STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. BCD-21-416

NECEC TRANSMISSION, LLC
AVANGRID NETWORKS, INC., et al

Plaintiffs/Appellants

v.

BUREAU OF PARKS AND LANDS, et al

Defendants/Appellees

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

BRIEF OF AMICUS CURIAE

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Emeritus Professor of Law

**On behalf of PLAINTIFFS/APPELLANTS
NECEC TRANSMISSION, LLC AND AVANGRID NETWORKS, INC.**

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5. Whether the Business Court holding sustaining the Initiative erred in characterizing the Initiative as an exercise of state police power to protect the environment given the fact that all of the Initiative Sections are either constitutionally impermissible, an invalid exercise of police power, or irrelevant to these proceedings.

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STATEMENT OF AMICUS'S INTEREST

Pursuant to the Maine Rules of Appellate Procedure, Rule 7A(e)(1) Amicus states as follows: I have a BS degree in Economics (1960) from the University of Utah, and an MS degree in Economics (1963) and a JD degree (1966) from the University of Wisconsin. I was a (tenured) full time member of the faculty of the University of

Maine School of law (1966-2006); from 2006 to the present I have been an active Emeritus Professor of Law. I have taught occasional classes, guest lectured, written a book on intertidal land law, *Maine's Beaches are Public Property, w*ritten numerous op-ed pieces for Maine publications, and consulted in my areas of specialization. The latter include property law, land use law, state and local government law, environmental law, and administrative law. I have published books on land use law (Tower Publications) and environment law (Butterworths Publishers). I served on the State Environmental Improvement Commission (now the BEP) for five years (1969-1974). Believing that global warming is the overarching reality of our era—that reliance on fossil fuels must be reduced, I have worked with an ad hoc group of former Maine State government agency heads in support of the Avangrid Corporation's NECEC project. In this capacity I submitted Amicus briefs to the Law Court in the *Avangrid* case, and in the *Black v. BEP* case. I believe my background (economics and law) and long experience dealing with issues raised by the second Initiative aimed at prohibiting the NECEC project (now before the court) equips me to submit an Amicus brief addressing these issues. That said, I respectfully submit the attached brief.

STATEMENT OF FACTS

Amicus would associate himself with the comprehensive Statement of Facts laid out in Plaintiff/Appellants NECEC Transmission LLC, Avangrid Networks brief, and the additional facts laid out on pages 3-8 of Plaintiff/Appellant H.Q. Energy Services (U.S.) Inc. brief. That said, given his long-standing concern for environmental issues, amicus calls the following facts to the Court's attention; they provide essential context/background to the issues now before the Court.

Global warming is real; the problem is getting worse, not better. An October, 2021 report released by the United Nations noted:

> "The Emissions Gap Report 2021 shows that new national climate pledges combined with other mitigation measures put the world on track for a global temperature rise of 2.7°C by the end of the century. That is well above the goals of the Paris climate agreement and would lead to catastrophic changes in the Earth's climate. To keep global warming below 1.5°C this century, the aspirational goal of the Paris Agreement, the world needs to halve annual greenhouse gas emissions in the next eight years."[1]

To be clear, the NECEC project will not solve the global warming problem facing Maine, the nation, the global community. But it is a necessary step in the right direction. It substitutes a large quantity of hydroelectric energy (so-called green energy) for fossil fuel energy. Fossil fuels are the root cause of global warming.

[1] The UN Emissions Gap Report 2021, *The Heat Is On: A World of Promises Not Yet Delivered*, is available online. A follow-up report by the UN's Intergovernmental Panel on Climate Change *Climate Change 2022: Impacts, Adaptation and Vulnerability,* is also available online. A press release summary noted: "This report is a dire warning about the consequences of inaction…It shows that climate change is a grave and mounting threat to our wellbeing and a healthy planet." See also NY Times summary of the UN report, March 1, 2022, *Time is Running Out*, pg.1.

DETAILED ARGUMENT *in re* ISSUE 1

Whether the Business Court holding sustaining the Initiative erred in failing to recognize that a legislative declaration that transmission lines (including high-impact electric transmission lines (HETL) and other linear developments, now "deemed" (*ipso facto*) to substantially alter uses in/on publically owned land, in effect amends Article IX §23. This is unconstitutional. §23 contains no such edict. As written §23 invites developers to show that their project does not substantially alter existing uses of public land. If successful, legislative approval is not needed.

In Amicus's view the Business Court erred. The power to legislate by initiative is rooted in Maine's Constitution, Article IV, Pt. 3, §18. But that very authorization is, by its own terms, limited. The power to amend the Constitution by initiative is expressly prohibited; section 18, paragraph 1 states:

> "The electors may propose to the Legislature for its consideration any bill, resolve or resolution, including bills to amend or repeal emergency legislation **but not an amendment of the State Constitution,** …"[2] (emphasis added)

But "amend" the Constitution is precisely what the Initiative has done. The Initiative's declaration that power lines (including HETL) and other linear developments "… are **deemed** [*ipso facto*] to substantially alter the uses of the land…"[3] fundamentally changes (amends) Article IX, §23. The initiators/electors have done by indirection (by amending 12 MRS §1852 (4) and enacting 35-A MRS, §3132, sub-§6-C) what they are constitutionally barred from doing directly, i.e., amend Article IX, §23.

§23 as written clearly does not bar power lines and other linear infrastructure

[2] Me. Const., Art. IV, Pt. 3, §18, para. 1.
[3] The Initiative, Section 1. amending 12 MRS §1852 (4).

developments. §23 does not bar the leasing or sale of publically owned lands. §23 requires legislative approval only in settings where a proposed development reduces" publically owned land (not a factor in these proceedings) or "substantially alters" existing uses on publically owned land. As written, §23 treats the question of whether a power line, a HETL, or other linear infrastructure development "substantially" alters existing uses, as an "open question." Developers of such projects have the opportunity to show that their project will not "substantially" alter uses on publically owned land, and thus do not require legislative approval. If a power line, a HETL or other linear infrastructure developer cannot make this showing, §23 makes clear that their project may yet be authorized by a favorable 2/3 vote of the Legislature.

The initiated legislation, by flatly "deeming" that all power lines and other linear developments "substantially" alter existing uses, in effect amends Article IX, §23. It does so by characterizing widely variable settings and conditions (as to whether a power line, a HETL or other linear development will "substantially" alter" permitted uses on public lands) as fixed, inherently harmful, always give rise to "substantial" alteration, and as such, should always be subject to legislative approval. That does not comport with Maine's diverse landscapes. More importantly, it is facially inconsistent with the precise wording of §23, i.e., that only linear development activities that "substantially" alter existing uses of publically

owned land require legislative approval. The constitutional choice of words, whether a development activity "substantially" alters, or does not "substantially" alter, cannot be legislatively altered. Moreover, what is "substantial" or not "substantial is inherently an "open question", a question of degree that can only be decided on a case by case basis. This is precisely how it has been seen by the BPL charged by the Legislature with the leasing of public lands and with carrying out the mandate of Art. IX, §23 since its adoption in 1994.

In sum, what the initiators/electors would call a simple word change ("… are **deemed** to substantially alter…") addressing power lines, HETL and other linear developments changes §23's meaning, making it, in reality a far-reaching and invalid amendment of Art. IX, §23. This amendment, dressed in legislative sheep's clothing fundamentally changes the role of the Legislature, the scope of §23, the rights of power line, HETL, and other linear infrastructure developers, and how BPL has operated (without controversy or legal challenge) for nearly 30 years. This word change, characterizing any/all linear developments as "substantial" amends IX §23.[4] This cannot be done by Initiative.

