
BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT
DOCKET NO. CUM-20-181

Avangrid Networks, Inc., et al.

v.

Secretary of State et al.

Brief of Amicus Curiae Dmitry Bam

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STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

Article IV of the Maine Constitution grants the state legislature extensive lawmaking power, while also reserving broad legislative authority for the Maine people. That authority, however, is subject to a key constraint: it can be used to make and change laws, but not to issue directives to the other two independent departments of state government. Such a directive is not a legitimate law, and when either the legislature or the people, under the guise of lawmaking, merely commandeer an administrative agency or a state court, they exceed the scope of legislative power in Article IV and violate the separation of powers doctrine in Article III of the Constitution. This case is about whether a Citizen Initiative proposed for the November ballot is such an invalid directive.

The core distinction between (valid) laws and (invalid) directives has been recognized in the United States since the time of the founding. Legislative encroachment into the judicial sphere was a common occurrence in colonial and post-revolutionary America. Exercise of judicial powers by the legislature, especially to single out an individual person for punishment or substantial deprivation, was the impetus for

the entrenchment of separation of powers in the United States Constitution, and for the express adoption of the separation of powers provisions in state constitutions, including Maine's, in the late eighteenth and early nineteenth centuries. In an influential treatise, Thomas Cooley, one of the leading constitutional authorities of his era, explained that “[i]f the legislature would prescribe a different rule for the future from that which the courts enforce, it must be done by statute, and *cannot be done by a mandate to the courts, which leaves the law unchanged, but seeks to compel the courts to construe and apply it*, not according to the legislative judgement.”¹ Since Cooley, numerous other scholars have recognized a similar distinction.

The United States Supreme Court and other federal and state courts have also distinguished between a change in the law and a mere determination of particular litigation. For example, in *United States v. Klein*, 80 U.S. 128 (1871), the Supreme Court held that Congress violated the separation of powers doctrine when it passed legislation that directed the outcome of decisions by the Supreme Court. In striking down the law, Chief Justice Chase explained that an attempt “to prescribe a rule for the

¹ Thomas Cooley, *A Treatise on Constitutional Limitations* (Little, Brown 1868) (emphasis added).

decision of a cause in a particular way” is improper.² And in many cases since *Klein*, courts have been called to determine whether a challenged law was indeed a law or a directive.³

Often, the line separating laws from directives is difficult to identify and enforce because the legislature couches even improper directives in somewhat generalized, prospective, law-like terms. Recognizing the serious separation of powers concerns raised by a command to another branch, legislatures toe the line, stopping just short of directly telling another branch what to do or how to rule. In these situations, courts are left with a challenging classification dilemma, forced to determine whether the legislation is a true change in the law or is in fact a legislative prescription directing the outcome in a specific case. This case presents no such line-drawing difficulties: the proponents of the Initiative have made no effort whatsoever to dress up this Resolve as a law or to conceal their intent. There is no pretense, no winks, no nods, no wolves in sheep clothing. As Justice Scalia famously said in another context, “this wolf comes as a wolf.”

² 80 U.S. (Wall.) 128, 146 (1871).

³ See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995); *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992); *Bank of Markazi v. Peterson*, 578 U.S. ____ (2016). These cases are discussed in greater detail below.

The Initiative does not purport to change the law that governs applications for Certificates of Public Necessity and Convenience. Everything about the law remains unchanged – the substantive standards that the PUC must apply to determine public need, the process that applicants for a certificate must follow, the standard of review this Court uses to review the PUC’s decisions. There are no amendments to 35-A M.R.S. § 3132 or PUC Rules. Instead, the Initiative is a direct and blunt command to another branch of state government on how to interpret and apply a law in one case and one case only. It is a textbook example of a legislative action that is nominally a law but is in fact nothing more than a mandate to an executive agency, and, indirectly, to this Court. It is a directive to enter a very specific order, whether the underlying facts and evidence support that order or not, and it is a blatant exercise of the powers belonging to the other branches.

I have not seen an Initiative of this kind, in Maine or elsewhere, in my many years as a scholar, and I would be hard-pressed to imagine a more perfect example of a law that exceeds legislative authority and violates separation of powers than this one. Were the Maine Legislature to issue such a directive, it would be unconstitutional under centuries of

established precedent and foundational separation of power principles. And the result is the same when the people use the reserved legislative power to violate those principles. In short, when the legislative actor leaves the applicable substantive law in place but directs the outcome in particular case for only one particular party, it invades the constitutionally assigned function of the other branches and violates Article III of the Maine Constitution.

