

STATE OF MAINE
MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-20-181

AVANGRID NETWORKS, INC., *et al.*

Plaintiffs – Appellants

v.

**MATTHEW DUNLAP, in his official capacity as Secretary of State for the
State of Maine, *et al.***

Defendants –Appellees

APPEAL
FROM THE CUMBERLAND COUNTY SUPERIOR COURT
DOCKET NO. CV-2020-206

BRIEF OF APPELLANT
MAINE STATE CHAMBER OF COMMERCE

Gerald F. Petruccelli, No. 1245
PETRUCCELLI, MARTIN & HADDOW
Two Monument Sq., Ste. 900
P.O. Box 17555
Portland, ME 04112-8555
(207) 775-0200
gpetruccelli@pmhlegal.com

Nicole R. Bissonnette, No. 5239
PETRUCCELLI, MARTIN & HADDOW
Two Monument Sq., Ste. 900
P.O. Box 17555
Portland, ME 04112-8555
(207) 775-0200
nbissonnette@pmhlegal.com

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**STATEMENT OF THE FACTS OF THE CASE INCLUDING
PROCEDURAL HISTORY**

A full statement of the facts of the case and the procedural history will no doubt be set forth in Avangrid's Brief. A detailed statement of the facts of the case may also be drawn from Avangrid's verified complaint. (App. 26-37.) The facts are also well summarized in the Superior Court Order on Appeal. (App. 13-25.).

As those factual statements recount in greater detail, the New England Clean Energy Connect Project has been the subject of multiple administrative proceedings, including the one before the Maine Public Utilities Commission ("PUC") that is central to this appeal. After the PUC issued its Certificate of Public Convenience and Necessity finding the project to be in the public interest, NextEra, an intervenor in the PUC and a Defendant-Intervenor here, appealed the PUC decision to this Court and the Law Court affirmed. *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm'n et al*, 2020 ME 34, 227 A.3d 1117. Now, opponents of the project have submitted enough valid signatures so that, absent injunctive relief, the Secretary will place on the ballot the proposition quoted in full in the Order. (App. 16.) If enacted by the voters, the resolve will direct the PUC to reverse its Order granting the Certificate of Public Convenience and Necessity, and instead to deny the Certificate without which the project cannot be constructed and operated.

Avangrid and the two Plaintiffs by intervention asked the Superior Court for declaratory and injunctive relief. The Court directed an expedited schedule and

combined the hearing on the preliminary injunction with the trial on the merits on undisputed facts.

The Superior Court denied injunctive relief and this appeal followed.

STATEMENT OF THE ISSUES PRESENTED
AND STANDARD OF REVIEW

The ultimate issue for review is whether it was erroneous as a matter of law to deny a permanent injunction directing the Secretary to not place the Initiative on the ballot. The elemental or subsidiary issues are: (1) whether the constitutional challenge presented by the Plaintiffs may be adjudicated before the election or only if and after the voters approve the Initiative; (2) whether the Initiative is constitutionally disqualified from placement on the ballot because it is unauthorized by Section 18, Part Third of Article IV, for either or both of the reasons that (a) it is not legislation, and (b) it facially violates the separation of powers; and (3) assuming that this Court reaches the question and assuming that the Initiative is not constitutionally permissible under Section 18, whether there is any reason to deny permanent injunctive relief.

SUMMARY OF THE ARGUMENT

Although constitutional questions about an initiative's post-election application, such as the due process questions lurking in this one, are generally held not to preclude its placement on the ballot but are generally judicially reviewable only if and after the voters approve the Initiative, constitutional challenges about whether the

initiative is within the power reserved to the people under Section 18 of Part Third of Article IV in the first place must be adjudicated before election day, because the core question actually presented is whether the Maine Constitution authorizes the vote.

That timing question requires close analysis of what issues will be litigated if the Court addresses them. This Initiative fails to qualify for the ballot for two related and overlapping reasons. First, the Legislature does not have the power to grant litigants relief that is intrinsically and historically judicial in nature, without regard to whether a court would have the authority to take the action under consideration. Second, the courts and only the courts do have the authority to reopen their own decisions, or to hear and decide appeals from the PUC, or to remand to the Commission with instructions. In other words, this “resolve” is not legislative in its nature because it has none of the characteristics of legislation. For the same underlying reasons, it is excluded as a plain violation of the separation of powers succinctly stated in Article III of the Maine Constitution.

If the Plaintiffs prevail on the merits of the constitutional challenge, there is no basis for denying injunctive relief. The Plaintiffs will be harmed not only by the potential enactment of the Initiative but also by its placement on the ballot. The costs of contesting the election cannot be assumed away and they are a significant irreparable harm. The even greater harm from the perspective of the Maine State Chamber of Commerce is that a failure to enjoin the vote, even if the Initiative is

defeated, will validate other such initiatives in the future. Denial of injunctive relief makes vulnerable to nullification by referendum every permitting decision by every administrative agency, even after affirmance in this Court. No permit will be fully final, even when this Court affirms it, or the appeal period runs. Rational actors surveying the substantial costs and difficulties of securing permits in Maine for major projects will have to consider the additional risk that lawfully valid permits, affirmed by this Court, may be nullified if enough voters on any given election day can be persuaded that the project is not a good idea for them. This element of uncertainty about the finality of permits is a substantial harm for which there is no adequate remedy at law. This Court must therefore enjoin this Initiative to make clear to opponents of projects that they need to win in the agencies or in court – the branches of government delegated the constitutional and statutory authority for adjudicating such specific individual disputes.

ARGUMENT

I. Introduction

Plaintiff Appellant Maine State Chamber of Commerce (“Chamber”) appeals from the Order of the Superior Court dated June 29. The Superior Court erred as a matter of law when it held that the manifest constitutional flaws of the Initiative under consideration are not in order for judicial review until after the Initiative has been voted upon. This Initiative demands pre-election review, notwithstanding the

judiciary's understandable general reluctance to consider constitutional questions involving initiatives before the votes are counted. The Superior Court erroneously failed to recognize that this Initiative is fundamentally different from the initiatives that are generally not entitled to pre-election review and, therefore, erroneously denied pre-election review here.

