STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

NECEC TRANSMISSION, LLC, ET AL.,

Plaintiffs – Appellants

v.

BUREAU OF PARKS AND LANDS, ET AL.,

Defendants – Appellees

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

REPLY BRIEF OF APPELLANTS-INTERVENORS CIANBRO CORPORATION AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 104

Philip M. Coffin III, Bar No. 2462
Jeffrey D. Russell, Bar No. 4506
Cyrus E. Cheslak, Bar No. 6171

LAMBERT COFFIN
P.O. Box 15215
Portland, Maine 04112-5215
(207) 874-4000
pcoffin@lambertcoffin.com
jrussell@lambertcoffin.com
ccheslak@lambertcoffin.com

Counsel for Appellant-Intervenor Cianbro Corporation

Benjamin K. Grant, Bar No. 4328
Robert M. Cheverie, *Visiting Attorney*

MCTEAGUE HIGBEE
P.O. Box 5000
Topsham, Maine 04086
(207) 725-5581
bgrant@mcteaguehigbee.com

ROBERT M. CHEVERIE & ASSOCIATES, P.C.
333 East River Drive, Suite 101
Hartford, Connecticut
(860) 290-9610
RCheverie@cheverielaw.com

Counsel for Appellant-Intervenor International Brotherhood of Electrical Workers Local 104

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ARGUMENT

A. Appellees' characterization of Appellants' vested rights argument is deceptive.

1. Appellants are not seeking to preclude judicial review of permits.

Appellees' presentation of the vested rights issues raised here is misleading and inaccurate. To be clear, Appellants do not seek to immunize the permit process from judicial review, or to preclude any kind of appropriate agency review of permits under existing law, but rather to prevent the retroactive application of new legal requirements in a manner that would vitiate existing property rights. Appellants simply seek to enforce this Court's recognized limitations on the power to apply retroactively a legal framework after a permit has already been granted and substantial action has been taken pursuant to it – limitations that are inherently consistent with, and demanded by, any notion of good faith and due process. Appellees attempt to narrow existing Maine law to escape the force of the vested rights claim in this case, but their arguments are deeply flawed.

Recognizing the significance of this Court's reliance on the vested rights analysis set forth in *Town of Sykesville v. West Shore Comm's, Inc.*, 677 A.2d 102 (Md. Ct. Spec. App. 1996), Appellees argue that *Powell v. Calvert County*, 795 A.2d 96 (Md. 2002), effectively supersedes *Town of Sykesville.* That argument

is misguided; *Town of Sykesville* remains good law and provides useful guidance here. The *Powell* decision's holding was narrowly focused on the principle that a new law should be applied on remand if a permit is vacated on appeal. *Id.* at 98-101. The case simply does not in any way decree that valid vested rights are destroyed or prevented by the existence of an appeal or challenge. In contrast to its reliance on *Town of Sykesville* in *Sahl v. Town of York*, 2000 ME 180, 760 A.2d 266, this Court has never relied on *Powell,* nor has it narrowed *Sahl* or the vested rights doctrine in the ways that Appellees suggest. Moreover, *Powell* has never been cited outside of the Fourth Circuit for any purpose until the Business Court referenced it in this action, representing the sole exception nearly two decades after it was first published. Further, the Business Court's broad reading of *Powell* is contrary to subsequent Maryland precedent. *Sherwood Hill Improvement Assoc. v. TTV Props. III, LLC*, 2018 WL 566566, at *8, 2018 Md. App. LEXIS 75 (Md. Ct. Spec. App. Jan. 26, 2018). *Powell*'s narrow reach is far less than Appellees present.

Other cases Appellees rely on are fatally flawed or stand for different propositions than the one NECEC LLC expounds here. Some involve permits or variances that were unlawful under then-existing law in the first instance. *See, e.g., Ebzery v. City of Sheridan*, 982 P.2d 1251, 1257 (Wyo. 1999) ("Generally, a permit issued under a mistake of fact confers no vested right or privilege and

