STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-416

NECEC TRANSMISSION, LLC, ET AL.,

Plaintiffs – Appellants

v.

BUREAU OF PARKS AND LANDS, ET AL.,

Defendants – Appellees

On Report from Business and Consumer Court
Docket No. BCD-CIV-2021-00058

BRIEF OF APPELLANTS-INTERVENORS CIANBRO CORPORATION AND INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 104

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INTRODUCTION

This case presents fundamental questions about the fairness of retroactive laws depriving a party of vested rights no matter how much good faith effort was expended in undertaking the project, or how much bad faith was imbued in competitor-financed opposition to it. The question presented becomes all the more imperative when the retroactive law targets only one specific project and is openly supported and promoted by that project's economic competitors. Affirming this decision would send a clear and resounding message that no rights are safe from retroactive deprivation because well-heeled lobbyists can engineer a referendum, coopt the initiative process, and take those rights away. It would also cement Maine's position as a hostile place to do business where contracts can be torn up on the whim of an off-year election. The Initiative violates basic norms of fairness and due process and should not be allowed to stand.

JOINT STATEMENT OF FACTS AND PROCEDURAL HISTORY

Cianbro Corporation ("Cianbro"), an open-shop contractor, and the International Brotherhood of Electrical Workers Local 104 ("IBEW Local 104"), a union representing workers on this project, submit this joint statement of fact and procedural history in support of NECEC Transmission LLC's and Avangrid Networks, Inc.'s (collectively "NECEC LLC") appeal of the denial of their motion

for preliminary injunction. The following facts are derived from the pleadings filed in the Superior Court's Business and Consumer Docket ("Business Court") in connection with Cianbro and IBEW Local 104's respective motions to intervene, intervenor complaints, and memoranda of law in support of NECEC LLC's motion for preliminary injunction and declaratory relief relating to the ballot initiative ("Initiative") that would prohibit the construction of the New England Clean Energy Connect transmission line corridor ("the Corridor" or "the Project").

Cianbro is a quintessential Maine business success story. Founded in 1949 by the Cianchette brothers, it is one of the nation's largest one-hundred percent employee-owned, open-shop construction and construction services companies. Affidavit of Paul Franceschi in Support of NECEC LLC's Motion for Preliminary Injunction, ¶¶ 4-5 ("Franceschi Aff."). Headquartered in Pittsfield, Maine, Cianbro maintains operational support facilities in eleven states including Maine, three specialized fabrication and coating facilities (Maine, Illinois, Texas), and two deepwater and modular manufacturing facilities in Maine and Maryland. *Id*. ¶ 6. Having worked in more than 40 states, Cianbro employs thousands of team members with a deep and recognized commitment to employee safety and environmental protection. *Id*. ¶ 7. Cianbro's diverse construction experience spans numerous commercial and industrial sectors,

including the construction and repair of transmission and distribution lines, electrical substations, and substation security, and Cianbro provides a number of crucial services to the power and energy market including construction services, maintenance, restoration, emergency response, and construction management services. *Id.* ¶ 9.

In April 2020, Cianbro was informed by NECEC LLC it had been selected as contractor for two key aspects of the Corridor.[1] *Id.* ¶ 16. The first is the physical construction of an approximately 145-mile 320kV high-voltage direct current transmission line running from the Maine/Canada border to Lewiston, Maine ("the T-Line"). *Id.* ¶14. The T-Line transmits power from Quebec to a new alternating current convertor station at Merrill Road in Lewiston ("the Convertor Station"). *Id.* The second aspect of Cianbro's work is the construction of the Convertor Station itself. *Id.* ¶ 14 The Convertor Station is critical in converting the power from its more efficiently transmissible direct current form back into alternating current form needed for distribution. These are both substantial undertakings that have involved years of analysis, estimation, bidding, planning, resource allocation, and substantial physical construction. *Id.* ¶¶ 30-31.

[1] Cianbro entered a joint venture with Irby Construction on the transmission line portion of the Corridor project. Franceschi Aff. ¶ 17. Cianbro separately entered another agreement with another firm relating to work on the convertor station in Lewiston. *Id.* ¶ 18. Both are described herein.

IBEW Local 104 is an unincorporated association that represents employees in the outside electrical utility industry. Affidavit of Timothy Burgess, in Support of NECEC LLC's Motion for Preliminary Injunction, ¶¶ 4-5 ("Burgess Aff."). IBEW Local 104 members performed significant construction work on the Corridor in various capacities as Linemen, Heavy Equipment Operators, Groundmen, Driver Groundmen, and Apprentices, including work on transmission line construction, reconstruction, maintenance line work, station and cable work, and other electrical work. *Id.* ¶ 4. IBEW Local 104's members are an integral part of the workforce that maintains Maine's electrical infrastructure. *Id.* ¶¶ 8-9. Importantly, Cianbro's and IBEW Local 104 members' involvement in the Corridor have combined to put hundreds of Maine residents to work, with many more expected over the life of the project. *Id.* ¶ 6.

