STATE OF MAINE

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

AVANGRID NETWORKS, INC., et al.

Appellant,

v.

BUREAU OF PARKS AND LANDS, et al.,

Appellees

On Report from the Business and Consumer Court
Docket No. BCD-CIV-2021-00058

BRIEF OF APPELLEE-INTERVENOR NEXTERA ENERGY RESOURCES, LLC

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INTRODUCTION

In July of 2021, the Law Court stated that "Effective in 1909, the Maine Constitution was amended to shift some legislative power from the Legislature to the people." *Portland Reg'l Chamber of Commerce v. City of Portland,* 2021 ME 34, ¶ 9, 253 A.3d 586, 591; Me. Const. art. IV, pt. 3, § 18 (providing for citizens to directly enact a law). On November 2, 2021, the people of Maine exercised their constitutional right to legislate and overwhelmingly passed a citizen initiative ("the Initiative") which supplements existing law by:

(1) Prohibiting the construction of high-impact electric transmission lines in the Upper Kennebec Region (Section 5, 35-A M.R.S. §3132(6-D));

(2) Requiring a high-impact electric transmission line to obtain the approval of the Legislature, unless the line uses public land, in which case the line requires a two-thirds approval of all members to each House of the Legislature (Section 4, 35-A M.R.S. §3132(6-C)); and

(3) Clarifying that any transmission line that uses public reserved land constitutes a substantial alteration, which requires a two-thirds approval of all members to each House prior to Maine's Bureau of Parks and Lands ("BPL") executing a lease with the owner of the line (Section 1, 12 M.R.S. §1852(4)).[1]

Sections 4 and 5 apply retroactively to any high-impact electric transmission line not under construction as of September 16, 2020, while Section 1 is retroactive to leases executed on or after September 16, 2014. 35-A M.R.S. §3132(6-C); 12

[1] Sections 2 and 3 of the Initiative make managerial, generally non-substantive edits to 35-A M.R.S. § 3131(4A) and 35-A M.R.S. § 3131(6-A).

M.R.S. §1852(4). By its plain language, the Initiative applies broadly to all high-impact electric transmission lines to be developed in Maine, including those transmission lines proposed as part of NECEC Transmission, LLC's ("NECEC") transmission project (the "Project"). The Initiative also applies to a lease executed between BPL and Central Maine Power Company ("CMP") for the Project to cross approximately one mile of public reserved land in the Upper Kennebec Region (the "BPL Lease"). The BPL Lease was invalidated by the Superior Court and is pending review by the Law Court.

In denying the request of NECEC and Avangrid Networks, Inc. ("Avangrid") (collectively "Appellants")[2] for a preliminary injunction against the Initiative applying to the Project, the Business & Consumer Court ("Business Court") concluded that the Initiative is constitutionally valid and that Appellants failed to meet their burden of establishing any of the four requirements for a preliminary injunction. For instance, the Business Court concluded that the Initiative: (1) does not overturn any existing final determination of the executive or judicial branch; (2) has a rational basis in furthering the legitimate legislative purpose of protecting the environment; and (3) the State maintains the power to enact laws to protect the environment and public lands, thus defeating Appellants' separation of powers,

[2] CMP, a subsidiary of Avangrid, has transferred ownership of the development and construction of the Project to NECEC. A.21.

Contract Clause, and vested rights challenges. These Business Court conclusions are unassailable in this M.R. App. P. 24(c) ("Rule 24(c)") appeal.

Against the well-reasoned Business Court decision to deny the preliminary injunction, Appellants through this Rule 24(c) appeal challenge the legality of applying the Initiative to the Project. In so challenging, Appellants request that the Law Court depart from well-settled appellate rules of practice, statutory construction, and constitutional jurisprudence in favor of imposing unprecedented and *ad hoc* constraints on the right of the citizens of Maine – and, by extension, the Legislature. Appellants' predominate rationale on appeal is that they spent a lot of money to advance construction of the Project prior to passage of the Initiative, so they must have the right to continue construction despite the plain language of the Initiative. Conversely, as the Business Court aptly found:

> NECEC's decision to forge ahead with construction in the face of a substantial possibility that retroactive change negatively impacting the Project could be passed in the near future was a calculated risk. . . . Here, the evidence establishes that upon commencement of construction, both in January and May 2021, Plaintiffs themselves were faced with a flashing red light about the risks of proceeding with the Project.

A.45, 46 n.24.

Unquestionably, the Framers of the Maine and Federal Constitutions did not intend for the respective constitutions to be interpreted to redress Appellants' calculated business decision to forge ahead with construction with advance

knowledge of the Initiative – particularly, when such redress would be at the expense of legislative action to protect the environment and public lands. Instead, consistent with well-established precedent and constitutional maxims, Maine's supplemental transmission line routing requirements embodied in the Initiative apply to all high-impact electric transmission lines projects to be developed in Maine, including Appellants' Project.

STATEMENT OF FACTS

The Project includes a 145.3-mile high-impact electric transmission line which is comprised of five segments, with the first segment routing through the Upper Kennebec Region. A.20, 32. The first segment is 53.1 miles long, requiring a new transmission corridor. A.20. This first segment is also the most controversial segment, because it will cross hundreds of wetlands and waterways, bird habitats, and vernal pools. *Id*. Pursuant the BPL Lease, the first segment proposes to route through a 300-foot-wide and approximately one-mile long parcel administered by BPL. A.21.

As a first step in Maine's multi-layered permitting process, on May 3, 2019, the Public Utilities Commission ("PUC") issued an order granting a certificate of public convenience and necessity ("CPCN") for the Project to CMP, which was later

transferred to NECEC ("CPCN Order").[3] A.21-22. The CPCN Order was affirmed by the Law Court on March 17, 2020. A.22.

Separate and distinct from the CPCN review by the PUC, on May 11, 2020, the Maine Department of Environmental Protection ("DEP") preliminarily approved the route of the Project. A.22-23. Finding that the Initiative applies to the Project, DEP subsequently suspended the permit for the Project, subject to reinstatement if the Business Court enjoined the Initiative, as Appellants had requested. Because the Business Court denied Appellants' request to enjoin, DEP's suspension remains in place.

In addition to the suspended DEP permit, the Project has yet to obtain four municipal routing permits. A.24. One of the municipal permits is before the Town of Caratunk, which resides in the Upper Kennebec Region. There are also pending appeals on the routing of the Project before the Maine Board of Environmental Protection ("BEP"), Superior Court, and the Law Court. A.22, 26-27 n9. Furthermore, a lawsuit in federal district court is challenging the U.S. Army Corps of Engineers' issuance of an Environmental Assessment for the Project. A.23-24.

The Project also encountered steadfast opposition from the citizens of Maine, which resulted in Mainers applying for the Initiative on September 15, 2020,

[3] Judicial notice of the PUC and DEP orders cited herein is permitted. *See Town of Mt. Vernon v. Landherr*, 2018 ME 105, ¶ 14, 190 A.3d 249, 253.

obtaining sufficient signatures for a vote by January 22, 2021, and passing it by a 59% majority on November 2, 2021. A.16-17, 27-30, 44-45. The Initiative became law on December 19, 2021. A.30.

On November 3, 2021, seeking to overturn the will of the people, Appellants filed a Verified Complaint For Declaratory Judgment and a Motion for A Preliminary Injunction ("the Motion") against the application of the Initiative to the Project. On December 16, 2021, the Business Court denied the Motion, concluding:

> Plaintiffs have not satisfied their burden to demonstrate that all four criteria necessary for a preliminary injunction have been satisfied. To the contrary, *the Court concludes Plaintiffs have not shown any of the criteria to be met.* Consequently, Plaintiffs have not established their entitlement to a preliminary injunction. Plaintiffs' Motion for Preliminary Injunction is denied.
>
> (emphasis added) A.67.

On December 23, 2021, Appellants filed a Motion to Report questions of law pursuant to Rule 24(c). On December 28, 2021, over the objections of NextEra Energy Resources, LLC ("NextEra"),[4] the Business Court granted Appellants' Motion to Report.

[4] NextEra is an indirect owner of the following Maine-based solar and wind projects under development: Chariot Solar, LLC, Dawn Land Solar, LLC, Kennebec Solar, LLC, Lone Pine Solar, LLC, Moose Wind, LLC and Penobscot, Wind, LLC. NextEra's Unopposed Motion to Intervene was granted by the Business Court on November 23, 2021.

STATEMENT OF THE ISSUES

1. Whether Appellants have met their heavy burden of establishing that the application of the Initiative to the Project violates: (a) Maine's separation of powers doctrine; (b) the Contract Clauses in the Federal and Maine Constitutions; (c) Maine's Presentment Clause; or (d) Maine's Due Process Clause?
2. Whether Appellants' reporting of the case violates the final judgment rule?

STANDARD OF REVIEW

In a Rule 24(c) appeal, the Law Court reviews *de novo* questions of law related to the construction and constitutionality of a citizens' initiative and its implementing statutes. *See Portland Reg'l,* 2021 ME 34, ¶ 7, 253 A.3d at 590-591; *Liberty Ins. Underwriters. Inc. v. Estate of Faulkner,* 2008 ME 149, ¶ 15, 957 A.2d 94, 99. A citizens' initiative carries a heavy presumption of constitutionality. *Portland Reg'l,* 2021 ME 34, ¶ 7, 253 A.3d at 590-591. "If at all possible, we will construe [a] statute to preserve its constitutionality." *Martin v. MacMahan*, 2021 ME 62, ¶ 24, 2021 WL 5895158, quoting *Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9, 794 A.2d 62. "The party challenging the statute's constitutionality bears the burden of proving that no conceivable state of facts exists to support the statute." *State of Maine, et al. v. L.V.I. Group*, 1997 ME 25, ¶ 8, 690 A.2d 960, 963.

