

STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. CUM-20-181

AVANGRID NETWORKS, INC.,
Plaintiff/ Appellant

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

v.

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

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

NEXTERA ENERGY RESOURCES, LLC
Defendant-Intervenor/ Appellee

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

**REPLY AND CROSS-APPEAL RESPONSE BRIEF
OF AVANGRID NETWORKS, INC.**

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INTRODUCTION

The principal Defendant Secretary of State and all the amici in this case – former PUC Commissioners, former Legislators, and constitutional law professors – as well as the Intervenor business groups, all agree with Avangrid that the Initiative does not comport with article IV, part 3, § 18 of the Constitution because it is not legislation and therefore exceeds the scope of the people’s initiative power. Such overwhelming agreement on an issue of this magnitude is striking. The Court should decide now that the Initiative is unlawful, and make clear that the initiative process cannot be used for *ad hoc* reversals of individual final agency determinations that have been affirmed by this Court.

There is no compelling reason to permit the misuse of the initiative process by avoiding this issue until after the election. No constitutional bar prevents this Court from exercising its historic power of judicial review. Further, Avangrid’s claims are ripe because the validity of the vote on the Initiative itself is at issue. This case does not address the hypothetical future application of the Initiative; rather, it challenges whether the initiative process was validly invoked in the first instance. This question presents a controversy that is both present and concrete.

And the injunction requested by Avangrid is the *only* remedy suitable in the circumstances. Failure to address decisively now the ripe constitutional abuse acknowledged by the Secretary risks sacrificing vast economic investment in this State, and the substantial benefits to flow from that investment as determined by the PUC.

This case is ultimately about protecting the integrity of the direct initiative. The Constitution establishes certain prerequisites – a checklist that must be met in order to invoke the initiative process. Whether these constitutional requirements have been satisfied is a question reviewable and enforceable pre-election. If not, and activist groups are permitted to compel the electorate to endure an unconstitutional election process, the legitimacy of the initiative process will be undermined. This Court should not permit such an outcome simply because NextEra and MLP wish to undo the PUC’s determination that the NECEC is in the public interest because of the “substantial benefits” that would accrue to Maine as a result of the Project. A.30-31, ¶¶ 22-26. NextEra already appealed that finding to this Court, and lost. *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm’n*, 2020 ME 34, 227 A.3d 1117. They cannot now resort to the initiative process to accomplish a result so far outside of the legislative domain.

ARGUMENT

I. This Court’s Review of the Superior Court’s Decision is *De Novo*, Not for Abuse of Discretion.

Contrary to MLP’s claim, no deference to the Superior Court’s decision is appropriate when the trial court did not exercise any discretion. The Superior Court did not deny declaratory and injunctive relief based on a balancing of the equities, but rather dismissed Avangrid’s complaint because it concluded that “pre-election review” is not available under the Constitution “as a matter of law.” A.18; *see id.* at 19. This

Court “review[s] conclusions of law, including issues of constitutional interpretation, de novo.” *LeGrand v. York Cty. Judge of Probate*, 2017 ME 167, ¶ 31, 168 A.3d 783.

II. Initiative Proponents Have Not Identified Any Valid Reason for the Court to Abdicate Its Judicial Function in This Case.

A. The Maine Constitution vests the power of judicial review in this Court, and does not make an exception to that power for cases involving direct initiatives.

Judicial review is a basic constitutional principle. *See* Me. Const. art. VI, § 1. Because “[i]t is emphatically the province and duty of the judicial department to say what the law is,’ it is [the Court’s] *duty*” to ensure that “laws are not wanting when measured against the proscriptions of our Charters.” *Portland Pipe Line Corp. v. Envtl. Improvement Comm’n*, 307 A.2d 1, 8 (Me. 1973) (emphasis added) (quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803)). “If . . . the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.” *Id.* (quoting *Marbury*, 5 U.S. (1 Cranch) at 178); *see Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188 (citing *Marbury*, 5 U.S. (1 Cranch) at 178), and stating that, when an initiative conflicts with the Constitution, “the Constitution prevails”).

MLP would have this Court abdicate this historic and vital power based on (a) inapplicable constitutional language; (b) an innocuous footnote in *Wagner v. Secretary of State*, 663 A.2d 564 (Me. 1995); and (c) non-binding advisory opinions that address the distinct issue of the Legislature’s, rather than the judiciary’s, authority to

withhold an initiative from the ballot. The Court should not abandon its role in applying the Maine Constitution as the supreme law of the State based on such thin reeds. To the contrary, the “presumption favoring judicial review” can only be overcome by clear and specific language. *Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1069 (2020); *see Demore v. Kim*, 538 U.S. 510, 517 (2003). No such language exists in the Constitution or elsewhere.

The directive that an initiative “shall” be submitted to voters, Me. Const. art. IV, pt. 3, § 18(2), does not bar pre-election judicial review because it does not apply to the judiciary. The directive not only appears in article IV of the Constitution, governing the Legislature, but it also appears in a section that describes legislative procedures. Section 18 provides that “electors may propose” an initiative “*to the Legislature* for its consideration.” *Id.* § 18(1) (emphasis added). The initiative must be “addressed *to the Legislature.*” *Id.* (emphasis added). “The measure thus proposed, unless enacted without change *by the Legislature . . .*, shall be submitted to the electors together with any amended form, substitute, or recommendation *of the Legislature.*” *Id.* § 18(2) (emphases added). The mandatory language of § 18(2) therefore clearly speaks to the authority of the Legislature, not that of the judiciary. As Amicus Professor Bam eloquently demonstrates, there is no basis to conclude that the fundamental principle of judicial review was preempted by § 18. *See Bam Br.* at 6-9.

Viewed in context, it is plain that *Wagner’s* footnote does not sweep as broadly as MLP claims. The Court did observe in *Wagner* that, because “the Legislature has

not enacted the initiative without change, it must be referred to the electors.” 663 A.2d at 566 n.3. That footnote, however, was appended to a sentence observing that the Secretary of State had certified the initiative petition as valid and presented it to the Legislature. *Id.* at 566. As such, it was merely describing what the Legislature’s obligations were under § 18(2). Notably, after making this statement, the Court then went on to determine whether the proposed initiative was “beyond the electorate’s grant of authority.” *Id.* at 567. That entire discussion would be superfluous if footnote 3 is as broad as MLP claims. *Wagner* does not bear such a strained reading.

