

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-20-181

AVANGRID NETWORKS, INC.,
Plaintiff/ Appellant

INDUSTRIAL ENERGY CONSUMER GROUP and
MAINE STATE CHAMBER OF COMMERCE
Plaintiff-Intervenors/ Appellants

v.

MATTHEW DUNLAP, in his official capacity as
Secretary of State for the State of Maine
Defendant/ Appellee/ Cross-Appellant

MAINERS FOR LOCAL POWER and NINE MAINE CITIZENS
Defendant-Intervenors/ Appellees/ Cross-Appellants

NEXTERA ENERGY RESOURCES, LLC
Defendant-Intervenor/ Appellee

On Appeal from Cumberland County Superior Court
Docket No.: CV-2020-206

BRIEF OF AVANGRID NETWORKS, INC.

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STATEMENT OF THE FACTS¹

I. Factual Background

In response to a request for proposal for clean energy, Avangrid Network Inc.'s ("Avangrid") subsidiary Central Maine Power Co. ("CMP"), together with an affiliate of Hydro-Québec, submitted the winning proposal to deliver 1,200 MW of electricity to Massachusetts. A.27-28, ¶¶ 9-12. A key component of that proposal was the New England Clean Energy Connect Project ("NECEC" or "Project"), a high voltage direct current transmission line from the Maine-Québec border to Lewiston, Maine that would deliver clean hydropower to the New England electric grid. A.28, ¶¶ 11, 13-15. CMP is seeking the permits for the NECEC. *Id.* ¶ 16. In accord with regulatory requirements, Avangrid's subsidiary NECEC Transmission LLC ("NECEC LLC") will construct, operate, and maintain the Project. A. 29, ¶ 17.

CMP obtained the approval of the Maine Public Utilities Commission ("PUC") for the Project. *Id.* ¶ 20. After CMP filed its petition for a certificate of public convenience and necessity ("CPCN"), the PUC conducted a 19-month review, in which 31 parties participated, that involved thousands of pages of pre-filed testimony and supporting materials, written discovery, technical conferences, six days of evidentiary hearings, and three public witness hearings. A.29-30, ¶¶ 19, 21. In a 101-

¹ The relevant facts, which are undisputed, are evidenced by Plaintiff's Verified Complaint, *see Bangor Historic Track, Inc. v. Dept. of Agric.*, 2003 ME 140, ¶ 10, 837 A.2d 129, and its attached exhibit. The exhibit, a copy of the relevant order of the Maine Public Utilities Commission, as well as this Court's prior decisions in *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ___ A.3d ___, and *Reed v. Sec'y of State*, 2020 ME 57, ___ A.3d ___, are subject to judicial notice. M.R. Evid. 201; *In re Scott S.*, 2001 ME 114, ¶ 13, 775 A.2d 1144.

page order (“Order”), the PUC granted CMP’s petition. A.29, ¶ 20. As required by 35-A M.R.S. § 3132, the PUC weighed the benefits and costs of the NECEC to the ratepayers and residents of the State of Maine. The PUC concluded that the NECEC is in the public interest and, therefore, there is a public need for the Project. A.30, ¶ 22. It found that the NECEC would result in “substantial benefits to Maine electricity customers” by reducing energy prices; would “enhance system reliability and fuel security within Maine”; would “provide environmental benefits by displacing fossil fuel generation” as well as “greenhouse gas (GHG) production”; and would produce “substantial macroeconomic benefits” through investment, employment, and taxes. A.30-31, ¶¶ 23-25. The PUC found that these benefits outweighed any adverse effects. A.31, ¶ 26. Accordingly, the PUC issued a CPCN for the Project. *Id.* ¶ 27.

NextEra Energy Resources, LLC (“NextEra”), an intervenor in the PUC proceeding, appealed the Order. *NextEra*, 2020 ME 34, ¶¶ 1, 5 ___ A.3d ___. In its appeal, NextEra argued, among other things, that the PUC improperly found that the Project was in the public interest and that there was a public need for the NECEC. *Id.* ¶¶ 20, 29. This Court disagreed and affirmed the grant of the CPCN. *Id.* ¶ 43. This Court held that the PUC had reasonably interpreted the public need standard under § 3132. *Id.* ¶¶ 22-27. It also held that the PUC, after weighing the relevant factors, had appropriately found the “public need” requirement to be satisfied. *Id.* ¶¶ 28-38. This Court therefore affirmed the PUC’s Order. *Id.* ¶ 43.

Despite this Court’s final judgment affirming the Order, Project opponents, including NextEra, have pursued a direct initiative commanding the PUC to revoke the CPCN (the “Initiative”). The Initiative states:

Sec. 1. Amend order. Resolved: That within 30 days of the effective date of this resolve and pursuant to its authority under the Maine Revised Statutes, Title 35-A, section 1321, the Public Utilities Commission shall amend “Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation,” entered by the Public Utilities Commission on May 3, 2019 in Docket No. 2017-00232 for the New England Clean Energy Connect transmission project, referred to in this resolve as “the NECEC transmission project.” The amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project. There not being a public need, the amended order must deny the request for a certificate of public convenience and necessity for the NECEC transmission project.

A.34, ¶ 40. The Initiative establishes no new, generally applicable standards governing CPCNs, nor does it rely on any changed circumstances. Instead, it would simply reverse a specific order issued by the PUC in a single docket and affirmed by this Court. Never before has an initiative been used to revoke a single permit, in disregard for the disruption to the project specifically and economic investment generally.

II. Procedural Background

Within a week of this Court’s order affirming the Secretary of State’s determination that the proponents of the Initiative had submitted sufficient signatures to place the Initiative on the ballot, *see Reed*, 2020 ME 57, ¶ 1, ___A.3d___,² Avangrid

² Avangrid’s claims were not ripe until this Court affirmed the Secretary’s determination that the petition was valid. Absent sufficient signatures, there would be no vote – and, thus, no controversy.

brought suit against the Secretary seeking declaratory judgment that the Initiative was unconstitutional and injunctive relief barring a vote on the Initiative. A.36. The Complaint sought relief on the basis that the Initiative exceeds the legislative power reserved to the people under article IV, part 3, § 18 of the Maine Constitution, and also infringes upon powers reserved to the executive and judicial branches in violation of article III, § 2. A.34-35, ¶¶ 44-53. The Complaint further alleged that the Initiative could not be justified as an exercise of legislative power under article IV, part 3, § 13. A.35-36, ¶¶ 54-56. Mainers for Local Power and certain Maine voters (collectively “MLP”) and NextEra intervened to oppose Avangrid’s request; the Maine State Chamber of Commerce (“MSCC”) and the Industrial Energy Consumer Group (“IECG”) intervened in support of Avangrid.

After a hearing that combined the motion for preliminary injunction with a trial on the merits, the Superior Court (Warren, J.) dismissed the Complaint. A.25. The court held that Avangrid’s claims constituted “a substantive challenge to the validity of the initiative and must be deferred until after the election,” A.22, and declined to reach the merits of Avangrid’s claims – despite concluding that “there are no disputed factual issues and that all of the issues before the court are questions of law,” A.14, and that the claims raised issues “deserving of serious consideration,” A.24.

STATEMENT OF THE ISSUES

1. Whether a claim that the Initiative exceeds the scope of the initiative power under article IV, part 3, § 18 of the Constitution, when brought after the

Initiative was certified and before it is presented to the electorate, is ripe and otherwise appropriate for judicial review as a matter of law?

2. Whether the Initiative exceeds the initiative power under article IV, part 3, § 18 of the Constitution because it reverses a final agency order affirmed by this Court without promulgating any new substantive, generally applicable standards?

3. Whether it is appropriate to issue a declaratory judgment that the Initiative is invalid and enter an injunction prohibiting an unconstitutional exercise of the direct initiative power?

SUMMARY OF THE ARGUMENT

The proponents of the Initiative are seeking to use the initiative power under article IV, part 3, § 18 of the Constitution in an unprecedented manner: to reverse a single agency order, after it was affirmed by this Court, without establishing *any* substantive, generally applicable standards that could be applied in future agency proceedings. The Initiative is not “legislation,” and thus exceeds the electorate’s initiative power under § 18. A vote on the invalid Initiative must be enjoined.