Finally, Amicus would note that Maine case law reaffirms the plain language of the Constitution, i.e., that initiated measures may not amend the Constitution of

[4] Apart from the constitutional argument, Amicus would note that the Initiative is retroactive (to preclude the NECEC project, see *infra* Issue 3) and unwise; HETL and other linear projects meet essential infrastructure needs; they are subject to regulatory scientific/engineering scrutiny; that's where the focus should be; they should not be caught up in the political debates of the day.

Maine, see *Wagner v. Secretary of State*.[5] That said, plaintiffs in *Wagner* failed because it was premature, not ripe (it was brought well before the initiative would be presented to the voters); it also failed because both the trial court and the Law Court agreed that: "On its face, the proposed initiative legislation is not a constitutional amendment."[6] It was not "…a back door attempt to amend the Constitution."[7]

Here, however, unlike *Wagner*, there is no ripeness issue—the voters have adopted the initiated measure; the vote was certified by the Governor; it became law in December, 2021. This suit is not a pre-election challenge. The merits of the initiated measure can/must be addressed. To that end, here, as shown above, and unlike *Wagner*, "… a reading of the actual text…"[8] of the purported legislation evidences the fact that "on its face" it fundamentally changed Art. IX, §23. By "deeming" that all HETL and other linear developments always cause "substantial alteration" the electors have legislated a false certainty—they have taken a condition that may or may not exist and without any factual basis, evidence, data, they have legislatively asserted that it always exists. This assertion both amends Art. IX, §23, and on its face is simply untrue—not all HETL or other linear developments substantially alter existing uses on public lands. That fact is borne

[5] 663 A2d 564 (Me. 1995).
[6] Id. at pg. 567.
[7] Id. citing the Superior Court holding.
[8] Id.

out by multiple (and unchallenged) BPL leasing arrangements put in place since §23 was adopted.

Amicus will show in subsequent arguments that this is not the only provision of the initiated measure that "on its face" is unconstitutional. But the above argument (without more) is sufficient for this Court to do what the *Wagner* Court was prepared to do had it found facial evidence "… that the initiative was a disguised constitutional amendment…," i.e., declare the initiated measure unconstitutional.[9] The facial evidence here is clear. Amicus asks this Court to so hold.

DETAILED ARGUMENT in re ISSUE 2

> Whether the Business Court holding sustaining the Initiative is contrary to equal protection, separation of powers principles and Maine case law, in that the Initiative geographically identifies a small area (approximately .002% of Maine's total land area)[10] within which a single corporation is targeted/excluded not by name, but by prohibiting a single type of project (HETL), despite prior issuance of necessary permits.[11]

In Amicus's view the Business Court erred. Section 5 of the Initiative is focused on a relatively small geographic area referred to as, "… the Upper Kennebec Region … approximately 43,300 acres of land … " and expressly states that "… a high-impact electric transmission line **may not** be constructed …" within this defined area.[12] The prohibition is absolute; it applies only to HETL, leaving other

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[9] Id.
[10] If one suggests the relevant land area to be considered is the unorganized (wilderness/ heavily forested) portion of the state, the Initiative's geographically identified area encompasses approximately .004% of this smaller land area.
[11] The Initiative, Section 5, enacting 35-A MRS, §3132, sub-§6-D.

linear infrastructure projects (indeed any other development activity) that may pose environmental risk and/or the potential for "substantially altering" uses on public and/or private lands, outside the scope of this singular geographically defined proscription.

Though the NECEC Transmission LLC et al[13] as a corporate entity, is not expressly named in the Initiative, it's HETL is the only development activity that is, or likely ever will be, proscribed by Section 5. In Amicus's view, one must be either naive or obtuse to believe that the NECEC LLC's project is not the sole target of this Initiative provision. In short, the initiators/electors (rather than name the corporate entity they would exclude) have fashioned what amounts to a word game to achieve this discriminatory end. In Amicus's view, this is not sustainable.

In striking down the initiators/electors first initiative the Court in *Avangrid Networks Inc. v. Sect. of State* case[14] made clear that "…the Legislature may not enact a private resolve singling out an individual [or corporation] for unique treatment."[15] But this is precisely what the initiators/electors have done in Section 5 of their second initiative.

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[12] Id. (emphasis added)
[13] See Bus. Ct. Order, fn. 1 at pg. 4.
[14] 2020 ME 109.
[15] See 2020 ME 109 ¶36 f.n. 10.

Earlier Maine case law *Ace Tire Co. Inc. v. City of Waterville* [16] made the same point the *Avangrid* Court made. In police power regulations of junkyards, the city imposed hugely disparate licensing fees on yards located in one part of town as opposed to yards in locations the town deemed more appropriate. The *Ace Tire* court made two points germane to this case. First, it noted that: "Under a general power to regulate and license, a municipality cannot, directly or indirectly, entirely prohibit a useful occupation or privilege."[17] Second, it noted:

> "…the discrimination is unwarranted and arbitrary, the difference is illusory [akin to prohibiting HETL but no other linear developments] … is prohibitory in nature and must be declared unconstitutional….The Act and its application under the police power must have a clear, real, and substantial relation to its purpose." [18]

That said, the issue before the Business Court (and now this Court) was/is whether the initiated legislation is constitutionally sustainable given the fact that a salient provision, Section 5, encompasses a relatively small geographic area, prohibits a single type of development (HETL), impacts a single corporation (NECEC Transmission LLC), and nullifies permits and a lease issued by three different executive agencies of Maine State Government. The Business Court's holding says:

> "There is nothing in the plain language of the Initiative that suggests it is anything other than a statute of general applicability affecting various linear projects and regulating high-impact electric transmission lines in Maine. It does not reverse any specific agency decision but rather places new, retroactive requirements on a category of decisions."[19]

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[16] 302 A2d 90 (Me. 1973).
[17] Id. at pg. 99. The *Ace Tire* Court cites an earlier Maine case *State v. Brown*, 135 Me. 36, at pg. 40, 188 A. 713 (Me. 1936) at pg. 715 for the same proposition.
[18] Id. at pg. 100.
[19] Bus. Ct. Order at pgs. 37-38.

In Amicus's view this statement is fraught with error. As previously noted Section 5 does not include other linear infrastructure projects (or any other development activity) in its geographically defined proscription.

Further, the Business Court's statement that the Initiative "… does not reverse any specific agency decision…"[20] cannot be squared with the facts. The limited scope of Section 5's prohibition; its limited geographic reach, and the time line of Section 5's drafting say it all. Section 5 states that HETL are the only development activity prohibited in the defined area. Section 5 expressly states that a HETL (the NECEC LLC project is the only such project within the defined area) may not be constructed in the Upper Kennebec Region. Most important— Section 5 was drafted (and presented to the Secretary of State's office **after** the NECEC project was fully approved by the PUC and the DEP, **after** this Court affirmed the PUC approval, **after** BPL's lease (to CMP) of approximately 33 acres of public land was entered into, and **after** the initiators/ electors first initiative was struck down by this Court's holding in *Avangrid Networks Inc. v. Sect. of State*, 2020 ME 109.[21]

The initiators/electors of the second Initiative knew what they needed to do. The end result contemplated by Section 5 is clear—stop the project. The Initiative

[20] Id.

[21] The PUC's project approval was granted in May, 2019; the first initiative was begun in August, 2019; the Court's *NextEra* decision sustaining the PUC's approval was handed down in March, 2020; the DEP's project approval was granted in May, 2020; the Court's *Avangrid* decision striking down the first initiative was handed down in August, 2020; the second initiative was begun in September, 2020.

was crafted knowing it needed voter approval— that goal, having been achieved, now requires judicial review of the second Initiative's constitutional validity. In Amicus's view, it is patently unconstitutional.

