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

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

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INTRODUCTION

In 2019, after failing to convince the executive and judicial branches of the merits of their positions, opponents of the New England Clean Energy Connect Project (the "Project") turned to the initiative power.[1] This first effort was brazen and aimed directly at the Public Utilities Commission ("PUC") and the Certificate of Public Convenience and Necessity ("CPCN") issued for the Project. This objective manifested the opponents' understanding that, to kill the Project, they had to cause the CPCN to be revoked. That first effort failed when this Court held such a directive was unconstitutional because "the action that would be mandated by the direct initiative would be executive in nature, not legislative." *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 36, 237 A.3d 882.

Informed by this Court's ruling in *Avangrid*, Project opponents again turned to the initiative power. Their objective had not changed, but by this time, they faced additional hurdles—not only had the Project received administrative approvals and permits, but the issuance of the CPCN had been upheld by this

[1] The opponents of the Project, including Appellee-Intervenors NextEra Energy Resources, LLC ("NextEra"), Senators Russell and Black, and Amici Curiae Calpine Corporation and Vistra Corporation, have sought unsuccessfully at every conceivable opportunity to prevent the Project's construction and operation through near continuous litigation before courts and administrative agencies, including the Massachusetts Department of Utilities, Massachusetts Supreme Judicial Court, Maine Public Utilities Commission, the Maine Department of Environmental Protection, Maine Supreme Judicial Court, Army Corps of Engineers, Department of Energy, U.S. District Court for the District of Maine, and U.S. Circuit Court of Appeals for the First Circuit. *See, e.g., NextEra Energy Resources, LLC v. Mass. Dep't of Pub. Utils.*, 485 Mass. 595, 152 N.E.3d 48; *Sierra Club v. U.S. Army Corp of Eng'rs*, 997 F.3d 395 (1st Cir. 2021); *NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117. (*See also* A. 21-24; HQUS Br. 6; NECEC Br. 3.) They have failed to convince each and every one of these tribunals of the merits of their position.

Court. *NextEra Energy Resources, LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117. Abandoning their initial crude attempt at "legislative" directive, opponents came up with a novel "legislative" innovation to address these permits and decisions: they would retroactively render them ineffectual or, in a word, nullify them. When examined, however, it becomes clear that the Initiative (I.B. 1) is "nothing more than old wine in new bottles."[2]

ARGUMENT

At the outset, the Appellees attempt to head off the serious threshold question of constitutional authority of the electors by arguing preservation and waiver. On the merits, Appellees seek to justify the unprecedented and sweeping claims to legislative power made by the Initiative by calling it the "will of the people." But the initiative power, although broad, is not limitless and the electors are not entitled to enact "legislation" that exceeds their lawmaking power.[3] *See also Citizens Against Rent Control/Coal. For Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981).

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[2] NRCM and Individual Defendant-Intervenors' Opposition to Plaintiffs Motion for Preliminary Injunction, *NECEC Transmission LLC, et al. v. Bureau of Parks and Lands, et al.*, Docket No. BCD-CIV-2021-00058, at *21 (Nov. 24, 2021).

[3] The Appellees have continuously implied, as accepted by the trial court, that the "overwhelming" support for the Initiative by the people of the State of Maine, as they characterize it, somehow cures constitutional deficiencies. (Initiators' Br. 1; NextEra Br. 1; Amici Curiae Brief of Calpine Corporation, *et al.*, 1). But, regardless of the amount of votes cast, the limits of the Maine Constitution are "as binding upon the people as upon the Legislature." *Opinion of the Justices*, 191 A.2d 357, 360 (Me. 1963).

As set forth in the opening brief of H.Q. Energy Services (U.S.) Inc. ("HQUS") and detailed further herein, Article IX, Section 23 of the Maine Constitution was an express delegation of lawmaking authority to the Legislature alone; the electors have no authority to enact "legislation" that purports to implement it. Even if such authority existed, the Initiative still fails because the novel "deeming" provisions found in Sections 1 and 4 are inconsistent with the plain terms of Article IX, Section 23 and the Initiative, in several ways, violates the separation of powers. Finally, should this Court conclude that one section—or even part of one section—passes constitutional muster, the Initiative as a whole must still fall because none of its component parts are severable.

I. This Court should accept the report and render a decision because this litigation presents novel questions of law that can be resolved without further proceedings.

The Appellees urge this Court to either discharge this report or severely limit the scope of review, a result that would only benefit one group—those who have continuously sought to succeed not on the merits, but through "death by delay" tactics. (State's Br. 10-12; Initiators' Br. 12-14; NextEra Br. 51-55). In particular, the Initiators and NextEra frame this report as presenting nothing more than routine legal issues that this Court should allow to wind their way through what will likely be lengthy and drawn out pre-trial and trial proceedings. By making such arguments, the Appellees fail to acknowledge both the magnitude of the

constitutional questions presented and their readiness for appellate adjudication.