Avangrid’s challenge is ripe and must be resolved by this Court now. A pre-election challenge to an initiative is ripe when, as here, it involves a claim that the initiative at issue is not legislative and therefore exceeds the powers reserved to the people. A general challenge to the substantive constitutionality of an initiative is not ripe prior to the election because it is contingent upon the adoption and application of the initiative. As has been widely recognized, however, a claim that an initiative

exceeds the scope of the legislative power is ripe pre-election because it implicates the validity of the vote itself. Under this majority rule, adopted in Maine, Avangrid's challenge to the Initiative is ripe for adjudication. Moreover, the Constitution does not bar this Court from enjoining an unlawful vote. There is no right to pursue an initiative that is not, in fact, legislation.

The Initiative has none of the characteristics of legislation – it contains no generally applicable standards capable of future application. Instead, by directing the PUC to reverse its Order and deny CMP's petition under existing law, contrary to the evidence supporting that Order, its effect is limited to reversing a specific order issued by the PUC in a single docket and affirmed by this Court. As such, the Initiative infringes upon the judicial power by purporting to reverse the outcome of a decision by this Court, and invades the executive domain by directing the PUC to render a particular decision under pre-existing standards. The Initiative is also not a valid use of special legislation, which cannot be used to interfere with the powers committed to the judicial and executive branches of government. Because the Initiative is not legislative in nature, it is not a proper subject of the initiative process.

The Court must enjoin a vote on the Initiative. The vote itself would violate the Constitution, and would therefore cause irreparable harm. Holding an "advisory" vote would undermine the integrity of the initiative process, and cause voter confusion and frustration at public expense. This Court should take swift judicial action in the face of an imminent constitutional violation.

ARGUMENT

I. All Issues Presented Are Subject to *De Novo* Review.

This case presents questions regarding the availability of pre-election judicial review of direct initiatives, the breadth of the direct initiative power, and the propriety of declaratory and injunctive relief barring a vote on an initiative. All are pure legal issues subject to *de novo* review. See *State v. Elliott*, 2010 ME 3, ¶ 17, 987 A.2d 513 (*de novo* review of interpretations of the Maine Constitution); *Mason v. City of Augusta*, 2007 ME 101, ¶ 18, 927 A.2d 1146 (*de novo* review of pure legal issues).

II. Avangrid's Claims Are Appropriate for Pre-Election Judicial Review.

A. The Claims Are Ripe Because They Concern the Breadth of the Initiative Power Itself, Not the Substantive Validity of the Initiative if Adopted.

As the Secretary agrees, the requirement that a “case must be ripe for judicial consideration,” *Wagner v. Sec’y of State*, 663 A.2d 564, 567 (Me. 1995), is satisfied here. This case squarely presents the question whether the Initiative exceeds the scope of the people’s legislative authority because it is not a “bill, resolve, or resolution” – that is, *legislation* – under article IV, part 3, § 18. As discussed below, it is not. Instead, the Initiative infringes upon the judicial and executive powers in violation of article III, § 2. This issue – whether the Initiative is a valid use of the constitutional initiative power – is ripe because it (1) presents the live question whether the Initiative lawfully invokes the initiative process, and (2) is concrete and specific, as no additional facts are needed for decision. Courts must “review a proposed initiative to determine if it

is beyond the scope of the initiative power” even before it appears on the ballot. *Philadelphia II v. Gregoire*, 911 P.2d 389, 394 (Wash. 1996).

1. Pre-election subject matter challenges, including challenges to the legislative nature of an initiative, are ripe.

This Court’s precedent establishes that Avangrid’s claim is ripe for adjudication. The Court follows the general rule that a pre-election challenge to the substantive validity of an initiative if adopted is not ripe. *See Wagner*, 663 A.2d at 566-68 & n.5; *Lockman v. Sec’y of State*, 684 A.2d 415, 420 (Me. 1996). A claim is not ripe if it relates to the “future effect, enforceability, and constitutionality of the initiative if enacted.” *Wagner*, 663 A.2d at 567. This general rule does not bar all pre-election claims, however. In *Wagner*, the Law Court expressly considered and resolved whether “the proposed initiative legislation . . . present[ed] . . . a subject matter beyond the electorate’s grant of authority.” *Id.* This question could be addressed because it asked whether the initiative was “in direct violation of section 18,” *id.*, and therefore created a present controversy regarding the validity of the vote itself.³

The *Wagner* rule, disallowing pre-election substantive challenges while permitting challenges relating to the scope of the people’s initiative power, is sound. *See* James B. Gordon & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 313, 320 (1989). It is justifiable to defer

³ *Wagner*’s “subject matter” rule is consistent with this Court’s cases resolving other pre-election challenges to proposed ballot questions that implicated the validity of the vote itself. *See Lockman*, 684 A.2d at 418-19 (addressing a pre-election claim that the Legislature violated separation of powers in formulating the ballot question for a competing measure); *McCaffrey v. Gartley*, 377 A.2d 1367, 1372 (Me. 1977) (holding that Constitution did not permit emergency legislation to be placed on ballot as a competing measure).

determining whether an initiative is substantively constitutional – *e.g.*, whether it would violate due process or constitute a taking – until after its adoption because the law has no effect until that time and additional facts may be necessary to adjudicate the constitutional issue. *See id.* at 304, 310, 317. By contrast, pre-election review of whether the subject matter of an initiative exceeds the scope of the legislative power is necessary because such claims “address the justiciable issue whether the measure’s proponents are legally entitled to invoke the direct legislation process in the first instance.” *Id.* at 298. “The issue raised is not the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure’s proponents are entitled to invoke the direct legislation process at all.” *Id.* at 314. Such a challenge is similar to a procedural challenge: in both instances, the “case is concrete and specific, and the record will not be improved by waiting until after the election to see how the law is applied in a specific case.” *Id.* “If the election is permitted, the very injury complained of will occur.” *Id.*

In accord with these principles, the majority of courts have found pre-election claims that a proposed initiative exceeds the people’s legislative power ripe. In *Philadelphia II*, for example, the Washington Supreme Court noted that “[a] fundamental limit on the initiative power inheres in its nature as a legislative function.” 911 P.2d at 394 (quotation marks omitted). The court reasoned that, because the initiative power “is limited in scope to subject matter which is legislative in nature,” a court may resolve the question “whether the initiative is authorized by”

the constitution before an election, even if it “may not rule on the constitutional validity of a proposed initiative.” *Id.* Similarly, in *Donovan v. Priest*, the Arkansas Supreme Court found a pre-election claim that a proposed measure exceeded the scope of the initiative power to be ripe. 931 S.W.2d 119, 120 (Ark. 1996). Noting that the people retained only the power to enact legislative measures, the court concluded that it could resolve a pre-election claim to determine whether the measure was properly subject to the initiative process. *Id.* at 120-21. The court concluded that such claims presented justiciable issues that (1) were concrete, (2) existed before the election, (3) would not be clarified by post-election developments, and (4) related to the “proponents’ right to invoke the direct-legislation process.” *Id.* at 121-22.⁴

⁴ Numerous other courts have taken the same view. See, e.g., *Carter v. Lehi City*, 269 P.3d 141, 147-48, 163 & n.58 (Utah 2012) (pre-election “subject matter challenges,” including challenges to whether an initiative is “a valid exercise of legislative rather than executive or judicial power,” are justiciable because they concern the facial question” of whether the initiative process may be invoked); *Glover v. Concerned Citizens for Fuji Park and Fairgrounds*, 50 P.3d 546, 552 (Nev. 2002) (“pre-election intervention is warranted to declare void an initiative” that exceeds the legislative power); *Burnell v. City of Morgantown*, 558 S.E.2d 306, 314 (W.V. 2001) (permitting pre-election judicial review if an initiative is alleged to “involve a subject matter that is beyond the scope of the initiative . . . power”); *State ex rel. Gateway Green Alliance v. Welch*, 23 S.W.3d 861, 863 (Mo. Ct. App. 2000) (“[A]n initiative petition may be scrutinized pre-election for the purpose of determining whether the measure proposes legislative . . . action.”); *Lane Transit Dist. v. Lane Cty.*, 957 P.2d 1217, 1218 & n.1 (Or. 1998) (initiatives that exceed the “constitutional reservation of the initiative power . . . properly are excluded from the ballot”); *City of Idaho Springs v. Blackwell*, 731 P.2d 1250, 1253 (Colo. 1987) (“[A] necessary exception to the rule proscribing premature . . . judicial interference with initiative and referendum exists where the electorate exceeds the proper sphere of legislation”); *Saggio v. Connelly*, 709 P.2d 874, 875 (Ariz. 1985) (allowing pre-election claim regarding whether initiative “is, in fact, legislation”); *Am. Fed. of Labor v. Eu*, 686 P.2d 609, 614 (Cal. 1984) (a pre-election claim that the “initiative is not legislative in character” is ripe because it “goes to the power of the electorate to adopt the proposal in the first instance. . . . The question raised is, in a sense, jurisdictional.”). Courts typically only deny review if proponents challenge the substantive constitutionality of an initiative. See, e.g., *Herbst Gaming, Inc. v. Sec’y of State*, 141 P.3d 1224, 1228 (Nev. 2006) (declining to reach due process and equal protection claims, while stating that pre-election challenges to the “subject matter” of an initiative, such as a claim that an initiative “is administrative rather than legislative,” are ripe); *Winkle v. City of Tucson*, 949 P.2d 502, 504-05 (Ariz. 1997) (disallowing pre-election review of preemption claims, while acknowledging that pre-election challenges “that the initiative does not comprise legislation” are ripe).

