S. at 22).

A. There Was No Substantial Impairment

First, NECEC does not appear to dispute that its Contracts Clause claim will fail if this Court affirms the Business Court's decision in *Black v. Cutko*, which vacates the BPL Lease. As the Business Court noted, if that decision is affirmed (a result Defendant BPL opposes), "there will have been no valid lease to impair." A56.

Second, contrary to NECEC's assertion, NECE Br. at 48 n.28, the terms of the BPL lease expressly contemplate the possibility of legislative alteration of NECEC's rights under the Lease, providing that NECEC is required to comply with state laws "now or hereinafter enacted." A142 ¶ 6(m). IB 1 is a "hereinafter enacted" state law that requires NECEC to obtain two-thirds legislative approval to maintain its lease. Because the lease agreement expressly requires NECEC to comply with future statutory changes, a law enacting just such a new condition cannot be said to impair its contract. *See KHK Assocs. v. Dep't of Hum. Servs.*, 632 A.2d 138, 141 (Me. 1993)

(rejecting Contracts Clause claim where lease contained a clause stating that it was "subject to available budgetary appropriations" and Legislature declined to appropriate funds); *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 463 (Cal. Ct. App. 2001) (rejecting claim that citizen-initiated ban on oil-drilling violated Contracts Clause in part because lease required lessee to comply with all applicable laws). Therefore, far from "depriv[ing] NECEC LLC of the benefit of its bargain," NECEC Br. at 48, IB 1 was a type of contingency expressly contemplated by the parties' contractual language.

NECEC counters that the IB 1 does not fall within the scope of that provision because it only applies to future laws "which may be applicable to Lessee in connection to its use of the Premises," and that IB 1 does not regulate "use." NECEC Br. 48 n.28. This is an untenably narrow reading of the provision. Under IB 1, if NECEC cannot obtain two-thirds approval of the Legislature, it will lose its lease, and therefore be unable to make "use" of the land that is the subject of the Lease. IB 1 therefore does, in fact, operate as a restriction on use.

The Business Court also correctly held that the foreseeability of a law like IB 1 cuts against NECEC's claim of substantial impairment. A57. A regulation that the parties "should have foreseen" cannot impair a contract. *All. of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 115 (D. Me. 2004) (quoting C*hrysler Corp. v. Kolosso Auto Sales, Inc.*, 148 F.3d 892, 879 (7th Cir.1998)); *see also Mercado-Boneta v. Administracion del Fondo de Compensacion al Paciete*, 125 F.3d 9, 13 (1st Cir. 1997); *Kittery*

Retail Ventures, 2004 ME 65, ¶ 39, 856 A.2d 1183. Given that 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, future land use regulations are more likely to be foreseeable to contracting parties. Regulation of leases of public land is, if anything, even more foreseeable, since such leases impact the uses of lands held in a public trust. *See* 12 M.R.S.A. § 1846(1).

B. IB 1 Is Reasonable and Necessary to Serve an Important State Purpose

The Business Court also properly held that IB 1 is likely to survive a Contracts Clause challenge because it is reasonable and necessary to serve an important purpose. A58. In so ruling, the Court correctly concluded that deference to the citizens' judgment on this factor is warranted. A57. While courts are reluctant to give such deference when the state alters its own contractual obligations for reasons of fiscal self-interest, *see U.S. Trust Co.*, 431 U.S. at 26, the same concerns are not present when the legislation at issue is not an attempt by the State to "reduce its financial obligations." *Id.*; *see Seven Up Pete Venture v. State*, 114 P.3d 1009, 1023 (Mont. 2005) (applying deferential review to citizen initiated mining ban because the ban "did not act to benefit the State's self-interest"); *Hermosa Beach Stop Oil Coal.*, 86 Cal. App. 4th at 565 (applying deferential review to citizen initiated oil-drilling ban where city was not "attempting to repudiate debts it has incurred under a contract").

Because deference to the citizens' judgment is required, NECEC's argument

that IB 1 is unreasonable because it seeks to address a problem that "existed at the time the contractual obligation was incurred" misses the mark. NECEC Br. at 49 (quoting *Univ. of Haw. Pro. Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999)). The Ninth Circuit decision that NECEC cites for that proposition involved a contract in which the State had a direct financial interest and thus was not entitled to deference in its judgment of reasonableness. *Cayetano*, 183 F.3d at 1099. In any event, it would make little sense to apply such a rule to citizens' initiatives, which, by their nature, tend to operate as a corrective against governmental action (or inaction) that the people have determined to be unwise. A requirement that, to avoid a Contracts Clause violation, the citizens must act *before* the government (in their eyes) missteps would diminish the people's democratic rights under those constitutional provisions.