Soon after the execution of the relevant contracts, Cianbro began planning and entering into various agreements with highly specialized subcontractors to complete its T-Line and Convertor Station construction duties. The T-Line construction for which Cianbro is responsible involves multiple phases of physical construction, including pouring and setting foundations, erecting towers, and stringing of electrical conductors. Franceschi Aff. ¶ 24. Construction of the Corridor along the T-Line began on January 18,

2021 in accordance with the established schedule and as allowed by weather and environmental conditions, and receipt of a federal permit. (A. 31.) Cianbro itself began constructing and installing structures along the T-Line on February 2, 2021. As of November 2021, when construction operations were suspended following the Initiative's passage and NECEC LLC's subsequent agreement to cease construction, Cianbro and its subcontractors had constructed a significant percentage of the planned structures on the T-Line project. Franceschi Aff. ¶ 22. By Election Day, Cianbro drilled 107 transmission line pole holes, poured seventeen percent of the T-Line's concrete foundations, installed 101 pole bases, and fully erected 78 poles, at a cost of several million dollars. *Id.* ¶ 24. In addition, the Cianbro team has received, unloaded, inspected, and stored 100% of electrical conductor, fiber optic cable, and insulators for the project as well as more than 60% of all transmission poles. *Id.*

Likewise, Cianbro immediately began executing its construction planning and responsibilities for the Convertor Station. *Id*. ¶ 31. Cianbro has incurred millions of dollars of expenses on the Convertor Station for materials, construction, and subcontractor services, including engineering, consulting, preparation and physical construction services. *Id.* ¶ 26. The site preparation work was nearly complete, which would have allowed the work on the Converter Station to progress, when the project was suspended. *See id.* ¶ 25.

As to IBEW Local 104, its members have performed significant work on construction and upgrades of other portions of the Corridor project. Again, many of IBEW Local 104's members are from Maine and were paid for thousands of hours of their work on the Corridor project. Burgess Aff. ¶ 4. Overall, IBEW Local 104 represents 260 employees who performed physical work and construction on the T-Line section of the Corridor. *Id.* These employees were working 60 hours per week and earned compensation of about $1 million per week. *Id.* Over the life of the Corridor project, IBEW Local 104 expected to have approximately 300 workers who would have earned in excess of $100 million in wages and benefits, in addition to the years of maintenance and upkeep associated with the physical infrastructure entailed in the Corridor. *Id.*

The Corridor project was planned over several years and will take several years to build to completion. Franceschi Aff. ¶ 19. That is the nature of projects of this size and complexity. *Id.* ¶¶ 30-31. Cianbro was selected because it has a significant amount of experience with large, multi-year projects that depend and rely heavily on the issuance of federal, state, and local permits, including environmental permits; IBEW Local 104's members relied on such permits to assist with the work on this complex, technical project. Reliance on the effectiveness and stability of these permits as granted under existing law is

absolutely essential for the analysis, sequencing, planning, and completion of the work. Franceschi Aff. ¶ 10. Disruptions and uncertainties, particularly those caused by events after construction has begun based on permits already issued, are harmful to a contractor's ability to construct a project and for the construction industry generally. *Id.* ¶10. It is equally disruptive and problematic for workers like IBEW Local 104 members whose livelihoods are bound up in these projects that have been planned on for years and are under substantial construction. Burgess Aff. ¶ 6.

Cianbro, like many large construction companies, strategically plans its business years in advance by seeking out opportunities on the horizon and committing planning and estimating resources to those opportunities. Franceschi Aff. ¶ 30. In choosing which projects to pursue and to devote resources towards, the likelihood that the project will actually progress to construction is a critical factor. *Id.* The Corridor, like many large projects, was no different; lawfully issued permits were justifiably treated as confirmation that the project was going to proceed to completion. *Id.* The imposition of retroactive changes to governing law affecting the continued viability of a project post-construction, as the Initiative purports to do, creates substantial uncertainty for Cianbro and other contractors as far as equipment, labor,

planning, resources, bidding other jobs, and even its overall business model. *Id.* ¶¶ 32-33.

Similarly, projects such as the Corridor make up a substantial portion of IBEW 104's work and provide stable employment for its membership – which, in turn, maintains a stable workforce available to maintain infrastructure and restore power following natural disasters. Burgess. Aff. ¶¶ 7-8. Loss of projects such as the Corridor discourages investment into future energy infrastructure projects and thereby diminishes critical work opportunities for members of IBEW Local 104. *Id*. ¶ 9.

