STATE OF MAINE
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 THE BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CV-2021-00058

BRIEF OF INTERVENORS-APPELLEES

Thomas B. Saviello, Christine M. Geisser, Wendy A. Huisch, Jonathan T. Hull, Theresa E. York, Robert C. Yorks and the Natural Resources Council of Maine

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INTRODUCTION

On November 2, 2021, an overwhelming majority of the people of Maine voted in favor of Question 1 (the "Initiative") to strengthen the protections for Maine's public lands and protect the Upper Kennebec Region. The very next day, Plaintiffs NECEC Transmission LLC and Avangrid Networks, Inc. (Central Maine Power's parent company) (collectively, "Avangrid") filed a complaint to preemptively enjoin the Initiative and circumvent the will of the people. The Superior Court properly denied that request and the matter is now before this Court on a Rule 24(c) report.

Avangrid asserts that it has "vested rights" to complete the New England Clean Energy Connect ("NECEC" or "Project") and consequently the Initiative provisions requiring 2/3 legislative approval for any transmission line crossing public lands and banning high-impact transmission lines in the Upper Kennebec Region cannot be applied to the NECEC. But the vested rights doctrine does not apply to its lease of public lands, which instead is governed by the law of contract. Rights cannot vest, moreover, where its permits are under appeal and Avangrid had knowledge of a likely change in the law affecting the Project—before it made the calculated decision to start clearing and construction, it had known for almost a year that the committee of the Legislature with jurisdiction over the Bureau of Parks and Lands ("BPL") had unanimously recommended to the Legislature that the Lease be canceled; it had known for over six months before it began any physical work that the Natural Resources Council of Maine ("NRCM") and others had appealed its Maine Department of

Environmental Protection ("DEP") permits to the Board of Environmental Protection ("BEP") and that two other parties had appealed the permits to Superior Court, appeals that are still pending; and it knew of the likely placement of the Initiative on the November ballot.

While Avangrid could build under these circumstances, it did so entirely at its own risk. To hold otherwise would enable and encourage a race to develop during pending appeals and changes to the law as a means of depriving litigants of their appeal rights and the agency and courts of their authority to make final decisions, as well as the rights of the people to exercise their constitutional right to initiate legislation.

In making these claims, Avangrid and its allies rely largely on the argument that because it has spent a great deal of money on the Project, it is entitled to complete it; to hold otherwise, they assert, would mean no infrastructure project will ever be built in Maine again. Avangrid's arguments in this regard strongly suggest that Avangrid itself recognizes the weakness of its claims, substituting overheated rhetoric for substantive legal analysis. It has no claim with respect to the alleged retroactive application of Section 1 of the Initiative, which amends 12 M.R.S. § 1852(4), to its lease of public lands, because it has no current lease—the court in *Black v. Cutko* invalidated its lease and *res judicata* principles preclude Avangrid from claiming otherwise here. Similarly, *res judicata* principles preclude it from challenging the ban on high-impact transmission lines in the Upper Kennebec Region because it failed to appeal the DEP's decision suspending its permit on the basis of that ban.

And contrary to Avangrid's arguments, many infrastructure projects, including major transmission lines and pipelines, have been built under the same system Avangrid inveighs against so heavily. What courts, agencies, and voters have consistently rejected, however, are bad projects, like the Big A dam, the Dickey-Lincoln dam, the Eastport Refinery, and the NECEC.

STATEMENT OF FACTS

After New Hampshire rejected a virtually identical project, the Massachusetts utilities in early 2018 selected Central Maine Power Company to build a transmission line through Maine to import hydropower from Quebec. The NECEC consists of five segments. Of these segments, the Initiative primarily affects Segment 1, 53 miles of new right-of-way from the Canadian border to the Forks in the heart of a globally significant forest. (A. 20-21.)

The schedule Avangrid negotiated with the Massachusetts utilities drives its arguments here. Avangrid bid and agreed to a highly aggressive schedule, including allowing a total of only 18 months for obtaining final state permits. (A. 251.) In fact, and not surprisingly given the scope of the project and the level of public interest, the DEP did not hold hearings until more than 18 months after the applications were filed, and did not issue permits for more than 30 months. (A. 22.) Those permits are on appeal to the BEP, a development Avangrid and its lawyers surely could have anticipated but did not include in the schedule.

In anticipation of bidding for the project, CMP sought a lease from BPL for a

300-foot-wide, roughly one-mile-long corridor across two public lots that lie in Segment 1. (A. 19-20.) BPL signed a lease in 2014 even though 35-A M.R.S. § 3132(13) prohibited any such lease prior to issuance of a certificate of public convenience and necessity ("CPCN") by the Public Utilities Commission ("PUC") for which CMP had yet to apply. Neither BPL nor CMP sought legislative approval for the 2014 lease. *Black v. Cutko*, No. BCDWB-CV-2020-29, 2021 WL 3700685, at *12 (Me. B.C.D. Aug. 10, 2021). CMP obtained a CPCN from the PUC in May of 2019 and the DEP conducted hearings on CMP's permit applications in April and May.

In December 2019, Senator Black introduced L.D. 1893, which addressed the 2014 lease. (A. 25.) On January 21, 2020, the Agriculture, Conservation, and Forestry ("ACF") Committee, which has jurisdiction over BPL, held a hearing on L.D. 1893. (A. 25, 271.) A CMP representative and Director Cutko testified. (A. 275.) Director Cutko acknowledged that BPL had not made any determination as to whether the NECEC would reduce or substantially alter the uses of the public lands and told the Committee that BPL entered into the 2014 lease believing 12 M.R.S. § 1852(4) exempted leases from the requirement of legislative approval. (A. 275; *see also* Ex. B to Affidavit of Senator Craig Hickman ("Hickman Aff.") at 7, 10.) The Committee also reviewed advice to BPL from an Assistant Attorney General concerning another possible route for NECEC over different public lands, which stated in no uncertain terms that, prior to executing such a lease, BPL was required to determine whether there was a substantial alteration to the uses of the lands and, if there was, to seek 2/3 approval of

the Legislature. (A. 271, 275-76.)

As a result, Senator Hickman drafted Committee Amendment A to L.D. 1893, which made clear that the NECEC constitutes a substantial alteration of the public lands, requires 2/3 legislative approval, and canceled the unlawful lease. (A. 271-72, 275-76.) As Senator Bennett, one of the drafters of the 1993 constitutional amendment, has explained, "a high-impact transmission line like NECEC that crosses public lands for the purpose of delivering power to Massachusetts is precisely the kind of reduction or substantial alteration of the public lands that I and others had in mind when we drafted Article IX, Section 23 to require the approval of 2/3 of the Legislature." (Affidavit of Senator Richard A. Bennett ("R. Bennett Aff.") ⁋ 6.) On February 18, 2020, the ACF Committee voted unanimously that L.D. 1893 as amended ought to pass. (A. 276.) Unanimous committee actions are typically enacted, frequently "under the hammer," but because COVID-19 forced the Legislature to adjourn, L.D. 1893 did not get a vote in either chamber. (A. 276.)

The DEP issued a permit for the NECEC on May 11, 2020. On June 10, 2020, NRCM appealed the DEP's Order to the BEP. (Affidavit of Nick Bennett ("N. Bennett Aff.") ¶¶ 5-11.) Two other groups filed appeals in the Superior Court, which were remanded to the BEP and consolidated with NRCM's. All of those appeals remain pending before the BEP, which has statutory authority to conduct a *de novo* review and "may affirm, amend, reverse or remand to the commissioner for further proceedings" any license issued by the Commissioner. 38 M.R.S. § 341-D(4).

Less than two weeks after appealing to the BEP, NRCM and 20 individuals sued BPL and CMP, challenging the 2014 lease as *ultra vires*. On the same day, BPL and CMP signed a new lease, intending—as set out in a contemporaneous email—to issue a lease after issuance of the CPCN and, by the legerdemain of changing the title to "Amended and Restated Transmission Line Lease," show there was no "substantial alteration" in 2020 requiring legislative approval. *See Black*, 2021 WL 3700685, at *4 n.6.

The petition to put what became Question 1 on the ballot was submitted to the Secretary of State on September 15, 2020. (A. 27.) The purpose of the Initiative was, among other things, (1) to protect the Upper Kennebec Region from the environmental damage that would be caused by high-impact transmission lines and (2) to make clear that the fragmentation caused by linear projects worked a reduction or substantial alteration to public lands and thus required 2/3 legislative approval under the Constitution. (A. 280, 286.)

After review by the Office of Policy and Legal Analysis, the Secretary of State issued petitions with revisions to the proposed statutory language on October 30, 2020. (A. 27, 69-70.) Section 1 amended 12 M.R.S. § 1852(4), clarifying and correcting BPL's erroneous interpretation that it exempted transmission line leases from Article IX, Section 23's requirement of legislative approval. (A. 69.) Because it corrected an erroneous interpretation of the statute, Section 1 was retroactive to September 2014, the relevant statute of limitations period. Section 1 does not contemplate any enforcement action by BPL against any leaseholder but rather simply requires that any

transmission line lease be approved by a 2/3 vote of the Legislature.

Sections 2-4 made high-impact transmission lines subject to legislative approval and required 2/3 legislative approval for lines crossing public lands. (A. 69-70.) Section 5 banned such lines in the Upper Kennebec Region. (A. 70.) None of these sections provides for or contemplates enforcement by the PUC, nor for any CPCN revocation; rather, these sections simply add a requirement of legislative approval and a ban in the Upper Kennebec Region that precludes construction of a high-impact transmission lines there. Section 6 made these provisions retroactive to September 16, 2020, the date the question was submitted to the Secretary of State, an approach approved by this Court in *City of Portland v. Fisherman's Wharf Associates II*, 541 A.2d 160, 163-64 (Me. 1988), and applicable to any project in which construction had not yet begun as of that date. (A. 70.)