This reasoning leads to the conclusion that pre-election review is not limited to express constitutional prohibitions unique to the initiative process.⁵ Certainly, it is appropriate to enforce express constitutional limits on the subject matter of initiatives, *see, e.g., Wagner*, 663 A.2d at 567 (considering whether the initiative was an amendment to the Constitution, in violation of article IV, part 3, § 18(1)), and to enforce constitutional procedures that preclude the use of a direct initiative, *see, e.g., Opinion of the Justices*, 159 Me. 209, 214-15, 191 A.2d 357 (1963) (issuance of bonds cannot be done by direct initiative because art. IV, § 14 requires a 2/3 vote of both Houses). But pre-election judicial review is not *limited* to these circumstances. The requirement that an initiative be a “bill, resolve or resolution,” Me. Const. art. IV, pt. 3, § 18(1) is similarly an express constitutional limit on the initiative process that is justiciable pre-election. It, too, is a subject matter limitation on initiatives; it, too, presents a concrete controversy in advance of the election, because the entitlement to invoke the initiative process is at issue; and it, too, will not be sharpened by post-election events.

2. Avangrid brings a subject matter challenge, not a challenge to the substance of the Initiative.

The ripe question presented is whether the Initiative addresses a subject matter beyond the people’s legislative authority under article IV, part 3, § 18. As explained *infra* at Part II(A), the Initiative must be a “bill, resolve or resolution” – *i.e.*, legislation

⁵ MLP relied below on *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989 (Alaska 2004), but its reliance was misplaced. In that case, the Alaska Supreme Court actually acknowledged that “subject-matter limitations on initiatives” are indeed subject to “pre-election review.” *Id.* at 993. The challenge in this case fits this category, given that a claim that an initiative exceeds the scope of the legislative power is a subject matter challenge. *See Herbst Gaming, Inc.*, 141 P.3d at 1228.

– in order to be a proper subject of the initiative process. Me. Const. art. IV, pt. 3, § 18(1). Indeed, the very title of the constitutional provision outlining the initiative process is “Direct initiative *of legislation.*” *Id.* § 18 (emphasis added). An action that is not legislative is beyond the scope of the initiative power. Thus, as in *Wagner*, the Court must consider whether the Initiative *can be enacted* under § 18 – not whether the Initiative is unconstitutional *if enacted*.⁶

Contrary to the Superior Court’s conclusion, Avangrid does *not* invite this Court to consider the substantive validity of the Initiative. Avangrid does not argue here that the Initiative would, for instance, constitute a taking or violate due process *if enacted*. Such claims would require application of the Initiative’s language to facts yet to be developed regarding Avangrid’s vested interests. *See Donovan*, 931 S.W.2d at 360; *cf. Lockman*, 684 A.2d at 420 (noting the challenge “depends on the happening of future events and is not presently ripe”). Instead, Avangrid argues that the Initiative, at present, is not *legislative* at all – an argument that requires consideration of no facts beyond the face of the Initiative and that presents a live controversy because it implicates whether a vote would be lawful. Avangrid’s claims relate to the constitutionality of the vote, not the enforceability of the law if enacted.

⁶ That the Initiative labels itself a “Resolve” does not make it legislation. Such a superficial analysis would render any constitutional inquiry meaningless. In *Wagner*, this Court considered the implications of the “actual text” of the initiative, read as a whole – *i.e.*, whether it would “usurp[] . . . the enacting powers of the Legislature [or] the interpretive powers of the judiciary.” 663 A.2d at 567; *see Lewis v. Webb*, 3 Me. 326 (1825) (concluding that despite the Legislature’s label of a measure as a “resolve,” considered as a whole, the purported “resolve” exceeded the legislative powers by impeding upon the province of the judiciary). The same inquiry regarding the facial validity of the Initiative must happen here.

Moreover, Avangrid’s claim is not converted into a substantive challenge that must be deferred until after the election simply because whether the Initiative is a legislative “bill, resolve or resolution” also implicates a violation of the separation of powers under article III, § 2. The Initiative is not a valid exercise of legislative power for the same reason it invades that of the judiciary and executive. *See Carter*, 269 P.3d at 151-155 (defining scope of legislative power in contradistinction to judicial and executive power); *see also Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013) (“[A] voter initiative must be a valid exercise of legislative power, rather than executive or judicial power.”).⁷ The relevant ripeness question is whether the issues present a concrete controversy relating to the propriety of the vote that would not be clarified by post-election events. Here, the answer is “yes” as to the claim regarding the scope of the legislative power as well as the separation of powers claim.

Finally, the inquiry the Court must undertake here applies to state-wide initiatives as certainly as it does to municipal initiatives. *See, e.g., Wagner*, 663 A.3d at 567; *Philadelphia II*, 911 P.2d at 395; *Donovan*, 931 S.W.2d at 128. It is *more*, not less, critical to enforce the “legislative” requirement in the context of state-wide initiatives than it is for municipal initiatives. Municipal bodies often lawfully combine legislative

⁷ The decision in *Coppernoll v. Reed*, 119 P.3d 318 (Wash. 2005), is not to the contrary. In that case, the court re-affirmed that claims that “the subject matter of the measure is not proper for direct legislation” are ripe pre-election. *Id.* at 322. The petitioners had *not* argued that the initiative was “not legislative in nature”; instead, they argued that the initiative violated the right to trial by jury and separation of powers. *Id.* at 324. Because the petitioners had not argued that the legislative power had been exceeded, and thus did not challenge the validity of the vote itself, their claims were not justiciable. *Id.* Here, by contrast, it is expressly claimed that the Initiative exceeds the people’s legislative power.

and executive power. By contrast, at the state level, executive, judicial, and legislative powers are strictly separated. Me. Const. art. III, § 2. There is thus a heightened concern that the people – in pursuing a state-wide initiative – be restricted to legislative acts. *See Vagneur*, 295 P.3d at 503-04 (separation of powers precludes initiatives that exceed the legislative power); *Carter*, 269 P.3d at 147 (same). Thus, this Court must determine prior to the election whether the Initiative is in fact legislation.

B. There Is No Constitutional Impediment to Pre-Election Judicial Review of the Initiative and Injunctive Relief Barring It from the Ballot.

There also is no constitutional bar to this Court issuing pre-election the relief requested by Avangrid. The Constitution provides that a procedurally valid initiative “shall be submitted to the electors,” Me. Const. art. IV, pt. 3, § 18(2), but that requirement, deliberately placed in article IV, governs the authority and conduct of the Legislature only. It presents no impediment to the authority and obligation of the judiciary to police and prevent unconstitutional acts. *See Barron v. City of Baltimore*, 32 U.S. 243, 247 (1833) (Marshall, C.J.) (reasoning that different constitutional clauses limit different government actors based on the text and structure of the constitution, noting that such structure is in no way accidental and is “of great importance”); *Marbury v. Madison*, 5 U.S. 137, 178-79 (1803) (Marshall, C.J.) (reasoning that a written constitution would be meaningless in restraining legislative power, as it was clearly intended to do, if the courts were not capable of engaging in judicial review). The purpose of the constitutional initiative amendment is to serve as a check upon the

legislative branch and the political lobby – not as a restraint upon the judiciary. Leg. Rec. 643 (1907) (the initiative amendment would “[b]reak up this monopoly of the law-making business” that was “in the hands of a selected few”).⁸

Prior opinions expressed by the Justices of this Court do not support limiting judicial review. In 1996, in response to a question from the Legislature, the Justices opined only that the *Legislature* must submit an unconstitutional question to referendum. *See Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996).⁹ The Justices’ answer was consistent with the purpose of § 18 – to enable the electorate to enact, amend, or repeal legislation without interference from the Legislature. *See* Leg. Rec. 643-44, 646 (1907). The Justices’ answer says nothing about this Court’s authority – indeed, obligation – to exercise judicial review. Moreover, in answering the Legislature, the Justices were rendering an advisory opinion, *see* Me. Const. art. VI, § 3, and in that posture could not enjoin a vote. When confronted by the issue in a traditional court action, this Court indicated that it *would* determine whether an initiative is beyond the scope of the legislative power. *Wagner*, 663 A.2d at 567.¹⁰ As

⁸ *See also* J. William Black, *Maine’s Experience with the Initiative and Referendum*, *The Annals of the American Academy of Political and Social Science*, at 177 (Vol. 43, Sep. 1912), *available at* <https://www.jstor.org/stable/pdf/1012544.pdf> (stating that the initiative is “a safeguard against ill-advised and corrupt legislation” and “a check upon the lobby and the power of the old-time political boss”).