The Business Court holding, however, characterizing the Initiative as an exercise of state police powers[22] sustained the Initiative and the stoppage of construction on the project. This has the collateral effect of nullifying/reversing PUC, DEP, and BPL agency decisions/approvals/ permits—permits issued, after lengthy public hearings, by each of these quasi-judicial executive agencies. It begs credulity to believe that the initiators/electors had any other purpose, intent, or end result in mind when they drafted Section 5 of the second Initiative.[23] But neither the initiators/electors intent nor the Business Court holding can set aside this Court's holding in *Avangrid* that pointedly noted:

> "Although the Legislature may properly constrain the Commission [PUC] in its legislative functions and may alter the authority conferred on the Commission, **the Legislature [**here the Initiative**] would exceed its legislative powers if it were to require the Commission to vacate and reverse a particular administrative decision the Commission had made."[24]** (emphasis added)

The *Avangrid* Court, citing an earlier Maine Case *Grubb v. S.D. Warren Co.*,[25]

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[22] Amicus's Issues 4 and 5, *infra*, argue that the initiative is not a valid exercise of police powers.
[23] The second Initiative's (more subtle) Section 5 approach to reversing multiple agency decisions is clearly designed to achieve for the initiators/electors what they failed to achieve in their first initiative that bluntly ordered the PUC to reverse its CPCN decision. That approach was struck down in *Avangrid Networks Inc. v. Sect. of State*, 2020 ME 109. Importantly, however, the end result in both initiatives being the same (the striking down of agency decisions) a similar Law Court disposition is warranted here.
[24] *Avangrid* 2020 ME 109, ¶35. The failure here is greater than in *Avangrid*; the "previous action" of three different agencies is overturned.
[25] 2003 ME 139, ¶11.

went on to note:

> "The Legislature [here the Initiative] may not 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. **Thus, the action that would be mandated by the direct initiative would be executive in nature, not legislative."** [26] (emphasis added)

In sum, *Avangrid* makes clear, the Business Court erred.

A further weakness of the Initiative's Section 5 is that (by its own terms) it applies only to 43,300 acres of forestland land surrounding and proximate to the NECEC project. Unlike other Maine environmentally protective enactments, e.g., LURC legislation, the Site Law, air and water pollution control laws, shore land zoning protections, wetland protections, all of which apply statewide or to significant land areas, and can truly be said to be "of general applicability,"[27] the geographic area identified here pales in comparison. If Section 5 is part of a general police power enactment "…to protect the environment." as stated by the Business Court,[28] why wasn't the geographic area encompassed in Section 5 closer to the 10 million acres of unorganized territory in Maine, or at least inclusive of all designated unique, fragile, or scenic areas within these 10 million acres? Short answer—saving the wilderness (Maine's forestland) from HETL was never the motive for Section 5. [29] Protecting a seemingly large, (43,300 acres) but actually a

[26] *Avangrid* 2020 ME 109, ¶35.
[27] Bus. Ct. Order at pgs. 37-38.
[28] Bus. Ct. Order at pg. 24.
[29] It is common knowledge and generally conceded that the area defined in Section 5 is not unique in any sense of the word—it is woodland (as is much of the unorganized territory) but

small portion of Maine's undifferentiated forestland is part of the word game—a means to the real motive—killing the NECEC project. In short, the Business Court holding that the Section 5 area defined in the Initiative and its prohibition is "… a statute of general applicability…" is not credible. [30]

In support of it's holding, the Business Court cites *Friends of Cong. Square Park v. City of Portland* [31] for the proposition that initiators/electors are permitted to benefit from the enactment of legislation they have brought forward. As a general rule, Amicus supports this view. However, the Business Court fails to note that the Congress Square Park initiators/electors canvassed the entire City of Portland and fashioned a legislative proposal that called for new more protective policies that would protect 35 different publically owned land areas in every corner of the city. The "friends of Congress Square Park" were not the sole beneficiaries of the initiative they created; their initiative did not seek to protect only the relatively small Congress Square Park area. In short, unlike the case at hand, the Congress Square Park initiative proposed legislation "of general applicability" within the City of Portland. The *Congress Square Park* case, understood fully, supports Amicus's argument—it does not sustain the Initiative as the Business

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apart from its proximity to the NECEC project it is unremarkable and undifferentiated. See Turkel, *One Crucial Mile Creates Wide Gap for Power Project,* Maine Sunday Telegram, Oct. 17, 2021 at pg. A-10.

[30] Rhetorically one might ask, would the zoning of one street in an entire Town, leaving all other streets in the Town without zoning be permissible? On equal protection grounds alone, Amicus doubts this would be a sustainable exercise of police powers.

[31] 2014 ME 62, 91 A3d 601 (Me. 2014).

Court holds, indeed it points out another error of the Business Court.

In conclusion, the Business Court holding sustaining the Initiative's enactment of 35-A MRS, §3132, sub-§6-D, contains multiple errors. It allows the initiators/ electors to once again do by indirection what they are constitutionally barred from doing directly, i.e., violate separation of powers principles by permitting the quasi-judicial decisions of three separate executive department agencies to be nullified/ reversed; violate equal protection principles by permitting a geographically defined prohibition that impacts a small fraction of Maine's forested unorganized territory and a single corporate entity. Further, the Business Court holding misconstrues the *Congress Square Park* case and ignores relevant portions of the *Avangrid* case. Amicus would urge the Law Court to so hold and to declare the voter approved second Initiative unconstitutional.

DETAILED ARGUMENT in re ISSUE 3

Whether the Business Court holding sustaining the Initiative erred in that it failed to recognize that Maine's Constitution, Art. I, §11 states that: "The Legislature shall pass no…**ex post facto law, nor law impairing the obligation of contracts."**[32] It follows that the Initiative's reach back provisions that exempt a narrow range of essential infrastructure developments from 1 MRS §302 protections[33] violate Maine's Constitution.

[32] Both Maine's Constitution (Art. I, §11) and the Federal Constitution (Art. I, §9, Clause 3) prohibit Bills of Attainder, and ex post facto laws. Maine's constitutional safeguards against retroactive legislation are clearly broadened by this constitutional language.

[33] More colloquially 1 MRS §302 is said to determine when a "vested right" (the right to continue and complete a project) arises. Leaving a full exploration of "vested rights law to other parties in these proceedings, this Amicus would briefly note that read fully §302 makes clear that the NECEC project is beyond the reach of the Initiative. §302 states: **"Actions and proceedings**

In Amicus's view the Business Court erred. If further evidence is needed that the Initiative is not "… a statute of general applicability…"[34] the last sentence in Section 1 (dealing only with infrastructure leases of public lands) and the single sentence of Section 6 (dealing only with the location and legislative approval of HETL) projects provides it. Without naming NECEC Transmission LLC, Avangrid Networks, Inc. the dates of the retroactivity provisions in these two sentences (squarely fit) and are designed to halt the NECEC project.[35] The reality is, one corporation is impermissibly singled out for unique treatment[36]

Moreover, in their zeal to avoid 1 MRS §302, the initiators/electors and the Business Court fail to acknowledge that the barrier to these rollback provisions is not simply §302, but Maine's Constitution, Art. I, §11 that clearly states: "The

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pending at the time of the passage, amendment, or repeal of an Act or Ordinance [e.g., this Initiative] are not affected thereby." §302 continues: "For the purposes of this section and regardless of any other action taken by the reviewing authority, an application for a license or permit required by law at the time of its filing shall be considered to be a pending proceeding when the reviewing authority has conducted at least one substantive review of the application." The NECEC project was well beyond the "pending" stage at the time this Initiative became law (December, 2021). Multiple state and federal agencies had deemed that all required applications were complete; they had conducted extensive hearings, and, (by January 2021) had actually issued all needed project permits. Construction could be and was lawfully begun. By its own terms, §302's vesting of the right "not [to be] affected" by a change in the law [the retroactivity provisions in this Initiative) had already accrued to NECEC LLC. These principles go back to the earliest days of the nation, see *Calder v. Bull*, 3 U.S. 386 (1798) at pgs. 390-391.