All three Plaintiffs and the Secretary agree that the Initiative is unconstitutional. (App. 13-14.) All three Plaintiffs and the Secretary also agree that this case is an exception to the general rule and should be adjudicated before the election. (App. 14.) The Superior Court Order acknowledges "...that the separation of powers issue is a question deserving of serious consideration." (App. 24.) The court's error was in holding as a matter of law that such serious consideration cannot occur before the vote. The ruling is predicated upon the court's erroneous framing of the question presented. The Superior Court focused on whether pre-election review is available as a matter of law to *legislative* initiatives. (App. 18.) However, a "resolve" that is directed solely at overturning a PUC decision after affirmance by this Court is intrinsically not legislation. It also violates the separation of powers, whether enacted by the Legislature or by the people. For those related and overlapping reasons, it is unconstitutional as essentially *ultra vires*. That renders the Initiative constitutionally ineligible for placement on the ballot. The question is not whether legislative resolves

are reviewable before the election; the question that must be decided now is whether this Initiative is a legislative resolve.

The Superior Court wrongly inverted the litigation logic. The non-legislative character of this Initiative and the powerful separation of powers argument demand pre-election review. The court wrongly denied that review without fully considering why this challenge to this Initiative is materially different from the typical constitutional challenge to the typical initiative.

Article IV, Part Third, Section 18 of the Maine Constitution reserves to the people the authority to enact legislation. It reserves no other power or right. For that reason, any initiative that is constitutionally eligible to be placed on the ballot in accordance with Section 18 must be legislative. This Initiative is not legislative because it is the antithesis of general applicability and prospectivity. It is also not legislative because it is an attempt to exercise powers plainly belonging to the executive and judicial branches, violating the separation of powers. It is constitutionally different from any valid exercise of the legislative authority under Article IV.

The “resolve” is explicitly not a public law. It neither enacts, nor amends, nor repeals any law. It is not generally applicable. It is entirely retrospective in its operation; only its single effect is in any sense prospective. That single effect, ending the NECEC project, is “prospective” only in the sequential sense that it will occur, if

at all, only after the vote. Calling it a “resolve” does not determine its intrinsic character or essence. It is unlike a typical resolve in every way.

Among the briefs and reply briefs submitted by the parties to the Superior Court there appeared to be a consensus that there are three questions. One, sometimes characterized as “ripeness,” but not actually ripeness in the conventional sense, is whether the constitutional flaw of this Initiative may be adjudicated in advance of the election.

There is a certain circularity between considering when any question may be adjudicated and considering the issue demanding to be adjudicated. The content of the challenge drives the decision of when to adjudicate it. Because many constitutional challenges to initiatives are not adjudicated before the election, in order to decide the litigability of the constitutional question being presented here, it is imperative to focus on the precise terms of the specific constitutional question. The Superior Court should have classified the question presented in this case as fundamentally and intrinsically different from the constitutional challenges that are not entitled to pre-election adjudication.

The third question is whether a court of equity, having decided that the Constitution is being violated, might nevertheless withhold injunctive relief for any reason at all, or particularly for any of the reasons advanced by the Secretary and the Defendant-Intervenors.

Stated otherwise, this “resolve” is fundamentally not legislative in its nature. It violates the separation of powers not merely by reopening a final decision of this Court and a PUC decision, but by reversing or vacating this Court’s decision without any pretext of doing any judicial work in the process. This leaves this Initiative outside the scope of the people’s authority under Section 18 of Part Third of Article IV. The question may properly be restated as: must the Court decide before the election whether the Initiative is authorized by Section 18 in the first instance, as distinguished from deciding whether there is some constitutional flaw in the application of the Initiative that “goes live” only if it is enacted. This eligibility issue is crucially different from questions about whether this proposed Initiative, if enacted, might infringe upon the liberties of the people, as guaranteed to them in the Bill of Rights in the Federal Constitution or Article I of the Maine Constitution. This Initiative almost certainly also raises due process issues at a minimum but those are not why the Court must enjoin the vote. This is a question about the fundamental structural architecture of our government as ordained and established by the people themselves in our Constitution. It is the judiciary’s solemn duty to preserve, protect, and defend that Constitution from unconstitutional usurpations, even by “the people.”

II. Challenges About Constitutionality Under Section 18 Are Different from Other Constitutional Challenges

Many constitutional cases, including many of the most famous ones, do not relate to the legislative authority of the government in the first instance. Those cases may generally be grouped for purposes of this discussion as those in which an otherwise presumptively constitutional exercise of legislative authority, in its application, infringes upon liberties reserved to the people by the Bill of Rights in the Federal Constitution or the Declaration of Rights in Article I of the Maine Constitution. This is not that case, however, and all of the judicial opinions explaining why those cases are reviewable only after enactment have nothing to say to this case.

The issue before the Court is whether the Court may permanently enjoin this Initiative from appearing on the November ballot. The Superior Court wrote that its decision is congruent with the 1996 *Opinion of the Justices*. (App. 19.) However, it is not supported by those opinions of those justices in that quite different case.

As a preliminary matter, advisory opinions have no precedential value. They are the opinions of the justices sitting at that time and are not the opinion of the Supreme Judicial Court itself. *Opinion of the Justices*, 673 A.2d 693, 694 (Me. 1996). They hold no precedential value because they are “rendered within a tight time schedule and without the benefit of full factual development, oral argument, or full briefing by all interested parties.” *Id.* In the 1996 matter, the opinions were issued in the “waning

days” of the Legislative session, so “extensive study and analysis [was] not possible.” Advisory opinions have impact and import when it comes to influencing decisions made by the other branches of government, but they have no precedential value and have no effect unless acted upon by those other branches. And though in strictly identical situations they may be informative for the litigating parties, they remain nonbinding and are less impactful when the underlying issues vary from what was presented in the initial request.

The circumstances of the issues presented then were significantly different from those before the Court now. For example, in 1996, the justices were contemplating whether the people could direct the congressional delegation, or members of the state executive and legislative branches, to use their powers to call for a constitutional convention. In that situation, addressing only legislative (and not judicial) authority, the justices at the time unanimously agreed that the question should be put on the ballot even if it was unconstitutional. However, they did not unanimously agree that this would be the case with every such initiative. For example, Justices Glassman, Clifford, and Lipez viewed it as generally inappropriate to preemptively address the constitutionality of an initiative, but they noted that there are “rare circumstances” that would allow it. *Id.* at 699. They cited their concerns that the issue they faced in 1996 may not have a “concrete, certain, or immediate legal problem” and thus was not ripe for adjudication, noting that ripeness “concerns the

fitness of an issue for judicial decision and the hardship to the parties of withholding court consideration.” *Id.* (citing *Maine Pub. Serv. Co. v. Pub. Utils. Comm’n*, 524 A.2d 122, 1226 (Me. 1987)).