Cianbro and IBEW Local 104 intervened in this matter pursuant to Maine Rule of Civil Procedure 24(a) and 24(b) because they have significant interests in this case and their individual interests were not adequately represented by the existing parties, despite the overlap with Plaintiffs on common questions of law. Order on Mot. to Intervene (Nov. 22, 2021). Cianbro and IBEW Local 104 thereafter submitted for the Business Court's consideration memoranda in support of Plaintiffs' arguments in their motion for preliminary injunction and request for declaratory relief. (A. 6.) On December 15, 2021, Cianbro and IBEW Local 104 each presented oral arguments in support of the motion for preliminary injunction, providing additional analysis and important context about the risks and consequences of the Initiative's codification into Maine law.

(A. 64, n.30.) The next day, the Business Court denied the Plaintiffs' motion for preliminary injunction and declaratory relief. (A. 16-67; hereinafter "Order"). On December 28, 2021, the Business Court granted the Plaintiffs' motion to report interlocutory ruling pursuant to Maine Rule of Appellate Procedure 24(c). (A. 12-15.) Cianbro and IBEW Local 104 submit this joint brief to expound on the important questions relating to vested rights and to provide their critical perspective on the impact this retroactive law could have on them, their members, and their industries for decades to come.

STATEMENT OF THE ISSUES

1. Whether the Business Court erred when it concluded that the vested rights doctrine did not apply when substantial construction was under way pursuant to then validly issued permits.

SUMMARY OF THE ARGUMENT

The Business Court erred when it concluded that the doctrine of vested rights did not apply to the substantial physical construction undertaken on the Corridor in good faith and pursuant to validly issued permits. The Business Court also incorrectly assessed the source of the bad faith imbued into the Initiative because it should have looked to the source and origin of the Initiative and not applied the impossible standard of determining the voters' state of mind when they cast their ballots.

To allow for the retroactive abrogation of then-validly issued permits as a result of a law that is plainly applicable to one project establishes a dangerous precedent of allowing the politics *de jour* to trump valid permits, tear up long-standing contracts, waste millions of dollars and thousands of man-hours, and cement Maine's place among the nation's riskiest, and thus least attractive, places to do business. Allowing well-financed competitors of individual projects to coopt Maine's initiative processes for anti-competitive purposes corrupts the process itself and sends a message that no project in Maine is safe from retroactive legislation until years after the project has begun and every conceivable appeal is exhausted or passed, no matter how frivolous or disingenuous those challenges may be.

ARGUMENT

I. Standard of Review

The Court reviews the denial of a motion for preliminary injunction for an abuse of discretion. *Dep't of Envtl. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989). Courts will set aside a ruling on a preliminary injunction when the court clearly errs in assessing the facts, misapprehends the applicable legal principles, or otherwise abuses its discretion. *Id.* Although fact-finding is a prerequisite for judicial action in an action for preliminary injunction and those findings of fact are reviewed for clear error, *Bangor Historic Track, Inc. v. Dep't*

of Agric., Food & Rural Res., 2003 ME 140, ¶ 11, 837 A.2d 129; *State v. Pineo,* 2002 ME 93, ¶ 6, 798 A.2d 1093, 1096, "a mistake of law constitutes an abuse of discretion." *Smith v. Rideout*, 2010 ME 69, ¶ 13, 1 A.3d 441; *Sanchez v. Esso Standard Oil Co*., 572 F.3d 1, 14 (1st Cir. 2009)("[a]n error of law is always an abuse of discretion.").

II. The Vested Rights Doctrine applies to NECEC LLC's construction on the Corridor project and the Business Court misapplied its application.

A. Vested rights are not limited to municipal actions.

The Business Court erred when it concluded that the vested rights doctrine is necessarily limited to the municipal law context. (A. 41.) To the contrary, the vested rights doctrine is derived from fundamental notions of fairness and due process and cannot be so narrowly construed. *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977) (discussing the unconstitutional nature of retroactive deprivation of vested rights, and citing cases dating back to the early years of Maine becoming a state). Such a limitation would defy the very principles that gave rise to the doctrine in the first place. It is axiomatic that the state's deprivation of due process and vested rights, whether by direct state or indirect municipal action, is a constitutional violation. That Maine's case law happens to include a disproportionate number of recent municipal vested rights cases speaks only to the frequency and ease of changing zoning

laws, not the applicability of the doctrine generally to state action. Limiting the application to municipal permits, and excluding state-issued permits, is contrary to the purpose and the text of the doctrine and this Court's long-standing application of it. It would also, as NECEC LLC points out, make Maine an outlier in the country and make it less competitive and attractive for business and investment.

B. The Business Court misapplied the vested rights doctrine as to the demonstrated substantial visible construction of the Corridor project.

Under well-established Maine law, a party secures its legally acquired vested rights when it engages in physical construction pursuant to a validly issued permit and with a bona fide intention to continue the project to completion. *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266 (citing *Town of Sykesville v. West Shore Communications, Inc.*, 677 A.2d 102, 104 (Md. Ct. Spec. App. 1996)). Actual construction means that the project has commenced substantial and visible construction as part of a subjective good-faith effort to bring the project to completion. *See AWL Power v. City of Rochester*, 813 A.3d 517, 521-22 (N.H. 2002) (defining actual construction as having undertaken substantial, physical, visible construction that goes beyond mere planning and site surveys and noting that $200,000 was sufficient to support vesting); *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1064 (N.Y. 1996) ("a vested right can

be acquired when, pursuant to a legally issued permit, the landowner demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development").

