STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

AVANGRID NETWORKS, INC., et al.,
Plaintiffs/Appellants

v.

BUREAU OF PARKS AND LANDS et al.,
Defendant- Appellees

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

REPLY BRIEF OF INTERVENOR-APPELLANT INDUSTRIAL ENERGY CONSUMER GROUP

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ARGUMENT

I. Retroactive application of the Initiative to block the NECEC project would violate the separation of powers.

No one disputes that the power of the people to legislate by citizen initiative "is substantial." (State Br. at 32.) That power is limited, however, by the Maine Constitution. *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188. IECG argued in its opening brief that neither the Legislature nor the people acting by citizen initiative has the power to change the criteria for obtaining a Certificate of Public Convenience and Necessity ("CPCN"), and then have the new criteria applied retroactively to a project that met the criteria that existed when it won a final agency approval that was affirmed by this Court. *See* IECG Br. at 9-12 (discussing *Grubb v. S.D. Warren Co.*, 2003 ME 139, 837 A.2d 117). This constitutional limitation on retroactive changes to final executive and judicial action is essential to ensure that the people of Maine can rely upon the decisions of their government in ordering their affairs, rather than being perpetually subject to the retroactive creation and application of new rules by different branches, even after duly authorized final decisions have been made. Without separation of powers, the danger that retroactive changes will impose substantial deprivations on actors who have played by the democratically established rules increases dramatically. The

separation of powers is an essential component of the rule of law. *See I.N.S. v. Chadha*, 462 U.S. 919, 960-62 (1983)(Powell, J., concurring).

The State claims that the separation-of-powers analysis this Court applied in *Grubb* "lacks a limiting principle" because (the State says) it would prevent the Legislature from acting in response to the discovery of new problems:

> Imagine it is *discovered* that high-impact electric transmission lines cause some significant public harm that was unknown at the time of the CPCN proceedings. Appellants' position would appear to imply that the Legislature could not enact general legislation to address this *new problem* to the extent the proposed solution would "disrupt" prior PUC decisions authorizing construction of the lines causing the harm.

(State Br. at 35 (emphasis added).) But that scenario is not this case. And it underscores why the actual Initiative at issue here is unconstitutional.

No "new problem" caused by the NECEC project has been "discovered." Instead, based on the same universe of information that was before the PUC when it issued the CPCN, the Legislature has simply dictated a different outcome to that proceeding. No one is suggesting that the Legislature is powerless to act "to protect public health, safety, and similar interest," when new problems that threaten those interests are discovered, as sometimes happens with the passage of time and the evolution of scientific understanding. *Id*. But again, that is not this case.

The State tries to distinguish *Grubb*—where the Court held that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action," 2003 ME 139, ¶ 11, 837 A.2d 117, 121—by noting that "[w]hile the injured worker in *Grubb* was seeking to apply the new statute by re-opening and reversing the outcome of a quasi-judicial proceeding," the Initiative's "amendments to 35-A M.R.S. § 3132 do not require the re-opening of the CPCN proceeding." (State Br. at 36 (citation omitted).) But the State gets nowhere with the suggestion that retroactive application of the Initiative does not "require the re-opening of the CPCN proceeding." Retroactive application of the Initiative would reverse and erase that decision and its effects and consequences. Whether this technically amounts to a "re-opening of the CPCN proceeding," or simply to its wholesale obliteration, is beside the point.

National Resources Council of Maine ("NRCM") suggests that *Grubb* is distinguishable because it "discussed separation of powers principles in the context of applying the doctrine of *res judicata* as a defense," as opposed to "an affirmative separation of powers claim" (NRCM Br. at 49), but does not explain why that distinction should make any difference here, or why the separation-of-powers principle on which *Grubb* unmistakably turned is affected by that distinction. The rule is the same whether asserted as a defense or in the context of an affirmative claim: either way, "[t]he Legislature

may not disturb a decision rendered in a previous action, as to the parties to that action. . . ." *Grubb*, 2003 ME 139, ¶ 11.