Avangrid's 10-Q filing for the period ending September 30, 2020, filed on October 30, 2020, acknowledged the prospect of the Initiative being placed on the ballot and stated that it "cannot predict the outcome of this citizen initiative." (Affidavit of Jonathan R. Bolton ("Bolton Aff.") ¶ 5; Ex. D to Bolton Aff. at 56.) Avangrid in fact was not merely uncertain about the outcome, it was fully aware at the time the question was submitted to the Secretary of State that the Initiative had a strong likelihood of being placed on the ballot and passing. (A. 44-45.) Not only had a previous attempt to submit a question to the voters that would have rejected NECEC obtained enough signatures to qualify on the ballot, but polling throughout the previous referendum and

prior to submission of signatures in September also informed Avangrid that the Initiative, if put on the ballot, was likely to pass. (A. 284.) Indeed, Avangrid spent over $1 million in December 2020 alone on polling and media buys trying to defeat the signature gathering effort, a clear admission that it was aware of the likely passage of the Initiative if enough signatures were gathered. (Bolton Aff. ¶ 10, Ex. I to Bolton Aff.)

Meanwhile, the Sierra Club, AMC, and NRCM sued the Army Corps of Engineers on October 27, 2020, for failing to prepare an Environmental Impact Statement rather than an Environmental Assessment. (A. 23.) The First Circuit entered an injunction prohibiting any clearing or construction in Segment 1 on January 15, 2021. (A. 24.)

Nonetheless, in order to meet the schedule necessary to realize a $2 billion profit, *see* Josh Keefe, *The Money at Stake in the Battle over CMP's 145-Mile Electric Line*, Bangor Daily News (June 10, 2019), Avangrid began clearing on January 18, 2021. (A. 31.) At that time not only had it been enjoined from proceeding in Segment 1, but it also had had its state permits remanded to the BEP for further action, faced challenges to its public lands lease both in court and at the Legislature, and faced an impending Initiative it knew had substantial support. On January 21, 2021, the individual Intervenors and others submitted petitions with over 95,000 signatures to the Secretary of State. (A. 102). Since only 63,067 signatures were required, Avangrid knew then that the measure would be on the ballot in November. (A. 27-28.) Final confirmation came on February 22 when the Secretary certified the measure to the Legislature. (A. 28.)

On March 17, 2021, Justice Murphy issued a decision in *Black v. Cutko* that rejected the principal argument advanced by CMP and BPL—that leases pursuant to 12 M.R.S. § 1852(4) were somehow exempt from application of Article IX, Section 23 of the Maine Constitution and 12 M.R.S. §§ 598-598-B. 2021 WL 3700685 at *8. Shortly thereafter, the ACF Committee voted 12-1 to send a letter to BPL reiterating its long-standing view that the public lands lease with CMP required legislative approval. (A. 272.)

Thus, Avangrid knew that it was unlikely to be able to use the leased public lands, which are in Segment 1, two months before the First Circuit's injunction banning any clearing or construction in Segment 1 was lifted. Its decision to begin "hand felling" in May after the injunction was lifted, (A. 241), was wholly at its own risk, since there was a substantial likelihood that it would be unable to connect the line and had no alternative permitted. (A. 45-46.) A permit prohibition against clearing in June and July meant that by August, very little clearing in Segment 1 had been done. *See* (A. 241.) And on August 10, 2021, Justice Murphy issued a final judgment vacating the Lease and confirming that CMP never had a valid lease and thus never had the right to use the public lands. *Black*, 2021 WL 3700685, at *14-15. NECEC Transmission appealed. On September 15, 2021, this Court entered an order prohibiting any construction or vegetation removal during the pendency of the appeal.

As a result of the judgment in *Black v. Cutko*, on August 12, 2021, the DEP Commissioner initiated a permit suspension proceeding to determine whether the lack

of a lease meant that NECEC could not be built as permitted. *Central Maine Power Co. & NECEC Transmission, LLC*, License Suspension Proceeding, Decision and Order 1-2 (Me. D.E.P. Nov. 23, 2021). On November 2, the voters overwhelmingly approved the Initiative; as a result, on November 5 the DEP expanded the scope of its proceedings to consider the effect of the Initiative on the NECEC permit. *Id.* at 3. On November 23, the Commissioner, reserving decision on whether the *Black v. Cutko* decision independently required suspending the permit, suspended the NECEC permit because the Initiative barred the project in the Upper Kennebec Region, unless enjoined by a court. *Id.* at 11; *see also* (A. 23.) NECEC Transmission and CMP did not appeal this suspension order.

Neither BPL nor the PUC has initiated or threatened to initiate any action against the Project.

ISSUES PRESENTED FOR REVIEW

1. Should the Court discharge the Report where the case does not involve any doubtful legal questions and the claims are not justiciable?

2. Does Section 1 of the Initiative amending the authority of BPL to enter into transmission line leases violate the separation of powers or impair the NECEC lease given the Legislature's broad authority over public lands, the decision in *Black v. Cutko*, and the language of the lease itself?

3. Has Avangrid acquired a "vested right" to complete the Project where its permits are under appeal and it had knowledge of a likely change in the law before it commenced any construction?

4. Do Sections 2-6 of the Initiative relating to high-impact transmission lines intrude on the powers of the other branches where they are statutes of general applicability and do not reverse any decision of either an agency or this Court?

5. Has Avangrid failed to satisfy the other preliminary injunction tests where a claimed constitutional violation does not establish irreparable injury, its alleged injury is speculative, and the public's interest in the citizen-initiative process is entitled to deference?

SUMMARY OF ARGUMENT

The Court should discharge the report because the case raises no novel or doubtful issues and the claims are not justiciable. Should the Court decide to address the issues, it should affirm the trial court's correct conclusions that Avangrid failed to show a likelihood of success on the merits where: (i) the Initiative is a statute of general applicability; (ii) Section 1 of the Initiative does not impair Avangrid's lease because Avangrid lacks a valid lease, it does not breach the terms of the invalid lease, a prerequisite to an impairment of contract claim, and in any case its amendment to BPL's leasing authority was entirely foreseeable at the time the lease was executed; (iii) Avangrid has not acquired and cannot acquire "vested rights" to complete the Project where its permits are under appeal and it had knowledge of a likely change in the law before starting any clearing or construction; and (iv) the Initiative does not reverse or affect any agency or court decision in violation of the separation of powers. The trial court also correctly concluded that the other preliminary injunction factors favored the Defendants.

ARGUMENT

Each section of the Initiative, like all such legislation, "carries a heavy presumption of constitutionality." *League of Women Voters v. Sec'y of State*, 683 A.2d 769,

771 (Me. 1996). Because legislative power is "absolute, except as restricted and limited by the Constitution," *Sawyer v. Gilmore*, 83 A. 673, 678 (Me. 1912); *see also* Me. Const. art. IV, pt. 3, § 1; *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 27, 237 A.3d 882, Avangrid's failure to establish a likelihood of success on the merits of any of its constitutional claims dooms its request for preliminary relief.

I. Standard of Review and Lack of Fitness for a Report.

A Rule 24(c) report is a species of interlocutory appeal that "permits parties, in limited circumstances, to obtain review from the Law Court prior to obtaining a final judgment from the trial court." *Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 9, 81 A.3d 348 (quotation marks omitted). This Court must "independently determine whether acceptance of the report 'is consistent with [its] basic function as an appellate court, or would improperly place [it] in the role of an advisory board.'" *Id.* (quoting *Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 8, 61 A.3d 1242). In making this determination, the Court considers whether: (1) "the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation"; (2) "the question might not have to be decided because of other possible dispositions"; and (3) "a decision on the issue would, in at least one alternative, dispose of the action." *Id.*

The report fails these tests. *First*, Avangrid's claims involve no new or doubtful legal issues. Rather, they involve long-established principles relating to the inability of a developer to acquire "vested rights" during the pendency of permit appeals, especially where the developer has knowledge of the possibility of a change to the law. *Second*,

even though neither BPL nor the PUC, much less the Legislature, has threatened to take, let alone taken, any action with respect to the Project, Avangrid asks this Court to issue an opinion about powers that they might seek to exercise in the future, *e.g.* revisiting some portion of the CPCN. Even when not faced with the disfavored posture of a report, this Court, when sitting as the Law Court, cannot issue an advisory opinion on powers that a governmental entity "might choose to exercise in the future." *Lynch v. Town of Kittery*, 473 A.2d 1277, 1280 (Me. 1984); *see also Pilot Point, LLC v. Town of Cape Elizabeth*, 2020 ME 100, ¶ 31, 237 A.3d 200; *Clark v. Hancock Cnty. Comm'rs*, 2014 ME 33, ¶¶ 12, 20, 87 A.3d 712. *Third*, Avangrid's failure to name the DEP as a defendant reveals the lack of justiciability of its claims—rather than appeal the DEP suspension order, Avangrid has chosen to sue parties who are taking no steps to enforce the statute, and the Legislature, which cannot be sued at all. Its attempt to enjoin the world to allow the Project to be completed simply is not justiciable. *See Whole Woman's Health v. Jackson*, 142 S. Ct. 522, 535 (2021) (observing "no court may lawfully enjoin the world at large" (internal citations and quotations omitted)). For all these reasons, the Court should discharge the report rather than issue an advisory ruling.

If the Court accepts the report, then on review of a denial of a preliminary injunction for a constitutional violation, Avangrid "must demonstrate convincingly that the law and the Constitution conflict. All reasonable doubts must be resolved in favor of the constitutionality of the enactment." *All. for Retired Ams. v. Sec'y of State*, 2020 ME 123, ¶ 9, 240 A.3d 45 (quoting *Jones v. Sec'y of State*, 2020 ME 113, ¶ 18, 238 A.3d 982).

In addition to this "heavy burden," Avangrid "faces another significant burden in seeking the 'extraordinary remedy' of a preliminary injunction" that is "only to be granted with utmost caution when justice urgently demands it." *Id.* ¶ 10 (quotation marks omitted). Avangrid "must demonstrate that it has a clear likelihood of success on the merits" in addition to the other elements of injunctive relief. *Id.* ¶ 11 (quotation marks omitted). This Court reviews "the trial court's findings of fact for clear error and its denial of the requested preliminary injunction for an abuse of discretion." *Id.* ¶ 12. When reviewing factual findings for clear error, the Court must "view the evidence and inferences that may be drawn from the evidence from the perspective most favorable to the court's judgment." *Cates v. Donahue*, 2007 ME 38, ¶ 9, 916 A.2d 941.

