

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

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LAW COURT DOCKET NO. CUM-20-181

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AVANGRID NETWORKS, INC., ET AL.

Plaintiffs-Appellants

v.

SECRETARY OF STATE ET AL.

Defendants-Appellees

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

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**BRIEF OF APPELLEE/CROSS-APPELLANT  
SECRETARY OF STATE**

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## **STATEMENT OF FACTS AND PROCEDURAL HISTORY**

Avangrid Networks, Inc., is the parent company of Central Maine Power (“CMP”) and the developer of the New England Clean Energy Connect Transmission Project – a proposal to transmit 1,200 MW of hydroelectric power from Quebec Province in Canada to Massachusetts, along a 145-mile long corridor through western Maine to a new converter station in Lewiston. Appendix (“App.”) 28. In order to construct the project, CMP needs to obtain approvals from a number of different state and federal agencies, and municipal governments. App. 28-29. The only regulatory approval at issue in this proceeding is the Certificate of Public Convenience and Necessity (“CPCN”) issued by the Maine Public Utilities Commission (“PUC”). CMP filed its petition for a CPCN in September 2017. After, a 19-month long process involving multiple intervenors and many days of hearings, the PUC granted the CPCN to CMP on May 3, 2019. App. 29-30. The PUC’s 101-page order is attached to the complaint in this action. App. 37-139.

NextEra Energy Resources, LLC (“NextEra”), an intervenor in the PUC proceeding and also a party to this action, appealed the PUC’s ruling, contending that there was insufficient evidence to support the PUC’s factual findings and arguing that the PUC erred in its interpretation of the governing statutes and application of the “public need” standard. On March 17, 2020,

this Court affirmed the PUC’s ruling, determining that the relevant findings were supported by substantial record evidence and that there was “no error in the Commission’s determination that the NECEC project meets the applicable statutory standards for a CPCN.” *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, ¶¶ 1, 5, 30, 35 n.15, 37 & 43, 227 A.3d 1117.

In the late summer of 2019, a group of citizens led by former state Senator Tom Saviello applied to the Secretary of State for approval to circulate a petition for a direct initiative. *See* 21-A M.R.S.A. § 901.<sup>1</sup> The text of the proposed resolve (“the Initiative”) provides in full:

**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

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<sup>1</sup> Pursuant to 21-A M.R.S.A. § 901(3-A) and Me. Const. art. IV, pt. 3, § 20, an application for an initiative petition must include the full text of the legislative proposal. The Revisor of Statutes provides technical assistance in reviewing the text of the proposal to advise whether it conforms to legislative drafting conventions and to suggest any changes needed to conform to those conventions. 21-A M.R.S.A. § 901(3-A). “The applicant must give written consent to the final language of the proposed law to the Secretary of State before the petition form is designed by the Secretary.” *Id.* All of these steps were followed with respect to this Initiative, as outlined in the agency record filed with the court in *Reed*.

order must deny the request for a certificate of public convenience and necessity for the NECEC transmission project.

The Secretary approved the petition form, and petitioners began gathering signatures in October 2019. App. 33.

Proponents of the Initiative filed a total of 15,785 petitions with the Secretary containing 82,449 signatures on February 3, 2020. *Reed v. Sec’y of State*, 2020 ME 57, ¶ 6, \_\_ A.3d \_\_ (*per curiam*) On March 4, 2020, at the conclusion of the thirty-day review period provided in 21-A M.R.S.A. § 905(1), the Secretary found that the petition contained more than the minimum number of 63,067 valid voter signatures as required by the Constitution, and thus determined that the Initiative was valid and would be submitted to the voters for approval unless first enacted without change by the 129<sup>th</sup> Legislature.<sup>2</sup> *Reed*, 2020 ME 57, ¶ 7.

A single voter, Delbert A. Reed, filed a timely Rule 80C petition seeking judicial review of the Secretary’s determination, pursuant to 21-A M.R.S.A. § 905(2), alleging on numerous grounds that thousands of signatures were improperly counted as valid. *Reed*, 2020 ME 57, ¶ 8. *Mainers for Local Power*

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<sup>2</sup> The Secretary presented the initiated bill to the Legislature on March 16, 2020, which was the day before the Legislature adjourned *sine die* on March 17, 2020, due to the COVID-19 pandemic. See House Advance Journal and Calendar, Supplement 10 (Mar. 17, 2020). All bills pending at the time of adjournment, including the initiative, were carried over to any special session of the 129<sup>th</sup> Legislature. See <https://legislature.maine.gov/LawMakerWeb/dockets.asp?ID=280077119>.

and NextEra intervened as parties in that proceeding, as did the Maine State Chamber of Commerce and the Industrial Energy Consumer Group (“IECG”) – four entities that have also intervened in this proceeding.

Following a remand to take additional evidence in response to Reed’s challenges, the Secretary issued an amended determination, which invalidated additional signatures but concluded that the petition still contained enough valid signatures to qualify for the ballot. *Reed*, 2020 ME 57, ¶¶ 8-10. The Superior Court affirmed the Secretary’s decision on April 13, 2020, and this Court affirmed the decision on May 7, 2020. *Id.* ¶ 22. In a footnote, the Court clarified that its decision did not address whether the petition comported with other constitutional or other statutory requirements. *Id.* ¶ 22 n.16.