The purpose of Rule 24(c) of the Maine Rules of Appellate Procedure is to "permit parties, in limited circumstances, to obtain review from [this court] prior to obtaining a final judgment from the trial court." *Liberty Ins. Underwriters, Inc. v. Estate of Faulkner*, 2008 ME 149, ¶ 5, 957 A.2d 94. As an exception to the final judgment rule—which is intended to "promote[] efficiency and reduce[] costs," *id.*—the report procedure is to "be used sparingly." *Bank of Am., N.A. v. Cloutier*, 2013 ME 17, ¶ 8, 61 A.3d 1242. Therefore, this Court generally looks to three factors to determine the appropriateness of accepting a report, each of which the trial court properly determined were satisfied here. *See, e.g., Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC*, 2013 ME 89, ¶ 10, 81 A.3d 348.

This litigation presents multiple issues that warrant an authoritative decision on unsettled questions of law or matters of first impression, including: the authority of the electors to initiate legislation attempting to implement Article IX, Section 23 of the Maine Constitution; the inconsistency between the Initiative's "deeming" sections and the plain language of Article IX, Section 23; the constitutionality of attempting to bind the executive and judicial branches to legislative interpretation and application of constitutional terms; the scope of the constitutional vested rights doctrine; and the constitutionality of retroactive legislation effectively vacating final executive actions and judicial decisions. An authoritative ruling on these

issues "will likely bring this litigation to a swift conclusion." (A. 15.) Further, because a determination by this Court on such issues would conserve the resources of the judiciary and the litigants, full consideration of this report fits well within the purposes of Rule 24(c). (*See* A. 18.)

Reinforcing this point, it bears emphasis that the parties have, in their opening briefs, collectively filed over 440 pages on these issues. Nine *amici curiae* briefs, representing the views and concerns of a diverse spectrum of interests, have been researched, drafted and submitted. To accept Appellees' invitation to reject the report at this stage, or to sharply narrow the scope of issues addressed would be at odds with the purpose of Rule 24(c) and flip the purposes of the final judgment rule on its head by wasting judicial resources and creating inefficiency, delay, and substantial expense.

II. The authority to enact legislation under Article IX, Section 23 is limited to the Legislature.

Section 1 and the second part of Section 4 of the Initiative each attempt to appropriate the phrase "uses substantially altered" from Article IX, Section 23 of the Maine Constitution and infuse it, by statute, with binding and conclusive meaning. Beyond consideration of whether this is a valid exercise of the legislative power, there exists a threshold question of whether the electors even hold the authority to initiate legislation within the realm of Article IX, Section 23. The answer, by the plain terms of the Maine Constitution, is no.

A. The question of the electors' authority is jurisdictional in nature and is a matter of sufficient doubt and novelty that judicial economy weighs in favor of addressing it in this report.

In its opening brief, HQUS acknowledged that the question of whether the electors have the authority to enact legislation pursuant to Article IX, Section 23 was not explicitly briefed below, but urged this Court to address the question to preserve judicial resources. (HQUS' Br. 22.) Not surprisingly, the State Defendants urge the Court to decline to decide this question. (State's Br. 47.) This position fails to acknowledge, however, that this question is jurisdictional in nature and its resolution may dispose of the entire action.

As this Court has previously noted, the authority of the electors to legislate on certain subject matters is jurisdictional. *See Avangrid*, 2020 ME 109, ¶ 22, 237 A.3d 882 ("Procedural and subject matter requirements could be viewed as jurisdictional limitations . . . ." (quotation marks omitted)). On this basis, the Court has, on multiple occasions, addressed the question of whether the electors even have the authority to enact proposed legislation before it is enacted or presented to the voters. *See, e.g., id.* ¶ 20 ("[T]his case presents the question whether the subject matter of the initiative is even eligible to proceed as a direct initiative."); *Wagner v. Sec'y of State*, 663 A.2d 564, 566-67 (Me. 1995) (addressing whether a proposed initiative was "beyond the electorate's grant of authority").

That this challenge comes after rather than before the Initiative's enactment, does not change the basic principle that the electors may not enact legislation beyond their authority. In the same vein, that this issue was not explicitly briefed below should not prevent this Court from addressing it now. Rather, just as subject matter jurisdiction of the courts cannot be waived, *see, e.g., Monteith v. Monteith*, 2021 ME 40, ¶ 22, 255 A.3d 1030, so too the review of the authority of the electors to enact the legislation at issue should be non-waivable. Moreover, a failure to address the issue of the electors' authority at this juncture would create the very real risk that a substantive constitutional ruling on the Initiative be issued, only for the entire matter to become moot because it is held the electors lacked the authority to enact the Initiative in the first place. *See, e.g., Chandler v. Dubey*, 378 A.2d 1096, 1099 (Me. 1977) ("Advisory opinions may only be rendered under restricted circumstances set out in art. VI, sec. 3 of the Maine constitution.").