Thus, the Business Court correctly determined that IB 1 passes muster under the appropriate deferential standard of review. IB 1 reflects a judgment by the people of Maine to provide that uses of public land involving transmission lines—as well as landing strips, pipelines, and railroad tracks—constitutes substantial alteration of that land and thus requires legislative approval. Limiting large-scale development on Maine's public reserved land is plainly an important public purpose, and a two-thirds legislative approval requirement for major infrastructure projects passing over that land is a reasonable and necessary means to accomplish that purpose. In addition, the approval requirement is a reasonable condition and of an appropriate character, since it is the same condition spelled out in the Constitution.

V. IB 1 Is Not Inconsistent with the Parks Clause

HQUS makes an argument, not raised below (or in its complaint), that the Deeming Provisions of IB 1 could not properly be enacted by direct initiative. HQUS Br. at 21–27. HQUS argues that these provisions "alter the spectrum of pre-amendment uses of the designated lands." HQUS Br. at 24. This argument was not presented to the Business Court and therefore is not properly on report.

Should the Court reach the argument, it should reject it. IB 1 does not itself "substantially alter[]" the uses of the public lots, such that two-thirds approval of the Legislature would be required to enact it. It does not allow or prohibit any particular use. Rather, it is a legislative interpretation—made pursuant to the legislative implementation authority in the Parks Clause itself—of the types of uses of the public lots that meet the constitutional standard, and thus would require two-thirds approval of the Legislature. Just as the Legislature's decision to statutorily define the various terms in the Parks Clause, *see* 12 M.R.S. § 598, did not require a two-thirds vote of the Legislature, neither does IB 1, which is merely a more specific version of the same type of legislative act. The citizens and the Legislature are equally competent to enact such legislation. *See League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) ("The exercise of initiative power by the people is simply a popular means of exercising the plenary legislative power"); *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 9, 91 A.3d 601 ("We liberally construe grants of initiative and referendum powers").

HQUS also argues that the Deeming Provisions are unconstitutional because they "attempt to limit or expand the meaning of" various terms in the Parks Clause. HQUS Br. at 29. This argument fails for the same reasons that HQUS's separation of powers argument fails. The Parks Clause entrusts to the Legislature the responsibility to oversee the public lots and other designated public lands. Moreover, it expressly contemplates that the Legislature will adopt "legislation implementing this section." Me. Const. art. IX, § 23. When the Legislature entrusts an agency to administer a statute, courts will afford "great deference" to the agency's interpretation of that statute. *S.D. Warren Co. v. Bd. of Envtl. Prot.*, 2005 ME 27, ¶ 4, 868 A.2d 210. Courts should likewise accord deference to legislative interpretations of constitutional provisions that the framers have delegated to the Legislature for implementation, upholding such interpretations if reasonable. *See Twiford v. Nueces Cty. Appraisal Dist.*, 725 S.W.2d 325, 327 (Tex. App. 1987) (recognizing that when the legislature is given implementing authority, it "may define terms which are not defined in the constitution itself, provided its definitions constitute reasonable interpretations of the constitutional language and do not do violence to the plain meaning and intent of the constitutional framers").

Applying that deferential standard of review, the Court should conclude that IB 1 is a reasonable, and therefore valid, interpretation of the substantial alteration standard in the Parks Clause. Construction of a transmission line that meets the statutory criteria for a high-impact electric transmission line—including a length of 50

miles or greater and high-voltage or direct current capacity, *see* 35-A M.R.S.A. § 3131(4-A)—could reasonably be said, as a categorical matter, to "substantially" alter the use of designated public lands. *See* HQUS Br. at 30. Similarly, construction of significant infrastructure on public reserved lands, such as transmission lines, pipelines, and railroads could also be reasonably said to "substantially" alter the uses of those parcels. Given the Parks Clause's use of undefined terminology and express assignment of responsibility to the Legislature, the Legislature should be afforded sufficient discretion and flexibility to constitutionally make these kinds of policy determinations.

HQUS further argues that IB 1 is an unreasonable interpretation of the Parks Clause because the term "use," as applied to the public lots, must be interpreted to immunize from the two-thirds vote requirement proposed uses of public reserved lands that are permitted by the Articles of Separation, including infrastructure projects like constructing power lines. HQUS Br. at 35. However, HQUS cites no legislative history suggesting that the framers of the Parks Clause intended to exempt from the requirements of that Clause any project that would "spur development and support communities." HQUS Br. at 34. Absent some textual or historical evidence the framers of the Parks Clause intended to link the meaning of "use" to the Articles of Separation, the fact that the Articles might limit the permissible uses of the public lots does not dictate whether the Parks Clause might separately require the Legislature to approve by two-thirds a particular type of use—even one permitted by the Articles.

VI. IB 1 Is Not Unconstitutional "Targeted" Legislation

HQUS argues that IB 1 is "targeted" legislation that violates article IV, part 3, § 1 of the Maine constitution, because it is not "reasonable." HQUS Br. at 47–50.

