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 APPEAL FROM THE BUSINESS AND CONSUMER COURT
DOCKET NO. BCD-CIV-2021-00058

BRIEF OF INTERVENOR-PLAINTIFF/APPELLANT H.Q. ENERGY SERVICES (U.S.) INC.

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes, Codes and Rules

Constitutional Provisions

Other Authorities

INTRODUCTION

The New England Clean Energy Connect Project (the "Project") is a large-scale transmission project that will introduce base load[1] clean hydroelectric power generated by existing hydroelectric dams in Québec into the New England regional power grid. As with most, if not all projects of this scale, the Project has generated opposition, much of which has been funded by competing fossil fuel burning electric generators. In this regard, the Project has been faced with two successive citizens' initiatives that have sought, by statutory direction, to circumvent the strictures of the Maine Constitution.

The first attempt failed in August 2020, when this Court declared the first initiative targeting the Project was an attempt to exercise the executive power, and is not within the scope of the initiative power. *See Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 273 A.3d 882. In so ruling, this Court recognized the first initiative for what it was—an extraordinary attempt by opponents of the Project (including competitor fossil-fuel burning electric generators) to enlist the "unmatched" legislative power to "sweep away settled expectations." *Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994); *Avangrid*, 2020 ME 109, 273 A.3d 882.

[1] Base load power is the electric power provided at a constant, steady rate that is required to provide power on an around-the-clock basis to meet ordinary demand. *See, e.g.*, Glossary, U.S. ENERGY INFO. ADMIN., available at https://www.eia.gov/tools/glossary/?id=B (last visited Feb. 14, 2022).

Undeterred by the setback, a mere five weeks after this Court's decision in *Avangrid*, opponents of the Project presented the current initiative (the "Initiative"). Having learned from their mistake, the opponents attempted to cloak the Initiative under the thinnest veil of general applicability by avoiding naming the Project or particular executive actions. The Business and Consumer Court (Duddy, J.) accepted this, telling developers of projects and developments in Maine, no matter how large or small, that they may not rely on existing law and that opponents (including those massively funded by market competitors) can retroactively change the rules and "sweep away [their] settled expectations." *Landgraf*, 511 U.S. at 266.

The implications of the Business Court's decision are profound. Together with the Initiative, it sends the message that, in Maine, no matter how carefully governmental standards and processes have been crafted, no matter how diligent and conscientious developers are in complying with such standards and participating in the processes, and no matter how well-informed particular decisions (made by those with expertise in the field) are, a small group of competitor-funded citizens can retroactively change the laws, obviate permits and administrative actions, and overturn judicial decisions. In short, the Initiative seeks to convert Maine statutory and constitutional law into a rope of sand.

But this is not the law of Maine. "[W]hen a statute—including one enacted by citizen initiative—conflicts with a constitutional provision, the Constitution prevails." *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188. The Initiative constitutes a direct attack on executive and judicial processes, violating basic constitutional principles and protections in the process. Moreover, the Initiative and the Business Court's decision threaten to prevent the realization of $250 million in support benefits specific to the State of Maine and Maine ratepayers, urgently needed reduction in regional greenhouse gas ("GHG") emissions, and increased grid reliability and price stability. This Court should not and cannot allow such precedent to stand.

STATEMENT OF THE FACTS

In order to avoid duplication and unnecessary expenditures of judicial resources, H.Q. Energy Services (U.S.) Inc. ("HQUS") fully agrees with and adopts the statement of facts set forth by Appellants NECEC Transmission LLC and Avangrid Networks, Inc. (collectively referred to herein, at times, as "NECEC LLC") as if fully set forth herein. *See* Procedural Order, Docket No. BCD-21-416 at 2 (Jan. 3, 2022) (encouraging joint briefs to the extent possible "to avoid unnecessary duplication of effort and argument"). The following additional facts are provided only for completeness and ease of reference for this Court.

HQUS is an indirect wholly-owned subsidiary of Hydro-Québec ("HQ"), the provincial electric utility of the Province of Québec in Canada. (HQUS Compl. ¶ 3.)[2] HQUS sells the electricity generated by HQ's hydroelectric power facilities in Québec; one of the lowest GHG emitting forms of electricity generation. (HQUS Compl. ¶ 3.) In 2017, an affiliate of HQ partnered with Central Maine Power Company ("CMP") to submit a proposal in response to requests for proposals for clean energy by Massachusetts electric distribution companies ("EDCs") pursuant to the Green Communities Act, 2008 Mass. Acts ch. 169, § 83D, as amended by 2016 Mass. Acts ch. 188. (A. 20; A. 80, ¶¶ 26-27.)

The proposal called for the construction of a 1,200 MW high-voltage direct current ("HVDC") transmission line—the Project—to connect HQ's existing transmission system and transmit energy from HQ's existing hydroelectric power generating facilities to the New England electric grid. (A. 80, ¶ 27.) The Project will directly result in delivery of 1,200 MW of clean hydroelectricity generated by HQ into the New England regional grid, resulting in a reduction in wholesale electricity prices, reduction in reliance on regional high GHG-emitting fossil fuel plants, and increased grid reliability. (A. 81, ¶ 27.)

After the proposal was selected by Massachusetts, CMP, HQUS and three Massachusetts EDCs entered into transmission service agreements ("TSAs"),

[2] "HQUS Compl.", as used herein, refers to Plaintiff-Intervenor H.Q. Energy Services (U.S.) Inc.'s Complaint-In-Intervention filed below.

requiring CMP to provide 1,200 MW of transmission service via the Project to the EDCs and HQUS for a period of 40 years. (A. 31; A. 81, ¶ 28.) HQUS subsequently entered into three Power Purchase Agreements ("PPAs") with the EDCs, which obligate HQUS to sell 1,090 MW of energy to the EDCs for the first 20 years of the Project's useful life. (A. 31; A. 81, ¶ 28.) HQUS may sell additional clean energy using the remaining 110 MW capacity in years 1-20 into the New England electricity market or to other buyers, such as Maine. (A. 31; A. 81, ¶ 28.) In the final 20 years of the Project's useful life (years 21-40), HQUS may use the full transmission capacity of the Project to sell 1,200 MW of clean energy in the New England market or enter into further PPAs, as appropriate. (A. 31; A. 81, ¶ 28.)

If the Project does not reach commercial operation, NECEC Transmission LLC (as the assignee of CMP's rights) will be unable to provide HQUS with the necessary transmission service to transmit the electricity generated by HQ to the New England transmission system and to the EDCs and other New England buyers. (HQUS Compl. ¶ 22.) Because HQUS will be unable to meet its obligations under the PPAs (providing the EDCs with certain committed amounts of electric energy), the PPAs will be substantially impaired or terminated, resulting in significant economic losses. (HQUS Compl. ¶¶ 17, 22.) Moreover, eliminating this source of electricity from New England would significantly impede the well-

considered and urgent governmental policies intended to decarbonize the ISO-NE grid and would remove a stable, reliable source of electric generation capacity that is not dependent on increasingly constrained sources of natural gas. (*See* A. 84-85, ¶¶ 38-39.)

In order to transmit electricity from HQ's existing hydropower generators to the Project, HQ has concurrently begun the construction of an HVDC transmission line running from an existing substation in Thetford Mines, Québec to the United States-Canada border at Beattie Township. (A. 20; A. 82, ¶¶ 30-31.) This transmission line will interconnect with the Project and allow HQUS to deliver HQ's clean energy into the New England electricity market and to other buyers. (A. 82, ¶ 30.)

CMP and other Project supporters and opponents fully participated in the rigorous review processes that have been designed by the Maine and federal governments to ensure that developments such as the Project will serve the public interest. Indeed, after extensive hearings, the Maine Public Utilities Commission ("MPUC") issued a 100-page order granting a Certificate of Public Convenience and Necessity ("CPCN") for the Project.[3] (A. 6-7); *NextEra Energy Resources,*

[3] *See Central Me. Power Co.*, Request For Approval of CPCN For The New England Clean Energy Connection Construction of a 1,200 MW HVDC Transmission Line From Quebec-Maine Border to Lewiston Pertaining to Central Maine Power Company, No. 2017-00232, Order (Me. P.U.C. May 3, 2019) ("PUC Order"), available at https://mpuc-cms.maine.gov/CQM.Public.WebUI/Common/Casemaster.aspx?CaseNumber=2017-00232 (last visited Feb. 11, 2022).

LLC v. Me. Pub. Utils. Comm'n, 2020 ME 34, ¶¶7-10, 227 A.3d 1117. In addition, the MPUC approved a stipulation providing for a package of benefits for Maine. (A. 84, ¶ 36; A. 86, ¶ 43.) By virtue of a separate agreement (the "Support Agreement") HQUS agreed to be responsible for the payment of certain portions of those benefits. (HQUS Compl. ¶ 8.) In particular, these benefits include $170 million in payments by HQUS to specific funds for the benefit of Maine and Maine ratepayers. (HQUS Compl. ¶ 8.)

HQUS's payments were originally to commence upon the commercial operation of the Project but, as part of a second stipulation, and as also reflected in the Support Agreement, HQUS agreed to accelerate the commencement of these payments to January 1, 2021.[4] (HQUS Compl. ¶ 9.) Additionally, on July 9, 2020, HQUS entered into an agreement with Governor Janet Mills (through the Governor's Energy Office, on behalf of the State of Maine), to sell 500,000 MWh of electricity per year, for 20 years, to Maine at a $4.00/MWh discount to market rate (the "Mills Agreement").[5] (HQUS Compl. ¶ 7.) As of October 1, 2021, HQUS has made four (4) quarterly benefits payments of $2,375,000 each, totaling

[4] HQUS is also required to make additional quarterly payments of $62,500 for a period of 40 years ($10,000,000 total) to NECEC LLC, which funds will be used by NECEC LLC to satisfy separate obligations to beneficiary groups pursuant to a stipulated agreement between the MPUC and NECEC LLC. (HQUS Compl. ¶ 8, n.1.)

[5] The Mills Agreement is available at https://www.maine.gov/energy/sites/maine.gov.energy/files/inline-files/HQ-GEO-Commitment.pdf (last visited Feb. 11, 2022).