Therefore, in the "special circumstances of this case, . . . judicial economy [would be] best promoted, without doing damage to any principle of judicial review, by [this Court] addressing the merits" of the threshold question of electoral authority. *State v. Moore*, 577 A.2d 348, 350 (Me. 1990).

B. Article IX, Section 23 of the Maine Constitution assigns lawmaking power solely to the Legislature.

The initiative power—as set forth in Article IV, Part Third, Section 18 of the Maine Constitution—is broad and liberally construed, *League of Woman Voters v.*

Sec'y of State, 683 A.2d 769, 771 (Me. 1996),[4] but it is not co-extensive with that of the Legislature. The people, "[b]y adding the direct initiative and referendum provisions to the Maine Constitution in 1909," only "took back . . . *part of* the legislative power that in 1820 they had delegated entirely to the [L]egislature." *Allen v Quinn*, 459 A.2d 1098, 1103 (Me. 1983) (emphasis added); *see also Opinion of the Justices*, 437 A.2d 597, 606 (Me. 1981) (same). The result is that the electors are not, as a constitutional matter, "equally competent" to legislate on all matters.[5] (State's Br. 47.)

The limit on the electors' lawmaking power stems from the plain language of the Maine Constitution which, in several places, imposes specific requirements for legislative action. Where such requirements exist, they are "as binding upon the people as upon the Legislature." *Opinion of the Justices*, 191 A.2d 357, 359-60

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[4] The State Defendants cite *League of Women Voters v. Secretary of State*, 683 A.2d 769 (Me. 1996), for the general proposition that the electors' powers are co-equal to that of the Legislature. But *League of Women Voters* related only to the exercise of the general police powers via legislation, not a highly specific constitutional provision on a discrete subject matter and which has a higher vote threshold for enactment. Moreover, *League of Women Voters* explicitly recognizes that the electors can overstep "the limits of their constitutionally granted powers in enacting initiative measures." *Id.* at 772.

[5] For example, only the Legislature may propose a constitutional amendment or initiate a bond issue; the electors have no such authority. Me. Const. art. IV, pt. 3, § 18; art. IX, § 14; art. X, § 4; *Opinion of the Justices*, 159 Me. 209, 191 A.2d 357 (1963) (declaring that the limit of the Maine Constitution "is as binding upon the people as upon the Legislature."). Likewise, only the Legislature may remove the Governor, legislators and sheriffs from office through impeachment; the electors have no recall power. Me. Const. art. IV, pt. 1, § 8; art. IV, pt. 2, § 7; art. IV, pt. 3, §§ 3-4; *Moulton v. Scully*, 111 Me. 428, 89 A. 944 (1914). By ratifying the Maine Constitution and its amendments, the people of the State of Maine consented to the application of representative, rather than direct, democracy in these areas. *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) (discussing the Maine Constitution's assignment of powers between the Legislature and the people).

(1963). Indeed, the Justices of this Court have spoken to this very issue with respect to a constitutional provision—Article IX, Section 14 (general obligation bonds)—structured similarly to that of Article IX, Section 23. *See Opinion of the Justices*, 191 A.2d 357. Like Article IX, Section 23, the general obligation bond provision of the Maine Constitution relates to enactment of very specific types of legislation and requires greater than majority approval (two-thirds of both Houses). Me. Const. art. IX, § 14. In concluding that the people could not initiate with respect to general obligation bond issues, the Justices stated that the "two-thirds of both houses" enactment requirement set forth in Article IX, Section 14 is "as binding upon the people as upon the Legislature." *Opinion of the Justices*, 191 A.2d at 359-60. The same *must* be true for Article IX, Section 23.

Article IX, Section 23 of the Maine Constitution expressly contemplates that the *Legislature* would designate lands to be protected by "legislation implementing [that] section." *See* 12 M.R.S § 598-A. As later enacted, that implementing legislation included the *Legislature's* interpretation of terms contained in Article IX, Section 23. *See id.* § 598. Taken together, this implementing legislation provides the general contours by which the executive agencies charged with managing designated lands determine whether legislative approval is required.[6]

[6] This is not to say that the executive department is bound by the definitions of constitutional terms in the Designated Lands Act, 12 M.R.S. § 598 to 598-B. As part of a co-equal branch of government, executive agencies may interpret constitutional terms on equal footing with the legislative branch, subject only to binding interpretations thereof by the judiciary.