II. Section 1's Amendment of 12 M.R.S. § 1852(4) May Be Applied to NECEC's Lease of Public Lands.

As an initial matter, the doctrine of vested rights simply does not apply to Section 1 of the Initiative, which relates to leases of public lands. Leases are not permits and are governed by contract law. Section 1 provides that transmission lines and similar linear projects substantially alter the public lands and that leases for such projects must receive 2/3 legislative approval in accordance with Article IX, Section 23 of the Maine Constitution. Its constitutionality turns on whether (i) it is reasonable and (ii) not repugnant to a specific provision in the Constitution. *See State v. Haskell*, 2008 ME 82, ¶ 8 n.6, 955 A.2d 737. It is reasonable if it is "in the interest of the public welfare and . . . the methods utilized bear a rational relationship to the intended goals," even if other

methods could achieve those goals. *Me. Beer & Wine Wholesalers Ass'n v. State*, 619 A.2d 94, 99 (Me. 1993); *see also Watson v. State Comm'r of Banking*, 223 A.2d 834, 836 (Me. 1966).

Section 1 easily meets the reasonableness test. Its purpose is to protect Maine's public lands, which are held in trust for the people of Maine, by recognizing the uniquely fragmenting effect of linear projects, with their resulting adverse impacts to wildlife, conservation, recreation, and even timber harvesting, while simultaneously correcting BPL's erroneous interpretation of 12 M.R.S. § 1852(4) and the disparate treatment between the NECEC and every other major transmission line since the passage of Article IX, Section 23. *See* (Affidavit of David Publicover ¶¶ 5, 12; A. 275; Ex. C to Hickman Aff. at 6-7.)

HQUS alone argues Section 1 somehow fails this reasonableness test because it addresses only projects on public reserved lands and not on state parks or other public lands. But the only ill identified throughout the permitting and legislative attention to this issue has involved transmission line leases on public reserved lands and specifically 12 M.R.S. § 1852(4). *See Black*, 2021 WL 3700685, at *3-*4. Contrary to HQUS's argument, it is not necessary for legislation to address every theoretical ill; it suffices to take incremental steps to further the goal of protecting Maine's environment and public lands. *See Williamson v. Lee Optical of Okla. Inc.*, 348 U.S. 483, 489 (1955) ("[T]he reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind."); *see also Biodiversity Assocs. v. Cables*, 357 F.3d 1152,

1156 (10th Cir. 2004) (upholding "legislation applicable to selected sections of the Black Hills National Forest in South Dakota and nowhere else").

Nor does the contention that Section 1 impermissibly targets the NECEC lease stand up to scrutiny. The plain language of the Initiative confirms that it is a law of general applicability, whatever impact it may have on NECEC. It is hornbook law that statutes of general applicability are not invalid simply because they may impact a particular entity or project: that the referendum language "was motivated" by—and would apply to—the NECEC does not convert a "law of general applicability" into something else. *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 15, 91 A.3d 601; *see MacImage of Me., LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶ 32, 40 A.3d 975.

This practice of applying the new law to the project that motivated the change is common-place for legislative action or referenda.[1] *Bank Markazi v. Peterson*, 578 U.S. 212 (2016); *see also Casciani v. Nesbitt*, 659 F. Supp. 2d 427, 437 (W.D.N.Y. 2009), *aff'd*, 392 F. App'x 887 (2d Cir. 2010) ("[E]ven if legislation is enacted in direct response to a particular individual's actual or proposed activities, that alone will not render the legislation invalid, as long as it is not pinpointed against a named individual or group, and is general in its wording and impact." (cleaned up)); *W. Land Equities, Inc. v. City of Logan*, 617 P.2d 388, 396 (Utah 1980) ("There may be instances when an application

[1] Ballot initiatives enacted in Maine have previously been used to approve or disallow particular projects: *E.g.*, L.D. 1619, I.B. 1 (June 8, 1976) (creating the Bigelow Preserve in order to block the development of a private ski resort); L.D. 719, I.B. 1 (Feb. 19, 1991) (revoking authorization of the widening of the Maine Turnpike).

would for the first time draw attention to a serious problem that calls for an immediate amendment to a zoning ordinance, and such an amendment would be entitled to valid retroactive effect."); *see also Friends of Me.'s Mountains v. Bd. of Env't Prot.*, 2013 ME 25, ¶¶ 5, 9, 61 A.3d 689 (applying subsequently enacted noise ordinance to existing permit).

Because section 1 is reasonable and in the public interest, Avangrid focuses on the argument that it is somehow "repugnant" to the Constitution in that it violates separation of powers by usurping judicial and executive authority and violates the Contracts Clause. None of these claims survives scrutiny.

A. Section 1 Does Not Violate the Separation of Powers.

Avangrid and its supporters argue that "deeming" high-impact transmission lines a substantial alteration to the use of public lands impermissibly treads on the "exclusive province" of the judicial branch to construe the Constitution, *e.g.* (HQUS Blue Br. 38-40), and impermissibly eliminates the executive branch's discretion to make that determination, (Avangrid Blue Br. 4-5). Both arguments fail.

Under the Maine Constitution, the test to determine whether legislation runs afoul of the separation of powers doctrine "is a narrow one: 'has the power in issue been explicitly granted to one branch of state government, and to no other branch?'" *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985) (*quoting State v. Hunter*, 447 A.2d 797, 800 (Me. 1982)). If so, another branch cannot exercise it. *See id.* Unlike the "absolute" power of the legislature, the powers of the judiciary and executive branches are defined by grant, not by limitation. *See Sawyer*, 83 A. at 678. To evaluate whether "the power in

issue [has] been explicitly granted to one branch of state government, and to no other branch," a court looks only at the statutory language and compares that language to the constitutional assignment of powers. *Bossie*, 488 A.2d at 480-81 (quotation marks omitted).

As the trial court held, there "is nothing in the plain language of the Initiative that suggests it is anything other than a statute of general applicability affecting various linear projects and regulating high-impact electric transmission lines in Maine." (A. 52.) This conclusion follows from application of the admonition of Chief Justice McKusick, quoting Judge Henry Friendly's summary of Justice Frankfurter's three rules of statutory interpretation: "(1) Read the statute; (2) read the statute; (3) read the statute!" *See Stone v. Bd. of Registration in Med.*, 503 A.2d 222, 224 n.4 (Me. 1986); (A.52.)

The language amending 12 M.R.S. § 1852(4) makes clear it does not usurp the power of the judicial branch. Indeed, Article IX, Section 23 of the Maine Constitution expressly contemplates implementing legislation and the legislature has previously acted in this area. 12 M.R.S. §§ 598-598-B. HQUS emphasizes that "[i]t is emphatically the province and duty of the judicial department to say what the law is." (HQUS Blue Br. 39 (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803))). But the Court has also acknowledged that "the political branches have a role in interpreting and applying the Constitution." *United States v. Morrison*, 529 U.S. 598, 616 n.7 (2000); *see also United States v. Nixon*, 418 U.S. 683, 703 (1974) ("In the performance of assigned constitutional duties each branch of the Government must initially interpret the Constitution, and the

interpretation of its powers by any branch is due great respect from the others.").

This Court has held, moreover, that legislation may implement constitutional provisions. *See State v. Bachelder*, 403 A.2d 754, 758-59 (Me. 1979) ("Although the Bill-of-Rights provisions are self-executing, the Legislature is not thereby precluded from enacting legislation to facilitate the exercise of these constitutional privileges and the enforcement of these protective rights."). It has also held that the Legislature may act within an area over which the judicial branch has inherent authority. *See Bd. of Overseers of Bar v. Lee*, 422 A.2d 998, 1002-03 (Me. 1980).

Maine is no outlier in this respect. Congress (where authorized)[2] and other state legislatures also have the power to enact statutes that further a constitutional purpose. *See, e.g., Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 80-81 (2000) ("It is for Congress in the first instance to determine whether and what legislation is needed to secure the guarantees of the Fourteenth Amendment, and its conclusions are entitled to much deference.") (quotation marks and alteration omitted)); *South Carolina v. Katzenbach*, 383 U.S. 301, 308 (1966) (holding that challenged sections of Voting Rights Act of 1965 were "an appropriate means for carrying out Congress' constitutional responsibilities" under the Fifteenth Amendment); *Stanwitz v. Reagan*, 429 P.3d 1138, 1142 (Ariz. 2018) ("A statute regulating a provision of our constitution is permissible if it 'does not unreasonably hinder or restrict the constitutional provision and if the [statute]

[2] While the Maine Legislature has plenary powers "defined by limitation, not by grant," Congress enjoys "only those powers granted to it by the United States Constitution." *League of Women Voters*, 683 A.2d at 771.

reasonably supplements the constitutional purpose' of the provision." (alterations omitted) (*quoting Direct Sellers Ass'n v. McBrayer*, 503 P.2d 951, 953 (Ariz. 1972) (en banc)).

The argument that 12 M.R.S. § 1852(4) as amended usurps the executive branch's power fares no better. The power to execute the law is vested in the Governor, *see* Me. Const. art. V, pt. 1, §§ 1, 12, as well as agencies like BPL, *see Opinion of the Justices*, 2015 ME 27, ¶ 5, 112 A.3d 926; *Avangrid*, 2020 ME 109, ¶¶ 33-34, 237 A.3d 882. "Administrative agencies . . . are by their nature 'limited in their operations within the framework established for them by the Legislature.'" *Ford Motor Co. v. Darling's*, 2014 ME 7, ¶ 42, 86 A.3d 35 (*quoting Clark v. State Emps. Appeals Bd.*, 363 A.2d 735, 736 (Me. 1976)); *see also Mainers for Fair Bear Hunting v. Dep't of Inland Fisheries & Wildlife*, 2016 ME 57, ¶ 9, 136 A.3d 714 ("Each State agency's authority turns on its individual enabling statute."). Thus, agency action "is always subject to check by the terms of the legislation that authorized it; and if that authority is exceeded it is open to . . . the power of [the legislature] to modify or revoke the authority entirely." *I.N.S. v. Chadha*, 462 U.S. 919, 953 n.16 (1983).