may be revoked at any time."); *Hussey v. Barrington*, 604 A.2d 82, 86 (1992) (Plaintiffs did not acquire vested rights from the relevant zoning board appeal because the "hearing was conducted without jurisdiction."); *State ex rel. Cities Serv. Oil Co. v. Bd. of Appeals*, 124 N.W.2d 809 (1963) (noting that expenditures did not prevent reversal of permit on appeal under then-existing statute). Save for *Donadio,* discussed *infra,* none involve retroactive changes to the laws pursuant to which the underlying permits were issued. *See Bowman v. York*, 240 Neb. 201, 482 N.W.2d 537, 547 (1992) (no vested rights to improper zoning where defendants knew correctness of then-existing zoning was in question); *Columbus Bd. of Zoning Appeals v. Wetherald*, 605 N.E.2d 208, 210 (Ind. Ct. App. 1992) (building pursuant to permits deemed unlawful under then-existing law). Others also support the unremarkable proposition that construction does not moot a permit appeals process, *see, e.g., Harding v. Bd. of Zoning Appeals of City of Montgomery*, 219 S.E.2d 324, 332 (W. Va. 1975), or are inapposite because they sound in equitable estoppel, *see, e.g., 75-80 Props., L.L.C. v. Rale, Inc*., 236 A.3d 545, 571 (Md. 2020).

These cases stand for propositions that are not at issue here. Unlike most of the cases relied on by Appellees, NECEC LLC is not seeking to use the vested rights doctrine to prevent judicial review of specific permits. The retroactive application of new legal requirements is central to this case, and sets this case

apart from those above in a crucial way. Maine law clearly recognizes that rights vest against subsequent changes in law. *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").

NECEC LLC did not merely change its position in reliance on approval of a permit that could be subject to judicial review; it instead relied on the applicable and controlling statutory law and administrative processes that governed issuance of Project permits and thus NECEC LLC's planning and construction of the Corridor. NECEC LLC and those building the Corridor, including Cianbro and IBEW Local 104, could assess and mitigate the risk that a permit might be reversed; there is no similar ability to manage the risk of wholesale, retroactive changes in legislation. The latter is what happened here; the Initiative renders the permits illegal altogether through targeted retroactive application. It is this risk that the vested rights doctrine is designed to preclude. Further, the record is replete with evidence that NECEC LLC and its partners engaged in substantial construction in good faith with eye toward completion. It is inaccurate to suggest that NECEC LLC gambled and an appeal of a permit went the wrong way. Rather, the house changed the game after the cards had been dealt and the hands had been revealed.

The Initiative is a retroactive change of law that deprives NECEC LLC of its property rights under targeted and inappropriate circumstances. Appellees' strawman should be recognized and called out: NECEC LLC is not seeking to immunize permits from judicial review; rather, it is seeking to protect existing property rights that were attained through the established and appropriate administrative channels, from changes to the law that existed when the permits were sought, issued, and after construction began. That property interest is entirely consistent with the philosophical underpinnings of the vested rights doctrine under Maine law. *Peterson*, 1998 ME 192, ¶ 12, n.3, 715 A.2d 930 (noting that vested rights occur when a governmental agency applies a new legal standard to an existing permit).

2. A permit need not be unappealable for rights to vest.

The Business Court erred when it ruled that the mere potential for an appeal is sufficient to vitiate vested rights. A.46-50. For the reasons set forth in NECEC LLC's reply brief, the vested rights claim asserted in this case is legal/constitutional, not equitable, and therefore the vesting of NECEC LLC's rights is independent of whether any potential challenges to the project existed or might exist. Even if the issue were to be analyzed from an equitable perspective, Maine courts have long considered the relevant period to relate to the issuance – or even the probable issuance – of a permit, not its final

disposition after the exhaustion of years of legal wrangling. *Thomas v. Zoning Bd. of Appeals of the City of Bangor*, 381 A.2d 643, 647 (Me. 1978) (noting that rights equitably vest when there is a "substantial good faith change made in reliance" on then-existing law or "on the probability of the issuance of a permit approval") (emphasis added); *Sahl*, 2000 ME 180, ¶¶ 12-13, 760 A.2d 266 (noting circumstances when vesting does not occur, which do not include any appeals period).

NECEC LLC's rights vested when it received the relevant permits and it initiated construction of the T-Line, which began on January 18, 2021 with corridor clearing and continued with the start of Cianbro's work on February 2, 2021. The fact that an appeal of those permits could have been or was taken is insufficient to divest NECEC LLC of its rights to continue this project under existing law given the substantial construction undertaken in good faith reliance on the issued permits.