QUESTION PRESENTED

Does the Citizen Initiative directing the PUC to reverse a previous order issued by the PUC and affirmed by this Court exceed the scope of legislative power reserved to the people and violate the separation of powers clause in the Maine Constitution?

STATEMENT OF AMICUS CURIAE

Amicus Dmitry Bam is a Professor at the University of Maine School of Law. I teach and write in the areas of constitutional law, election law, and judicial power. I submit this brief to provide the Court with my perspective on the constitutional separation of powers issues raised by the Citizen Initiative. In my teaching and scholarship, I have been an emphatic supporter of direct democracy and the right of the

people to self-govern. But as a constitutional scholar, I believe strongly in the concept of separation of powers, and ensuring that the independence of all three branches is protected.

This brief expresses views that are my own and not an official position of the University of Maine School of Law, or the University of Maine System.

ARGUMENT

I. Article IV does not limit the Court's power to review the constitutionality of the Citizen Initiative

While I express no opinion on the prudential ripeness issues raised by the parties below, I begin by briefly addressing the constitutional grounds relied on by the lower court. The court, citing Article IV, Pt. 3 § 18(2) of the Maine Constitution, held that it has no power to review the constitutionality of the Initiative pre-election. Section 18(2) states that proposed initiatives “shall be submitted to the electors” unless enacted by the Legislature, and the court interpreted that command as a limit on the judicial branch’s power to enjoin the Initiative.

While I agree with the lower court that the “shall be submitted” language is best interpreted as a command, in my opinion, this language is intended to constrain the legislative branch, not the judicial branch. In

reaching this conclusion, I rely on the text, history, purpose, and structure of the Maine Constitution.

The purpose of the initiative process was to encourage participatory democracy and to empower the Maine people to enact legislation when the legislature fails to act.⁴ Concerns of inaction by a recalcitrant legislature, not a constitution-enforcing judiciary, are the driving force behind the provision in Article IV, Pt. 3 § 18(2).⁵

The history of the initiative process in Maine confirms that its purpose is to limit the legislature, not the judiciary. The initiative was not part of the original Maine Constitution, but was initially part of the People's Party platform in 1896, and was ultimately adopted in 1908. The People's Party sought to enhance direct democracy in Maine in order to “wrench the *legislative power* in state capitols across the country from the grip of large business and financial interests.”⁶ As this Court explained, the initiative process allows the people to take “back to

⁴ Opinion of the Justices, 275 A.2d 800 (Me. 1971).

⁵ See, e.g., James E. Castello, *The Limits of Popular Sovereignty: Using the Initiative Power to Control Legislative Procedure*, 74 Cal. L. Rev. 491, 563 (1986) (“The purpose of the initiative clause . . . is to permit public votes on those measures which the legislature either viciously or negligently fails or refuses to enact.”); Daniel Hays Lowenstein, *California Initiatives and the Single-Subject Rule*, 30 UCLA L. Rev. 936, 964 (1983) (“The initiative’s purpose was to provide an outlet for the public’s dissatisfaction with the legislature’s treatment or nontreatment of an important and, in many cases, broad policy area.”).

⁶ Jeremy R. Fischer, *Exercise the power, play by the rules: Why popular exercise of legislative power in Maine should be constrained by legislative rules*, 61 Me. L. Rev. 504, 506 (2009) (emphasis added).

themselves part of the legislative power that in 1820 they had delegated entirely to the legislature.”⁷ Nothing in the history of the amendment process hints that Article IV, Section 18 sought to limit judicial authority to review initiatives for constitutionality.

The structure of the Constitution further confirms that the “shall be submitted” language does not constrain judicial power. The language is contained in Part Three of Article IV of the Constitution, which is titled “Legislative Power.” The rest of the Article has to do with the scope of the powers of the legislature, not the judiciary. The Judicial Power is detailed in Article VI of the Maine Constitution. Courts frequently rely on the structure of the Constitution, and the precise location of the constitutional commands, to ascertain its meaning.⁸

In the past, this Court has decided constitutional challenges to a proposed ballot question prior to the election, and doing so is certainly within the scope of the judicial power.⁹ Thus, while the Court may for prudential reasons decline to intervene, Article IV imposes no

⁷ Allen v. Quinn, 459 A.2d 1098 (Me. 1983).