1. A permit need not be unappealable for rights to vest.

For such rights to vest, a project must also be undertaken pursuant to a lawfully obtained permit. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266. A permit is valid when it is lawfully sought and then issued, and it is not invalid merely because the permit conceivably may be subject to some appeal in the future. *Peterson v. Town of Rangeley*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930 (recognizing "the circumstances when rights vest . . . occur when a municipality applies a new ordinance to an existing permit.")(emphasis added). Maine law does not contemplate the expiration or exhaustion of all appeals period as being necessary to vest rights under the doctrine. *Id.*; *Sahl*, 2000 ME 180, ¶¶ 12-13, 760 A.2d 266 (noting circumstances when vesting does not occur, which does not include the viability of an appeals period); *see also Thomas v. Zoning Bd. Of Appeals of the City of Bangor*, 381 A.2d 643, 647 (Me. 1978) ("[A]n applicant for a building permit may acquire vested rights to such a permit by virtue of a substantial good faith change made in reliance on the zoning law in effect at the time of the application, or on the probability of the issuance of a permit

approval."). These cases concern issued permits, regardless of whether they were subject to some conceivable substantive or procedural appeal. The mere possibility that some permits could be further appealed does not vitiate the vesting of rights when construction already commenced in good faith pursuant to then-issued permits.

The Court in *Sahl* made clear that the standard for assessing the status of a project's permits has nothing to do with potential avenues of appeal; rather, it made clear that the question was whether construction was undertaken "pursuant to a validly issued building permit." *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (emphasis added). Likewise, the Court in *Peterson*, noted that the relevant timeframe of the vesting of rights was in relation to the possession of an existing permit, without further qualification. *Peterson*, 1998 ME 192, ¶ 12 n.3, 715 A.2d 930. The relevant time period for assessing the vesting of rights thus turns on the issuance and possession of a permit and the initiation of construction, not the potential for an appeals process which may begin years after actual construction has commenced.

The Business Court erred when it ruled that the mere potential for an appeal is sufficient to vitiate vested rights. (A. 46-50.) This ruling is inconsistent with the law of this state and contradicts the underlying purpose of the doctrine: construction commenced in good faith reliance on then-validly

issued permits may not be retroactively prohibited. The Court's reliance on *Donadio v. Cunningham* to support its far-reaching conclusion is misplaced. 277 A.2d 375 (N.J. 1971). There are several crucial distinctions between *Donadio* and the Corridor that make the Business Court's reliance on this New Jersey case particularly inappropriate. Under the prevailing law in *Donadio,* a 45-day appeals period was allowed after a development decision was rendered by the Board. *Id.* at 379. Further, as soon as the Board gave a green light to construction, McDonald's snapped into action and "very shortly after" the decision began construction in an overt attempt to "bootstrap" its rights while the appeals process was playing out. *Id.* at 382. The Court did not credit McDonald's alacrity, instead concluding that the decision by McDonald's to initiate construction when it did was part of an effort to "win[] an unseemly race" and strong-arm its way to approval. *Id.*

Here, the Business Court did not even so much as suggest that NECEC LLC initiated construction as part of some "unseemly race" or for any other reason than to adhere to its long-established construction schedule. In fact, the Business Court noted that NECEC LLC's initiation of construction and progress on the Corridor was "no head fake" and that some delays in the commencement occurred and were "inevitable" in large-scale projects such as this. (A. 31, 43.) As made clear by the affidavit in support of Cianbro's memorandum, projects

like this are scheduled months or years in advance. Franceschi Aff. ¶ 32. Practically speaking, it would be impossible for a 145-mile long state-wide project that crosses an international border to be jump-started on short notice like the McDonald's drive-thru restaurant in *Donadio* was. *See id.* ¶¶ 32-36. Second, the appeals period in *Donadio* was a mere 45 days, whereas here, various appeal periods could extend upwards of six years, meaning that potentially it could be seven or eight years after a permit is granted before there is complete and final clarity on its appeals. *See* 28 U.S.C. § 2401(a). As detailed in the supporting affidavits, waiting so many years from the permit's approval for complete exhaustion of possible challenges would jeopardize this project and many others of this size and complexity. Franceschi Aff. ¶¶ 40-46. Projects of this ilk require years of planning, are subject to contractual obligations and financing conditions, and are established and executed pursuant to highly structured equipment and material acquisition schedules and detailed labor agreements. *Id.*

Requiring a party to wait for exhaustion of all appeals periods, extending years after the permit is issued, fatally undermines the underlying purpose and application of the doctrine. *Id.* ¶ 45. It would also render these projects less attractive and more expensive and thus all the more elusive. *Id.* ¶ 46. NECEC LLC's rights vested when it received the relevant permits and it initiated

construction of the T-Line, which began on January 18, 2021 with corridor clearing, which facilitated the start of Cianbro's work on February 2, 2021. The fact that an appeal could have been taken is insufficient to divest NECEC LLC of its rights to continue this project.