The Business Court's reliance on *Donadio v. Cunningham,* 277 A.2d 375 (N.J. 1971), to support its far-reaching conclusion that a potential appeal precludes any vesting is misplaced. This is particularly true as the Business Court here concluded that, unlike the developer in *Donadio*, "there can be no doubt that . . . NECEC [LLC] has proceed in good faith." A.43. Whereas the developer in *Donadio* sprang into action "very shortly after" the permit decision

in an overt attempt to "bootstrap" its rights to a markedly smaller, simpler, and less developed project while the appeals process was pending as part of an "unseemly race," *id.,* NECEC LLC and its partners initiated and undertook construction on the Corridor in good faith and as part of a long-established plan. As made clear by the affidavit in support of Cianbro's memorandum, projects on this scale and of this complexity are scheduled months or years in advance. A.255-57 (Dickinson Aff. ¶¶ 9-16); Franceschi Aff. ¶ 32. The disparity in the nature and needs of projects as disparate as the NECEC Corridor project and the McDonalds' drive-thru in *Donadio* hardly requires explication. Suffice it to say that there is no evidence that NECEC LLC undertook any "unseemly race," and indeed was credited by the Business Court with undertaking the project in good faith. A.31, 43. *Donadio* does not provide the guidance Appellees contend it does because the conduct there was plainly in bad faith, a fact that is demonstrably absent here, particularly in light of the approval of permits through the established administrative procedures and processes that governed the project

Appellees also rely heavily on one Superior Court case, *Conservation Law Found. v. State*, No. P-98-45, 2002 WL 34947097, 2002 Me. Super. LEXIS 15, to support the notion that the mere potential of an appeal precludes the vesting of rights. Not only is this case not binding on this Court, it is not persuasive

because it addresses a different scenario altogether – namely, an attempt to use vested rights to preclude an appeal. *Conservation Law Foundation* involved merely the construction of a dock, not a massive clean energy project that has been years in the making, and involved an attempt to preclude an appeal of a permit, which is not at issue in the instant matter. In that case, there was no suggestion that the underlying statutes allowing for the issuance of permits could be amended retroactively in the middle of construction. *Id.* *8. Indeed, the court observed that "it is plain that there is no retroactive, inequitable application of the law to the [implicated] property." *Id.* *10. But that is precisely what has happened under the Initiative here.

Appellees' presentation of the vested rights doctrine from other jurisdictions fares no better. Despite the superficial appeal of several quotations about "vested rights," a deeper inspection reveals that several of the cases the State and some Appellee-Intervenors rely on are utterly inapposite. State Br. 23. In *Big John's Billiards, Inc.,* for example, the court addressed whether newly passed anti-smoking legislation with carve-outs for cigar bars violated the takings clause and constituted "special legislation" that granted "special or exclusive privileges" for those businesses. 852 N.W.2d 727, 741 (Neb. 2014). The quotation the State cites to as authoritative in determining whether a right can vest despite a potential appeal actually refers to that court's

rejection of *Big John's Billiards'* argument that it had a "vested right" to "operate a premises that allowed smoking." *Id.* Besides not being about legally/constitutionally acquired vested rights, *Big John's Billiards* cites to and relies on *United States Cold Storage, Inc. v. City of La Vista*, where the court rejected out of hand an industrial storage facility's argument it had a "vested right" to a favorable pre-annexation tax rate. 831 N.W.2d 23, 33-34 (Neb. 2013). These cases are meaningless here, as they dealt with mere prospective economic expectations.

Antoon v. Cleveland Clinic Found., 71 N.E.3d 974, 982-83 (Ohio 2016), another case relied on by Appellees, is similarly inapposite. In that case, the court considered whether a statute of limitations for medical malpractice claims deprived a person of a "vested" right. *Id.* In rejecting the argument that the filing of a claim within the statutory period gives rise to a "vested right" to resurrect that claim after dismissing it and allowing the statute to run, the court used the terms "vested rights," "vested claims" and "vested cause of action" interchangeably, confirming that it was never a case about a legally acquired vested rights in property, but rather the interplay of potential civil actions and statutes of repose. *Id.* at 981. Again, besides the glimmer of a catchy quote, this case is a mirage that provides no guidance in this context.

