

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

Law Court Docket No. CUM-20-181

AVANGRID NETWORKS, INC., *et al.*

Plaintiffs – Appellants

v.

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

Defendants –Appellees

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

REPLY BRIEF OF APPELLANT
MAINE STATE CHAMBER OF COMMERCE

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

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

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ARGUMENT

I. Introduction

The Chamber replies to the briefs of the Defendants and the Amici as follows. Recognizing the large number of briefs, an overview of the ten briefs now before the Court may assist to organize the analysis. The Chamber will present specific responses to other briefs in the sections to follow.

The central issue is whether this Initiative is authorized by Article IV, Part Third, Section 18 of the Maine Constitution (“Section 18”). Three Plaintiffs, the Secretary, and the Amici all agree that it is not a proper Section 18 initiative because it is not legislative in nature and the people’s initiative power is limited to legislative matters. *See Moulton v. Scully*, 111 Me. 428, 448, 89 A. 944, 953 (1914) (“The design [of the Citizen’s Initiative amendment] was to have the *legislative power* not final but subject to the will of the people... That is, the central idea of the change was to confer the *law making power* ... upon the people themselves... [The initiative power] applies only to legislation, to the making of laws...”)(emphasis added).

Accordingly, any concern about “ripeness” or the availability of injunctive relief, derived from previous decisions on *legislative* initiatives, is resolved by recognizing that the Constitution’s directive that the Secretary “shall” place the measure on the ballot (1) is directed at the Legislature, not the judiciary, and (2) does not authorize unconstitutional non-legislative initiatives. *See, e.g.*, (Delogu Br. 13.) (“the

‘shall’ clause is irrelevant because there is no legislation”); (Bam Br. 6.) (“While I agree with the lower court that the ‘shall be submitted’ language is best interpreted as a command, in my opinion, this language is intended to constrain the legislative branch, not the judicial branch.”); (Sec’y Br. 11.) (citing *Wagner v. Sec’y of State*, 663 A.2d 564, 567 (Me. 1995)) (“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.”).

This is supported by the historical context out of which Section 18 arose. “The People’s Party sought to enhance direct democracy in Maine in order to ‘wrench the *legislative power* in state capitols across the country from the grip of large business and financial interests.” (Bam Br. 7.) (citing Jeremy R. Fischer, *Exercise the Power, Play by the Rules: Why Popular Exercise of Legislative Power in Maine Should be Constrained by Legislative Rules*, 61 Me. L. Rev. 504, 506 (2009) (emphasis added)). As the Secretary correctly noted, this Initiative is distinguishable because its intended effect “is not dependent on contingencies or circumstances that may not arise until after the election.” (Sec’y Br. 12.) Little more needs to be said about ripeness or remedy if the ground for the challenge is correctly stated.

The parties resisting injunctive relief essentially ignore the harms that will inevitably result if the Initiative is not enjoined. No party resisting injunctive relief argues that there is any adequate remedy at law for any of the Plaintiffs. They do not contend that harm is not irreparable. The limit of any debate about remedy is

whether there is any judicially cognizable harm to be remedied. Because harm in this context is by definition irreparable, an injunction of the constitutional violation is the only judicial remedy and cannot justly be denied.

The occurrence of a constitutionally invalid election is itself a harm to all the people and a particularized harm to the Plaintiffs and the thousands of businesses represented by the Chamber. They will need to expend substantial monetary and non-monetary resources to try to defeat an Initiative the people have no constitutional or other right to initiate. They will continue to suffer the risk that the people, or the Legislature itself, without basis in law or fact, can snatch away validly issued permits for economically valuable projects, turning to waste substantial investments of money and time. Denial of injunctive relief in this case will be a decision holding that an unconstitutional use of the initiative process cannot be enjoined, and that non-legislative initiatives are entitled to be placed on the ballot and may be contested in court only after they become operational.

The mere occurrence of a judicially authorized unconstitutional election renders vulnerable to future referenda every permit lawfully issued by any Maine administrative agency, even after Law Court affirmance. That is an enormous harm for which there is no remedy but injunction.

