STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-416

NECEC TRANSMISSION LLC, et al.

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Defendant-Appellees

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

REPLY BRIEF OF APPELLANT

THE MAINE STATE CHAMBER OF COMMERCE

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INTRODUCTION

The Maine State Chamber of Commerce ("Chamber") respectfully submits this Reply to the Appellees' briefs and several of the amicus briefs. Before sharpening the focus on the Business Court's error, the Chamber seeks to emphasize also that this Initiative is an illegitimate collateral attack on two decisions of this Court and the Certificate of Public Convenience and Necessity ("CPCN") of the Maine Public Utilities Commission ("PUC"). This cornerstone principle of finality underlies the constitutional separation of powers, permeates multiple legal and equitable doctrines (*see* Chamber Blue Brief 8-13) and, in this case, like the settled law of vested rights, precludes retroactive application of the challenged Initiative.

To be clear, if the Initiative had been enacted before the Law Court's affirmance of the CPCN, vested rights alone would preclude the Initiative's retroactive application to the NECEC project ("Project"). But the Law Court's affirmance of the CPCN, before the Initiative had even been drafted or suggested, also precludes retroactivity. That is the holding of the other Law Court decision also now being collaterally attacked, *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882. Together, the settled law of vested rights and the law prohibiting collateral attack doubly preclude retroactivity.

I. THE INITIATIVE IS AN IMPERMISSIBLE COLLATERAL ATTACK

As outlined in the Chamber's opening Brief (Chamber Blue Brief 8-13), the fundamental legal principle that precludes retroactive application of the Initiative here is the unimpeachable validity of final executive and judicial decisions. It is a core principle of our jurisprudence that unsuccessful parties may not later attack judgments or administrative rulings collaterally. An attack is "collateral," and therefore impermissible, when it is made in different judicial or administrative proceedings. It exacerbates the impropriety of an attempted collateral attack when it comes from a different branch of government in violation of the separation of powers.

The Restatement defines a "collateral attack" generally as "one that is made through some other procedural medium than motion for new trial, appeal, post judgment motion, or independent suit in equity to set aside the judgment, all of which are classified as 'direct attack.'" RESTATEMENT (SECOND) OF JUDGMENTS § 80 reporter's notes cmt. a (AM. LAW INST. 1982).

Here, the PUC issued its CPCN after extensive hearings in which the non-governmental parties now resisting this Appeal had every opportunity to participate. On direct appeal by NextEra, a party here, this Court affirmed the CPCN. *NextEra Energy Res., LLC v. Me. PUC*, 2020 ME 34, ¶ 1, 227 A.3d 1117. Recently, Calpine and Vistra were allowed over objection to file a brief as Amici. They are also fossil fuel interests opposed to losing market share to clean hydro power after the NECEC

Project is completed. With immaterial differences in detail or adopted names, the same group of businesses and individuals that lost in the PUC and on direct appeal in this Court then backed the first failed initiative attempt and lost again in this Court in *Avangrid Networks, Inc. v. Sec'y of State*, *supra*. The same parties have also directly or indirectly participated vigorously in the Maine Department of Environmental Protection ("DEP") and Land Use Planning Commission ("LUPC") and have brought appeals and filed applications for stays, and, so far, except for the Business Court Order in this case, they have been unsuccessful.

The Business Court, however, decided that settled legal principles and rules of finality and retroactivity must yield to the intransigence of Project opponents, even when they target the CPCN by making new law and declaring it to be applicable retroactively to this Project. The opposite is true. Final orders and lawful construction preclude retroactive collateral attacks.

It is also notable that multiple statements of procedural history by the Appellees and their Amici omit the times the DEP, the Board of Environmental Protection ("BEP"), and the Superior Court denied various applications for stays for the lack of likelihood of success on the merits. (A. 22-23, 91.) Those unsuccessful stay applications are significant in this Court's assessment of the propriety of commencing construction under all the circumstances, but they also resonate in consideration of this collateral attack on both the CPCN itself and this Court's affirmance of the CPCN. In other words, every denial of every stay application

further justified the judgment of the permit holder to proceed, and every denial of every stay application also further reinforces the illegitimacy of any retroactive application of this Initiative to collaterally attack the CPCN and its affirmance.