[34] Bus. Ct. Order at pg. 37; also *supra* fn. 27-30 and accompanying text.

[35] Though Section 1 of the Initiative also exempts leases for other linear infrastructure developments (not just HETL) from 1 MRS §302 benefits it should be noted that expanding the types of activity deprived of §302 benefits harms a very small class of developers—all other non-lease and non-infrastructure developers anywhere in the state continue to receive §302 benefits. The violation of equal protection principles seems clear, particularly when there are no substantive changes (none) to any existing §302 provision.

[36] See *supra* fns. 12-14 and accompanying text.

Legislature shall pass no bill of attainder,[37] **ex post facto law**,[38] **nor law impairing the obligation of contracts….**" The U.S. Constitution, Art. I, §10, clause 1 (using identical language) bars States from passing legislation having any of these prohibited goals or end results. Interestingly, the language in the U.S. Constitution limiting the powers of Congress omits the "impairing the obligation of contracts" clause. It follows that Maine's constitutional prohibitions on these undesirable types of legislative enactments is broader than those the U.S. Constitution imposes on Congress.[39] Amicus will deal more fully with these constitutional issues shortly.

First, however, amicus examines the Initiative's reference to 1 MRS §302: Correctly seen §302 is an important (a legislative) carrying out of the letter and spirit of the cited constitutional provision and is applicable statewide and to any/all "actions and proceedings."[40] §302 could be substantively narrowed or broadened

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[37] A Bill of Attainder at common law (and today) is legislation that imposes a punishment or penalty on an individual or corporate entity without benefit of a trial; see Wikipedia.com. The facts of this case do not constitute a Bill of Attainder and amicus will not speak to this clause in discussing Art. I, §11 of Maine's Constitution.

[38] "An ex post facto law is a law that retroactively changes the legal consequences of actions that were committed, or relationships that existed, before the enactment of the law." See Wikipedia. com. Though both the Federal and Maine's constitutional prohibitions on ex post facto laws generally arise (and are applied) in criminal law settings, see *Collins v. Youngblood*, 497 U.S. 37 (1990) and *State v. Jaubert*, 603 A2d 861 (Me. 1992), both the U.S. Supreme Court, and Maine's Supreme Judicial Court have fashioned narrow civil law settings that have found an ex post facto law to violate their respective constitutional prohibitions, see *State of Maine v. Letalien*, 985 A2d 4 (Me. 2009) and *Kennedy v, Mendoza-Martinez*, 372 U.S. 144 (1963).

[39] Though "impairing the obligation of contracts" language is not found in Art. I, §9, clause 3 of the U.S. Constitution, (and thus Congress is not bound to adhere to this prohibition) the fact that this language does appear in Art. I, §10, clause 1 of the federal constitution binds Maine to adhere to this prohibition.

[40] See 1 MRS §302.

by the Legislature or by an Initiative.[41] But clearly nothing in Sections 1 or 6 of the Initiative "constrains"[42] (i.e., narrows or broadens) any existing word, phrase, or sentence in §302. In short, the substantive provisions in §302 — provisions that apply statewide and shore up Art. I, §11's constitutional mandate, remain intact.

Instead, the Initiative with no thought to "general applicability"[43] exempts HETL and a narrow range of infrastructure developments (often essential) involving leased land, from §302 benefits—benefits that §302 provides to all other development activities, i.e. "actions and proceedings". The Business Court, while characterizing the Initiative as a "police power" enactment[44] fails to acknowledge the magnitude of disproportion between those who lose §302 benefits (a relative handful of developers) and those who retain these benefits (thousands of developers in all parts of the state). Further, neither the Business Court nor the initiators/electors lay out (explain) how, in what way, to what degree this exemption of (often necessary) infrastructure development activities advances the health, safety, and general welfare of Maine people.

In short, labeling something a "police power" enactment (particularly an exemption from a statewide statutory provision that has been a part of Maine law for decades) does not make it so without a reasoned justification, data, some hard

[41] See *supra* fn, 24; the *Avangrid* citation underscores the point being made.
[42] Id, *Avangrid's* choice of words.
[43] See *supra* fns. 27-30 and accompanying text.
[44] See Bus. Ct. Order at pg. 24.

facts showing the need for, and/or the public benefit from, exemptions that narrow the statewide benefit §302 provides all developers. The fact the neither the Business Court nor initiators/electors have provided any justifying information is evidence that none exists. Moreover, Section 1's focus on a very narrow group of infrastructure developments on leased lands, when measured against the statewide benefits of an untrammeled §302 violates equal protection principles. So does Section 6's focus on HETL alone, which in the context of these proceedings, means the NECEC project alone.

In Amicus's view patently unequal treatment is not constitutionally permissible police power legislation.[45] Both Sections 1 and 6 (in different ways) violate equal protection principles. This reality (without more) evidences the initiators/electors intent to deprive HETL and other leased land linear developers of §302 (vested right) benefits, and going forward to prohibit regulatory bodies from considering §302 when/if similar developments arise in the future. The previously cited *Avangrid* and *Ace Tire Co.* cases make clear that these retroactive provisions are constitutionally impermissible.[46] Amicus would urge the Law Court to so hold.

Turning now to language in Maine's constitution: "The Legislature **shall pass**

[45] The argument that *MacImage of Maine, LLC v. Androscoggin Cty.*, 2012 ME 44, 40 A3d 975 eviscerates equal protection challenges to §302 retroactive provisions, would do well to read ¶¶ 33-35 of the Court's opinion carefully. There is no rational relationship "to a legitimate state interest" here, nor do Sections 1 and 6 treat "similarly situated persons [corporations]" equally.
[46] See *Ace Tire Co. supra* fns. 15-17 and accompanying text.

… no ex post facto law, nor law impairing the obligation of contracts."[47] It seems axiomatic that retroactive provisions (whether passed by the Legislature or by Initiative) cannot ignore or glibly overrule these constitutional prohibitions. The historic federal and state court tendency to limit ex post facto law arguments to criminal law matters seems unwarranted; there is certainly no such limitation in the plain language of either the U.S. or the Maine Constitution. Recent case law expanding ex post facto arguments to a range of civil law enactments (such as we have here) is both noteworthy and long overdue.[48] The Court in *State of Maine v. Letalien* [49] has joined this broadened use of ex post facto law argument. The Court followed the leading federal case *Kennedy v, Mendoza-Martinez*,[50] and its useful seven-part analysis. The critical factor in the *Letalien* holding (leading the court to conclude that the new law was an invalid ex post facto law) was the increased penalty (the punitive character) of the new legislation as opposed to the regulatory burdens of the old legislation. [51]

Amicus notes that the new legislation here (the second Initiative) is civil in

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[47] Maine Constitution Art. I, §11.
[48] See *supra* fn. 38.
[49] 2009 ME 130, 995 A2d 4.
[50] 372 U.S. 144 (1963).
[51] See *supra* note 38, *Letalien* ¶62; *Mendoza-Martinez*, 372 U.S. at pg. 186. See *also* Wille, *Maine's Sex Offender Registry and the Ex Post Facto Clause: An Examination of the Law Court's Unwillingness to Use Independent Constitutional Analysis in State v. Letalien*, 63 Me. L. Rev. 367 (2010)(the author argues *Letalien* was correctly decided, but the Law Court having tied Maine's ex post facto law tightly to Federal law prevents future Maine courts from taking a more nuanced position that would at times be more protective of the public interest.

character. It was clearly enacted years after the NECEC project was begun. These facts alone are telling—they are punitive in tone; the initiators knew their first Initiative was declared unconstitutional, but they were not going away even though it was much later in the day. In Amicus's view this second Initiative is punitive in character; it is a prohibited ex post facto law (to a greater degree than was the case in *Letalien*).[52] This is evidenced by the single mindedness, the unyielding feature of the Initiative's several Sections—all aimed at killing the NECEC project; all prepared to ignore realities that reflect the larger public interest as found by multiple state and federal regulatory bodies—this is punitive behavior.