SUMMARY OF ARGUMENT

The Initiative's supplemental transmission line routing requirements comport with the Maine and Federal Constitutions. The Initiative does not direct the PUC to vacate the CPCN Order or reverse the Law Court's upholding of the CPCN Order. Therefore, contrary to the assertions of the Appellants and Appellant-Intervenors,[5] the Initiative does not implicate the separation of powers concerns raised by the Court in *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 35, 36, 237 A.3d at 882, 894-895. Rather than overturning existing executive and judicial branch decisions, the Business Court properly determined that the Initiative enacts supplemental transmission line routing requirements to Maine's existing statutory scheme regulating the routing of transmission lines.

Maine's existing statutes regulating the construction of transmission lines are an interrelated and iterative scheme which delegates jurisdictional authority among state agencies and municipalities. More specifically, to construct the Project, NECEC was required to obtain a CPCN from the PUC under 35-A M.R.S. § 3132, and a separate transmission line route approval pursuant to 38 M.R.S. §§ 480-A–480-JJ from DEP, and now BEP on appeal. Route approvals are also required from local municipalities and federal agencies. Thus, although the PUC did issue a CPCN

[5] Appellant-Intervenors include H.Q. Energy Services (U.S.) Inc. ("HQUS"), the Maine State Chamber of Commerce ("Commerce"), the Industrial Energy Consumer Group ("Industrial"), and International Brotherhood of Electrical Workers Local 104 ("Local 104").

finding a public need for the Project, the route for the Project has not been finally approved. Because the route has not been finally approved, applying the Initiative to the Project in the pending appeals and applications related to the Project's route is consistent with well-established precedent. There are currently pending appeals related to the Project's routing before BEP, Superior Court, and the Law Court, as well as four municipalities which have yet to approve NECEC siting transmission through their towns. Application of the Initiative in these appeals and municipal permitting proceedings is required and does not run afoul of the Maine or Federal Constitutions.

The Initiative also comports with the Contract Clauses of the Maine and Federal Constitutions, because the BPL Lease is "void in the eyes of the law" (A.27 n. 9), and, therefore, the Lease cannot be impaired. Even if the Law Court, in a separate appeal, finds the BPL Lease is valid by overturning the pre-Initiative rationale of the Superior Court, the Initiative's impact on the BPL Lease was foreseeable and the plain language of the BPL Lease requires that it comply with changes in the law. Thus, under the well-established foreseeability test, the Initiative is not implicated by Appellants' Contract Clause claim. Alternatively, the Initiative also advances the important state purpose of protecting the environment and public lands, which independently defeats Appellants' Contract Clause claim.

Appellants' assertion it possesses legally acquired vested property rights is unavailing, because the Initiative is furthering the legitimate legislative purpose of protecting the environment and public lands through reasonable means, which satisfies Maine's Due Process Clause. In addition, Appellants' advance knowledge of the Initiative separately undermines their vested rights claim.

Contrary to these well-settled principles, Appellants' and Appellant-Intervenors' challenge to the Initiative invites the Law Court to impose novel and arbitrary constraints on legislative action that do not currently exist, nor should they. Appellants' assertions are driven by their need to invent a constitutional protection to redress ill-advised business decisions, decisions that the Business Court found were made with full knowledge of the Initiative and how it would apply to the Project. *See, e.g.,* A.45, 46 n.24. The imposition of Appellants' *ad hoc* constraints on legislative action to redress their bad business decisions would unquestionably subvert long-standing maxims of statutory construction and constitutional jurisprudence, and, therefore, should be rejected. In contrast, following well-established principles of statutory construction and constitutional jurisprudence demonstrates that applying the Initiative to the Project comports with the Maine and Federal Constitutions. Accordingly, the Business Court properly determined that the Appellants failed to meet their heavy burden of establishing that the Initiative is unconstitutional as it relates to the Project.

ARGUMENT

I. The Initiative Comports with Maine's Separation of Powers Doctrine.

"It is but the restatement of a fundamental and familiar principle to say that the sovereign power is lodged in the people and that the Constitution, framed and adopted by the people, divides the powers of government into three distinct and yet coordinate departments, executive, judicial and legislative."[6] *Sawyer v. Gilmore*, 83 A. 673, 678 (Me. 1912). With respect to the separation of powers among these branches of state government, the Maine Constitution is "much more rigorous" than the separation of powers under the U.S. Constitution because "[t]he United States Constitution has no provision corresponding to article III, section 2 of the Maine Constitution, explicitly requiring that no one person exercise the powers of more than one of the three branches of government." *See State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). Given the restrictive language in Article II, Section 2, the Law Court inquires: "has the power in issue been explicitly granted to one branch of state government, and to no other branch?" *Id*. at 800. In the instant case, the answer to

[6] The Maine Constitution Article III, Sections 1 and 2 read:

> **Section 1. Powers distributed.** The powers of this government shall be divided into 3 distinct departments, the legislative, executive and judicial.
>
> **Section 2. To be kept separate.** No person or persons, belonging to one of these departments, shall exercise any of the powers properly belonging to either of the others, except in the cases herein expressly directed or permitted.

this question is no – the Initiative is a valid exercise of legislative power and is not exercising powers granted to the executive and judicial branches. As set forth below, contrary to Appellants' fundamental assertions, the Initiative does not require the PUC to reverse the CPCN Order, and, therefore, likewise does not reverse this Court's affirmance of that order.

A. Section 5 Comports with Maine's Separation of Powers Doctrine.

Section 5 of the Initiative prohibits the routing of a high-impact electric transmission line in the Upper Kennebec Region. 35-A M.R.S. §3132(6-D). Appellants and Appellant-Intervenors incorrectly assert that Section 5 is unconstitutional because it invalidates the CPCN Order and reverses the Law Court's affirmation of the CPCN Order. Appellants Br. at 40-44; HQUS Br. at 45-47; Industrial Br. at 7-21.

It is well-settled that a citizens' initiative is evaluated by applying the ordinary rules of construction, with the understanding that a citizens' initiative carries a "heavy presumption of constitutionality" and will be liberally construed to facilitate the peoples' exercising of their right to legislate. *See Portland Reg'l,* 2021 ME 34, ¶¶ 7, 8, 253 A.3d at 590-591. Under the ordinary rules of statutory construction, if the language of the initiative is plain and unambiguous, the Court does not look beyond its text. *Id*. at ¶¶ 23, 24. Section 5 uses plain and clear language to add supplemental transmission line routing requirements to existing law by clarifying

that a high-impact electric transmission line may not be constructed and routed in the Upper Kennebec Region. *See* 35-A M.R.S. §3132(6-D). The expressed retroactive language of 35-A M.R.S. §3132(6-E) applies Section 5 to the Project, because NECEC started construction after September 16, 2020.

Contrary to Appellants' assertions, the plain and unambiguous language of Section 5 does not compel the PUC to take any action, much less vacate the CPCN Order. It follows, accordingly, that the Initiative does not affect (much less reverse) the Law Court's affirmation of the CPCN in *NextEra v. PUC*, 2020 ME 34, 227 A.3d 1117. Hence, Appellants' reading of Section 5 not only deviates from a straightforward application of the plain language doctrine, Appellants impermissibly read additional words into Section 5 which are not in the text. *See Blue Yonder, LLC v. State Tax Assessor*, 2011 ME 49, ¶ 10, 17 A.3d 667, 671 ("We will not read additional language into a statute.").

Furthermore, Appellants and Appellant-Intervenors would have the Court depart from these well-settled rules of statutory construction asserting that "as applied" Section 5 compels the PUC to reverse the CPCN Order. The as applied theory, however, is unavailing. Rather than specific authority over the routing of the Project, the PUC was delegated the authority to determine whether the Project has a public need and is in the public intertest pursuant to 35-A M.R.S. § 3132(6):

> *The Commission's finding that the NECEC meets the public interest and public need standards is based on a careful weighing of the benefits*

> *and costs of the NECEC to the ratepayers and residents of the State of Maine.* As required by Maine statute, these include the effects of the NECEC on economics, reliability, public health and safety, scenic, historic and recreational values, and state renewable energy goals. 35-A M.R.S. § 3132(6). Based on its consideration of these factors, the Commission finds that the NECEC is in the public interest.

(emphasis added) CPCN Order at 7.

By contrast, DEP, BEP and local municipalities are exclusively charged with permitting the actual route of the line. Hence, the Law Court's affirmation of the CPCN Order upheld the PUC's application of the public interest standard, not the routing of the Project. *NextEra v. PUC*, 2020 ME 34, ¶¶ 26-43, 227 A.3d at 1124-1129 ("we cannot say that the Commission erred as matter of law by concluding that the term 'public need' is a general standard of meeting the public interest. . . .").