At base, requiring a party to wait for exhaustion of all appeals periods, which here would extend years after the permit is issued, fatally undermines the underlying purpose of the vested rights doctrine. Imposing such a rule would render such projects far less attractive and much more expensive, and thus all the more elusive for a state, such as Maine, in dire need of infrastructure investment. It would be fundamentally unworkable for large infrastructure projects to sit on ice and wait for all permits to be final and non-appealable, and for any proposed changes of law to be defeated, prior to beginning construction. *See* Franceschi Aff. ¶¶ 32-37. While Appellees rely on inapposite foreign cases like *Big John's Billiards* to support the impracticable notion that a right must be "fixed, settled, absolute, and not contingent upon anything" in order to vest, 852 N.W.2d at 741, NECEC LLC's partners such as Cianbro have to deal with the real world and its harsh truths. These include the fact that requiring absolutely final and non-appealable permits would delay, if not completely stall, investment in major infrastructure projects including those badly needed to fight climate change.

Although the thrust of the vested rights remains whether substantial construction was conducted pursuant to a valid permit with good faith toward completion, the enormity of work and expense that must be undertaken before that construction can be commenced cannot be understated. For context,

NECEC LLC spent upwards of five years planning the Corridor. A.80. Cianbro began pursuing work on the project in 2018 and was selected as the contractor in 2020, at which time it began coordinating assets, equipment, subcontractors, fuel labor, and directing the acquisition of specialized equipment for the project. Franceschi Aff. ¶¶ 15-16, 21. These efforts, like all large projects, are made with a good faith reliance on validly issued permits and existing law, and necessarily limited Cianbro's ability to look for other projects, which, as noted above, can take years to materialize. *Id.* ¶ 30. Planning and building projects of this magnitude is a herculean effort that begins long before ground is broken. Complex construction projects cannot be turned off and on like a light switch; injecting the degree of uncertainty into the industry that the Initiative does will deter the development of big projects, whether for green energy, new port and shipping space, transportation projects, construction of new schools or hospitals, or any other large-scale, multi-faceted project.

Killing this project would have the immediate consequence of undermining the region's greenhouse gas emission reduction goals, setting back decarbonization and electrification efforts, and preventing the elimination of 3.6 million metric tons of carbon emissions (the equivalent of removing 700,000 cars from the road). Brief of Amici NSTAR, et al. at 5, 25-27; Weiner Br. 9, 14; Anderson Br. 17-19. The long-term effects of the Initiative would

compound the logistical, permitting, financing, and economic challenges that NECEC LLC encountered, meaning that other projects will face similar industry onslaughts, with opponents now armed with another tool to protect their market share. A.255-57 (Dickinson Aff. ¶¶ 9-16); Franceschi Aff. ¶¶ 32-37. Upholding the Initiative would make future projects, including clean energy projects, more difficult to achieve, and by extension, would undermine Maine and New England's efforts to render the grid greener, cleaner, and more resilient.

For good reason, Maine law does not support and has never supported the drastic requirement of exhaustion of all obstacles for rights to vest. To the contrary, Maine courts have consistently held that vesting begins on the front-end of the permit process, and is not vitiated by the mere pendency of an appeals period or a potential challenge. *Sahl*, 2000 ME 180, ¶¶ 12-13, 760 A.2d 266; *Peterson*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930; *Thomas*, 381 A.2d at 647. The Business Court erred in warping this timeline.

B. NECEC LLC and its construction partners made actual, substantial, and visible progress toward completion.

Although the Business Court erred in concluding that the vested rights doctrine was inapplicable and that NECEC LLC's rights did not vest, it was correct when it concluded that substantial construction had commenced on the

T-Line. A.46. Under established Maine law, a party secures its legally acquired vested rights when it engages in physical construction pursuant to a validly issued permit and with a bona fide intention to continue the project to completion. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (citing *Town of Sykesville*, 677 A.2d at 104); *see also AWL Power v. City of Rochester*, 813 A.2d 517, 521-22 (N.H. 2002) (defining actual construction as having undertaken substantial, physical, visible construction that goes beyond mere planning and site surveys and noting that $200,000 was sufficient to support vesting); *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1064 (N.Y. 1996) ("a vested right can be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development"). Notably, no party has preserved the argument that NECEC LLC's construction was insubstantial, and the Business Court concluded the opposite was true.[1] A.43. In any event, courts typically refrain from assessing degrees of project completion because such measures "depart from th[e]

[1] This issue was first hinted at by the State on appeal in a footnote without any discussion. State Br. 31 n.6. An argument raised for the first time on the appeal is deemed waived. *Estate of Hoch v. Stifel*, 2011 ME 24, ¶ 30, 16 A.3d 137 ("is a well settled universal rule of appellate procedure that a case will not be reviewed by an appellate court on a theory different from that on which it was tried.") (Quotation marks omitted); *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 ("An issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.").

rationale" that a party need only initiate construction in some reasonably substantial way to vest their rights. *AWL Power*, 813 A.2d at 521-22 (citing cases).