In the same vein the Initiative ignores facts, e.g. that the NECEC project is a legally permissible undertaking; that, in a globally warming world, the project is an essential infrastructure improvement; that it represents $1 billion of new capital investment in Maine;[53] that (for decades) it will enhance the property tax base of dozens of Maine towns; that it provides a portion of the transmitted energy, and other collateral benefits, directly to Maine people; that it will employ hundreds of Maine workers during the construction phase alone; that it acquired all necessary

[52] The Initiative also violates the constitutional prohibition of "…law[s] impairing the obligation of contracts." See *Portland Sav. Bank v. Landry*, 372 A2d 573 (Me. 1977)(*Landry* though arising in a different context, mortgage default redemption rights, underscores the vitality of this constitutional prohibition). As in *Landry*, the new law, the Initiative, is not merely remedial—it goes to the heart of the relationship between the State and Avangrid— it stops the NECEC project altogether by withdrawing/nullifying permits, proscribing BPL leases, creating exemptions from 1 MRS §302; this is "impairment;" it is unconstitutional.

[53] Economists would point out that an investment of this size will have a statewide "multiplier" effect that will be equal to (or greater) than the initial investment.

state and federal permits, and that it has begun actual construction of the project with the attendant costs that entails. This ignoring of facts is punitive behavior. This behavior is now evidenced by the initiators pursuit of construction "stoppage orders" of the NECEC project (now 35% complete) in multiple agency and court forums—the punitive behavior never ends. But Amicus would argue that this long pattern of punitive behavior (though it may fire up supporters and raise money) is inconsistent with this court's holding in *Letalien*, inconsistent with Maine and U.S. constitutional prohibitions.

Some last points: Notwithstanding the absolute language in the Maine Constitution— "…**no**… ex post facto law nor law impairing the obligation of contracts," Maine courts have recognized limited reach back exceptions to these prohibitions. Most have arisen in contexts where developers have exhibited bad faith or were trying to slip in under the wire (gain approval of a project shortly before new legislation went into effect). The Business Court, in sustaining this Initiative, seizes on two such cases, *City of Portland v. Fisherman's Wharf Associates II* , and *Kittery Retail Ventures LLC. v. Town of Kittery*.[54] While conceding that "NECEC has not demonstrated bad faith here,"[55] the Court fails to note, that the developers in each of these cases never began actual construction, whereas the plaintiffs here (having all necessary permits) did commence actual

[54] 541 A2d 160 (Me. 1988) and 856 A2d 1183 (Me. 2004) respectively.
[55] Bus. Ct. Order at pg. 27.

construction. Further, the reach back provisions in the two cited cases, five months in *Fisherman's Wharf*, and one year in *Kittery Retail*,[56] were far less than the Initiative's Section 1 reach back of fifteen months, and the Section 6 reach back of seven years. In short, the facts in the cases cited by the Business Court are quite different from the facts at hand and do not logically dispose of, appellant's reliance on Me. Const. Art. I, §11. [57]

Also worth noting is the fact that the *Kittery* developers raised, and the Law Court addressed, Art. I, §11 contracts clause issues. The fact that the *Kittery* developers presented a weak (impairment of contract) argument that was rejected by the Law Court does not preclude Appellants from demonstrating that in this case the Initiative's retroactive blocking of the NECEC project meets the "substantial impairment" test adopted in *Kittery*. Here, halting the project impairs an array of third party contracts and nullifies the benefits of state law (1 MRS §302) and validly issued state and federal permits; it is therefore unconstitutional.[58]

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[56] The one year reach back provision has been critically examined, see Sanborn, *Striking an Equitable Balance, Placing Reasonable Limits on Retroactive Zoning Changes After Kittery Retail Ventures, LLC v. Town of Kittery,* 58 Me. L. Rev. 601, (2006). Amicus could find no case sustaining a seven year reach back provision; a five year reach back provision in *Sahl v. Town of York*, *infra* fn. 59, was not sustained.

[57] Despite multiple efforts, it should be noted that at this point in time opponents of the project have not prevailed in any Law Court or federal Court of Appeals proceeding.

[58] On its face, the "substantial impairment" test adopted by the Law Court in *Kittery* is met here; Avangrid has acquired 145 miles of right of way, borne the cost of obtaining all required permits, began construction in good faith and borne $450 million dollars of associated costs, and they are meeting an essential public infrastructure need. In short, NECEC LLC's "impairment of contract" argument is much stronger than the *Kittery* developer's argument. See also, *Allied Structural Steel v. Spannaus*, 438 U.S. 234 (1978)(successfully challenging on 'impairment of

The Business Court dismissal of NECEC LLC's contract clause argument on grounds that the retroactive provision "…serves a significant and legitimate public purpose" is not (on balance) borne out by the findings of the multiple state and federal agencies that have approved the project. Further, the Court in citing the *Kittery Retail* court's reasoning for rejecting the developer's impairment of contracts argument fails to acknowledge the strikingly different factual realities between the Kittery developers and NECEC LLC's project. Finally, the Business Court's treatment of a Superior Court holding (with respect to a right of way lease of .9 of a mile of state owned land) as though it were final/binding, when in fact the validity of the lease is presently before this Court on appeal, seems inapposite at best; it surely cannot be the basis for rejecting NECEC LLC's contract clause argument.

Interestingly, the Business Court discusses at some length *Sahl v. Town of York*,

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contract grounds' new corporate burdens imposed when pension plans are cancelled). *Spannaus* makes clear that "**While the Contract Clause does not operate to obliterate the police power of the States, it does impose some limits upon the power of a State to abridge existing contractual relationships**…" 438 U.S. at 235. The court goes on "…the Contract Clause remains part of the Constitution. It is not a dead letter. And its basic contours are brought into focus by several of this Court's 20th-century decisions." Id. at 241. The court further notes: "The law [here, the Initiative) was not … purportedly enacted to deal with a broad, generalized economic or social problem…. It did not effect simply a temporary alteration of the contractual relationships of those within its coverage, but worked a severe, permanent, and immediate change in those relationships—irrevocably and retroactively… And its narrow aim was leveled, not at every Minnesota employer… but only at those who had … voluntarily … establish[ed] pension plans for their employees." Id. at 250. A full reading of this Supreme Court holding is worthwhile.

but inexplicably dismisses this Court's holding in *Sahl*.[59] Though the developers in *Sahl* seemingly did not explicitly raise ex post facto arguments the Court did note that the Town's ordinance reached back five years. They further noted that the developers had commenced construction "… in good faith… with the intention to continue with the construction and to carry it through to completion;"[60] they noted that the Town had "…encouraged and approved phasing of the project…" In these circumstances the Court having characterized the Sahl's actions to be "…pursuant to a legally issued permit…"[61] (as were all of Appellant's actions) unanimously held "… that the Hugheses' [the developer's] right to complete construction of the motel had vested…." [62] In short, the *Sahl* case supports plaintiff's Art. I, §11 arguments. In Amicus's view, the Business Court erred in dismissing the *Sahl* case as peremptorily as they did.