$9,500,000, into funds for the benefit of Maine and Maine ratepayers. (HQUS Compl. ¶ 10.)

On November 2, 2021, the voters of the State of Maine approved the Initiative—a citizens' initiative which seeks to bar completion of the Project by amending Title 12 and Title 35-A of the Maine Revised Statutes and applying such amendments retroactively to the Project. (A. 28-30.) The following day, NECEC LLC and Avangrid Networks, Inc. filed a Verified Complaint naming the Bureau of Parks and Lands (the "Bureau"), the MPUC, the Maine Senate and the Maine House of Representatives as defendants (collectively, the "State Defendants"). (A. 16, 71-135.) Multiple parties intervened both in support of and opposition to the lawsuit, including HQUS. (A. 19.)

The Verified Complaint was accompanied by a motion for a preliminary injunction. (A. 16; A. 162-198.) After expedited briefing on the motion for preliminary injunction and limited oral argument, the Business Court denied the motion, but recognized that "[t]he applicable law . . . is uncertain on many disputed points" and that NECEC LLC, HQUS and the other supporting intervenors "have legitimate counter arguments on all disputed points of law." (A. 16-70; A. 17.) On motion of NECEC LLC, the Business Court reported the lawsuit to this Court pursuant to Rule 24(c) of the Maine Rules of Appellate Procedure. (A. 12-25.)

STATEMENT OF THE ISSUES

1. Whether the Business Court erred and abused its discretion when it determined that Appellants failed to show a likelihood of success on the merits by failing to determine that:

    a. Sections 1 and 4 of the Initiative present multiple constitutional deficiencies on their face, including because they were not duly enacted and are repugnant to the plain meaning of Article IX, Section 23 of the Maine Constitution.

    b. Sections 1, 4 and 5 of the Initiative violate the separation of powers by usurping the powers of the judicial and executive branches and attempting to overturn or render unenforceable judicially confirmed final agency actions.

    c. The Initiative impermissibly targets the Project in violation of Article IV, Part Third, Section 1 of the Maine Constitution.

2. Whether the Business Court abused its discretion when it failed to determine that the grant of a preliminary injunction would be in the public interest.

SUMMARY OF THE ARGUMENT

Sections 1 and 4 of the Initiative invoke and rely upon the authority of Article IX, Section 23 of the Maine Constitution for their validity and effect. But neither Article IX, Section 23, nor any other provision of the Maine Constitution provide the electors with such authority.

First, the power to enact implementing legislation, designate lands, and approve reductions or substantial alterations of use of designated lands is expressly reserved to the Legislature. It does not extend to the Maine voters as electors. Despite this, Sections 1 and 4 of the Initiative both purport to draw on the constitutional authority provided by Article IX, Section 23 and statutorily apply it. But, because Article IX, Section 23's authority is confined to the Legislature, Sections 1 and 4 of the Initiative exceed the scope of the initiative power, and thus were not duly enacted. On this basis alone, Sections 1 and 4 of the Initiative cannot be considered to have the force of law. Because the Initiative is an integrated whole with a singular purpose, no provision can be considered severable and if any one provision is invalidated, the whole falls.

But even if it is assumed the voters did have the authority to approve the entirety of the Initiative, the individual sections still violate constitutional provisions in several ways. First, Sections 1 and 4 of the Initiative manifestly and materially misapply the plain meaning of Article IX, Section 23 by converting its

deliberate conditional terms and individualized application into a categorical and absolute approach. Second, Sections 1, 4 and 5 of the Initiative usurp the functions of the executive and judicial branches, including by attempting to overturn executive action that has been judicially confirmed. Third, the Initiative directly targets the Project through terms and phrases, specific dates, and circumstances particular to the Project in an attempt to ensure the Initiative is retroactive *just enough* to capture and prevent the completion of the Project. In short, the Initiative attempts to render executive and judicial powers obsolete, executive and judicial actions and decisions unenforceable, and the processes that produced them nullities. The Business Court erred when it failed to recognize these deficiencies.

In addition, the Business Court also erred and abused its discretion when it failed to properly consider the substantial beneficial public interest in the completion and operation of the Project, including a reduction in regional GHG emissions, increased grid reliability and price stability, and direct economic investments in and benefits for Maine.

STANDARD OF REVIEW

The party seeking a preliminary injunction has the burden of demonstrating that four factors are met: "(1) it will suffer irreparable injury if the injunction is not granted; (2) such injury outweighs any harm which granting the injunctive relief would inflict on the other party; (3) it has a likelihood of success on the merits (at

most, a probability; at least, a substantial possibility); and (4) the public interest will not be adversely affected by granting the injunction." *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129. These factors "are not to be applied woodenly or in isolation from each other; rather, the court . . . should weigh all of these factors together." *Dep't of Env. Prot. v. Emerson*, 563 A.2d 762, 768 (Me. 1989).

The grant or denial of injunctive relief, as an equitable remedy, is reviewed by this Court for an abuse of discretion. *Eaton v. Cormier*, 2000 ME 65, ¶ 4, 748 A.2d 1006. Any fact-finding necessary for such action is reviewed for clear error. *Bangor Historic Track*, 2003 ME 140, ¶ 11, 837 A.2d 129. Legal conclusions are reviewed *de novo*, *State v. Dubois Livestock, Inc.*, 2017 ME 223, ¶ 6, 174 A.3d 308, and mistakes of law constitute an abuse of discretion, *see Smith v. Rideout*, 2010 ME 69, ¶ 13, 1 A.3d 441.

ARGUMENT

1. This case was properly reported pursuant to Rule 24(c) of the Maine Rules of Appellate Procedure.

Rule 24(c) of the Maine Rules of Appellate Procedure provides a trial court with the ability, "on motion of the aggrieved party," to report "question[s] of law involved in an interlocutory order or ruling" to this Court "before any further proceedings are taken." M.R. App. P. 24(c). Upon receipt of a report, this Court conducts "an independent examination to decide if answering the question is

consistent with [its] basic function as an appellate court." *Bank of Am. v. Cloutier*, 2013 ME 17, ¶ 8, 61 A.3d 1242. This includes consideration of "whether (1) the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) the question might not have to be decided because of other possible dispositions; and (3) a decision on the issue would, in at least one alternative, dispose of the action." *Id.* Each of these factors supports accepting the report here.

Although the acceptance of a report is the exception and not the rule, *see Maine Senate v. Sec'y of State*, 2018 ME 52, ¶ 14, 183 A.3d 749, this "case presents many difficult questions," the resolution of which "carries regional and national implications." (A. 17-18.) Many of the questions and issues presented by this case are not only novel, but fundamental to Maine's constitutional system. Resolution of these issues by this Court—whether in favor of the appellants or otherwise—"will likely bring this litigation to a swift conclusion." (A. 15.) It was, therefore, appropriate for the trial court to report this case "in its entirety," and all issues presented by this case are now properly before this Court. (A. 15.) *See State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981).

2. The Business Court abused its discretion in denying the preliminary injunction because it made multiple errors of law in determining the Appellants failed to show a likelihood of success on the merits.

The "sine qua non" of the four-part preliminary injunction analysis is whether a likelihood of success of the merits is shown. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics & Elections*, 2015 ME 103, ¶ 28, 121 A.3d 792. This factor is satisfied if there is "a probability" of success or, at minimum, "a substantial possibility" of success on the merits. *Bangor Historic Track*, 2003 ME 140, ¶ 9, 837 A.2d 129.

The Business Court, despite finding that there were "legitimate counter arguments on all disputed points of law," determined that this factor was not met. (A. 17.) In order to reach this conclusion, the Business Court made several errors of law with respect to arguments that, if successful, would have mandated a preliminary injunction be entered. The Business Court, therefore, erred when it declined to grant preliminary injunctive relief.

a. If any portion of the Initiative is determined to be invalid, then the entirety must fall because no single provision is severable from the remainder.

Prior to reaching the merits of the numerous issues presented in this report, a preliminary discussion of severability is appropriate.[6] The proponents of the

[6] The question of severability was not addressed by the Business Court because it erroneously determined that no provision of the Initiative violates the Maine Constitution. If it had correctly determined that any of Sections 1, 4 or 5 were invalid, then it would have been

Initiative circulated a petition "describ[ing] a single [a]ct proposing multiple statutory amendments . . . aimed at the stated, but compound, purpose to 'Require Legislative Approval of Certain Transmission Lines, Require Legislative Approval of Certain Transmission Lines and Facilities and Other Projects on Public Reserved Lands *and* Prohibit the Construction of Certain Transmission Lines in the Upper Kennebec Region.'" *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶¶ 3, 27, 256 A.3d 260. After gathering sufficient signatures to place the Initiative on the November 2021 ballot, proponents of the Initiative supported, and subsequently vigorously defended from attack, a single compound question being presented to the voters. *Id.* ¶ 8. The proponents of the Initiative are now subject to the consequences of their consolidated approach.

As is discussed herein, Sections 1, 4 and 5 of the Initiative each present numerous constitutional deficiencies and are invalid as applied to the Project. However, even if this Court ultimately determines that less than all portions of the

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forced to address this issue. The issue, however, was preserved by the State Defendants when they asserted that, even if the Business Court found Section 1 and portions of Section 4 unconstitutional, the remainder of Section 4 and Section 5 of the Initiative would still bar the Project from being completed. HQUS further addresses this argument here because a decision by this Court that the Initiative is invalid as applied to the Project, whether in toto or by reason of non-severability will "bring this litigation to a swift conclusion." (A. 15.)