Once the executive agency makes such a decision, the *Legislature* discharges its duty to decide whether, notwithstanding that a reduction or substantial alteration of use would occur, to nonetheless approve the proposed action "by vote of 2/3 of all the members elected to each House." Me. Const. art. IX, § 23. In order to ensure that "legislation implementing" Article IX, Section 23 (including what lands are to be protected and whether to approve of proposed actions that would cause a reduction or substantial alteration of use) was given deliberate consideration and has broad-based agreement, the framers established specific and exacting requirements for enactment—"by vote of 2/3 of all the members elected to each House," Me. Const. art. IX, § 23.[7]

Article IX, Section 23 leaves no residual power to the electors. It was an express assignment of authority to the *Legislature* alone. This understanding also accords with what a "careful, intelligent voter" would have understood when voting on Article IX, Section 23 in 1993. *Opinion of the Justices*, 2017 ME 100, ¶

[7] The Maine Constitution has only *four* provisions (including Article IX, Section 23) in which a supermajority approval is required for enactment of legislation. *See* Me. Const. art. IX, § 14 (bond issues), § 20 (mining excise tax trust fund), § 21 (state mandates), § 23 (designated lands). Each of these areas is complex and, therefore, the Maine Constitution requires that the Legislature give proposed legislation in these areas more deliberate consideration and reach broad-based agreement before acting.

The limited legislative history of Article IX, Section 23 likewise suggests that purpose of requiring supermajority approval was because of the numerous complexities involved in transfers and uses of protected lands, such as administrative and management restrictions, deed restrictions, easements, statutory restrictions, and constitutional restrictions such as the Articles of Separation (Me. Const. art. X, § 5, Item Seventh). *See Resolution, Proposing an Amendment to the Constitution of Maine to Protect State Parks: Hearing on L.D. 228 Before the Comm. on State and Local Government*, 119th Legis. (1993) (testimony of Herb Hartman, Director of the Bureau of Parks & Recreation).

58, 162 A.3d 188. Indeed, that is precisely what the voters were told by the ballot question: "Do you favor amending the Constitution of Maine to protect state park or other designated conservation or recreation land by requiring a 2/3 vote of the *Legislature* to reduce it or change its purpose?" 1993 Const. Res. § 1 (emphasis added). Thus, as an assignment of legislative power, and only legislative power, the power to enact "legislation implementing" Article IX, Section 23 "belong[s]" solely to the Legislature. (*See* State's Br. 41) (quoting Me. Const. art. III, § 2).

The Legislature itself has recognized this limitation by providing that designated lands remain so designated "until such time as the designation is repealed or limited by a 2/3 vote of the Legislature." 12 M.R.S. § 598-A. In the absence of Article IX, Section 23 and its constitutional requirement for enacting implementing legislation, the Legislature would not be able to include this supermajority requirement. *Cf. SC Testing Tech., Inc. v. Dep't of Environmental Protection*, 688 A.2d 421, 425 (Me. 1996) ("The Legislature may not enact a law that purports to bind a future Legislature."). This principle is equally binding on the electors. *See Opinion of the Justices*, 673 A.2d 693, 697 (Me. 1996) ("[T]hat the present Legislature cannot bind future Legislatures without passing a constitutional amendment, applies equally to the electors: the initiative, if passed, cannot be binding upon future sessions of the Legislature.").

For all of the foregoing reasons, and those reasons set forth in HQUS' opening brief, Sections 1 and 4 of the Initiative were not duly enacted. Because these sections of the Initiative were not enacted by "vote of 2/3 of all the members elected to each House," they do not meet the requirements of the Maine Constitution and must fail.

III. The electors do not have the power to legislate in a manner that violates the Maine Constitution.

Even if it is assumed, *arguendo*, that the electors have the necessary authority, they still may not legislate in a manner that violates the Maine Constitution. *See, e.g.*, Me. Const. art. IV, pt. 3, § 1; *Avangrid*, 2020 ME 109, ¶ 27, 237 A.3d 882; *League of Woman Voters*, 683 A.2d at 771. As explained in the opening briefs of HQUS, NECEC Transmission, LLC and the Industrial Energy Consumer Group, and as further discussed below, Section 1 and the Section 4 of the Initiative exceed constitutional limits on permissible legislation. (*See* HQUS Br. 36-47; NECEC Br. 37-47; IECG Br. 8-20.)

A. Sections 1 and 4 of the Initiative misapply the "uses substantially altered" standard of Article IX, Section 23, thereby exceeding the scope of the initiative power and violating the separation of powers.

Although Sections 1 and 4 of the Initiative may have the appearance of legislation at quick glance, any deeper review makes it apparent that the Initiative actually represents a radical departure from the bounds of the lawmaking power

established in the Maine Constitution. If sanctioned, as the State Defendants invite this Court to do, it would have the effect of subordinating the executive and judiciary to the legislative interpretation of constitutional terms. This invitation is pernicious. To accept it would be to diminish the status of the Maine Constitution as the fundamental law and radically augment the legislative power at the expense of the executive and even the judiciary.