NextEra's argument that the Initiative "can be easily read as consistent with Maine's separation of powers doctrine, because it does not require the overturning [of] the CPCN Order or this Court's affirmation of the same in *NextEra*" (NextEra Br. at 17), makes little sense. As just explained, the fact that the Initiative does not specifically direct the PUC to "vacate the CPCN Order" (*id*. at 13), or "direct the PUC to reopen its decision and reach the opposite conclusion" (State Br. at 34), does not change the reality that retroactive application would have the same effect on the CPCN and the NECEC project as if the Initiative *had* expressly directed the PUC to vacate the CPCN. Contrary to what proponents of retroactive application claim, it is not necessary to have the very unusual fact pattern of *Avangrid*—where the purported legislation expressly directed that a previous decision be reopened and reversed—for there to be a separation-of-powers problem. This is clear from *Grubb*, where there was no such express directive, but a constitutional problem nevertheless.

The PUC issued the CPCN under 35-A M.R.S. § 3132. If Section 3132, as amended by the Initiative, were applied retroactively to the NECEC project, the CPCN would now be in contravention of the statute, as subsection 6-C

requires approval by a 2/3 vote of the Legislature, and subsection 6-D precludes high impact electric transmission lines in the Upper Kennebec Region, which (as defined) includes a portion of the NECEC. That would make this Court's holding in *NextEra* that "[w]e discern no error in the Commission's determination that the NECEC project meets the applicable statutory standards for a CPCN" manifestly incorrect. *NextEra Energy Res., LLC v. Maine Pub. Utilities Comm'n*, 2020 ME 34, ¶ 1, 227 A.3d 1117, 1119; *see also id.* ¶ 43 ("In short, the Commission reasonably interpreted and applied the relevant statutory mandates in arriving at its decision to grant CMP a certificate of public convenience and necessity for the NECEC Project . . . ."). The idea that "the Initiative does not affect (much less reverse) the Law Court's affirmation of the CPCN in *NextEra v. PUC*" (NextEra Br. at 13) is intelligible only if this Court's decisions are understood as abstract writings, of interest for reasons other than their actual consequences in the world.

Contrary to NextEra's suggestion that the Initiative does not affect the CPCN because "DEP, BEP and local municipalities are exclusively charged with permitting the actual route of the line" (NextEra Br. at 14), the Initiative amends Title 35-A, and it is the PUC that is charged with applying and enforcing Title 35-A—not the DEP, BEP, or localities. *See* 35-A M.R.S. §§ 103, 115(1). There is no way the Initiative could retroactively change the statute

under which the PUC issued the CPCN, and do so in a way that makes the CPCN illegal under the retroactively established law, without invalidating this Court's previous ruling that the CPCN "meets the applicable statutory standards." Under the Initiative, if applied retroactively, the NECEC would not meet the applicable statutory standards.

Equally illogical is Calpine's contention that the Initiative does not "undermine the Law Court's actual ruling" in *NextEra* because the issue there "was only whether the PUC's issuance of a [CPCN] . . . 'result[ed] from a reasonable exercise of discretion and [was] supported by substantial evidence.'" (Calpine Br. at 32.) According to Calpine, "'[n]othing about the Law Court's judgment that the PUC acted reasonably is affected" by the Initiative (*id*. at 33)—but how could a judgment that the PUC's decision to issue the CPCN was "a reasonable exercise of discretion" *not* be affected by a change in law that, if applied retroactively, would render the decision indisputably incorrect and unlawful? These are the contortions NextEra and Calpine are forced to engage in to get around the Initiative's obvious unconstitutionality.

To insist (as the State does) that "[t]he most that can be said about [the Initiative's] effect on the CPCN decision is that it renders it moot" (State Br. at 34) is to ignore the rather important fact that the Initiative takes a final decision of the executive branch that was affirmed on appeal by the judicial

branch and purports to undo the work the separate and co-equal executive and judicial branches have done. Retroactive application of the Initiative would terminate NECEC's rights under the CPCN and stop the project from being constructed. For IECG and its members, this Court's decision upholding the CPCN is most definitely not moot.