Initiative are unconstitutional, the entirety of the Initiative must still fall because no provision is severable from the remainder.[7]

The Maine Constitution supports this conclusion. When a petition is circulated for signature by voters, the Maine Constitution requires the petition "set forth the full text of the measure requested or proposed." Me. Const. art. IV, pt. 3, § 20. This requirement shows that the text of the proposed measure is integral to the petition process and a person's decision to sign the petition.[8] This reasoning is reinforced when it is recognized that, at the polls, the voters could only vote upon the question presented to them. *Cf. Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 16, 187 A.3d 609 ("Interpreting citizen-enacted legislation requires

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[7] The general rule is that statutory provisions are severable even in the absence a severability clause. *See* 1 M.R.S. § 71(8); *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973). This Court has explained, however, that this rule of construction applies only if "the rest of the statute 'can be given effect' without the invalid provision, and the invalid provision is not such an integral part of the statute that the Legislature would only have enacted the statute as a whole." *Opinion of the Justices*, 2004 ME 54, ¶ 23, 850 A.2d 1145 (quoting *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986)). Thus, in "examining the effectiveness of the remaining provisions of [an initiated bill], . . . [a] court would have to decide: (1) whether the invalid provisions are so integral to the initiated bill that the entire act would have to be struck down, and (2) whether, individually, the remaining provisions can function and be given effect absent the invalid provisions." *Opinion of the Justices*, 2004 ME 54, ¶ 24, 850 A.2d 1145.

[8] The 2004 *Opinion of the Justices* does not diminish this point. 2004 ME 54, 850 A.2d 1145. There, the Justices opined that an initiated bill *may* be severable and is subject to the same analysis that any other legislation undergoes. *Id.* ¶¶ 21-26. Because the specific initiated bill at issue in the 2004 *Opinion* not only contained a severability clause, but also "contained multiple separate goals," the Justices were "of the opinion" that certain provisions were "not so integral to the initiative as to invalidate the bill in its entirety" if one provision was invalidated. *Id.* ¶¶ 28-29. This is a wholly separate analysis from the present Initiative, which was presented to the voters *without* a severability clause and which, as a result, could not inform a voter that they were signing for legislation that may or may not stand as a whole.

[the Court] to ascertain the will of the people rather than the will of the Legislature." (quotation marks omitted)). Presented as a take-it-or-leave-it package bound by conjunctive links, the ballot question stated:

> Do you want to ban the construction of high-impact electric transmission lines in the Upper Kennebec Region ***and*** to require the Legislature to approve all other such projects anywhere in Maine, both retroactively to 2020, ***and*** to require the Legislature, retroactively to 2014, to approve by a two-thirds vote such projects using public land?

(A. 14 (emphasis added)); *cf. Caiazzo*, 2021 ME 42, ¶ 24, 256 A.3d 260 ("[S]plintering a single bill that was proposed to be presented for a yes-or-no vote into multiple pieces of legislation might be inconsistent with the intent of those who drafted or signed the petition.").

Because the Initiative was presented as a compound question with a single purpose, it is not possible, as a matter of law, to "determine that the legislation would have been enacted except as an entirety." *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973); *see also Opinion of the Justices*, 2004 ME 54, ¶ 24, 850 A.2d 1145. The "Citizen's Guide" prepared by the Secretary of State, *see* 1 M.R.S. § 353, bolsters this conclusion by providing that a "'yes' vote is to enact the initiated bill *in its entirety*." *Maine Citizen's Guide to the Referendum Election,* ME. SEC'Y OF STATE at 7, available at https://www.maine.gov/sos/cec/elec/upcoming/pdf/11-21citizensguide.pdf (last visited Feb. 8, 2022) (emphasis added).

Based on the foregoing, each individual section of the Initiative must be considered "such an integral part of the [Initiative] that the [voters] would only have [signed the petition or approved] the [Initiative] as a whole." *Bayside Enters., Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986). Accordingly, "if one portion [of the Initiative] offends the Constitution, the whole must fall." *LaPointe*, 308 A.2d at 292. As set forth throughout this brief, Sections 1, 4 and 5 of the Initiative "offend[] the Constitution," and, therefore, "the whole must fall." *Id.*

b. The Business Court erred as a matter of law when it failed to determine that the Initiative presents on its face multiple constitutional deficiencies.

At its core, the Initiative is an attempt to appropriate the supermajority legislative approval requirement from Article IX, Section 23 of the Maine Constitution and apply it in a specific, retroactive manner. In full, Article IX, Section 23 of the Maine Constitution, provides:

> **State park land.** State park land, public lots or other real estate held by the State for conservation or recreation purposes and *designated by legislation implementing* this section *may not* be reduced or its uses substantially altered *except on the vote of 2/3 of all the members elected to each House*. The proceeds from the sale of such land must be used to purchase additional real estate in the same county for the same purposes.

Me. Const. art. IX, § 23 (emphasis added).

Deconstructed into its component parts, the relevant portion of Article IX, Section 23 does three things: (1) subjects certain state-held lands to its protections and contemplates implementing legislation to designate such lands; (2) requires a determination of whether a proposed use or action would reduce or substantially alter the uses of protected lands (made by the executive agency with management responsibility for the lands at issue); and (3) requires that, if a proposed action would result in a reduction or substantial alteration of use, the proposed action be approved by a 2/3 vote of all members of each House of the Legislature. *Id.*

It is equally important to understand that Article IX, Section 23 requires, by its plain text, that the *Legislature* act and does *not* authorize the electors to act by initiative. *See Vorhees v. Sagadahoc Cty.*, 2006 ME 79, ¶ 6, 900 A.2d 733 ("[This Court will] apply the plain language of the constitutional provision if the language is unambiguous."); *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) ("[I]n construing the Constitution we seek the meaning which the words would convey to an intelligent, careful voter."). It also does *not* remove or alter the authority of executive agencies to manage designated lands in accordance with their delegated authority and statutory authorizations. It does *not* authorize the Legislature to determine that, notwithstanding what the executive or judicial branches may conclude in individual, case-specific circumstances, a proposed action is or is not a reduction or substantial alteration of use. It is not an allocation of unlimited and

unbridled power to the Legislature (or the electors) to legislatively adjudicate whether an action is or is not a substantial alteration of use in a manner that is unreviewable or otherwise insulated from judicial review. *Cf.* Appellees'/Cross-Appellants Motion to Dismiss All Appeals as Moot, Docket No. BCD-21-257, at 19 (Dec. 23, 2021) (the "Black Mot. to Dismiss"), available at www.courts.maine.gov/news/black/_motion_to_dismiss.pdf (last visited Feb. 11, 2022) (arguing that the Initiative "obviates" the need for judicial review).

Stated differently, Article IX, Section 23 did not change the executive's duty to manage and administer designated lands or the judiciary's responsibility to adjudicate related claims. Article IX, Section 23 did not alter the allocation of powers among the three branches of the Maine government. Rather, except for a very narrow role created for the Legislature alone, Article IX, Section 23 maintains the status quo by requiring that designated lands not be reduced or the longstanding uses thereof be substantially altered except by the 2/3 vote of all members of each House of the Legislature.

The Initiative represents an extraordinary attempt to appropriate this constitutional scheme and apply it in a manner intended to block one specific project. In doing so, the Initiative has twisted the intent, meaning, effect and application of Article IX, Section 23. The Business Court erred as a matter of law

when it failed, albeit with express hesitation, to appreciate this in upholding the derogation of the plain terms of Article IX, Section 23 by the Initiative.

i. The Initiative was not duly enacted because the initiative power does not include the authority to approve substantial alterations of use under Article IX, Section 23 or to alter/amend the Maine Constitution.

The Initiative presents a threshold question of whether the electors, when exercising the initiative power, *see* Me. Const. art. IV, pt. 3, § 18, have the authority to (1) enact legislation that purports to exercise the Legislature's approval authority under Article IX, Section 23 or (2) amend the meaning of Article IX, Section 23.[9] Because, as discussed below, the answer to these questions must be

[9] In order for the legislative approval requirement under Article IX, Section 23 to be triggered, there must first be a determination that a reduction or substantial alteration of use will occur as a result of a proposed action. Article IX, Section 23 does not state *who* makes that determination. The executive, judicial and legislative branches have all acquiesced in the understanding that it is the executive agency tasked with managing the land at issue who makes that determination. *See, e.g., Memorandum: Extent of DEP's Rulemaking Authority Regarding Mining on State-Owned Lands*, Office of the Me. Att'y Gen., at 4 (Sep. 14, 2016); *Black v. Cutko*, Docket No. BCDWB-CV-2020-29, 2021 WL 3700685, at *9 (B.C.D. Aug. 10, 2021). This long-standing practice is not surprising because it comports with the separation of powers and the roles of each branch of the Maine government. *See Avangrid*, 2020 ME 109, ¶ 33, 237 A.3d 882 ("In general, the first branch enacts the laws, the second approves and executes them, and the third expounds and enforces them."); *see also Dudley v. Greene*, 35 Me. 14, 16 (1852) (legislative and executive duties for public reserved lands).

If Sections 1 and 4 of the Initiative do not constitute a reduction or substantial alteration of use, then they constitute an attempt to override this understanding of Article IX, Section 23 and provide the Legislature (and, perhaps, the electors) with the ability to legislatively determine—that is, legislatively adjudicate—the question of whether a particular proposed action would or would not cause a reduction or substantial alteration of use. This would amend the plain meaning and effect of Article IX, Section 23 and violate the separation of powers. Such a reallocation of power may only be accomplished through constitutional amendment and the electors have no power to propose such an amendment. *See* Me. Const. art. IV, pt. 3, § 18(1) ("The electors may propose to the Legislature for its consideration any bill, resolve or resolution,

no, Sections 1 and 4 of the Initiative were not duly enacted and cannot have the force of law.[10]

By the express terms of Article IX, Section 23, no action or use of designated lands (whether by executive action, legislative action, judicial action or otherwise) may reduce or substantially alter the uses of such land except by vote of 2/3 vote of all members elected to each House of the Legislature. Once it is properly determined that a proposed use would reduce or substantially alter the uses of designated lands, Article IX, Section 23 empowers and obligates the Legislature, and the *Legislature alone*, to determine whether or not to approve such use. Moreover, such approval must be by two-third of all members elected to each House—nothing else will do.

The Initiative attempts a novel, and unconstitutional, end-run around the strictures of Article IX, Section 23 by conclusively "deeming" whole categories of uses of these lands as substantial alterations. But, a close review of Article IX, Section 23 makes it clear that a proposed use *must* be weighed against the

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including bills to amend or repeal emergency legislation *but not an amendment of the State Constitution*."); *see also* Me. Const. art. X, § 4.