As has been extensively briefed, Sections 1 and 4 of the Initiative set forth a categorical and particular meaning of the phrase "uses substantially altered" and attempts to bind the executive branch to that interpretation.[8] To an extent, the Appellees also argue that the judiciary should bind itself to such interpretation because the Legislature is entitled to great "deference" in this area and any "implementing legislation" is subject only to a "reasonableness" test. (State Br. 40-41.) This Court must firmly and resolutely reject such attempts to arrogate power in violation of the Maine Constitution.

To understand the implications of the attempted arrogation of power that the Initiative represents, all that is required is a plain language review of Article IX, Section 23 of the Maine Constitution. To date, however, no court has issued an

[8] The Attorney General has, in other contexts, noted that "[i]t is not clear whether the Legislature can simply 'deem' that" certain federal laws are not effected by state statute and that the preemptive nature of federal law and judicial review means "it makes no difference whether the Legislature has deemed otherwise." *An Act to Implement the Recommendations of the Task Force on Changes to the Maine Indian Claims Settlement Implementing Act, L.D. 2094*, 129th Legis. at 20 (2020) (written testimony of Maine Attorney General Aaron Frey), available at https://legislature.maine.gov/bills/getTestimonyDoc.asp?id=141207.

authoritative interpretation of what Article IX, Section 23 means, including its "uses substantially altered" standard, independent of any legislation that purports to apply it.[9] None of the Appellees—and the State Defendants' in particular—have made any effort to interpret Article IX, Section 23 itself, thereby failing to apply the cardinal rule of constitutional interpretation; the words of a constitutional provision must be given "the meaning which the words would convey to an intelligent, careful voter." *Allen v. Quinn*, 459 A.2d 1098, 1100 (Me. 1983) (quotation marks omitted).

But, as discussed in HQUS' opening brief, each of the words utilized in Article IX, Section 23 has a readily ascertainable meaning, as does the phrase "uses substantially altered" and the operation of the amendment as a whole. (*See* HQUS' Br. 28-36.) Having avoided actually interpreting—or even attempting to interpret—Article IX, Section 23 in its own right, the Appellees nonetheless claim that the Initiative is simply a "minor reinterpretation" of "undefined terminology" employed in Article IX, Section 23. (State's Br. 49.) In their view, the Initiative is no different than the Legislature's definition of "substantially altered" in Title 12, Section 598(5) and should be accorded "great deference." (State's Br. 41, 48.)

[9] The trial court did not address the plain meaning of Article IX, Section 23 below. The trial court in *Black v. Cutko* purportedly "started" with Article IX, Section 23, but then immediately deferred to the implementing legislation in the Designated Lands Act without further discussion of the constitutional terms themselves. *See Black v. Cutko*, Docket No. BCDWB-CV-2020-29, 2021 WL 3700685, at *8-9 (B.C.D. Aug. 10, 2021).

This claim to legislative primacy is at odds with the established understanding of Article IX, Section 23 and the separation of powers.[10]

Indeed, Sections 1 and 4 of the Initiative are vastly different from the definition provided in Section 598(5). To begin with, in contrast with Sections 1 and 4 of the Initiative, Section 598(5) is general and not context-specific. Moreover, although circular, the definition of "substantially alter" in Section 598(5) at least recognizes that the term substantial is *variable*.[11] It recognizes that Article IX, Section 23 speaks to different degrees of alterations of use, with only those rising to the level of substantiality being subject to legislative approval. (*See* HQUS' Br. 30-31.) Sections 1 and 4 do not allow for such variability. Instead, they categorically require legislative approval for any transmission line that crosses designated lands; an approach that is inconsistent with the plain variable language used in Article IX, Section 23. (*See* Orlando Delogu Amicus Br. 5.) Thus, by mere statute, the Initiative would materially change the meaning of Article IX, Section 23—a power which may only be exercised by constitutional amendment;

[10] This claim to legislative primacy ignores that over nearly thirty years, Article IX, Section 23 has been put into practice based on its three component parts: (1) the Legislature designates the lands to be protected; (2) the executive agency with management responsibilities for such lands determines whether a proposed action would reduce or substantially alter the uses of such land; and (3) if a reduction or substantial alteration of use would occur, the executive agency submits the proposed action to the Legislature for approval.

[11] The constitutionality of 12 M.R.S. § 598(5), of course, is not at issue in this litigation. If the constitutionality of Section 598(5) were challenged, judicial review would necessarily begin with the meaning of Article IX, Section 23 and then proceed to the appropriateness of the legislative implementation.

this is something that neither the electors nor Legislature may do. *See McGee v. Sec'y of State*, 2006 ME 50, ¶ 21, 896 A.2d 933 (implementing legislation may not be "inconsistent with" or "abridge[] directly or indirectly" the constitutional provision it purports to implement); *LaFleur ex rel. Anderson v. Frost*, 146 Me. 270, 280, 80 A.2d 407, 412 (1951); *see also Mesivtah Eitz Chaim of Bobov, Inc. v. Pike County Board of Assessment Appeals*, 615 Pa. 463, 470-73, 44 A.3d 3, 7-9 (2012); *Boswell v. State*, 181 Okla. 435, 74 P.2d 940, 950-51 (1937).