II. The Secretary's Brief

The Secretary is correct that this Initiative is not legislative in its fundamental nature and therefore not within the power of the Legislature under Article IV, or within the legislative power of the people, under Section 18. The Secretary is also correct that this issue is ripe for adjudication and needs to be decided before election day. However, the Secretary is wrong to say that the separation of powers issue is not also ripe for decision.

The Initiative is clearly not legislative because it has only one intended effect: to prohibit by fiat the completion and operation of a project that has been adjudged legal in a final decision of the Public Utilities Commission, affirmed in a final decision by this Court. The PUC and the Law Court applied law to facts, supported by evidence, and determined the public interest. This Initiative unconstitutionally will nullify final decisions of the Law Court and the PUC and, worse, compel the PUC to make an unlawful decision.

As the Chamber's Brief explained in detail, there is a categorical difference between the internal or potential operational constitutionality of any initiative after it has been enacted and become effective, and the foundational question of whether this Initiative is legislative and constitutionally authorized to be put to a vote at all. The unlawful and unprecedented reversal of a closed case at the PUC, after its affirmance in the Law Court, without any change in law or any change in circumstances or the evidentiary record, is not legislation *and* it usurps the authority of the Law Court and

the PUC. As Professor Bam pointed out, the “‘simplest example’ of unconstitutional usurpation of judicial authority would be a statute that says, ‘In Smith v. Jones, Smith wins.’” (Bam Br. 10) (citing *Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018)). The two reasons for declaring this Initiative unconstitutional are congruent. Either of those reasons, but especially both reasons, compel the conclusion that the Initiative is not within the power of the people under Section 18. The distinction the Secretary seeks to draw is illusory. Because the Secretary is correct that the Initiative is not legislative in its nature, the Secretary is wrong to say that the usurpation of judicial authority is not also a reason to enjoin it.

The Secretary’s argument that that this Initiative should be declared to be unconstitutional but not enjoined disregards the deleterious precedential effect that decision will have on every future economic investment opportunity in this state. The Chamber presses the related points it made in its opening Brief but takes this opportunity to respond to two points in the Secretary’s opening Brief. First, the status of any other administrative proceeding necessary for this project is immaterial to any issue before the Court. (*See, contra*, Sec’y Br. 26.) The fact that multiple administrative proceedings are required adds further weight to the point that this Initiative is not permitted but, that aside, each of those administrative proceedings must, as a matter of justice, proceed as expeditiously as the nature of its work permits. It is an illegitimate makeweight excuse to slow down one of them to wait for the

others. Delay and procrastination are themselves illegitimate tools of opponents of all projects. It is beneath any court to amplify the power of those illegitimate tools.

Second, returning to a point the Secretary has made before, the Secretary argues that the Court should weigh the harm to be prevented or avoided against the effects an injunction would have on the petition signers' faith in the initiative process. But the Secretary's argument actually *supports* injunctive relief in this instance. If the voters are frustrated about having signed an unconstitutional initiative, they will undoubtedly be more frustrated after expending time, energy, and resources trying to get it enacted, only to have this Court rule, *after* that effort, that the Initiative was unconstitutional all along and thus unenforceable. As the legislator Amici point out, "the Electors should not be burdened with casting a futile vote." (Leg. Br. 18.) Denying injunctive relief would thus compound the harm outlined by the Secretary.

The far greater concern must be the public's inevitable loss of confidence in the judiciary if this Court's opinion identifies a constitutional violation in time to prevent it and declines to act.

III. The Briefs of the Defendant-Intervenors

To the extent that the Defendant-Intervenors join issue, their position is wrong as a matter of law for the reasons advanced by the Secretary, the Plaintiffs, and the Amici. MLP and the individual Defendant-Intervenors argue that what they call "substantive constitutionality" may be adjudicated only after the Initiative has been

enacted by the voters. The term “substantive constitutionality” relies on cases in which the subject of the challenge is the operational constitutionality of the proposition after it becomes effective. Here, for example, there will be due process and possibly other challenges if the voters enact this Initiative. However, those cases are distinguishable because the specific constitutional violation here is the referendum itself. That violation is simultaneously in and of itself a civic harm no constitutional officer may lawfully commit. It also generates other serious harms. This foundational question is whether the Constitution itself authorizes a vote on this non-legislative item, wrongly denominated a “resolve.” Though most legislative enactments are constitutional, and some are not, that truism skips over the question of whether a proposal is legislative to begin with; this one is not.