Illustrations from cases rejecting collateral attacks are perhaps more instructive. In *Chicot Cty. Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940), the Bank was holding some bonds which had been canceled pursuant to a New Deal statute designed to refinance insolvent entities such as the Drainage District. *Id.* at 372-373. The Bank's bonds had been canceled in the Bankruptcy Court Order approving the Drainage District's refinancing plan[1]. *Id.* at 373. The Bank did not appeal the order.

The authorizing statute was later ruled unconstitutional by the Supreme Court in a different case. *Id.* After the Supreme Court's determination that the underlying statutory authority for the cancellation of the bonds had been unconstitutional, the Bank sought to enforce the bonds asserting that, because the statute had never been constitutional, the court therefore had never had any authority to cancel the bonds or otherwise approve the Drainage District's plan. *Id.* at 373-374. The District asserted res judicata as an affirmative defense to the Bank's collection action. *Id.* at 373. The Supreme Court ruled that even the unconstitutionality of the underlying authority for the earlier adjudication did not support a collateral attack in the later collection action

[1] The case was decided under the old Bankruptcy Act and the "Bankruptcy Court" was the U.S. District Court, in Bankruptcy using the old referee system. The judgment, therefore, was the District Court's.

because jurisdiction issues and constitutionality issues were as much subject to res judicata as any other issue in any other case. *Id.* 376-378.

A few decades later, in *Durfee v. Duke*, 375 U.S. 106 (1963), the Nebraska Supreme Court, in a de novo review, had ruled that certain disputed real estate was in Nebraska and the property of the Nebraska party. *Id.* at 108. Both the state line and the property boundary were the Missouri River. *Id.* The Nebraska court decided that the river had changed course by avulsion and not accretion and therefore did not alter the property boundary or the state line. *Id.* The property line and the state line thus remained where they had been before the avulsion altered the water's flow. *Id.* The defeated litigant then commenced a new action in federal court in Missouri claiming that, because the land was not in fact in Nebraska, the Nebraska Court could never have had territorial jurisdiction to decide its title. *Id.* at 108-109. The Supreme Court ruled that the Nebraska Court's determination of its jurisdiction was a final judgment not vulnerable to collateral attack, even for lack of territorial jurisdiction. *Id.* at 116.

In *N. Berwick v. Jones*, 534 A.2d 667 (Me. 1987), in an opinion by Chief Justice McKusick, this Court ruled that an administrative adjudication by the planning board, that there was a water course on the property in question, precluded a subsequent collateral attack in a Superior Court enforcement proceeding. *Id.* at 668. The authority of the Planning Board to issue the disputed order concerning the subject real estate depended upon whether there was a water course on the property. *Id.* This Court held that the finding of the water course could have been challenged only on direct appeal.

Id. at 671. Instead of appealing, the landowner had instead tried to comply with the order, failed, and subsequently was cited for violation of the order. *Id.* at 669. The water course finding in the original order (even if arguably jurisdictional) was not open to collateral attack to defend the notice of violation in Superior Court.

Here, the original failed initiative targeting the NECEC Project was a candid collateral attack on the CPCN. Operationally, and in purpose and effect, this Initiative is no more legitimate than the first failed effort that this Court has rejected. The primary or only purpose of the current Initiative is also to nullify the CPCN and its affirmance by this Court. In form, the Initiative consists of six numbered sections. Four of the six sections are about transmission lines, indeed about this specific transmission line. This Initiative vitiates and nullifies the CPCN in a different way but as thoroughly as the first initiative would have. Therefore, retroactivity is impossible here.

This Court's Decision in *Avangrid Networks*, squarely and soundly based on this Court's precedent in *Lewis v. Webb,* 3 Me. 326 (1825), grounded in the Maine Constitution, and particularly the constitutional provisions concerning the separation of powers, reinforces the basic principle of the finality of decisions, subject *only* to *direct* review on appeal. Such appeals in nearly every instance are decided under the law in effect at the time the decisions were made because the appeals are for error. It cannot be error to follow the law in place at the time. It cannot possibly be error not to follow some future law not yet then in existence, or not yet then even proposed.