Because the Legislature has the power to modify or limit an agency's power, Section 1's removal of BPL's discretion to decide whether a certain category of projects constitute a substantial alteration in the use of public lands does not impermissibly intrude on executive branch powers. As the Superior Court found in *Black v. Cutko,* in Article IX, Section 23, the Legislature took back significant authority previously delegated to BPL and has broad powers over public lands under the Constitution. *Black*,

2021 WL 3700685 at *5; *see also* Me. Const. art. X, § 5. And as the *Biodiversity Associates* court held, "[t]o 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." 357 F.3d at 1162 (emphasis omitted); *see also Hodges v. Snyder*, 261 U.S. 600, 603 (1923) (public rights such as grants to a public utility "may be annulled by subsequent legislation" (*citing, inter alia, Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. (18 How.) 421, 439 (1855))).

In *Wheeling & Belmont Bridge*, a private plaintiff obtained a court judgment requiring that a bridge over the Ohio River "be removed," yet the Court upheld a subsequent act of Congress that "declared" the bridge "to be [a] lawful structure[]," finding no separation of powers issue because of the public rights involved. 59 U.S. at 429-430. In a situation such as this, where BPL has misconstrued 12 M.R.S. § 1852(4), the Legislature has the power to amend the statute. *See State v. L.V.I. Grp.*, 1997 ME 25, ¶ 13, 690 A.2d 960. The Legislature "may even, within broad constitutional bounds, make such a change retroactive and thereby undo what it perceives to be the undesirable past consequence of a misinterpretation of its work product." *Id.* (*quoting Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 (1994)).

Finally, HQUS advances the preposterous argument that the Initiative runs afoul of Article IX, Section 23 of the Maine Constitution because it "attempt[s] to alter the spectrum of pre-amendment uses of designated lands . . . to exclude electric

transmission lines, landing strips, pipelines and railroads, and, *in effect, substantially alter the uses of such lands*." (HQUS Blue Br. 24 (emphasis added)). This argument is completely untethered from the language of Article IX, Section 23 and misapprehends the meaning of "uses" as defined by statute, which do not include electric transmisison lines. *See, e.g.*, 12 M.R.S. §§ 1845, 1847. The purpose of Article IX, Section 23 is to protect Maine's public lands, and Section 1 furthers that purpose. (R. Bennett Aff. ¶¶ 2-6.)

B. Retroactive Application of Section 1 Does Not Violate the Contracts Clause.

Just as Section 1 is well within the legislative power to ensure protection of Maine's public lands when used for linear projects generally, application of Section 1 to the NECEC lease does not violate the Contracts Clause. Avangrid cannot show a likelihood of success on its Contracts Clause claim where it has no valid lease, has not demonstrated a breach of the terms of its invalidated lease, and, in any case, the change to BPL's leasing authority was plainly foreseeable at the time the lease was executed.

1. Avangrid has no lease to be impaired.

"It is axiomatic that the existence of a contract must first be established before a claim may be pursued under the Contract Clause." *Conway v. Sorrell*, 894 F. Supp. 794, 799 (D. Vt. 1995) (*citing Ind. ex rel Anderson v. Brand*, 303 U.S. 95, 100 (1938)); *see also Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (noting that the first inquiry is "whether there is a contractual relationship" (quotation marks

omitted)). Here, a court has already determined that Avangrid has no valid lease and, consequently, it has no claim.

The determination in *Black v. Cutko* that there is no valid lease over public lands has *res judicata* effect in this proceeding and is not subject to review or reversal here. *See Sargent v. Buckley*, 1997 ME 159, ¶ 6, 697 A.2d 1272 ("Collateral estoppel bars [a party] from asserting an issue of fact or law that was actually litigated on the merits and determined by a valid final judgment in a prior action if the issue was essential to the judgment."). That remains true notwithstanding an appeal, despite the automatic stay on execution of the judgment during the pendency of the appeal. *Bartlett v. Pullen*, 586 A.2d 1263, 1265 (Me. 1991) (following the majority rule that "a judgment is final for purposes of *res judicata* despite the pendency of an appeal" (citing Restatement (Second) of Judgments § 13 cmt. f (Am. Law Inst. 1982))); *accord In re Kane*, 254 F.3d 325, 328 (1st Cir. 2001).

Thus, contrary to Avangrid's claim about the effect of Rule 62(e) of the Rules Civil Procedure, although that rule may prevent the plaintiffs from obtaining particular remedies for the time being, it does not undo the decision invalidating the lease in the "eyes of the law," as the trial court held. (A. 26-27.) For that reason, the Court should discharge the report as to issues relating to Section 1 of the Initiative; those issues may be pursued in *Black*—which is on appeal from a final judgment, unlike this appeal which is on report of an interlocutory order.

2. Avangrid could not demonstrate a breach even if it had a lease.

Not only can Avangrid not resurrect the lease here, but the lease language itself also demonstrates the fallacy of its Contracts Clause claim. As this Court has held, absent a breach, there can be no impairment of contract. *KHK Assocs. v. Dep't of Human Servs.*, 632 A.2d 138, 140-41 (Me. 1993). Section 6(m) of the lease provides that "Lessee shall be in compliance with all Federal, State and local statutes . . . now or *hereinafter enacted which may be applicable to Lessee in connection to its use of the Premises*." (A. 142. (emphasis added)) That plain language defeats any breach claim and hence any impairment of contract claim.

Faced with the lease's clear language regarding "hereinafter enacted" statutes, Avangrid argues that it only agreed to comply with laws governing the "use" of leased premises and that Section 1 does not govern the "use" of the public lands. This argument relies on a far too narrow reading of both the lease and statutory language: Section 3 of the lease provides that "[t]he Property shall be used by the Lessee as follows: to erect, *construct*, reconstruct, replace, remove, maintain, *operate,* repair, upgrade, and use poles, towers, wires, switches, and other above-ground structures and apparatus used or useful for the above-ground transmission of electricity . . . ." (A. 138 (emphasis added.) Section 1 of the Initiative pertains to "a lease or conveyance for the purpose of *constructing* and *operating* such poles, transmission lines and facilities, landing strips, pipelines and railroad tracks . . . ." (A. 69 (emphasis added)). That language forecloses its Contracts Clause challenge, as other jurisdictions have found based on similar

language. *See, e.g.*, *Hermosa Beach Stop Oil Coal. v. City of Hermosa Beach*, 103 Cal. Rptr. 2d 447, 463-64 (Cal. Ct. App. 2001) (holding that a ban on oil drilling could not impair a public land drilling lease that provided "[t]he Lessee shall comply with all laws, rules and regulations of the United States, of the State of California and its political subdivisions, and of the City of Hermosa Beach applicable to the Lessee's operations").

3. In any case, Section 1 does not effect a "substantial impairment."

Even if Avangrid could overcome these fatal deficiencies, it still cannot succeed on an impairment of contract claim. The threshold question is whether the law operates "as a substantial impairment of a contractual relationship." *Am. Republic Ins. Co. v. Superintendent of Ins.*, 647 A.2d 1195, 1197 (Me. 1994) (quotation marks omitted). Section 1 does no such thing.

"[A] contractual obligation is not impaired within the meaning that the modern cases impress upon the Constitution if at the time the contract was made the parties should have foreseen the new regulation challenged under the clause." *All. of Auto. Mfrs. v. Gwadosky*, 304 F. Supp. 2d 104, 115 (D. Me. 2004) (*quoting Chrysler Corp. v. Kolosso Auto Sales, Inc.,* 148 F.3d 892, 897 (7th Cir. 1998)); *see also Energy Reserves Grp., Inc. v. Kan. Power & Light Co.,* 459 U.S. 400, 411 (1983) ("In determining the extent of the impairment, we are to consider whether the industry the complaining party has entered has been regulated in the past.").

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, and that is

particularly true for the regulation of public lands. Protecting Maine's public lands is enshrined in the Maine Constitution. *See Me. Educ. Ass'n Benefits Tr. v. Cioppa,* 842 F. Supp. 2d 373, 383-84 (D. Me. 2012); *see also Biodiversity Assocs.,* 357 F.3d at 1162 ("the power over the public land thus entrusted to Congress is without limitations" (*quoting Kleppe v. New Mexico*, 426 U.S. 529, 539 (1976))).

Regulation of public lands is not only generally foreseeable to contracting parties, but NECEC also knew of a specific legislative proposal to cancel its former lease four months before it signed the new lease. (A. 271, 276.) As the Supreme Court has explained, "[o]ne whose rights, such as they are, are subject to state restriction, cannot remove them from the power of the state by making a contract about them." *Hudson Cnty. Water Co. v. McCarter,* 209 U.S. 349, 357 (1908).

Even assuming a substantial impairment, Section 1 nevertheless survives constitutional scrutiny because it is "reasonable and necessary to serve an important public purpose" based on "reasonable conditions" and "of a character appropriate" to the purpose of the legislation. *Kittery Retail Ventures*, 2004 ME 65, ¶ 38, 856 A.2d 1183. Courts generally defer to the judgment of the Legislature regarding necessity and reasonableness, unless the self-interest of the State is implicated as a contracting party. *See id.*; *see also U.S. Tr. Co. of N.Y. v. New Jersey*, 431 U.S. 1, 26 (1977). As the trial court astutely observed, Section 1 does not implicate this exception to the rule because the change it brings about does not result in a financial benefit to the State: "NECEC argues that the State of Maine will allegedly benefit from the completion of the Project . . . It

cannot also argue that the State's self-interest is implicated by a law which will block the Project." (A. 58.)

Avangrid broadly asserts other courts have found that "voiding a lease on state lands unconstitutionally impairs the contract rights of leaseholders—here, NECEC LLC," (Avangrid Blue Br. 47-48), but cites only one case in support of this assertion, *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494 (5th Cir. 2001). That case reflects its desperation. There, in the early 1800s, pursuant to a constitutional provision, Mississippi leased public lands to private parties for the use and benefit of public schools. *Id.* at 498. The leases guaranteed continuation of the lease price forever but, in 1890, the Mississippi Constitution was amended to prohibit the donation of state lands to private parties. *Id.* at 498-99. Much later, in the 1990s, the State and various school boards alleged that the lease provision that guaranteed continuation of the lease price forever was unconstitutional under the 1890 amendment and that the leases were therefore voidable. *Id.* at 499. The *Lipscomb* court found that voiding the lease rates would not further a significant and legitimate purpose where the State's interest in holding the public lands in trust for public schools had already been accomplished, the leases provided a small but steady source of revenue, towns had built up around the leased lands thereby enlarging the tax base for property taxes to support the schools, and the change was not foreseeable. *Id.* at 511-14.