Consistent with 35-A M.R.S. § 3132(6), the CPCN Order did not qualify or condition the PUC's findings of public need and public interest on a specific route for the Project. Instead, the only public interest findings in the CPCN Order associated with the Upper Kennebec Region were high-level considerations of scenic and recreational values, for which the PUC concluded: (1) the Project would have an adverse impact on these values; (2) "the Commission is unable to precisely quantify the extent of the adverse impact" of the Project on these values; and (3) "the DEP and the LUPC, the agencies with expertise in these matters, will conduct expert reviews" on these values. CPCN Order at 64, 66. The PUC's reliance on DEP's

expertise on routing matters[7] is consistent with Maine's statutory scheme that delegates jurisdiction to different state agencies to regulate the construction and routing of transmission lines. *See NextEra*, 2020 ME 34, ¶ 32, 227 A.3d at 1126. On this point, 35-A M.R.S. § 3132(6) provides:

> The commission shall, as necessary and in accordance with subsections 7 and 8, consider the findings of the Department of Environmental Protection under Title 38, chapter 3, subchapter 1, article 6, with respect to the proposed transmission line and any modifications ordered by the Department of Environmental Protection to lessen the impact of the proposed transmission line on the environment.

And, following the language in 35-A M.R.S. § 3132(6), the CPCN Order concluded:

> *While the Commission's review of these statutory criteria is in the context of whether the utility has met its burden of showing there is a public need for the project*, DEP's review of similar criteria is different in that it considers whether the utility has shown that its project (1) does not unreasonably interfere with existing scenic, aesthetic, and recreational uses, among others and (2) whether the utility has shown that it 'has made adequate provision for fitting the development harmoniously into the existing natural environment and that the development will not adversely affect existing uses, scenic character . . . .' 38 M.R.S §§ 480-D, 484.

CPCN Order at 21 (emphasis added).

[7] Pursuant to 38 M.R.S. §§ 480-A–480-JJ, DEP's review of the Project included construction and routing, including transmission pole height, placement, type, and setbacks. *See* DEP Findings of Fact and Order (May 11, 2020).

Similarly, 35-A M.R.S. § 3132(6) also explains that issuance of a CPCN does not override, or even affect, the ability of municipalities to "regulate the siting of the proposed transmission line":

> At the time of its issuance of a certificate of public convenience and necessity, the commission shall send to each municipality through which a proposed corridor or corridors for a transmission line extends a separate notice that *the issuance of the certificate does not override, supersede or otherwise affect municipal authority to regulate the siting of the proposed transmission line*.

(emphasis added).

The PUC's statutes likewise make clear that the routing of the transmission line is within the province of DEP, noting that if DEP, and now BEP on appeal,[8] make changes to the transmission line and its route, they must report the changes and associated costs to the PUC. *See* 35-A M.R.S. §3132(7). The purpose of that report is not for the PUC to review or opine on the legitimacy of the route changes required by DEP/BEP, but, instead, solely to determine if the change in route materially changes the costs upon which the PUC relied when granting the CPCN. *See* 35-A M.R.S. §3132(8).

Appellants' premise that applying Section 5's supplemental transmission line routing requirements to the Project directs the PUC to reverse the CPCN Order is

[8] *See Champlain Wind, LLC v. Board of Envtl. Prot.,* 2015 ME 156, ¶ 14, 129 A.3d 279, 283 (Law Court reviews BEP's *de novo* review of DEP's approval, rather than DEP's approval. Also, the Court concluded that "the Board's authorizing legislation establishes the Board's responsibility to 'protect and enhance the public's right to use and enjoy the State's natural resources.' 38 M.R.S. §§ 341-A(1)(2014)").

thus demonstrably incorrect. Any PUC review that may occur in the future due to a change in the route by DEP/BEP or a municipality would be based on a material change in the costs upon which the CPCN Order was premised. Therefore, any such PUC review was already embedded in the statutory scheme long before Appellants requested a CPCN for the Project. Hence, the language of Section 5 is plainly directed at the routing of high-impact electric transmission lines, the specifics of which are determined not by the PUC, but by DEP, BEP and local municipalities. This is the plain and certainly reasonable interpretation which renders Section 5 constitutional. Conversely, Appellants' suggestion that the Court instead expand the language of the Initiative as somehow directing the PUC to reverse the CPCN Order thus would violate the well-settled principle that courts are required to adopt a reasonable interpretation of a statute that shows it to be consistent with the constitution over a reading that the statute is unconstitutional. *See Martin*, 2021 ME 62, ¶ 24. Without question, Section 5 can be easily read as consistent with Maine's separation of powers doctrine, because it does not require the overturning the CPCN Order or this Court's affirmation of the same in *NextEra*.

While the entities actually charged with authority over the Project's route (DEP, BEP and the municipalities) are not parties to this appeal, on this point, the law is equally clear that Section 5's supplemental requirements must be applied in the Project's pending appeals before BEP, Superior Court, and this Court (the BPL

Lease), and the Town of Caratunk's review of NECEC's application. *See MacImage of Me., LLC v. Androscoggin County,* 2012 ME 44, ¶ 38, 40 A.3d 975, 989 ("if, subsequent to the judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation is denied."), quoting *United States v. Schooner Peggy*, 5 U.S. 103, 110, (1801); *Morrill v. Maine Tpk. Auth.,* 2009 ME 116, ¶¶ 6, 7, 983 A.2d 1065, 1067-1068 (retroactive application of newly enacted law to pending appeal); *Bernier v. Data Gen. Corp.,* 2002 ME 2, ¶ 17, 787 A.2d 144, 150 (retroactive application of newly enacted inflation adjustment to workers compensation appeal); *Baker v. Town of Woolwich*, 517 A.2d 64, 69 (Me. 1987) ("We adhere to the well-recognized principle that 'a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary.'") *quoting*, *Bradley v. Richmond School Board*, 416 U.S. 696, 711 (1974).

The application of Section 5 in the pending appeals and the Town of Caratunk's municipal application does not implicate Maine's separation of powers doctrine. *Morrissette v. Kimberly-Clark Corp.,* 2003 ME 138, ¶¶ 13-15, 837 A.2d 123, 127-128 (finding no separation of powers violation when hearing officer's administrative decision applied new law retroactively during the pendency of a subsequent petition), citing *Elramly v. INS,* 131 F.3d 1284, 1285 (9th Cir. 1997)

(application of new law enacted by Congress during the pendency of a remand did not violate separation of powers between legislature and judiciary, because there was no final decision); *Bernier,* 2002 ME 2, ¶ 17 n.7, 787 A.2d at 150 n.7 (Law Court, in *dictum,* explained that *Plaut v. Spendthrift Farm, Inc.,* 514 U.S. 211, 217-18 (1995) "proscribes the enactment of legislation that affects final judgments; it does not prohibit legislation that affects cases that are pending in the judicial system . . . We do not address possible separation of powers issues in the present case because the proceeding was pending at the time of the enactment of section 224.").

The Law Court's ruling in *Morrissette* is particularly instructive. In that case there was no final disposition of an employee's prospective benefits, which, in turn, required the application of the new law in the review of the employee's pending petition. Likewise, there is no final disposition of the route for the Project as demonstrated by BEP's *de novo* review of DEP's initial approval of the route, a preliminary decision which itself has since been suspended. When BEP issues its decision, there is already an appellate docket open to review BEP's decision in Superior Court.[9] As mentioned, the Town of Caratunk has yet to approve the siting of the Project in the Upper Kennebec Region, and, also, the Law Court is currently considering an appeal on the legality of the BPL Lease to allow the Project to route

[9] *NextEra Energy Resources, LLC v. Department of Environmental Protection*, Docket Nos. KEN-AP-20-27 and SOM-AP-20-04, Combined Order on Motions (Aug. 11, 2020).

in the Upper Kennebec Region.[10] Each of these proceedings, following well-established precedent, must apply the supplemental transmission line routing requirements of the Initiative, including Section 5, to the Project.

Appellants and Appellant-Intervenors further incorrectly assert the Business Court should have found a *per se* separation of powers violation due to the Initiative specifically targeting the Project. Appellants Br. at 44-47; HQUS Br. at 47-50; Industrial at 4, 14-15. Although the Business Court properly concluded that the plain and unambiguous language of the Initiative, including Section 5, demonstrates that it applies to all transmission projects, the fact that the Initiative also applies to the Project is not a *per se* constitutional violation. *See Bank Markazi v. Peterson*, 578 U.S. 212, 228, 233 (2016) ("Congress may indeed direct courts to apply newly enacted, outcome-altering legislation in pending civil cases…. This Court and lower courts have upheld as a valid exercise of Congress' legislative power diverse laws that governed one or a very small number of specific subjects." (citations omitted)); *Biodiversity Assocs. v. Cables*, 375 F.3d 1152, 1160-1163 (10th Cir. 2004), cert. denied, 543 U.S. 817 (2004), citing *Stop H-3 Ass'n v. Dole*, 870 F.2d 1419, 1435 n.24 (9th Cir. 1989) (". . . even if we were to accept appellants' argument that section 114 represents an attempt by Congress to control the Executive branch's execution

[10] Also, see, *infra,* Section I.B., the impact of the Initiative on the BPL Lease is consistent with Maine's separation of powers doctrine.

of the 4(f) statutes with respect to H-3, we still could not conclude that Congress violated the separation of powers. Simply put, Congress may change its mind, so long as it complies with the Constitution's requirements for action that alters the delegation of authority to the Executive branch."); *Nat'l Coalition to Save Our Mall v. Norton,* cert. denied 269 F.3d 1092, 1097 (D.C. Cir. 2001) cert. denied 537 U.S. 813 (2002) ("In view of *Plaut*, *Miller v. French* and *Wheeling Bridge,* we see no reason why the specificity should suddenly become fatal merely because there happened to be a pending lawsuit.") *Cf. Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶ 15, 91 A.3d 601, 606.