⁸ Antonin Scalia, *Foreword: The Importance of Structure in Constitutional Interpretation*, 83 Notre Dame L. Rev. 1417, 1418 (2008). Charles L. Black, Jr., *Structure and Relationship in Constitutional Law* (1969).

⁹ Lockman v. Sec’y of State, 684 A.2d 415, 418-19 (Me. 1996); McCaffrey v. Gartley, 377 A.2d 1367, 1372 (Me. 1977).

constitutional prohibition on judicial review of an unconstitutional Initiative before the election.

II. The Initiative violates the separation of powers doctrine by directing the result in a specific case without changing the law

The Citizen Initiative violates one of the bedrock principles of the Maine Constitution: the separation of powers. Separation of powers provides a key structural protection of individual rights and it prohibits the exercise by one branch of powers delegated to another. The Supreme Court has reaffirmed the importance of the separation of governmental powers into the three coordinate branches in many cases.¹⁰ So has this Court.¹¹

One way for the legislative branch to violate the separation of powers doctrine is by exercising its power to direct other branches what to do in particular cases. The legislative power may be used to pass laws but not to issue an ukase to the other branches while leaving the law unchanged. Scholars and courts have long struggled to identify the line between proper laws and improper commands, and there exists a lively scholarly debate about when a legislature crosses the line. But there is

¹⁰ *Morrison v. Olson*, 487 U.S. 654, 693 (1988).

¹¹ *See, e.g., State v. Hunter*, 447 A.2d 797, 799-800 (Me. 1982).

widespread agreement that a naked directive to another branch to make a particular finding in a specific case crosses the line.

And that is precisely what we have in this case; the Initiative contains no indicia of a traditional law and has all the characteristics of a command to resolve a specific case – a case that has already been decided the other way by two branches of our state government – in a specific way. With the Citizen Initiative, the people (and therefore the legislative power) assume the role of both the administrative agency and a judge. A “law” that says nothing more than “Plaintiff loses” leaves nothing for the agency to do and nothing for this Court to review. The use of the legislative power to anoint a winner and a loser in a particular case is precisely what the separation of powers doctrine is supposed to prevent. In a recent Supreme Court case, the Court explained that the “simplest example” of unconstitutional usurpation of judicial authority would be a statute that says, “In *Smith v. Jones*, Smith wins.”¹² This is precisely what the Initiative does.

A. The separation of powers is a key structural requirement of the Maine Constitution.

¹² *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018).

To prevent the accumulation of power within the same hands, the Maine Constitution divides government power between the three departments – or three branches – of state government.¹³ Under the Constitution, each branch is assigned specific powers, and each branch is prohibited from exercising the powers belonging to another branch. Article VI of the Maine Constitution vests the judicial power of the State in the Supreme Judicial Court, and other courts established by the legislature, while Article IV vests the legislative power in the Maine House and Senate and Article V vests the executive power in the Governor.¹⁴ This separation recognizes that “[t]he accumulation of all powers legislative, executive and judiciary in the same hands, whether of one, a few or many, and whether hereditary, self-appointive, or elective, may justly be pronounced the very definition of tyranny.”¹⁵ In the words of Alexander Hamilton, “there is no liberty if the power of judging be not separated from the legislative and executive powers.”¹⁶

Although any of the three branches might improperly appropriate powers for themselves, one critical abuse that separation of powers is

¹³ Me. Const. art. III.

¹⁴ Me. Const. art. IV - VI.

¹⁵ The Federalist No. 47 at 324 (J. Madison).