To the extent that the Appellees argue the Initiative binds the executive to a particular meaning of Article IX, Section 23, and now brazenly ask this Court to willingly subordinate itself to such interpretation, such approach does not accord with the principles of separation of powers. As this Court just recently reminded opponents of the Project: "[T]he first branch enacts laws, the second approves and executes them, and the third expounds and enforces them." *Avangrid*, 2020 ME 109, ¶ 33, 237 A.3d 882 (quoting Tinkle, *The Maine State Constitution* 70 (2d ed. 2013)). And while each department is imbued with particular powers to the exclusion of the others, they are all "co-equal," *New England Outdoor Ctr. v. Comm'r of Inland Fisheries and Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009, including with respect to the right to interpret and apply the Maine Constitution. As the United States Supreme Court has said, "[i]n the performance of assigned constitutional duties each branch of the Government must initially interpret the

Constitution, and the interpretation of its powers by any branch is due great respect from the others."[12] *United States v. Nixon*, 418 U.S. 683, 703-704 (1974).

Thus, contrary to Appellees' mischaracterization of HQUS' argument, it is not disputed that the Legislature is entitled to interpret and apply the Maine Constitution. However, neither the Legislature nor the electors are more competent to do so than the executive department and its administrative agencies.[13]

B. Section 4 of the Initiative creates an unconstitutional one-house legislative veto and requires impermissible legislative adjudication.

The first part of Section 4 of the Initiative requires approval by the Legislature—presumably by a majority—before the construction of any high-impact electric transmission lines anywhere in the State of Maine. This requirement, as claimed by Appellees, is not intended to replace the legislatively-established standards and administrative processes for those who seek to construct high-impact electric transmission lines, but merely to add an additional step.

As written, Section 4 of the Initiative purports to provide the Legislature with the unqualified and unreviewable right to approve or veto the construction of

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[12] Of course, if the departments differ in their interpretation or application of the Maine Constitution, then the judicial department may step in and authoritatively resolve the dispute. *See McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 407 (1819); *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

[13] The State Defendants' extravagant claims of legislative power are advanced to the benefit of the Legislature, but to the detriment of the PUC and Bureau of Parks and Land, which have been rendered mute. *Cf.* Amicus Br. of Former Commissioners of the Maine Public Utilities Commission; Amicus Br. of State Representatives, *et al.*

any high-impact electric transmission line for any reason (or no reason) whatsoever. This authority to approve or deny is to be exercised by laypersons without any set standards, factors or guidelines. *Cf. Waterville Hotel Corp. v. Bd. of Zoning Appeals*, 241 A.2d 50, 53 (Me. 1968) (municipal legislative body may not delegate to itself or to board "an unfettered discretion to issue or not issue permits"). It requires developers of proposed transmission lines spend unknown amounts of money and time to obtain all of the necessary administrative permits and approvals (federal, state and local), only then to be subject to the standardless political whims of the Legislature.

If majority approval by the Legislature is not obtained—whether by a failure to obtain the majority of either House alone or both Houses—the developer is denied all rights to proceed with its proposed transmission line. It matters not whether every other permit and approval—issued by those with technical expertise in the relevant fields—has been granted. Moreover, if approval is not granted (or a vote is withheld for any reason or no reason) Section 4 provides no opportunity for judicial review and the Governor would not be presented with any legislation to review for signature or veto. *Cf.* Me. Const. art. IV, pt. 3, § 2; *Lightfoot v. State of Me. Legislature*, 583 A.2d 694, 694 (Me. 1990) ("The Legislature acts within its constitutional sphere of activity when it exercises discretion to reject or enact legislation.").

Each of the Appellees attempts to avoid the practical realities of Section 4 by advancing the unfounded argument that nothing prevents the Legislature from presenting its approval of high-impact electric transmission lines to the Governor. (State's Br. 37 n.10; NextEra's Br. 30-31; Initiators' Br. 49 n.4.) But it is not what happens when an approval is granted that is at issue, but it is rather, what happens when the Legislature disapproves of a project or simply withholds voting at all. Such legislative action (or inaction) leaves nothing to present to the Governor.

Section 4 turns the Legislature into the judge, jury and executioner with respect to the construction of high-impact electric transmission lines anywhere in the State of Maine. Plainly, this does not comply with the constitutional requirements of bicameralism and presentment and constitutes an unconstitutional attempt to establish a legislative adjudication.[14] *See* Me. Const. art. IV, pt. 3, § 2; *INS v. Chadha*, 462 U.S. 919, 955-59 (1983); *see also id.* at 966 (Powell, J, concurring) (characterizing the one-house veto at issue as "clearly adjudicatory").