That advisory opinion’s focus is distinguishable from the current case. In the 1996 matter, the issue was not before the Court for final adjudication of a dispute. No parties were involved and there was no briefing of the legal issues, nor arguments by affected individuals. Had the initiative been put on the ballot, and *then* adjudicated in the courts, no discernable or concrete harm would have befallen opponents of the measure. However, in this case, there are significant financial harms that will befall the litigants, and significant global harms to the business community at large due to the instability created in the regulatory framework by the very fact of this proposition moving forward. The 1996 advisory opinion contemplated that any harm could be avoided by a post-election judicial determination of unconstitutionality. However, in this case, Chamber constituents would in many ways be more negatively impacted by a failed ballot question that never returned to the Court for review because the very act of the unconstitutional ballot initiative being put to a vote creates significant harm in the form of uncertainty, with no adequate remedy available thereafter.

The 1996 advisory opinions contain several distinguishing factors. For example, the justices cited another *Opinion of the Justices*, 623 A.2d 1258, 1264 (Me. 1993), which cited its reliance on *Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 60 A.2d

908, 911 (1948)(“The right of the people...to enact Legislation ...is an absolute one and cannot be abridged directly or indirectly by any action *of the legislature.*”) *Opinion of the Justices*, 673 A.2d at 397(emphasis added). *Dorsky* addressed the issue of having two competing measures on the same ballot, the emphasis being the argument that the citizen’s initiative was lawful, but the Legislature was seeking to include a competing bill. However, in this case, the Legislature has made no such attempt and the Initiative is not constitutional on its face.

Perhaps most significantly, or even dispositively, a resolve urging the congressional delegation to take some action is not obviously beyond the Legislature’s purview. A resolve urging independent political actors to take some position is not unheard of in legislative practice. It is not unlike the run of resolves expressing legislative sentiments of approval for some accomplishment by some citizen or team or business. It has no binding effect on the addressees who are free to ignore it. That resolve did not direct reversal of final orders of the PUC and the Court in a single specific closed case, and the questions posed to the Justices did not involve the proper scope of *judicial* review of such action at all. The issue here is that the electors are attempting to usurp powers constitutionally reserved to other branches of government, and at the same time preclude pre-election judicial review of that effort.

III. What is Not in Dispute

For purposes of isolating and identifying the differences between and among the parties, and more importantly identifying and rectifying the errors of the Superior Court Order, it might help to begin with what is not in dispute. Proposed public laws prospectively applicable to all citizens, compelling or prohibiting or limiting some activity, may be subject to challenge as (clearly or arguably) facially unconstitutional, or on the ground that they radiate powerful potential “as applied” challenges to their constitutionality. The typical grounds for such challenges lie in the Federal Bill of Rights or Article I of the Maine Constitution and not Articles III through VI of the Maine Constitution. There seems to be no real disagreement that those challenges usually must await a concrete case presenting a factually developed controversy that generates the constitutional question.

This Initiative presents potential due process or other constitutional problems that will emerge in due course if the voters should enact this Initiative. Those problems are not the reasons for enjoining the Secretary from placing the question on the ballot. The reasons that this particular resolve must not be placed on the ballot are: (1) that it is intrinsically not a legislative enactment, and (2) it plainly violates the separation of powers.

The core question being presented in this case is as ripe and as concrete as a justiciable question can be. It is whether the preconditions to placing a measure on

the ballot are met or violated by this Initiative. The question of whether an initiative may be placed on the ballot does not become ripe after election day, it becomes moot.

IV. The Constitution Confers and Limits Governmental Power

Rhetoric about “participatory democracy” is not a basis for disregarding the text of the Constitution. The first three words of the United States Constitution and almost the first three words of the Maine Constitution are “we the people.” The people enacted both Constitutions to ordain and establish the forms of government best suited to the people’s circumstances as they understood them with the primary purpose of precluding or foreclosing a monarchy, particularly a hereditary monarchy, and establishing instead a constitutional democratic republic in which the people would choose the government officials who would actually exercise the authority of the government. In 1909, the Maine Constitution was amended to empower the people, subject to the procedural prerequisites of the Constitution as amended, *to enact legislation*, not to sit as the court of last resort, either with or without some semblance of the evidence and reasoned argument that are defining characteristic of judicial work. Because this is not legislation in any sense, it is not a proper measure for the direct initiative process.

In *Morris v. Goss*, 147 Me. 89, 106-107, 83 A.2d 556, 565 (1951), the Court recognized the importance of upholding the limitations placed on “the people” to participate in such decisions via initiative. Just as the Court “has never hesitated to

exercise its power and authority to protect the individual from an unconstitutional invasion of his rights by the legislative branch of government,” the Court recognized its “duty to prevent the people from interfering in an unconstitutional manner with the constitutional exercise by the Legislature of the powers conferred upon it by the Constitution.” *Id.* Here, the Court must act similarly to prevent the people from interfering unconstitutionally with the judicial function reserved to the judicial branch.

The scope and extent of what was restored to the people in 1909 cannot fully be understood simply by looking at Section 18 in isolation and embroidering it with rhetoric about participatory democracy or absolute rights. There is a specialized and restricted form of participatory democracy in Section 18 that must be understood in the context of the entire Constitution. And notwithstanding rhetoric to the contrary, the people’s right is not absolute in the sense that it precludes judicial review of its conformity with the Constitution. *See, e.g., Morris*, 147 Me. 89, 83 A.2d 556.

Under the Maine Constitution, the people may exercise their right to enact a bill, resolve or resolution by a citizen’s initiative. Me. Const. art. IV, pt. 3, § 18. That power is strictly legislative, as evidenced by its inclusion in Article IV, part third (“Legislative Power”). Like the Legislature, the electors cannot “exercise any of the powers properly belonging to either of the [other branches], except in the cases herein expressly directed or permitted.” Me. Const. art. III, § 2.

Finality of judicial determinations is fundamental to our system of government. This principle was recognized in *Grubb v. S.D. Warren*, where the Court held that the Legislature could not change the result of a previous (final) workers' compensation decision. 2003 ME 139, 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." *Id.* ¶ 11. Like *Grubb*, no factual (or here, even legal) circumstances would have changed between the time of the original, final adjudication of the matter and the time when the Initiative's directives were to be put in place. And unlike other citizens' initiatives that have general applicability, this Initiative seeks only to overturn a single decision in a single PUC docket, targeting one project and one company. Even if the Initiative is defeated at the ballot box, allowing it to move forward would hold generally that this type of retroactive redetermination of a final judgment by referendum is possible. It would create instability in our system of checks and balances that could not be repaired.