¹⁶ The Federalist No. 78 (A. Hamilton) (quoting Montesquieu, *The Spirit of the Laws* 157 (A. Cohler, B. Miller, & H. Stone eds. 1989)).

intended to prevent is accumulation of power by the legislature and encroachment by the legislature into the powers of the other branches. Such interference was common in the years leading up to the adoption of the federal Constitution and it was one of the primary reasons for the inclusion of separation-of-powers provisions in the federal and state constitutions at the time of the Founding.¹⁷ State legislatures “constantly heard private petitions, which often were only the complaints of one individual or group against another, and made final judgments on these complaints.”¹⁸ One of the chief concerns was legislative intervention in cases still pending before courts. In the words of one scholar, “Article III, in large measure, reflects a reaction against the practice” of legislative interference with state courts.¹⁹ And all throughout New England, state and local assemblies denounced legislative assumptions of judicial power.²⁰

¹⁷ David Kairys, *Legislative Usurpation: The Early Practice and Constitutional Repudiation of Legislative Intervention in Adjudication*, 73 UMKC L. Rev. 945 (2005) (discussing early practice of legislative intervention in litigation and its repudiation by the Framers of the Constitution).

¹⁸ Gordon Wood, *The Creation of the American Republic 1776–1787*, pp. 154–155 (1969).

¹⁹ Manning, *Response, Deriving Rules of Statutory Interpretation from the Constitution*, 101 Colum. L. Rev. 1648, 1663 (2001).

²⁰ See *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1331 (2016) (Roberts, C.J., dissenting) (describing the evolution of separation of powers in colonial America).

The Supreme Court has, time and time again, reaffirmed the importance of separation of powers as a safeguard of individual freedom.²¹ “Under the basic concept of separation of powers,” the judicial power “can no more be shared with another branch than the Chief Executive, for example, can share with the Judiciary the veto power, or the Congress share with the Judiciary the power to override a Presidential veto.”²² Under the United States Constitution, the separation of powers limitation is implied. No so here in Maine, where the Constitution contains an express separation of powers provision. This is why Maine courts have recognized the importance of separation of powers as a “rigorous” constraint on each branch of state government.²³ In fact, this Court has explained that the separation of powers doctrine is even more rigorous under the Maine Constitution than its federal counterpart.²⁴

B. The citizen initiative process is an exercise of legislative power.

²¹ Bond v. United States, 564 U.S. 211, 223 (2011).

²² Stern v. Marshall, 564 U.S. 462, 483 (2011).

²³ State v. Hunter, 44 7 A.2d 797, 799-800 (Me. 1982).

²⁴ *Id.*

Before I turn to the main question of whether the Initiative violates the separation of powers doctrine, I briefly address the question of how to classify a citizen initiative under the Maine Constitution.

As discussed earlier, the Initiative power is contained in Article IV of the Constitution. Article IV sets out the scope of legislative authority, and it is undisputed that it limits the initiative power to exercises of such authority. “Maine’s initiative process . . . gives citizens a mechanism by which to exercise the legislative power partially independent of the legislature.”²⁵ The text is clear that the initiative power in Article IV is limited to proposing legislation – bills, resolves, and resolutions.²⁶ These are legislative terms. Neither of the other branches operates by proposing these types of legislation. Black’s Law Dictionary defines a “bill” as “a *legislative* proposal offered for debate before its enactment and a “resolve” as a “main motion that formally expresses the sense, will, or action of a deliberative assembly (esp. a *legislative* body).”²⁷

Courts, including this Court, have long recognized that the people, in the exercise of reserved legislative powers, have no more power to

²⁵ Jeremy R. Fischer, *Exercise the power, play by the rules: Why popular exercise of legislative power in Maine should be constrained by legislative rules*, 61 Me. L. Rev. 504, 505 (2009).

²⁶ Me. Const. art. IV, pt. 3, § 18(1).

²⁷ See Black’s Law Dictionary (11th ed. 2019) (emphasis added).

violate the Constitution than the legislature.²⁸ As this Court held just three years ago, “when a statute – including one enacted by citizen initiative – conflicts with a constitutional provision, the Constitution prevails.”²⁹ Just as there are individual rights constraints on the actions of the people, so there are structural constraints.³⁰ In fact, the Constitution’s structural provisions are in place to protect individual rights. And no provision is more important to the structure of a constitutional government than separation of powers. Because the electors reserved legislative powers for themselves in Article IV of the Constitution, the separation of powers and other structural limits on legislative action apply to the electors acting in their legislative capacity.