The U.S. Supreme Court's pre-Civil War decision in *State of Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421 (1855) ("*Wheeling Bridge*") is not to the contrary. In *Wheeling Bridge*, an earlier court decision had found a bridge that had been erected across the Ohio River to be unlawful because "congress had acted upon the subject and had regulated the navigation of the Ohio River, and had thereby secured to the public, by virtue of its authority, the free and unobstructed use of the same; and . . . the erection of the bridge, so far as it interfered with the enjoyment of this use, was inconsistent with and in violation of the acts of congress . . . ." 59 U.S. at 430. When Congress changed the law, "so that the bridge [was] no longer an unlawful obstruction," the Court held that the original decision ordering that the bridge be removed could no longer be enforced. *Id*. at 431–32.

The situation here is different. After the PUC granted final approval of the CPCN for the NECEC project, and its decision was affirmed by this Court, the Initiative then attempted to overturn that decision of the executive and

judicial branches by retroactively changing the rules that applied to a regulatory/judicial proceeding that had been conducted as required under then-existing law. It is one thing to say that if a bridge has been declared unlawful under an act of Congress, and that act of Congress is then changed so that the bridge ceases to be unlawful, there is no longer any basis for continuing to deem the bridge unlawful. It is something else altogether to say that a hard-won regulatory approval of a complex energy infrastructure project that comported with the law as it existed when the approval was issued may be overturned by retroactively changing the law under which the project was approved.

Calpine argues that while "'the *private* rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation,' . . . that rule 'does not apply to a suit brought for the enforcement of a *public* right, which, even after it has been established by the judgment of the court, *may be annulled by subsequent legislation*.'" (Calpine Br. at 34 (Calpine's emphasis) (quoting *Hodges v. Snyder*, 261 U.S. 600, 603 (1923)). But Calpine never explains what *public* right it believes is being "taken away" or "annulled" by the Initiative. It is true that a public right was taken away or annulled in *Wheeling Bridge*: the original judgment declaring the bridge unlawful was based on the right of the public to unobstructed navigation of

the river, and the subsequent change in law to permit the obstruction eliminated that public right. Here, however, no public right is being taken away or annulled. It is also significant that *Wheeling Bridge* was about a prior injunctive order that had prospective effects; it did not in fact turn on whether the right at issue was public or private, but on the nature of the relief awarded (a continuing injunction that could be modified if the law changed). For these reasons *Wheeling Bridge* does not support retroactive application of the Initiative.

The State is correct that the Initiative has many "characteristic[s] of a legislative act . . . ." (State Br. at 34.) That is because, as applied prospectively, it *is* a legislative act. But to apply it retroactively to stop the NECEC project after it has won final approval would violate the rule this Court stated in *Grubb*, and recently reaffirmed in *Avangrid*, that "[t]he Legislature may not disturb a decision rendered in a previous action, as to the parties to that action," because "to do so would violate the doctrine of separation of powers.'" *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 35, 237 A.3d 882, 894 (quoting *Grubb*., 2003 ME 139, ¶ 11, 837 A.2d 117). Because the same CPCN is at issue, if *Grubb* applied in *Avangrid*, it applies here.

There is nothing constitutionally wrong with legislation that "imposes new legislative approval requirements for a whole range of utility

projects . . . ." (State Br. at 38.) The problem arises when these new approval requirements are applied to projects that have already been finally approved. The State cites *MacImage of Maine, LLC v. Androscoggin Cty*., for the proposition that "[t]he constitutional separation of powers is not *always* undermined when the Legislature passes legislation that affects cases that are pending in the judicial system . . . ." 2012 ME 44, ¶ 27, 40 A.3d 975, 986 (emphasis added) (quotation marks omitted). Here, however, the dispute over the CPCN is no longer pending, but instead has been litigated to a final judgment.

In any event, the legislative action in *MacImage* that was applied retroactively was a narrow gap-filling measure, enacted "to balance competing interests by legislating the reasonableness of fees that could be charged *during the time period when the county registries were acting without legislative guidance* . . . ." *Id*. ¶ 29 (emphasis added). The Court also suggested that the Legislature was just acting to "undo what it perceive[d] to be the undesirable past consequences of a misinterpretation of its work product." *Id*. ¶ 23 (quotation marks omitted). Here, in contrast, we are dealing not with a narrow gap-filling measure, or one designed to correct a misinterpretation of a law on the books, but instead with a measure that flat-out changes the rules under which the CPCN was lawfully issued and finally approved to produce

the opposite outcome. That is something the separation of powers principle at the heart of the Maine Constitution does not permit.