Every section of the Initiative, including the cynical declaration of retroactivity, is about the transmission line that was authorized by the PUC and affirmed twice in this Court. The illegitimate effort to create the illusion of severability is discussed below[2]. This second collateral attack on this Court's affirmance of the CPCN, and this new collateral attack on this Court's ruling that the first effort at referendum was unconstitutional, is a multi-level second collateral attack and not a magical squaring of the circle, as the promoters of the Initiative imagine.

The collateral attack issue is particularly important to the Chamber and to business generally. It is also important to the entirety of Maine's population, present and future. It is difficult enough to attract investment now. It will be exponentially more difficult if the Law Court announces a wide-open rule allowing retroactive permit revocation by referendum, regardless of the rulings of this Court, and regardless of substantial investment undertaken in good faith, to meet contract deadlines, on authority of permits issued and not stayed. The permitting process for essential utility infrastructure is difficult enough as it is. Rational risk analysts will be extremely reluctant to spend millions just to get permits that, even after judicial affirmance, can be collaterally attacked by the same interests that unsuccessfully opposed their issuance or, worse, by gadflies who did not participate but come out of

[2] On the important question of severability, the opponents of the Project invoke waiver. Severability is not the private claim or defense of any party to waive. But, nevertheless, it is not an element of Plaintiff's case, and it is proper to refute erroneous arguments of severability, whenever they appear, to assist the Court to understand fully the unitary character of the statute as it relates to the impossibility of its retroactive applicability. *See Elliot v. Commonwealth,* 593 S.E.2d 263, 268 (Va. 2004).

nowhere after the fact. Unlike litigants, circulators of initiative petitions are not required to show standing. That is an added reason for rejecting collateral attack by referendum.

Whether this Initiative will properly prevent a different project that might be proposed hereafter is an issue for another day. What is clear now is that this Initiative had no purpose other than to defeat *this* Project. That purpose cannot be accomplished without overruling two opinions of the Law Court and nullifying the CPCN of the PUC. Use of the referendum by parties who have lost multiple proceedings to undo adverse rulings is an abandonment of the law, not its exercise.

II. ANY RETROACTIVE APPLICATION WOULD VIOLATE THIS COURT'S PRIOR DECISIONS BY NULLIFYING THE CPCN

There is no interpretation of the Initiative that does not destroy the CPCN. If the denial of injunctive relief is affirmed, and if this Initiative is permitted to have any retroactive effect at all, the inevitable, not merely foreseeable, consequence will be that the CPCN is nullified and of no further effect. More importantly, what the PUC has ruled to be in the public interest as necessary utility infrastructure will instead be outlawed, at the behest of parties who were defeated in the PUC and this Court. That result, if allowed, will violate separation of powers because it will be brought about by a purportedly legislative act *first* proposed by those parties *after* they had lost *because* they had lost. For this to occur, the Court must overrule or ignore its own decisions in *Avangrid*, *supra*, and *NextEra*, *supra*. Retroactive application of the terms of this

Initiative will violate every principle of finality known to our law, including especially those prohibiting collateral attack on final judgments, especially collateral attacks by a different branch of the government.

To affirm the Business Court Order, this Court must also overrule *Lewis v. Webb*. To do that, the Court will also need to violate every principle of stare decisis.

III. THE BUSINESS COURT ORDER CANNOT BE RECONCILED WITH SETTLED MAINE LAW OF RETROACTIVITY AND VESTED RIGHTS

At the heart of the Business Court's Order and the Brief of the State Appellees is an erroneous analysis of the proper application and administration of the vested rights doctrine. The approach adopted there would vitiate or abolish the vested rights limitation on retroactivity, notwithstanding its constitutional grounding, to permit unlimited retroactivity. In short, if the Business Court and the State Appellees are correct, there is no longer any vested rights limitation at all on retroactive state laws and no meaningful vested rights limitation for municipal ordinances.