C. The legislative power may not be used to direct the result in a pending case without amending the underlying law.

The Initiative violates a well-established principle that the legislature may not direct the result in a pending case unless it changes the law. This rule has been well established throughout the United States

²⁸ *League of Women Voters v. Sec’y of State*, 683 A.2d 769, 772 (Me. 1996); see also Craig B. Holman et al., *Judicial Review of Ballot Initiatives: The Changing Role of State and Federal Courts*, 31 Loy. L.A. L. Rev. 1239, 1246 (1998) (“The courts have generally operated under the presumption that both legislation and initiatives are subject to similar standards of review and constitutional scrutiny.”).

²⁹ *Opinion of the Justices*, 162 A.3d 188 (2017).

³⁰ *Profl Eng’rs in Cal. Govt v. Kempton*, 155 P.3d 226, 239 (Cal. 2007) (“[I]n interpreting a voter initiative . . . we apply the same principles that govern statutory construction.”)

for well over a century, and has been recognized by this Court and other high courts throughout the nation.

1. The prohibition on directing results in pending cases has a long history in the United States.

There is widespread agreement among scholars and courts that the legislature may not use its power to direct the result in a pending case without changing the law.³¹ A legislature may be able to change the law with a specific case in mind, even in the hopes of accomplishing a certain result in a case. But it cannot instruct the other two branches how to apply existing law, and it cannot direct the other branches to disregard the law in a particular case. This principle is at the core of the separation of powers doctrine. Separation of powers means nothing if the legislature may simply tell the judicial and the executive branch how to decide cases.

Federal courts have recognized this principle since the United States Supreme Court's decision in *United States v. Klein*. In *Klein*, the Court reviewed a legislative action that sought to direct a specific outcome in a Supreme Court case. The case concerned the interpretation of the Abandoned Property Collection Act, which allowed citizens of

³¹ See, e.g., Stephen I. Vladeck, *Why Klein (Still) Matters: Congressional Deception and the War on Terrorism*, 5 J. Nat'l Sec. L. & Pol'y 251, 252-53 (2011).

rebellious states in the Civil War to recover seized property if they could prove that they did not participate in the rebellion. In a case called *United States v. Padelford*, the Supreme Court held that persons who engaged in rebellion but received a pardon would be entitled to restoration under the Act.³² Congress expressed its disagreement with the Court's decision by passing a new law that prohibited pardons to be used as evidence of loyalty and instead directed the Court to treat a pardon as conclusive evidence of disloyalty, demanding that the federal courts dismiss claims based on pardons. The Supreme Court struck down the law, holding that Congress may not "prescribe rules of decision" to the courts "in cases pending before it." Justice Chase explained that Congress cannot forbid the Court "to give the effect to evidence which, in its own judgment, such evidence should have, and is directed to give it an effect precisely the opposite."³³ This law, the Court held, "passed the limit which separates the legislative from the judicial power."³⁴

Klein is distinguishable from a number of cases where the Court held that Congress may pass legislation governing even pending

³² *Klein*, 80 U.S. at 146.

³³ *Id.* at 147.

³⁴ *Id.*

litigation, so long as the legislation makes a change in the law that the other branches would then apply. For example, in *Robertson v. Seattle Audubon Society*, 503 U.S. 429 (1992), the Court upheld a federal statute enacted in response to ongoing litigation. The statute modified timber harvesting restrictions in forests home to endangered spotted owls. The Court explained that the statute “compelled changes in law, not findings or results under old law.”³⁵ Even though the law referred to ongoing litigation by name and docket number, the statute changed the law governing future suits as well as the ongoing suit. The line created by cases like *Klein* and *Robertson* is clear: a legislature can change the law (even if the change directly affects the outcome in a particular case), but the legislature cannot leave the law unchanged while directing the courts to make a specific decision. “The distinction between the functions of the legislative and the judicial departments is that it is the province of the legislature to establish rules that shall regulate and govern in matters of transactions occurring subsequent to the legislative action, while the judiciary determines rights and obligations with reference to

³⁵ *Robertson*, 503 U.S. at 438.

transactions that are past or conditions that exist at the time of the exercise of judicial power.”³⁶

State courts, including this Court, have also recognized specific resolution of claims as a judicial power, and legislative exercise of such power as a violation of separation of powers.³⁷ Although this Court has not yet addressed a statute or an Initiative of this kind,³⁸ its earlier holdings recognize that the legislature runs afoul of the separation of powers when it reverses a final judgment as to the parties in a particular action.³⁹ Such retroactive directives are particularly problematic. As one federal court held, “[r]etroactive legislation that contravenes a prior judicial decision violates the separation of powers doctrine.”⁴⁰ And this Court explained, “[a]ll public laws, from their very nature and effects, are

³⁶ 16 C.J.S. Constitutional Law §115.