[14] If this claim to power is upheld, then the Legislature could require, for example, that notwithstanding the acceptance of a road for highway purposes, the Legislature must approve or disapprove that action. Likewise, if applied at the municipal level, the municipal legislative body could require approval of construction of any buildings such that a code enforcement officer issues a building permit to a landowner who meets all applicable standards for construction only for the municipal legislative body to disapprove of the construction because they disliked the style of the house to be built.

IV. The electors do not have the authority to retroactively apply legislation that effectively vacates past executive actions and judicial decisions.

Previously, opponents of the Project sought to prevent its completion by expressly overriding the administrative approval process. To do so, they proposed "legislation" that directed the PUC to reach new, diametrically opposite findings and revoke the previously issued CPCN. This Court confirmed that such an attempt was not legislation and was beyond the reach of the electors. *Avangrid*, 2020 ME 109, ¶¶ 35-36, 273 A.3d 882. As a result of this misstep, opponents of the Project were faced with the challenge of preventing continued construction on a now-fully permitted transmission line and without singling out any specific administrative approval or permit.

The Initiative is the opponents' attempt to surmount that challenge. Rather than direct an administrative agency to revoke a permit or approval, the Initiative takes the new tack of reaching back *just far enough* to render necessary final permits and approvals as well as any court decisions upholding them unenforceable and superfluous. Of the various parts of the Initiative, Section 4 renders such permits, approvals and judgments ineffective absent approval by the Legislature. Section 5 of the Initiative, meanwhile, retroactively imposes a total ban on construction of high-impact electric transmission lines within a wide swath of Maine. The result, as intended, is to render any existing permits and approvals received, and judicial decisions upholding them, nullities.

In claiming that the Initiative does not violate the Maine Constitution, each of the Appellees cite to *Pennsylvania v. Wheeling & Belmont Bridge Co*., 59 U.S. 421 (1855), for the proposition that the separation of powers is not violated when legislation affects final judgments with prospective effects.[15] (State's Br. 39-40; NextEra's Br. 26-29; Initiators' Br. 21-22.) The *Wheeling* rule, however, is an *exception* to the general rule that legislation may not reopen or overrule final judgments and applies only with respect to legislation altering the prospective effect of injunctions. *See Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 232 (1995); *BellSouth Corp. v. F.C.C.*, 162 F.3d 678, 692-93 (D.C. Cir. 1998); *Benjamin v. Jacobson*, 124 F.3d 162, 171 (2d Cir. 1997). It has no applicability to decisions in which—like this Court's decision in *NextEra Energy Resources, LLC v. Me. Public Utilities Commission*—there is no continuing injunctive relief. 2020 ME 34, ¶ 43, 227 A.3d 1117.

Rather, as the Supreme Court has summarized, final judgments "may not be revised, overturned or *refused faith and credit* by another Department." *Plaut*, 514 U.S. at 225-226 (quotation marks omitted) (emphasis added). Moreover, "no decision of any court of the United States can, under any circumstances . . . be liable to a revision, *or even suspension*, by the Legislature itself, in whom no

[15] This argument is raised by the Appellees despite the fact that it was not presented below beyond brief citation in support of the argument that regulation of public utilities lies with the Legislature. It was not cited for the principle now advanced by the Appellees, nor was such argument made below. *See supra* n.2 at 24.

judicial power of any kind appears to be vested." *Id.* (quotation marks omitted) (emphasis added). Sections 4 and 5 of the Initiative fail to heed these longstanding principles and, in fact, have the intended purpose and effect of suspending, and rendering unenforceable, the PUC's decision to issue a CPCN and this Court's decision upholding it.[16] This violates the separation of powers.

Moreover, the State Defendants actually concede that the Initiative would render the CPCN "moot" and have the "practical effect of undoing prior executive action." (State's Br. 34.) To the State Defendants, this arrogation of power to the legislative branch is acceptable because the Legislature "must retain the ability to alter or override [administrative agencies'] policy decisions via legislation if it concludes that they are not, or are no longer in the public interest."[17] (State's Br. 35.) Such a stance ignores that there is a stark difference between *prospective* legislation that implements policies moving forward and permissibly affects the continuing operation of previously authorized activities, and *retroactive* legislation seeking, in purpose and effect, to render ineffectual prior executive actions in

[16] Appellees' claims that this Court's decision in *NextEra* was "narrow" does not insulate the Initiative from this defect because it was conclusive not only to the claims and issues raised, but also those that might have been raised. *See, e.g., Federacion de Maestros de Puerto Rico v. Junta de Relaciones del Trabajo de Puerto Rico*, 410 F.3d 17, 22, n.8 (1st Cir. 2005) (discussing "horizontal" and "vertical" issue and claims preclusion).