Morrisette v. Kimberly-Clark Corp, 2003 ME 138, 837 A.2d 123, is not to the contrary. In that matter, the Legislature enacted new legislation that explicitly allowed for pending cases to fall under the new, generally applicable, rules. *Morrisette's* case was still pending at a stage allowed under the workers' compensation rules and thus the new legislation was followed. Here, however, the PUC decision is *not* pending. It has been fully and finally adjudicated and is therefore distinguishable from the

Morrisette decision. *Morrisette* recognized as well that the result in a previous adjudication cannot be changed without good reasons grounded in changed circumstances. Also, importantly, the *Morrisette* decision noted that the new legislation that allowed for application to pending cases could not be applied, if “there is some constitutional or other prohibition.” *Id.* at 127, ¶ 13. Here, as in *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995), which *Morrisette* cites, the proposed change would violate the separation of powers “to the extent that it sought to reopen the final judgments of an Article III court.” *Morrisette*, 2003 ME 138, ¶ 14, 837 A.2d 123.

When, as here, an initiative cannot sensibly be read as having any purpose or effect other than to vacate the Court’s affirmance of a final PUC decision and remand the matter with instructions that the Court never designed, directing the PUC to do something contrary to the PUC’s best judgment, without any change in the law even retroactively, and without any additional record evidence or other change in circumstances, the Initiative is constitutionally beyond the people’s reserved power or right to enact legislation. The reason this resolve cannot go on the ballot is because it is beyond the power of the Legislature itself and because it encroaches upon the exclusive prerogative of the judicial branch.

V. Interpretation of the Constitution Cannot Disregard Structure and Context

Like any other important inquiry concerning any other important document, it is well to begin at the beginning and read to the end. The preamble in Article I

Section 2 affirms that sovereignty is in the people, not some royal family. But the people exercised their sovereignty to ordain and establish the Constitution empowering and authorizing the government of Maine to act for the people in the operational exercise of their sovereignty. *See, e.g., Morris*, 147 Me. at 106, 83 A.2d at 565 (“True it is that all rights of government are derived from the people. ... Another purpose of a constitution is to insure the orderly conduct of government, and a proper discharge of the essential functions thereof.”).

The Constitution apportions and limits governmental power in Articles III, IV, V, and VI. Significantly, Article III in two succinct sections divides the powers of the government into three distinct departments and explicitly forbids any person or persons belonging to any one of those departments to exercise any power properly belonging to either of the others except as otherwise expressly directed or permitted.

Article VI vests the judicial power in the Supreme Judicial Court and such other courts as the Legislature shall establish. It emphasizes in Section 5 that no justice of the Supreme Judicial Court or any court shall hold any other office under the United States or any other state or the State of Maine except as a justice of the peace or as a member of the judicial council.

Article IV is quite a bit longer. It addresses in some detail several matters relating separately to the House of Representatives and the Senate. In Part Third of Article IV, the Legislative power is described and elaborated in detail. Nothing in

Article IV explicitly authorizes the Legislature to act upon or intervene in any judicial proceeding.

Section 17 of Part Third of Article IV explicitly empowers the people to veto an enactment of the Legislature signed by the Governor. Section 17 modifies the Governor's veto power by also allowing it to be exercised by the people under the circumstances described therein. That same Section authorizes the people to override the judgments and acts of the legislative bodies, even though approved by the Governor. The Legislature itself has authority to override a gubernatorial veto and the people in Section 17 can exercise their own veto, even where the Governor has not. Section 17 does not empower the people to reject court decisions.

The constitutional invalidity of this Initiative under Section 18 is derived in substantial part from the fact that what it proposes to accomplish is in no way authorized by Section 17 (People's Veto). Section 17 does not authorize the people to veto a decision of the PUC or any other administrative body, nor does it authorize the people to reject or vacate or overrule or reverse a decision of the Maine Supreme Judicial Court or any other court. That authority belongs to the judiciary alone. *Lewis v. Webb*, 3 Me. 326 (1825). In this context, therefore, it is all the more extraordinary that the proponents of this resolve undertake to do exactly that, notwithstanding the absence of any authorization to do so in Section 17.

In construing Section 18, for purposes of this case, it is structurally imperative to recognize that it follows Section 17's people's veto and is not a redundant or misplaced mechanism for rejecting prior judicial actions. Section 17 and Section 18 are adjacent, discrete, and complementary provisions within Article IV, part Third, which is exclusively about legislative power. From this it is apparent that only measures that constitute an exercise of legislative power (and do not violate the separation of powers) are eligible for ballot placement. The Superior Court's refusal to address this critical issue was an error that needs to be corrected by this Court before August 28.

Article V vests "supreme executive power in a Governor." Me. Const. art. V, pt. 1, § 1. Just as the judiciary and legislative branches cannot exercise those powers without express authority, Me. Const. art. III, § 2, the people are similarly limited. It is thus clear from Article III of the Constitution that neither the Governor nor the judiciary may exercise legislative power.

Importantly, the judiciary is constitutionally obligated, in the course of judicial review, to maintain this fundamental balance by preventing or remedying the improper exercise of legislative power. It is the judiciary's duty to enforce the Constitution to maintain the separation of powers. That is the Court's obligation in this case.

All of this is consistent with the familiar history of American government as it has functioned since 1789. This Initiative, although denominated a “resolve,” is outside the authority of Article IV and therefore is outside the legislative authority reserved to the people in Section 18. For that reason, it is not entitled to be placed on the ballot.

Section 18, Subsection 2 is not to the contrary. It does say in part: “the measure thus proposed, unless enacted without change by the Legislature at the session at which it is presented, shall be submitted to the electors....” Me. Const. art. IV, pt. 3, § 18(2). Certainly, that language forecloses any action *by the Legislature* to prevent an initiative from getting to the people. The purpose of Section 18 is to enable the people to exercise legislative authority.

Importantly, however, the quoted text is in Article IV. It is not in Article VI. Therefore, it does not prohibit pre-election judicial review of the constitutional legitimacy under Article IV of any initiative. The quoted words in Article IV cannot mean literally that any initiative, no matter its text or its purpose or its obvious effect, is entitled to be placed on the ballot.