A few words about some settled general rules of constitutional law appear to be in order because so many of the opposing briefs have rather conspicuously misdirected and misapplied them. To begin, this is not a case challenging the general authority of the Legislature to enact laws prospectively and generally governing the construction of utility infrastructure or the management of public lands. Therefore, norms or "tests" that are employed by courts to adjudicate the general constitutional boundaries of the Legislature's broad authority, including such terms as "police

power" or "rational basis" or "presumption of constitutionality," have absolutely nothing to do with whether a legislative enactment may be applied retroactively.

Second, by contrast, it is well settled that retroactive application of legislation is a narrow exception to the general rule of prospectivity. The well-settled and well-developed law of vested rights is a crucial limitation on the narrow retroactivity exception to protect, as it says, rights that are vested.

Of course, *Lochner v. New York*, 198 U.S. 45 (1905) was wrong and, more importantly, fundamentally anti-democratic and a constitutionally illegitimate distortion of the separation of powers between the judicial and legislative branches. But a due-process-based limitation on retroactivity is not a *Lochner*-like limitation on general legislative authority under Federal Article I or Maine Article IV Part Third, any more than the Bill of Rights, or the 14th Amendment, or Maine's Article I Declaration of Rights offend the presumption of constitutionality. It is tragically wrong economic, energy, and environmental policy for the Legislature *prospectively* to prohibit the construction of essential utility infrastructure or to burden it with serial approvals that may be politically unattainable. Such legislation, however, may well survive in a prospective and general sense because it is presumed to be constitutional, and it is arguably rational in somebody's mind. That such legislation may survive judicial review after the overruling of *Lochner* does change the settled law of vested rights as a crucial limitation on the *retroactive* application of *any* legislation. Retroactivity needs to be adjudicated in a way that accords with the reality that it is a

disfavored exception to the general principle of prospectivity. *See Op. of the Justices*, 370 A.2d 654, 668 (Me. 1977) ("In general, retroactivity in legislation is disfavored ….")

Where there are vested rights, retroactivity is impossible. The Appellees and the Business Court seem to think that where retroactivity has been declared, vested rights are impossible, or where political intransigence is observable, no rights may vest. Those misconceptions must be squarely rejected by this Court in this case.

Returning to the specifics of the vested rights here, all the construction that has been done was undoubtedly sufficiently substantial, both physically and economically, to vest the rights to complete the Project. It is neither trifling nor pretextual.

NECEC Transmission LLC's vested rights to the Project may not now be disturbed by retroactive legislation because the construction and its expenditures were undertaken, pursuant to legally valid permits, in good faith, to meet a pressing contractual deadline. Those factors establish the vested rights as a matter of law and no further analysis or speculation about risk management can defeat them.

To restate the ruling of the Business Court and the arguments of the State Appellees, no person may ever acquire any vested rights under any permit if there remains either a possibility of a different outcome on direct appellate review of a permit, or a possibility that a handful of disgruntled citizens will secure enough signatures to cause a referendum election at which they might prevail, or not. This is not the law. Neither of those contingencies precludes vesting because neither prohibits the lawful construction that accomplishes the vesting. And it should be

unnecessary to say but, to be clear, the *vested* rights are the *rights* conferred by the permit, not a blanket *immunity* from any generally applicable future policy change. Right, Privileges, Immunities, and Liberties are not redundant synonyms for naming one thing, they are non-identical legal concepts. *See* Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 Yale L.J. 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 Yale L.J. 710 (1917).

The risk that any of these permits will be disturbed on direct appellate review under the law pursuant to which they were issued is small. As noted above, it is significant that multiple efforts to stay the permits pursuant to which the construction has been done were denied for a lack of likelihood of success on the merits.

It is particularly disingenuous to suggest that there is any real risk of a different outcome in the BEP because its review of the Commissioner's Order is explicitly not deferential. The Board is entitled to undertake a different weighting of the plusses and the minuses of the Project under the applicable environmental laws. Not a syllable of the applicable environmental laws has been altered or affected by the Initiative. It is impossible to imagine how the Board would come to a different outcome attempting to "apply" this Initiative retroactively while the pages of environmental statutes and regulations that control the BEP decision sit untouched by the Initiative. The only risk taken was that the Board, reviewing the record, would conclude that the Commissioner's judgment was wrong.