The advisory opinions by the Justices of this Court cited by the trial court and MLP do not compel a contrary conclusion because they addressed a different issue. This case presents a question regarding this Court’s authority to enforce the Constitution by enjoining a vote. In the advisory opinions, the Justices considered a different question – the *Legislature’s* authority to withhold a question from the ballot. *See Opinion of the Justices*, 2004 ME 54, ¶¶ 1, 7, 850 A.2d 1145 (answering questions presented by the House and Senate regarding “their responsibilities”); *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) (answering the following question: “[M]ust the Legislature submit an initiated bill . . . that . . . is unconstitutional as written?”).

Because this case invokes the power of the judiciary to enforce the Constitution, and requests binding declaratory and injunctive relief rather than a mere advisory opinion, the concern with discouraging participatory democracy that was present in the solemn occasion proceedings is not present here. In the context of an

advisory opinion, there is need for caution in addressing the substantive constitutionality of a proposed initiative because the opinion has no binding effect and relates to issues that would not arise unless the initiative were adopted – though, it should be noted, the Justices have issued such advisory opinions. *See Opinion of the Justices*, 2004 ME 54, ¶ 6, 850 A.2d 1145. Here, Avangrid’s claims dispel rather than cause concern that the vote would occur under a cloud of uncertainty, or that the Court’s actions would be, as a practical matter, meaningless. Avangrid asks the Court to enjoin an unlawful vote because the vote itself would be unconstitutional.

Precluding an unconstitutional vote that would exceed the initiative power will not discourage participatory democracy, as MLP argues. Rather, it will protect the initiative process from illegitimate use. *Am. Fed. of Labor v. Eu*, 686 P.2d 609, 615 (Cal. 1984) (an unconstitutional vote “tends to denigrate the legitimate use of the initiative procedure”). It would be far worse to strike down the unlawful Initiative *after* the election than before. The case cited by MLP, *Winkle v. City of Tucson*, 949 P.2d 502 (Ariz. 1997), is not to the contrary. In that case, while the court observed that it would show restraint in addressing substantive constitutional challenges, it nevertheless made clear that it would “examine an initiative to determine whether it belongs on the ballot (whether it is proposed legislation).” *Id.* at 506. Allowing the perversion of the initiative process does not protect it, but rather degrades it.

The Constitution is the ultimate democratic document. Its structure protects the rights of the people. *See* THE FEDERALIST NO. 78 (Alexander Hamilton), 1788

WL 492, at *2 (“[T]here is no liberty, if the power of judging be not separated from the legislative and executive powers”). The Constitution restricts the scope of the initiative power to legislative acts, Me. Const. art. IV, pt. 3, § 18, and there is an “absolute right” only to exercise, not to exceed, this power, *cf. McGee v. Sec’y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933. Enforcing limitations placed by the Constitution on the initiative process does not undermine democracy – it effectuates it.

B. Avangrid’s claims are ripe for adjudication because they are both present and concrete.

The prudential doctrine of ripeness does not preclude this Court from reaching the merits of Avangrid’s claims before the election. MLP distorts the principles underlying this Court’s ripeness doctrine by engaging in a misleading categorization analysis. Merely repeating the mantra that Avangrid raises a “substantive challenge” does not make it so, any more than labelling the Initiative a “resolve” accomplishes that. This Court’s case law, as well as that of other states, makes it clear that the claims raised by Avangrid are ripe for adjudication.

1. MLP fails to recognize that Avangrid’s claims are ripe because they relate to the validity of the vote under § 18 and all relevant facts are already known.

MLP’s formalistic ripeness analysis is inconsistent with Maine law. Ripeness is a prudential doctrine that requires the existence of a “genuine controversy” that “presents a concrete, certain, and immediate legal problem.” *Waterville Indus., Inc. v. Fin. Auth. of Me.*, 2000 ME 138, ¶ 22, 758 A.2d 986 (quoting *Wagner*, 663 A.2d at 567).

Therefore, a proper ripeness determination considers whether the relevant facts are known (concreteness and certainty) and whether there is a present dispute (an immediate legal problem). Because Avangrid's claims satisfy both of these requirements, the Court should reach the merits.

The present dispute concerns whether the Initiative is within the scope of the initiative process under article IV, part 3, § 18 of the Constitution. The relevant facts are known, because the text of the Initiative is final and will be presented to the electorate absent relief from this Court. Unlike a true "substantive" challenge, this case does not require consideration of facts that are as yet unknown, such as how the Initiative will be applied in the future. That is textbook ripeness.

MLP's facile analogy to challenging a bill pending before the Legislature misses the mark. Bills are subject to change throughout the legislative process, and that process is subject to internal rules policed by the Legislature. *See* James D. Gordon & David B. Magleby, *Pre-Election Judicial Review of Initiatives and Referendums*, 64 NOTRE DAME L. REV. 298, 315 (1989). In the initiative process, by contrast, the text of the measure is fixed and the process is subject only to constitutional and statutory limitations. *Id.* The uncertainty and system of internal checks and balances that are present in the legislative process are therefore absent in the initiative process. Disputes over the constitutional and statutory rules governing the initiative process are both concrete and present prior to the election. Accordingly, "courts properly have the role of policing the integrity of the [initiative] process." *Id.*

2. MLP wrongly narrows the scope of ripe claims and mischaracterizes Avangrid's claims as "substantive."

Instead of engaging in the proper analysis, MLP prefers to play word games by trying to pigeon-hole Avangrid's claims as a "substantive challenge." As MLP would have it, the only types of claims that are ripe pre-election are those that are unique to the ballot initiative process. Even under this rule, Avangrid's claim is ripe: as MLP concedes, pre-election claims under "the constitutional provision . . . that authorizes direct legislation" are ripe. MLP Br. at 14; *see id.* (acknowledging that claims regarding the "scope of *Section 18*" are ripe). Avangrid's claim is that the Initiative violates § 18 because it is not a "bill, resolve or resolution,"¹ and, thus, its claim is ripe under MLP's own theory. MLP's concession should end the inquiry. But, in any event, MLP's constricted theory is not the majority rule, and has never been adopted by this Court.