The same problem dooms Calpine's effort to explain away *Grubb* on the ground that *Grubb* "relied on *State v. L.V.I. Grp*., 1997 ME 25, ¶ 13, 690 A.2d 960, in which [the Court] affirmed that the Legislature 'of course, has the power to amend a statute that it believes' has been 'misconstrued.'" (Calpine Br. at 30.) Whatever power Calpine may believe the Legislature has to retroactively amend a statute it believes has been misconstrued, no one has suggested that the problem the Initiative is designed to address is that Title 35-A and the CPCN standards have been misconstrued. Instead, as Calpine acknowledges, the Initiative expresses the "judgment of the people of Maine that no 'high-impact electric transmission line' may 'be constructed in the Upper Kennebec Region . . . .'" (Calpine Br. at 31.) This is not a situation where an existing law has been misconstrued, but one where the law is making a 180-degree U-turn. And even if the Legislature did believe an existing law had been misconstrued, *L.V.I*. makes clear that "a final judgment in a case is a decisive declaration of the rights between the parties, and the Legislature cannot disturb the decision . . . as to the parties in that action." 1997 ME 25, ¶ 11 n. 4.

The NECEC project won the approval of the executive and judicial branches, in a process the legislative branch created. For that decision now to be overturned by a citizen initiative would violate the separation of powers and undermine the rule of law. By so holding, this Court will ensure that potential future investors in the energy infrastructure projects the climate crisis urgently demands will have a clear understanding that, in Maine, when such a project has won final approval, it may in fact be built.

II. Section I of the Initiative is not severable from Sections IV and V.

The State argues that because "no appellant raised the issue of severability in the Business Court," the argument that the provisions of the Initiative are not severable has been waived. (State Br. at 51.) But the trial court never ruled that any portion of the Initiative was unconstitutional, and "[t]he question of severance arises only after a statute has been held unconstitutional." *Ass'n of Am. Railroads v. United States Dep't of Transportation*, 896 F.3d 539, 550 (D.C. Cir. 2018). An argument on severability "cannot be waived by a party to a suit by failure to raise it." *Elliott v. Commonwealth*, 267 Va. 464, 472, 593 S.E.2d 263, 268 (2004). "Rather, it is the duty of the Court, faced with a constitutional challenge to a statute, to consider *sua sponte* whether an invalid portion of a statute may be severed to

permit the continued operation of the constitutional portion of the statute," or whether the statutory provisions are instead inseverable. *See id.* The severability argument has not been waived.

The State's contention that "all three substantive provisions in [the Initiative] function independently from each other" (State Br. at 52) would come as a surprise to the Secretary of State, who this Court found did not abuse her discretion in drafting "a *single*, concise ballot *question* describing the *single Act* that was circulated to the voters for signature and presented to the Legislature for enactment before being referred to referendum." *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 27, 256 A.3d 260, 268 (emphases added). The Secretary's decision takes precedence over the State's conclusory insistence to the contrary, and dictates the outcome of the severability analysis. The Initiative was put to the voters as a single piece of legislation, and it should rise or fall on that basis. *See* 21-A M.R.S. § 906(6)(A)(3) (one of three considerations the Secretary is to weigh in determining whether an initiative comprises "more than one issue, each requiring a separate question," is whether "[t]he questions are severable and can be enacted or rejected separately without negating the intent of the petitioners."); *Caiazzo*, 2021 ME 42, ¶ 24 ("Requiring the Secretary of State to separate provisions of an initiative into multiple questions could infringe on the electors' right of direct

initiative because splintering a single bill that was proposed to be presented for a yes-or-no vote into multiple pieces of legislation might be inconsistent with the intent of those who drafted or signed the petition.”).

CONCLUSION

WHEREFORE, IECG respectfully requests that the Court accept the report and grant Appellants their requested relief.

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

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, Attorney for Industrial Energy Consumer Group, certify on April 20, 2022 I served (by agreement of counsel) the *Reply Brief of Intervenor-Appellant Industrial Energy Consumer Group* to the attorneys listed below.

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