The question for decision before August 28 is whether the Maine Constitution empowers anybody other than the judiciary to reopen and reverse a decision of this Court. A hypothetical may be helpful even if highly unlikely to occur in actuality. Suppose that the Law Court considers itself constitutionally compelled to reverse a

conviction after a jury trial in a case in which there is no reason to doubt that the defendant had committed a most heinous and cruel torture and murder of a particularly sympathetic victim. Assume for these purposes that procedural errors by police and prosecutors, under the exclusionary rule, leave the Court no choice but to vacate the conviction and to exclude evidence without which the Defendant cannot be retried effectively. Suppose also that the public outrage is so overwhelming that hundreds of thousands of signatures are gathered in a matter of weeks for a “resolve” directing the Court to recall its mandate and affirm the conviction. That would be such a plain violation of the separation of powers and so far beyond the authority of the Legislature, that the judiciary would be constitutionally obligated to act to enjoin the initiative. That hypothetical case differs from this case only in degree and detail. The Court cannot fail to enjoin the vote on this initiative without overruling *Lewis* and *Wagner v. Sec’y of State*, 663 A.2d 564 (Me. 1995), and without ignoring its constitutional obligation to uphold the separation of powers in Article III.

It is the Court’s solemn duty to maintain the separation of powers, not as a matter of self-importance, but as a matter of protecting the larger public interest as expressed in the Constitution itself. The proponents of every initiative claim to be speaking for “the people.” Even if they win a decisive victory, however, they speak for only a majority of the voters and fewer than all of the people who did not vote. All of the people have an interest in having their courts promptly and vigilantly

prevent any abuse of the initiative process in the people's Constitution, whether by deep-pocket special interests or by the noblest and most pure-hearted citizens.

VI. The Initiative is Not Legislation; Items That are Not Legislative Must Not be Put to the Voters

A. The Court Cannot Not Decide

Article IV, Part Third, Section 18 restores to the people the right (power) to exercise directly *only* the legislative authority in Article IV, except for certain legislative matters that are expressly excluded. It is common ground among all the parties that the people have no constitutional power, or “right,” if that is the preferred term, under Section 18 that is not first a power that is already conferred upon the Legislature in Article IV. But all legislative power is limited to acts that are historically and analytically legislative in their nature as demonstrated by customary practice. It is also more specifically circumscribed by Article III's separation of powers.

As discussed above, Article IV, Part Third, Section 18 may not properly be interpreted in isolation from the totality of Articles III, IV, V, and VI of the Maine Constitution. In that context, this purported “resolve” is beyond any authority vested in the Legislature under Article IV and is therefore beyond any authority restored or reserved to the people under Section 18.

Before demonstrating in the following section that this Initiative is not legislative and therefore not authorized by Section 18, it is useful to revisit the importance of deciding that question on the constitutional merits right now. No court

ever actually has had an opportunity to not-decide the question before it. Whatever justiciability doctrines or norms may be cited, a determination that a question cannot be adjudicated is itself an adjudication. One side wins and the other side loses. It usually matters not to the loser, or to the winner, why the Court has declined to exercise its authority to grant any judicial remedy to the Plaintiff.

Applied to these circumstances, if the Court is of the view that every initiative, no matter how flawed constitutionally, and no matter what kind of constitutional flaw is presented, must go to the voters unless it explicitly involves a bond issue or a constitutional amendment or removal of a public officer, the Court necessarily will have made the decision that any set of words proposed by a sufficient number of registered voters is entitled to go to the ballot. This is a decision that any court should be slow to make. It is not a non-decision. It is not a prudent postponement of a decision.

In a similar but somewhat different way, for the Court to adopt the position advanced by the Secretary in the Superior Court, that the challenge is justiciable and that the Initiative is unconstitutional, but it should nonetheless be placed on the ballot, would essentially make the Court's decision an advisory opinion in a circumstance in which the advice may be expected to be ignored.

For reasons to be addressed in Section VI below, it is essential that the Court not create a circumstance in which this Initiative loses at the polls and the Court never

firmly declares that this kind of initiative is constitutionally illegitimate. This is the particular concern of the Chamber and will be discussed more extensively with respect to the question of whether injunctive relief should be withheld. However, it also relates to the appropriate approach to this question.

Maine has a robust array of administrative agencies and permitting processes that must be navigated before any major project can break ground. This is not to complain about those processes but to note that the Court must have in mind the radiating effects of a decision to consider the constitutional merits in this case. If the Initiative is defeated at the ballot box, the issue of its legitimacy will never be adjudicated. The occurrence of the vote will itself send a clear message to every person contemplating any major project in Maine that even an exquisitely presented project that secures all the necessary permits from the PUC, the Department of Environmental Protection and/or the Board of Environmental Protection, the Land Use Planning Commission, the Army Corps of Engineers, and potentially other state and federal agencies is nevertheless vulnerable to challenge by referendum even after being affirmed by this Court. The potential that any competitor or other interest group can mount a petition drive to overturn lawfully issued permits will be an enormous disincentive to economic development throughout the State of Maine because rational business actors do not court such risks if they have alternative investment opportunities.

B. The Initiative is not Legislative

As a matter of appellate practice, the Court employed the correct two-step analysis in *Wagner*, 663 A.2d 564. In *Wagner*, unlike the 1996 *Opinion of the Justices*, this Court was addressing the proper scope and function of *judicial* review, not merely the proper scope of legislative authority. The *Wagner* Court recognized that there are circumstances in which a measure that has collected enough signatures may be excluded from the ballot if it is not within the authority reserved to the people under Section 18. The Court first decided that the initiative being challenged there was within the scope of the electorate's authority under Section 18, which allowed the Court to move to the second step of the analysis. *Id.* In the second step, the Court decided that that initiative, having already been determined to be a permissible legislative function, was otherwise not ripe for adjudication as to its unconstitutional effect if enacted. In the present case, the Superior Court erred as to the first *Wagner* step.

The Superior Court erroneously limited *Wagner*, and therefore the scope of judicial review for compliance with Section 18, to initiatives that *are* legislative but encroach on one of the *legislative* powers reserved to the Legislature, such as constitutional amendments. The Superior Court erroneously declined to assess whether this Initiative does *not* exercise a *legislative* power, that is available to *both* the

Legislature and the people, but a *judicial* power that is available to *neither*, because it is reserved instead to the judicial branch.