2. The Business Court was correct about NECEC LLC's good faith and actual progress.

Even though the Business Court erred in its misapplication of the vested rights doctrine, it nonetheless correctly found that NECEC LLC proceeded with construction "in good faith." (A. 43). Good faith in this context is merely the absence of bad faith, and is thus a low bar to clear. *Town of Sykesville*, 677 A.2d at 113-116 (describing bad faith as a "false start"). Indeed, the Business Court here aptly described NECEC LLC's efforts – $449.8 million in expenditures and initiation of a construction project according to complex and interrelated plans – as "no head fake" and part of a good faith effort to initiate construction. (A. 16, 43, 72.) Indeed, there was real and substantial progress toward the long-stated goal of completion of the project that will reduce greenhouse gas emissions and dependence on fossil fuels, and that progress included substantial, visible physical construction along the T-Line and of the Convertor Station. Cianbro's efforts in just the few weeks before the Initiative was even certified on February 22, 2021, resulted in the complete installation of numerous transmission poles

along the T-Line at a cost of millions – and far more by Election Day. Measured as of either date, the construction efforts undertaken by NECEC LLC and its contractors are far in excess of what is required to show actual, physical construction and is strongly supported by other courts' rulings on what constitutes actual, visible construction. *See AWL Power*, 813 A.3d at 521-22 (defining actual construction as having undertaken substantial, physical, visible construction that goes beyond mere planning and site surveys and noting that $200,000 was sufficient to support vesting).

C. The Business Court erred when it determined that the proposal of the Initiative provided NECEC LLC with "notice" sufficient to divest it of its rights.

1. Signature drives and submission of proposed legislation cannot divest rights.

The Business Court wrongly concluded that NECEC LLC had "notice" of the potential new requirements of the Initiative sufficient to cease or reverse any vesting of rights. (A. 42, 57.) Until a proposed change in law is enacted, it is inchoate and incomplete and cannot give sufficient notice that change in law has occurred or will occur. Inchoate proposals and signature submissions to the State are not sufficient to give a party meaningful notice that the law is about to change; they are mere applications proposing a change in law. 21-A M.R.S. § 901 (requiring Secretary of State to "review the application" of the

petition for conformity with various statutory requirements). The mere proposal of an initiative is simply insufficient to give a party notice that its vested rights are in jeopardy because there is no guarantee it will be certified, let alone enacted.

Even to the extent a party has knowledge that a potential initiative could later be passed that alters its vested rights, that knowledge cannot constitute requisite notice prior to the initiative's certification by the Secretary of State that triggers its addition to the ballot. *See 1350 Lake Shore Associates v. Healey*, 861 N.E.2d 944, 953 (Ill. 2006). Contrary to Appellee-Intervenors' contention, the suggestion that collecting or submitting signatures for verification and certification is sufficient to prevent the vesting of rights cannot be the law because those steps are merely part of a preliminary review of a proposal. *Cf. Avangrid Networks, Inc. v. Sec'y of State,* 2020 ME 109, ¶ 12 n.4, 237 A.3d 882 (confirming treatment of submitted initiatives as "proposed legislation.").

Signature drives should not and do not stop the vesting of rights because many signature drives fail. Others appear to be successful but are later vitiated by the determination of invalid, illegible, or duplicative signatures. 21-A M.R.S. § 905 (requiring Secretary of State to "determine the validity of the petition" before it can proceed further); 21-A M.R.S. § 354 (setting forth signature requirements for petition drives). Furthermore, under this reasoning, a

signature drive could be undertaken, fall dramatically short of its required goal, be re-attempted, and that original signature gathering and administrative review would then have necessarily divested the rights of a party who was engaged in construction despite the signature drive failing -- all because that party would be said to have had purported "notice" of a potential change in law. That cannot be sufficient to divest property rights. Worse, such a paradigm could easily be abused. For example, a signature drive could be started and knowingly or even intentionally fall short of the required number of signatures yet would still be endowed with the power to divest otherwise valid rights to proceed with ongoing construction. That same signature drive could be continued or restarted in a subsequent or off-year election, where turnout and enthusiasm typically vary from on-cycle elections. Or, signature drives could be abused to manufacture construction delays to prevent adherence to contractual deadlines or make financing untenable, making targeted projects economically nonviable. Where, like here, a competitor funds the initiative and guides its development, any of these possibilities could be employed as means to suppress the potential threats to its market share.