[10] This issue was raised when the State Defendants responded to HQUS' various arguments by claiming that Article IX, Section 23 "'belong[s] to' the Legislature." *See* State Defendant's Response to Briefs of Plaintiff-Intervenors (the "State Defendants' Response") at 8 (quoting Me. Const. art. III, § 2). Having had no opportunity to respond to the State Defendants' arguments below due to the expedited briefing schedule, HQUS does so herein in order to raise a fundamental and important issue for this Court's consideration and to preserve judicial resources.

spectrum of pre-amendment uses. Absent the existence of sanctioned, pre-amendment uses, the phrase "uses substantially altered" would become meaningless. *Cf. State v. McLaughlin*, 2018 ME 97, ¶ 9, 189 A.3d 262 (rules of construction require rejection of interpretation that "render[s] some language mere surplusage." (quotation marks omitted)); *Opinion of the Justices*, 2015 ME 107, ¶ 35, 123 A.3d 494 ("[T]he same principles employed in the construction of statutory language hold true in the construction of a constitutional provision."). This raises the question of what spectrum of uses comprise those constitutionally protected by Article IX, Section 23?

The legislative history of Article IX, Section 23 provides nothing to indicate that it was intended to eliminate any of the established uses of designated lands in 1993. The surest indicator of what constitutes an approved and established use is one authorized by statute. For the public reserved lands—the category of designated lands relevant to the Project—many statutorily-approved uses were then in effect, including leases for utility lines, pipelines, and railroads. *See, e.g.*, P.L. 1987, ch. 737, §§ B2, C106 (codified at 12 M.R.S. § 585, repealed by P.L. 1997, ch. 678, § 5). The Legislature was also well aware that the public reserved lands were subject to the Articles of Separation and the beneficial public use requirement they impose on public reserved lands. *See* pp. 31-35, *infra*.

In fact, following the addition of Article IX, Section 23, the Legislature, in a subsequent reorganization of the relevant statutes, reenacted the Bureau's authority to lease public reserved lands *without change*. *See* P.L. 1997, ch. 678, § 13 (codified at 12 M.R.S. § 1852). *See also* Reply Brief of Appellant's Bureau of Parks and Lands and Director Cutko, *Black v. Cutko*, Docket No. BCD-21-257, at 4-15 (Jan. 24, 2022), available at https://www.courts.maine.gov/news/black/appellants_reply_brief.pdf (last visited Feb. 11, 2022).

Sections 1 and 4 of the Initiative attempt to alter the spectrum of pre-amendment uses of designated lands (and public reserved lands in particular) to exclude electric transmission lines, landing strips, pipelines and railroads, and, in effect, substantially alter the uses of such lands.[11] The Legislature did not approve the Initiative by 2/3 vote of all members elected to each House; in fact, the Legislature's failure to act on the matter was properly considered to be a legislative disapproval. *See Farris ex rel. Dorsky v. Goss*, 143 Me. 227, 231-32, 60 A.2d 908, 911 (1948). The voters of Maine, when acting to approve initiated legislation, do not act as "members" of the Legislature, nor is approval by a 2/3 margin required.

[11] Just as an *affirmative* action can reduce or substantially alter the uses of land (for example, if the Bureau attempted to sell a portion of a state park), so too can those that would *prohibit* a previously authorized use (for example, if the Bureau attempted to prohibit recreation in state parks).

The question becomes, then, whether the electors, by virtue of Article IV, Part Third, Section 18 of the Maine Constitution, nevertheless have the authority to initiate and approve a measure with a subject matter governed by Article IX, Section 23? A straightforward examination of the scope of legislative power and application of standard rules of construction provide a clear answer to this question—no, the electors do not retain such authority.

In Maine, the Legislature is imbued with the "full power to make and establish all reasonable laws and regulations for the defense and benefit of the people of this State, not repugnant to this Constitution, nor to that of the United States." Me. Const. art. IV, pt. 3, § 1. The electors exercise a form of the legislative authority when initiating legislation. *See Avangrid*, 2020 ME 109, ¶¶ 15, 26-27, 237 A.3d 882. The initiative power, however, is not coextensive with the authority of the Legislature and the authority of the electors is not unbounded. Indeed, the Maine Constitution contains numerous instances in which certain functions or matters are reserved to the Legislature, thereby preventing the electors from initiating or otherwise acting directly on certain matters.[12]

[12] For example, the people cannot initiate a constitutional amendment, Me. Const. art. IV, pt. 3, § 18; art. X, § 4; a measure that de facto amends the United States Constitution, *Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996); a measure that is not legislative in character, *Avangrid*, 2020 ME 109, 237 A.2d 882; a measure that initiates a bond issues; Me. Const. art. IX, § 14; *Opinion of the Justices*, 159 Me. 209, 191 A.2d 357 (1963); or a measure that constitutes a surrender of the Legislature's taxation or police powers. Me. Const. art. IX, § 9; *First Nat. Bank of Boston v. Me. Turnpike Authority*, 136 A.2d 699 (Me. 1957). As regards other important acts, the people cannot, for example, initiate an act to recall a governor; the power of

Article IX, Section 23 is one such provision. First, the plain text of Article IX, Section 23 is clear—any legislation that reduces or substantially alters the use of designated lands must be enacted by vote of 2/3 of all members elected to each House. *See Vorhees*, 2006 ME 79, ¶ 6, 900 A.2d 733; *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983). Second, the express and singular requirement that such legislation be approved by 2/3 of the *full-elected membership* of both Houses of the Legislature demonstrates the exclusion of approval by any other method, including by citizens' initiative.[13] *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994); *Lee v. Massie*, 447 A.2d 65, 68 (Me. 1982). Third, the discreet subject matter of Article IX, Section 23 (protection of designated lands from reductions or substantial alterations of use) is far more specific than the broad, undefined scope of Article IV, Part Third, Section 18, thereby requiring that the more specific strictures of Article IX, Section 23 control. *See S. Portland Civil Serv. Comm'n v.*

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impeachment belongs to the legislature, Me. Const. art. IV, pt. 1, § 8 and art. IV, pt. 2, § 7; and the power to decide gubernatorial disability belongs to the Legislature and the Chief Justice of the Maine Supreme Judicial Court, Me. Const. art. V, pt. 1, § 14 and § 15. Likewise, the people cannot initiate an act to disqualify, punish, or expel a senator or representative, or remove a sheriff from office; those powers belong to each house or the Legislature. Me. Const. art. IV, pt. 3, § 3 and § 4; *Moulton v. Scully*, 111 Me. 428, 89 A. 944 (1914). *See generally* Derek P. Langhauser, *Legislative Amendment of Citizen Initiatives: Where the "Will of the Voter" Meets the "Consent of the Elector"*, 30 ME. POLICY REV. 60, 61-62 (2021), available at https://digitalcommons.library.umaine.edu/mpr/vol30/iss1/7/ (last visited Feb. 9, 2022).

[13] For example, the electors cannot initiate a constitutional amendment because the Maine Constitution requires that "2/3 of both Houses" enact a resolve, *see* Me. Const. art. X, § 4; *cf. Wagner v. Sec'y of State*, 663 A.2d 564, 566-67 (Me. 1995), nor may the electors initiate a bond issue because the Maine Constitution requires a vote by 2/3 of both houses, *see* Me. Const art IV, pt. 3, § 18; art. IX, § 14; *Opinion of the Justices*, 159 Me. 209, 214, 191 A.2d 357, 359 (1963).

City of S. Portland, 667 A.2d 599, 601 (Me. 1995); *Avangrid*, 2020 ME 109, ¶ 14, 237 A.3d 882. Fourth, and finally, Article IX, Section 23 was adopted in 1993—eighty-four years after the initiative power was added to the Maine Constitution in 1909—thus invoking the rule that more recent enactments deserve more weight than prior enactments. *See In re Dunleavy*, 2003 ME 124, ¶ 15 n. 12, 838 A.2d 338.

The Legislature "is presumed to be aware of the state of the law and decisions of [Maine courts]" when exercising the legislative power. *Stockley v. Doil*, 2005 ME 47, ¶ 14, 870 A.2d 1208. This necessarily includes when adopting a constitutional amendment. *Cf.* Me. Const. art. X, § 4 (Legislature proposes constitutional amendments by resolution). Article IX, Section 23 could have provided that the electors share the authority to legislate on the subject matters covered therein—for example, it could have provided for "vote of 2/3 of all the members elected to each House *or a majority at referendum upon a citizen initiative*." But the plain text of Article IX, Section 23 does not say that and this Court should not read such language into a constitutional amendment.[14]

[14] This is tacitly recognized in 12 M.R.S. § 598-A, where the Legislature designated lands pursuant to Article IX, Section 23, and stated that "[o]nce so designated….the designated lands remain subject to this provision and the Constitution of Maine, Article IX, Section 23, until such time as the designation is repealed or limited by 2/3 vote of the Legislature." Although this section raises an internal inconsistency to the extent that the Legislature purports to designate lands by majority but requires a supermajority to undesignate the same, it highlights that a citizens' initiative could not be used to designate additional lands nor to remove lands already designated from the protections of Article IX, Section 23.

Accordingly, because the electors lack the authority to enact legislation that reduce or substantially alter the constitutionally-sanctioned uses of designated lands, Sections 1 and 4 of the Initiative were not duly enacted, do not have the force of law, and cannot be applied to the Project.

ii. Sections 1 and 4 of the Initiative are inconsistent with and repugnant to the plain text of Article IX, Section 23 of the Maine Constitution.

Beyond the improper enactment of Sections 1 and 4 of the Initiative as a general matter, those sections are also inconsistent with the plain language of Article IX, Section 23. Both Section 1 and Section 4 appropriate the "uses substantially altered" standard from Article IX, Section 23 and apply it categorically and without exception to "deem" certain actions—i.e., leases for transmission lines and facilities, landing strips, pipelines and railroad tracks, and the construction of high-impact electric transmission lines—as substantially altering the uses of designated lands unequivocally, regardless of the actual scope or magnitude of those activities and without regard to the range of uses that exist and vary amongst the various types of designated lands themselves.[15] Application

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[15] There is an internal inconsistency between Section 1 and Section 4 of the Initiative despite having similar language and, presumably, the same intent. Section 1 provides that leases for certain types of linear projects "are deemed to substantially *alter the uses of the land* within the meaning of the Constitution of Maine, Article IX, Section 23." I.B. 1, § 1. This specifically ties its 2/3 approval requirement to Article IX, Section 23 and the substantial alteration of use standard.

of Article IX, Section 23, however, presents a series of mixed questions of law and fact, including: (1) what spectrum of "uses" are among those constitutionally-sanctioned and protected by Article IX, Section 23 for the particular land at issue; (2) whether, as compared against that spectrum of uses, the proposed action would alter those uses; and (3) if so, whether that alteration would be substantial in degree.