Stated otherwise, any complaint alleging that an initiative is unauthorized by the Constitution because it is fundamentally not legislative in character and violates the separation of powers is entitled to be adjudicated promptly, before the ballots are printed, regardless of which decision the Court makes on the challenge. This is that case and the Superior Court erroneously ruled it is not.

Though rare, this Court has prevented unconstitutional ballot measures from being placed before the voters. For example, in *Morris*, 147 Me. 89, 83 A.2d 556, the Court refused to force the Secretary to accept a referendum because the people lacked the power to revoke the Legislature's emergency tax law via referendum, stating that "The act is not subject to constitutional referendum, and the Secretary of State should not receive the petitions invoking the same." *Id.* at 110, 83 A.2d at 567. Similarly, in *Moulton v. Scully*, 111 Me. 428, 446, 89 A. 944, 952 (1914), the Court noted that "the people" do not have the power to remove public officers via referendum because that power is reserved to the Legislature and to the Governor.

[It is without foundation] that merely because the word "resolution" or "resolve" is used in [Section 18], and a resolution was adopted by the legislature as the basis of these proceedings, the court has no power to construe these terms, cannot distinguish between them but must blindly accept the word resolution in both cases as having the same meaning.

Id.

Like those discussed in *Moulton* and *Morris*, this Initiative is not legislative in character and exceeds the scope of what the Constitution reserves to the people in Section 18.

Once pre-election judicial review of this initiative is undertaken, the right answer is that this Initiative is not legislative in character and violates the separation of powers as clearly and fundamentally set forth in *Lewis*, 3 Me. 326. This Initiative is not within the legislative authority reclaimed by the people in Section 18 of Part Third of Article IV. That Section restores to the people only the power to legislate and not the power to reopen a case that has been finally decided.

C. The Initiative Is an Exercise of Judicial Power

At this late stage of English and American legal history, it is reasonably to be hoped that extensive argument and citation is not necessary to say that the finality of adjudications is a cornerstone of our judicial system and that the carefully constructed and significantly limited circumstances and justifications for reopening a judicial decision do not contemplate a resolve by a legislature, even if it is only for the purpose of reopening the decision to give the losing litigant another opportunity to litigate.

It has been the settled law of Maine since 1825 that a legislative resolve may not direct or allow or accomplish the reopening of a final decision in a litigated matter in a Maine court. *Lewis v. Webb* could not be more clear. The Court rejected the

Legislature's effort to re-open a fully and finally adjudicated probate matter to allow for the re-litigation of issues and the possibility of a different result.

[Rendering a decision null and void is] ... an exercise of power common in Courts of law; a power not questioned; but it is one purely judicial in its nature, and its consequences. It is one of the striking and peculiar features of judicial power that it is displayed in the decision of controversies between contending parties; the settlement of their rights and redress of their wrongs. But it is urged that the resolve is not liable to objection on constitutional ground; that the authority exercised by the legislature is not in any degree judicial; that the resolve goes no farther than to authorize a re-examination of the cause, to empower one judicial Court to review the proceedings of another judicial Court by way of appeal, and thus to do complete and final justice to all concerned. It is true the resolve does not in terms, purport to transfer property directly from one man to another by mere legislative authority; but it professes to grant to one party in a cause, which has been, according to existing laws, finally decided, special authority to compel the other party, contrary to the general law of the land, to submit his cause to another Court for trial; the consequence of which may be the total loss of all those rights and all that property which the judgment complained of had entitled him, and those claiming through or under him, to hold and enjoy; that is to say, it professes to accomplish in an indirect and circuitous manner, that which the existing laws forbid, and which by a direct and legal course cannot be attained...

Lewis, 3 Me. at 332-33.

In this case, the outcome sought by the Initiative is even more intrusive than the one in *Lewis*. The *Lewis* resolve sought only to re-open the case, not to decide it. It did not “purport to transfer property directly from one man to another by mere legislative authority.” *Id.* Instead, it would have left open the possibility that a litigant

would be required to relitigate a closed case and risk a “total loss of all those rights and all that property which the judgment complained of had entitled him.” *Id.*

In the present case, the Initiative is not limited to re-opening the case to allow for more information to be presented. Instead, it is a directive to change the result without new evidence or any change in the law. There is no ambiguity in the purpose or effect of the Initiative; it is an even more extreme version of the resolve held to be invalid in *Lewis*. This Initiative is a frontal assault on the *Lewis* decision and the fundamental principles of judicial finality upon which it rests. This Initiative not only vacates a decision from this Court and a final PUC order, but it specifies the terms of the PUC order that must be entered, notwithstanding the law and notwithstanding the evidence.

Deciding cases, and reopening cases, is uniquely and distinctively a judicial function scrupulously protected by Maine’s rigorous separation of powers provision in Article III. Even the Court itself may not freely, without reason or justification, simply because it prefers a different outcome, reopen its own decisions, much less redecide them absent a change in either law or circumstances. Often, changes in circumstances come too late to matter and usually changes in the law are not retroactive. Courts and agencies have authority to revisit their closed cases but do not do so absent justification and not always even where there is some justification. For example, in *Quirion v. PUC*, 684 A.2d 1294 (Me. 1996), this Court rejected a collateral

attack on a final PUC decision, noting that “[a] valid and final judgment of the PUC has res judicata effect.” *Id.* at 1296 (citing *Ervey v. Northeastern Log Homes*, 638 A.2d 709, 711 (Me. 1994)). This Court held that the PUC's ruling “was clearly within its statutorily granted powers, is final and valid, and cannot now be challenged.” *Id.* This is consistent with M.R. Civ. P. 60(b), which provides relief from judgment, in certain limited circumstances. None of the enumerated exceptions to finality are applicable to this Court’s final determination in *NextEra*. *A fortiori*, neither the Legislature nor the people by initiative have the power to reopen closed matters and reverse their outcomes with no justification but disagreement.

VII. The Only Remedy Available to the Plaintiffs is a Permanent Injunction; There is no Alternative Remedy; Denial of all Remedies to a Successful Plaintiff is no Different from a Judgment for the Defendant

Although the parties have, to this point at least, differed on three questions, it is difficult to understand how the third question – regarding the appropriateness of an injunction – can even arise in a court of justice. To begin with the most obvious point, unsuccessful plaintiffs do not get remedies. The question of a proper remedy can arise only after the plaintiff has prevailed. Adapted to this case, that elementally obvious point means that the Court will have decided that the constitutional challenge mounted by these Plaintiffs is indeed entitled to be litigated before the election and that these Plaintiffs are indeed correct that the Initiative is constitutionally illegitimate. With that for a premise, it is astonishing that the Secretary or the Intervenor-

Defendants resist injunctive relief. From the Chamber's point of view, the principal risk in addressing their arguments is to imply that the arguments might succeed if not refuted.