In conclusion, the Business Court's failure to see the significance of 1 MRS §302 in support of Art. I, §11 of Maine's Constitution, was error. The initiators knew full well that they could not expressly dismiss provisions of the Maine

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[59] 2000 ME 180, 760 A2d 266.
[60] Id. ¶ 12.
[61] Id. ¶ 14. The Law Court's reasoning in *Sahl* implied (but did not find) that the (1977) Town of York Ordinance was enacted in "bad faith." But *Thomas v. Zoning Bd. of Appeals of City of Bangor*, 381 A2d 643, 647 (Me. 1978) makes clear that: "… a bad faith or discriminatory enactment of a zoning ordinance for the purpose of preventing a legal use by the applicant [as is the case here] may confer vested rights on the applicant." Amicus has argued throughout that the Initiative (not the action of the voters) was proffered in "bad faith," that it is discriminatory (unconstitutional) in any of several ways.
[62] *Sahl* at ¶12 and ¶14.

Constitution in their Initiative. They chose instead to ignore them, to enact retro-active legislation focused on 1 MRS §302, presumably hoping that the constitutional prohibitions would not be raised or not be seen as overarching. The Initiative was erroneously characterized by the Business Court as a police power enactment notwithstanding the facts: 1. That it is not "generally applicable;" 2. it applies in Section 1 to only a narrow range of developers, in Section 6 to one developer (the NECEC project); 3. it does not alter or amend any substantive provision of 1 MRS §302; 4. it leaves unchanged §302's statewide protections/ benefits afforded to all other developers, thereby violating equal protection principles; 5. it reaches back inordinate periods of time; and (most importantly) 6. it ignores Me. Const. Art. I, §11 prohibitions altogether. This circumventing initiator strategy once again attempts to do indirectly what cannot be done directly, i.e., overrule and/or ignore Maine and U.S. Constitutional provisions/limitations in their effort to kill the NECEC project.[63]

But Maine and U.S. constitutional prohibitions cannot be ignored. Federal case law says they cannot be ignored;[64] Maine case law *Letalien* and *Kittery Retail* have recognized the legitimacy of ex post facto law and impairment of contracts arguments. Amicus has argued that 1 MRS §302 (correctly understood) accords

[63] See text *supra* pgs. 2 and 13.
[64] See *supra* fns. 33, 38, and 58. It is worth noting that the Legislature has limited municipal land use permit reach-back powers to nullify or amend an ordinance to 45 days; see 30-A MRS, §3007, sub-§6.

NECEC LLC a vested right to complete the transmission line project.[65] More pointedly, this argument asserts that the facts of this case dictate that on equal protection grounds or on either ex post facto grounds or impairment of contract grounds (or both) this second Initiative is unconstitutional. Amicus urges this Court to so hold.

DETAILED ARGUMENT in re ISSUE 4

Whether the Business Court holding sustaining the Initiative erred in failing to recognize that the Initiative's declaration that HETL projects may not be constructed anywhere in the state without the approval of the Legislature requires the declaration of, and legislative adherence to, whatever additional regulatory guidelines, standards, supporting data (beyond that provided to regulatory bodies, e.g., the PUC and DEP) HETL projects must provide the Legislature to obtain their approval. Unfettered legislative discretion to approve or disapprove HETL projects violates due process and equal protection principles and Maine case law.

In Amicus's view the Business Court erred. The opening line in Section 4 of the Initiative is direct and unambiguous:

> "In addition to obtaining a certificate of public convenience and necessity, a high-impact electric transmission line [HETL] may not be constructed anywhere in the State without **first** obtaining the approval of the Legislature…."[66] (emphasis added)

A similar provision is found in Section 1 of the Initiative. Section 4 goes on to note that if a HETL crosses or utilizes publically owned land the approval must be by 2/3 "…of all the members elected to each House of the Legislature." If it does not (cross or utilize public land) presumably only a majority of the Legislature must approve the HETL. But in either case there is nothing in Section 4 (or in

[65] See *supra* fn. 32.
[66] The Initiative, Section 4, enacting a new sub-§6-C to 35-A MRS §3132.

Section 1) that limits (puts parameters on) the unfettered discretion of the Legislature to approve or disapprove proposed HETL projects. A future HETL developer (or a Section 1 developer of other linear infrastructure projects) has no idea what the decision making criteria of the Legislature will be—what data—what showing of need—what level of technical competence—what level of fiscal capacity—what level of harm avoidance—what level of public benefit will become the basis for gaining the required legislative approval, or what asserted failure will result in disapproval? Must the Legislature as a whole fashion decision making criteria or may individual legislators fashion their own criteria? Will these criteria be announced, a matter of record? Will these criteria change every two years as the makeup of the Legislature changes? The Initiative answers none of these questions. In sum, Section 4 provides no substantive due process safeguards to guide HETL developers, other Section 1 developers, or individual legislators.

Further, nothing in Section 1 or Section 4 assures future HETL (or other linear infrastructure) developers that before a legislative approval/disapproval decision is made there will be any type of procedural due process accorded an applicant, e.g., a public hearing at which a record may be fashioned which could become the basis for required legislative approval (or justify a disapproval).[67] Can the Legislature as

[67] Sections 1 and 4 are not LDs for which hearings are routinely held—with passage of the Initiative (November, 2021) these Sections are already the law; the question before the Court is whether the absence of guidelines and hearings is constitutional.

a (committee of the whole) conduct a hearing on a proposed HETL or other linear development? Possibly. Does the Initiative require it? No. Can the Legislature create and refer a Section 1 or Section 4 proposal to a Joint Standing Committee for a hearing prior to the Legislative vote to approve/disapprove the project? Possibly. Does the Initiative require it? No. Do either of these hearing possibilities bind individual legislators to participate in a hearing, or to give weight to (much less adhere to) committee hearing decisions prior to voting to approve/ disapprove a proposed Section 1 or Section 4 project? [68] Again, the answer is No. In short, the Initiative does not provide any Section 1 or Section 4 developer with any opportunity for a hearing prior to the Legislature's vote to approve/disapprove a proposed project.

In Amicus's view the absence of both substantive and procedural due process safeguards in Sections 1 and 4 of the Initiative is palpable, and clearly unconstitutional. Moreover, the Initiative's grant of unfettered legislative discretion is at odds with Maine and national case law. In *Waterville Hotel Corp. v. Bd. of Zoning Appeals*[69] the Law Court notes:

> "The view that **the legislative authority cannot delegate to itself** or to another municipal board an unfettered discretion to issue or not issue permits appears to be

[68] Though a legislative hearing pursuant to either of the two strategies posed by the rhetorical questions is arguably possible, no language in Sections 1 and 4 require such a hearing as part of the process for "… first obtaining the approval of the Legislature…"
[69] 241 A2d 50 (Me. 1968).

> accepted by the text writers who have been concerned with the subject."[70] (emphasis added)

The Law Court, citing *Humble Oil & Refining Co. v. Wahner*, 130 NW 2d 304 (1964), states:

> "Standards were needed… not only to guide the board but also to inform Humble and any other parties hoping to build filing stations of what was required of them and what factors were to be considered by the board in disposing of each application for a filing station permit. Without standards both the board and Humble were at sea without chart, rudder, or compass and this was bound to create a situation in which the board could do just as it pleased"[71]

The *Waterville Hotel* court concludes by noting:

> "The failure to spell out standards reduces the property owner to a state of total uncertainty and amounts to depriving him of the use of his property."[72]

Another case, *Cope v. Inhabitants of the Town of Brunswick*,[73] citing *Waterville Hotel*, and *Town of Windham v. LaPointe*[74] reiterates the constitutional duties of legislative bodies and/or delegated boards that arise when making land use decisions. The *Cope* court cited *Town of Windham*, wherein the Court struck down as unconstitutional a zoning provision that vested unguided authority in the selectmen and planning board to approve or disapprove the location of proposed trailer parks; *Cope* quoting its own earlier opinion noted:

> "Such broad delegation of power breeds selectivity in the enforcement of the law. When no standards are provided to guide the discretion of the enforcement authority,

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[70] Id. at pg. 53. In the text of its opinion the court then cites Yokley on Zoning Law & Practice, Vol. 1, Section 62; 9 McQuillin, Municipal Corporations, Section 26.114, page 267, 3 Antieau, Municipal Corporation Law, Section 24.08, page 377.
[71] Id.
[72] Id.
[73] 464 A2d 223 (Me. 1983).
[74] 308 A2d 286 (Me. 1973).