Rather, seeking to escape the obviously substantial nature of NECEC LLC's construction, NRCM suggests that the Project must be viewed in discrete segments and that that construction in certain segments was insubstantial and consisted merely of "pouring a perfunctory foundation." NRCM Br. 35. As an initial matter, there should be no dispute that the expenditure of $450 million (approximately half of projected expenditures, and substantially more than most entire construction projects in Maine) is more than sufficient to demonstrate "substantial" construction and a good faith intent to complete the project. This conclusion is not undermined by the fact that NECEC LLC has not yet installed poles in every single segment. *See AWL Power*, 813 A.2d at 520, 23 (holding that rights had permanently vested where a developer had spent about 3 percent of total cost and not begun any part of the condominium units, which constituted the second part of a planned development). Beginning construction of one part of a single project vests rights to the whole. *Sahl*, 2000 ME 180, ¶ 14, 760 A.2d 266.

Further, there is no basis to find that this construction was not undertaken in good faith. Despite the Business Court's explicit conclusion that

"there can be no doubt that . . . NECEC has proceeded in good faith," A.43, the State suggests that NECEC LLC's actions and arguments amount to some sort of underhanded "Darwinist" race to begin a project and strong-arm its way to vested rights. State Br. 29. There is simply no evidence to support this claim, and there is ample evidence to support the opposite. Indeed, the Business Court was correct when it aptly concluded that NECEC LLC's effort here was "no head fake," and that the initiation of construction pursuant to a long-planned, highly regimented, serial, coordinated timeline, is the standard in projects of this magnitude. A.43. Real and meaningful progress was made on the Corridor in January and February 2021, prior to the Initiative's certification and pursuant to validly issued permits, thus easily satisfying this prong of the *Sahl* factors. Indeed, the commencement of the Corridor was driven by contractual deadlines that had to be closely coordinated with, and in many cases were governed by, administrative processes and reviews. These administrative processes are the embodiment of legislatively created and imposed procedures, standards, and objectives that are designed and intended to ensure that projects like the Corridor serve the public good. In important ways, in this case NECEC LLC is not only seeking to defend vested property rights but also the administrative and judicial review processes themselves.

That the Corridor's permits and processes were repeatedly approved by the relevant expert agencies underscores that the Corridor project was undertaken in good faith and pursuant to the laws and processes that governed it from its inception. Indeed, construction on the project was necessarily commenced as soon as possible after the receipt of the permits, which had been significantly delayed by the machinations of NECEC opponents. A.255-57 (Dickinson Aff. ¶¶ 9-16). The original project schedule had called for an even earlier start to construction, which would have been far preferable for a project of the type and magnitude of the NECEC, A. 257 ¶ 16, which take years of careful planning and coordination to assemble equipment, material, and skilled workers. Franceschi Aff. ¶ 32. These delays have real consequences and are incredibly disruptive to plans and, in particular, to the workers whose livelihoods rely on the work. *Id.* ¶¶ 33-36; Burgess Aff. ¶¶ 6-9. It is expensive and problematic to idle workers, and many subcontractors will not be able to afford to standby and will have to redirect their workflows to other projects. Franceschi Aff. ¶ 37. Far from beginning construction in some sort of bad faith race, NECEC LLC *needed* to begin construction when it did – notably, at a time when the Initiative was no more than a mere possibility.