³⁷ “The essence of the judicial power, as distinguished from the legislative, is its focus on resolving specific controversies between particular parties in litigation.” *Bell v. Town of Wells*, 557 A.2d 168, 191 (1989) (Wathen, J., dissenting).

³⁸ *Lewis v. Webb*, decided by this Court nearly two centuries ago, was perhaps the closest previous legislative attempt to direct the outcome of a specific case that had reached final judgment. The case is discussed in greater detail below.

³⁹ *Grubb v. S.D. Warren Co.*, 2003 ME 139 ¶11, 837 A.2d 117, 121 (2003) (“The Legislature may not disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers.”).

⁴⁰ *Varga v. Stanwood-Camano School District*, 2007 WL 2193740 (W.D. Wash.); see also *In re Pers. Restraint of Stewart*, 115 Wash. App. 319, 335 (2003) (“The legislature violates the separation of powers doctrine when it passes retroactive legislation that contradicts prior judicial construction of a statute.”).

to be considered as rules for future cases, prescribed for the benefit and regulation of the whole community.”⁴¹

This Court’s decision in *Lewis v. Webb*⁴² established strong precedent in Maine against legislation that reopens final judgments. In *Lewis v. Webb*, the Legislature passed a Resolve authorizing two individuals to appeal a final judgment of the Probate Court and directing this Court to sustain the new proceeding. The Court held the Resolve unconstitutional as an exercise of judicial power, with the Legislature essentially acting as an appellate court.⁴³ In fact, the Court intimated that a directive as to a particular case may be no law at all because a law “must in its nature be general and prospective; a rule for all, and binding on all.” And echoing Justice Marshall’s famous words in *Fletcher v. Peck*,⁴⁴ the Court explained that “[i]t is the province of the legislature to make and establish the laws; and it is the province and duty of the Judges to expound and apply them.”⁴⁵

⁴¹ *Lewis v. Webb*, 3 Me. 326, 335 (1825).

⁴² 3 Me. 326 (1825).

⁴³ *Id.* at 332 (explaining that this Court would have to treat the Resolve as “having produced the usual effect of an ordinary appeal; that is, having vacated the decree below.”).

⁴⁴ “It is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.” 10 U.S. (6 Cranch) 87, 136 (1810).

⁴⁵ *Lewis v. Webb*, 3 Me. at 333.

Although most of the separation of powers challenges at the state and federal level have focused on legislative usurpation of judicial authority, the same principle applies to usurpation of the executive branch authority. The Constitutional text mandates that all usurpations of other branches be treated equally since “[n]o person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers belonging to either of the others . . .”⁴⁶ This Court has previously held that the Legislature may not exercise powers granted to the executive branch, including agencies.⁴⁷ When an independent agency interprets the existing law to require one outcome, the Legislature may not order them to reach the opposite conclusion unless it first changes the law.

2. Special legislation and directives are disfavored because they eviscerate judicial independence and threaten individual liberties.

The prohibition on directing the outcome of a case is critical to protecting the independence and integrity of the executive and judicial branches. The judiciary has the power to interpret the law.⁴⁸ Telling the

⁴⁶ Me. Const. art. III, § 2.

⁴⁷ N.E. Outdoor Ctr., 2000 ME 66, ¶ 10, 748 A.2d 1009 (2000).

⁴⁸ Marbury v. Madison, 5 U.S. (1 Cranch) 137, 177 (1803).

Court what outcome to reach, especially after the Court has already reached a contrary outcome, infringes on the independence of the Court and the judicial power. The judiciary must be able to make its own independent determination of whether statutory standards were met in any particular case. If the legislature can simply tell an administrative agency how to decide a case, the Court is unable to adequately review that agency's decision or its reasoning.⁴⁹

Both this Court and the United States Supreme Court have affirmed their independence and the finality of their judgments. In *Plaut v. Spendthrift Farm, Inc.*,⁵⁰ investors brought suit against an investment company for securities fraud. The Court dismissed the suit because it was brought after the statute of limitations had run. When Congress retroactively abrogated this decision, providing that the dismissed suits would be treated as if timely filed, the Court invalidated the statute, explaining that “by legislating so as to affect only a closed, limited, and apparently identified class of individuals, Congress applied law to

⁴⁹ The Initiative suggests that the PUC would be required to vacate its previous detailed and reasoned findings and enter new findings, consisting of a single sentence that “that the construction and operation of the NECEC transmission project are not in the public interest and there is not a public need for the NECEC transmission project.” Without any administrative findings, the Court would likely find that the mandated denial of the Certificate as arbitrary or capricious.