⁹ *See also Opinion of the Justices*, 2004 ME 54, ¶ 37, 850 A.2d 1145 (Clifford, Rudman, and Alexander, JJ.) (citing the 1996 *Opinion of the Justices*); *Lockman*, 684 A.2d at 419 (“[P]lacement on the ballot is a ministerial act of the *Secretary of State* pursuant to the self-executing procedure set forth in the Constitution.” (emphasis added)); *Wyman v. Sec’y of State*, 625 A.3d 307, 311 (Me. 1993) (stating only that the Secretary and the Attorney General could not preclude the petition process because of the potential substantive invalidity of an initiative).

¹⁰ In *Wagner*, the Court again acknowledged that the Legislature is bound to refer an initiative to the people. *Wagner*, 663 A.2d at 566 n.3. Because the Court found that the initiative was not beyond the scope of the

this Court has long recognized, “when, if ever the executive or legislative departments have exercised in any respect a power not conferred by the constitution, . . . the judiciary is not only permitted *but compelled* to sit in judgment” to determine whether any action is “in violation of, or inconsistent with, constitutional restraints.” *Ex parte Davis*, 41 Me. 38, 53-54 (1856) (emphasis added).

In the context of judicial, rather than legislative, oversight, the right of the people to present an initiative to the electorate is necessarily contingent on that initiative having satisfied all constitutional prerequisites. In particular, for present purposes, it must be a “bill, resolve or resolution.” *Id.* § 18(1). The people have no “absolute right,” *McGee v. Sec’y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933, to pursue an initiative that exceeds the legislative power; to the contrary, the Constitution only “reserves to the people the *right to legislate* by direct initiative if the constitutional conditions are satisfied,” *id.* ¶ 25 (second emphasis added). The Constitution, moreover, need only be liberally construed to facilitate the people’s “sovereign power to legislate.” *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983) (emphasis added). Because an initiative must be a “bill, resolve or resolution” to be within the people’s legislative power, it is appropriate and necessary for this Court to address now the issues presented here. If those requirements have not been fulfilled, then a vote is not lawful and can be enjoined. *See Wagner*, 663 A.2d at 567 (citing cases).

initiative power, however, this statement was dicta. The Court did not hold that the judicial branch is prohibited from enjoining a vote on an initiative that exceeds the people’s legislative power.

Construing § 18 to permit judicial review is supported not only by *Wagner* but also by analogous case law from other jurisdictions. In *Philadelphia II*, for example, the court determined that “shall” language deprived the attorney general of discretion to withhold an initiative, 911 P.2d at 392-93, but nevertheless held “that a *court* may review the substance of the proposed initiative to determine whether it exceeds the scope of initiative power,” *id.* at 392. As the court observed, “the meaning and scope of a constitutional provision is exclusively a judicial function.” *Id.*; see *Vagneur*, 295 P.3d at 496, 503 (recognizing court’s power to enjoin vote, and issuing injunction) *Donovan*, 931 S.W.2d at 128 (enjoining vote on initiative); *City of Idaho Springs*, 731 P.2d at 1253 (barring vote on non-legislative initiative “does not infringe the fundamental right of the people to legislate”). The same is true here.

* * *

This case does not require the Court to merely offer an opinion on the substantive constitutionality of the Initiative. *Cf. Opinion of the Justices*, 2004 ME 54, ¶ 38, 850 A.2d 1145 (Clifford, Rudman, and Alexander, JJ.).¹¹ This case instead requires the Court to determine whether the constitutional prerequisites for advancing an initiative have been fulfilled: *i.e.*, whether the Initiative at present—and not just if enacted—is a “bill, resolve or resolution” under article IV, part 3, § 18, thereby

¹¹ Notably, in the 2004 *Opinion of the Justices*, a majority *did* offer an opinion as to the constitutionality of an initiative pre-election, thereby rejecting the position of three justices that the question was not ripe. *Id.* ¶ 6.

entitling the electorate to vote on the Initiative. That question is ripe and appropriate for present adjudication.

III. The Initiative Exceeds the Scope of the Legislative Power.

To obtain a permanent injunction, Avangrid must succeed on the merits. *Windham Land Tr. v. Jeffords*, 2009 ME 29, ¶ 41, 967 A.2d 690. As the Secretary agrees, Avangrid’s claim is meritorious. The Initiative purports to reverse a specific PUC order, issued to a single entity and subsequently affirmed by this Court as supported by competent evidence—all without providing any substantive, generally applicable standards capable of future application. The Initiative is not legislation.¹²

A. The Initiative Exceeds the Legislative Power Retained by the People under Article IV, Part 3, § 18 of the Constitution.

Article IV of the Constitution, which vests the “legislative power” in the House of Representatives and Senate, also reserves to the people the “power to propose laws.” Me. Const. art. IV, pt. 1, § 1. Thus, citizens may “propose to the Legislature for its consideration any *bill, resolve or resolution.*” *Id.* pt. 3, § 18(1) (emphasis added). Article IV, of which § 18 is a part, addresses legislative power only. Accordingly, as Maine courts have long recognized, the initiative power is limited to the exercise of *legislative* authority. Here, the Initiative exceeds the legislative power granted in § 18.

¹² This issue was not resolved in *Reed*. In *Reed*, this Court determined *only* “that the initiative proponents presented valid signatures numbering in excess of the constitutional requirement,” and “d[id] not address any other aspect of the petition, *including whether the petition comports with other constitutional or statutory requirements for a direct initiative of legislation.*” 2020 ME 57, ¶ 22 n.16, ___ A.3d ___ (emphasis added).

1. Article IV reserves to the people only legislative power.

The plain text of article IV limits the initiative power to exercises of legislative authority. *See Opinion of the Justices*, 2017 ME 100, ¶ 58, 162 A.3d 188 (“[C]onstruction of the Maine Constitution depends primarily on its plain language.”). The initiative power in § 18 is framed in terms of proposing legislation. Me. Const. art. IV, pt. 3, § 18(1) (referring to “any bill, resolve or resolution”); *see id.* pt. 1, § 1 (reserving the power to propose “laws”); *id.* pt. 3, § 20 (defining “measure” as “an Act, bill, resolve or resolution proposed by the people”). Each of these terms is legislative in nature.¹³

Consistent with the plain language of the Constitution, this Court has recognized that the use of the initiative process is limited to legislation. *See Allen*, 459 A.2d at 1098 (“[T]he people took back to themselves part of the *legislative* power that in 1820 they had delegated entirely to the legislature.” (emphasis added)).¹⁴ In *Moulton v. Scully*, the Court held that the initiative amendment did not apply to the removal of a public officer because it was not a legislative act. 111 Me. 428, 89 A. 944, 952-55 (1914). The Court noted that by using the terms “bills” and “resolves,” the amendment only returned to the people the Legislature’s power “as a lawmaking

¹³ *See* Black’s Law Dictionary (11th ed. 2019) (defining “bill” as “a legislative proposal offered for debate before its enactment” and “resolve” as a “main motion that formally expresses the sense, will, or action of a deliberative assembly (esp. a legislative body)”). The legislative history of § 18 supports this conclusion. During the debate on the initiative amendment, the discussion focused on returning *legislative* power to the people. For example, Representative Cobb spoke in favor of the amendment because it would return “[a]n essential function of the government,” namely “the making of laws,” to the people. Leg. Rec. 643 (1907). This legislative history is consistent with the nationwide movement in the 1900s to return lawmaking power to the people. *See Carter*, 269 P.3d at 148-49.