C. Signature drives do not give notice of changes in law so as to bar vesting of rights.

As stated previously and in NECEC LLC's briefing, the vested rights claim here is legal, not equitable, and is unaffected by issues relating to notice or knowledge of potential legislative opposition. Even if an equitable analysis were to be used, a proposal to change a law is not sufficient to give notice that the law will change or is even likely to change. Until a proposed change in law is enacted, it is inchoate and incomplete and gives the public notice of nothing other than the proposal of a potential change in law, and nothing more. This principle applies with particular force to a ballot initiative because an initiative must first be prepared with proper language, circulated, receive enough signatures, and then be certified by the Secretary of State before it can ever even be considered by the voters, let alone enacted into law. *See* 21-A M.R.S. § 354 (setting forth signature requirements for petition drives); 21-A M.R.S. § 901 (requiring Secretary of State to "review the application" of the petition for conformity with various statutory requirements); 21-A M.R.S. § 905 (requiring Secretary of State to "determine the validity of the petition" before it can proceed further); *Avangrid Networks, Inc. v. Sec'y of State,* 2020 ME 109, ¶ 12 n.4, 237 A.3d 882 (confirming treatment of submitted initiatives as "proposed legislation").

The mere proposal of an initiative is manifestly insufficient to give a party notice that its vested rights are in jeopardy because there is no way to tell whether signatures gathered for an initiative will mature into an actual legal proposal or wither on the vine of public opinion based only on its submission for initial review. Precluding the vesting of rights in a project because an initiative could conceivably be passed cannot be, and never has been, the rule. Moreover, submitting a proposed initiative requires only five voter signatures. That five people could divest an entity of vested rights in a large-scale project after years of planning by merely proposing a referendum confers to a handful of motivated partisans a grossly disproportionate veto power. For these reasons, the Business Court's reference to the dates prior to the Secretary of State's certification of the Initiative when resolving the question of vesting is incorrect.

The State and Appellee Intervenors make too much of their apparent confidence that the Initiative was destined to pass, substituting sound principles with *post hoc ergo propter hoc* logic stemming from the first Initiative's prior electoral success. The State hedges its speculation ("NECEC knew of the substantial risk posed by [the Initiative]"), State Br. 26, but other Intervenors boldly claim that the Initiative was "likely" to change the law, and that NECEC LLC was acting in bad faith because "it kn[ew] that a legal change

[was] *highly likely* to go into effect." NRCM Br. 34, 37 (emphasis added). NRCM insists that this second Initiative, "if put on the ballot, was likely to pass." *Id.* 7-8.

A promoter's hope of passage of one's own measure is not the same as passage, and such confidence is entirely irrelevant to the analysis of whether NECEC LLC legally acquired vested rights by virtue of its substantial investment and action pursuant to valid permits under existing law. The implication of Appellees' logic—that because a previous unconstitutional effort was successful in obtaining signatures, that any similar subsequent effort is therefore also likely to obtain sufficient signatures and be enacted and gives sufficient notice to all parties of an imminent change in law—is as startling as it is legally unsupportable.[2] Indeed, the authority cited in support of this contention is political polling data. *Id.*; A.284. Polling data changes over time and may not be accurate at all; it certainly cannot give a party actual notice of an imminent change in law, as Appellees suggest. Dewey did not defeat Truman. Establishing a rule that because a change in law is proposed means that every entity in the state had actual notice of its likely passage is a dubious proposition at best.

[2] In the case of the present initiative, this is particularly dubious given that second signature gathering effort took place between November 2020 and January 2021, the height of the Covid-19 pandemic, with public gatherings restricted. *See generally* Executive Order 16 FY 20/21 (issued Nov. 4, 2020), accessible at https://www.maine.gov/governor/mills/official_documents (last visited April 15, 2022).

The trouble and abuse that could result from adopting a rule that a signature drive acts to divest a party of property rights, which is the practical consequence of Appellees' position, is not difficult to discern. Signature drives often fail; others seem successful but ultimately are determined to be unsuccessful based on procedure and/or validity of the signatures collected; others result in initiatives that do not pass. The attempt alone cannot divest property rights. Worse, such a rule could easily be abused. Cianbro/IBEW Local 104 Blue Br. 20. Initiative proponents have 18 months to gather signatures after issuance of the petition. Me. Const. art. IV, pt. 3, § 18. A signature drive could be started, held in abeyance, and then intentionally fall short of the required number of signatures yet would still divest otherwise valid rights to proceed with ongoing construction. It could be pursued with a "defeat by delay" intent to result in construction delays, frustrate contractual compliance, or render financing untenable, any of which risk making targeted projects economically or pragmatically nonviable.[3] In fact, another anti-CMP signature drive recently fell short of the required signature requirements to put the measure on the 2022 ballot, perhaps by design, all but ensuring its appearance on an off-year ballot where supporters may well believe its chances

[3] The fossil fuel industry has pursued just such a strategy for the NECEC. *See* Anderson Br. 24-27.

of passage are greater.[4] Where, like here, a competitor funds the initiative and guides its development, any of these possibilities could be strategically employed as means to suppress the potential threats to its bottom line.