In a preliminary injunction context, a court will act when a plaintiff demonstrates that it will suffer irreparable injury if the injunction is not granted, that the plaintiff's injury (to be avoided by the injunction) outweighs harm caused by the injunction to the defendant; the plaintiff is likely to succeed on the merits; and that granting the injunction would not cause an adverse effect on the public interest.

Ingraham v. Univ. of Me., 441 A.2d 691, 693 (Me. 1982)(citing *Women's Cmty. Health Ctr. v. Cohen*, 477 F. Supp. 542, 544 (D.Me. 1979); *UV Indus. Inc. v. Posner*, 466 F. Supp. 1251, 1255 (D.Me. 1979)).

It seems not to be a matter of disagreement that this familiar four-factor analysis is employed at the end of trial on the merits in a materially different way because the Court has decided that the plaintiff does indeed prevail on the merits. Obviously, the likelihood of success on the merits has now risen to 100%. At the close of the trial, the judicial task is to fashion the best remedy, not to consider whether the successful plaintiff should have no remedy at all. As a matter of obvious operational fact here, there is no remedy for these Plaintiffs except an injunction.

There may be cases in which declaratory judgment is sufficient to persuade a State official to change course. But there is nothing in this case so far to suggest that

a declaratory judgment will deter the Secretary from placing this question on the November ballot. Indeed, as discussed previously, absent the Court's injunction the Secretary will be required to include the Initiative on the ballot, which is why injunctive relief is the *only* adequate remedy if Plaintiffs prevail. If the Secretary's previous arguments are repeated on appeal, it will be clear that a declaratory judgment will have no effect, because even though the Secretary recognizes that the Initiative is unconstitutional, he believes it should still go to the voters. (App. 14.)

The Chamber acknowledges that the other three factors of the four-factor test are not eliminated simply because the plaintiff prevails, nor does the Chamber argue a total absence of cases in which the successful plaintiff seeking injunctive relief is required to accept relief that is not injunctive in nature. However, in the present case, there is no serious or even not-serious proposal by any of the three Defendants that there is any other remedy. If their argument is that the Plaintiff should have no remedy at all, even though winning, they ought to explain how that would be different from losing.

Reciting the other three factors of the *Ingraham* Test is not to apply them. Turning first to the public interest, there is no public interest in an unconstitutional vote. There is no public interest in enabling a clear violation of the separation of powers. There is no public interest in having the Superior Court and the Law Court

preside over a process in which the Secretary admits the crucial constitutional point but intends to proceed with the unconstitutional action anyway.

If the public interest is to be invoked, here, the public interest ought to be defined or at least articulated. The efforts of the three Defendants to do so to date have been truly extraordinary. Many of them amount to some variation on the idea that it will make the people feel better to express themselves, even if in December or January the Court declares the whole thing to have been an unconstitutional waste of time and an unfortunate distraction during a presidential election year. This is an odd view of what the public interest actually is. The Secretary has expressed a concern in the Superior Court filing that the public might lose confidence in the initiative process if a court were to enjoin an unconstitutional election. Why the public would lose confidence in the initiative process, if spared the need to waste their time in an unconstitutional ceremony, is unclear but the argument completely ignores the counter risk. The greater risk is that the people will lose confidence in the judiciary if the judiciary announces a violation of the Constitution and does nothing to stop or prevent it. Similarly, it seems more likely that the people would lose confidence in the initiative process if they expend their time, energy, and political attention on this matter only to have the Initiative declared unconstitutional after the election.

Arguments were made in the Superior Court to the effect that this would be a useful measure of public opinion that might influence the PUC, which has issued its

final order, but to do what, exactly? Maine's constitutional initiative and referendum processes are not a public opinion poll or a focus group. Sampling public opinion is not a reason to decline to enjoin a violation of the Constitution. And to refocus the discussion, the remedial issues being addressed in this section of this Brief do not arise unless the Court has already decided to reach the critical question and decide it in the Plaintiffs' favor. If the Defendants seriously mean to argue in this Court that an unconstitutional election cannot be enjoined or ought not to be enjoined because of some balancing of equities, the public interest is not one of the reasons to deny injunctive relief.

Turning then to the usual analysis where the plaintiff has in fact won the case, the first question is whether there is harm. The second question is whether it is irreparable, that is to say, in the alternative, is there another remedy? In this case any harm is obviously irreparable. Therefore, the question then gets to be whether it is somehow unfair to the Defendant - here, the Secretary of State - to be required to comply with the Constitution and whether the postulated unfairness of requiring a constitutional officer to obey the Constitution is so serious that the Plaintiffs ought to have an alternative remedy, or in this instance no remedy at all. To state these questions is to answer them.

One kind of situation in which injunctive relief is denied to a successful plaintiff is where the case probably ought not to have been of equitable cognizance at

all because there is a plain, complete, and adequate remedy at law. For example, in *Innogenetics, N.V. v. Abbott Labs*, 512 F.3d 1363, 1377 (Fed. Cir. 2008), the court decided that the plaintiff had prevailed on a patent infringement claim but that a permanent injunction should be denied because the damages awarded provided prospective compensation, in effect monetized future harms, so that the harm being asserted by the plaintiff was not irreparable. This is not that kind of case.

Another classic instance involves a dispute about real estate lot lines or setback rules such that a permanent injunction would require a fully completed building to be torn down with little or no material benefit to the plaintiff but imposing an enormous burden in the form of waste on the defendant, whose encroachment may have been minor and accidental or inadvertent. Where a building encroaches only a few inches over the line and does not materially affect the use and enjoyment of the plaintiff's property, an equity court might impose a sale of the strip of land necessary to make the lines right in return for a specified amount of money determined by the Court. Although not damages at law, the monetary exchange for land is a fairer remedy than an injunction which would be of little actual benefit to the plaintiff but inflict enormous economic harm on the defendant. This is not one of those cases either. *See Crocker v. Manhattan Life Ins. Co.* 61 App. Div. 226, 70, N.Y. Supp. 492 (1901). *See generally*, WILLIAM F. WALSH, A TREATISE ON EQUITY 281-98, (1930). If these Defendants are seriously to come before the Law Court of Maine, arguing that an

unconstitutional election ought not to be enjoined because of some balancing of the hardships, the Defendants need to mount a much more robust presentation than has occurred to date. At this point, the Chamber can only await the briefing and the reply.