By contrast, here, the state's interest in having the public reserved lands held in trust for the benefit of Maine people has not been accomplished in any way by BPL's

lease with CMP for the Project. The Lease has only served to undermine the public interest in legislative oversight of public lands. Further, a modification to the laws governing the use of public lands for high-impact transmission lines was entirely foreseeable.

Finally, Section 1 itself does not terminate or otherwise impair the Lease, but instead requires only that Avangrid obtain legislative approval. *See Kittery Retail Ventures*, 2004 ME 65, ¶ 41, 856 A.2d 1183 ("Substantial impairment does not occur when a change in law does not affect the express terms of the contract or the obligations of the parties, but only affects the underlying subject matter of the contract."). This minimal requirement is undoubtedly reasonable and necessary and does not give rise to a substantial impairment of contract.

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In light of the foregoing, Avangrid and most of its supporters (not surprisingly) spend little of their time on Section 1. They collapse all six sections of the Initiative into a single claim of "vested rights" in the hope that their arguments about the provisions relating to high-impact transmission lines in sections 2-6 of the Initiative will somehow carry over into Section 1. Their overheated rhetoric relying on the argument that upholding the Initiative threatens the future of Maine and any hope of addressing climate change reveals the lack of foundation for their legal arguments, as does their belated attempt to introduce "severability"—a clear concession that Section 1's amendment of 12 M.R.S. § 1852(4) passes muster. *See* (HQUS Blue Br. 10, 14-16; IECG

Blue Br. 7, 27-28; Avangrid Blue Br. 41, n.23.)

Neither Avangrid nor any of the other Intervenors raised the severability issue below, however, and consequently they have waived the argument on report. *See Mehlhorn v. Derby,* 2006 ME 110, ¶ 11, 905 A.2d 290. Even if they had not waived severability—which they clearly did—they have not advanced any facts or arguments that could overcome the strong presumption in Maine law in favor of severability. *See* 1 M.R.S. § 71(8); *Opinion of the Justices,* 2004 ME 54, ¶ 23, 850 A.2d 1145.

Not only is Section 1 obviously severable, an argument that hardly merits discussion, but as we now show, Avangrid's vested rights claim also fails.

III. Application of Sections 2-6 of the Initiative Relating to High-Impact Transmission Lines Does Not Deprive Avangrid of "Vested Rights."

The centerpiece of Avangrid's argument is that it has a vested right to complete the Project under *Sahl.* (Avangrid Blue Br. 1.) *Sahl* held that vested rights arise by: (1) actual physical commencement of significant and visible construction; (2) undertaken in good faith with the intention to continue with the construction through to completion; and (3) construction commenced pursuant to validly issued permits. *See Sahl v. Town of York*, 2000 ME 180, ¶12, 760 A.2d 266. Rights cannot vest, however, while permits are under appeal. Nor can they vest when a developer proceeds to build knowing not only that its permits are under appeal, but also that a likely change in the law is pending that would bar its project. Avangrid's entire argument collapses because it assumes its own conclusion, *i.e.*, that it possesses vested rights.

A. Avangrid Did Not Vest Rights While Appeals of Its Permits Were Pending and Accepting Its Vested Rights Claim Would Impermissibly Undermine the State's Police Power.

Avangrid defines a "vested right" as "one that 'cannot be impaired or taken away without the person's consent.'" (Avangrid Blue Br. 17 (*quoting Vested Right*, Black's Law Dictionary (11th ed. 2019)). Avangrid and the Chamber then contradict their preferred definition by arguing that appeals can "divest" the permit holder of its rights (*i.e.* take them away without consent). (Avangrid Blue Br. 36; Chamber Blue Br. 8.) As the trial court found, and as Avangrid concedes, it "commenced construction while several of the permits required for the Project were subject to pending appeals by an administrative agency or court." (A. 48; Avangrid Blue Br. 13.) Although Avangrid's permits gave it a right to begin construction, it could not vest rights in the Project during the pendency of those appeals. *Conservation L. Found., Inc. v. State*, No. AP-98-45, 2002 WL 34947097, at *3 (Me. Super. Ct. Jan. 28, 2002). By proceeding with construction, Avangrid took a calculated risk that the law would remain unchanged even while the appeals were pending.

The appeals of Avangrid's environmental permits to the BEP have been pending since June 2020, months before Avangrid began clearing. *See* (A. 22-23.) The BEP "is not bound by the commissioner's findings of fact or conclusions of law but may adopt, modify or review findings of fact or conclusions of law." 38 M.R.S. § 341-D(4). The BEP is not a sideshow—it is now the decision-making body with respect to Avangrid's environmental permits. The Legislature has carefully structured the DEP to preserve a

key role for the BEP, a citizen board that "must be chosen to represent the broadest possible public interest and experience," *id.* § 341-C(2), in overseeing decisions made by the Commissioner. *See id.* §§ 341-A, 341-D(4). Allowing rights to vest while an appeal to the BEP is pending "would debase the statutory process" for administrative and judicial resolution of permit challenges, depriving challengers of any effective outlet for opposition. *Conservation L. Found.*, 2002 WL 34947097, at *3.

The Superior Court's conclusion that a developer cannot vest rights to complete construction during the pendency of litigation involving required permits accords with both the *Conservation Law Foundation* court's holding and the weight of authority from other jurisdictions. (A. 47-48); *see, e.g.*, *Powell v. Calvert Cnty.*, 795 A.2d 96, 101 (Md. 2002) (holding that "nothing can vest or even begin to vest" while appeals are pending); *Bowman v. City of York*, 482 N.W.2d 537, 546 (Neb. 1992) (holding that one who builds on appeal "take[s] the risk that it will have to tear down what it has built"); *Harding v. Bd. of Zoning Appeals of City of Morgantown*, 219 S.E.2d 324, 332 (W. Va. 1975) ("Appellants proceeded at their own peril in incurring expenditures in reliance on the challenged permit."); *Donadio v. Cunningham*, 277 A.2d 375, 382 (N.J. 1971) ("[N]o [vested] rights may be acquired when the acts relied upon are done prior to the end of the appeal period, so long as the rule exists that the state of legislation at the time of the decision of the case is controlling, even at the appellate level."); *see also 75-80 Props., LLC v. Rale, Inc.*, 236 A.3d 545, 571 (Md. 2020) ("[A] party that changes its position in reliance on a regulatory approval that is the subject of judicial review does so at its own

risk."); *Letendre v. Currituck Cnty.*, 817 S.E.2d 73, 106 (N.C. Ct. App. 2018) (holding that developer "took a calculated risk to proceed with construction while litigation challenging her project's approval was pending").

The decision of Maryland's highest court in *Powell*, which also involved a change in law while appeals were pending, is on all fours with this case. There, a county board granted a "special exception" to allow storage of excavation materials on the applicant's property. 795 A.2d at 98. While that decision was on appeal, the county amended its ordinance to prohibit special exceptions for the storage of such materials. *Id.* at 98-99. On remand on other grounds, the board applied the prior ordinance and again granted the special exception. *Id.* at 99. The challengers again appealed, and the case eventually made its way to the Maryland Court of Appeals, which rejected the applicant's claim of vested rights, holding that "[u]ntil *all necessary approvals*, including all final court approvals, are obtained, nothing can vest or even begin to vest." *Id.* at 101 (emphasis added). The court further held that, "[u]pon the case being remanded, the [subsequent] amendment to the law was in effect and should have been applied by the [county board]." *Id.* at 105.

Powell is thus directly contrary to Avangrid's proposition that a builder can "vest rights to construct a project in accordance with the law *as it existed at the time construction began*, regardless of pending appeals," (Avangrid Blue Br. 37), and Avangrid fails to distinguish it. Its argument that no "permit" had issued in that case ignores the reality that there is no meaningful difference between a zoning variance (what the Maryland

court called a "special exception") and a permit for purposes of a vested rights analysis. *See Powell*, 795 A.2d at 104 (equating a "valid permit" with a "valid special exception" for purposes of vested rights analysis). Both represent a governmental authorization for a particular land use activity. *Powell* makes clear that all such necessary governmental approvals have to be final in order for rights to vest.

In light of *Powell*, Avangrid's reliance on *Town of Sykesville v. West Shore Commcations, Inc.*, 677 A.2d 102 (Md. Ct. Spec. App. 1996), is particularly misplaced. *Sykesville* predates *Powell* and is from a lower court (Maryland's intermediate appellate court, as opposed to its highest court). *Sahl* also predates *Powell* and, even if it did not, *Sahl* did not purport to adopt the entirety of *Sykesville's* analysis. In sum, *Sykesville* simply cannot bear the weight Avangrid assigns it in the face of the rule enunciated in *Powell*, which has been followed in Maine, *see Conservation L. Found.*, 2002 WL 34947097, at *3, and by numerous courts around the country.

Avangrid further contends that "[f]reezing construction until all appeal periods have expired would cripple infrastructure development." (Avangrid Blue Br. 36.) It contends that because the federal appeals period is six years, no developer would risk undertaking a project if the period of uncertainty lasted that long. (Avangrid Blue Br. 36.) That is a classic strawman: Avangrid's state permits had to be and were appealed within 30 days, *see* 38 M.R.S. § 341-D(4), almost a year before issuance of all federal permits, which were likewise immediately challenged, *see* (A. 22-23.) And, contrary to the hyperventilation about how applying the ordinary rule that rights cannot vest during

an appeal would discourage development of infrastructure, numerous significant infrastructure projects have been permitted and built under this same regime, *e.g.*, CMP's Maine Power Reliability Program (construction and upgrade of 230 miles of transmission line from Rumford to Pownal and Windsor (Affidavit of Paul Franceschi ¶12); Bangor Hydro's Northeast Reliability Interconnect (85 mile transmission line from the Canadian border to Orrington); Maritimes and Northeast pipeline (over 200 miles of new pipeline from the Canadian border to Westbrook).

Moreover, Avangrid's lament is an undisguised policy argument. The Legislature can supplement, abrogate, or alter the vested rights doctrine as it sees fit. Indeed, it has previously done so. *See, e.g.*, 30-A M.R.S. § 3007(6). If the Legislature believes that the rule preventing vesting of rights during appeals poses an unreasonable threat to development, it can change the rule. Here, however, the people exercising the legislative power reserved to them under the Maine Constitution have made plain that Avangrid has no vested rights to complete the NECEC.