¹⁴ The Court has frequently made similar observations. *See, e.g., McGee*, 2006 ME 50, ¶¶ 24-25, 896 A.2d 933; *Opinion of the Justices*, 682 A.2d 661, 665 (Me. 1996); *Opinion of the Justices*, 275 A.2d 800, 803 (Me. 1971); *Farris ex rel. Dorskey v. Goss*, 143 Me. 227, 230-31, 60 A.2d 908, 910-11 (1948).

body,” not as an “impeaching or addressing body.” *Id.* at 953. The purpose of the amendment was to make “the legislative power . . . subject to the will of the people.”

Id. It added:

This, too, marks the limitation of the amendment. It applies only to legislation, to the making of laws, whether it be a public act, a private act, or a resolve having the force of law. This is shown clearly and conclusively by the language of section 2 of part third of article IV, under the general head of ‘Legislative Power.’ . . . The referendum applies and was intended to apply only to acts or resolves of this class, to “every bill or resolution having the force of law,” that is, to what is commonly known as legislative acts and resolves This is the simple and plain interpretation of simple and plain language.

Id.; see *Opinion of the Justices*, 118 Me. 544, 107 A. 673, 674-76 (1919) (ratification of an amendment could not be done by initiative because it is “in no sense legislation”). It is well settled, therefore, that the initiative power is limited solely to legislative acts.

2. The Initiative is not a proper exercise of legislative power because it establishes no substantive rules and applies only to a single concluded administrative proceeding.

Because the initiative power only extends to legislation, it is necessary for this Court to determine whether the Initiative is legislative. In making this threshold determination, no presumption of constitutionality applies – such a presumption attaches only if an initiative is legislation. See *Opinion of the Justices*, 623 A.2d 1268, 1262 (Me. 1993) (applying presumption of constitutionality to initiative that was, in fact, legislation). The Initiative is not a proper exercise of legislative power because it is neither generally applicable nor capable of future application.

While the legislative power is broad, it is not limitless. This Court has recognized that a proper exercise of legislative power “must in its nature be general and prospective; a rule for all, and binding on all.” *Lewis*, 3 Me. at 333; see *Bell v. Town of Wells*, 557 A.2d 168, 191 (1989) (Wathen, J., dissenting) (discussing *Lewis*). In a case cited approvingly by the Court, see *Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶ 15, 91 A.3d 601, the Utah Supreme Court defined the legislative power in terms similar to that employed in *Lewis*: “Legislative power generally (a) involves the promulgation of laws of general applicability; and (b) is based on the weighing of broad, competing policy considerations.” *Carter*, 269 P.3d at 151. Thus, “[w]hen the government legislates, it establishes rules” that “apply to everyone who engages in the type of conduct that the law addresses” and “weighs broad policy considerations, not the specific facts of individual cases.” *Id.* at 151-52.¹⁵

The outer bounds of legislative power can be delineated “by contrasting this power with its executive and judicial counterparts.” *Carter*, 269 P.3d at 152. The Legislature establishes “a general rule.” *Id.* “[I]ts enforcement is left to the executive

¹⁵ This rule is widely recognized. See, e.g., *Phillips v. City of Whitefish*, 330 P.3d 442, 467-68 (Mont. 2014) (“Permanency and generality are key features” of legislation); *Vagueur*, 295 P.3d at 506-07 (endorsing *Carter*’s definition of legislative power); *LC&S, Inc. v. Warren Cty. Area Plan Comm’n*, 244 F.3d 601, 602 (7th Cir. 2001) (“Legislation is prospective in effect and, more important, general in its application.”); *Buckeye Community Hope Found. v. Cuyaboga Falls*, 697 N.E.2d 181, 186 (Ohio 1998) (ordinance not “legislative” because it had “no general, prospective application”); *City of Wichita v. Kansas Taxpayers Network, Inc.*, 874 P.2d 667, 672 (Kan. 1994) (“Permanency and generality are key features of a legislative [act].”); *Town of Whitehall v. Preece*, 956 P.2d 743, 749 (Mont. 1998) (same); *Fite v. Lacey*, 691 P.2d 901, 904 (Okla. 1984) (“legislative” acts are “rules of civil conduct . . . of general application” that are “not a transient, sudden order to and concerning a particular person, but something permanent, uniform, and universal”); *Lane Transit Dist.*, 957 P.2d at 1220 (“legislative activity” is the “making laws of general applicability and permanent nature”); see also, e.g., *De Niz Robles v. Lynch*, 803 F.3d 1165, 1172 (10th Cir. 2015) (Gorsuch, J.) (describing legislation as “announcing new rules of general applicability”).

(by applying it to the particularized circumstances of individuals),” while “its adjudication is left to the judiciary (by resolving specific disputes between parties as to the applicability of the law to their actions).” *Id.*

Viewed in these terms, it is plain that the Initiative is not legislation. The Initiative is not generally applicable. It is not based on broad policy considerations, and does not create any new legislative standards governing power line siting, construction, or operation. It could not be any more narrowly targeted, given its specific reference to one PUC docket and a single order in that docket. It establishes no substantive standards for the PUC to consider in granting future CPCNs. It simply directs the PUC to reverse a single order granted after months of administrative process, public hearing, and testimony.¹⁶ Rather than being an expression of policy “for all, and binding on all,” it is a punitive measure “for one, and binding on one.” The Initiative exceeds the scope of the legislative power, and thus the scope of the direct initiative provision in § 18.

3. The Initiative is not a proper exercise of legislative power merely because it concerns an order of the PUC.

The fact that the Initiative concerns a PUC order does not alter this analysis. The Legislature’s power does not encompass standard-less, after-the-fact reversals of

¹⁶ An initiative has never before been used in Maine to approve or disapprove a single project, after an agency with full authority issued a final decision regarding that project and the Court affirmed that decision.

PUC decisions. Because the scope of the initiative power is no broader than that of the Legislature,¹⁷ the initiative process also cannot be used to accomplish this result.

a. The Legislature’s power over the PUC is limited.

The legislative power over the PUC is subject to limitations. The PUC has extensive authority to make adjudicatory decisions. The Legislature can exercise control over the PUC, but only through the promulgation of substantive, prospective standards – not through *ad hoc* reversals of agency adjudications.

The “general purpose” of the PUC, created in 1913, was “to place the entire regulation and control of all public service corporations . . . in the hands of a board or commission which can investigate conditions, hear parties, and grant relief much more expeditiously and fairly than the Legislature itself.” *In re Searsport Water Co.*, 118 Me. 382, 108 A. 452, 457 (1919); *see* Leg. Rec. 1039-40 (1913) (The “whole intention” was to keep oversight of utilities “out of politics” by creating a “tribunal . . . made up of experts”). These “expert” PUC commissioners would “be on the same footing with the judges of the Supreme Court.” Leg. Rec. 885 (1913). The PUC would make “final decision[s]” on questions of fact, while questions of law were to “go up to the Supreme Court in the same manner in which questions of law go from other courts.” *Id.* at 907. The PUC’s enabling act “in effect creat[ed] another great court” with regulatory expertise. *Id.* at 1038.

¹⁷ In *Moulton*, the Court held that the legislative authority reserved to the people originated from and was limited by the Constitution’s grant of legislative power to the Legislature. 111 Me. at 448, 89 A. at 953.

The Legislature delegated “its entire authority over [the regulation of public utilities] to the Commission.” *New England Tel. & Tel. Co. v. Pub. Utils. Comm’n*, 470 A.2d 772, 778 (Me. 1984); *see Mech. Falls Water Co. v. Pub. Utils. Comm’n*, 381 A.2d 1080, 1090 (Me. 1977) (“In its wisdom the Legislature delegated its entire authority to regulate and control public utilities to the Public Utilities Commission.”). Pursuant to its enabling act, the PUC has both “the power and . . . duty to enforce the provisions of this act and all other laws relating to public utilities.” P.L. 1913, ch. 129, § 8; *see Leg. Rec.* 885 (1913) (noting that the PUC was granted the “power . . . to regulate utilities and conduct them for the benefit of the whole people of the state”). This broad power continues to be reflected in Title 35-A. *See, e.g.*, 35-A M.R.S. § 103(4).

As illustrated by *In re Searsport Water Co.*, the Legislature does not have unbounded authority over PUC decisions. At issue in that case was whether the PUC had the power to increase rates above the rates set in legislatively-authorized contracts between water companies and municipalities. 118 Me. 382, 108 A. at 454. This Court held that it did, and in so doing recognized the limits of legislative authority. As the Court determined, the language of the PUC’s enabling act was “broad enough to include the regulation and control of every rate . . . of every public utility whether fixed by contract or by the utility itself, *unless [1] limited in some manner by the terms of the act, or [2] the state has previously suspended its regulatory powers.*” *Id.* at 457 (emphasis added). In short, the PUC’s exercise of its powers can only be restricted by substantive, prospective legislation.

b. The Initiative exceeds the scope of legislative authority over the PUC.