Appellants undoubtedly wanted to construct the Project through the Upper Kennebec and chose to take the risk of forging ahead with construction fully aware that the Initiative had the signatures for enactment or to appear on the ballot. Now that the very foreseeable outcome – passage of the Initiative – has occurred, there is no basis in the law to redress Appellants' calculated business risk, particularly when doing so would require the Court to abrogate legitimate legislative action. The plain language of the Initiative does not reverse the CPCN Order, and, accordingly, Appellants' and Appellant-Intervenors' claim that Section 5 violates Maine's separation of power is baseless and should be rejected.

B. Sections 1 and 4 Comport with Maine's Separation of Powers Doctrine.

The constitutional analysis of Sections 1 and 4 is similar to that of Section 5 and yields the same result: neither violates separation of powers because the Initiative does not reverse the CPCN Order or this Court's affirmance of that order.

Section 1 clarifies that any transmission line that uses public reserved land constitutes a substantial alteration to that land. As a substantial alteration, prior to BPL executing a lease with the transmission line owner, approval of all members to each House of the Legislature is required. 12 M.R.S. §1852(4). Section 1 is retroactive to September 16, 2020, and, therefore, applies to the Project. *Id*. Section 4 requires that a high-impact electric transmission line receive approval of the Legislature, unless the line is using public lands identified in Title 12, Section 598-A, in which case the line must receive the approval of all members to each House of the Legislature. 35-A M.R.S. §3132(6-D). Like Section 1, Section 4 is retroactive to September 16, 2020 and applies to the Project. 35-A M.R.S. §3132(6-E).

In addition to arguing that Section 4 is unconstitutional because it allows the Legislature to cancel the Project, which overturns the CPCN Order, Appellants maintain that Sections 1 and 4 also overturn BPL's final agency action to grant the Project a lease over public reserved land, while HQUS adds that Sections 1 and 4 cannot survive because the Sections conflict with Section 23 of the Maine

Constitution. Appellants Br. at 39, 41; HQUS Br. at 18-42. Appellants and Appellant-Intervenors are incorrect.

As with Section 5, the plain and unambiguous text of Sections 1 and 4 do not dictate that the Legislature cancel the Project, nor does the text compel the PUC to vacate the CPCN Order or reverse this Court's rulings in *NextEra*. *Portland Reg'l,* 2021 ME 34, ¶¶ 23, 24, 253 A.3d at 595-596. Neither Section 1 or Section 4 are votes on the CPCN or on the public need and public interest for the Project, and, therefore, cannot vacate the CPCN. Instead, the legislative votes are related to the routing of the Project, including the routing through public lands. Also, similar to the discussion of Section 5, *supra*, the CPCN Order's finding of public need and public interest was not conditioned upon NECEC's use of any specific route, including over public land. In fact, the CPCN Order does not mention the BPL Lease. Therefore, without disturbing the PUC's CPCN Order, Section 1 clarifies what constitutes a substantial alteration, while Section 4 adds supplemental legislative approvals for a high-impact electric transmission line.

The reclaiming and supplementing of legislative power in this manner does not violate the separation of powers established in Maine's Constitution. *See Auburn Water Dist. v. PUC*, 163 A.2d 743, 744-745 (Me. 1960) ("The Legislature thus placed in the hands of its agents, namely, the Commission, broad powers of regulation and control of public utilities. The power of the Legislature was not,

however, surrendered, but delegated. The Commission has no life except as life is given by the Legislature."). The Law Court has further explained:

> . . . the Constitution operates differently with respect to these different branches. The authority of the executive and judicial departments is a grant. These departments can exercise only the powers enumerated in and conferred upon them by the Constitution and such as are necessarily implied therefrom. The powers of the Legislature in matters of legislation, broadly speaking are absolute, except as restricted and limited by the Constitution.

Sawyer, 83 A. at 678. Instructively, the Tenth Circuit held that Congress' reclaiming of powers through a new law regulating federal forest land did not usurp the power of the executive, even though the law targeted specific tracks of land, concluding:

> To give specific orders *by duly enacted legislation* in an area where Congress has previously delegated managerial authority is not an unconstitutional encroachment on the prerogatives of the Executive; it is merely to reclaim the formerly delegated authority. Such delegations, which are accomplished by statute, are always revocable in like manner….

Biodiversity Assocs., 375 F.3d at 1162 (emphasis in original). Applying *Sawyer* and *Biodiversity Assocs.* to the instant case, there is no text of the Maine Constitution granting powers to the BPL, or any executive branch, to regulate the routing of transmission lines or determine what uses constitute a substantial alteration of public land. Instead, BPL (and PUC, DEP and BEP for that matter) are creatures of statute. As such, their powers to regulate the routing of transmission lines must be delegated to them by legislative action, and, accordingly, legislative action can reclaim or modify those powers. Hence, the Initiative, as legislative action, had the power to

clarify that transmission lines constitute a substantial alteration to public lands, and require legislative approvals of certain transmission line routing.

As the above demonstrates, there can be no doubt that the Legislature has the authority to enact the text of the Initiative and provide for the supplemental routing requirements contained therein. The only question is whether Appellants have met their heavy burden of establishing that applying it to the Project in the currently pending routing appeals and proceedings renders the Initiative unconstitutional. They have not.

Appellants' and Appellant-Intervenors' assertion that the Initiative is unconstitutional because it would nullify BPL's final action and execution of a Lease is without merit. Initially, as the law stands today, there is no valid BPL final action and Lease, and, therefore, it is axiomatic that there can be no constitutional infirmity assigned to the Initiative's impact on the BPL Lease. *See Black v. Cutko*, State of Maine, Cumberland, Business and Consumer Docket, Decision and Order at 28, 2021 WL 3700685 (Me. B.C.D. Aug. 10, 2021). Even if, *arguendo*, this Court overturns the Superior Court's pre-Initiative determination that the BPL Lease is invalid, and determines that the plain language of the existing Lease does not itself require compliance with the Initiative, it is well-settled that there is no violation of the separation of powers doctrine when legislative action, such as the Initiative, changes the law on use of a public right (*e.g.,* the use and enjoyment of Maine's

public lands). Indeed, the intervening law, here the Initiative, can direct an executive agency or court to reverse a final decision involving a public right. This stalwart principle of constitutional law is not only completely ignored by Appellants and Appellant-Intervenors, it defeats HQUS' enigmatic assertion that Maine has a legal obligation to allow third parties to use public reserved lands to construct transmission lines. HQUS Br. at 32-36.

In the seminal case of *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 59 U.S. (18 How.) 421 (1855), the U.S. Supreme Court held that the right of navigation of the Ohio River was a public right regulated by Congress, and, as such, Congress, at any time, could change the law with respect to the public right. In *Wheeling Bridge*, the Court had initially enjoined the construction of a bridge proposed to cross the Ohio River. Subsequent to the initial decision, Congress intervened and passed a law expressly authorizing the construction of the bridge in question. Based on Congress' new statute allowing construction of the bridge the Supreme Court had previously enjoined, the Court overturned and dissolved the injunction, holding that because a public right was involved there was no usurping of the power of the judicial branch. *Id*. at 459. In a unanimous decision, the U.S. Supreme Court confirmed *Wheeling Bridge* in *Hodges v. Snyder*, 261 U.S. 600, 603-604 (1923), concluding that there is no vesting in a final judgment when the case involves a

public right, because Congress has the constitutional authority to annul the judgement through subsequent legislation.

Following the holding in *Wheeling Bridge*, the U.S. Court of Appeals for the Tenth Circuit upheld the constitutionality of a Congress-enacted rider ("Rider") to an appropriations bill that directed the Forest Service, an agency of the executive branch, to take actions to manage Black Hills National Forest. The actions included activities that violated a settlement agreement between private litigants and the Forest Service, which had been approved by the U.S. District Court for the District of Colorado. *Biodiversity Assoc.,* 357 F.3d at 1158-59. Specifically, the Rider changed the law from prohibiting the cutting of trees unless the cutting complied with environmental laws to directing the cutting of trees notwithstanding any environmental law. *Id.* at 1162. In ruling that the Rider did not usurp the power of the judiciary, the Court concluded:

> *Wheeling Bridge* has remained a fix star in the Supreme Court's separation-of-power jurisprudence . . . . This case falls squarely within the principle of Wheeling Bridge . . . [the] rights with respect to the national forests is a public right . . . under the regulation of congress. …. when rights are the creatures of Congress, as they were in *Wheeling Bridge*, *Congress* is free to modify them at will, even though its action *may dictate results in pending cases and terminate prospective relief in concluded one.* (quotations omitted) (emphasis added)

Id. at 1166, 1167, 1171. The Tenth Circuit similarly concluded the Rider did not tread on the powers of the executive branch. *Id*. at 1170-71.

This Court in *Washington* explicitly followed *Wheeling*'s holding on the inviolability of legislative action regulating a public right:

> The plaintiff only shared in the public right. He had no right against the public. The sovereign had the absolute control of it and could regulate, enlarge, limit or even destroy it, as he might deem best for the whole public . . . .