Sections 1 and 4 circumvents these inquiries in favor of a categorical and absolute "deeming" of substantial alteration of use. Therefore, even assuming that Sections 1 and 4 would otherwise be constitutionally valid, the unqualified application of a constitutional standard by the Initiative is plainly erroneous and cannot stand. *Cf. LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951); *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819) ("We must never forget that it is a *constitution* we are expounding."). Because Sections 1 and 4 attempt to limit or expand the meaning of, at a minimum, the constitutional terms "substantially" and "uses" by legislation, this Court should

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Section 4 of the Initiative, on the other hand, does not mention Article IX, Section 23 or otherwise provide a constitutional tie for its 2/3 approval requirement. *See* I.B. 1, § 4. Moreover, assuming that Section 4 is intended to tie into Article IX, Section 23 through the reference to 12 M.R.S. § 598-A and designated lands, Section 4 still utilizes the incorrect test by providing that high-impact transmission lines crossing designated lands are "deemed to substantially *alter the land*." To the extent that Section 4 purports to alter the standard to trigger a 2/3 approval under Article IX, Section 23, such legislation is inconsistent with the Maine Constitution and cannot stand. *See LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951) ("A power granted or reserved by the Constitution may not be limited by the Legislature").

not allow them to stand. *See, e.g., Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188; *LaFleur ex rel. Anderson v. Frost*, 146 Me. at 280, 80 A.2d at 412; *see also Boswell v. State*, 181 Ok. 435, 74 P.2d 940 (1937) ("note" may not be defined as a "debt"); *Mesivtah Eitz Chaim of Bobov, Inc. v. Pike Cty. Bd. of Assessment Appeals*, 615 Pa. 463, 470-73, 44 A.3d 3, 8-9 (2012) (legislature may not expand judicially determined meaning of the constitutional term "public charity").

Substantially: To begin, the term "substantially" connotes degree. *See Substantial*, BLACK'S LAW DICTIONARY (10th ed. 2014) ("Considerable in amount or value; large in volume or number."). Article IX, Section 23 uses "substantially" in this sense by not requiring approval of *all* alterations of use, but only those alterations that are "considerable" or "large" in nature. Both the executive and judicial branches have read this to mean that a case-specific analysis must be undertaken in order to determine whether the legislative approval requirement of Article IX, Section 23 is triggered. *See, e.g., Memorandum: Extent of DEP's Rulemaking Authority Regarding Mining on State-Owned Lands*, OFFICE OF THE ME. ATT'Y GEN., at 4 (Sep. 14, 2016) (stating that "the director of the land-owning agency must first determine that a proposed mining activity would not "frustrate

the essential purposes for which that agency holds and manages the land");[16] *Black v. Cutko*, Docket No. BCDWB-CV-2020-29, 2021 WL 3700685, at *9 (B.C.D. Aug. 10, 2021) (stating that the Bureau "must make a reduction/substantial alteration determination" before entering into certain leases).[17]

Sections 1 and 4 of the Initiative disregard this plain text understanding of the meaning of Article IX, Section 23. *Vorhees*, 2006 ME 79, ¶ 6, 900 A.2d 733 (providing the standard rule of construction that the Court will "apply the plain language of the constitutional provision if the language is unambiguous"). Instead, the Initiative attempts to impose a categorical definition of a *constitutional* term that is necessarily variable in application. The invalidity of such an approach is magnified when it is further noted that Section 1 of the Initiative applies only to leases issued by one agency (the Bureau), on one specific type of designated lands (public reserved lands), for a highly selective list of corridor-type projects (electric transmission lines and facilities, telecommunication line and facilities, landing

[16] Available at https://lldc.mainelegislature.org/Open/AG/Opinions/2016/ag_20160914.pdf (last visited Feb. 9, 2022). This understanding also tracks the language of 12 M.R.S. § 598(5), again evidencing the long-standing practice that the executive agency managing the land at issue makes the initial determination of whether a proposed action is or is not a substantial alteration of use.

[17] HQUS disagrees with the Business Court's conclusions as applied to the lease at issue in *Black v. Cutko*, as well as its findings with respect to the Bureau's requirements when issuing leases for public reserved lands. These issues are currently pending before this Court in a separate action. *See Black v. Cutko*, Docket No. BCD-21-257. Regardless of whether the Business Court's conclusions are upheld on appeal, however, such conclusions were indisputably an exercise of the *judicial* power. The Initiative purports to contradict this understanding of the application of Article IX, Section 23 and bind the executive and judiciary.

strips, pipelines, and railroad tracks).[18] That the Initiative does not even purport to apply to leases issued by the same agency (the Bureau) for another category of designated lands (nonreserved public lands, *see* 12 M.R.S. § 598-A(2-A)(E)) for the *same exact activities*, *see* 12 M.R.S. § 1838(4)(A), underscores the danger of allowing such an approach to stand. *See Landgraf v. USI Film Products*, 511 U.S. 244, 266 (1994) ("[The electors'] responsivity to political pressures poses a risk that it may be tempted to use retroactive legislation as a means of retribution against unpopular groups or individuals.").

Uses: Second, the categorical application of the substantial alteration of use standard does not comport with an understanding of the long-standing uses of public reserved lands that existed well before Article IX, Section 23 was enacted or even considered. In 1820, Maine separated from the Commonwealth of Massachusetts and became a state in its own right. As part of this, Maine agreed to be bound by the Articles of Separation, an agreement with the Commonwealth setting forth the terms and conditions by which the Commonwealth would consent to Maine's separation. Part First and Part Seventh of the Articles of Separation required that Maine preserve certain lands that had been "reserved" by the Commonwealth for beneficial public uses and to continue the long-standing policy

[18] Moreover, Section 1 of the Initiative does not even cover all of the activities authorized under the specific leasing provision being amended, inexplicably leaving out leases issued for roads and bridges, despite such uses also being linear corridor-type projects. *See* I.B. 1, § 1.

of making such reservations when disposing of public lands moving forward. *See* Lee M. Schepps, *Maine's Public Lots: Emergence of a Public Trust*, 26 Me. L. Rev. 217, 219-20 (1974). The Articles of Separation are contained in Article X, Section 5 of the Maine Constitution and remain in full force and effect.[19] *See Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 11 n.6, 206 A.3d 283.

The reserved lots inherited from the Commonwealth, and those later reserved by Maine in accordance with the Articles of Separation, are known as the "public lots" or the "public reserved lots". In a 1973 *Opinion of the Justices*, the Justices of this Court opined that the uses of these public reserved lots are governed and limited by the Articles of Separation. *Opinion of the Justices*, 308 A.2d 253, 270-73 (Me. 1973). This Court confirmed this in *Cushing v. State*, where it stated that "[t]he State holds title to the public reserved lots as trustee and is constrained to hold and preserve these lots *for the 'public uses' contemplated by the Articles of Separation*." 434 A.2d 486, 500 (Me. 1981) (emphasis added).[20]

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[19] By an initial act in 1824, and continuing to this day, Maine has adhered to this requirement. *See* P.L. 1824, ch. 280; 12 M.R.S. § 1858(1). Additionally, as an agreement between states, the Articles of Separation have been approved by the United States Congress, making them the supreme law of the land. *See* U.S. Const. art I, § 10, cl. 3; art. IV, § 3, cl. 1; art. VI, § 2; *see also Texas v. New Mexico*, ___ U.S. ____, 138 S. Ct. 954, 958 (2018); *Green v. Biddle*, 21 U.S. 1, 92 (1823) (articles of separation between Virginia and Kentucky); *Opinion of the Justices*, 308 A.2d 253, 269 n.1 (Me. 1973) (citing *Green v. Biddle*).

[20] The State Defendants, citing *Dudley v. Greene*, 35 Me. 14 (1852), have claimed that the Legislature is "ultimately responsible for the management of Maine's public reserved lands," and can cut the executive branch out of such management. (State Defendant's Response at 8.) This is a misstatement of law. As the Justices of this Court have stated, upon Maine's separation, the management of the public reserved lots became a responsibility of the *State of Maine*. *Opinion*

Over the two centuries since, Maine has adhered to its obligations to use the public reserved lands for beneficial public uses, specifically those intended to spur development and support communities. Accordingly, the Bureau (and its predecessors) has long had the authority to permit productive third-party uses of the public reserved lands, including for electric transmission lines. *See, e.g.*, P.L. 1951, ch. 146 (original utility line leasing authority); *see also* Lee M. Schepps, *Maine's Public Lots: Emergence of a Public Trust*, 26 ME. L. REV. 217, 257 (1974). When the modern "multiple use" management scheme was put in place, and subsequently reaffirmed in 1973, the Legislature expressly contemplated the continued third party use of the public reserved lands. *See Opinion of the Justices*, 308 A.2d at 262, 272-73 (Section 15 of L.D. 1812).

When Article IX, Section 23 was enacted in 1993, it did not alter the then-existing uses of the public reserved lands.[21] Rather, it preserved the status quo—

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of the Justices, 308 A.2d at 270-71. The decision in *Dudley* is in accord, providing that "[t]he management of the [public reserved] lands must necessarily be *in the State* for the protection and preservation of whatever value there may be growing thereon." 35 Me. at 16 (emphasis added). The Legislature, acting as the will of the people through the general legislative power, is responsible for establishing the "mode and manner in which [the State] shall exercise" its management responsibilities, including the establishment of an agency to manage the public reserved lands. *Id.* But, as with any other exercise of the legislative power, the Legislature is constrained by the terms of the Maine Constitution when legislating as to the public reserved lands. *See* Me. Const. art. IV, pt. 3, § 1.