Taking the PUC’s history and *In re Searsport Water Company* together, it is clear that, consistent with *Lewis*, the power of the Legislature over the PUC is subject to constraints. The determination whether an action is properly “legislation” turns on its character and timing: it must create substantive standards, and it must do so in a manner that can be applied prospectively. In this case, neither the character of the Initiative—reversing a PUC decision without creating new substantive standards—nor its timing—following the completion of an extensive agency hearing process and a final order upheld by this Court—are consistent with the limits on legislative authority over the PUC.

Auburn Water District v. Public Utilities Commission, 163 A.2d 743 (Me. 1960), is not to the contrary. That case acknowledges that “regulation of public utilities is a function of the Legislature,” and that the “[t]he power of the Legislature was not . . . surrendered” at the creation of the PUC. *Id.* at 744. Those principles, however, do not establish that the Legislature’s power over the PUC is limitless as MLP contends. In *Auburn Water District*, the Court simply considered whether the Legislature had the power to establish, in the charter creating the water district, certain rates as well as a term for the district’s bonds. *Id.* at 743. The Court concluded that the Legislature did have this power. *Id.* at 745, 747. Notably, however, the character of the legislative action in *Auburn Water District*—creation of a charter establishing rates and governing

bonds—is unlike the standard-less Initiative. The timing of the charter is also distinguishable, as it preceded any rate determination by the PUC. That case does not establish that the Initiative, which overturns an existing and final PUC order, is within the proper scope of legislative authority.

Further, the PUC’s governing statutes do not, and cannot, expand the scope of the Legislature’s powers. Section 1323 of Title 35-A, relied upon by MLP below, requires a public utility to exhaust its remedies before the PUC prior to seeking relief from the Legislature. 35-A M.R.S. § 1323. There is no authority suggesting that § 1323 can be used by any party other than an aggrieved utility to reverse adjudicatory decisions by the PUC. Such appeals go directly to this Court. *Id.* § 1320. Rather, that statute permits a public utility to seek legislative changes to the PUC’s substantive standards, such as those governing the grant of a CPCN, while compelling the utility to first seek relief before the PUC.¹⁸

In sum, there is no support for the proposition that the scope of the legislative power over the PUC is completely without limits. Final decisions made by the PUC are not subject to *ad hoc* reversals via the political process.

¹⁸ Similarly, the Legislature cannot expand its own power by merely asserting it. The Legislature did recently enact a resolve directing the approval of off-shore wind energy contracts, 2019 Resolves, ch. 87, but that resolve was never challenged in court, and thus provides no useful guidance. Even assuming that the resolve was lawful, it does not provide support for the Initiative. Unlike the Initiative, it did not reverse a final decision; the PUC had already reopened the proceeding. *Long Term Contracting for Offshore Wind Energy and Tidal Projects*, Docket No. 2010-00235, Order (Aug. 6, 2018). The “net metering” law, also cited by MLP, is also inapposite. In that bill, unlike the Initiative, the Legislature adopted new substantive standards to be applied by the PUC on a going-forward basis. *See* L.D. 91 (Apr. 2, 2019); L.D. 143 (Jan. 17, 2019).

B. The Initiative Purports to Exercise Powers Reserved to the Judicial and Executive Branches Pursuant to Article III, § 2.

The non-legislative nature of the Initiative is fatal under article IV, part 3, § 18(1), and the Court thus need go no further to rule in favor of Avangrid. But this constitutional flaw is compounded by the Initiative's infringement upon the powers reserved to the judiciary and executive. Article III, § 2 of the Maine Constitution states: "No 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, except in the cases herein expressly directed or permitted." Like article IV, part 3, § 18, this provision makes it clear that the initiative power is cabined to exercises of legislative authority. *See Morris v. Goss*, 147 Me. 89, 106, 83 A.2d 556, 565 (1951) ("Only in a constitutional manner may the people exercise the law making power reserved to themselves."). "[E]xecutive and judicial powers are not available to the people in the initiative process." *Carter*, 269 P.3d at 147.

Separation of powers has deep roots in American law. Chief Justice John Marshall explained that "[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." *Fletcher v. Peck*, 10 U.S. 87, 136 (1810). The framers adopted a system of separated powers because they were "well acquainted with the danger of subjecting the determination of the rights of one person to the 'tyranny of shifting majorities.' . . . It was to prevent

the recurrence of such abuses that the Framers vested the executive, legislative, and judicial powers in separate branches.” *I.N.S. v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring); see THE FEDERALIST NO. 47 (James Madison), 1788 WL 461, at *3. The separation of powers doctrine thus “seeks to prevent unfair applications of the law to specific individuals.” *Carter*, 269 P.3d at 152.

Article III, § 2 expressly provides for a “strict separation of powers between the three branches of government.” *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985). Under the Maine Constitution, the separation of powers doctrine is “much more rigorous” than under the U.S. Constitution. *N.E. Outdoor Ctr. v. Comm’r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 9, 748 A.2d 1009 (quoting *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982)). “[S]eparation of powers issues must be dealt with in a formal rather than functional manner.” *Bossie*, 488 A.2d at 480. Under Maine law, the question is: “[H]as the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.” *Id.* (quoting *Hunter*, 447 A.2d at 800).

The Initiative twice violates the separation of powers doctrine. First, it invades the prerogatives of the judiciary by purporting to adjudicate a specific dispute between two parties, reversing a final judgment affirmed by this Court. Second, it infringes upon executive authority by purporting to apply the law to a particularized set of circumstances, reversing the outcome of an extensive agency hearing process.

1. The Initiative usurps judicial authority because it would reverse the judgment of this Court.

The Constitution grants the judiciary full “judicial power.” Me. Const. art. VI, § 1. “The essence of the judicial power, as distinguished from the legislative, is its focus on resolving specific controversies between particular parties in litigation.” *Bell*, 557 A.2d at 191 (Wathen, J., dissenting); see *Carter*, 269 P.3d at 151 (the “judicial power . . . involves the application of the law to particular individuals or groups based on their particularized circumstances”). The Initiative would infringe upon the judicial power by reversing the outcome of a final judgment.

It is well established under Maine law that it violates the separation of powers for the Legislature to reverse a final judgment as to the parties in that action. *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117 (“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.”); *State v. L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960 (“[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.”); *Lewis*, 3 Me. at 332; see *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219-27 (1995) (citing *Lewis* and holding that a legislative attempt to overturn a judicial decision violates separation of powers).¹⁹ A law cannot “change the result of

¹⁹ This line of cases reflects the principle, deeply rooted in American government, that prevents a legislature from interfering with a “particular case”: “A legislature without exceeding its province cannot reverse a determination once made, in a particular case; though it may prescribe a new rule for future cases.” THE FEDERALIST NO. 81 (Alexander Hamilton), 1788 WL 495, at *3; see also THE FEDERALIST NO. 48 (James

a previous decision.” *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117. The same holds true even of final agency decisions. *Id.* ¶¶ 9, 11 (final Workers’ Compensation Board decisions cannot be disturbed by the Legislature).

The Initiative directly contravenes this well-established line of precedent, as *Lewis* illustrates. In that case, the Court invalidated a resolve passed by the Legislature that would have permitted an untimely appeal of a probate judgment. *Lewis*, 3 Me. at 326-27. The Court considered the question whether the act was of “legislative or judicial character,” and determined it was the latter. *Id.* at 331-32. The Court found that the “resolve” was “purely judicial in its nature” because it would “set aside a judgment or a decree of a Judicial Court, and render it null and void.” *Id.* at 332. The Court rejected the argument that it was not “judicial” because it went “no farther than to authorize a re-examination of the cause,” concluding that it “professes to accomplish in an indirect and circuitous manner, that which the existing laws forbid . . .; and to perform an act . . . between party and party; an act therefore of a judicial character, in the simple form of legislation.” *Id.* at 332-33. The Initiative claims markedly more power than the resolve in *Lewis*. There, the Legislature only sought to direct the judiciary to re-hear a case. Here, the Initiative proposes to force the PUC to vacate its essential findings and reverse its final decision—without any different

Madison), 1788 WL 462, at *3 (noting concern with “cases belonging to the judiciary department [being] frequently drawn within legislative cognizance and determination”).

evidentiary findings—even after it was affirmed by this Court. It is judicial in its essence.