The proper scope of pre-election challenges to initiatives considers whether an initiative meets the checklist of requirements set forth in the Constitution (*e.g.*, whether the initiative's "subject matter" is validly within the scope of the initiative power). Some of these requirements are set out in § 18. Most notably, for purposes of this case, an initiative must be a "bill, resolve or resolution," *i.e.*, legislative in

¹ This issue was not resolved in *Reed v. Secretary of State*, 2020 ME 57, ___ A.3d ___. MLP claimed below that this Court had "held" that the Initiative was a proper resolve, MLP Mem. at 8, but now has retreated to the position that this Court "observed" that the Initiative proposes a resolve, MLP Br. at 16. This retreat is telling. In fact, the Court did not have before it, and did not consider, whether the Initiative was a proper exercise of legislative power under § 18. *Reed*, 2020 ME 57, ¶ 22 n.16, ___ A.3d ___.

nature. Me. Const. art. IV, pt. 3, § 18(1). This requirement in § 18 that an initiative be legislation, for example, bars exercise of the impeachment power through the initiative process. *Moulton v. Scully*, 89 A. 944, 952-55 (Me. 1914). In addition, an initiative may not be a constitutional amendment. Me. Const. art. IV, pt. 3, § 18(1). An initiative must also meet certain procedural requirements, including a signature threshold. *Id.* § 18(2). Other requirements are set out in other constitutional provisions. An initiative may not relate to bond issuance. *See id.* art. IX, § 14; *Opinion of the Justices*, 159 Me. 209, 213-15, 191 A.2d 357, 359-60 (1963). And, an initiative cannot be judicial or executive in nature. Me. Const. art. III, § 2.²

Any challenge to whether an initiative meets this constitutional checklist goes to the validity of the initiative process itself, and is ripe prior to the election. What is *not* ripe is any challenge that the initiative, as applied, would be unconstitutional – such as a due process claim or a takings claim.

This simple distinction is supported by *Wagner*, as well as precedent from other jurisdictions. The Court in *Wagner* acknowledged that, pre-election, it would enforce the bounds of the “electorate’s grant of authority,” but will not resolve questions regarding the “future effect” or “enforceability” of initiatives. 663 A.2d at 567. In evaluating which of these two distinct scenarios was before it, the Court considered

² Each of these requirements are equally enforceable, whether stated as an affirmative or negative limitation on the initiative process. Subject matter challenges based on affirmative constitutional requirements (*e.g.*, that an initiative must be legislation) are no less justiciable than subject matter challenges based on negative constitutional limitations (*e.g.*, that an initiative cannot amend the Constitution).

the full text of the proposed initiative—not just whether it labeled itself a “resolve” as suggested by MLP—to determine whether it would “usurp[] the enacting powers of the Legislature” or the “interpretive powers of the judiciary” or otherwise exceed the initiative power under the Constitution. *Id.* This approach accords with the myriad pre-election cases addressing the question of whether an initiative exceeds the initiative power because it is not legislation. *See Avangrid Br.* at 9-10 (citing cases).

MLP misconstrues Avangrid’s argument, claiming that Avangrid has taken the position that violation of any generally applicable constitutional rule means that an initiative ceases to be a “bill, resolve or resolution” under § 18. In fact, Avangrid’s claim is more limited: that an initiative must be *legislative*, and cannot be judicial or executive in nature, in order to be within the scope of the constitutional initiative power.³ That claim, which springs directly from the text of § 18, will not “open the floodgates” to general constitutional challenges to initiatives prior to the election.

Likewise, because Avangrid is not making a generalized claim of unconstitutionality, its claim does not run afoul of *Lockman v. Secretary of State*, which denied review of claims that turned on the effect of the initiative on the use of state lands, 684 A.2d 415, 420 (Me. 1996), or cases from other jurisdictions declining to reach substantive claims unrelated to the legislative nature of the initiative at issue, *see*,

³ Simply put, there are three boxes into which any governmental action must fit: the legislative box, the judicial box, or the executive box. Separation of powers mandates that no action can fit in more than one box. A claim that a purported initiative is not legislative is therefore necessarily related to a claim that an action is judicial or executive. This relationship between the claims does not convert Avangrid’s claim into a “substantive challenge” that cannot be adjudicated prior to an election.

e.g., *Stewart v. Adv. Gaming Techs., Inc.*, 723 N.W.2d 65, 79 (Neb. 2006) (declining to reach pre-election claims under games of chance provision); *Coppernoll v. Reed*, 119 P.3d 318, 322 (Wash. 2005) (acknowledging that a pre-election claim that an initiative is not legislative is ripe, while declining to reach questions not implicating that issue). None of these cases disapproves of pre-election challenges to the legislative nature of a proposed initiative – the very claim at issue here. In fact, MLP has identified *no case* holding that a pre-election challenge to the legislative nature of an initiative is unripe.

In sum, this case does not concern a “substantive challenge,” as MLP repeatedly claims. Rather, Avangrid’s claims raise a subject matter challenge based on the express constitutional limitations on the use of the initiative process. As a challenge to the scope of the initiative process itself, the claims are present and concrete, and are therefore ripe.