The argument that submitting petition signatures for review by the Secretary is sufficient to divest rights is similarly unavailing. First, submitting a proposed referendum question to the Secretary of State is merely the

transmission of "proposed legislation" to the Secretary of State. *See Avangrid Networks, Inc.,* 2020 ME 109 ¶ 12, n.4, 237 A.3d 882. Proposed legislation is not operative legislation. *Michalowski v. Bd. of Licensure*, 2012 ME 134, ¶ 24, 58 A.3d 1074 (explaining that proposed legislation does not convey authority to act pursuant to the proposed powers as opposed to then-existing governing powers). Second, submitting a proposed referendum requires only five voter signatures. That five people could halt a properly permitted project with years of planning by merely proposing a referendum is absurd on its face. Third, the submission of a proposed initiative to the Secretary of State for review necessarily requires the Secretary of State's office to perform a "gatekeeping" function and reject any application that does not meet the formal requirements of proposed legislation. *Avangrid Networks, Inc.,* 2020 ME 109, ¶ 12, n.4, 237 A.3d 882 (citing 21-A M.R.S. § 901). Title 21-A specifically requires that the submission shall be reviewed for its "validity" prior to its certification. 21-A M.R.S. § 905(1).

In short, neither gathering signatures nor submitting them to the Secretary of State are acts sufficient to give notice to a party that a law will change, only that there exists a group of people who signed a petition who desire the law to change, and they have sent their proposal to the Secretary of State for preliminary review. 21-A M.R.S. § 901. The underlying validity of the

proposal and its procedural propriety has not been confirmed, as required, on its submission. The Business Court's reliance on the fact that the Initiative was submitted to the Secretary of State when resolving the question of vesting is therefore incorrect. That argument assumes that submission amounts to certification, which has been erroneously equated with enactment. It is analogous to claiming that a legislator's receipt of statements of support and submission of a drafted bill to a legislative committee for consideration is sufficient to give a party notice that the then-operative law will change. It is not, and this Court has never supported such a construct.

The Business Court also erred to the extent it considered the Maine Legislature's consideration of LD 1295 relevant to the question of notice. (A. 45.) In no way can the Legislature's chosen course of action on LD 1295 be construed to have given NECEC LLC notice that the project was at risk of prohibition. *See United States v. Booker*, 543 U.S. 220, 293 n.12 (2005) (noting that Congress's decision not to enact legislation "constitutes powerful evidence that Congress did not want it to become law."). Although it is true that the Legislature had legislation before it that would have accomplished the same substantive goal as the Initiative's competitor-financed anti-Corridor campaign had here (i.e., stopping the Corridor), instead of acting on it, the Legislature

adjourned the Legislative session *sine die*, effectively leaving LD 1295 for dead. LD 1295 is simply irrelevant to the question of vested rights.

The contemplation of the Initiative and its corresponding signature drive do not prevent vesting, nor did the Legislature's decision not to pass legislation, and neither gave NECEC LLC "notice" of impending changes in then-operative law. The Initiative was not a valid legal challenge to the Corridor until it was enacted into law or, at the very earliest, certified by the Secretary of State on February 22, 2021. By that time, NECEC LLC and its contracted partners spent millions building physical infrastructure and towers for the T-Line. NECEC LLC thus legally acquired vested rights when it began T-Line construction operations on January 18, 2021, weeks prior to the certification of the Initiative. Any action or progress relating to the Initiatives' development that occurred prior to January 18, 2021, is irrelevant to assessing when rights vested because the Initiative was inchoate and still in its developmental stages. Further, the period between January 18, when construction began, and February 22, when the Initiative was certified, is only relevant to the question of whether there was actual physical construction ongoing during this time; the record is clear that there was indeed active, physical, and visible construction ongoing, at a massive cost to NECEC LLC. Finally, despite the Initiative's certification on February 22, the Initiative remained a mere possibility, just like any other proposed but not

yet passed, legislation until November 3, 2021, after the passage of another 253 days of active construction pursuant to validly obtained permits.

2. The fact of bad faith sponsorship by the Corridor's competitors should not be held against NECEC LLC in determining vested rights.

Finally, the Business Court erroneously imputed the fact of the Initiative's competitor-backed support to NECEC LLC in finding that the bad faith and discriminatory intent of the Initiative (and its corporate sponsors) prevented the vesting of rights. (A. 44-45.) The Business Court inferred that the failed Initiative in 2020 "put NECEC [LLC] on notice of the public's desire to effectuate a change in the law." (A. 45.) The Court also concluded that the fact that the Secretary of State "issued the petition" for the Initiative "reinforce[ed] the likelihood that the [Corridor] Project would face legislative roadblocks, especially given the popularity of the 2020 Initiative." *Id.* The Court further relied on Avangrid Inc.'s 10-Q filing with the Securities and Exchange Commission in noting that NECEC LLC's inability to predict the outcome of the Initiative somehow gave it "notice" that the law was going to change. Even to the extent these facts are relevant to the vested rights analysis, they do not support the notion that NECEC LLC had notice that a change in law was likely, let alone imminent, and in any event should not be held against NECEC LLC here.