Although HQUS cites the 1825 case of *Lewis v. Webb*, 3 Me. 326, for this proposition, the modern version of the doctrine is stated in *Nadeau v. State*, 395 A.2d 107 (Me. 1978), which upheld the constitutionality of a resolve waiving sovereign immunity to allow a particular litigant to sue the State. *Id.* at 114. Clarifying that *Lewis*'s holding is based on equal protection (and thus not article IV, pt. 3, § 1), *Nadeau* holds that "a law uniform in operation is not rendered invalid merely because of the limited number of persons who will be affected by it." *Id.* at 112, 113. Such a law need only have a "rational basis for treating [those affected by the law] in a different manner." *Id.* at 113. *Nadeau* further explains that even special legislation singling out particular individuals is not unconstitutional "[w]here the objects of a law cannot readily be attained by general legislation." *Id.*

Nadeau confirms that IB 1 is not unconstitutional targeted legislation. IB 1 is a general law that imposes new requirements on an entire class of linear infrastructure projects not just retroactively, but into the future. Voters could have rationally determined that the significant construction that will typically be required for such projects warrants enhanced scrutiny and regulation. While HQUS argues that IB 1 is improper because it leaves unchanged other laws that would allegedly further the same interests, but not affect the Corridor, HQUS Br. at 48, "the Equal Protection

Clause does not require that a State must choose between attacking every aspect of a problem or not attacking the problem at all." *Beaulieu v. City of Lewiston*, 440 A.2d 334, 339 (Me. 1982) (quoting *Dandridge v. Williams*, 397 U.S. 471, 486–87 (1970)).

Finally, even if IB 1 were "targeted" legislation, it would fall within the exception for situations in which general law could not readily attain a legitimate goal. Legislation targeting a massive infrastructure project with long-lasting effects for the entire State is not the same thing as legislation targeting a particular disfavored individual. While the latter would typically be motivated by bare animus—a motive that invariably runs afoul of equal protection principles—the former can be, as it is here, the result of a good-faith disagreement about whether such a massive infrastructure project is in the public interest.

VII. The Provisions of IB 1 Are Severable from Each Other

NECEC, HQUS, and IECG contend that IB 1 is inseverable, so that if any provision is invalid as applied to the Corridor, the others are as well. NECEC Br. 41 n.22; HQUS Br. 14–18; IECG Br. 27–28. HQUS in particular focuses on this point because a number of its arguments target less than the entirety of IB 1. But no appellant raised the issue of severability in the Business Court. By not making this argument below, the appellants failed to preserve it.[11]

[11] HQUS cites no authority for its novel proposition that the State Defendants somehow "preserved" the ability of the appellants to make this argument for the first time on appeal by pointing out to the Business Court that many of HQUS's arguments targeted less than all of IB 1. *See* HQUS Br. at 14 n.6. It was the appellants' burden below to show below that IB 1 could not be

If the argument is considered, the Court should reject it. Maine law provides that the invalidation of statutory provisions or applications does not affect other provisions "which can be given effect without the invalid provision or application." 1 M.R.S.A. § 71(8). This Court has explained that this language requires severance unless (1) the law cannot be given effect without the invalid provision or (2) the provision is "such an integral part of the statute that the Legislature would only have enacted the statute as a whole." *Bayside Enterprises, Inc. v. Maine Agr. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986); *see Opinion of the Justices*, 2004 ME 54, ¶ 23, 850 A.2d 1145 (opining that citizen-initiated legislation was severable).

Here, all three of the substantive provisions in IB 1 function independently from each other. Moreover, as NECEC has repeatedly pointed out, IB 1 was promoted to voters as an attempt to "kill" the Corridor project. NECEC Br. at 5, 21. Any one of the three major provisions in IB 1 would appear likely to do so, regardless of whether the others are enforceable. HQUS's claim that it is "not possible" to know what voters would have done if faced with an initiative omitting one of the substantive provisions, HQUS Br. at 17, is not only implausible on its face, but flips the severability analysis on its head, suggesting that, in absence of clear proof of legislative intent, there is a presumption *against* severability. The opposite is true. *See Lambert v. Wentworth*, 423 A.2d 527, 535 (Me. 1980); *Barr v. Am. Ass'n of Pol. Consultants,*

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constitutionally applied to the Corridor. To the extent defeating the presumption of severability is a necessary part of that showing, it was the appellants' obligation to raise and argue the issue.

Inc., 140 S. Ct. 2335, 2350 (2020).[12]

VIII. The Court Did Not Abuse Its Discretion in Applying the Remaining Injunction Factors

There is no reason for this Court to consider, on a report of questions of law, whether the Business Court abused its discretion in applying the remaining familiar standards for injunctive relief. Even if this Court were to resolve one of the questions of law discussed above in a manner that altered the appellants' likelihood of success, the Business Court is the proper forum for determining how that altered calculus might affect its overall determination as to whether an injunction should issue.