[21] The legislative history for Article IX, Section 23 makes it clear that the Legislature was well aware of the 1973 *Opinion of the Justices* and the public beneficial use requirement for the public reserved lands. *See* L.D. 228, Committee File (116th Legis. 1993) ("Public reserve lots have been ruled to be protected under the Constitution by the Law Court; State Parks should be

the then-existing acreage and uses of designated lands. As applied to the public reserved lots—which have a unique history and constitutional framework that applies—special care must be taken in applying the term "use".[22] For example, although the "use" of "state park lands" may mean one thing, it has a wholly separate meaning when applied to public reserved lands and *must* be construed in a manner consistent with the obligations imposed on the State of Maine by the Articles of Separation. *Opinion of the Justices*, 308 A.2d at 271, 272-73; *Cushing*, 434 A.2d at 500. On this basis, as applied to public reserved lots, any substantial alteration of use analysis under Article IX, Section 23 *must* be measured against the spectrum of productive uses authorized by the then-existing management framework and the terms of the Articles of Separation.

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too."); *see also Stockley*, 2005 ME 47, ¶ 14, 870 A.2d 1208 ("The Legislature is presumed to be aware of the state of the law and decisions of this Court when it passes an act.").

[22] The State Defendants urged the Business Court to treat the Articles of Separation as having "evolved" to allow modern uses such as conservation and recreation. (State Defendant's Response at 19.) In doing so, the State Defendants repeatedly asserted that HQUS was arguing that the Articles of Separation excluded conservation and recreation in favor of exclusive school and ministry uses. This is incorrect. HQUS broadly asserted, and continues to assert, that the Articles of Separation—as confirmed by this Court—prevent the wholesale *exclusion* of other public beneficial uses in favor of conservation and recreation exclusively. Moreover, HQUS has never asserted that the Articles of Separation *require* that the Bureau grant leases for transmission lines, merely that the existing constitutional and statutory scheme *permit* such use of the public reserved lands should the agency with the management thereof (the Bureau) deem it appropriate.

Sections 1 and 4 of the Initiative do not apply Article IX, Section 23 in this manner.[23] Rather, they categorically and conclusively provide that a utility line cannot fall within the existing spectrum of uses for which public reserved lands may be utilized. The Business Court's failure to even address this argument is error. (*Cf.* A. 35, n.14.)

c. The Business Court erred as a matter of law when it failed to examine the effect of the Initiative when considering its violations of the separation of powers.

The Maine Constitution is clear—"No person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers belonging to either of the others, except in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. This provision of the Maine Constitution is "explicit and restrictive," *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982), and underpins the fundamental concept that, "[t]he more that the

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[23] The Business Court misconstrued HQUS' arguments on this point by framing it as an attempt to "enforce" the terms of the Articles of Separation. (*See* A. 35, n.14; *see also* State Defendants' Response at 13-15.) In doing so, the Business Court dismissed the argument by "doubt[ing] whether HQUS, a non-sovereign party or intended beneficiary, has standing to assert a claim for violation of the Articles." (A. 35, n. 14.)

HQUS has not, however, attempted to "enforce" the Articles of Separation. Instead, HQUS has argued—and continues to argue—that the Articles of Separation provide the distinct lens through which the *use* of public reserved lands must be viewed. To the extent that HQUS—an entity doing business in Maine—has also argued that certain portions of the Initiative violate the Articles of Separation, HQUS is fully entitled to do so to the extent that the Initiative exceeds the legislative power by violating the Maine Constitution. *See Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 11, 206 A.3d 283 (explaining that the Articles of Separation are part of the Maine Constitution and in full force and effect); Me. Const. art. X, § 5 (Articles of Separation); Me. Const. art. IV, pt. 3, § 1 (limiting the legislative power to those acts that are not repugnant to the Maine Constitution).

'independence of each department, within its constitutional limits, can be preserved, the nearer the system will approach the perfection of civil government, and the security of civil liberty,'" *Avangrid*, 2020 ME 109, ¶ 24, 237 A.3d 882 (quoting *Lewis v. Webb*, 3 Me. 326, 329 (1825)); *see also Opinion of the Justices*, 2017 ME 100, ¶ 14, 162 A.3d 188. In relation to one another, the three branches are "co-equal." *N.E. Outdoor Ctr. v. Commn'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009.

The separation of powers in Maine "is much more rigorous than the same principle as applied to the federal government." *Hunter*, 447 A.2d at 799; *see also In re Dunleavy*, 2003 ME 124, ¶ 6, 838 A.2d 338; *cf. State v. Reeves*, 2022 ME 10, ¶ 41, --- A.3d --- (providing for primacy of the Maine Constitution). Therefore, Maine courts conduct a "formal" rather than "functional" inquiry into whether the separation of powers has been violated. *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985). The test is narrow: "has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power." *Hunter*, 447 A.2d at 800. Thus, the Legislature (and the people exercising the legislative power through initiatives) are explicitly prohibited from exercising those powers granted to the executive and judicial branches. *See, e.g., N.E. Outdoor Ctr.*, 2000 ME 66, ¶ 10, 748 A.2d 1009; *State v. L.V.I. Group*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960.

The Initiative violates these fundamental principles in bounds, standing out as a singular attempt to appropriate constitutional terms, purport to conclusively apply them to specific types of facilities and structures on a retroactive basis, and render executive action and judicial decisions nullities. The Business Court erred when it failed to recognize such.

i. Section 1 and Section 4 of the Initiative usurp the executive and judicial authority to interpret and apply the Maine Constitution.

The Bureau and CMP (as later assigned to NECEC LLC) entered into an Amended and Restated Lease for portions of the Johnson Mountain and West Forks Plantation public reserved lots in June 2020 in accordance with existing law. (A. 11; A. 96-97, ¶¶ 75-76). *See* 12 M.R.S. § 1852(4)(A). The validity of this lease was challenged and an appeal from the decision of the trial court is currently pending before this Court in a separate matter. *See Black v. Cutko*, Docket No. BCD-21-257. Section 1 of the Initiative purports to not only overturn the actions of the Bureau in executing the lease, but takes the next step of obviating the availability of judicial review. Section 4 of the Initiative has the same effect by categorically "deeming"[24] that construction of a high-impact transmission line

[24] In a legal sense, the term "deem" has been defined to mean "[t]reat[ing] (something) as if (1) it were really something else, or (2) it has qualities it doesn't have." *Deem*, BLACK'S LAW DICTIONARY at 504 (10th ed. 2014). "'Deem' has been traditionally considered to be a useful word when it is necessary to establish a legal fiction either positively by 'deeming' something to be what it is not or negatively by 'deeming' something not to be what it is . . . . All other uses of the word should be avoided . . . . 'Deeming' creates an artificiality and artificiality should not be

crossing designated lands is a substantial alteration of use, thereby allowing the Legislature to prohibit construction without the availability of judicial review. This exceeds the scope of the legislative power and violates the Maine Constitution. *See* Me. Const. art. III, § 2; *Hunter*, 447 A.2d at 799.

For an example of the implications of the sweeping authority claimed by the Initiative, this Court need not look any further than a motion to dismiss filed in the separately pending *Back v. Cutko* appeal. (*See* Black Mot. to Dismiss.) There, proponents of the Initiative state that Section 1 "conclusively answers the question [of] whether the Project constitutes a reduction or substantial alteration of the public reserved lands in Johnson Mountain Township and West Forks Plantation." (Black Mot. to Dismiss at 18.) The proponents further argue that the Initiative—a "*legislative determination*" of the meaning of a constitutional term—"*conclusively answers*" all of the issues pending before this Court in *Black v. Cutko* and "obviates" the need for judicial review of whether certain executive actions constitute substantial alterations of use. (Black Mot. to Dismiss at 4, 18-19 (emphasis added)). This is not and cannot be the law of the State of Maine.

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). While

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resorted to if it can be avoided." *Id.* (citing G.C. Thornton, *Legislative Drafting* 99 (4th ed. 1996)). The State Defendants aptly name Section 1 and 4 as "deeming provisions," which are considered to be "clause[s] in a statute that makes a presumption about a significant fact or treats something as equivalent to another thing." *Deeming Provision,* BLACK'S LAW DICTIONARY at 504 (10th ed. 2014).

the Legislature "may help provide meaning to the constitution by defining undefined words and phrases, the definition provided by [the] [L]egislature itself must be constitutional." *Chiodo v. Section 43.24 Panel*, 846 N.W.2d 845, 853 (Iowa 2014). As a result, "when a statute—including one enacted by citizen initiative—conflicts with a constitutional provision, the Constitution prevails." *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188. "It is . . . a fundamental duty of the court and within its *exclusive* province to construe both the statutes and the Constitution and to ascertain not only from the words, themselves, but from the context, from the purpose to be sought, and in some cases from the result attending upon one construction or the other, what the real intention of the lawmaking power was and how the expressed intention should be interpreted."[25] *Moulton v. Scully*, 111 Me. 428, 446, 89 A. 944, 953 (1914) (emphasis added); *accord Philadelphia II*

[25] The State Defendants, citing decisions from other jurisdiction, argue that the courts should afford "great deference" to legislative application of constitutional terms. (State Defendants' Response at 9.) They argue that this principle is similar to that set forth by this Court in *S.D. Warren v. Bd. of Environ. Prot.*, 2005 ME 27, 868 A.2d 210. (State Defendants' Response at 5.) But *S.D. Warren* relates only to the deference provided to an agency in interpreting statutes, not a constitutional provision. *S.D. Warren*, 2005 ME 27, ¶ 4, 868 A.2d 210. This Court has never deferred, and should not now defer, to a *legislative* interpretation of the Constitution. *Cf. Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803); *Moulton v. Scully*, 111 Me. 428, 446, 89 A. 944, 953 (1914).

Further, it bears emphasis that the State Defendants are composed of members of both the legislative and executive branches. The claim of ownership and dominance over Article IX, Section 23 by the Legislature are advanced at the expense of the executive. But the effectiveness of the separation of powers depends on each branch defending its authority from encroachments by others. *See* Me. Const. art. III, § 2; James Madison, *The Federalist*, Nos. 47, 48 & 51, at 336-47, 355-59 (Benjamin F. Wright ed. 2004).

v. Gregoire, 128 Wash.2d 707, 911 P.2d 394 (1996) ("[T]he construction of the meaning and scope of a constitutional provision is exclusively a judicial function."). "This principle is too familiar to require the citation of authority." *Moulton*, 111 Me. 428, 89 A. at 953.