C. Avangrid’s claims are not time-barred.

Not only are Avangrid’s claims ripe, they are also timely. The deadline for petition challenges set forth in article IV, part 3, § 22 of the Constitution expressly applies only to challenges to “determination[s] of the validity of written petitions.” Me. Const. art. IV, pt. 3, § 22; *see also* 21-A M.R.S. § 905(1). This case involves neither a challenge to the validity of “written petitions” nor a challenge to a “determination” by the Secretary. The procedural issues determined by the Secretary do not include whether an initiative is beyond the scope of the direct initiative power, but instead are limited to, for example, whether signature, circulator, and oath requirements have

been satisfied. *See* Me. Const. art. IV, pt. 3, §§ 18(2), 20; 21-A M.R.S. § 903-A. The Secretary acknowledged below that he did not make a determination whether the Initiative was “legislative.” Sec’y Mem. at 11. Accordingly, as the Superior Court concluded, the 100-day deadline for challenges to determinations regarding the validity of petitions does not apply. A.14; *see Wagner*, 663 A.2d at 565 (deciding challenge outside of 100-day deadline).⁴

Further, MLP misrepresents the types of claims that can be brought when it argues that challenges are either procedural claims that must be completed within 100 days or are substantive claims that cannot be brought until after an election. There are also subject matter challenges under the Constitution, including challenges to the legislative nature of an initiative. *See Herbst Gaming, Inc. v. Heller*, 141 P.3d 1224, 1228 (Nev. 2006); *Gordon & Magleby*, *supra*, at 302-03. As discussed above, such claims can be adjudicated pre-election, and are not subject to the deadlines in § 22.

D. All necessary parties are present in this proceeding.

MLP’s final, half-hearted attempt to avoid adjudication of the merits by claiming that necessary parties are absent is wrong. Avangrid is not litigating a future

⁴ Only challenges that are related to the agency decision are “subsumed” within an 80C appeal. *See Cape Shore House Owners Ass’n v. Town of Cape Elizabeth*, 2019 ME 86, ¶ 8, 209 A.3d 102. Because the Secretary made no determination regarding whether the Initiative was “legislation,” that constitutional issue was not a part of or related to the appeal from the Secretary’s determination. Indeed, that issue was not even ripe until it was clear that the Initiative would otherwise be placed on the ballot. Accordingly, *Reed* cannot have *res judicata* effect – even if MLP had preserved that argument by raising it below, which it did not. An argument made for the first time on appeal is not adequately preserved. *See First Fin., Inc. v. Morrison*, 2019 ME 96, ¶ 14, 210 A.3d 811; *Teele v. West-Harper*, 2017 ME 196, ¶ 11 n.4, 170 A.3d 803. Further, an argument is not preserved when it is made only in a footnote, as here. *See Dep’t of Human Servs. v. Sanford Health Care Facility, Inc.*, 2005 ME 63, ¶ 10 n.5, 875 A.2d 128.

dispute between CMP and the PUC that would arise, as MLP concedes, only “if [the Initiative is] enacted,” MLP Br. at 20; in fact, there is no present dispute at all between those parties because the PUC issued the CPCN that Avangrid is *defending*.⁵ Rather, the current dispute relates to the lawfulness of the Secretary placing on the ballot a purported initiative that would reverse the CPCN. There is no reasonable question that all parties necessary to “effectively and completely adjudicate” this dispute – Avangrid and the Secretary – are present here. *Centamore*, 634 A.2d at 951.

III. The Constitution Precludes Use of Initiatives to Reverse a Final PUC Order, Affirmed by This Court, Because Such an Act Is Not Legislative.

The people’s initiative power is not unlimited; rather, it is subject to constitutional restraints. *See Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188. Moreover, MLP is flatly wrong when it claims that “there is no subject matter on which the Legislature can pass a law, but the people, acting by initiative, cannot.” MLP Br. at 21. The electorate cannot, for instance, pass bonds or constitutional amendments by initiative. *See supra*, at 9-10. The Initiative goes beyond the powers of the people, and is unprecedented. Never before has an initiative been used to reverse a single permit issued by an agency and affirmed by this Court.⁶ This is for good

⁵ This case does not involve a challenge to the issuance of a permit. Thus, the cases cited by MLP for the proposition that the holder of a permit is a necessary party to a challenge to that permit are simply inapposite. *See, e.g., Centamore v. Comm’r, Dep’t of Human Servs.*, 634 A.2d 950, 951 (Me. 1993).

⁶ MLP wrongly cites several initiatives it claims support its position that the Initiative is a proper use of legislative power. MLP Br. at 23 n.11. Contrary to how MLP characterizes those initiatives, not a single previous initiative sought to approve or disapprove a specific project, after an agency with full authority issued a final decision regarding that project, affirmed by the Court. *See, e.g., L.D. 20, I.B. 1* (1987) (creating prospective, generally applicable standards for nuclear waste); *Leg. Rec. 186* (1987) (discussing *L.D. 20, I.B. 1* (footnote continued)

reason: such a use of the initiative process exceeds the legislative power reserved to the people and invades the prerogatives of the judicial and executive branches.

A. As the Secretary, former PUC Commissioners, former Legislators, and constitutional law professors all recognize, the legislative power does not permit reversal of final PUC decisions.

No party to this proceeding disputes that the initiative power is limited to the exercise of legislative power. The straightforward question in this case, therefore, is whether the Initiative’s *ad hoc* reversal of an agency’s adjudicative decision affirmed by this Court is actually an exercise of legislative power. All the parties and amici in this case, other than MLP (NextEra remains silent on the point), agree that it is not because it violates both article IV, part 3, § 18 and article III, § 2. MLP poses the right question — does “anything in the Maine constitution *forbid*] the Legislature from” taking this step? MLP Br. at 23 — but answers it incorrectly. The Constitution forbids the Legislature and the people from reversing a final agency order without establishing any new, substantive standards. Avangrid Br. at 19-22. MLP admits that

(continued footnote)

(1987)) (“There are a couple of things that concern me deeply. Statements made by my good colleague, Senator Clark of Cumberland, which I do want to clarify. One of them is that the initiated question by thousands of Maine voters, is simply to close down Maine Yankee. That is not the case, ladies and gentlemen.”); L.D. 1619, I.B. 1 (1975) (establishing a public preserve without revoking any agency orders); *see also, e.g.*, L.D. 719, I.B. 1, § 5 (1995) (establishing a process to evaluate *all* highway construction or reconstruction projects in the state). The Secretary agrees that this Initiative is in a class of its own. Sec’y Br. at 8 (“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.”).

the Initiative contains no such new standards, but rather “direct[s] the PUC to rescind” the CPCN. MLP Br. at 20.⁷