On May 12, 2020, Avangrid filed this declaratory judgment action, challenging the constitutionality of the Initiative and seeking to enjoin the Secretary from placing the question on the ballot. In its Verified Complaint, Avangrid asserts, among other things, that the Initiative “exceeds the scope of the legislative power reserved to the people” under Article IV, Part 3, § 18 of the Maine Constitution and “is therefore not a valid direct initiative.” In addition, if enacted, Avangrid alleges the Initiative would violate the separation of powers provisions of Article III, section 2, and the special legislation clause in Article IV, part 3, section 13. App. 35-36. Avangrid

sought a declaratory judgment to that effect, and an injunction preventing the Secretary from putting the question before the voters in November.<sup>3</sup>

The Maine State Chamber of Commerce, IECG, NextEra, and Mainers for Local Power filed unopposed motions to intervene, pursuant to M. R. Civ. P. 24(a). A group of nine individual Maine voters, many of whom signed the petition and all of whom claimed they wish to vote on the Initiative, also moved to intervene, joining Mainers for Local Power. *See App.* 170-177. All motions were granted. *App.* 5-8. The parties agreed that Avangrid’s motion for preliminary injunction could be consolidated with its request for a permanent injunction, pursuant to M.R. Civ. P. 65(b)(2), and that no evidentiary hearing was necessary.

Intervenors Maine State Chamber of Commerce and IECG aligned with Avangrid on all issues in the trial court, including the request for injunctive relief. Mainers for Local Power and Maine Voters (“MLP”) argued for dismissal of the entire action on the grounds that none of the issues are ripe

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<sup>3</sup> The Secretary is charged with writing the ballot question for a citizen initiative, but not until after the petition has been determined to contain enough valid voter signatures to qualify, and the Legislature has adjourned the session at which the measure was presented without enacting the initiated bill as proposed. 21-A M.R.S.A. § 901(4). The Secretary is required to solicit public comments on a proposed ballot question before finalizing it. *Id.* § 905-A. That process was completed on July 8, 2020, and the final question that will appear on the ballot, absent an injunction, reads as follows: “Do you want to require the Maine Public Utilities Commission to reject a previously-approved proposal to construct the New England Clean Energy Connect electrical power transmission line through western Maine?” *See* Secretary’s announcement: <https://www1.maine.gov/sos/news/2020/energycorridorballotquestion.html>.

for judicial review prior to an election. In their view, the Initiative is within the citizens' power to legislate and, in any event, does not violate separation of powers because the PUC acts as an agent of the Legislature and, therefore, of the citizens acting as legislators. NextEra took no position on the merits, arguing only that none of the issues presented were ripe for review. MLP and NextEra also contended that if Avangrid's claim is cognizable pre-election, it is now time-barred because Avangrid did not file it in time to be fully adjudicated within the 100-day period provided in the Constitution, art. IV, pt. 3, § 22.<sup>4</sup>

The Secretary took what might be described as a middle position, agreeing with Avangrid that the matter was ripe and subject to pre-election review, and that the Initiative is beyond the citizens' power to legislate, but contending that Avangrid had not proven the elements necessary to obtain injunctive relief. The Secretary urged the trial court to issue a declaratory judgment on the first claim in Avangrid's complaint, dismiss the remaining claims, and deny injunctive relief, thereby allowing the measure to be

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<sup>4</sup> Section 22 expressly authorizes the Legislature to:

enact laws not inconsistent with the Constitution to establish procedures for determining the validity of written petitions. Such laws *shall include provision for judicial review of any determination, to be completed within 100 days* from the date of filing of a written petition in the office of the Secretary of State.

Title 21-A, section 905 was enacted pursuant to this provision and includes specific time periods within which challenges to the Secretary's determination of validity must be filed and decided by the courts.

presented to the voters in November. The Secretary agrees with MLP that Avangrid could have brought this claim at the same time as Reed’s challenge, but does not believe that it was required to do so by the Constitution or any statute. The Secretary thus argued below that the claim should not be considered time-barred, but the delay should be weighed in the balancing of equities under the criteria for injunctive relief.

After accelerated briefing and oral argument, the Superior Court (Warren, J.) dismissed the action on June 29, 2020. App. 25. The court concluded that the 100-day deadline in Section 22 applies only to adjudicating challenges to the validity of the petition – e.g., the issues of form and procedure litigated in *Reed* – and not the text of the proposed resolve. App. 14 n.2. The court held that while the Initiative presents “a significant separation of powers issue ... deserving of serious consideration,” that issue is not ripe or otherwise subject to pre-election review. App. 22, 24.

Avangrid promptly appealed on July 2, 2020, and the Secretary and Mainers for Local Power filed separate cross-appeals shortly thereafter. The parties requested an expedited schedule on appeal in recognition that the Secretary must finalize the content and layout of ballots for the November 3, 2020 general election by the end of August.