The industry proponents of the Initiative—large, out-of-state, fossil-fuel burning economic competitors of the Corridor—argue that NECEC LLC's knowledge of the proposal—*i.e.*, the mere fact of organized opposition to the Corridor—necessarily defeats any vested rights claim. *See* Amici Curiae Calpine/Vista Br. 20-24; Appellee-Intervenor NextEra Br. 47-48. While perhaps superficially appealing, this argument inappropriately introduces the equitable issue of "bad faith" into the legally acquired vested rights analysis presented by Appellants. *See Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 27, 856 A.2d 1183 ("a party may equitably acquire vested rights by showing bad faith or discriminatory enactment") (emphasis added). The *Sahl* factors, which this Court has consistently applied for more than twenty years to assess a party's legally acquired vested rights, only considers "good faith" in the context of whether construction's "commencement [was] undertaken in good faith with the intention to continue with the construction and to carry it through to completion," *Sahl*, 2000 ME 180, ¶ 12 (quoting *Town*

[4] Campaign for consumer-owned power utility lacks signatures for 2022 ballot but aims for 2023, *Portland Press Herald,* Tux Turkel, Jan. 19, 2022 ("It's all designed to generate, 'I hate CMP.'").

of Sykesville, 677 A.2d at 104), which is precisely what the Business Court was referring to when it concluded that "there can be no doubt that in this sense, NECEC [LLC] has proceed in good faith." A.43.

Other cases relied on by the industry proponents of the Initiative introduce the temporal question of when expenditures were made in the context of a party's knowledge of the potential prospective change in law and largely miss the mark. *See Biggs v. Sandwich*, 470 A.2d 928, 931 (NH 1983) (applying different test than articulated in *Sahl* and where the zoning amendment was known before the land was even purchased); *see also Piper v. Meredith*, 266 A.2d 103, 109 (NH 1970); *Hanchera v. Bd. of Adjustment*, 694 N.W. 2d 641, 646 (Neb. 2005). Some involve additional indicators of "bad faith," while others are facially distinguishable because their trial courts expressly found that there was "bad faith" and a "race" with authorities to incur obligations and make expenditures before the authorities could act, factors that are wholly missing here. *Hillsborough v. Smith*, 170 S.E.2d 904, 910 (NC 1969). Others still do not involve any construction at all. *See, e.g., Ropiy v. Hernandez*, 842 N.E.2d 747, 749 (Ill. 2006) (permits to change existing law denied because proposal had been introduced and there were no expenditures on actual construction); *Town of Cross Plains v. Kitt's "Field of Dreams" Korner, Inc*., 775 N.W.2d 283, 293-95 (Wis. 2009) (applying analysis in the context of

prospective expectation to run an adult entertainment business). These cases do not move the needle on the core issues of this appeal, and are at best relevant to an equitable claim for vested rights, which is not the Appellants' claim in this case.

Finally, even to the extent that this Court were to engage in an equitable analysis, the reliance on these cases would be fundamentally misplaced because they conflate the source of good/bad faith and whether that good or bad faith establishes or vitiates a party's vested rights. This Court held in *Kittery Retail Ventures, LLC*, that a party may equitably acquire vested rights by showing "bad faith or discriminatory enactment" when proposing a change in law. 2004 ME 65, ¶ 24, 856 A.2d 1183. Although NECEC LLC has been consistent that it believes that the industry-sponsored support for the Initiative was conducted in bad faith, such bad faith is not part of the analysis of NECEC LLC's legally acquired vested rights. This Court should decline industry's invitation to add an additional factor to the *Sahl* framework.

The Business Court's reasoning appears to equate erroneously the Initiative's submission with its certification, thus effectively elevating a signature drive to the stature of duly enacted legislation. The Initiative was not a live challenge to the Corridor at least until it was certified by the Secretary of

State on February 22, 2021, weeks after millions had been spent on actual physical construction.