It is a reasonable business judgment that it is worth the small risk of an adverse outcome on direct appeal to avoid breaching a contract and have it terminated while waiting idly for an almost inevitable affirmance of the permits. The business risk of a permit being reversed on appeal is a risk that can be assessed and managed from the outset by the permit holder. Therefore, it is not unfair to conclude that, when a permit is manifestly unlawful when issued, no rights can vest under that permit. Those cases are rare because our agencies get and follow good legal advice. Conversely, there is no basis in law or logic to conflate that conservative business judgment with a totally different risk that the intransigent and historically futile opposition of commercial competitors and NIMBYs will carry the day in a referendum that is not yet certain even to be on the ballot. No holder of legally valid permits, even if they are on direct appeal, is obligated to predict or speculate about a successful referendum, promoted, and financed by the parties who have been defeated in every administrative proceeding. Because of the well-known settled law of vested rights there is no such risk as a matter of law. It is therefore not bad faith to begin construction based on manifestly lawful permits simply because it is possible that some opponent might eventually change the law. This Court should not now retroactively change the law of retroactivity. But if it does, there will hereafter be no objective basis on which such risk can be assessed or managed.

The Business Court has inverted the analysis and determined that the vested rights doctrine does not exist because the risk it precludes was assumed by the act of

accepting the exceptionally small *different* risk of a reversal on direct appeal. To restate that position, there is a vested rights doctrine, but no rights ever vest if there is any possibility of a referendum engineered by the people who lost in the administrative proceedings from which the permit was granted. That is not the correct statement of the vested rights doctrine. For a fuller discussion, *See* Amicus Brief of Professor Bam.

Very little needs to be said about the idea that vested rights is only a peculiarity of municipal planning board and building permit law and not deeply embedded in the constitution and statutes of Maine. There are many cases discussing the retroactivity or not of many laws that do not involve municipal regulation of land use or zoning or construction. *See, e.g., Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557 (Me. 1981); *Sabasteanski v. Pagurko*, 232 A.2d 524 (Me. 1967); *Miller v. Fallon*, 134 Me. 145, 183 A. 416 (1936); *Bowman v. Geyer*, 127 Me. 351, 143 A. 272 (1928); *Berry v. Clary*, 77 Me. 482, 1 A. 360 (1885); *Coffin v. Rich*, 45 Me. 507 (1858); *Read v. Frankfort Bank*, 23 Me. 318 (1843); *Oriental Bank v. Freeze*, 18 Me. 109 (1841); *Lewis v. Webb*, 3 Me. 326 (1825).

In three often-cited cases before this Court that did involve municipal regulation of construction activity, two involved situations in which no construction had begun and therefore there were no vested rights under Maine law. *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, 856 A.2d 1183; *Portland v. Fisherman's Wharf Assoc. II*, 541 A.2d 160 (Me. 1988). One, *Sahl v. Town of York,* 2000 ME 180, 760 A.2d 266, squarely holds that good faith construction vests the rights to continue under the law as it stood at the time. Nothing about any of those three decisions

suggests that the analysis is any different if complex state environmental and utility regulations stand in the place of the municipal planning and zoning ordinances. In short, the Business Court made fundamental legal errors essentially eviscerating the vested rights doctrine by imposing impossible conditions for its invocation. Once that error is corrected, Appellants' likelihood of success approaches inevitable, and denial of injunctive relief is not merely an abuse of discretion but a compound legal error.

Opponents of the Project place weight upon the decision the Court of Appeals of Maryland in *Powell v. Calvert Cnty.*, 795 A.2d 96 (Md. 2002). *See* (State Red Br. 25-26; Saviello Red Br. 31-33.) The suggestion seems to be that that case overruled or undermines *Town of Sykesville v. W. Shore Commc'ns, Inc.,* 677 A.2d 102 (Md. Ct. Spec. App. 1996) favorably cited by this Court in *Sahl* so that *Sahl* is no longer precedent in Maine.