## STATEMENT OF THE ISSUES

- I. Whether the Superior Court erred in dismissing Avangrid's complaint on the grounds that Avangrid's challenges to the Initiative are not subject to pre-election review.
- II. Whether the Initiative is beyond the electors' power to legislate under Article IV, Part 3, Section 18 of the Maine Constitution.
- III. Whether Avangrid is not entitled to an injunction barring the Initiative from being presented to the voters at the election in November 2020.

## SUMMARY OF ARGUMENT

This Initiative, by its plain language, directs an executive branch agency to reverse a final determination by the PUC, reached at the conclusion of a lengthy adjudicatory proceeding and upheld by this Court on appeal. It does not enact or amend Maine statutes, establish new rules or procedures to be applied to transmission line projects, or change the criteria for issuance of a CPCN. It simply seeks to reverse the outcome of a final executive branch decision, upheld by the judicial branch. In the 110-year history of the initiative and referendum process in Maine, it appears that no initiative in this form has ever been presented to the voters. *See* list of citizen initiatives since 1909, compiled by Maine's Law and Legislative Reference Library: <https://www.maine.gov/legis/lawlib/lldl/citizeninitiated/>.

Constitutional challenges to an initiative are generally not considered ripe for pre-election review because the initiative might not pass and thus might never become effective. *See Wagner v. Sec’y of State*, 663 A.2d 564, 567-68 (Me. 1995) (any determinations about constitutionality of initiative based on its effect if enacted would be premature); *Lockman v. Sec’y of State*, 684 A.2d 415, 420 (Me. 1996) (whether competing measure would “substantially alter” use of state lands in violation of Article IX, Section 23 of the Maine Constitution not ripe for pre-election review). After examining the challenge presented by Avangrid below, however, the Secretary was persuaded that, as written, the Initiative is not “legislative” in nature and is therefore beyond the power of the citizens to enact. The citizen initiative provisions of the Maine Constitution, Article IV, Part 3, § 18 (“Section 18”), must be liberally construed to facilitate the people’s exercise of their sovereign power to legislate, *Allen v. Quinn*, 459 A.2d 1098, 1102-03 (Me. 1983), but the people’s power is strictly legislative and neither the citizens nor the Legislature has the authority to reverse a permit granted by an agency after an adjudicatory hearing and upheld by this Court on appeal.

In the Secretary’s view, this case presents the rare occasion on which a challenge to the text of an Initiative is ripe for pre-election review. The Secretary thus contends that the Superior Court erred in dismissing the first

claim in Avangrid's complaint, but was correct in dismissing Avangrid's remaining challenges as unripe. Accordingly, the Secretary asks this Court to vacate the dismissal and remand with direction to the Superior Court to enter a declaratory judgment on the one claim that is ripe for review.

## ARGUMENT

### **I. The Superior Court erred in dismissing Avangrid's complaint on the grounds that Avangrid's challenges to the Initiative are not subject to pre-election review.**

Standard of Review. Ripeness is a question of law that is reviewed de novo by this Court. *Clark v. Hancock Cty. Commrs.*, 2014 ME 33, ¶ 19, 87 A.3d 712.

Avangrid's claim that the Initiative is beyond the power of the citizens to legislate is ripe for pre-election review. The Superior Court erred in ruling otherwise.

"For a case to be ripe there must be a genuine controversy and a concrete, certain, and immediate legal problem." *Id.* ¶ 19, 87 A.3d 712 (quotations omitted). Whether or not the subject matter of an initiative is within the citizen's power to legislate generates a concrete, certain and immediate issue that arises pre-election and is not dependent on the outcome of the election.

In *Wagner*, this Court implicitly acknowledged that whether an initiative presents a “subject matter beyond the electorate’s grant of authority” to legislate under Section 18 is a justiciable question prior to the election. 663 A.2d at 567. The plaintiffs in *Wagner* had filed a declaratory judgment action asserting that the challenged initiative was a disguised attempt to amend Maine’s Constitution – and thus beyond the electorate’s power under Section 18 – because the text of the initiative sought to prevent future legislatures from enacting measures inconsistent with a particular definition of protected classes. *See* Me. Const. art. IV, pt. 3, § 18 (“electors may propose to the Legislature for its consideration any bill, resolve or resolution, including bills to amend or repeal emergency legislation *but not an amendment of the State Constitution*”) (emphasis added).

The Court considered this claim as part of a pre-election challenge. After consideration, however, the court held that the initiated bill “on its face” was not a “back door attempt to amend the Constitution,” but was “only a statutory amendment.” 663 A.2d at 567. Having thus determined that the initiative in *Wagner* was legislative in nature – both in form and function – the Court held that it had to be submitted to the voters. 663 A.2d at 567-68. The Court was unwilling to address “the ramifications the initiated legislation might have on existing laws” or “to express a view as to the future effect and

application of proposed legislation” where those effects were unclear from the face of the initiated bill. *Id.* at 567 (quoting *Opinion of the Justices*, 437 A.2d 597, 611 (Me. 1981)).