But, according to the State Defendants, these constitutional principles do not apply to Article IX, Section 23 because it "belong[s] to" the Legislature. (State Defendants' Response at 8 (citing Me. Const. art. III, § 2)). Rather, in addition to approving a proposed use that reduces or substantially alters designated lands, the Legislature and/or the electors also get to make the threshold determination of whether the proposed use is, in fact, a reduction or substantial alteration of use. As detailed above, Article IX, Section 23 does not authorize this claim to authority; it also collides head on with the separation of powers.

As discussed previously, the executive branch (acting through its agencies) has long determined whether a given action or use would result in a reduction or substantial alteration. If that determination is challenged, then the judicial branch will interpret Article IX, Section 23 and other relevant law and render a decision specific to the facts presented. By mere statute, however, Sections 1 and 4 of the Initiative purport to bind the executive and judicial branches to a conclusive

determination of constitutional terms in specific circumstance, obviating executive action and judicial review.[26]

This is beyond the scope of the electors' powers and the Business Court erred as a matter of law when it failed to acknowledge such.

ii. The intended effect of Sections 4 and 5 of the Initiative is to overturn actions and decisions of the executive and the judiciary.

The CPCN issued for the Project is a final executive action that has been judicially confirmed. *NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117. In *Avangrid*, this Court confirmed that the legislative power cannot be used to overturn such executive action. *Avangrid*, 2020 ME 109, ¶¶ 35-36, 273 A.3d 882; *see also Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117. Although the text of the initiative at issue in *Avangrid* was more brazen, Sections 4 and 5 of the Initiative are nothing more than an attempt to "accomplish in an indirect and circuitous manner" that which could not be obtained by direct attack, *Lewis v. Webb*, 3 Me. (Greenl.) 326, 332-33 (1825), and therefore suffers from the same deficiencies.

[26] Although Sections 1 and 4 purport to apply constitutional terms and would, ostensibly, bind the executive and judicial branches, the State Defendants have claimed that it would not bind the Legislature. (State Defendants' Response at 12.) Thus, with respect to the other departments, Sections 1 and 4 are given the dignity of a constitutional amendment, but with respect to the Legislature, they are only accorded the status of a mere statute that may be repealed by majority vote.

To construct a high-impact electric transmission line in the State of Maine, a utility must first seek and obtain a certificate of public convenience and necessity from the MPUC. 35-A M.R.S. § 3132. Upon receipt of an application for a CPCN, the MPUC holds public hearings, considers testimony and submissions, weighs statutory factors, and renders a decision. *Avangrid*, 2020 ME 109, ¶ 35, 273 A.2d 882; 35-A M.R.S. § 3132(2), (6). In doing so, the MPUC acts in an "administrative adjudicatory role that is traditionally regarded as a quasi-judicial function of a State agency in *executing* the law." *Avangrid*, 2020 ME 109, ¶ 33, 273 A.2d 882.

CMP filed a petition for a CPCN for the Project in September 2017. *See NextEra*, 2020 ME 34, ¶ 3, 227 A.3d 1117. After over nineteen months of review, including six days of public hearings, substantial written submissions, and a 162-page hearing examiners' report, the MPUC issued a 100-page order granting the Project a CPCN. *Id.* ¶¶ 5-6, 9-10. (A. 21-22; A. 84, ¶ 36.) On appeal by a market competitor, this Court "discern[ed] no error in the [MPUC's] determination that the project meets the applicable statutory standards for a CPCN." *NextEra*, 2020 ME 34, ¶ 1, 227 A.3d 1117. (A. 22.) Thus, as of March 17, 2020, CMP had a validly issued, judicially confirmed CPCN authorizing the construction of the Project. (A. 22.)

The effect of Section 4 of the Initiative is to vitiate the effectiveness of the CPCN by retroactively adding a new legislative approval requirement (specifically, approval by 2/3 vote of all members elected to each House because the Project crosses designated lands). The Initiative attempts to hide this effect by tempering its language to avoid mention of approval of a CPCN, instead providing that such legislative approval must be obtained prior to commencing construction on a high-impact electric transmission line. I.B. 1, § 4 (codified at 35-A M.R.S. § 3132(6-C)). Yet, the *entire* purpose and effect of a CPCN is to authorize construction of an electric-transmission line, thereby ensuring that the publics' essential electrical power needs are met. *See* 35-A M.R.S. § 3132(6).

Section 4 adds no new standards to the CPCN approval process and makes no change to the MPUC's authority. *See generally* I.B. 1, § 4. It merely provides the Legislature with a second chance to adjudicate (without any applicable standards, process or availability of judicial review) whether the CPCN should have been issued. This exceeds the legislative power. It relegates the MPUC's prior issuance of a CPCN for the Project, and the judicial approval thereof, to an unenforceable nullity unless and until the Legislature approves construction by a 2/3 vote.[27]

[27] The conclusory "deeming" language of Sections 1 and 4 of the Initiative would mean that construction cannot proceed absent the Legislature's approval. But nothing compels the Legislature to even take up a vote on the matter, leaving the Project in the legal equivalent of no

Section 5 of the Initiative takes this a step further and affirmatively prohibits the construction of high-impact electric transmission lines within the ill-defined "Upper Kennebec Region". I.B. 1, § 5 (codified at 35-A M.R.S. § 3132(6-D)). The effect, much like Section 4, is to vitiate the effectiveness of the previously issued and judicially confirmed CPCN by preventing the action approved by its issuance. Moreover, because the MPUC is the executive agency tasked with "faithfully executing" the laws related to public utilities, *see Opinion of the Justices*, 2015 ME 27, ¶ 5, 112 A.3d 926; 35-A M.R.S. §§ 103, 3132(6-A), it is a near certainty that the MPUC will be forced to revoke the previously issued and judicially confirmed CPCN. This also exceeds the legislative power.

The Legislature and the electors do not have the power to require the MPUC to "vacate and reverse a particular administrative decision." *Avangrid*, 2020 ME 109, ¶ 35, 237 A.3d 882. To do so is an invalid attempt to take actions that are "executive in nature, not legislative." *Id.* Likewise, the legislative power does not allow for the Legislature or the electors to "disturb a decision rendered in a previous action, as to the parties to that action; to do so would violate the doctrine of separation of powers." *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117; *see also L.V.I. Group*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960. As applied to the

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man's land. *Cf. Lightfoot v. Me. Legislature*, 583 A.2d 694, 694 (Me. 1990) (judiciary may not interfere with the Legislature when it acts within 'its constitutional sphere of activity . . . [by] exercis[ing] discretion to reject or enact legislation.").

Project, Sections 4 and 5 of the Initiative constitute nothing more than an attempt to overturn the decisions and actions of the executive and the judiciary. The Maine Constitution forbids such an attempt. Me. Const. art. III, § 2; *Hunter*, 447 A.2d at 799.

The Business Court erred as a matter of law when it failed to recognize Sections 4 and 5 of the Initiative as attempting to overturn executive actions and judicial decisions. (*See* A. 50-55.) According to the Business Court, the electors may single out a project that they disapprove of and "place new, retroactive requirements on a category of decisions" as long as they do not call out the targeted project by name. (A. 53.) This narrow view ignores the practical effect of the retroactive addition of new requirements; the prior approval is no longer legally sufficient unless and until such requirements are met. It is unclear how the Business Court expects the Project to meet the retroactive "requirement" of Section 5 of the Initiative, which does nothing more than prohibit the very action that the CPCN previously authorized. Stated simply, the Initiative is not a "supplementation of existing law," (A. 53), it is merely another attempt to "accomplish in an indirect and circuitous manner," *Lewis v. Webb*, 3 Me. (Greenl.) 326, 332-33 (1825), that which this Court has already said is impermissible. *Avangrid*, 2020 ME 109, 237 A.3d 882; c*f. Langley v. Home Indem. Co.*, 272 A.2d 740, 746 (Me. 1971) (failure to properly construe the effect of a statute in

favor of labels "would be to lose focus upon reality in the obscurity of semantic fog.").

d. The Business Court erred as a matter of law when it determined that the constitutional protections of vested rights does not apply to the Project.

The errors of the Business Court's decision with respect to the impairment of vested rights by the Initiative are aptly discussed by other appellants in this matter and HQUS fully joins in such arguments. As with several other portions of this brief, HQUS does not restate these arguments in an effort to comply with the spirit of this Court's request to avoid duplication of arguments.

e. The Initiative targets the Project in direct violation of Article IV, Part 3, Section 1 of the Maine Constitution.

The Initiative has one intent—to prevent the construction of the Project. This type of legislation is invalid under the Maine Constitution, is not "reasonable" legislation, *see* Me. Const. art. IV, pt. 3, § 1, and is therefore beyond the scope of the legislative authority to enact (whether exercised by the Legislature or the electors).

In 1825, this Court emphatically provided that "it can *never* be within the bounds of *legitimate legislation*, to enact a special law, or pass a resolve dispensing with the general law, in a particular case, and granting a privilege and indulgence to one man, by way of exemption from the operation of a law, leaving all others under its operation." *Lewis v. Webb*, 3 Me. (Greenl.) 326, 326 (1825). This Court

reasoned that, because "[s]uch a law is neither just or reasonable in its consequences," it violates "the great principle of constitutional equality." *Id.* As a result, targeted legislation has long been considered to lie outside the legislative power. *See* Me. Const. art. IV, pt. 3, § 1; *Proprietors of Kennebec Purchase v. Laboree*, 2 Me. (2 Greenl.) 275, 292-93 (1823); *see also Merrill v. Sherburne*, 1 N.H. 199, 204-214, 1818 WL 479, at *5-10 (1818) (distinguishing legislative from judicial powers).