B. Avangrid's Knowledge of a Likely Change to the Law Precludes Its Claim of Vested Rights.

One of the trial court's few legal errors was its failure to appreciate the scope of the good faith element of a vested rights claim. The good faith element is not limited, as the trial court held, to where "construction was undertaken with the genuine intention to carry construction through to completion." (A. 43.) Rather, because of the fundamentally equitable nature of the vested rights doctrine, the good faith element

requires consideration of all the circumstances, including the developer's knowledge of pending appeals, potential changes in law, and the overall likelihood that the existing law will continue in effect. A developer cannot circumvent expiration of a permit merely by pouring a perfunctory foundation, but that is not the only way it might manifest a lack of good faith. Proceeding in the face of likely legal impediments—torpedoes be damned—is another, because it indicates the party believes itself to be above the law.

This Court's vested rights cases clearly establish that a developer's knowledge of opposition to its projects and potential changes in law are relevant. In *Fisherman's Wharf*, for instance, this Court held that the developer had failed to establish vested rights based partly on its "knowledge of the contents of the proposed ordinance and its retroactive provisions prior to acquiring title to the property in question." 541 A.2d at 164. And more recently, in *Kittery Retail Ventures*, this Court reiterated that, because vested rights is "an equitable remedy, [the developer's] knowledge of the situation must be taken into account." 2004 ME 65, ¶ 27, 856 A.2d 1183. Neither of these cases suggests that the good faith factor is limited to whether the developer intends to complete construction. Even *Sahl* does not support Avangrid's narrow view of good faith. Central to the *Sahl* court's good faith determination was the fact "that the Hugheses were unaware of the amended ordinance prior to its enactment." 2000 ME 180, ¶ 14, 760 A.2d 266.

Cases in other jurisdictions likewise hold that a developer's awareness of a pending or likely change in law is relevant to good faith. *See, e.g.*, *Friends of Yamhill Cnty.,*

Inc. v. Bd. of Comm'rs of Yamhill Cnty., 238 P.3d 1016, 1030 & n.8 (Or. Ct. App. 2010); *Hanchera v. Bd. of Adjustment*, 694 N.W.2d 641, 646 (Neb. 2005); *1350 Lake Shore Assocs. v. Mazur-Berg*, 791 N.E.2d 60, 74-75 (Ill. App. Ct. 2003); *AWL Power, Inc. v. City of Rochester*, 813 A.2d 517, 606, 608 (N.H. 2002); *Kauai Cnty. v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 778 & n.18 (Haw. 1982) (holding that developers' construction expenditures made prior to referendum vote "fell short of good faith as manifestations of a race of diligence to undermine the referendum process"); *City of Tucson v. Ariz. Mortuary*, 272 P. 923, 928-29 (Ariz. 1928). As the North Carolina Supreme Court has explained:

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

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

As its lone authority that good faith is limited to the intent to complete construction, Avangrid again cites *Sykesville*. (Avangrid Blue Br. 24.) And, once again, *Sykesville* is no longer good law for that proposition. The *Sykesville* court reaches this conclusion from the premise that Maryland has a "narrow version of zoning estoppel," 677 A.2d at 117, for which it cited a then-recent intermediate appellate court case, *Relay Improvement Association v. Sycamore Realty Co.*, 661 A.2d 182 (Md. Ct. App. 1995). However, Maryland's highest court subsequently rejected the intermediate court's view in *Relay* of zoning estoppel. *Sycamore Realty Co. v. Baltimore Cnty.*, 684 A.2d 1331, 1337

(Md. 1996). Avangrid's incessant reliance on *Sykesville* reveals the tenuousness of its position. The Superior Court did not abuse its discretion in relying instead on Maine precedent.

As this Court recognized in *Kittery Retail Ventures*, equity courts must consider *all the circumstances*, 2004 ME 65, ¶ 34, 856 A.2d 1183, including the likelihood that a legal challenge will succeed or that a proposed legal change will eventuate. Thus, Avangrid misunderstands the relevance of formal legal events such as the certification date. This is not a heckler's-veto-style rule that allows a single obstinate neighbor to endanger a project—a developer might reasonably and in good faith rely on existing law even if it knows about a petition to change the law, if the circumstances show that petition is futile or hopeless. But a builder does not act in good faith when, as here, it knows that a legal change is highly likely to go into effect which would bar its project and forges ahead regardless in the hope that a court will condone its machinations. *See Kauai Cnty.*, 653 P.2d at 778 n.18.

The circumstances of this case fully support the trial court's conclusion that Avangrid's "decision to forge ahead with construction . . . was a calculated risk." (A. 45.) The "fact that the 2020 initiative collected enough signatures to qualify for a statewide referendum put [Avangrid] on notice of the public's desire to effectuate a change in the law." (A. 45.) The current Initiative process began in September 2020, and signature gathering began at the end of October after the Secretary of State issued the petition. (A. 27-28.) Avangrid's polling on the proposed Initiative and its other

expenditures prior to submission of over 95,000 signatures in January, as well as its October 30 10-Q, reflect Avangrid's awareness of the proposed change to the law and its likelihood of passage. (A. 281, 284; Bolton Aff. ¶ 5; Ex. D to Bolton Aff. at 56.) The Secretary certified the signatures on February 22, 2021. *See* (A. 28.)

Thus, from the day it commenced clearing and construction until the day it filed this action, Avangrid knew that it was either certain or highly likely that it would not be able to lawfully complete the Project. Even if Avangrid was relying on the existing law continuing in effect—which seems doubtful—such reliance would have been plainly unreasonable and not in good faith.

Although, as demonstrated, above the "vested rights" theory has no application to the Lease, the litigation challenging it and Avangrid's knowledge of a likely change to BPL's leasing authority would similarly be fatal to any such claim. Avangrid has not commenced any clearing or construction on the public lots and does not have a final valid lease. Furthermore, it cites to no authority for its remarkable theory that it can obtain vested rights against the sovereign to use *public lands* by virtue of activity on nearby *private* lands. Such a holding would be an affront to the power of the State over its own lands. It can have no "vested rights" in the Lease under any theory.

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The law dealing with the effect of appeals and knowledge establishes that Avangrid has no vested rights subject to any kind of due process claim. Because it has no vested rights, it cannot rely on cases that apply to circumstances where vested rights

have been acquired or otherwise exist. *See, e.g.*, *Warren v. Waterville Urb. Renewal Auth.*, 235 A.2d 295, 304 (Me. 1967) (holding that because the Constitution expressly ordains the right to "just compensation," that right cannot be abridged through procedural rules). Avangrid has no due process claim here.

C. Avangrid Cannot Transform an Equitable Vested Rights Theory Derived From Municipal Law into a "Unique Species" of Due Process.

Although Avangrid never acquired vested rights to build the corridor because of the pendency of appeals and other challenges, as well as its knowledge of possible changes to the law, Avangrid's vested rights claim faces another insurmountable obstacle—there is no special "vested rights" category of due process analysis, as Avangrid claims. Specifically, Avangrid contends that "the vested rights doctrine is a unique species of due process claim that is more restrictive than generic due process claims because, instead of addressing prospective economic regulation, it protects settled property interests from retroactive impairment." (Avangrid Blue Br. 18.) It goes on to claim that this "unique species of due process claim" is not subject to rational basis review but rather is subject only to the three-part test set out in *Sahl*. (Avangrid Blue Br. 21-24.)

This novel theory is not supported by any legal authority. Under Maine's firmly established framework, "[i]f the Legislature intends a retroactive application, the statute must be so applied unless the Legislature is prohibited from regulating conduct in the intended manner, and such a limitation upon the Legislature's power can only arise

from the United States Constitution or the Maine Constitution." *L.V.I. Grp.*, 1997 ME 25, ¶ 9, 690 A.2d 960 (quotation marks omitted)(quoting *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056, 1060 n.5 (Me. 1986)). Further, "the retroactive aspects of economic legislation meet the requirements of the due process clause if enacted to further a legitimate legislative purpose by rational means." *Tompkins v. Wade & Searway Constr. Corp.*, 612 A.2d 874, 877 (Me. 1992). Thus, the Initiative must be upheld here if it passes rational basis scrutiny, and there is no doubt that it does—the trial court found as much, (A. 40), and Avangrid has not challenged that conclusion on appeal.

The notion that the state lacks power to divest an individual of a present property interest permeated nineteenth and early twentieth century law. *See, e.g.*, Nathan S. Chapman & Michael W. McConnell, *Due Process as Separation of Powers*, 121 Yale L.J. 1672, 1731-32 & n.266 (2012); *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. 275, 288-89 (1823) (citing *Fletcher v. Peck*, 10 U.S. (6 Cranch) 87, 139 (1810)). That notion, however, reflected the economic substantive due process concept that did not survive the 1930s. *See* James L. Kainen, *The Historical Framework for Reviving Constitutional Protection for Property and Contract Rights*, 79 Cornell L. Rev. 87, 103 (1993); *Ferguson v. Skrupa*, 372 U.S. 726, 730 (1963) (explaining that doctrine set forth in *Lochner v. City of New York*, 198 U.S. 45 (1905) and its progeny, that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely, "has long since been discarded").

Courts no longer apply heightened scrutiny to economic regulations under the Due Process Clause, instead recognizing that "all property is held in subordination to the police power." *Thomas v. Zoning Bd. of Appeals*, 381 A.2d 643, 647 (Me. 1978) (quotation marks omitted). As the trial court noted, "[t]he police power of the State to make laws within its territory is 'older than any written constitution. It is the power which the states have not surrendered to the nation, and which by the Tenth Amendment were expressly reserved to the states respectively or to the people.'" (A. 39 n.19 (quoting *York Harbor Vill. Corp. v. Libby,* 126 Me. 537, 540, 140 A. 382, 385 (1928))). Moreover, "[t]he exercise of the police power in such cases violates no constitutional guarantee against the impairment of vested rights or contracts." (A. 39 (quoting *Baxter v. Waterville Sewerage Dist.,* 146 Me. 211, 218, 79 A.2d 585, 589 (1951))). Thus, retroactive legislation "is not unlawful solely because it upsets otherwise settled expectations [or] impose[s] a new duty or liability based on past acts." *Usery v. Turner Elkhorn Mining Co.*, 428 U.S. 1, 16 (1976).