Avangrid’s first claim should be parsed in the same way as *Wagner*. The Initiative is styled as a “Resolve,” which is a form of direct initiative as described in Section 18. However, the subject matter, as revealed in the plain text of the Initiative, is not legislative in nature because it demands the reversal of a final agency decision in an adjudicatory proceeding and a final appellate court decision affirming that action. It does not enact or amend Maine statutes, establish new rules or procedures to be applied to transmission line projects, or change the criteria for issuance of a CPCN. Moreover, in contrast to the proposal in *Wagner*, the intended effect of the Initiative is spelled out in its text and is not dependent on contingencies or circumstances that may not arise until after the election. Because the effect of this Initiative is plain on its face, Avangrid’s contention that such action is beyond legislative power is concrete, certain, and immediate now – before the voters are presented with a ballot question to approve the Initiative.

Courts in other jurisdictions have drawn this same distinction, ruling that a claim that an initiative is beyond the power of the people to enact – as distinct from a claim that the initiated law might be unconstitutional if

enacted – should be adjudicated before the people vote. *See, e.g., Philadelphia II v. Gregoire*, 911 P.2d 389, 393-94 (Wash. 1996) (courts are generally reluctant to rule on validity of initiative before vote of people, but an established exception authorizes review to determine whether initiative is “beyond the scope of the initiative power”); *Coppernoll v. Reed*, 119 P.3d 318, 324 (Wash. 2005) (distinguishing between review of initiatives for general constitutionality, which may only occur post-election, and determining before the election whether the “fundamental and overriding purpose” of the initiative is within the citizens power to enact); *Carter v. Lehi City*, 269 P.3d 141 (Utah 2012) (“the question courts should ask in evaluating the propriety of a proposed initiative is whether the initiative would be a proper exercise of legislative power if enacted by the state legislature”).<sup>5</sup> *See generally* James B. Gordon & David B. Magelby, *Pre-Election Review of Initiatives and*

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<sup>5</sup> The Supreme Court of Alaska has established a different line of demarcation to distinguish claims that are ripe for pre-election review. As explained in *Alaska Action Center, Inc. v. Municipality of Anchorage*, 84 P.3d 989, 992-93 (Alaska 2004), if a challenge goes to the substance of a citizen-initiated bill and does not depend on whether the measure would be enacted by the citizens or by the legislature, then such a challenge should not be addressed until after enactment by the voters. On the other hand, if the challenge goes to the use of the initiative process to enact a statutory provision, as opposed to the substance of the proposed statute, then it would be appropriate for pre-election review. The stated rationale for this distinction is to prevent the court from involving itself in the legislative process before a measure has been enacted – whether by the citizens or their elected representatives. *Alaska Action Center*, 84 P.3d at 992-93. If this Court were to adopt Alaska’s approach (which has not been recognized by the Law Court to date), Avangrid’s first claim would not be ripe for review because its argument that the text of the Initiative is improper legislation is not based on the use of the initiative process, but goes to the substance of the measure and would apply regardless of which legislative body – the citizens or their elected representatives – were to enact it.

*Referendums*, 64 Notre Dame L. Rev. 298, 313-17 (1989) (whether the subject matter of the initiative is beyond the citizens' power to legislate recognized as one of exceptions to general rule that constitutional challenges to a citizen initiative are not ripe for judicial review pre-election). A subject matter challenge pre-election does not raise the same justiciability issues as a general constitutional challenge "because postelection events will not further sharpen the issue." *Coppernoll*, 119 P.2d at 322. The same is true here.<sup>6</sup>

The Secretary believes that whether the fundamental and overriding purpose of this Initiative places it beyond the electorate's power to enact is an issue that is ripe for judicial review at this stage.

## **II. The Initiative is beyond the electorate's power to legislate under Article IV, Part 3, Section 18 of the Maine Constitution.**

The remaining legal issues presented on appeal are subject to de novo review both because there were no factual disputes for the trial court to adjudicate, and because the trial court did not reach this issue, having decided it was not ripe for review. *See Mason v. City of Augusta*, 2007 ME 101, ¶ 18, 927 A.2d 1146 ("Because the facts are stipulated, we review de novo the legal issues presented to the Superior Court.").

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<sup>6</sup> In *Coppernoll*, as in *Wagner*, the court ultimately concluded that the initiative in question was not plainly beyond the citizens' power to legislate, but in both cases the text of the initiative left open questions about how it would be implemented.

The people's power to initiate legislation under Article IV, Part 3, § 18 of the Maine Constitution is broad, but not unlimited. Section 18(1) provides in part:

1. **Petition procedure.** The electors may propose to the Legislature for its consideration any bill, resolve or resolution, including bills to amend or repeal emergency legislation but not an amendment of the State Constitution, by written petition....

Art. IV. Pt. 3, § 18. Since the people may propose "any bill, resolve or resolution" "to the Legislature" for enactment, and if the Legislature fails to enact it, to the voters for approval acting in their capacity as legislators, the measure proposed must be legislative in nature. *See* Art. IV. Pt. 3, § 18.