This conclusion cannot be avoided by suggesting that the PUC’s order granting the CPCN was not “final” – it was. The legislative history of the PUC confirms that the “final judgment of the commission shall end everything.” Leg. Rec. 907 (1913). The finality of PUC proceedings is not undermined by its ability to reopen proceedings and amend prior orders. To reopen a proceeding, there must be “sufficient passage of time or other change in circumstances.” *Verizon N.E., Inc. v. Pub. Utils. Comm’n*, 2005 ME 16, ¶ 8, 866 A.2d 844 (quotation marks omitted). This standard applies whether a party seeks to reopen a proceeding, or whether the PUC does so: *Verizon* simply establishes that, if a party requests reopening, it bears the burden of proof. *Id.* ¶ 10. This conclusion is confirmed by *Quirion v. Public Utilities Commission*, which held that the PUC’s decisions are final and may not be collaterally attacked. 684 A.2d 1294, 1296 (Me. 1996). There is no reason to construe the PUC’s decisions as final in one context but not another. Absent a change in circumstances, the Legislature may not reopen the proceeding. *Grubb*, 2003 ME 139, ¶¶ 10, 12, 837 A.2d 117.²⁰

The PUC’s final judgment was affirmed by this Court. In its appeal of the PUC’s Order, NextEra argued that CMP’s petition failed to demonstrate that a

²⁰ *Morrisette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, is inapposite, as that case only permitted the Legislature to retroactively change an agency determination because of an intervening change of circumstances. In this case it is uncontested there has been no change in circumstances.

“public need” exists for the Project under § 3132. *NextEra*, 2020 ME 34, ¶¶ 20, 29. The core holding in *NextEra* was that CMP had in fact met the statutory requirement for demonstrating a “public need.” *Id.* ¶ 43. The proper deference shown by this Court in making that determination does not alter that ultimate holding. This Court concluded that there was “no error in the [PUC]’s determination that the NECEC project meets the applicable statutory standards for a CPCN.” *Id.* ¶ 1. This Court further concluded that the PUC’s interpretation of “public need” is reasonable, *id.* ¶ 27, and that the PUC’s findings regarding the “public need” factors set out in § 3132 were “supported by significant record evidence,” *id.* ¶ 30. This Court thus affirmed the grant of the CPCN. *Id.* ¶ 43.

The Initiative now seeks to unravel that final judgment by directing the PUC “to find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project.” A.34, ¶ 40. The Initiative would reverse the core holding of this Court by directing entry of a finding—contrary to the substantial evidence before the PUC—that there is “*not* a public need for the NECEC transmission project.” *Id.* (emphasis added). Indeed, the Initiative specifically directs the PUC to “deny the request” for a CPCN. *Id.* By seeking to reverse a final judgment of this Court, the Initiative would render an essential function of Maine’s judiciary futile. The people, acting as the Legislature, may not re-open and re-adjudicate a proceeding that has reached a final judgment in Maine’s highest Court without exceeding their power.

2. The Initiative usurps executive authority because it would reverse an agency determination on an *ad hoc* basis.

The Constitution expressly grants the Governor the right and responsibility to “take care that the laws be faithfully executed.” Me. Const. art. V, pt. 1, § 12. As this Court has recognized, the Legislature may not exercise powers granted to the executive branch, including agencies. *N.E. Outdoor Ctr.*, 2000 ME 66, ¶ 10, 748 A.2d 1009. The executive power “encompasses prosecutorial or administrative acts aimed at applying the law to particular individuals or groups based on individual facts and circumstances.” *Carter*, 269 P.3d at 151. The Initiative would infringe upon the executive power by reversing the outcome of a specific administrative proceeding without setting forth any new, substantive standards.

Although Maine courts have not had occasion to consider whether a state-wide initiative may be used to fulfill a state agency’s administrative function, the well-accepted rule is that “the powers of initiative . . . do not encompass the right to petition for an election on administrative matters.” *Vagneur*, 295 P.3d at 506; *see* 42 Am. Jur. 2d Initiative & Referendum § 6 (2d ed.) (the initiative power applies to “acts which are legislative in character and not to administrative actions”); *see also Friends of Congress Square Park*, 2014 ME 63, ¶¶ 14-15, 91 A.3d 601.²¹ Maine courts should apply

²¹ Many other courts have also held that initiatives and referenda are invalid if they are administrative rather than legislative. *See, e.g., Phillips*, 330 P.3d at 451 (referendum could apply to “legislative acts only”); *City of Port Angeles v. Our Water-Our Choice!*, 239 P.3d 589, 593 (Wash. 2010) (“[A]dministrative matters[] are not subject to initiative.”); *McAlister v. City of Fairway*, 212 P.3d 184, 194 (Kan. 2009) (“[T]he initiative . . . is only appropriate for measures that are quite clearly and fully legislative and not principally executive or administrative” (internal quotation marks omitted)); *State ex rel. Oberlin Citizens for Responsible Dev. v. Talarico*,

this distinction, given the text of article IV, part 3, § 18 and article III, § 2. These provisions confirm that the initiative process excludes exercises of executive power. See *Vagneur*, 295 P.3d at 503-04 (separation of powers precludes the use of initiatives to exercise executive (*i.e.*, administrative) power); *Carter*, 269 P.3d at 147 (same).²²

An initiative is legislative in nature, and thus permissible, “if it clearly includes action which adopts policy affecting the public generally,” 42 Am. Jur. 2d Initiative & Referendum § 7, but is administrative in nature, and thus impermissible, if it simply “direct[s] a decision that has been delegated to a governmental body with that authority,” *id.* § 8. In *Vagneur*, for example, the Colorado Supreme Court concluded that an initiative could not be used to displace a “highway design that was the culmination of an administrative process . . . not with a generally applicable rule or a new governing standard, but simply with a different highway system.” 295 P.3d at 509. Because the initiative did not “propose to establish a law of general applicability

836 N.E.2d 529, 533 (Ohio 2005) (initiative unlawful because it “executes and administers laws already in existence”); *In re Initiative Petition No. 27 of City of Okla. City*, 82 P.3d 90, 93 (Okla. 2003) (initiative power applies “only to legislative matters and not to administrative acts”); *Glover*, 50 P.3d at 549-50 (measure “constitutes an administrative act and is not subject to the initiative power of the people”); *Lane Transit Dist.*, 957 P.2d at 1220 (“Proposed initiative measures addressing administrative matters properly are excluded from the ballot.”); *Town of Hilton Head Island v. Coal. of Expressswnay Opponents*, 415 S.E.2d 801, 806 (S.C. 1992) (excluding administrative measure from ballot); *Wennerstrom v. City of Mesa*, 821 P.2d 146, 149 (Ariz. 1991) (initiatives are limited “to legislative actions” rather than “administrative actions”); *City of Idaho Springs*, 731 P.2d at 1254 (initiatives were “related to administrative matters and were invalid attempts to exercise the constitutional right of initiative”); *Am. Fed. of Labor*, 686 P.2d at 627 (“[A]n initiative which seeks to do something other than enact a statute – which seeks to render an administrative decision [or] adjudicate a dispute . . . – is not within the initiative power reserved by the people.”); *Beach v. City of Saline*, 316 N.W.2d 724, 725 (Mich. 1982) (initiatives are limited to questions “truly legislative in character”).

²² This Court has never upheld a legislative act reversing an agency permit that is similar to the Initiative. In *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d 160 (Me. 1988), the Court was presented with the question of whether a voter-initiated zoning ordinance could be given retroactive effect. *Id.* at 162. The Court concluded that the ordinance could be applied to pending applications. *Id.* at 164. Notably, however, the ordinance contained substantive criteria, and did not simply reverse a single permit. The same is true of the ordinance in *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 2, 856 A.2d 1183.

or a rule that sets a governing standard,” the initiative was invalid because it was an administrative rather than legislative action. *Id.*

The Court delineated the difference between legislative and administrative actions in *Friends of Congress Square Park*. In that case, the Court was asked to enforce a city ordinance restricting initiatives to “legislative matters.” 2014 ME 63, ¶¶ 10-11, 91 A.3d 601. Citing *Vagneur* and *Carter*, the Court concluded that an initiative is legislative rather than administrative if it “proposes a law of general applicability rather than one based on individualized, case-specific considerations.” *Id.* ¶¶ 14-15.