D. Vested rights protect property interests from targeted attacks against potentially unpopular groups.

One need look no further than the sides of roads littered with tens of thousands of placards opposing "the CMP Corridor" to conclude that this was targeted legislation. The Business Court noted as much in discussing the existence of a political action committee, the name of which was "No CMP Corridor." Its acknowledged *raison d'etre* was to present Mainers with "the opportunity to vote on the fate of the destructive CMP Corridor," repeating that a "yes" vote on the Initiative would block the Corridor, not other similar projects. A.30. Conspicuously absent from the anti-Corridor campaign was any mention or acknowledgment that the Initiative could have an impact beyond the Initiative's myopic focus of its fossil-fuel burning sponsors.

The Appellees' argument that the Initiative is merely a "general law" that affects "an entire class of linear infrastructure projects" is only accurate insofar as there is one certificate of convenience and necessity in the class that meets the Initiative's bizarrely specific timelines for retroactive proscription: the NECEC Corridor. State Br. 50; NRCM Br. 16. Contrary to claims of generality and universal applicability, the Initiative grafts, with near surgical precision,

the fossil-fuel industry funded opposition to the Corridor into legislative text with applicable dates designed to nix only one project: the industry's cheaper, cleaner, hydro-power transmitting competitor. A. 30.

The anti-CMP animus baked into the Initiative's predecessor and this iteration's strategy, financing, development, campaign, and marketing is unmistakable and cannot be so easily dismissed by the bald statement that the Initiative is a law of general application. Ironically, the State proffers that "legislation targeting a massive infrastructure project with long-lasting effects for the entire State is not the same thing as legislation targeting a particular disfavored individual." State Br. 51. Except that in this case, they are exactly the same thing, and the Initiative's sponsors were incredibly candid about that fact during the campaign. In truth, the Initiative plainly targets the Corridor. Its chief sponsors said so time and again, but now sing a different tune.

CONCLUSION

For the reasons stated herein, the Business Court erred when it denied Appellants' motion for injunctive relief. The doctrine of vested rights prevents this targeted, retroactive legislation from applying to the NECEC Corridor. This Court should vacate the Order of the Business Court and enter a preliminary injunction in NECEC LLC's favor.

Dated at Portland, Maine this 20th day of April 2022.

/s/ *Philip M. Coffin III*

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Philip M. Coffin III, Bar No. 2462
Jeffrey D. Russell, Bar No. 4506
Cyrus E. Cheslak, Bar No. 6171

LAMBERT COFFIN
Two Monument Square, Suite 400
PO Box 15215
Portland, Maine 04101
207-870-4000
pcoffin@lambertcoffin.com
jrussell@lambertcoffin.com
ccheslak@lambertcoffin.com

Counsel for Appellant-Intervenor Cianbro Corporation

/s/ *Benjamin K. Grant*

_____

Benjamin K. Grant, Bar No. 4328
Robert M. Cheverie, *Visiting Attorney*

MCTEAGUE HIGBEE
P.O. Box 5000
4 Union Park
Topsham, ME 04086
207-725-5581
bgrant@mcteaguehigbee.com

ROBERT M. CHEVERIE & ASSOCIATES, P.C.
Robert M. Cheverie & Associates, P.C.
333 East River Drive, Suite 101
Hartford, Connecticut

860-290-9610
RCheverie@cheverielaw.com

Counsel for Appellant-Intervenor
International Brotherhood of Electrical
Workers Local 104

CERTIFICATE OF SERVICE

I, Cyrus E. Cheslak, hereby certify that on this 20th day of April 2022, I, as agreed by the parties, caused electronic copies of the foregoing Brief of Appellant-Intervenors Cianbro Corporation and the International Brotherhood of Electrical Workers Local 104 to be served on counsel for the Appellee, the State of Maine, and Appellee-Intervenors, by electronic mail.

/s/ *Cyrus E. Cheslak*
_____
Philip M. Coffin III, Bar No. 2462
Jeffrey D. Russell, Bar No. 4506
Cyrus E. Cheslak, Bar No. 6171

LAMBERT COFFIN
Two Monument Square, Suite 400
PO Box 15215
Portland, Maine 04101
207-870-4000
pcoffin@lambertcoffin.com
jrussell@lambertcoffin.com
ccheslak@lambertcoffin.com

Counsel for Appellant-Intervenor Cianbro Corporation