[17] The plain language of the first part of Section 4 of the Initiative does not support the claim that it is in support of the "public interest," as the standardless legislative approval requirement is not tied to consideration of the public interest. In contrast, the PUC is specifically required to consider the public interest when deciding to issue a CPCN. *See* 35-A M.R.S. § 3132(6).

accordance with legislatively-imposed standards and processes and judicial decisions thereon. The former may be permissible policy making within the legislative function, while the latter is an impermissible recipe for constitutional, administrative and economic chaos in the State of Maine.[18]

V. The standard rules of severability support a conclusion that no single portion of the Initiative is severable from the remainder.

The State Defendants incorrectly assert that HQUS' severability argument "flips the severability analysis on its head, suggesting that, in absence of clear proof of legislative intent, there is a presumption *against* severability." (State's Br. 52.) This misapprehends the entire argument set forth in HQUS' opening brief. (*See* HQUS' Br. 14-18.) As HQUS acknowledged, the standard rule is that statutory provisions are severable regardless of whether a severability clause exists. (HQUS Br. 16 n.7) *See* 1 M.R.S. § 71(8); *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (1973). This does not mean that all statutes are necessarily severable.

This Court has consistently provided that there are two main factors to be considered with respect to severability of legislation, including initiated legislation:

[18] For discussion on the effect of retroactive legislation of this nature on the environment, *see* Amicus Brief of Richard Anderson, *et al.*; for discussion on economic effects, *see* Amicus Brief of Professor Robert J. Weiner; for discussion of effects on administrative procedures, *see* Amicus Brief of Former Commissioners of the Maine Public Utilities Commission; for a discussion of impact on municipalities, *see* Amicus Brief of the City of Lewiston; for discussion on reliability of the New England grid and attempts to combat climate change, *see* Amicus Brief of NSTAR Electric Company, *et al.*; for discussion on the separation of powers, *see* Amicus Brief of State Representatives, *et al.*

"(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; *Bayside Enterprises, Inc. v. Me. Agric. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986). HQUS does not dispute that, to some degree, each of Sections 1, 4 and 5 could, in the abstract, function independently and be given technical effect if one was to be struck down. But that does not complete the analysis. The question still remains as to whether the intent of the electors was to enact legislation comprising an integrated whole.

Here, the Initiative was presented to the voters of Maine for petition signatures and enactment as one single package of legislation. (*See* HQUS' Br. 15, 17.) This was a deliberate choice of the Initiators to, as the Secretary of State acknowledged, "maximiz[e] the likelihood that the initiative would halt the NECEC project" by being enacted. *Caiazzo v. Sec'y of State*, 2021 ME 42, 256 A.3d 260. After this Court acknowledged that "splintering 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," *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 24, 256 A.3d 260,[19] the Secretary of State

[19] The State Defendants look back to appellate briefs filed in *Caiazzo* to claim that "both sides" agreed the Initiative was severable, but the argument of one appellant is inapposite. (State's Br. 53 n.12.) Moreover, the State Defendants have recast the purpose and intent of such argument in the prior litigation, which revolved on whether the Secretary of State was required to split the ballot question regarding the

prepared the statutorily required "Citizen's Guide" for the referendum election.[20] *See* 1 M.R.S. § 353. That guide advised voters that a "'yes' vote [was] to enact the initiated bill *in its entirety*." *Maine Citizen's Guide to the Referendum Election, Tuesday, November 2, 2021*, ME. SEC'Y OF STATE at 7 (emphasis added).

Based on all of the foregoing, there is overwhelming evidence that the intent of the initiators of the Initiative and the voters who approved it did so with the understanding that it would be enacted as a single package of legislation designed to stop the Project. To determine otherwise would be to thwart the voters' clear intent and tell future initiators opposing projects that they can throw large packages of proposed legislation at the wall and let future litigation decide what sticks.

CONCLUSION

For all of the reasons set forth in HQUS' opening brief, and for all of the additional reasons set forth above, HQUS respectively requests that this Court vacate the decision of the Business Court and direct that a preliminary injunction be entered in Plaintiffs' favor.

Initiative into three separate questions. *See Caiazzo v. Sec'y of State*, 2021 ME 42, ¶¶ 1-9, 256 A.3d 260. If the question was split into three *prior to the election*, then each provision *may* have been severable from the whole because the voters could choose to vote up or down on each substantive provision. The initiators of the Initiative chose to forsake that approach in favor of a single question.

[20] This Court has previously looked to the Citizen's Guide, *see* 1 M.R.S. § 353, to determine the "legislative intent" of the voters. *See Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶¶ 24, 26, 187 A.3d 609; *Maine Equal Justice Partners v. Comm'nr of Dep't of Health & Human Servs.*, 2018 ME 127, ¶ 51, 193 A.3d 796 (Alexander, J., dissenting).

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CERTIFICATE OF SERVICE

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