According to the criteria in *Friends of Congress Square Park*,²³ it is plain that the Initiative here is administrative and thus infringes upon executive authority. The Initiative is not generally applicable, but rather is expressly case-specific; executes existing law, rather than creating new law; sets forth no prospective standards, but instead is drawn narrowly to have retroactive effect in a single PUC proceeding; implements existing policy rather than declaring a broad public purpose; relates to a matter requiring specialized knowledge; involves a subject matter which the Legislature has delegated to the PUC; exercises the traditionally executive act of

²³ These factors include whether the initiative: “makes new law, rather than executes existing law,” “relates to subjects of a permanent or general character, as opposed to subjects that are temporary in operation and effect,” “declares a public purpose and provides for the ways and means to accomplish that purpose, rather than implementing existing policy or dealing with a small segment of an overall policy question,” “requires only general knowledge, rather than specialized training and experience,” “does not involve a subject matter in which the legislative body has delegated decisionmaking power,” and is a historically legislative act, “rather than [a] traditionally executive act[.]” *Id.* ¶ 13 n.7.

issuing or revoking a permit; and would hamper effective administration of government. *See id.* ¶¶ 14-17 & n.7. The Initiative is executive in nature.

C. The Initiative Cannot Be Saved as an Exercise of the Disfavored Power to Adopt Special Legislation.

The constitutional infirmity of the Initiative cannot be remedied by suggesting that it is an exercise of special legislation. Although the Constitution permits special legislation when general legislation could not attain the legitimate object of the legislation, *see Brann v. State*, 424 A.2d 699, 704 (Me. 1981), the Constitution also *requires* the Legislature to “provide, as far as practicable, by general laws, for all matters usually appertaining to special or private legislation.” Me. Const. art. IV, pt. 3, § 13.²⁴

This provision reflects the principle, long recognized under Maine law, that

[i]t can never be within the bounds of legitimate legislation, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, . . . by way of exemption from the operation and effect of such general law, leaving all other persons under its operation. Such a law is neither just [n]or reasonable

Lewis, 3 Me. at 336; *see Opinion of the Justices*, 402 A.2d 601, 602 (Me. 1979) (discussing *Lewis*). Thus, while the Legislature does enact special laws, those laws pertain to subjects that cannot be addressed via general laws. *See Brann*, 424 A.2d at 704; *Me. Pharm. Ass’n v. Bd. of Comm’rs of Profession of Pharmacy*, 245 A.2d 271, 273 (Me. 1968).

²⁴ There is no reason why § 13 should not apply to direct initiatives, given the potential for abusive targeting of politically disfavored groups through the initiative process. *See Carter*, 269 P.3d at 153 (noting that the prohibition on special laws protects the right to be “governed by general rules” and prevents individuals from being “single[d] out” arbitrarily).

In this case, the object of the Initiative “could have been more fully attained through general legislation,” *Fitzpatrick v. Greater Portland Pub. Dev. Comm’n*, 495 A.2d 791, 794 (Me. 1985), by establishing new standards generally applicable to transmission projects. The Initiative instead targets CMP for special disfavor by exempting it from the usual operation of 35-A M.R.S. § 3132, which sets forth the criteria governing the issuance of CPCNs, instead of providing “a rule for all and binding on all.” *Lewis*, 3 Me. at 333. The Initiative therefore is not a constitutional use of special legislation. *See Look v. State*, 267 A.2d 907, 910 (Me. 1970). In any event, as discussed *supra*, “special legislation” that is not legislation at all, but instead an invasion of the judicial and executive realms, is not constitutionally permitted.

IV. The Court Should Grant Declaratory and Injunctive Relief.

Because Avangrid presents a ripe claim, as the Secretary concedes, and because Avangrid should succeed on the merits, as the Secretary also agrees, the Court should grant the relief requested by Avangrid. Because this Court is presented with the ripe, concrete question of whether the constitutional prerequisite that the Initiative be a “bill, resolve, or resolution” has been fulfilled, this Court can enter declaratory judgment. The principal parties to this lawsuit, the Secretary and Avangrid, agree that this case presents a “genuine controversy and a concrete, certain, and immediate legal problem” regarding whether the Initiative—at *present*, and not merely *if enacted*—is outside the scope of the electorate’s grant of authority under the Constitution. *Clark v. Hancock Cty. Comm’rs*, 2014 ME 33, ¶ 19, 87 A.3d 712 (quotation marks omitted).

As a genuine, and not merely “theoretical,” dispute, declaratory relief that the constitutional prerequisite has not been fulfilled is proper. *Jipson v. Liberty Mut. Fire Ins. Co.*, 2007 ME 10, ¶ 5, 912 A.2d 1250; *see Wagner*, 663 A.2d at 567.

Further, an injunction is proper. Success on the merits is the most important factor relating to injunctive relief. *See Nat’l Org. for Marriage v. Comm’n on Governmental Ethics & Elections Pracs.*, 2015 ME 103, ¶ 28, 121 A.3d 792. Avangrid has also carried its burden on the remaining factors for injunctive relief, namely, to show that (1) it “would suffer irreparable injury” absent relief, (2) the injury would “outweigh[] any harm” from the injunction, and (3) the “public interest will not be adversely affected by granting the injunction.” *Windham Land Tr.*, 2009 ME 29, ¶ 41, 967 A.2d 690.

Allowing the proponents of the Initiative to unconstitutionally invoke the initiative process constitutes an immediate and serious irreparable injury. *See Gordon v. Holder*, 721 F.3d 638, 658 (D.C. Cir. 2013); *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 886 (N.D. Ill. 2019); *City of Providence v. Barr*, 415 F. Supp. 3d 302, 306 (D.R.I. 2019). It cannot be remedied by a post-election challenge. Avangrid has no adequate remedy at law for an unlawful vote. *See Bangor Historic Track, Inc.*, 2003 ME 140, ¶ 10, 837 A.2d 129 (the very definition of irreparable harm is that “for which there is no adequate remedy at law”). Further, the harm to economic investment in Maine from disrupting the finality of agency permitting processes is incalculable.

There is no harm to the public in prohibiting an unconstitutional vote, and there is a compelling public interest in enjoining a constitutional violation. A

constitutional violation outweighs any injury from enjoining an improperly invoked initiative process. *See Gordon*, 721 F.3d at 653. The initiative process is being unlawfully used to create chaos and confusion, deceiving voters into believing they are exercising a legislative power that they do not in fact possess. There is no value and considerable harm “in putting before the people a measure which they have no power to enact.” *Am. Fed. of Labor*, 686 P.2d at 615.

The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot. It will confuse some voters and frustrate others, and an ultimate decision that the measure is invalid, coming after the voters have voted in favor of the measure, tends to denigrate the legitimate use of the initiative procedure.

Id. It is therefore “wholly unjustified to allow voters to give their time, thought, and deliberation to the question of the desirability of the legislation as to which they are to cast their ballots, and thereafter . . . confront them with a judicial decree that their action was in vain.” *Town of Hilton Head Island*, 415 S.E.2d at 805 (quoting *Schultz v. City of Philadelphia*, 122 A.2d 279, 283 (Pa. 1956)); *see Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720, 732 (N.J. 2010) (noting harm to the public from permitting voters to participate in an unconstitutional initiative process). The costs of an election are not insignificant. Though the people’s right to directly legislate through the initiative process must be respected, it does not justify the wasteful expenditure of money, nor the significant community divisions concerning an initiative that is constitutionally void. There is no justification for holding an “advisory vote,” which would merely perpetuate the constitutional violation. To the

contrary, it “is clearly in the public’s interest” to enjoin a constitutional violation. *City of Evanston*, 412 F. Supp. 3d at 887.

In sum, this Court is “not only permitted *but compelled* to sit in judgment” in this case. *Ex parte Davis*, 41 Me. at 53 (emphasis added). The Court must “fearlessly meet[] every official call uninfluenced by the clamors of popular complaint.” *Id.* By doing so, this Court will “render permanent the landmarks of the constitution and [] promote the great ends of the government of a free people.” *Id.* at 54.

CONCLUSION

The Initiative exceeds the scope of legislative powers reserved to the people under article IV, part 3, § 18; violates article III, § 2 by infringing upon the powers of the judiciary and executive; and violates the prohibition on special legislation in article IV, part 3, § 13. The Legislature cannot use its power to defeat the exercise of its fellow branches’ constitutional functions. Nor can the people. Avangrid is entitled to a declaratory judgment and a permanent injunction.

DATED: July 13, 2020

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