None of the cases that Avangrid cites support its argument that "vested rights" is a "unique species of due process claim" applicable to state statutes involving land use regulation. (Avangrid Blue Br. 18-19, 21); *cf. Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977) (holding that application of marital property distribution statute to marital property acquired prior to statute's adoption did not violate due process rights); *Sabasteanski v. Pagurko*, 232 A.2d 524, 525-26 (Me. 1967) (making no mention of due process but holding that defendants who received defective deed could not use a

retrospective curative statute to destroy plaintiff's lawfully acquired title to the same property); *Inhabitants of Otisfield v. Scribner*, 151 A. 670, 671 (Me. 1930) (making no mention of due process but holding that curative statute cannot be used to validate taxes that were unlawfully assessed in the first instance); *Adams v. Palmer*, 51 Me. 480, 495-96 (1863) (holding statute cannot render valid a prior release of dower which was voidable when it was executed, and which, before the passage of the statute, had been avoided); *Coffin v. Rich*, 45 Me. 507, 511-13 (1858) (making no mention of due process but holding that the right of a creditor against any individual stockholder does not vest until he recovers his judgment against the stockholder and the repeal of a statute providing for liability of stockholders is not unconstitutional); *accord Heber v. Lucerne-in-Maine Vill. Corp.*, 2000 ME 137, ¶¶ 10-12, 755 A.2d 1064 (making no mention of due process but holding that a statute cannot be retroactively applied to eliminate a personal property damage cause of action that accrued prior to the statute's enactment).

None of this Court's cases discussing vested rights and statutes involves land use regulation. In cases where this Court has addressed vested rights and land use regulation, it has been in the context of municipal action. *See, e.g.*, *Peterson v. Town of Rangeley*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930 ("The circumstances when rights vest . . . occur when a *municipality* applies a *new ordinance* to an existing permit." (emphasis added)). Those cases treat vested rights as a matter equity, not constitutional due process. Avangrid has cited no authority for its theory that there is, like dark matter, a heretofore undiscovered "legal" vested rights doctrine that protects land use rights from

legislation. *Sahl* never states that the vested rights doctrine is constitutional rather than equitable, nor does it identify the source of the doctrine. The law in other jurisdictions, however, universally recognizes that the municipal vested rights doctrine comes in only one flavor—equitable. *See, e.g.*, *Summit Media LLC v. City of Los Angeles*, 150 Cal. Rptr. 3d 574, 589 (Ct. App. 2012) ("Where land use is at issue, there is no meaningful distinction between an estoppel claim and a vested right claim."); *Friends of Yamhill Cnty.*,, 238 P.3d at 1023 ("[A] common law vested right is one established by the application of court-made equitable principles rather than standards adopted by a legislative body." (quotation marks omitted)); *Cohn Communities, Inc. v. Clayton Cnty.*, 359 S.E.2d 887, 889 (Ga. 1987) (noting that Georgia's vested rights doctrine "is derived from the principle of equitable estoppel").

Nor can Avangrid avoid this constitutional framework merely by expending large sums, try as it might. The amount of retroactive economic adjustment permitted by the Due Process Clause is not capped. A statute may impose significant civil liability or expense based on conduct or reliance occurring prior to their enactment. For example, courts have consistently ruled that "retroactive application of CERCLA does not violate due process" even though it imposes such liability on conduct occurring prior to the statute's enactment and without any notice to the liable party. *United States v. Ne. Pharm. & Chem. Co.*, 810 F.2d 726, 733 (8th Cir. 1986); *see also id.* at 734 (collecting cases).

If Avangrid's vested rights claim is actually a due process claim, the Initiative is subject to and easily satisfies rational basis review. If Avangrid is asserting an equitable

vested rights claim, it is not cognizable against the people exercising the legislative power. Either way, Avangrid cannot succeed on this claim.

D. Avangrid's Vested Rights Claim Fails Under *Sahl* in Any Case.

Even if the vested rights doctrine did apply in this context, Avangrid cannot establish that it has acquired vested rights to complete construction of the NECEC in Segment 1. It cannot meet two of the three prongs of *Sahl*: *first*, unlike in *Sahl*, where the developer had final, unappealable permits, all of Avangrid's permits are under appeal, as is its lease; *second*, Avangrid has not commenced construction in Segment 1.

Section 5 of the Initiative, codified as 35-A M.R.S. § 3132(6-D), prohibits the construction of high-impact electric transmission lines in the Upper Kennebec Region. Segment 1 of the Project, which includes the public lands, is located within the Upper Kennebec Region. Although it has cleared vegetation in Segment 1, Avangrid has done no clearing on the public lots and has not erected any towers or even dug holes or placed pads for towers anywhere in Segment 1. Clearing without more does not qualify as construction within the meaning of *Sahl*. This Court has not expressly defined "construction" or "construct" within the vested rights analysis, but the language of *Sahl* requiring "significant and visible construction" signals a meaning in accord with the plain meaning of the term. *See Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quoting *Sykesville*, 677 A.2d at 104); *Construction*, Black's Law Dictionary (11th ed. 2019); *Construct*, Merriam-Webster, https://www.merriam-webster.com/dictionary/construct (last visited March 29, 2022). In other words, a developer must do more than merely clear

or otherwise prepare the land. *See, e.g., Belvidere Twp. v. Heinze*, 615 N.W.2d 250, 254 (Mich. Ct. App. 2000) (holding that "activities [that] were merely preliminary in nature and did not change the substantial character of the land" were insufficient to create vested rights in a nonconforming use); *Clackamas Cnty. v. Holmes*, 508 P.2d 190, 193 (Or. 1973) ("[T]he acts of the landowner should rise beyond mere contemplated use or preparation, such as leveling of land, boring test holes, or preliminary negotiations with contractors or architects"). Since Avangrid has not commenced "significant and visible construction" anywhere in Segment 1, or even begun clearing on the public lots, it has not acquired a "vested right" to complete the Project there. *See Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266.

Perhaps most important, Avangrid's lack of rights in one portion of the project could result in its inability to ever connect and operate the project. Approval for one portion of a project does not vest rights in other portions requiring separate approvals. *See, e.g.*, *Larrivee v. Timmons*, 549 A.2d 744, 746 (Me. 1988); *Leighton v. Town of Waterboro*, No. CIV. A. AP-02-068, 2005 WL 2727094, at *2 (Me. Super. Ct. May 4, 2005) ("Subdivision approval for the park as a whole is not a substitute for a valid building permit issued by a separate municipal authority under separate standards in a separate proceeding."). Thus, even if Avangrid had acquired rights by virtue of its construction

in other Segments—which it did not—it did not and could not as a result acquire vested rights in the public lots or Segment 1.[3]

IV. Sections 2-6 Do Not Violate Separation of Powers.

Avangrid's separation of powers argument is nothing more than old wine in new bottles—it simply recycles the arguments it made in connection with the first initiative. As demonstrated above, Section 1 has nothing in common with the previous initiative and in no way encroaches on the separation of powers. Sections 2-6 also plainly differ in every material respect. The Superior Court did not abuse its discretion in declining to enjoin application of "the new law to the perceived threat which inspired it." (A. 53.) As the Superior Court recognized, whether the law might affect Avangrid has nothing to do with whether the law is an appropriate exercise of legislative power. (A. 52-53.)

Avangrid essentially concedes that the Initiative is general legislation, but argues that that is irrelevant to its separation of powers claims. (Avangrid Blue Br. at 47.) This concession should end the "formal" separation of powers analysis. *See Bossie*, 488 A.2d 480 ("[S]eparation of powers issues must be dealt with in a formal rather than functional manner."). An analysis of sections 2-5, furthermore, confirms that they do not intrude on either of the other branches.

[3] *Cf. Material Serv. Corp. v. Town of Fitzhugh*, 2015 OK CIV APP 13, ¶ 29, 343 P.3d 624, 631 (challenge to permit for activity on leased land precludes vested rights in lease). *See also Omaha Fish & Wildlife Club, Inc. v. Community Refuse Disposal, Inc.*, 329 N.W.2d 335, 339 (Neb. 1983) (developer did not act in good faith when it knew of a pending lawsuit challenging its proposed use of the land, because such a suit indicated that "a substantial question existed" as to the project's legality).

A. The Initiative Does Not Usurp Executive Authority.

Sections 2-4 apply to high-impact transmission lines and require legislative approval of any such transmission line in addition to PUC approval (with a 2/3 approval requirement for use of public lands); Section 5 bans high-impact transmission lines in the Upper Kennebec Region; and Section 6 makes these provisions retroactive to the date the proposed legislation was submitted to the Secretary of State.

The overlay of additional legislative approval is commonplace and does not implicate the PUC's CPCN in any way. The ability to zone a particular area (like the Upper Kennebec Region) to allow or forbid the construction and operation of a particular land use as Section 5 does is a quintessentially legislative function. *See, e.g.,* 12 M.R.S. §§ 685-A, 685-C (zoning the unorganized territories); P.L. 2009, ch. 655 (favoring certain infrastructure corridors designated "statutory corridors"—such as the Searsport-Loring pipeline corridor); 35-A M.R.S. §§ 3453-3453-A (Legislatively favoring certain expedited permitting areas for wind energy development). Indeed, control over the use and development of Maine's forests is a legislative prerogative and function going back to statehood. *See Uliano v. Bd. of Envtl. Prot.*, 2009 ME 89, ¶ 31, 977 A.2d 400.

Nor does anything about Section 5's Upper Kennebec prohibition require PUC action. Avangrid claims that because the ban appears in Title 35-A, the PUC must act to revoke the CPCN. But the DEP has already suspended NECEC's environmental permits based on this prohibition, without disturbing the CPCN. Not only did NECEC

and Avangrid fail to sue the DEP here, but NECEC also did not appeal the suspension decision, which has become final and is subject to principles of *res judicata*. *See Town of Mount Vernon v. Landherr,* 2018 ME 105, ¶ 15, 190 A.3d 249. NECEC's failure to appeal there precludes it from arguing here that only the PUC may take action regarding the prohibition—the DEP has asserted jurisdiction to enforce the prohibition and NECEC did not object to the DEP's assertion of jurisdiction or its enforcement. *See Quirion v. Pub. Utils. Comm'n*, 684 A.2d 1294, 1296 (Me. 1996) (applying *res judicata* where an entity fails to appeal from an agency decision asserting jurisdiction).