⁵⁰ 514 U.S. 211 (1995).

individuals, thereby acting like a court rather than making law.” Justice Breyer, writing in concurrence, explained that while Congress “may enact legislation that focuses upon a small group, or even a single individual,” statutes must be “more than simply an effort to apply, person by person, a previously enacted law, or to single out for oppressive treatment one, or a handful, of particular individuals.”⁵¹

This Court has also sought to protect the integrity and finality of its judgments. The Court has explained 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.”⁵² Likewise, reversing final judgments made by agency proceedings also violates the separation of powers.⁵³ But it does little good to prevent the Legislature from reopening final judgments from this Court and from Maine’s administrative agencies if the Legislature could simply direct the judicial and executive branches how to decide those cases in the first place. If the Legislature cannot overrule the final judgments from the other two branches indirectly, it is inconceivable that

⁵¹ *Id.* at 243.

⁵² *State v. L.V.I. Group*, 60 A.2d 960 (Me. 1997).

⁵³ See *Grubb*, 2003 ME 139, ¶ 9, 11, 837 A.2d 117 (Me. 2003) (explaining that the legislature could not disturb final Workers’ Compensation Board decisions).

the Legislature might be able to do so directly. And if an agency or the Court interpret the preexisting law to require a certain outcome, the Legislature may not require an opposite outcome without changing the underlying law.

In addition to protecting the independence of the judiciary and the finality of its judgments, the line between directing the outcome of a case and changing the underlying law also protects individual rights. If the Legislature can mandate a specific outcome for a case that has already been resolved by an administrative agency and a court, and for no other case, the legislature can then subject any person to disparate treatment for identical conduct based on whim. As this Court explained, such a law would violate “the great principle of constitutional principle of equality.”⁵⁴ One of the central notions engrained in our constitutional structure is that laws should be generally applicable. We expect the legislature to enact rules that apply generally to society, and then turn to the judiciary to apply those rules to individual litigants in a fair and evenhanded manner. Individualized litigation shields litigants from majoritarian politics. Concurring in *INS v. Chadha*, Justice Powell

⁵⁴ Lewis v. Webb, 3 Me. 326, 336 (1825).

explained that “[t]he Framers were well aware of the dangers of subjecting the determination of the rights of one person to the tyranny of shifting majorities.”⁵⁵ Trial by legislature, Powell concluded, “lacks the safeguards necessary to prevent the abuse of power.”⁵⁶

When the legislature passes general and prospective laws, that law applies to current cases as well as unforeseen cases in the future. The requirement of legislative generality serves as a safeguard against legislative oppression. This is why special legislation is disfavored in Maine. This Court has held that exercise of legislative power “must in its nature be general and prospective; a rule for all, and binding on all.”⁵⁷ Interpreting the Constitutional requirement that “[t]he Legislature shall, from time to time, provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation,” this Court explained in *Lewis v. Webb* that special legislation, including resolves that merely carve out exceptions to general laws, is not “within the bounds of legitimate legislation” and is “neither just [n]or reasonable.”⁵⁸ For two centuries, this Court has understood as clearly

⁵⁵ 462 U.S. 919, 966 (1983).

⁵⁶ *Id.* at 962.

⁵⁷ *Lewis v. Webb*, 3 Me. 326, 333 (1825).

⁵⁸ *Id.* at 336.

unconstitutional the proposition that the legislature could enact a general law that applied to everyone except a particular party in a pending case. The Court should not change track now.