MLP relies on *Auburn Water District v. Public Utilities Commission*, 163 A.2d 743 (Me. 1960) but, as the Superior Court noted, that case does not answer the question presented here because it “did not involve a statute that the Legislature enacted to overturn a prior PUC decision.” A.24. Instead, that case affirmed only the enforceability of substantive standards adopted by the Legislature prior to the PUC’s action. *Auburn Water Dist.*, 163 A.2d at 743-45, 747. As Avangrid has previously explained, the Legislature’s authority over the PUC—as with its authority elsewhere—is limited to the promulgation of substantive, prospective legislation. *In re Searsport Water Co.*, 108 A. 452, 454 (Me. 1919). Further, as the former PUC Commissioners explain at length, mandating the reversal of a final PUC decision without promulgation of new, substantive standards would directly and substantively interfere with the agency adjudicatory process, would be contrary to the substantial evidence in the record, would destroy the finality of the adjudicative process, and would be arbitrary and capricious. PUC Br. at 18-23.⁸

⁷ MLP’s insinuation, MLP Br. at 31 n.17, that the PUC might have some discretion in applying the Initiative, which could later be reviewable by this Court, is both wrong and inconsistent with MLP’s own description of the Initiative’s effect. As Professor Bam and the former PUC Commissioners correctly describe, the Initiative is nothing more than a directive, under the guise of lawmaking, to reverse the CPCN Order despite the voluminous record established in the PUC’s adjudicatory proceeding. Bam Br. at 1; PUC Br. at 17.

⁸ Contrary to MLP’s claim, whether the NECEC is in the public interest is not “uniquely suited” to a referendum. Rather, as the former PUC Commissioners explain, an initiative would disrupt the lengthy and careful adjudicatory proceeding before the PUC by compelling a finding contrary to substantial evidence in the record. PUC Br. at 7-23.

MLP's reliance on § 1323 of Title 35-A is also misplaced. As the former PUC Commissioners note, that section is an exhaustion requirement for public utilities seeking substantive rule changes from the Legislature that are capable of future application – it is not, and cannot be, a bestowment upon the Legislature of a legislative power not granted in the Constitution, namely, the power to reverse the grant of an approval by PUC order. PUC Br. at 11 n.5. It says nothing about the power of the Legislature to reverse final adjudicatory decisions. Title 35-A instead requires that appeals of the PUC's adjudicatory decisions be taken to this Court. 35-A M.R.S. § 1320; *see* PUC Br. at 11.

Moreover, the resolve pertaining to the Aqua Ventus project does not support MLP's position. As the former PUC Commissioners stated, unlike in this case, the PUC had not yet acted on the Aqua Ventus matter, and, therefore, was not being ordered to reverse a prior finding. PUC Br. at 11 n.4; *see Long Term Contract for Offshore Wind Energy and Tidal Projects*, Docket No. 2010-00235, Order (Me. P.U.C. Aug. 6, 2018); Resolves 2019, ch. 87. That resolve, which was never subject to judicial review, is inapposite.

Finally, MLP's reliance on *I.N.S. v. Chadha*, 462 U.S. 919 (1983), is also unavailing. As an initial matter, the federal separation of powers doctrine is less rigorous than the Maine Constitution. *N.E. Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 9, 748 A.2d 1009. Further, immigration is an area in which the Supreme Court has said Congress holds “unreviewable authority.” *Chadha*, 462

U.S. at 940. Not even MLP argues that the Legislature’s actions regarding public utilities are similarly free from judicial review. Further, in the statutes at issue in *Chadha*, Congress had reserved to itself, on a going forward basis, review of any deportation decision; final decisions on such matters were expressly reserved to Congress. *Id.* *Chadha* therefore does not suggest that the legislative power under the Maine Constitution permits *ad hoc*, after-the-fact reversals of a single, final PUC decision affirmed by this Court.⁹

B. The venerable rule precluding legislative reversal of judicial decisions applies to PUC adjudicatory decisions.

MLP argues that the Initiative does not infringe upon the judicial power because (1) PUC decisions are never final; (2) *Lewis v. Webb*, 3 Me. 326 (1825) and *Plaut v. Spendthrift Farm*, 514 U.S. 211 (1995), do not apply to “public rights”; and (3) the Initiative somehow does not overrule this Court’s *NextEra* decision. All of those arguments fail. PUC orders are final. MLP waived any argument that *Lewis* and *Plaut* do not apply to public rights, which misconstrues the relevant case law in any event. Finally, the Initiative on its face expressly overrules this Court’s decision in *NextEra*.

⁹ For similar reasons, MLP’s analogy to federal private immigration bills is also misplaced. *See* MLP Br. at 36 n.21. Such private bills stand on shaky constitutional footing, but there is likely no one who has standing to challenge them. *See* James E. Pfander & Theresa R. Wardon, *Reclaiming the Immigration Constitution of the Early Republic: Prospectivity, Uniformity, and Transparency*, 96 VA. L. REV. 359, 428-32 (2010). Congress is increasingly moving away from using such bills. *Id.* Moreover, private immigration bills are traditionally used for aliens who are, for whatever reason, statutorily ineligible for relief under the applicable law. *See, e.g., Private Bills in Congress*, 79 HARV. L. REV. 1684, 1698 (1966). That situation is inapposite to the case before the Court.

1. PUC decisions are final.

As the former PUC Commissioners aptly explain, *see* PUC Br. at 12-13, MLP misconstrues the law regarding finality of PUC decisions. Title 35-A expressly recognizes that adjudicatory decisions are “final.” 35-A M.R.S. § 1320(1). The mere fact that the PUC can amend an order does not prove otherwise – if that alone prevents finality, then there is no such thing as a final judicial or agency order.