First, the failure to enact legislation because of a constitutional defect does not give rise to a reasonable inference that an amended version of the legislation is sure to pass a direct referendum and be upheld the next time around. Nor does the Secretary of State's issuance of a petition form – the documentation allowing the collection of signatures which must then be collected, counted, de-duplicated, verified, and submitted to the Secretary of State for certification. As discussed above, the existence of a signature drive, submitted to the State or otherwise, or a prior unsuccessful attempt to change in law are not sufficient to give a party realistic, practical, or fair notice that their investment is subject to complete divestment because this time could possibly be different. Nor is the inclusion of a statement in a routine securities disclosure enough; noting in a dry literal sense that one does not have a crystal ball is not the same as having notice that a measure's enactment is imminent.

Against that unavailing backdrop, the Business Court acknowledged – but failed to examine – the bad faith and animus baked into the anti-Corridor campaign from the start. (A. 30.) For instance, there was an entire political action committee called "NO CMP Corridor," tens of thousands of yard signs bearing that same message, and representatives of that committee stating that the Initiative was an opportunity to vote on "the destructive CMP Corridor." *Id.* Had the Business Court looked to the facts and circumstances surrounding the

evolution of the Initiative, from the ashes of the first failed referendum, *see Avangrid Networks*, *Inc*., 2020 ME 109, ¶ 2, 237 A.3d 882, through the copious public information and statements singling out Central Maine Power Company ("CMP") and the proposed Corridor, or through the smog of the shadowy network of oil and gas-backed political action committees, it would have detected the stench of bad faith and anti-CMP animus emanating from the Initiative's primary benefactors and beneficiaries – specifically, NECEC LLC and Avangrid's competitors. NECEC LLC's knowledge of the Initiative should not be held against it in the determination of vested rights, particularly where the bad faith of Project opponents is overwhelming.

III. The chilling effect this Initiative will have will last a generation and will deter untold investments in Maine's construction industry and Maine's future.

The logical underpinning of the vested rights doctrine is fairness, implicit in the concept of due process. *Friends of Yamhill Cty., Inc. v. Bd. of Comm'rs*, 238 P.3d 1016, 1022-23 (Or. App. 2010) ("the policy underlying the notion of vested rights is basically one of fairness" because it "focuses on financial and economic commitment to a particular use."); *Reichenbach v. Windward at Southampton*, 364 N.Y.S.2d 283, 291-92 (Sup. Ct. 1975) (vested rights "derives from the Fourteenth Amendment due process clause which involves that 'fundamental fairness' which is essential to the very concept of justice…" (quoting *Kinsella v*

United States, 361 U.S. 234 (1960))). The doctrine is meant to prohibit harmful changes of positions or circumstances after parties have made substantial investments in good faith.

That fairness is inextricably linked to the economic imperative that gave rise to the project in the first place. Business projects and investments are undertaken when there is a well-founded presumption that the then-existing law will persist throughout the project. To allow laws to render retroactively otherwise lawful projects unlawful would be to violate any notion of fundamental fairness, and to inject immediate uncertainty and unpredictability into the equation in other projects. These features will render projects less likely to be undertaken and more expensive when they are because of the possibility that existing law could be changed, adding an entirely gratuitous risk of post-hoc cancellation and thereby corroding fairness. Yet for the sponsors of the anti-Corridor campaign, these untoward business implications were features, not bugs, of the Initiative effort. At best it slows progress; at worst, it prevents it altogether.

Despite the Court's errors in misapplying the vested rights doctrine and its failure to consider the bad faith and discriminatory intent on full display throughout the anti-Corridor campaign, the Court was absolutely correct when it noted in reporting this question to the Law Court that "future projects will be

affected by the scope and applicability of retroactive legislation." (A. 12-15.) That is an understatement. Simply put, upholding this Initiative would codify in Maine law the permissibility of competitor-financed NIMBYism and invite myriad out of state interests to come into Maine and coopt the referendum process to sabotage otherwise validly undertaken projects. It would create an environment where any company or industry could seek to cancel any project that threatens it or could challenge the viability of potential competitors by hijacking the state's citizen-led referendum process for its own gain, thus creating a destabilizing and deeply unfair chilling effect on projects state and even region wide.

At present Maine ranks 48th for business friendliness and 37th in terms of its infrastructure.[2] Negating constitutional protections for approved projects after they have been started risks depressing these ranks even further. Maine law does not and cannot support such a result. This Initiative was, in a nutshell, a coordinated hit-piece by fossil-fuel burning competitors with one singular goal of stopping cleaner competition from gaining a foothold. It was not a

[2] https://www.forbes.com/best-states-for-business/list/#tab:overall';
https://www.cnbc.com/2021/07/13/americas-top-states-for-business.html ;
https://www.ibisworld.com/united-states/economic-profiles/maine/#BuildingSection ;
https://www.usnews.com/news/best-states/rankings/infrastructure;
https://www.forbes.com/best-states-for-business/list/#tab:overall .

reflection of the sound judgment of the people or the citizen legislature; it was the result of a dazzling TV campaign financed by those whose pockets are lined when projects like these are stymied.