As the briefs of the Plaintiffs and the academic and former legislator Amici demonstrate, the people in an exercise of participatory democracy established the Constitution to provide for the operationalization of the people’s sovereignty in a republic. They amended the Constitution in 1909 to provide for the direct popular exercise of the *legislative* power in that Constitution. The 1909 Amendment did not address or affect judicial power and the people did not reclaim any right to direct popular exercise of that power. As the briefs of the Plaintiffs acknowledge, there is abundant authority concerning the proper timing of constitutional challenges to initiatives that *are* within the legislative authority in Section 18. The authorities cited

by the Defendants in support of delaying a decision on a legislative initiative are not applicable to this case because *this* Initiative is *not* within that legislative authority.

Defendants ask this Court to ignore the consequences of delaying this decision. As the Chamber outlined in its opening Brief, there can be no non-decision of whether to enjoin the referendum. There are also other constitutional issues not far below the surface of this Initiative that will come to be adjudicated if it should ever be enacted, but those are not why it must be enjoined now. The core question for this Appeal is whether an initiative that is challenged on the specific ground that it not authorized by Section 18 should nevertheless be free from pre-election judicial review or, if not constitutionally authorized, nevertheless be placed on the ballot. That question answers itself. It must be reviewed and, if unauthorized, it must be enjoined.

Defendants' argument that the court should wait until after the election before deciding the constitutional issue here is tantamount to telling a defendant sued a second time to postpone the *res judicata* issue until after a second trial or asking a criminal defendant to wait until after a second trial to raise a double jeopardy defense. The harm *is* the second trial (here an evidence-free political trial in front of the electorate as jury with no judge instructing on the law).

In the Superior Court Order and the Defendants' briefs, there is an insufficient discussion of delay itself. Delay is a harm because it is inherently costly, and potentially fatal to otherwise legitimate projects. Only necessary delay can be justified in any process. It is all too obvious a tactic for every opponent of every project to

play for time and hope to procrastinate the project to cancellation. No court should overwork ripeness arguments to enable these unworthy tactics.

It is not disputed that the regulation of public utilities is a legislative function that has been delegated in its entirety to the PUC but subject to Law Court review. Changes to that delegation or the generally applicable standards that govern decision-making within that delegated authority are legislative prerogatives. But reopening final Law Court mandates and PUC final decisions is not a legislative function. The Legislature clearly acknowledged that fact when it provided for appellate review of PUC decisions within the judicial branch. 35-A M.R.S. § 1320. Whatever may be said about what the Legislature might do about future regulatory practices and standards, or whatever may be said about the Legislature's authority to make such changes even during the run of a pending case before the Commission, there is no basis for this Court to hold that it is a legislative act to command the commissioners to nullify their considered decision in a closed case after affirmance in the Law Court and then to make a decision contrary to their own best professional judgment and unsupported by the evidence in a voluminous record.

The earnest beliefs of some voters about what is in the public interest do not entitle them to review and overrule the final judgments of the PUC or the DEP or the LUPC or the Law Court about what is in the public interest. In a constitutional democratic republic, judgments about the public interest are almost always made by governmental officials, whether elected or appointed. The limit of the authority of

dissatisfied voters to reject past governmental decisions is set forth in Section 17 of Part Third of Article IV (the People's Veto), and Section 17 does not authorize this Initiative. Indeed, Section 17, like Section 18, is limited to legislative activity in that it only permits the veto of "bills, resolves or resolutions," not judicial or executive actions. Me. Const. art. IV, pt. 3, § 17.

Section 22 of Part Third of Article IV has nothing to do with this case. It does not and could not preclude judicial review of the only question before the Court, whether this Initiative is authorized by Section 18 in the first place. Section 22's timing provisions speak only to the processing of constitutionally-authorized petitions for their conformity with the procedural requirements. They do not infringe or limit the judiciary's authority and duty under Article VI of the Constitution to conduct judicial review of whether the initiative itself is authorized.