The Initiative is less brazen than the "legislation" at issue in *Lewis* and the first initiative, but it is no less targeted. The evidence adduced by NECEC LLC on this point is overwhelming. (A. 100-108, ¶¶ 89-103.) Beyond such evidence, placing the Initiative into the overall framework of the constitutional and statutory schemes that it amends and an evaluation of its effects expose its targeted nature.

First, Title 12, Chapter 220, among other matters, covers the duties and powers of the Bureau with respect to state parks and historic sites, nonreserved public lands, public reserved lands, submerged and intertidal lands, and the Allagash Wilderness Waterway. All except submerged lands are "designated lands" within the meaning of Article IX, Section 23. *See* 12 M.R.S. § 598-A(2-A). Yet, aside from 12 M.R.S. § 1852(4) (leases of public reserved lands for transmission lines and other linear projects), the Initiative does not amend any other portion of Chapter 220. This omission is particularly striking in reference to

the nonreserved public lands, which are governed by a statutory scheme and leasing authority closely resembling that for the public reserved lands. *Compare*, 12 M.R.S. § 1838 (leases of nonreserved public lands) *with* 12 M.R.S. § 1852 (leases of public reserved lands).

As supporters of the Initiative have argued—and the Business Court erroneously accepted—the Initiative merely purports to apply Article IX, Section 23. Why then, does the Initiative apply its "deeming" language to the public reserved lands (12 M.R.S. § 1852(4)) and not to the nonreserved public lands or any other type of designated lands? The answer lies in the Johnson Mountain Township and West Forks Plantation public reserved lots. Both of these lots are designated lands under Article IX, Section 23, both fall within the Bureau's leasing authority (12 M.R.S. § 1852(4)(A)), and both are the subject of leases for the Project. In short, the Initiative does not amend the leasing authority for nonreserved public lands because such an amendment does not assist in preventing the construction of the Project.

The retroactivity clause of Section 1 and the retroactive effect that Section 6 provides to Sections 4 and 5 further reveal the Initiative's targeted nature. Section 1 of the Initiative is retroactive to September 16, 2014, while Sections 4 and 5 (by operation of Section 6) are retroactive to projects upon which construction had not commenced prior to September 16, 2020. The difference between these dates—

looking beyond the inconsistency and absurdity in providing two different retroactive dates for legislation purporting to apply a nearly thirty-year old constitutional standard—makes sense only when considered against the history of the Project. *Cf. Danforth v. Minnesota*, 552 US. 264, 271-75 (2008) (constitutional standards, as applied to criminal procedure, are either retroactive or not). The first lease for use of the Johnson Mountain Township and West Forks Plantation public reserved lots was issued on December 15, 2014, and physical construction on the Project did not commence until after September 16, 2020 (due, in large part, by delays as a result of litigation brought by opponents and specific market competitors). (A. 25-26, 31; A. 96, ¶ 75; A. 114, ¶¶ 117-18.)

For all of these reasons, the Initiative is targeted at the Project, thereby violating Article IV, Part Third, Section 1 of the Maine Constitution.

3. The Business Court abused its discretion when it failed to determine that the grant of a preliminary injunction is in the public interest.[28]

The Maine Constitution is the ultimate expression of the will of the people of Maine. *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188; *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013). No public interest can exist in the enforcement of an unconstitutional law. *See Higher Society of Indiana v.*

[28] HQUS does not address additional balance of harms and irreparable injury arguments set forth by NECEC LLC, all of which HQUS agrees with and adopts in full. As set forth herein, the Initiative exceeds the legislative authority of the initiative process and violates the separation of powers. These violations constitute irreparable injury. *See Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013); *Collins v. Mnuchin*, 896 F.3d 640, 654 (5th Cir. 2018).

Tippecanoe County, Indiana, 858 F.3d 1113, 1116 (7th Cir. 2017) ("[T]he public interest is not harmed by preliminarily enjoining the enforcement of a statute that is probably unconstitutional." (quotation marks omitted)). Thus, "the result of any opinion or declaration that a statute is unconstitutional is the elevation of the will of the people as expressed in the Constitution above that as expressed in a statute." *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188.

The Business Court erred when it ignored these fundamental principles in an effort to "encourage the people's engagement in participatory democracy." (A. 66.) It matters not whether "[t]he public's directive, as announced by 59% of Maine voters [of the limited populace who voted on November 2, 2021], is clear," or that "the people of Maine have declared their interest in this litigation." (A. 67.) The legislative power—including the initiative power—does not include the power to adopt an unconstitutional law. Me. Const. art. IV, pt. 3, § 1; *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188.

On the other hand, the State of Maine—acting through its executive agencies such as the Bureau and the MPUC—has made it clear that "construction and operation of the New England Clean Energy Connect . . . is in the public interest." PUC Order at 6. This public interest stems from three interrelated direct and indirect benefits that will accrue to the State of Maine from the Project: (a)

reduction in regional GHG emissions; (b) increased grid reliability and price stability; and (c) direct economic investments.

First, there is no reasonable dispute that "[t]he harms associated with climate change are serious," *Massachusetts v. Env't. Prot. Agency*, 549 U.S. 497, 521 (2007), and present "the single greatest threat to Maine's natural environment." *Findings of Fact & Order*, ME. DEP'T OF ENV. PROT., Docket No. L-27625, at 105 (May 11, 2020). Because a "[f]ailure to take immediate action to mitigate the GHG emissions that are causing climate change will exacerbate these impacts," *id.*, Maine has adopted aggressive GHG emissions reduction goals. *See* 38 M.R.S. §§ 574-579 (climate change and GHG emissions reduction goals); §§ 580 to 580-C (Regional Greenhouse Gas Initiative); 35-A M.R.S. § 3210 (renewable resource portfolio goals). The Project will help assuage the deleterious effects of climate change by providing "significant incremental hydroelectric generation from existing and new resources in Quebec, and . . . result in reductions in overall GHG emissions through corresponding reductions of fossil fuel generation (primarily natural gas) in the region." PUC Order at 71. This Court has previously affirmed these findings, *see NextEra*, 2020 ME 34, ¶¶ 30, 37, 227 A.3d 1117, and they have also been corroborated by an independent review of a specialist commissioned by the United States Army Corp of Engineers, *see Environmental Assessment and Statement of Findings*, U.S. ARMY CORPS OF

ENG'RS, File No. NAE-2017-01342, at 122 (July 7, 2020); *see also Sierra Club v. U.S. Army Corps of Engs.*, 997 F.3d 395 (1st Cir. 2021) (affirming district court's denial of preliminary injunction as to a Corps permit because plaintiffs failed to show a likelihood of success on the merits); *NextEra Energy Res., LLC v. Mass. Dept. of Pub. Utils.*, 152 N.E.3d 48, 61-62 (Mass. 2020) (affirming a finding that HQUS will provide "9.45 million MWh of purely hydroelectric generation").

Second, the Project will offset the many risks associated with natural gas reliance through "enhance[d] transmission reliability, and supply reliability and diversity in the region, and serve as a hedge against high and volatile natural gas prices." PUC Order at 24. The "injection of such large quantity of price-taking energy into the Maine Zone will have a materially beneficial effect on energy prices in Maine" reducing by "$14-$44 million annually" and the "system upgrades required by (and provided by) the [Project] will provide extra redundancy and reliability to the Maine system during normal operations modes." *Id.* at 30, 39. In short, the Project will "provide a pathway to import up to 1,200 MW at no cost to Maine," *id.* at 41, reducing the region's reliance on natural gas and help insulate Maine ratepayers from the price spikes caused by "volatile natural gas prices," *id.* at 24 , and providing a "materially beneficial effect on energy prices in Maine," *id.* at 30. Again, this Court has previously affirmed these findings. *See NextEra*, 2020 ME 34, ¶¶ 30, 37, 227 A.3d 1117.

Finally, beyond all of the foregoing benefits and the indirect beneficial economic effect of the same on the Maine economy, "positive and substantial direct, indirect, and induced macroeconomic benefits will accrue to Maine from the development, construction, and operation of the [Project]." PUC Order at 46; *see also NextEra*, 2020 ME 34, ¶¶ 30, 37, 227 A.3d 1117. The Project is a $1 billion investment, including the creation of 1,600 jobs annually during its construction and 300 jobs during its operation and the payment of $18 million in property taxes annually. (A. 75, ¶ 18; A. 264-65, ¶ 32.) Moreover, as part of the Project, a package of nearly $250 million in benefits was negotiated that are to be paid directly to specific funds, including those set aside for electricity rate relief, low-income customers, expanded electric vehicle availability and charging infrastructure, increased access to broadband and heat pumps, and education and economic development grants. *See* PUC Order at 74-78 (discussing the stipulation provisions and benefits). HQUS itself has committed to providing a substantial portion of these funds, provide electrical vehicle expertise, and provide for fiber optic connection between Maine and Montreal. *See* PUC Order at 79.

The Business Court ignored all of the foregoing benefits and public interest inherent in the Project in its singular focus on the purported "public's directive." (A. 67.) This was error and an abuse of discretion.

CONCLUSION

HQUS fully agrees with NECEC LLC—"The Maine Constitution prohibits the exercise of legislative power to deprive a developer of the right to complete a project, after executive agencies have issued final permits (in certain instances, affirmed by this Court) authorizing construction and operation of the project, and after substantial construction has been undertaken and substantial expenditures have been made." The Maine Constitution provides clear and unambiguous limits on the use of the citizens' initiative power. It may not be used to take actions committed to the Legislature, alter or amend the Maine Constitution, interfere with executive and judicial functions, target individual projects, or overturn final executive agency actions and judicial decisions. Because the Initiative contravenes these limits and violates basic constitutional principles, HQUS respectfully requests that this Court vacate the decision of the Business Court and direct that the Business Court enter a preliminary injunction.

Dated: February 16, 2022

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CERTIFICATE OF SERVICE

I, Timothy C. Woodcock, Esq., hereby certify that on or before February 16, 2022, two copies of this brief of Intervenor-Plaintiff/Appellant H.Q. Energy Services (U.S.) Inc., was served upon counsel at the addresses set forth below, by first class U. S. mail, postage prepaid, and by electronic mail. Additionally, a single copy of the brief has been sent electronically to Mathew Pollack, Clerk, Maine Supreme Judicial Court.

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