Setting aside the merits or drawbacks of any particular project, though, there is something more fundamental at stake. There is something inherently odious about retroactive legislation, particular when so narrowly targeted. Upholding this Initiative would have the perverse effect of encouraging any industry who smells a competitor to gather signatures, slap together a misleading campaign, and coopt the citizen initiative process as a new business expense. That Cianbro, an open-shop contractor, and the IBEW Local 104, a large union labor organization, have agreed to join forces to support NECEC LLC's position speaks volumes as to how universally important these issues are to the workers and employers here in Maine and the lasting real-world impact these retroactive laws will have if this Initiative is upheld. Franceschi Aff. ¶ 4; Burgess Aff. ¶ 6.

The construction industry is especially at risk given the reliance on the issuance of permits and the stability that comes with upholding them and contracts. Construction projects of this size and complexity are organized and planned years in advance. Franceschi Aff. ¶¶ 30-31. This planning requires companies like Cianbro to allocate resources, acquire and dedicate equipment,

secure manpower, and line up subcontractors, which in turn must do the same. *Id.* ¶ 42. There is careful and long-term planning to ramp up construction and staffing, which includes seasonal considerations that limit construction activities during mud season and based on other environmental and wildlife concerns. *Id.* ¶ 43. Vitiating the permits on which these carefully laid plans rely jeopardizes the workflow of construction firms, subcontractors, and Maine families who rely on the planned work. Many subcontractors may not be able to manage the financial implications of such an immediate halt and disruption to business. *Id.* ¶ 37. Should the Corridor project cease for a sustained period and then restart, some of these subcontractors may have moved on to other projects and be unavailable to assist, driving up costs and challenges for Cianbro and others. *Id.* These disruptions have real-life consequences – including destabilization of the workforce necessary to maintain Maine's electrical infrastructure. Burgess Aff. ¶¶ 7-8. Cianbro and its subcontractors employ Mainers, whose lives and livelihoods are already being upended as their work is subjected to such uncertainty. Franceschi Aff. ¶ 22; Burgess Aff. ¶¶ 8-9. Construction companies must be able to move forward on projects once valid permits are issued and the project has cleared all hurdles under existing laws.

If Maine were to require absolute finality of all permitting, including the final and non-appealable resolution of any and all possible legal challenges

before a right to complete a project vests, it would greatly harm the industry's ability operate efficiently and effectively, making construction of clean energy projects or other major infrastructure projects virtually impossible. Why would a developer come to Maine and go through the entire permitting, bidding and planning process, and do everything correctly and lawfully, only to have the project pulled out from under them after work has begun? Make no mistake, upholding this Initiative puts renewable energy projects, such as wind, solar, offshore wind, and tidal energy squarely in the crosshairs of oil and gas-generated power companies who could again easily coopt the citizen-led initiative to protect their market share and deter needed investments in the state's future clean energy needs. Cianbro has long been associated with renewable energy projects like this, and its workforce and those of organizations like IBEW Local 104 and its members would pay the price for the unfair uncertainty that retroactive cancellation would cause.

One shudders to think what efforts will come out of the competitor-funded work while Maine continues to try to emerge as a leading producer of wind, solar, and tidal power development. Are future projects for those industries expected to put projects on ice until every conceivable challenge can be attempted and attempted again to defeat it? Must the Court don blinders when assessing ballot questions that generate tens of millions of

dollars in out-of-state advertising dollars? Can a company really be singularly targeted and then divested of its rights after it started because a competitor arranges enough signatures to be submitted? Whether it is the construction of a hospital, school, or even local sports arena, the notion that any project could be undermined by this precedent after construction has begun pursuant to valid permits because the opponent stands to lose an opportunity or just does not like the proponent is manifestly unjust and should not be allowed to stand. Affirming the Business Court's denial will produce precisely such a result.

CONCLUSION

For the reasons stated herein, the Business Court's erred when it denied Plaintiffs' motion for injunctive relief. The doctrine of vested rights applies to this retroactive legislation. This Court should vacate the Order of the Business Court and enter a preliminary injunction in NECEC LLC's favor.

Dated at Portland, Maine this 16th day of February 2022.

/s/ *Philip M. Coffin III*

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CERTIFICATE OF SERVICE

I, Philip M. Coffin III, hereby certify that on this 16th day of February 2022, I, as agreed by the parties, caused electronic copies of the foregoing Brief of Appellant-Intervenors Cianbro Corporation and the International Brotherhood of Electrical Workers Local 104 to be served on counsel for the Appellee, the State of Maine, and Appellee-Intervenors, by electronic mail.

/s/ *Cyrus E. Cheslak*

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