The initiative power "applies only to legislation, to the making of laws ...." *Moulton v. Scully*, 111 Me. 428, 449-51, 89 A. 944 (1914). That is, the use of the direct initiative power under Section 18 is limited to measures that are in fact "legislative." "Article IV, Part 3, § 18 must be liberally construed to facilitate, rather than to handicap, the people's exercise of their sovereign power to *legislate*." *Wagner*, 663 A.2d at 566 (quoting *Allen v. Quinn*, 459 A.2d 1098, 1102 (Me. 1983)) (emphasis added). "The exercise of the initiative power by the people is simply a popular means of exercising the plenary *legislative* power 'to make and establish all reasonable *laws and regulations* for the defense and benefit of the people of this State ....'" *League of Women*

*Voters v. Sec’y of State*, 683 A.2d 769, 771 (Me. 1996) (quoting Me. Const. art. IV, pt. 3, § 1) (emphasis added). See *Allen*, 459 A.2d at 1098 (“[b]y adding the direct initiative and referendum provisions to the Maine Constitution in 1909, the people took back to themselves part of the *legislative power* that in 1820 they had delegated entirely to the legislature”) (footnote omitted) (emphasis added). Indeed, under the express language of Section 18(1), any initiative must first be “propose[d] to the Legislature for its consideration” and, under Section 18(2), may only be presented to the voters for approval if the Legislature fails to enact the measure without change.<sup>7</sup>

Certain subject matters have been held to be beyond the citizens’ initiative power because of limits set by other provisions of the Constitution. The citizens may not initiate the issuance of bonds, for example, because that authority is exclusively derived from Article IX, § 14 of the Maine Constitution. *Opinion of the Justices*, 191 A.2d 357, 359-60 (Me. 1963). Removal of public officers is not a proper subject for initiative because that power resides solely in the Legislature and Governor under Article IX, § 5 of the Maine Constitution. *Moulton v. Scully*, 111 Me. 428, 449-51, 89 A. 944 (1914). Constitutional

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<sup>7</sup> The pertinent provision of Section 18(2) provides: “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 together with any amended form, substitute, or recommendation of the Legislature, and in such manner that the people can choose between the competing measures or reject both....”

amendments are also expressly excluded from the initiative power described in Section 18, as noted in *Wagner*. And in an advisory opinion to the House of Representatives in 1996, a majority of Justices concluded that an initiative provision directing legislators and the Governor to apply to Congress for a Constitutional Convention to adopt congressional term limits was also beyond the citizens' power to legislate. *Opinion of the Justices*, 673 A.2d 693, 696 (Me. 1996).

The Superior Court characterizes the above examples as being “procedural” in nature – as “instances where *procedures* specified in the Constitution are directly inconsistent with the procedure for initiative or referendum” – and thus distinguishable from “claims of substantive invalidity.” App. 20 (emphasis added). Another way to characterize these examples, however, is that they are instances where the Constitution authorizes specific types of actions by the Legislature that are citizen lawmakers are not empowered to take. In this respect, citizens' legislative powers are not completely co-extensive with the Legislature's plenary authority. The distinction drawn by the trial court does not provide a convincing analytical basis for the court not to address a different type of fundamental limitation on the citizen's (and Legislature's) power to legislate.

In evaluating whether measures are beyond the electorate's power, courts and commentators have distinguished between initiated bills that are "legislative" in nature as opposed to "administrative" – a distinction grounded in separation of powers principles. *See, e.g., Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013) (construing Colorado's constitution, court held that only initiated bills that were "legislative" in nature were within the people's power to legislate; "a voter initiative must be a valid exercise of legislative power, rather than executive or judicial power"); *Carter*, 269 P.3d at 147-48 (construing Utah's constitution, court held that only initiated bills that were legislative in nature were within the people's power to legislate; "[t]he true limit on voter initiatives ... is that they must be a valid exercise of legislative rather than executive or judicial power.").

As the Utah court observed, legislation involves the promulgation of laws of general applicability and is based on "weigh[ing] broad, competing policy considerations, not the specific facts of individual cases," whereas executive or administrative decisions involve "individualized, case-specific considerations," and "require careful study and specialized expertise, as well as discretionary judgment" in the implementation of legislative policy. *Carter*, 269 P.3d at 152-154, 158. At the same time, these cases recognize the difficulties of attempting

to delineate the “legislative” power “with clear, bright lines.” *Carter*, 269 P.3d at 151; *Vagneur*, 295 P.3d at 506-07.