All judicial and agency proceedings can be reopened, but that does not mean that all judicial and agency proceedings lack finality. Rule 60 of the Maine Rules of Civil Procedure allows a court to reopen a final judgment for, among other things, “newly discovered evidence” or “any other reason justifying relief from the operation of the judgment.” M.R. Civ. P. 60(b). Likewise, agencies commonly have the power to revisit prior decisions. For instance, the Workers Compensation Board, which was the agency at issue in *Grubb v. S.D. Warren*, 2003 ME 139, 837 A.2d 117, and *Morrisette v. Kimberly-Clark Corp.*, 2003 ME 138, 837 A.2d 123, may reopen any workers compensation award on the basis of newly discovered evidence. 39-A M.R.S. § 319. According to MLP’s argument, all such decisions are subject to revision by the Legislature because none are final. That is simply wrong. *See Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117 (“The Legislature may not disturb a decision rendered in a previous [agency] action, as to the parties to that action.”); *Lewis*, 3 Me. at 332 (the Legislature, “by a mere resolve,” may not “set aside a judgment or decree”).

Grubb controls this case. In *Grubb*, the Court concluded that a worker’s compensation award could not be reopened by the Legislature. 2003 ME 139, ¶ 12, 837 A.2d 117. The same reasoning applies to PUC orders – the mere fact the PUC “retains authority to revisit” an order, MLP Br. at 31, does not vitiate finality. After all, the same authority existed in *Grubb*, but that did not permit the Legislature to reopen the award. The same holds true for the PUC. See *Quirion v. Pub. Utils. Comm’n*, 684 A.2d 1294, 1296 (Me. 1996) (holding that PUC decisions are final).

MLP’s reliance on *Morrisette*, a companion case to *Grubb*, is unavailing. *Morrisette* does not stand for the proposition that the mere authority to reopen a decision renders it non-final. Rather, in *Morrisette*, the new standards adopted by the Legislature applied because the grounds for reopening the award — a change in circumstances — had been established and *the agency had therefore already reopened the proceeding*. 2003 ME 138, ¶ 12, 837 A.2d 123.¹⁰ No party has contended, or can contend, that there has been a change in circumstances or that the PUC has reopened proceedings regarding the NECEC. *Morrisette* is thus inapposite.

2. MLP cannot distinguish the *Lewis/Plaut* cases based on a purported distinction between public and private rights.

MLP, for the first time, invokes the argument that *Lewis* and *Plaut* apply only to private rights. This argument was never raised below. Accordingly, MLP has waived

¹⁰ Notably, in *Morrisette*, the Legislature promulgated new, generally applicable standards for all compensation awards, and did not purport to reverse a single decision. 2003 ME 139, ¶ 12, 837 A.2d 123. Of course, the Initiative introduces no such standards. *Morrisette* is distinguishable for this reason as well.

the argument and cannot rely upon it here. *First Fin., Inc.*, 2019 ME 96, ¶ 14, 210 A.3d 811; *Teele*, 2017 ME 196, ¶ 11 n.4, 170 A.3d 803. “No principle is better settled than that a party who raises an issue for the first time on appeal will be deemed to have waived the issue, even if the issue is one of constitutional law.” *Cyr v. Cyr*, 432 A.2d 793, 797 (Me. 1981). MLP’s decision to raise the argument for the first time on appeal, in violation of this “well settled universal rule of appellate procedure,” *McMahon v. McMahon*, 2019 ME 11, ¶ 16, 200 A.3d 789, does nothing more than highlight the weakness of the arguments MLP actually raised below regarding *Lewis*.

In any event, MLP’s unpreserved argument that the *Lewis/Plaut* framework does not apply to prospective public rights, MLP Br. at 32, is an attempt to jam a square peg into a round hole. The purported public v. private right distinction, never adopted in Maine, based on *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 59 U.S. 421, 429 (1855) (“*Wheeling Bridge I*”), only applies to cases involving prior injunctive orders having prospective effect. As such, *Wheeling Bridge II* and its progeny are inapposite.

In *Wheeling Bridge II*, Pennsylvania sued to enjoin the reconstruction of a bridge. 59 U.S. at 431. In a prior case, the court had entered an injunction mandating that the bridge be removed, *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. 518, 578 (1851); Congress had subsequently declared the bridge a lawful structure, *Wheeling Bridge II*, 59 U.S. at 429. Pennsylvania maintained that an act of Congress could not annul the final judgment of an Article III court. *Id.* at 431. Although the Court noted that the case dealt with a “public right common to all,” *id.* at 431, the crux of the

Court's decision was *the nature of the relief awarded*. The Court stressed that because the injunctive remedy was “executory, a continuing decree,” it could be modified by subsequent legislation. *Id.*

Indeed, the *Plaut* Court itself noted that its holding precluding Congress from overturning a final judicial decision was compatible with the principle that Congress may “alter[] *the prospective effect of injunctions*.” 514 U.S. at 232 (emphasis added). Accordingly, courts have routinely limited *Wheeling Bridge II* to legislative modification of prospective injunctive relief. *See, e.g., Gavin v. Branstad*, 122 F.3d 1081, 1086, 88–89 (8th Cir. 1997) (“[T]he character of the right involved has nothing to do with the separation of powers issue *Wheeling II* stands for the proposition that when Congress alters the substantive law on which an *injunction* is based, the injunction may be enforced only insofar as it conforms to the changed law.” (emphasis added)); *Biodiversity Assocs. v. Cables*, 357 F.3d 1152, 1166 (10th Cir. 2004) (applying new law allowing logging to address “epidemic” insect infestation in a specific area to prior settlement agreement entered by the court that enjoined logging).¹¹ The legislative authority to change the substantive law affecting the prospective application of injunctions is akin to the legislative authority to change the substantive law applicable to pending cases. *See Morrisette*, 2003 ME 138, ¶ 13, 837 A.2d 123.

¹¹ The case law is uniform that *Wheeling Bridge* is limited to injunctions. *Benjamin v. Jacobson*, 172 F.3d 144, 160–61 (2d Cir. 1999); *Mount Graham Coal. v. Thomas*, 89 F.3d 554, 556–57 (9th Cir. 1996); *Georgia Assoc. of Retarded Citizens v. McDaniel*, 855 F.2d 805, 812 (11th Cir. 1988); *McGrath v. Potash*, 199 F.2d 166, 167–68 (D.C. Cir. 1952); *W. Union Tel. Co. v. Int’l Bhd. of Elec. Workers*, 133 F.2d 955, 958 (7th Cir. 1943); *The Clinton Bridge*, 77 U.S. 454, 463 (1870).