See Frost v. Washington C.R. Co., 51 A. 806, 809 (Me. 1901); s*ee also Smedberg v. Moxie Dam Co.,* 92 A.2d 606, 610 (Me. 1952) (dismissing lawsuit that sought to enjoin a public right).

Undeniably, the public lands in Maine are reserved for the enjoyment of the public, and, therefore, are a public right. Maine's protection of the use of public land is found, for example, in Section 23 of the Maine Constitution,[11] and a statutory scheme which includes 12 M.R.S. § 598-A and 12 M.R.S. § 1852(4). The Initiative cross-references the designation of public lands under 12 M.R.S. § 598-A in Section 4, and supplements 12 M.R.S. § 1852(4) through Section 1. While the Superior Court has already determined that the BPL Lease was invalid, if this Court were to overturn that decision, Sections 1 and 4 of the Initiative would require Legislative approval of any lease with BPL. While that could ultimately lead to the invalidity of the lease if Appellants fail to get the requisite legislative approval, the Initiative's

[11] Section 23 of the Maine Constitution reads: "State park land, public lots or other real estate held by the State for conservation or recreation purposes and designated by legislation implementing this section may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes."

potential impact on the BPL Lease is congruent with the long-settled precedent of *Wheeling, Biodiversity Assoc.,* and *Frost*, and, therefore, is entirely consistent with Maine's Constitution.

Additionally, HQUS incorrectly claims that Sections 1 and 4 conflict with Section 23 of the Maine Constitution. HQUS Br. at 18-36. Section 23 establishes that Maine's public lands cannot be "reduced or its uses substantially altered except on the vote of two-thirds of all the members elected to each House," while Section 1 (any transmission line) and Section 4 (a high-impact electric transmission line) clarify that these types of transmission lines constitute a substantial alteration of public land, and, thus, require the referenced legislative vote. There is no conflict between Section 23 and Sections 1 and 4. Instead, the Initiative's enactment of what constitutes a substantial alteration is merely a straightforward refinement of the existing statutory scheme in 12 M.R.S. § 598-A and 12 M.R.S. § 1801 *et al.* governing the use of public lands, which is congruent with the language in Section 23. Contrary to HQUS' reading, there is simply no language in Section 23 that restricts or limits legislative action, including the Initiative's clarification of what constitutes a substantial alteration. Equally unavailing is HQUS' assertion (HQUS Br. at 25) that the authority of a citizen initiative to enact legislation is not equivalent to that of the Maine Legislature. "The exercise of initiative power by the people is simply a popular means of exercising the plenary legislative power 'to make and

establish all reasonable laws and regulations for the defense and benefit of the people of this State . . . .' Me. Const. art. IV, pt. 3, § 1." *League of Women Voters v. Secretary of State,* 683 A.2d 769, 771 (Me. 1996). Likewise, contrary to HQUS, there is no language in Section 23 that prohibits the legislative action from clarifying that certain uses constitute a substantial alteration requiring the two-thirds vote. *See Sawyer*, 83 A. at 678. Thus, HQUS' claim that Sections 1 and 4 directly conflict with Section 23 is without merit.

II. Section 4 Comports with Maine's Presentment Requirement.

Appellants incorrectly assert that the legislative approval requirements in Section 4 violate Maine's presentment requirement, because Section 4 does not expressly require presentment to the Governor. Appellant Br. at 41 n.22. Contrary to Appellants' assertion, statutes are not required to include a specific presentment provision to be in compliance with Maine Constitution Article IV, Part 3, § 2. *See, e.g., Wolf v. Scarnati,* 233 A.3d 679, 696, (Pa. 2020) ("'Under the canon of constitutional avoidance, if a statute is susceptible of two reasonable constructions, one of which would raise constitutional difficulties and the other of which would not, we adopt the latter construction . . . .' Because there is another reasonable interpretation of Section 7301(c) – that the provision does require presentment – we must read the statute in that manner.") (citations omitted); *Commonwealth v. Sessoms,* 532 A.2d 775, 782 (Pa. 1987) ("We do not find it fatal to the present

legislation that it does not explicitly require presentment of a rejection resolution to the governor. We may imply such a condition to avoid finding the statute unconstitutional on its face."). Furthermore, whether the constitutional requirement of presentment is violated occurs after the legislature has voted and, whether, at that time, the legislature fails to present the proposed law to the governor. *See Campaign of Fiscal Equity v. Marino,* 661 N.E.2d 1372, 1373-74 (N.Y. 1995) (the legislative practice of withholding passed bills from presentment to the Governor was a constitutional violation); *see also Sessoms*, 532 A.2d at 782. Therefore, consistent with case law, including the maxim that statutes are to be read as constitutional, Section 4 can be so read with respect to the constitutional requirement of presentment to the Governor. *See Martin,* 2021 ME 62, ¶ 24 ("when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, we will adopt that interpretation notwithstanding other possible interpretations of the statute that could violate the Constitution.") quoting *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551. Thus, Appellants' assertion that the constitutionality of Section 4 turns on whether Section 4 expressly requires presentment is unavailing.

III. The Initiative Comports with the Contract Clauses in the Maine and Federal Constitutions.

Appellants incorrectly claim that the Initiative violates the Contract Clauses of the Maine and Federal Constitutions. Appellants Br. at 47-50. The Law Court

applies the following three-part analysis to analyze a statute in the context of the nearly identical Contract Clauses of the Maine and Federal Constitutions:[12] (1) whether there is a contractual relationship that has been substantially impaired by the statute; (2) if yes, is the impairment justified by the statute implementing a "reasonable and necessary" important state purpose; and (3) is the adjustment of the contracting parties' rights and responsibilities based on "reasonable conditions" and "of a character appropriate" as it relates to the purpose of the statute. *See Kittery Retail Ventures v. Town of Kittery,* 2004 ME 65, ¶ 38, 856 A.2d 1183, 1195, quoting *United States Trust Co. v. New Jersey*, 431 U.S. 1, 22 (1977).

As a threshold matter, given that the BPL lease has been declared invalid, Appellants have not established a contractual relationship that can be impaired. *See Black,* at 28 and A.27 n9 ("As of now . . . the BPL Lease stands as void in the eyes of the law."); *see also Kittery Retail Ventures,* 2004 ME, 65 ¶ 38, 856 A.2d at 1195 (a claim under the Contract Clause requires a contractual relationship). However, assuming, *arguendo*, the BPL Lease is valid and is impaired by the Initiative, Appellants' Contract Clause claim still fails, because the impairment of the BPL Lease was either (1) foreseeable; or (2) justified by a reasonable and necessary

[12] The United States Constitution declares that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." (U.S. Const. art. I, § 10), while the Maine Declaration of Rights similarly declares that "The Legislature shall pass no . . . law impairing the obligation of contracts". Me. Const. art. I § 11.

important state purpose. Foreseeability is implicated when the subject matter of the contract is extensively regulated, and the contract contemplates compliance with future laws. *See Alliance of Auto. Mfrs. v. Gwadosky*, 304 F.Supp.2d 104, 115-16 (D. Me. 2004) (Contract Clause was not violated when parties had foreseeable and reasonable expectation that contract could be impaired from extensive regulation of the subject matter and the contract required compliance with future state and federal laws). Here, Appellants' Contract Clause argument fails both prongs because protection of public lands is extensively regulated and because the BPL lease itself contemplates, and requires compliance with, future changes in the law. For instance, Maine extensively regulates the use of public reserved land by third parties, which is the subject of the BPL Lease. *See, e.g.,*12 M.R.S. §1852(4). Additionally, as the Business Court correctly found, the BPL Lease contemplates, and requires compliance with, future laws:

> [T]he BPL Lease . . . explicitly provides 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 leased public lands]' (emphasis added). . . . As of June 23, 2020, the date that the amended and restated 2020 BPL Lease was executed, NECEC was on notice of efforts to stop construction on the public lands by subjecting the lease to new requirements, and should have foreseen the potential success of an initiative.

(emphasis added) A.56-57. Appellants counter that the BPL Lease was not written with the expectation of complying with a retroactive statute like the Initiative.

Appellants' assertion, however, is not congruent with the plain language of the lease or *Energy Reserves Group* that the Law Court cited in *Kittery*. *See Energy Reserves Group v. Kan. Power & Light Co.,* 459 U.S. 400, 416 (1983) (contractual terms that subject it to present and future state and federal laws show knowledge of extensive regulation and foreseeability when those laws are enacted; therefore, a party's reasonable expectations were not impaired under the U.S. Contract Clause), *see also Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 556-59 (2001) (total ban on drilling and production for oil did not violate Contract Clause because such regulation was foreseeable due to the language in the lease requiring that lessee comply with all applicable laws).

Additionally, Appellants' attempt to distance themselves from the language in the BPL Lease is of no consequence because Appellants contracted with the state, which comes with it the foreseeability the state may use its sovereign power to legislate against a contract. *See Kittery Retail Ventures,* 2004 ME 65 ¶ 39, 856 A.2d at 1195 quoting Justice Holmes from *Hudson County Water Co. v. McCarter*, 209 U.S. 349, 357 (1908) which made clear there are no such protections from the state's right to enact changes:

> One whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the State by making a contract about them. The contract will carry with it the infirmity of the subject matter.