This Court considered the distinction between initiated legislation that is “administrative” in nature, rather than “legislative,” in a case involving the City of Portland’s citizens’ initiative powers under a city charter that expressly authorized initiated ordinances “dealing with legislative matters on municipal affairs.” *See Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶¶ 13-19, 91 A.3d 601. In so doing, the Court cited approvingly the Colorado Supreme Court’s ruling in *Vagneur* and the Utah Supreme Court’s decision in *Carter*, as well as decisions from several other state courts in enumerating the factors typically considered to draw the distinction between “legislative” and “administrative” measures:

For example, courts consider an act to be legislative if it: (1) makes new law, rather than executes existing law, *see McAlister v. City of Fairway*, 212 P.3d 184, 194 (Kan. 2009); *Kearney v. City of Little Rock*, 302 S.W.3d 629, 634 (Ark. Ct. App. 2009); *State ex rel. Upper Arlington v. Franklin Cnty. Bd. of Elections*, 895 N.E.2d 177, 181 (Ohio 2008); (2) proposes a law of general applicability, rather than being based on individualized, case-specific considerations, *see Carter v. Lehi City*, 269 P.3d 141, 154 (Utah 2012); (3) relates to subjects of a permanent or general character, as opposed to subjects that are temporary in operation and effect, *see Vagneur v. City of Aspen*, 295 P.3d 493, 505 (Colo. 2013); (4) 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, *see McAlister*, 212 P.3d at 194; (5) requires only general knowledge, rather than

specialized training and experience or an intimate knowledge of the fiscal or other affairs of government, *see id.*; (6) does not involve a subject matter in which the legislative body has delegated decisionmaking power for local implementation, *see id.* at 195; *see also* 5 Eugene McQuillin, *The Law of Municipal Corporations* § 16:53 (3d ed. 1978); (7) establishes or amends zoning laws, *see Friends of Denver Parks, Inc. v. City and Cnty. of Denver*, 2013 WL 6814985, 327 P.3d. 311 (Colo. App. 2013); *but see Vagneur*, 295 P.3d at 510 (stating that the change in use of particular parcels are case-specific action that “generally do not reflect the exercise of legislative power”); (8) is informed by historical examples of legislative acts, such as longstanding parallels in statutes enacted by legislative bodies, rather than traditionally executive acts, longstanding parallels in statutes enacted by legislative bodies, rather than traditionally executive acts.

*Id.*, 2014 ME 63, ¶ 13 n.7, 91 A.3d 601.<sup>8</sup>

Moreover, this Court has expressly ruled that the Legislature lacks the power to “disturb a decision rendered in a previous action.” *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117; *State v. LVI Group, Inc.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960; *see also Lewis*, 3 Me. at 326-33 (Court invalidated a resolve passed by the Legislature that would have set aside a final judgment of the probate court, ruling that the resolve was an act of “judicial character,” not an exercise of “legislative power”). The Legislature may amend statutes in

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<sup>8</sup> The Superior Court rejected the legislative-administrative distinction as inapplicable to statewide initiatives. App. 21. The “administrative” designation may not be entirely applicable here, but the criteria developed in the above cases to determine what initiatives are “legislative” in nature are pertinent to determining what is within the citizens’ power to enact. The Secretary does not take a position on whether this Initiative is administrative in nature, but only that it is not “legislative” and thus is beyond the electors’ power.

response to a particular administrative or court decision with which the legislative body disagrees, and it may apply those amendments retroactively – but not to the extent of reopening matters that have become final judgments. *See LVI Group*, 1997 ME 25, ¶ 11 & n. 4, 690 A.2d 960 (purpose underlying legislative change to statutory definition of employer with retroactivity clause was to clarify original intent of law in response to a specific court decision, but it could not disturb that decision); and *Grubb*, 2003 ME 139, ¶ 11 (“statute does not, nor could it, change the result of a previous decision”). The same principle is recognized by the Supreme Court with respect to Congress’s legislative power. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 217-218 (1995) (Congress cannot enact legislation that effectively reopens final judgments), discussed in *Bernier v. Data General Corp.*, 2002 ME 2, ¶ 17, n.7, 787 A.2d 144.<sup>9</sup>

If the Legislature lacks the power to pass a bill or resolve that would reverse or otherwise disturb a decision rendered in a previous action, then the people likewise lack the power. *See League of Women Voters*, 683 A.2d at 771 (“[t]he exercise of initiative power by the people is simply a popular

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<sup>9</sup> By contrast, as noted in *Bernier*, 2002 ME 2, ¶ 17, n.7, 787 A.2d 144, and in *Morrisette v. Kimberly-Clark Corp.*, 2003 ME 138, ¶¶ 15-17, 837 A.2d 123, a legislative change in the rules may be applied retroactively to pending matters or to matters that have been reopened due to a change in circumstances.

means of exercising the plenary legislative power ‘to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State....’”) (quoting Art. I, pt. 3, § 1); *Opinion of the Justices*, 2017 ME 100, ¶ 59, 162 A.3d 188 (“[c]itizen initiatives are reviewed according to the same rules of construction as statutes enacted by vote of the Legislature”).

In the Secretary’s view, the Initiative at issue here is not “legislative” in nature, as the Law Court and other courts have defined that term. *See Friends of Congress Square Park*, 2014 ME 63, ¶¶ 13-17 & n.7, 91 A.3d 601; *see also Lewis*, 3 Me. at 326-33. The Initiative does not propose “a law of general applicability”; it purports to execute existing law in Title 35-A, rather than make new law. *See Friends of Congress Square Park*, 2014 ME 63, ¶¶ 13-17 & n.7, 91 A.3d 601. It does not purport to change the rules governing CPCNs or transmission projects of a certain size or scope.