The fundamental point is that neither *Sykesville* nor *Powell* is primary authority in Maine. In explaining its decision in *Sahl*, the Law Court could have cited *Sykesville,* or a treatise, or nothing. The Maryland Court has absolutely no judicial authority to overrule or undermine a Maine Law Court holding. Only the Law Court itself can reconsider its eminently wise decision in *Sahl*, and its acceptance in that case of the persuasive explication of the vested rights doctrine in *Sykesville*, but it should not do so because there are obvious differences between *Powell* and *Sykesville*, and between *Powell* and *Sahl* and this case.

The landowner in *Powell* claimed to have acquired a vested right to continue to store materials on land in a zone where the storage of such materials was allowed only with a special exception until an ordinance change later prohibited the storage categorically. *Powell*, 795 A.2d at 98. A special exception is not necessarily the same thing as a permit but, since it is a form of permission, the questions are what did it allow, when was it effective, and did that landowner acquire vested rights.

The storage of sand and gravel is not construction. Moreover, during that case, the special exception pursuant to which the landowner claimed to be operating was vacated; the Maryland Supreme Court permitted a new law to be applied only *after* the special exception was vacated and proceedings began anew. *Id.* at 98-100. No matter how one twists and turns it, *Powell* does not hold that the expenditure of hundreds of millions of dollars in good faith construction, pursuant to a pressing contractual deadline, on the authority of several validly issued permits that have never been vacated or even stayed, indeed after the denial of multiple requests for stays, is insufficient to establish vested rights. It simply holds that a new law can be applied, after a special exception has been vacated, to require sand and gravel to be moved to a lawful storage location.

Whatever overbroad statements the Maryland Supreme Court might have made in that opinion should not be embraced by this Court. The relevant precedent in Maine is *Sahl*. In its decision in *Sahl*, the Court did mention the *Sykesville* decision with approval. *Powell* does not overrule *Sykesville* by any fair reading of the two

decisions but, even if it did, that can have no effect on *Sahl* until *this* Court decides to reconsider *Sahl*. If *Powell* really does stand for what the Appellees and their Amici say it does, which any fair reading of *Powell* belies, it is a bad decision in a case with no binding authority on this Court. The Court should ignore *Powell* and decide this case on the issues that matter under the law that matters, and that is Maine law, especially *Sahl*.

Only a brief word is necessary about the strained argument by the Saviello parties (Saviello Red Br. 44-45), essentially contending that vested rights can never be acquired in a complex longitudinal project of this sort without building something everywhere. This is a single transmission line from point to point. Hundreds of millions of dollars or tens of millions of dollars or even millions of dollars of construction at any point along the line would be sufficient to confer vested rights so long as the vested rights doctrine is not vitiated by some extraordinary innovation as the Business Court suggests. The fact that approval of a mobile home park does not automatically confer building permits for each of the mobile homes and that later applications for the building permits may properly be decided upon the law in effect at the time of the applications is irrelevant here. (*See* Saviello Brief 45 (citing *Leighton v. Town of Waterboro*, No. CIV. A. AP-02-068, 2005 WL 2727094, at *2 (Me. Super. Ct. May 4, 2005).) The lease and the permits in hand at the time, all authorized all the work that was done on a single, unitary, undivided transmission line project. It is not

enough to defeat vested rights and retroactively apply this Initiative that all the authorized work could not physically be done everywhere at the same time.

IV. SEVERABILITY CANNOT RESCUE SOME PROVISIONS OF THE INITIATIVE BECAUSE THE INITIATIVE HAD A SINGLE OBJECTIVE

There is no analysis of the Initiative that supports severability as the key to retroactively outlawing the NECEC project. There is no part of the Initiative that is not central to its avowed purpose and, whether the point is to justify an otherwise impossible collateral attack or to negate or nullify the otherwise applicable rule of vested rights, there is no severability trick that will save the day. There is a single binary choice before the Court. Vital utility infrastructure will be built, or it will not be built. The rulings of this Court, the PUC, and several other agencies will be collaterally nullified, or not. The transactional logic and the litigation logic preclude any partial retroactivity. Because any retroactive effect of part of this Initiative will nullify the CPCN in direct violation of two recent decisions from this Court and ignore or overrule the settled law of vested rights, nothing in this Initiative can have any retroactive effect.