See also El Paso v. Simmons, 379 U.S. 497, 508 (1964) (when contracting with the state, "[n]ot only are existing laws read into contracts in order to fix obligations as between the parties, but the reservation of essential attributes of sovereign power is also read into contracts as a postulate of the legal order."); *SC Testing Tech. v. Department of Envtl. Protection*, 688 A.2d 421, 424 (Me. 1996) ("when a party enters into a contract with a state agency, it does so with the understanding that the Legislature may at some future time take action that nullifies the subject matter of the contract and, necessarily, the respective performance obligations of the parties"); *KHK Assocs. v. Department of Human Servs.,* 632 A.2d 138, 141 (Me. 1993) (no violation of Maine or Federal Contract Clauses when lease was subject to the legislative appropriation process, and legislature decided not to fund the lease); *Baxter v Waterville Sewerage District*, 79 A.2d 585, 589 (Me. 1951) (a new law creating Waterville Sewerage District was constitutional under Maine's Contract Clause even though it impaired contracts, because contracts cannot "deprive the State of its sovereign power to enact laws for the public health and public welfare."). Amplifying the foreseeability of the Initiative's protection of the public reserved land in the Upper Kennebec Region, Appellants were aware of challenges to the

BPL Lease[13] prior to the execution of the Lease in June 23, 2020.[14] *See* DEP Findings of Fact and Order at 8; A.25-26, 57. Because the change in law was foreseeable (indeed contractually contemplated), the Court, therefore, need not consider whether the BPL Lease was impaired to conclude the Initiative satisfies the Contract Clauses.

Separate from foreseeability, Appellants' Contract Clause claim also fails, because even if Section 5 impairs the BPL Lease, the impairment is reasonable and necessary to effectuate the important state purposes of protecting Maine's environment and public reserved lands. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 504 (1986) ("the Commonwealth has a strong public interest in preventing this type of harm, the environmental effect of which transcends any private agreement between contracting parties."); *Cf. Francis Small Heritage Trust v. Town of Limington*, 2014 ME 102, ¶ 20, 98 A.3d 1012, 1020 (Law Court recognizing "[t]here can be little doubt that the Legislature has enunciated a strong public policy in favor of the protection and conservation of the natural resources and scenic beauty of Maine."); *MC Assocs. v. Town of Cape Elizabeth*, 773 A.2d 439,

[13] CMP and BPL executed the first transmission line lease on December 15, 2014. *Black,* at 4; A.26. However, the 2020 lease superseded the 2014 lease. A.26.

[14] House bill LD 1893 was introduced in December 2019, which as later amended, and would have mandated a two-thirds vote on the BPL Lease. The Legislative record shows that on January 21, 2020, CMP testified and opposed LD 1893, which was unanimously voted out of the Agriculture, Conservation and Forestry Committee, but not voted on by the full Legislature due to the COVID-19 pandemic. A.25-26.

441 (Me. 2001), cert. denied 534 U.S. 1081 (2002) (Maine's police powers include environmental protection). Indisputably, the protection of the environment and Maine's public lands is "an essential attribute" of its sovereignty, which cannot be bargained away in a contract. *See United States Trust Co.*, 431 U.S. at 23; *Lefrancois v. Rhode Island,* 669 F. Supp. 1204, 1215 (D. R.I. 1987) (statute's abrogation of an agreement did not violate Contract Clause, because "[t]here can be little doubt that the protection of the environment is a broad societal interest which is well within the authority of the state to protect. It falls within the long-accepted definition of a state's police powers 'as an exercise of the sovereign right of the Government to protect the lives, health, morals, comforts, and general welfare of the people. . . .'", *quoting Manigault v. Springs,* 199 U.S. 473, 480 (1905).

Furthermore, contrary to the assertion of Appellants (Appellants Br. at 49), the Initiative's advancement of the important state interest of protecting the environment and public lands by reasonable and necessary means is properly afforded deference. The Initiative is due deference because it is not implicated by the self-interest test – which was articulated by the Supreme Court in *United States Trust Co* 431 U.S. at 25-26 and by the Law Court in *Kittery Retail Ventures,* 2004 ME 65 ¶ 38, 856 A.2d at 1195) – since the voiding of BPL Lease will not result in a pecuniary gain. Thus, Appellants' citation to *Lipscomb v. Columbus Mun.,* 269 F.3d 494 (5th Cir. 2001) is inapposite. The Federal Fifth Circuit concluded in *Lipscomb*:

> The State seeks to escape a purely financial obligation—its agreement to accept fixed rent terms for the Columbus school lands while reaping the benefits of the land's development — an arrangement that proved to be a hedge against inflationary erosions of rental income, inevitably attended by increasing land 'values.'

The contrary is true in the instant case because the Initiative's alleged impairment of the BPL Lease is a financial loss for Maine in favor of protecting the environment and public lands. Therefore, the Business Court properly concluded the "self-interest" test was not implicated, which, in turn, affords deference to the reasonableness and necessity of the Initiative for the protection of the environment and public lands. A.57-58. Accordingly, even if the Initiative impairs the BPL Lease, such an impairment does not violate the Contract Clauses of the Maine and Federal Constitutions, because the impairment was reasonable and necessary, and of the character needed to effectuate the important state purpose of environmental protection of Maine's public lands.

IV. Even if Appellants have not Waived their Due Process Challenge, the Initiative Comports with the Due Process Clause of the Maine Constitution.

Appellants assert that the Initiative cannot be applied to the Project without violating the substantive Due Process Clause of the Maine Constitution. Appellants Br. at 19-37. As a threshold matter, Appellants' claim under the Due Process Clause of the Maine Constitution has been waived. The Business Court concluded, "It is clear that Plaintiffs have not brought a Due Process Clause challenge . . . ." A.40,

n20. Appellants' newly raised due process assertions are not properly before this Court and, therefore, are deemed waived. *See Deutsche Bank Trust Co. Ams. v. Clifford*, 2021 ME 11, ¶ 12 n.6, 246 A.3d 597, 601 n.6 (argument deemed waived for failing to raise it before trial court); *State v. Reynolds*, 2018 ME 124, ¶ 28, 193 A.3d 168, 177 (Court concluded that a party "having been unsuccessful in his alternative argument before the trial court, has now changed his theory on appeal, we deem his current argument waived.")

Even if Appellants' due process claim is properly before this Court, Appellants overstate the holding in *Sahl v. Town York*, 2000 ME 180, 760 A.2d 266, and in doing so invite the Court to depart from well-settled precedent. Appellants Br. at 17-24; Commerce Br. at 22-28; Local 104 Br. at 12-17. To establish a violation of substantive due process for an alleged vested property right in a permit, there is a two-step process: (1) Appellants must carry their burden that they possess a vested right; and if Appellants carry their burden, then, (2) Appellants must show that the complained of statute is without any rational basis. *See Kittery Retail Ventures,* 2004 ME 65, ¶ 32, 856 A.2d at 1183 ("In analyzing a due process claim that involves the deprivation of a property interest, courts must first determine whether the plaintiff was deprived of a protectible property interest, and second, whether that deprivation was accomplished by 'means that were pretextual, arbitrary

and capricious, and . . . without any rational basis."), quoting *Reserve Ltd. v. Town of Longboat Key*, 17 F.3d 1374, 1379 (11th Cir. 1994).

For Appellants to carry their burden in showing they have a legally acquired vested property right, they must satisfy the Law Court's three-part test articulated in *Sahl*, which generally confirmed *Thomas v. Zoning Bd. of Appeals of City of Bangor*, 381 A.2d 643, 647 (Me. 1978). It is axiomatic that the determination of whether Appellants' claim satisfies the *Sahl* three-part test is, in the first instance, a factual determination for the Business Court, as the trier of fact, to decide. *Cf. McMullen v. Dowley,* 418 A.2d 1147, 1154 (Me. 1980) ("in the first instance, it is for the trial court, not the appellate court, to weigh the testimony, find the facts, and apply the law to the facts as found."). At this preliminary stage of the underlying case, the Business Court has not conducted a trial to adjudicate Appellants' vested rights claim. The Business Court instead ruled based on the papers that Appellants had failed to raise a cognizable vested rights claim. Notwithstanding the preliminary posture of the underlying case, Appellants and Appellant-Intervenors improperly call on the Court in the instant Rule 24(c) appeal to step into the fact-finding shoes of the Business Court and conclude that Appellants possess a vested property right under the *Sahl* test. A Rule 24(c) appeal, as addressed in Section V, *infra*, is not the appropriate forum to adjudicate factual findings or disputes. Therefore, Appellants' request for the Law Court to determine as part of this appeal

whether Appellants have carried their burden to satisfy the *Sahl* three-part test should be rejected.

Relatedly, Appellants and Appellant-Intervenors also incorrectly assert that *Sahl* holds a party need only establish it possesses a vested property right to also show a constitutional violation, or, in the alternative, require a court to apply a heighten level of scrutiny to the Initiative. The Law Court in *Sahl* reached no such holding. Further, Appellants' citations to the pre-*Kittery* cases of *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977) and *Sabasteanski v. Pagurko,* 232 A.2d 542 (Me. 1967) as supportive are not instructive because those cases involved the review of competing property rights – one over marital property and the other over a deed – and not whether a developer could reasonable rely on the existing law and permits in the face of a pending change in that law.