To the contrary, the Initiative is expressly targeted to disturb one specific “decision rendered in a previous action”: this Court’s affirmance of the PUC’s decision in *NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, 227 A.3d 1117. The Initiative even goes so far as to identify the specific docket number of the PUC decision that it expressly requires the PUC to reverse. It does not merely direct the PUC to reconsider the CPCN, but instead directs the PUC to reconsider and to reach a conclusion that the transmission

project is not in the public interest – exactly the reverse of the determination previously made by the PUC and upheld by this Court as a final judgment.

Neither the people nor the Legislature have the power to pass a bill or resolve that would reverse or otherwise disturb a decision rendered in a previous action.<sup>10</sup> See *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117; *LVI Group*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960; *Lewis*, 3 Me. at 333.

In sum, in the Secretary’s view, this case presents the extraordinary circumstance in which an initiative involves a subject matter that is beyond the power of the voters to enact. A declaratory judgment to that effect would be appropriate.<sup>11</sup>

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<sup>10</sup> Nothing in Title 35-A, including 35-A M.R.S.A. §§ 1321 and 1323, makes this Initiative “legislative” in nature. Decisions of the PUC have res judicata effect, just like the decision of the Workers Compensation Board at issue in *Grubb*, see *Quirion v. Pub. Utils. Comm’n*, 684 A.2d 1294 (Me. 1996), and thus cannot be reopened by a legislative directive in the manner of this Initiative. The fact that the scope of authority of the PUC, like all agencies, may be amended by the Legislature, and the PUC has certain ability to reconsider and amend its orders, does not mean that the Legislature or the people exercising their direct initiative power under the Maine Constitution have the authority to disturb a Law Court decision affirming a PUC decision that followed an adjudicatory hearing.

<sup>11</sup> Avangrid’s other legal claims, including its assertion that the Initiative is “unconstitutional” because it would violate the separation of powers and constitute impermissible special legislation if enacted, are not ripe for adjudication at this time and were properly dismissed by the lower court. See *Lockman*, 684 A.2d at 417; *Wagner*, 663 A.2d at 567-68.

**III. Avangrid is not entitled to an injunction barring the Initiative from being presented to the voters at the election in November 2020.**

Having dismissed Avangrid’s complaint in its entirety as unripe and not subject to pre-election review, the trial court did not analyze Avangrid’s request for injunctive relief. Given the short period of time between now and when general election and referendum ballots must be printed for distribution to voters overseas, the Secretary urges this Court to make a de novo determination on Avangrid’s request for injunctive relief (rather than remand to the trial court) if the Court finds the legal issue ripe for review. *Cf. Mason*, 2007 ME 101, ¶ 18, 927 A.2d 1146 (“Because the facts are stipulated, we review de novo the legal issues presented to the Superior Court.”).

To obtain injunctive relief on the one claim that is ripe for review, under M. R. Civ. P. 65, Avangrid had the burden of proving that it will suffer irreparable harm in the absence of an injunction, that such injury outweighs any harm to opposing parties, and that the public interest would not be adversely affected by granting the injunction. *Fitzpatrick v. Town of Falmouth*, 2005 ME 97, ¶ 18, 879 A.2d 21; *Walsh v. Johnston*, 608 A.2d 776, 778 (Me.1992). In the Secretary’s view, Avangrid failed to meet that burden, and, accordingly, the Initiative must still be presented to the voters.

**1. Avangrid has not proven that it will suffer irreparable injury if the Secretary is not enjoined from placing a ballot question for this Initiative on the ballot in November 2020.**

In the Secretary's view, Avangrid has not proven that the mere existence of a question approving this Initiative on the ballot in November would cause it irreparable harm. In order to satisfy the irreparable injury standard necessary for an injunction, Avangrid must establish that there is no adequate remedy at law. *Bar Harbor Banking & Trust Co. v. Alexander*, 411 A. 2d 74, 79 (Me. 1980). Avangrid chose not to intervene in the *Reed* matter, even though intervention by interested parties is expressly permitted by statute.<sup>12</sup> Had Avangrid intervened, the issues raised here could have been adjudicated in conjunction with judicial review of the Secretary's final determination under Section 905, and before the petitioners and Maine voters were led to believe that the Initiative had qualified for the ballot in November. That factor should weigh against granting Avangrid injunctive relief.