The Court should therefore reject the arguments of the Appellees Bureau of Parks and Land, et al. ("State") and Intervenor-Appellees Thomas B. Saviello, et al. ("Saviello") that, if certain sections of the Initiative are unenforceable, those invalid sections should be severed to allow the remaining section(s) of the Initiative to survive. (*See* State Red Br. 51-53; Saviello Red Br. 28-29.) When read in the context of

the Initiative's purpose and objective, the entire Initiative relates only to the NECEC transmission line. Linguistically and logically, no Section in the Initiative has any independence from any other. When every part that unlawfully vitiates the CPCN is nullified, all that remains are the section numbers and the punctuation marks.

The general severability rule is that statutory provisions are severable even in the absence a severability clause. *See* 1 M.R.S. § 71(8); *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973). This Court has explained, however, that this rule of construction applies only if "the rest of the statute 'can be given effect' without the invalid provision, and the invalid provision is not such an integral part of the statute that the Legislature would only have enacted the statute as a whole." *Opinion of the Justices*, 2004 ME 54, ¶ 23, 850 A.2d 1145 (quoting *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986)). Further, this Court has stated that it "considers the legislative purpose or purposes of the statute under consideration when examining questions of severability. *Id.*; *see Barr v. Am. Ass'n of Political Consultants*, ___US___, 140 S. Ct. 2335, 2350 (2020).

Thus, this Court has created a two-part test to determine whether the remaining sections of a bill after its other section(s) have been severed would survive:

1. Whether the invalid provisions are so integral to the initiated bill that the entire act would have to be struck down, and

2. Whether, individually, the remaining provisions can function and be given effect absent the invalid provisions.

Op. of the Justices, 2004 ME 54, ¶¶ 23-24, 850 A.2d 1145.

Here, the Attorney General's Office prepared a written description of the Initiative's legislative "Intent and Content," which was publicly disseminated to voters by the Secretary of State's Office leading up to the November 2021 election:

> This citizen-initiated bill would make a number of changes and additions to state laws governing the lease of public reserved lands and the construction of electric transmission lines. These statutory changes are intended to ban construction of a certain type of electric transmission line in a particular region of Franklin and Somerset Counties and require legislative approval of certain leases of public reserved land and electric transmission line projects throughout Maine.

Secretary of State, Maine Citizen's Guide to the Referendum Election 6 (Nov. 2, 2021), https://www.maine.gov/sos/cec/elec/upcoming/pdf/11-21citizensguide.pdf. The "Intent and Content" description also includes statements that "[a] 'YES' vote is to enact the initiated bill in its entirety" and that "[a] 'NO' vote opposes the initiated bill in its entirety." *Id.* at 7.

The key language there is that the Initiative sought to "ban construction of a certain type of electric transmission line," as that language encompasses the changes made to each of the six sections of the Initiative. Although Section 1 of the initiated bill and Section 6 (as applied to Sections 4 and 5) have separate retroactivity clauses, each of the changes has the same intent, to "ban construction of a certain type of electric transmission line." Section 1, which pertains to the "Lease of public reserved land for utilities and rights-of-way," specifically amends the language of the then-existing statutory language only to add the words "lines and":

> **4. Lease of public reserved land for utilities and rights-of-way.** The bureau may lease the right, for a term not exceeding 25 years, to:
>
> A. Set and maintain or use poles, electric power transmission and telecommunication transmission lines and facilities, roads, bridges and landing strips;
>
> …

Id. (underlined emphasis in original to indicate proposed change).

Unlike the initiative in *Op. of the Justices*, *supra*, the Initiative at issue here was presented to voters without a severability clause. The simple and dispositive point is only this: As the proponents' ads relentlessly stated, the point of the Initiative was to stop the NECEC corridor, *i.e., the transmission line authorized by the CPCN*. There is no form of severance that gives life to the CPCN while excising something else.