In fact, none of the Initiative provisions addresses the CPCN, let alone vacates it or requires the PUC to take specific action—they are retroactive to September 16, 2020, well after the PUC issued the CPCN, indeed well after the Court's decision in *Avangrid*. Sections 2-4 merely add a requirement—to obtain legislative approval in addition to regulatory approvals—without disturbing any of the technical findings of the PUC with regard to the CPCN (Section 4). Adding components to "the regulation of public utilities is a function of the Legislature" and the delegation of power to the PUC "was not in 1913, and never has been, all-inclusive but limited as the statutes have from time to time provided." *Poland Tel. Co. v. Pine Tree Tel. & Tel. Co.*, 218 A.2d 487, 489 (Me. 1966).

The CPCN, moreover, has always been only one of the numerous, ongoing approvals that Avangrid needs to build and operate the NECEC. The CPCN itself contemplates obtaining all other necessary "State approvals" and reporting its progress

thereon. Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation at 78, 99 (Me. P.U.C. May 3, 2019). The Initiative imposes just this type of additional "state approval" for a high-impact transmission line, an approach that has been used before without any sort of separation of powers concern. *See*, *e.g.*, 38 M.R.S. § 1466(3) ("No high-level radioactive waste disposal or storage facility covered by this section may be constructed or operated in the State, *unless the Legislature has expressly approved the construction or operation of that facility. This approval does not replace any other license or permit that may be required by law or rule*." (emphasis added)).[4]

In contravention of *Bossie*, Avangrid swaps the "formal" separation of powers analysis for a functional "as applied" approach, relying on two cases, neither of which supports its position. (Avangrid Blue Br. 44-47.) It relies primarily on *Grubb v. S.D. Warren Co.*, which did not recognize an affirmative separation of powers claim but instead discussed separation of powers principles in the context of applying the doctrine of *res judicata* as a defense. 2003 ME 139, ¶ 7, 837 A.2d 117 ("Because the hearing officer based his decision upon the conclusion that principles of *res judicata* do not apply in this case, we limit our analysis to that conclusion."). Indeed, *Grubb* was cited in *Avangrid* for that preclusion principle: the legislature cannot do what a court itself could not, *i.e.*,

[4] Avangrid sensibly abandons on appeal a claim it made below, that legislative approval violates the presentment clause. This and similar statutes are implemented through routine presentment to the Governor, like all legislative acts having the force of law. Indeed, as demonstrated in *Black v. Cutko*, BPL has sought and obtained legislative approval for every significant transmission line project crossing public lands—other than NECEC—since adoption of the amendment and those approvals have all been presented to the Governor for signature. *See, e.g.,* Resolves 2007, ch. 91.

"disturb a decision rendered in a previous action, as to the parties to that action." *Avangrid Networks, Inc.,* 2020 ME 109, ¶ 35, 237 A.3d 882.

Avangrid also relies on *In re Dunleavy*, which it describes with the misleading parenthetical "successful as-applied separation of powers challenge to statute." (Avangrid Blue Br. 45 n.26.). This throwaway citation, however, is too thin a reed on which to discard the formal rather than functional approach, as that case rested on the plain language of the statute—the very thing that Avangrid asks the court to discard here in favor of a functional approach. 2003 ME 124, ¶ 19, 838 A.2d 338.

B. The Initiative Does Not Usurp Judicial Authority.

Avangrid argues that retroactive application of the high-impact transmission line provisions would impermissibly encroach on the judicial branch because the Law Court affirmed the PUC's issuance of the 2019 CPCN in *NextEra Energy Resources, LLC v. Maine Public Utilities Commission*, 2020 ME 34, 227 A.3d 1117. (Avangrid Blue Br. 42.) Avangrid's argument invents an impact of the statute its words do not support.

The legislature cannot enact "a statute that says, 'in Smith v. Jones, Smith wins.'" *See Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018). But short of that "the legislative power is the power to make law, and [the legislature] can make laws that apply retroactively to pending [proceedings], even when it effectively ensures that one side wins." *Id.*

None of the cases cited by Avangrid are to the contrary. In *Lewis v. Webb*, the Law Court held that a legislative resolve granting specific individuals the right to appeal a probate decree five years after the original appeal period had expired would nullify the

original decree. 3 Me. 326, 335-37 (1825). That is, *Lewis* involved an attempt to reopen a specific final judgment that was otherwise settled and preclusive, which was impermissible. *See id.* In *L.V.I. Group*, by contrast, this Court held that a retroactive law could (indeed must) apply even though the same corporation had prevailed in a related matter under the previous version of the statute. 1997 ME 25, ¶¶ 13, 16, 690 A.2d 960. Such retroactive application of the law is permissible so long as the Legislature did not "vacate a final judgment and grant a new trial" or "overturn final judicial decisions" that were "decisive declaration[s] of the rights between the parties." *See id.* ¶ 11 n.4.

Avangrid mistakes the scope of *NextEra*, claiming that it was some sort of final adjudication that gave it vested rights to build the NECEC, regardless of future changes in the law. (Avangrid Blue Br. 43.) But that is not what this Court held in *NextEra*. Rather, it addressed only whether the PUC committed legal or factual error when it issued the CPCN in 2019. *See NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117. Here, retroactive application of Section 4 of the Initiative would not overturn or reopen that final judgment. In fact, Sections 4 and 5 of the Initiative are only retroactive to September 16, 2020—well after the *NextEra* decision issued in March 2020. The Legislature may always "give specific orders by duly enacted legislation in an area where [it] has previously delegated managerial authority." *Biodiversity Assocs.*, 357 F.3d at 1162. And "[t]he regulation of public utilities lies with the Legislature and not with the Executive or Judiciary." *Auburn Water Dist. v. Pub. Utils. Comm'n*, 156 Me. 222, 225, 163 A.2d 743, 744 (1960); *accord Mech. Falls Water Co. v. Pub. Utils. Comm'n*, 381 A.2d 1080,

1090 (Me. 1977); *Poland Tel. Co.*, 218 A.2d at 489. Applying Section 4 of the Initiative retroactively to September 16, 2020, does not usurp judicial power exercised in *Nextera* in violation of the Maine Constitution.

V. Avangrid has Not Demonstrated the Other Factors for an Injunction.

Avangrid also cannot meet the other preliminary injunction factors: (1) that it will suffer irreparable injury absent an injunction; (2) that such injury outweighs the harm an injunction would cause others; and (3) that the public interest would not be adversely affected by the issuance of an injunction. *All. for Retired Ams.,* 2020 ME 123, ¶ 11, 240 A.3d 45.

First, Avangrid argues that a prospective constitutional violation constitutes *per se* irreparable harm, yet it cites to no Maine case that adopts such a universal presumption. (Avangrid Blue Br. 50-51.) Contrary to Avangrid's argument, courts look at the type of constitutional right allegedly infringed, generally limiting the presumption of irreparable harm to circumstances implicating free speech or invasion of privacy. *See, e.g.*, *Ne. Fla. Chapter of the Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla.,* 896 F.2d 1283, 1285 (11th Cir. 1990) ("The only area of constitutional jurisprudence where we have said that an on-going violation constitutes irreparable injury is the area of first amendment and right of privacy jurisprudence."); *accord. Pub. Serv. Co. of N.H. v. Town of West Newbury,* 835 F.2d 380, 382 (1st Cir. 1987).

Likewise, the trial court correctly held that in addition to a likely constitutional violation, there must be an imminent threat of civil or criminal liability. (A. 59-61.)

Avangrid stretches to align itself with *Condon v. Andino, Inc.,* 961 F. Supp. 323 (D. Me. 1997), asserting that it must comply with the Initiative or risk fines. (Avangrid Blue Br. 51.) The problem with this argument is that the Initiative does not require any enforcement action, let alone any imminent civil or criminal liability, and none of the named defendants has taken any steps to enforce the provisions of the statute (and indeed may never do so).

Avangrid also asserts as irreparable harm that the Initiative threatens cancellation of the Project. (Avangrid Blue Br. 52.) The possibility that delayed construction will ultimately result in cancellation of the project is entirely speculative, and a "[s]peculative injury does not constitute a showing of irreparable harm." *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop.*, 839 F. Supp. 68, 75 (D. Me. 1993). Indeed, the trial court did not find any record evidence to support Avangrid's "specter of undue delay." (A. 62.); *see also* (A. 62-63) (discussing Avangrid's own Motion that asked the trial court to "assume" a two year delay for purposes of determining irreparable harm and Avangrid's failure to explain why a delay would cancel the project as opposed to resulting in revised contractual deadlines). Additionally, nothing prevents Avangrid from seeking legislative approval and a reroute.

Second, Avangrid has failed to establish that its alleged irreparable harm outweighs any harm that granting the injunction would cause to other parties. In addition to the risk of environmental harm that will occur if the Project is allowed to go forward, (Publicover Aff. ¶¶ 12-18; N. Bennett Aff. ¶¶ 13-16), the sanctity of citizen-initiated

legislation would be seriously undermined, which would create a constitutional harm to the voters whose rights require that "[b]efore legislation may be declared in violation of the Constitution, that fact must be established to such a degree as to leave no room for reasonable doubt." *League of Women Voters,* 683 A.2d at 771-72.

Third, despite the people overwhelmingly voting in support of the Initiative, Avangrid arrogantly asserts that it is in the public's interest to enjoin the Initiative and allow the Project to go forward, even though it may never be operational and may result in substantial environmental harm with no corresponding environmental benefit. The public interest undoubtedly favors enforcing the public's own expressed interest and upholding the sanctity and presumed constitutionality of citizen-initiated legislation.

CONCLUSION

For the foregoing reasons, the report should be discharged or, alternatively, the trail court's denial of the motion for preliminary injunction upheld.

Dated: 03/30/2022

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CERTIFICATE OF SERVICE

I, James T. Kilbreth, hereby certify that pursuant to agreement of the parties, a copy of this Brief of Intervenors-Appellees, Thomas B. Saviello, Christine M. Geisser, Wendy A. Huish, Jonathan T. Hull, Theresa E. York, Robert C. Yorks and the Natural Resources Council of Maine, was served via email only upon counsel at the addresses set forth below on March 30, 2022:

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