Contrary to Appellants' assertion, the law is clear that even if a party carries its burden that it possesses a vested property right (which the Business Court found Appellants did not), Appellants must also carry the burden to show that the statute fails the substantive due process rational basis test. *See Kittery Retail Ventures,* 2004 ME 65, ¶ 32, 856 A.2d at 1183; *Cf. L.V.I. Group*, 1997 ME 25 ¶ 9, 960 A.2d at 695 ("The statute does not violate the due process clause because it furthers the legitimate legislative purpose . . . and does so by rational means."); *Contractor's Supply of Waterbury, LLC v. Comm'r of Envtl. Prot*., 925 A.2d 1071, 1084-85

(Conn. 2007) (determining that while plaintiff had a protected property interest in a construction permit, the retroactive application of the law to the plaintiff's interest was permissible because the law furthered the legitimate state purpose of protecting the environment, thus satisfying the rational basis test).

Furthermore, Appellants' contention that the Initiative should be reviewed under heightened scrutiny is fatally flawed as heightened scrutiny is only applied if the statute implicates a fundamental right or fundamental liberty, neither of which apply to Appellants' claimed vested right. *See Doe v. Williams*, 2013 ME 24, ¶ 66, 61 A.3d 718, 737 ("If the challenged state action does not implicate a fundamental right or fundamental liberty interest, it will be upheld if it is reasonably related to a legitimate state interest."). Indeed, Appellants do not contend, as they could not contend, that their alleged vested right is a fundamental right or fundamental liberty. Therefore, the correct test to apply to determine whether an established vested property right claim violates the Due Process Clause is the rational basis test.

In this appeal, the Law Court can, as a matter of law, reject Appellants' Due Process claim by applying the rational basis test to the Initiative without consideration of whether Appellants possess a vested right. *See Schaeffler Grp, USA, Inc. v. United States,* 786 F.3d 1354, 1361 (Fed. Cir. 2015) ("although the vested rights analysis requested by the government may be 'relevant to the due process analysis,' we choose not to reach that question because we find that

Congress had a rational basis for the retroactive effect [of the statute] ….”). Under the rational basis test, if the Initiative furthers a legitimate legislative purpose through reasonable means, it satisfies the Due Process Clause. *Kittery Retail Ventures,* 2004 ME 65, ¶ 32, 856 A.2d at 1183; *L.V.I. Group*, 1997 ME 25 ¶ 9, 960 A.2d at 695. Instructively, the Federal Seventh Circuit, in a case involving a vested property rights claim against a change in a zoning ordinance, elaborated on the rational basis test:

> Once a landowner obtains such a state-created property right, the due process clause of the Fourteenth Amendment circumscribes, but does not eliminate, the government's ability to deprive him of that interest…. It is instead a modest limitation that prohibits government action only when it is random and irrational. . . . 'substantive due process requires only that the practice be rationally related to a legitimate governmental interest, or alternatively phrased, that the practice be neither arbitrary nor irrational.'

Gen. Auto Serv. Station v. City of Chicago 526 F.3d 991, 1000 (7th Cir. 2007) (citations omitted).

Consistent with this case law, the Business Court correctly concluded that the Initiative had a rational basis because it advanced the legitimate legislative purpose of imposing "additional environmental protections, and enacting those protections through supplemental requirements . . . . [which are] not unduly arbitrary or capricious." A.40. The Business Court correctly added that Appellants' vested right claim fails as a matter of law because the Initiative exercised the state's police powers to protect the environment, quoting *Baxter*, 79 A.2d at 586 ("The exercise

of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts."). A.24. These determinations are unassailable. Indeed, the Initiative is clearly not random or arbitrary, but, rather, is reasonably related to a legitimate legislature purpose of: (1) protecting the environment through prohibiting the routing of high-impact electric transmission lines in the Upper Kennebec Region (Section 5) and requiring legislative approval for the construction of such lines outside of the Upper Kennebec Region (Section 4)); and (2) preserving the enjoyment of public lands – Sections 1 and 4.

The fact that the Initiative's supplemental requirements apply retroactively to the Project does not change the substantive due process analysis. *See United States v. Locke*, 471 U.S. 84, 105 (1985) ("That this requirement was applied to claims already located by the time FLPMA was enacted and thus applies to vested claims does not alter the analysis, for any 'retroactive application of [FLPMA] is supported by a legitimate legislative purpose furthered by rational means.'") (citation omitted). Thus, consistent with the Business Court's findings, as a matter of law, the Initiative satisfies the Due Process Clause because it reasonably advances a legitimate legislative purpose of protecting the environment and public lands. As a result, Appellants' substantive due process claim fails.

While Appellants' due process claim is fatally flawed for the reasons set forth above, the Business Court also correctly determined that Appellants failed to

establish that they have vested rights, because they were well aware of the Initiative and pending appeals before incurring significant construction costs, either of which defeat a vested rights claim.

A. Knowledge of a Pending Change in the Law Defeats Appellants' Claim for Vested Rights.

The Business Court concluded that:

> On October 30, 2020, the Secretary of State issued the petition for the Initiative relevant to this case, reinforcing the likelihood that the Project would face legislative roadblocks, especially given the popularity of the 2020 initiative. NECEC was aware of the second Initiative and admitted in its October 30, 2020 10-Q report to the SEC that it could not predict the outcome of the referendum. NECEC commenced construction on January 18, 2021 despite this knowledge (and knowledge of all the other adverse actions to that date described in the Statement of Facts). NECEC's decision to forge ahead with construction in the face of a substantial possibility that retroactive change negatively impacting the Project could be passed in the near future was a calculated risk.

A.45.

Appellants were aware that on January 21, 2021, the Secretary of State had received sufficient signatures to present the Initiative for enactment by the Legislature or for a vote, and aware of the Secretary's certification on February 22, 2021. As such, the Business Court found that "the evidence establishes that upon commencement of construction, both in January and May 2021, Plaintiffs themselves were faced with a flashing red light about the risks of proceeding with

the Project" and "under intense risk that a change in the law would have an adverse impact on the success." A. 45-46. Again, these findings are unassailable.

As a matter of law, Appellants' undisputed knowledge of the Initiative defeats its claim of vested rights. In *Kittery*, the Law Court concluded that knowledge of a pending change in the law was dispositive against a claim for vested rights when there was no evidence of bad faith on behalf of legislative actors. *See, Kittery,* 2004 ME 65, ¶ 31, 856 A.2d at 1193 (the lack of evidence of bad faith "in conjunction with KRV's knowledge of the pending ordinance changes, leads us to conclude that this is not the case in which equity demands that KRV acquire vested rights."); *see also Portland v. Fisherman's Wharf Assocs. II,* 541 A.2d 160, 164 (Me. 1988). In the instant case the Business Court concluded NECEC had knowledge of the pending Initiative, and, on Brief, Appellants assert they are no longer claiming bad faith. A.42-45; Appellants Br. at 17 n.6. Hence, a straightforward application of *Kittery* results in Appellants' vested rights claim failing, as they had knowledge of the pending Initiative and there is no showing of bad faith. *See Fisherman's Wharf Assocs. II*, 541 A.2d at 164 ("considering FWA II's knowledge of the contents of the proposed ordinance and its retroactive provisions prior to acquiring title to the property in question, and the lack of any evidence of bad faith or discriminatory treatment by the City or initiated ordinance proponents, FWA II has failed to establish any vested rights based on equitable grounds."); *Sahl*, 2000 ME 180, ¶14

(vested rights found where "The [code enforcement officer] testified that the Hugheses were unaware of the amended ordinance prior to its enactment.").

Appellants counter that *Kittery* and *Fisherman's Wharf Assocs. II* are distinguishable because the parties in those cases were seeking to demonstrate an equitable vested right claim and Appellants are claiming a legally vested right. Appellants Br. at 17 n.6, 27-32. Appellants are wrong. In the underlying proceeding, Appellants alleged bad faith in the supporters of the Initiative, similar to the allegations asserted in *Kittery* and *Fisherman's Wharf Assocs. II*. A. 42, 127-128, 175-176. Appellants now disavow those assertions in an attempt to recast their claim as a legal, not an equitable claim. This attempted distinction does not revive Appellants' otherwise fatally flawed claim of vested rights. Instructively, in cases not brought in equity, other courts have also concluded that knowledge of a pending change in the law thwarts a claim of good faith reliance on the then-existing law, which, in turn, defeats a claim of vested rights. *Town of Cross Plains v. Kitt's,* 775 N.W.2d 283, 293 (Wis. Ct. App. 2009) ("Wisconsin case law establishes that there must be reasonable reliance on the existing law in order to acquire a vested interest. We then conclude that reasonable reliance on the existing law is not present where, as here, the owners knew the existing law was soon to change."); *Ropiy v. Hernandez*, 842 N.E.2d 747, 755 (Ill. App. Ct. 2006) ("We find Ropiy's expenditures, even if substantial, were not made in good faith reliance on the prior

classification because all of his expenditures were made after he had constructive knowledge of the proposed zoning change."); *Koontz v. Davidson County Bd. of Adjustment*, 503 S.E. 108, 109 (N.C. Ct. App. 1998) (developers knew of proposed rezoning proposal, and therefore, "developers did not exercise good faith reliance on a valid permit, as a matter of law, and thus they do not have a vested right to avoid the enacted zoning changes."); *Biggs v. Sanwich*, 470 A.2d 928, 931 (N.H. 1983) ("plaintiffs took a 'calculated risk' in proceeding with their construction and were not relying in good faith on the absence or non-adoption of the ordinance.").