In summary, the issue of injunctive relief arises only if the Court agrees with the Plaintiffs and the Secretary that this Initiative is unconstitutional. Denial of injunctive relief to a successful plaintiff occurs in rare circumstances not present here. There is no serious argument to be made that the irreparable harms to be suffered by these Plaintiffs need be endured because there would be some greater harm to these Defendants if the Constitution were obeyed. Indeed, it would seem that obeying the Constitution is logically and legally incapable of causing anything that may properly be denominated a “harm.”

Before closing, the Chamber takes this opportunity to press its view of its harm to itself and a significant number of the 5,000 Maine businesses for which the Chamber is the recognized voice. It is impossible to argue that there is no harm to the Chamber or its members and allies from being compelled to expend time, energy, and money in resisting an unconstitutional referendum. That time, energy, and money would better be deployed in other pursuits, whether other campaigns or attending to business. It is not seriously possible to suggest that there is no harm.

Additionally, unlike in traditional cases focused on injunctions, there is no opponent who could be forced to make the wronged party ‘whole’ at the end. The State of Maine will not reimburse Plaintiffs for the necessary expenditures to resist an unconstitutional initiative. Nor will the Defendant or Defendant-Intervenors make the Chamber and the Maine business community whole for the instability and additional risk that allowing an unconstitutional Initiative to move forward to the ballot creates for the business community.

No Defendant is suggesting that the Chamber and the businesses for which it speaks should be satisfied instead to get an unspecified sum of money from an unidentified source, and it is impossible to monetize these harms. That historically and traditionally has always been a reason to grant equitable relief, not a reason to withhold it.

But to return to a point mentioned above, the Chamber’s greatest concern is that denial of an injunction and affirmance of the Order will tell all existing and prospective businesses that the Court will not enforce constitutional limits on initiatives that competitors or critics may find it useful to fund. The message to the Chamber and all of the businesses now operating in Maine, and any entrepreneur who may be thinking of starting a business in Maine, is that all the permits required by Maine’s well-developed and thorough system of administrative permitting and regulations are never final because the permits can be withdrawn if slightly more than

half of the voters who show up on any given election day, including an off-year election day, disapprove for some reason or for no reason at all. This is a heavy, heavy burden for any business and a real but incalculable cost and risk to be imposed upon Maine's economy because the Secretary is concerned about hurting the voters' feelings and the Defendant-Intervenors are in favor of any delay that can be obtained for any reason, or because they hope to get a boost from an expression of public sentiment. That is really their case, although they will phrase it differently.

The Court as a matter of fundamental justice needs to act firmly and decisively when the Constitution is violated. To the extent that the Court even gets into the question of whether an injunction ought to be withheld and a constitutional violation permitted to continue, the Court ought not to overestimate the reasons presented by the Secretary and the Defendant-Intervenors and the Court especially ought not to underestimate the long term harm to be done to Maine businesses and Maine's economy if well-settled principles of finality are subject to a referendum exception not textually present in the Constitution and textually precluded by Article III of the Constitution.

CONCLUSION

This initiative is not one authorized by Article IV, Part Third, Section 18 because it is not legislation and because it purports instead to exercise a judicial power. That is what makes it ripe for pre-election review and that is why it must be

enjoined. The Law Court is constitutionally obligated to reverse the Order on appeal and itself enjoin this violation of our—the people’s—Constitution.

Respectfully submitted this 13th day of July 2020,



Gerald F. Petruccelli, Esq. – Bar No. 1245
Nicole R. Bissonnette, Esq. – Bar No. 5239
Attorneys for Maine State Chamber of
Commerce

Petruccelli Martin & Haddow, LLP
Two Monument Square, Suite 900
Portland, ME 04101
(207) 775-0200
gpetruccelli@pmhlegal.com
nbissonnette@pmhlegal.com

MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. CUM-20-181

AVANGRID NETWORKS, INC.,
MAINE STATE CHAMBER OF
COMMERCE, AND INDUSTRIAL
ENERGY CONSUMER GROUP,

Plaintiff-Appellants,

v.

MATTHEW DUNLAP, in his official
capacity as SECRETARY OF STATE,

Defendant-Appellee,

and

NEXTERA ENERGY RESOURCES,
LC, MAINERS FOR LOCAL POWER
AND MAINE VOTERS,

Defendant-Intervenors.

CERTIFICATE OF SERVICE

I, Gerald F. Petruccelli, attorney for Maine State Chamber of Commerce, hereby certify that by agreement of all Parties, I have caused copies of the Brief of Maine State Chamber of Commerce, to be served by electronic means, addressed as follows:

Phyllis Gardiner, Esq., AAG Phyllis.Gardiner@maine.gov
Thomas A. Knowlton, Esq. Thomas.A.Knowlton@maine.gov
David M. Kallin, Esq. DKallin@dwmlaw.com
Elizabeth C. Mooney, Esq. EMooney@dwmlaw.com
Adam R. Cote, Esq. ACote@dwmlaw.com
Paul W. Hughes, Esq. phughes@mwe.com

Matthew A. Waring, Esq. mwaring@mwe.com
Andrew A. Lyons-Berg, Esq. Alyonsberg@mwe.com
Chris Roach, Esq. croach@rrsblaw.com
John Aromando, Esq. jaromando@PierceAtwood.com
Jared des Rosiers, Esq. jdesrosiers@PierceAtwood.com
Joshua Dunlap, Esq. jdunlap@PierceAtwood.com
Sara A. Murphy, Esq. smurphy@PierceAtwood.com
Anthony W. Buxton, Esq. ABuxton@preti.com
R. Benjamin Borowski, Esq. RBorowski@preti.com
Sigmund D. Schutz, Esq. SSchutz@preti.com

Dated at Portland, Maine this ~~13th~~^{13th} day of July, 2020.



Gerald F. Petruccelli, Esq. – Bar No. 1245

Petruccelli, Martin & Haddow, LLP
Two Monument Square
P.O. Box 17555
Portland, Maine 04112-8555
(207) 775-0200
gpetruccelli@pmhlegal.com