It is long settled in American law since the time of *Marbury v. Madison*, 5 U.S. 137 (1803), that the Constitution is the supreme law. It is emphatically the province of the courts to say what the law is and to enforce it. It is the solemn duty of the courts to preserve, protect, and defend the Constitution from being ignored or violated by the other branches of the government, or here by the people wrongly purporting to exercise the power of the legislative branch, but instead invading the judicial and executive authorities. It trivializes the majesty of the Constitution to subordinate it to prudential rules about timeliness and tidiness. A patently unconstitutional use of the initiative process must be enjoined because a concrete

ongoing constitutional violation must not be permitted as a matter of constitutional principle. The judiciary has no duty more fundamental or important than to intervene firmly and promptly to prevent ongoing or imminent violations of the fundamental law of our democracy.

IV. The Briefs of the Amici Deserve Particular Attention

The briefs of the Amici deserve careful consideration. They are in accord with the submissions of all three Plaintiffs and the Defendant-Secretary on the central issue, and they provide both direct rebuttal and significant context to the briefs of the Defendant-Intervenors. Before addressing the submissions, it is appropriate to note that the Amici are particularly knowledgeable about these important issues.

Two of the Amici are or were law professors. Emeritus Professor Delogu taught courses in land use law and regulation and state and local government for decades and was one of the early leaders of Maine's developing environmental movement in the 1970s. He is a former member of the Board of Environmental Protection. Professor Bam teaches and writes about constitutional law and is a proponent of direct democracy and the proper use of the constitutional initiative power. (Bam Br. 5-6.) This case is about constitutional law. His views of the proper interpretation of the fundamental legal charter of our democracy are entitled to respect. Three former commissioners have provided first-hand insight into the role and well-developed processes of the PUC as engaged in essentially adjudicatory work,

and two former legislators have underscored the historic context for maintaining the balance of powers as crafted in our Constitution.

The Chamber has argued that the Constitution ought to be respected and enforced as a matter of fundamental principle. Arguments that it is permissible to violate the Constitution to stage an unconstitutional election because the Plaintiffs have not shown enough harm ought to be viewed skeptically. The harm to the certificate holder is self-evident. Just as this Court “has never hesitated to exercise its power and authority to protect the individual from an unconstitutional invasion of his rights by the legislative branch of government [...it is now this Court’s] duty to prevent the people from interfering in an unconstitutional manner” with the powers conferred on a branch of government. *Morris v. Goss*, 147 Me. 89, 107, 83 A.2d 556, 565 (Me. 1951). As the Chamber has argued, if this Initiative is allowed to proceed to the ballot, it will need to be resisted between now and the election at great expense. That is an irreparable harm. As Professor Bam noted, the administrative and judicial processes that have been utilized to this point “involve a neutral application of the law, and certain procedural safeguards, to avoid the risk that litigants will be treated unfairly by majoritarian forces.” (Bam Br. 26.) If this Court allows this Initiative to proceed to the ballot, it would allow ‘majoritarian forces’ to contravene the rights established and held by the litigants who participated extensively at the PUC level and whose rights were affirmed in *NextEra Energy Res., LLC v. Maine Pub. Utils. Comm’n et al*, 2020 ME 34, 227 A.3d 1117.

This litigation has been assuming that three docile commissioners will simply sign a paper that, as the Amici former commissioners point out, will violate their oath and will contradict the PUC record. (Fmr. Comm’rs Br. 18-19.) Maybe they will decline to violate their oath. But, if they do sign as ordered, that is not the end of this litigation. As the former PUC Commissioners point out, it could result “in an endless loop of appeals that may function to avoid any meaningful opportunity for judicial review of Commission action.” (Fmr. Comm’rs Br. 13.) (citing *Lincolnton Networks, Inc., et al*, Motion to Amend, Nos. 2012-00218, 2012-00219, 2012-00220, 2012-00221, Order at 4 (Me. P.U.C. July 26, 2013)). The Court will then be in the “untenable position of potentially being forced to redecide the *NextEra* case.” (Fmr. Comm’rs Br. 21). Presumably, because an Order compliant with this Initiative will lack any evidentiary or other legal basis, this Court would be required to “reject the amended order as arbitrary, capricious, and unsubstantiated by the written record.” (*Id.* at 22.)