The Founders were well aware of the dangers of allowing the legislature to determine outcome of specific cases and, as discussed earlier, this was one of the justifications for the separation of powers. As Chief Justice Marshall explained, in *Fletcher v. Peck*, “[i]t is the peculiar province of the legislature to prescribe general rules for the government of society; the application of those rules to individuals in society would seem to be the duty of other departments.”⁵⁹ There are good reasons for this rule. The administrative and judicial process involve a neutral application of the law, and certain procedural safeguards, to avoid the risk that litigants will be treated unfairly by majoritarian forces. When the legislature simply decides a pending case, it does so only with respect to that particular litigant, potentially depriving the litigant of liberty without the concurrence of other institutional actors.⁶⁰

D. This Citizen Initiative directs the result in a particular case without changing the law.

⁵⁹ 10 U.S. (6 Cranch) 87, 136 (1810).

⁶⁰ See *United States v. Brown*, 381 U.S. 437, 443 (1965) (“[I]f governmental power is fractionalized, if a given policy can be implemented only by a combination of legislative enactment, judicial application, and executive implementation, no man or group of men will be able to impose its unchecked will.”).

Although there is widespread agreement that the legislature cannot direct the result of a specific case, courts have often struggled to figure out when a legislative action is a mere direction and when it is a change in the law. Courts and scholars are often divided about which side of the line a particular law falls on.

In this case, however, the violation is clear. The Citizen Initiative here does nothing more than issue a direct command to the PUC. Although nominally a “resolve,” the Initiative does not take the form of a law or a resolve, as those terms are traditionally understood. Instead, the Initiative directs the PUC to enter a very specific finding, in a very specific case, despite of the fact that the PUC has already reached a contrary conclusion under the law, and this Court has already affirmed that conclusion in an earlier case. Without changing the law in any way, the Initiative simply orders the PUC to declare the other side the winner of the case.⁶¹ There is only one word to describe what the Initiative is doing: judging. Reversing the decisions of a lower court (which is how the

⁶¹ Cf. *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (“One way that Congress can cross the line from legislative power to judicial power is by usurping a court’s power to interpret and apply the law to the [circumstances] before it. The simplest example would be a statute that says, ‘In *Smith v. Jones*, *Smith wins.*’”) (internal citations and quotations omitted).

Initiative treats the final decision of this Court) with respect to a particular case is a judicial function.

The Initiative does not create any new rule for when certificates of public convenience and necessity may be issued or what kind of evidence is needed to demonstrate that a project is in the public interest. It makes no change to 35-A M.R.S. § 3132. Instead, it names a specific docket number, and demands that the PUC enter a specific order. It is a ticket for this day and this train only. The specificity of the Initiative leaves no doubt that no new law is being made and no law is being changed. If another entity (or even the same entity) seeks a permit for an identical project, with identical evidence of public need, the Initiative would not apply. Unlike some cases where courts have upheld legislative action, the Initiative leaves no determinations for the PUC or this Court to make. There are no findings necessary, no legal analysis required.

The Initiative raises precisely the concerns that the Framers of our state and federal constitutions sought to avoid. This sort of legislation with respect to a particular case invades the province of the judicial and executive branches and is best characterized as trial by legislature. If the legislative power includes not only the power to pass laws, but also to

mandate a specific interpretation of those laws and even direct the outcome of that application, the legislative power is without a check.

CONCLUSION

When a state legislature tries to interpret its own statutes and mandates specific results in individual cases under its statutes, such mandates exceeds the scope of its constitutionally prescribed authority. To put it simply, if the legislative power allows the legislature to commandeer another branch of state government, this is an unconstrained power. And if the legislature cannot violate the structural safeguards of our Constitution, neither can the people using the Initiative process. If Maine's people believe that the PUC is too lax with granting Certificates of Public Convenience and Necessity, or that this Court is too quick to affirm the PUC's decisions, both the Maine people and the Maine Legislature have the power to change the standards that the PUC applies or the standards of review that this Court uses to examine the PUC's actions. But what they cannot do is to leave the law unchanged while wielding the legislative power to tell other branches how to decide a finally adjudicated case. Although I have never seen a "law" like this in the past, I would expect to see many more in the future if this Court gives

the Legislature, and the electors, the green light to confine their laws to a single pending case and to interfere with the reasoned decisions of the other two branches.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Dmitry Bam", with a long horizontal flourish extending to the right.

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CERTIFICATE OF SERVICE

I, Dmitry Bam, hereby certify that a copy of this Amicus Brief was served upon counsel by email only, per agreement, at the address set forth below on July 13, 2020:

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