Wheeling Bridge II and its progeny thus have no application here. The Initiative does not create any new, generally applicable standards; the remedy afforded in the *NextEra* case did not involve any prospective injunctive relief; and there is no pending case. Rather, *NextEra* involved an action at law, wherein this Court affirmed the PUC's order issuing the CPCN. As discussed above, that order and judgment is final. The jurisprudence of this Court and the Supreme Court thus bar any interference with the final judgment of this Court. *Lewis*, 3 Me. at 332; *Plant*, 514 U.S. at 219-27.

3. The Initiative improperly overrules *NextEra*.

While MLP strains to argue that the Initiative would not overrule this Court's final judgment in *NextEra*, it is plain on the face of the Initiative that it would. The Court's decision in *NextEra* and the Initiative are incompatible.

The issue in *NextEra* was whether CMP had carried its burden to demonstrate that a public need exists for the NECEC. 2020 ME 34, ¶¶ 20, 28, 227 A.3d 1117. The Court held that it had, concluding that substantial evidence in the agency record supported the conclusion that the public need standard was satisfied. *Id.* ¶¶ 22-38, 43. The majority of this Court's decision dealt with the legal issue regarding how "public need" ought to be interpreted. *Id.* ¶¶ 22-27. The Court also reviewed the PUC's factual findings for abuse of discretion. *Id.* ¶¶ 28-38. The fact that deference was granted to the PUC on some issues makes no difference here. Without introducing any new evidence, the Initiative would reverse the PUC's order, stating that it "*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.” A.16. The Initiative thus mandates the conclusion that the *existing* PUC record can support no other conclusion than that CMP failed to demonstrate that the public need criterion was satisfied. As the former PUC Commissioners point out, this is “directly contrary to the record,” and the Court’s holding. PUC Br. at 19. The Initiative would ultimately compel this Court to “redecide the *NextEra* case.” PUC Br. at 21. Because the *NextEra* decision would be “set aside,” rendering it “null and void,” the Initiative is “purely judicial in its nature.” *Lewis*, 3 Me. at 332.

The Initiative attacks the *NextEra* judgment far more directly than the invalid resolve in *Lewis*. There, the Legislature only sought to direct the judiciary to re-hear a case. *Lewis*, 3 Me. at 332-33. The Initiative, by contrast, would require a different *outcome* by requiring the PUC to “deny the request” for a CPCN. A.16. It is hard to imagine a more frontal attack on a judicial decision. As the Supreme Court recently made clear, a legislature may not adopt a measure that says “In *Smith v. Jones*, Smith wins.” *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018). The Initiative does exactly that.

C. The Initiative attempts to exercise executive authority.

MLP is incorrect when it argues that there is no impediment to the Legislature infringing upon the executive function of applying the law in the administrative process. There is no authority supporting the notion that the Legislature can simply direct an agency to reverse a prior decision, without promulgating general standards.

This Court’s decision in *Friends of Congress Square Park v. City of Portland*, 2014 ME 63, 91 A.3d 601, supports Avangrid’s argument that the Initiative is not legislative. The Court held that an initiative is “legislative” if it “proposes a law of general applicability rather than one based on individualized, case-specific considerations.” *Id.* ¶ 15. Unlike the initiative at issue in *Friends of Congress Square Park*, there is absolutely nothing “generally applicable” about the Initiative. It is as case-specific as it can possibly be. It sets no policy, but merely “executes existing law.” *Id.* ¶ 13 n.7. That is the essence of executive action.

It is critical to apply this legislative/executive (or “administrative”) distinction in the context of state-wide initiatives. There is no constitutional bar that prohibits a municipality from exercising both legislative and executive powers – yet even in that context, an initiative cannot be used for administrative purposes. *See Vagneur v. City of Aspen*, 295 P.3d 493, 504 (Colo. 2013). The distinction between legislative and executive powers is far more important at the state level, given the express limitations set forth in article III, § 2 and article IV, part 3, § 18. It would be illogical to strictly police the legislative/administrative distinction at the municipal level, but to allow free reign at the state level.

MLP’s reliance on *Biodiversity Associates* is misplaced. In that case, Congress had replaced prior, substantive standards “with new ones.” 357 F.3d at 1164. Thus, the court did not need to “decide whether directing specific actions without changing the law would be an unconstitutional attempt by Congress to usurp the Executive’s role in

interpreting the law.” *Id.* That, of course, is exactly the question that this Court must decide, because the Initiative commands the PUC to take a specific, contrary action without changing the law at all. As the cases cited by Avangrid establish, such actions exceed the legislative power. *Avangrid Br.* at 33-36.

Maine courts have never retroactively invalidated final permits without issuing new substantive guidelines. Maine courts have only allowed new, generally applicable substantive standards to be applied retroactively or to pending applications. *See Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶¶ 2-17, 856 A.2d 1183 (retroactive application of new, generally applicable ordinance); *City of Portland v. Fisherman’s Wharf Assocs. II*, 541 A.2d 160, 162-64 (Me. 1988) (application of new, generally applicable ordinance to a pending application). The Court should not now go further to allow *ad hoc*, standard-less reversals of final agency decisions.

D. The disfavored power of enacting special legislation does not save the Initiative.

It is not permissible to accomplish through special legislation what the Initiative purports to do. *Bank Markazi v. Peterson*, 136 S. Ct. 1310 (2016), is not to the contrary. In that case, the Supreme Court simply held that Congress may amend applicable law, and direct the application of the revised law to a pending case. *Id.* at 1323-1325. The law at issue in *Bank Markazi* was constitutional because, instead of directing “findings or results under old law,” it provided a “new legal standard” for application in pending and future legal proceedings. *Id.* at 1326 (internal quotation

marks omitted). That is precisely what the Initiative does *not* do. Rather than creating new law, it merely directs a different result under the same “old law.” That is not permissible of any legislation, including special legislation.¹²

IV. The Secretary’s Invitation to Deny Injunctive Relief Would Be Disruptive and Extraordinarily Harmful to the Initiative Process.