These courts, consistent with the reasoning in *Kittery* and *Fisherman's Wharf Assocs. II*, evaluated whether the party could reasonably rely on existing law based on their knowledge of pending changes in the law. Here, Appellants were well aware of the text of the Initiative in September of 2020, aware that on January 21, 2021, the Secretary of State had received sufficient signatures to present the Initiative for enactment by the Legislature or for a vote, and aware of the Secretary's certification on February 22, 2021. With that full knowledge, Plaintiffs started construction on January 18, 2021. This is fatal to their claim of a vested property rights. To conclude otherwise would allow Appellants to avoid compliance with these supplemental transmission line routing requirements by taking a calculated business risk to forge ahead with construction. Thus, as a matter of law, Appellants cannot carry their burden on the second prong of the *Sahl* test.

B. Pending Appeals and Applications Defeat Appellants' Claim for Vested Rights.

The routing of the Project through the Upper Kennebec Region and public land is under appeal before BEP, Superior Court, federal court, and this Court (BPL Lease). Hence, the Business Court correctly concluded that "[i]n order to merit protection as a vested right, under the unique facts presented here, the permits relied upon must be final and not subject to appeal." A.47. The Business Court's rationale is supported by Appellants' knowledge that the pending Initiative included supplemental transmission line routing requirements that would be applied in these appeals and applications. *See* Section I.A., *supra*.

Conversely, Appellants' assertion that they possessed all "Project-wide" permits to start construction (Appellants Br. at 35) and, thus, had rights vested in these permits is a misnomer, because Appellants started construction with the knowledge that certain Project-wide permits were subject to change in actions that were pending before BEP, and in state and federal court, as well as through the citizens' initiative process. Additionally, Appellants started construction knowing that four municipal siting permits were, and currently remain, outstanding, including one to route in the Upper Kennebec Region. Appellants further have no legal authority to construct on the approximately one-mile parcel of public reserved land in the Upper Kennebec Region, as the Superior Court determined that it was void *ab initio*, a decision itself which is pending appeal before this Court. For these reasons,

as a matter of law, Appellants cannot carry their burden on the third prong of the *Sahl* test – starting construction with valid permits – as their permits were appealed, and four municipal permits remain outstanding. *Conservation Law Found. v. State,* No. AP-98-45, 2002 WL 34947097, at *3 (Me. Super. Ct. Jan. 28, 2002) (rights do not vest in a permit that is timely challenged and appealed); *Powell v. Calvert County*, 795 A.2d 96, 103, (Md. 2002); ("We have held that a vested right does not come into being until the completion of any litigation involving the zoning ordinance from which the vested right is claimed to have originated."); *Donadio v. Cunningham*, 277 A.2d 375, 382-83 (N.J. 1971) ("A landowner should not be able to thwart that public interest by a 'bootstrap' operation and by winning an unseemly race…. And, of course, an owner can acquire no additional rights by starting or continuing construction after an appeal has been taken."); *Ebzery v. City of Sheridan*, 982 P. 2d 1251, 1257 (Wyo. 1999) ("Actions taken in reliance on a variance or permit while the time for appeal is pending are inherently unreasonable…. Rather than protected activity, the commitment and expenditures under these circumstances are considered to be a calculated risk…. The theory of vested rights does not apply here."). Consistent with this line of case law, the Business Court correctly concluded that Appellants did not have permits that created vested rights that may be used as a sword to subvert the plain language of the Initiative. Appellants, therefore, cannot

satisfy two of the three prongs of the *Sahl* test, which, in turn, results in their vested rights claim failing as Appellants must carry their burden on all three prongs.

V. The Court Should Decline to Accept the Case.

As shown, *supra*, the Initiative does not violate the Maine and Federal Constitutions, and, therefore, it is appropriate to affirm the Business Court's denial of the preliminary injunction. For the reasons that follow, this case is also not proper for review under Rule 24(c).[15]

In a Rule 24(c) report the Court reviews questions of law *de novo*, whereas an interlocutory appeal of the preliminary injunction requires the Court to review the trial court's "findings of fact for clear error and its denial of the requested preliminary injunction for an abuse of discretion." *Alliance for Retired*, 2020 ME 123, ¶ 12, 240 A.3d 45, 50. The comingling of these different standards of review in one appeal is not supported by the text of Rule 24(c), yet Appellants' and Appellant-Intervenors' briefs are replete with challenges to the Business Court's findings of facts as error and an abuse of discretion. Appellants Br. at 6-11, 24-37, 50-55; Local 104 Br. at 10-32, Commerce Br. at 1-4, 12-30, 33-35; HQUS Br. at 11-

[15] Rule 24(c) reads: "If the trial court is of the opinion that a question of law involved in an interlocutory order or ruling made by it ought to be determined by the Law Court before any further proceedings are taken, it may on motion of the aggrieved party report the case to the Law Court for that purpose and stay all further proceedings except such as are necessary to preserve the rights of the parties without making any decision therein."

12, 14, 47-54. Therefore, the appeal is not supported by Rule 24(c) and is a violation of the final judgment rule. *See Liberty Ins. Underwriters,* 2008 ME 149, ¶ 24, 957 A.2d at 101 (Law Court rejected questions that "require a determination as to whether the factual record, as it stands, would support partial summary judgment in favor of either party. This determination should be made in the first instance at the trial level rather than on report.").

In addition to Appellants' misuse of a Rule 24(c) report, Appellants dedicated less than a page (Appellant Br. at 15) on the merits of the reporting, which is clearly insufficient to satisfy their burden that the reporting does not violate the final judgment rule under *Littlebrook's* three factor test:

> (1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions; and (3) whether a decision on the issue would, in at least one alternative, dispose of the action.

Littlebrook Airpark Condo. Ass'n v. Sweet Peas, *LLC*, 2013 ME 89, ¶ 8, 81 A.3d 348 (quotation marks omitted); *Sanborn v. Sanborn*, 2005 ME 95, ¶ 9, 877 A.2d 1075, 1076 ("A party urging that we reach the merits . . . has the burden of demonstrating to us that one of those exceptions to the final judgment rule justifies our reaching the merits of the appeal.").

A. Reporting of Questions of Law are Outweighed by the Rule Against Piecemeal Litigation.

"The first factor in essence, asks whether the issue presented is sufficiently significant to outweigh the purposes served by the final judgment rule." *In re Conservatorship of Emma*, 2017 ME 1, ¶ 8, 153 A.3d 102, 105. Any novelty associated with Appellants' questions of law are outweighed by Appellants failure to name BEP and the four municipalities as defendants, which ensures there will be subsequent litigation. Certainly, if the Court agrees with the Business Court that the Initiative is indeed constitutional and/or that the undisputed facts defeat any claim of vested rights, that may end this case. Granting the relief requested by Appellants, however, ensures that there will be subsequent litigation involving other parties not subject to this appeal, the very definition of piecemeal litigation that the law does not allow. Accordingly, Appellants have failed to carry their burden with respect to the first factor.

B. Appellants' questions will be decided by other dispositions.

"The second factor addresses the possibility of other rulings rendering the question moot. If there exist alternative grounds that could result in a final disposition, we are unlikely to accept the question." *In re Conservatorship*, 2017 ME 1, ¶ 8, 153 A.3d at 105 (citation omitted). Appellants seek to report the question of whether the vested rights doctrine can be asserted for a statute;

however, the reporting of such a question does not comport with the second factor, because the Business Court clearly ruled for separate – factual – reasons that Appellants have not shown they possess vested rights. A.41-50; *In re Conservatorship,* 2017 ME 1, ¶ 11, 153 A.3d at 105. Moreover, the determination of the route for the Project will be decided by BEP and local municipalities, the dispositions of which are not before the Court in this appeal. Accordingly, Appellants have failed to carry their burden with respect to the second factor.

C. Appellants' questions would not dispose of the action.

"The third factor asks whether at least one possible answer to the reported question would finally resolve the dispute." *In re Conservatorship*, 2017 ME 1, ¶ 8, 153 A.3d at 105. While the underlying case is at the preliminary injunction stage, Appellants have asserted that if the Law Court agrees that Appellants have failed to establish that the Initiative is unconstitutional, the case is over. It is unclear whether that assertion is enough to meet the requirement that an answer from this Court would "finally resolve the dispute." If the Court determines to answer the question and affirms the Business Court's determination that Appellants failed to establish that the Initiative is unconstitutional, however, Appellants should be held to their assertion. Any other ruling on Appellants'

questions, unquestionably, seek to have the Court improperly act in an advisory role. *See Littlebrook,* 2013 ME 89, ¶ 15, 81 A.3d at 354.

For any one of these reasons, this case was not properly reported under Rule 24(c).

CONCLUSION

For the reasons set forth above, Appellants have failed to carry their heavy burden of establishing that the Initiative is unconstitutional, or that this case was properly reported under Rule 24(c). Therefore, the Business Court's denial of Appellants' request for a preliminary injunction should be upheld.

Dated at Portland, Maine this 30th day of March, 2022.

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CERTIFICATE OF SERVICE

I, Christopher T. Roach, Esq., hereby certify that pursuant to agreement of the parties, a copy of this Brief of Appellee-Intervenor NextEra Energy Resources, LLC was served via email only upon counsel of record at the address set forth below on March 30, 2022:

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