But should the Court decide to reach these fact-bound questions, it should conclude that the Business Court's analysis of the remaining factors was not an abuse of discretion.

Irreparable Harm. NECEC contends that threatened constitutional violations are *per se* irreparable harm. NECEC Br. at 51. As the Business Court correctly observed, NECEC's out-of-jurisdiction caselaw for this proposition is distinguishable as NECEC does not face an "imminent threat of civil or criminal liability." A59–60.

[12] HQUS and IECG rely in part for their severability argument on *Caiazzo v. Secretary of State*, 2021 ME 42, 256 A.3d 260, which rejected a claim by a Corridor proponent that IB 1's ballot question was improperly worded as a single question. *Id.* ¶ 27. In that case, however, *both sides agreed that IB 1 was severable. Caiazzo v. Sec'y of State*, CUM-21-212, Br. of Appellant at 36–37 ("the three proposed changes to Title 12 and Title 35-A are severable"); Br. of Appellee at 49 ("the Secretary does not contest that the three sections of the bill . . . are likely severable given the strong presumption in Maine law toward severability"). In upholding the question, this Court did not suggest otherwise. To the contrary it recognized the "compound" purpose of IB 1. 2021 ME 42, ¶ 27, 256 A.3d 260.

What is more, other courts have limited the concept of *per se* irreparable harm to exclude injuries to property rights. The First Circuit, in the context of an energy project, has expressly rejected the notion that "any restraint on any interest in real property is per se irreparable injury." *Pub. Serv. Co. of N.H. v. Town of W. Newbury*, 835 F.2d 380, 381 (1st Cir. 1987) (affirming denial of preliminary injunction that would have blocked obligation of power company to remove utility poles); *see also Brown v. Sec'y, U.S. Dep't of Health & Hum. Servs.*, 4 F.4th 1220, 1225 (11th Cir. 2021) (rejecting claim that property-based constitutional claim was a "per se" irreparable injury).

NECEC also attacks the Business Court's conclusion that "[t]he specter of undue delay . . . . is unsupported by the record, and speculative." A62. This factual conclusion could only be reversed (if at all) for clear error. *Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 11, 837 A.2d 129. In any event, the Court's conclusion is solidly grounded in the record. NECEC based its claims on assumptions about the pace of litigation and offered no explanation of why it could not renegotiate any contractual deadlines if the pace of proceedings was slower than anticipated.

Balance of Harms/Public Interest. The Business Court also correctly concluded that the balance of harms and public interest favored withholding injunctive relief. A66–68. These factors merge when the government is a party. *See Nken v. Holder*, 556 U.S. 418, 435 (2009). While the various appellants point to alleged long-term environmental and other benefits from the Corridor, *see, e.g.*, NECEC Br. at 53, IECG Br. at 21, and alleged long-term harm to Maine's economy, *see* Cianbro/IBEW Br. at

26, the Business Court correctly framed the question as whether "during the likely short lived litigation period, the harm from entering or refusing to enter a preliminary injunction will be worse." A65. As the trial court concluded, allowing the Corridor to be constructed during the pendency of this litigation, only to require that it be torn down at the conclusion of litigation, would be a significant public harm. The court also properly recognized that equitable relief thwarting the will of the voters expressed through the direct initiative process is not in the public interest. A66–67. That is true particularly where, as here, the plaintiffs' ultimate likelihood of success is low.

NECEC responds that the fact that a law was adopted by direct initiative should not "preclude injunctive relief by fixing the public interest in favor of the challenged statute." NECEC Br. at 54. But the Business Court's decision does not suggest such a categorical rule. Rather, it recognizes a citizen-initiated law is a direct statement by the public of what it believes its interests to be, which statement should be given significant consideration in any analysis of public interest. Enjoining citizen-initiated laws further harms the public by nullifying voters' exercise of the franchise, fueling voter cynicism toward democratic processes and discouraging participation in future elections. It was therefore not an abuse of discretion for the Business Court to weigh the means by which IB 1 was enacted in determining the public interest.

Conclusion

The Court should conclude that Business Court correctly resolved the important and doubtful questions of law that were presented to it.

Respectfully submitted,

March 29, 2022

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CERTIFICATE OF SERVICE

I, Jonathan R. Bolton, hereby certify that pursuant to agreement of the parties, a copy of this Brief of Appellees Bureau Of Parks and Lands, Maine Public Utilities Commission, Maine House Of Representatives, and Maine Senate was served via email upon counsel at the address set forth below on March 30, 2022:

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. BCD-21-416

NECEC TRANSMISSION LLC, et al.,

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Defendant-Appellees

CERTIFICATE OF SIGNATURE

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f) (as modified by the Court's Order dated January 10, 2022), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

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