> the fact that the law might be applied in a discriminatory manner settles its unconstitutionality."[75]

These same principles, i.e., the need for standards to guide the applicant and limit the discretion of the decision maker were reaffirmed more recently in *Wakelin v. Town of Yarmouth,*[76] wherein the court (striking down the ordinance) noted:

> "An applicant for a special exception is faced with the question. What facts must I present to gain the Board's approval? He finds, however, no language in the Yarmouth ordinance which by reasonable interpretation answers that question….Such uncertainty is impermissible."[77]

The *Wakelin* court citing *Waterville Hotel* goes on:

> "…the absence of specific standards in zoning ordinances results in **a denial of equal protection of the laws** to the property owner…"[78] (emphasis added)

The fact that these three cases *Waterville Hotel*, *Cope*, and *Wakelin* [79] involve municipal instrumentalities does not mean that the equal protection and due process principles articulated/mandated in these cases are limited to these levels of government. Aside from the fact that none of these cases limit the need for standards, equal protection, and due process safeguards to local levels of

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[75] *Cope* 464 A2d at pg. 426; *Town of Windham* 308 A2d at pg. 293.
[76] 523 A2d 575 (Me. 1987).
[77] Id. at 577.
[78] Id. See also *Connally v. General Construction Co.* 269 U.S. 385, 391-393 (1926)(absence of standards violates due process); *also* Delogu & Spokes, *The Longstanding Requirement that Delegations of Land Use Control Power Contain "Meaningful" Standards to Restrain and Guide Decision-Makers Should Not be Weakened,* 48 Me. L. Rev. 50 (1996), particularly fn. 39.
[79] Beyond *Waterville Hotel*, *Cope*, and *Wakelin*, two other cases, *Town of Windham* and *Humble Oil* were noted in the above text. Beyond these cases five additional cases, support the points being made. Other cases cited by the Law Court, *Osius v. City of St. Clair Shores*, 75 NW2d 25, 27 (Mich. 1956), *Phillips Petroleum v. Zoning Bd. of Appeals of City of Bangor*, 260 A2d 435, 437 (Me. 1970), *North Bay Village v. Blackwell*, 88 So.2d 524, 526 (FL 1956); *Homrich v. Storrs*, 127 NW2d 329, 333-334 (Mich. 1964), and *Stucki v. Plavin*, 291 A2d 508, 510 (Me.1972).

government, Maine's Constitution, Art. I, §§1 and 6-A make clear that these principles/duties have statewide force at every level of government. Decision making bodies (what *Cope* referred to as "the enforcement authority") from locally appointed planning or school boards to elected boards, selectmen, town/city councils, county elected officials, state boards, and the Maine Legislature (when it departs from its policy making role and purports to approve or disapprove a HETL project (or other linear infrastructure developments) are constitutionally bound to provide due process and equal protection safeguards.

More to the point, NECEC LLC's constitutional right (Me. Const. Art. I §1) to **possess and protect its property** is not possible without standards that curb the unfettered discretion of the Legislature. This court's holding in *Wakelin* makes this point perfectly clear and bears repeating "…the absence of specific standards… results in a denial of equal protection…"[80]

In conclusion, Sections 1 and 4 of the Initiative contain no provisions addressing the issues raised in this argument; there is no awareness of Appellants constitutionally protected property rights, and no awareness of the Initiative's constitutional duty (Me. Const. Art. I, §6-A) to provide due process safeguards (substantive and procedural) and "equal protection of the laws". Given these failings, Amicus urges this court to declare Sections 1 and 4, indeed the whole of

[80] See *supra* fns. 77 and 78.

the Initiative, unconstitutional.

DETAILED ARGUMENT in re ISSUE 5

Whether the Business Court holding sustaining the Initiative erred in characterizing the Initiative as an exercise of state police power to protect the environment given the fact that all of the Initiative Sections are either constitutionally impermissible, an invalid exercise of police power, or irrelevant to these proceedings.

In Amicus's view the Business Court erred in its assertion that the Initiative is an exercise of the state's police powers.[81] Amicus certainly agrees with the trial court that the state's police powers are real, broad, and often essential, but they are not without limit.[82] The police power itself is couched in limiting language. An early Maine case *State v. Mayo* [83] speaking of the right to use public streets notes:

> "… the right to so use the public streets, as well as all personal and property rights, is not an absolute and unqualified right. It is subject to be limited and controlled by the sovereign authority, the state, whenever necessary to provide for and promote **the safety, peace, health, morals and general welfare of the people.** To secure these and kindred benefits is the purpose of organized government, and to that end may the power of the state , called its police power, be used." [84] (emphasis added)

Having limited the police power to enactments that "provide for and promote" safety, peace, health, morals and general welfare, the *Mayo* court in its next breath notes: "That **reasonable regulations** for the safety of the people ... are clearly within this police power of the state …. "[85] The court's inference is clear—unreasonable regulations are not a valid exercise of police powers. Maine's

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[81] See Bus. Ct. Order at pg. 24,
[82] See *supra* fn. 58.
[83] 106 Me. 62 (1909), 75 A. 295.
[84] Id. at pg. 297.
[85] Id.

Constitution also requires that laws (including citizen Initiatives) be reasonable; the Me. Const. Art. IV, Pt. 3, §1 goes a step further and makes clear that laws/ Initiatives may not violate either the Maine or the U.S. Constitution:

> "The Legislature … shall have 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."** [86]

In sum, a valid police power enactment must meet three tests; it must further some element of the public's safety, peace, health, morals and general welfare; it must be reasonable; and it must not violate either the Maine or the U.S. Constitution. In Amicus's view the second Initiative meets none of these tests, much less all three. A reading of each Section of the Initiative proves the point being made.

Section 1 does not add to or amend 12 MRS §1852, sub-§4 (dealing with the lease of public lands for utilities and rights-of-way) in any substantive way that furthers any of the stated (and limited) police power objectives noted above. Instead, Section 1 (and Section 4) facially and impermissibly amend Me. Const. Art. IX, §23 by **"deeming"** that all HETL and other linear developments invariably "substantially alter" existing uses on publically owned land. The Initiative then goes on to require that any/all leases or conveyances of these lands for such projects must "first" obtain 2/3 legislative approval. **Art. IX, §23 as originally written does not take these positions.** §23 regards the "substantially

[86] Me. Const. Art. IV, Pt. 3, §1.

alters" question as an "open question". Developers of 12 MRS §1852, sub-§4 projects are free to show that their project **does not** "substantially alter" existing uses; if they succeed they avoid the requirement of obtaining 2/3 legislative approval. §23 does not require all leases to be legislatively approved—only those projects that actually give rise to substantial alteration must have legislative approval. In sum, Sections 1 and 4 of the Initiative amend Art. IX, §23; this is barred by the very constitutional provision that gives rise to citizen Initiative powers, Art. IV, Part 3, §18 clearly states that the constitution may not be amended by an Initiative. See *supra* Amicus Issue 1, pgs. 2-5. If more is needed, the final sentence of Section 1 is in Amicus's view a prohibited ex post facto law and/or a law impairing the obligation of contracts. Such laws are barred by the Maine and the U.S. Constitution. See *supra* Amicus Issue 3, pgs. 13-25.