The Chamber has argued that the entire State of Maine has a strong interest in avoiding gratuitous impairment of the economy as a whole, or harm to the legitimate interests of thousands of Maine businesses resulting from the destabilizing and debilitating uncertainty inevitably engendered by this unconstitutional Initiative. The former commissioners have cast a particularly strong light on this important aspect of the uncertainty analysis. Maine’s investor-owned utilities, subject to regulation by the PUC, must attract investors. The rates paid by Maine consumers are driven by the utilities’ cost of capital, both debt and equity. Investor uncertainty demands a

premium for investment. (*See* Fmr. Comm’rs Br. 23-24.) It is a costly and irreparable harm to the Chamber, to all of the businesses it represents, and more importantly to the Maine economy as a whole to interject uncertainty into the investment calculus of every prospective applicant for permits in Maine. (*Id.* at 3, 21.) The harm is the election itself, even if—or especially if—the voters reject this Initiative. If that happens, no adjudication of the scope of Section 18 will ever occur and every prudent investor will need to consider that any permit in Maine may be subject to invalidation by referendum, or will at least need to consider the potential costs to defend an issued permit from invalidation in an expensive political campaign.

V. Conclusion

Of the three questions being litigated, one is dominant. If an initiative is not an enactment of legislation, it is not eligible for a vote and it must be enjoined. The only time to enjoin an unconstitutional action is before it occurs. MLP’s claim of “participatory democracy” is really an admission that this Initiative is beyond the authority of the Legislature. There is no “ripeness” issue. The dispute is fully formed. MLP and NextEra really are asserting that the unconstitutionality of a referendum is not amenable to judicial review. To the contrary, it is the prospective operational unconstitutionality of a proposed new law that is often not determined before the ballots have been counted. The unconstitutionality of the Initiative, as unauthorized because not legislation at all, must be determined before the ballots are printed.

It is now certain that letting this unconstitutional Initiative go forward, enacted or not, is a harm that radiates other harms for which there is no remedy at law. Injunctive remedies developed in equity to prevent wrongs (especially unconstitutional wrongs) in time to avoid harms that cannot be remedied by monetary judgments at law. A decision next year that the Initiative was not entitled to go to the voters will be too little too late. The time for action is now. The Court should not enable a constitutional officer to violate the Constitution now, only to learn that the Constitution really cannot be effectively protected later after all.

Respectfully submitted this 23rd day of July 2020,



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

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

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CERTIFICATE OF SERVICE

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

Phyllis Gardiner, Esq., AAG Phyllis.Gardiner@maine.gov
Thomas A. Knowlton, Esq. Thomas.A.Knowlton@maine.gov
David M. Kallin, Esq. DKallin@dwmlaw.com
Elizabeth C. Mooney, Esq. EMooney@dwmlaw.com
Adam R. Cote, Esq. ACote@dwmlaw.com
Paul W. Hughes, Esq. phughes@mwe.com
Andrew A. Lyons-Berg, Esq. Alyonsberg@mwe.com
Chris Roach, Esq. croach@rrsblaw.com
John Aromando, Esq. jaromando@PierceAtwood.com
Jared des Rosiers, Esq. jdesrosiers@PierceAtwood.com
Joshua Dunlap, Esq. jdunlap@PierceAtwood.com
Sara A. Murphy, Esq. smurphy@PierceAtwood.com
Anthony W. Buxton, Esq. ABuxton@preti.com
R. Benjamin Borowski, Esq. RBorowski@preti.com
Sigmund D. Schutz, Esq. SSchutz@preti.com
James L. Costello, Esq. jcostello@curtisthaxter.com
Rebecca Gray Klotzle rklotzle@curtisthaxter.com

Professor Dmitry Bam dmitry.bam@maine.edu
Professor Orlando Delogu orlandodelogu@maine.rr.com
Timothy C. Woodcock, Esq. twoodcock@eatonpeabody.com

Dated at Portland, Maine this ~~20th~~^{20th} day of July, 2020.



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

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