If the voters were to approve the Initiative, the CPCN issued by the PUC would not be reversed until after the Initiative goes into effect, which could

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<sup>12</sup> Section 905(2) expressly provides: "Upon timely application, anyone may intervene in this action when the applicant claims an interest relating to the subject matter of the petitions, unless the applicant's interest is adequately represented by existing parties." As noted above, the other business entities that have intervened as parties to this section all intervened in *Reed* as well.

not occur any sooner than the last week of December 2020.<sup>13</sup> The Secretary also understands that Avangrid has not yet obtained all of the other permits and governmental approvals that it needs to develop the NECEC transmission project, and may well not have done so before the end of this year. App. 28-29. Moreover, certain permits recently issued are being challenged in administrative appeals. See <https://www.mainepublic.org/post/cmp-powerline-opponents-line-formally-challenge-maine-deps-permit-project> (reporting that the Natural Resources Council of Maine filed an appeal of the permit issued to Avangrid by the Department of Environmental Protection on June 10, 2020, and on Tuesday, June 9, 2020, “an array of individuals and conservation organizations, plus the potential host towns of Caratunk and West Forks Plantation, called for a stay of any physical work on the project.”)

If the Court determines that the citizens lack the power to legislate in the manner presented by this Initiative, that would alter the practical and legal effect of any vote on the Initiative, thereby eliminating any potential harm to Avangrid from the election. Contrary to the contentions of MLP and

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<sup>13</sup> Pursuant to Me. Const. art. IV, pt. 3, § 19, any measure referred to the people and approved by a majority of the votes cast shall take effect and become a law in 30 days after the Governor has made public proclamation of the vote. The Governor must make that proclamation within 10 days “after the vote has been canvassed and determined,” which means after the Governor receives the official tabulation of the vote from the Secretary within 20 days after the election. See 21-A M.R.S. § 722. Since the election is scheduled for November 3, 2020, this means a potential effective date between December 24, 2019 and January 2, 2021.

NextEra below, a declaratory judgment would not be rendered an advisory opinion if no injunction were granted; as a final judgment, it would have real consequences to the parties and the public.

**2. Avangrid has not demonstrated that its alleged injury outweighs any harm that granting the injunction would inflict on other parties.**

Enjoining the Secretary from placing the initiated measure on the ballot would frustrate over 66,000 Maine citizens who validly signed the petition, as well as others who worked hard to satisfy the procedural requirements to qualify the Initiative for the ballot and thousands more who wish to vote for, or against, the Initiative. “The broad purpose of the direct initiative is the encouragement of participatory democracy,” *Wagner*, 663 A.2d at 566 (quoting *Allen*, 459 A.2d at 1102), and that purpose would be frustrated by the entry of an injunction.

The Secretary carefully reviewed the Initiative petition and determined that it met the statutory and constitutional requirements to be submitted first to the Legislature and, failing enactment, then presented to the voters for approval. That determination was upheld by this Court following two levels of judicial review. To enjoin the Secretary from placing the question on the

ballot at this late stage would undermine the public's confidence in the initiative process.<sup>14</sup>

These are significant harms that outweigh any potential harm to Avangrid by allowing the election to go forward.

**3. Avangrid has not demonstrated that the public interest will not be adversely affected by granting the injunction.**

Avangrid argues that to enjoin “enforcement of an unconstitutional law” would serve the public interest (App. 165), but, as noted above, “enforcement” of the Initiative is not a ripe issue here since enforcement cannot occur until after enactment.

Section 18(2) expressly states that a measure proposed by the people “shall be submitted to the electors” if not enacted without change by the Legislature. “The clause contains no exceptions to such a directive.” *Opinion of the Justices*, 673 A.2d at 697; *see also Opinion of the Justices*, 623 A.2d 1258, 1264 (Me. 1993) (answers of Glassman and Clifford, JJ.) It is in the public interest to make Maine citizens aware before they vote that the Initiative is

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<sup>14</sup> As courts in other jurisdictions have observed, a judicial decision that an initiated measure is invalid, not issued until after the voters have voted in favor of that measure, may also serve to undermine the legitimate use of the initiative procedure. *See City of San Diego v. Dunkl*, 86 Cal. App. 4th 384, 394 (2001). To avoid causing this harm, the Secretary urges the Court to reach the merits of Avangrid's first claim, but not issue an injunction. *See Opinion of the Justices*, 673 A.2d at 697 (initiated bill must be presented to the voters notwithstanding that it was unconstitutional as written and contained provisions beyond the citizens' power to legislate).

beyond their authority as written, but to frustrate their ability to vote on it at all would harm the public interest, in the Secretary's view.

Thus, even if the Court concludes that the Initiative exceeds the electorate's grant of authority under Section 18, the Secretary believes that a ballot question for the Initiative should still be included on the ballot and presented to the voters at the election on November 3, 2020.

When considering the three equitable factors and deciding whether to issue a permanent injunction, the trial court "should not consider these factors in isolation but should weigh all the criteria together." *Walsh*, 608 A.2d at 778. On balance, weighing all three equitable factors together, issuance of an injunction is not warranted.

### CONCLUSION

For the reasons stated above, the Secretary contends that only one constitutional issue raised by Avangrid is ripe for pre-election judicial review and that there is no basis for issuing an injunction to prevent the Initiative from appearing on the ballot. The Court should vacate the trial court's order of dismissal and remand to the Superior Court for entry of a declaratory

judgment in Avangrid's favor on the first claim that the Initiative involves a subject matter beyond the power of the electorate.

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