The Secretary agrees with Avangrid that this Court should make a *de novo* determination on Avangrid’s entitlement to injunctive relief barring the placement of the invalid Initiative on the November ballot. Sec’y Br. at 24 (citing *Mason v. City of Augusta*, 2007 ME 101, ¶ 18, 927 A.2d 1146). The Secretary, however, takes the remarkable position that, although the Initiative is beyond the electorate’s powers in article IV, part 3, § 18, the voters should nonetheless be allowed to vote on the invalid Initiative. *Id.* at 24-26. The Secretary’s position is untenable—it denies Avangrid any remedy for a successful claim, and sanctions a constitutional violation.¹³

Instead, the Secretary advocates for a vote that has no “practical or legal effect . . . thereby *eliminating any potential harm to Avangrid* from the election.” Sec’y Br. at 26 (emphasis added). The harm to Avangrid is both obvious and grave: the need to devote time and money to a political campaign to defeat an admittedly

¹² The Initiative is a far cry from ordinary special legislation, which addresses issues that cannot be addressed through general legislation and does not direct particular outcomes of particular cases under existing law. *See, e.g.*, Resolves 2016, ch. 84 (settlement of personal injury claims against the State).

¹³ The Secretary ignores entirely the most important factor in an injunctive analysis—the likelihood of success on the merits. *See Nat’l Org. for Marriage v. Comm’n on Governmental Ethics & Elections Pracs.*, 2015 ME 103, ¶ 28, 121 A.3d 792. That alone should end the Court’s inquiry: if the Initiative is unconstitutional, it is useless for the people to vote on it. *See In re Initiative Pet. No. 349, State Ques. No. 642*, 838 P.2d 1, 12 (Okla. 1992) (allowing an unconstitutional initiative to go to the voters would be a “costly, fruitless, and useless” exercise).

unconstitutional initiative, not to mention potential further proceedings at the PUC and in court; risk to its vast economic investment in the State of Maine and the benefits to Maine citizens resulting from that investment; and continued uncertainty and disruption of a project beyond the already stringent, expensive, and time consuming, but at least not standardless, regulatory process. And the harm to Maine's constitutional electoral system is just as grave.

In balancing the equities, on one side of the scale, the Secretary presents the Court with only the "66,000 Maine citizens who validly signed the petition" for an invalid Initiative. *Id.* at 27. On the other side, this Court is presented with:

- **The denigration of the public's trust in participatory democracy.**

Enjoining the Initiative from being put to a vote "strengthens rather than impairs the initiative process because voters are assured that their vote on a state question is meaningful." *In re Initiative Petition No. 349, State Question No. 642*, 838 P.2d at 12; *see Am. Fed'n of Labor*, 686 P.2d at 615; *see also Comm. to Recall Robert Menendez from the Office of U.S. Senator v. Wells*, 7 A.3d 720, 732 (N.J. 2010) ("[I]nviting citizens to sign petitions in the belief that they are participating in a constitutional process . . . adversely affects public confidence in the integrity of the system.").

- **The expenditure of public funds to promote a sham election.** The "immediate and irrevocable expenditures of [public] funds . . . cannot effectively be undone." *Legislature v. Deukmejian*, 669 P.2d 17, 30 (Cal. 1983); *see Utz v. City of*

Newport, 252 S.W.2d 434, 437 (Ky. 1952) (“The court ought not to compel the doing of a vain thing and the useless spending of public money.”).

- **The likelihood of voter confusion.** “[I]t would constitute a deception on the voters for a court to permit a measure to remain on the ballot knowing that . . . [it is] invalid.” *Citizens for Responsible Behavior v. Superior Court*, 1 Cal. App. 4th 1013, 1035, 2 Cal. Rptr. 2d 648 (1991) (quoting *Am. Fed’n of Labor*, 686 P.2d at 629 n.27); *City of San Diego v. Dunkel*, 86 Cal. App. 4th 384, 394, 103 Cal. Rptr. 2d 269 (2001) (“The presence of an invalid measure on the ballot . . . will confuse some voters and frustrate others.” (quoting *Am. Fed’n of Labor*, 686 P.2d at 615)).

- **The public distraction from valid and important issues presented on the ballot deserving of voter attention.** “The presence of an invalid measure on the ballot steals attention, time and money from the numerous valid propositions on the same ballot.” *Am. Fed’n of Labor*, 686 P.2d at 615; see *Schultz v. City of Philadelphia*, 122 A.2d 279, 283 (Pa. 1956) (stating it is “wholly unjustified to allow the voters to give their time, thought and deliberation to the question of the desirability of the legislation . . . and thereafter, if their vote be in the affirmative, confront them with a judicial decree that their action was in vain”).

- **The public interest in preventing constitutional violations.** It is “clearly in the public’s interest” to enjoin a constitutional violation. *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 887 (N.D. Ill. 2019).

- **The absence of any remedy to Avangrid, absent an injunction.**

“Irreparable injury is defined as injury for which there is no adequate remedy at law.” *Stanley v. Town of Greene*, 2015 ME 69, ¶ 13, 117 A.3d 600 (internal quotation marks omitted); see *Am. Trucking Ass’ns v. City of Los Angeles*, 559 F.3d 1046, 1058 (9th Cir. 2009) (constitutional violations are *per se* irreparable injury).

The scales of justice tip decidedly in Avangrid’s favor. This Court should direct the Superior Court to enter an injunction barring the Initiative from appearing on the November ballot. Any other outcome damages Maine’s constitutional framework for direct democracy and leaves irreparable injury unremedied.

CONCLUSION

This Court should reverse the Superior Court’s order, and grant the relief requested by Avangrid. The unprecedented use of the initiative process to reverse a single PUC order, affirmed by this Court, by directing the outcome under pre-existing law, rather than creating new substantive standards, falls far outside the bounds of legislative authority under article IV, part 3, § 18. There is no reasonable basis to permit the abuse of the initiative process by allowing an unconstitutional vote to occur. The Court should grant declaratory and injunctive relief in Avangrid’s favor.

DATED: July 20, 2020

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CERTIFICATE OF SERVICE

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