In short, severability cannot rescue this collateral attack on this Project because it is not possible to preserve the CPCN while retroactively applying other sections. This is not difficult. To be severable, the remaining, i.e., valid, provision(s), if any, in any document must be able to be fully implemented separately from the invalid provisions. Here, severing the invalid provision(s) concerning the CPCN will leave nothing. No part survives severance when the invalid part(s) are severed. There are no valid parts because every part is intended to outlaw what the CPCN, affirmed by this Court, authorizes. There is no clever way to slice and dice the Initiative, i.e., sever parts of it, to let part of it completely annul the CPCN, usurp the ordinary course of direct appellate review, and divest vested rights or preclude the vesting of rights, or

repeal the constitutionally based vested rights limitation as a matter of due process on retroactive application of statutes.

V. THE FAMILIAR FOUR FACTORS

Before closing, it is appropriate to consider the relative roles of the four factors governing preliminary injunctions. It is not seriously to be doubted that, by far, the most important of the four is the likelihood of success on the merits. *See Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections Practices*, 2015 ME 103, ¶ 28, 121 A.3d 792. Without a likelihood of success on the merits, there is nothing to be said about the other three factors that would merit an injunction. Conversely, where the likelihood of success on the merits is especially strong, there is little that can be said about the other three factors that would justify denying preliminary injunction.

Here, the Court is faced with a binary choice. If the Initiative is retroactively applicable to the NECEC Project, there is no need to discuss the other factors. For purposes of addressing the other three factors therefore, the essential premise is that success on the merits is sufficiently likely to warrant analysis of the other factors.

Injunctive relief is not some alien anomaly to be grudgingly used once a generation if at all. It is the only judicial remedy available to protect the vital vested rights of a Plaintiff in a circumstance in which the Plaintiff is very likely or highly probable to prevail on the merits.

The opponents have been obstructing and slow-walking one procedure after another to try to delay this Project to death and they have nearly succeeded. There

are important contractual deadlines at work here. This is not a grocery store where the only question is whether a delay pending trial will deprive the developer of a few profitable months. Here, there are pressing contractual deadlines and a victory after a trial, months from now, will be a hollow victory indeed because the contract will have been terminated and hundreds of millions of dollars in sunk costs will wrongly have been lost.

There is no remedy at law. There is no basis for supposing that there is any cause of action, or form of action, or civil action, whatever its name, pursuant to which the hundreds of millions of dollars in sunk costs, or the future benefits of the contractual bargain, can be recovered from any party if they are lost because of an erroneous failure to enjoin an unenforceable law when it was necessary to do so.

Finally, the Court has no basis for denying crucial injunctive relief on some basis characterized as the public interest. No court of justice has any authority to determine that refusing to enjoin unconstitutional and unlawful retroactivity is in the public interest. Indeed, the opposite is true: Protecting legally acquired vested rights and the separation of powers under the Maine Constitution is always in the public interest. Nor is it *per se* in the public interest because this Initiative was enacted by a majority of the voters who are not any better positioned to determine the public interest than the PUC, or the DEP, or the LUPC, or the Army Corps of Engineers, or the United States Department of Energy, or the many deeply skilled and experienced

Amici who have provided the Court with the best basis for ascertaining where the public's interest falls when faced with the greatest climate crisis in our history.

In any event, a judicial characterization of the public interest is seldom or never a sufficient basis to deny urgently needed injunctive relief to a meritorious plaintiff. It is often recited as a factor. One looks in vain for a case in which an injunction was denied even though the plaintiff was highly likely or even strongly probable to prevail on the merits, had no conceivable, even arguable, alternative remedy, and would undeniably lose hundreds of millions in sunk costs and hundreds of millions in lost opportunity costs only because the Court's litigation process would delay the ultimately favorable decision, or worse moot the case. That is exactly why preliminary injunction was invented. This is the case for which it was designed. Unless the Court decides that there is not a likelihood of success on the merits, denial of a preliminary injunction is manifestly erroneous.

CONCLUSION

The Business Court's Order must be reversed and remanded with instructions to enter a preliminary injunction for the reasons advanced by the Appellants and the Amici supporting the Appellants. Conversely, the arguments of the Appellees and the Amici supporting them are wrong as a matter of law. The Initiative comes too late to be applied retroactively to the NECEC Project.

Respectfully submitted,

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Date

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CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, hereby certify that on this 20th day of April, 2022, by agreement of the parties, I served all parties through their counsel as set forth below via electronic mail:

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