Section 2 of the Initiative again does not add to or amend 35-A MRS §3131, sub-§4-A in any substantive way that furthers any of the stated (and limited) police power objectives noted above. It merely defines a high-impact electric transmission line (HETL) to unambiguously include the NECEC project. Further, and irrelevant to the matters at hand, Section 2 removes (from 35-A MRS, §3131, sub-§4-A) statutory reference to 35-A MRS §122 dealing with energy infrastructure corridors, which provision had expired by its own terms.[87]

[87] See Laws of Maine 2009, Chapter 655, §A-2, sub-§10.

Section 3 of the Initiative amending 35-A MRS §3132, sub-§6-A again does not alter or add any substantive provision furthering any of the police power objectives noted above. It merely reaffirms an existing statutory requirement that HETL projects require PUC approval and the issuance of a certificate of public convenience and necessity.[88] Further, and irrelevant to the matters at hand, Section 3 also removes (from 35-A MRS, §3132, sub-§6-A) a statutory reference to 35-A MRS §122 dealing with energy infrastructure corridors, which provision had expired by its own terms.[89]

Section 4 of the Initiative focuses on HETL alone and applies statewide; it is not limited to settings involving the lease/sale of public lands. Again, It does not impose any new police power regulations on this (HETL) type of infrastructure development. It does, however, require all HETL developments (as does Section 1's leased land HETL projects) to "first obtain the approval of the Legislature," presumably by majority vote. In settings where public lands are crossed or utilized this legislative approval must be by 2/3 vote. But contrary to Maine case law and Maine's Constitution, Art. I, §6-A, Sections 1 and 4 of the Initiative leave the legislative prerogative totally unfettered. The Legislature may approve or disapprove a proposed project as whim dictates. In sum, the Initiative deprives HETL developers of due process and equal protection safeguards. See *supra*

[88] See 35-A MRS §3132 for the existing provision.
[89] See supra fn. 86.

Amicus Issue 4, pgs. 25-30.

Section 5 of the Initiative, in a bow to more traditional police power zoning enactments, carves out a defined geographic area (as the Business Court avers) "…to protect the environment,"[90] but bars only one type of development—HETL. The environmental harms caused by other large scale or other infrastructure uses, e.g., mining, rail lines, pipelines, etc. in the defined area are ignored. Vast similar areas surrounding the defined area are ignored; they are not subject to regulation. The Business court, then, in sustaining the initiative ignores its own warning:

> "…a new law may be directly motivated by a given entity or activity and enacted with the intent of imposing **requirements or restrictions** on that entity or activity; **so long as the law itself is one of general applicability** it will not be invalidated for including its target in its effect."[91] (emphasis added)

First, Section 5 does not merely impose "requirements or restrictions;" it states, a HETL "**may not** be constructed" in the defined area—that's not regulation, it's a **total prohibition**. Second, the "new law" is clearly not "of general applicability". The defined area targets a miniscule portion of Maine, a miniscule portion of the unorganized territory, and it ignores protection for identified (unique or high risk) sensitive environmental areas within the unorganized territory. The singular purpose of the "new law" is to block the NECEC project—nothing more or less. As such the "new law" is contrary to this court's holding in *Avangrid* and *Ace*

[90] See Bus. Ct. Order pg. 24.
[91] See Bus. Ct. Order pg. 38. The Business Court also ignores the fact that a transmission line of greater length, occupying a larger area than the NECEC project (the Jackson tie line) already exists on publically owned land within the defined area.

Tire;[92] it violates due process and equal protection principles, and because it overturns PUC, DEP, and BPL decisions it violates separation of powers principles. In short, the "new law" (the Initiative's Section 5) is not a valid police power enactment. See *supra* Amicus Issue 2, pgs. 6-12.

Section 6 of the Initiative again does not alter or add any substantive provision furthering any of the police power objectives noted above. Like Section 1, it references 1 MRS §302, but it does not add to or alter any of the substantive provisions in §302. Instead, Section 6 retroactively exempts HETL from §302 benefits enjoyed statewide by any/all other types of development. **Exempting a single type of development** (here a single corporate activity, NECEC LLC's HETL project) from a benefit that for decades has been conferred on every other (type and individual) development, **is not a sustainable police power enactment.** Section 6 facially violates equal protection principles and is barred by this court's holding in *Avangrid*.[93] Further, Sections 6 and 1 violate the Maine and the U. S. Constitution's prohibition of ex post facto laws and laws impairing the obligation of contracts. The reach back in time provisions in Sections 6 and 1 (whereby an act valid when undertaken, is now invalid) greatly exceed the limited recognized exceptions to ex post facto laws; and the economic loss that Appellants/this project will suffer more than meets the usual standards for a finding that the "new

[92] See *supra* fns. 13-17 and accompanying text.
[93] Id.

law" impairs the obligation of contracts.[94] See *supra* Amicus Issue 3, pgs. 13-24.

Concluding this argument, Amicus would return briefly to the *Avangrid* case; the Court in striking down the 1st Initiative held that Article IV, Pt. 3, §18 of the Maine Constitution was violated because "…**what is proposed here is not legislation."** [95] The holding went on:

> "Directing an agency to reach findings diametrically opposite to those it reached based on extensive adjudicatory hearings and a voluminous evidentiary record, affrmed on appeal, is not 'making and establishing' a law."[96]

The 2nd Initiative now before this Court has the trappings of legislation (multiple Sections, deleted provisions, new provisions) but read Section by Section, there is no substance, no "making and establishing a law." Instead of ordering a PUC to reverse its decision, this Initiative in Sections 1 and 4 impermissibly amends Art. IX, § 23 of the Maine Constitution. Further, these Sections clothe the Legislature (prior to PUC review and contrary to Maine case law)[97] with unfettered discretion to approve or disapprove HETL and other linear developments. Section 2 simply defines the term HETL to fit the NECEC project. It does not directly or indirectly bar NECEC LLC's project. Parts of Section 2 and Section 3 (referencing 35-A MRS §122) are irrelevant to these proceedings. Section 3's main provision simply

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[94] See *supra* fn. 58 and accompanying text for supporting case law.
[95] 2020 ME 109 ¶36.
[96] Id.
[97] The Legislature whose members have limited, or no scientific, engineering, or economic background will approve or disapprove a HETL or other linear project without the benefit of "extensive adjudicatory hearings" or "a voluminous evidentiary record".

reaffirms existing law. Section 5 is a patently invalid exercise of police powers; it is not "of general applicability"[98] and is contrary to case law defining equal protection and separation of powers principles.[99] Sections 1 and 6 violate constitutional provisions prohibiting ex post facto laws and laws impairing the obligation of contracts.

In short, every Section of this 2nd Initiative (a purported new law) is either constitutionally barred, an invalid exercise of police power, or irrelevant to these proceedings. There is no new valid legislation. *Ergo,* this Initiative is invalid. Further, this Initiative is contrary to *Lewis v. Webb* [100] (striking down a Legislative resolve on separation of powers grounds) in that it repeatedly attempts "… to accomplish in an indirect and circuitous manner, that which the existing laws forbid, and which by a direct and legal course cannot be attained."[101] More importantly, this Initiative is contrary to *Moulton v. Scully* [102] (delineating Me. Const. Art. IV, Pt. 3, §1 legislative powers and §18 Initiative powers). *Moulton* makes clear that an Initiative "… applies only to legislation, to the making of laws…"[103] But as in *Avangrid*, **"… what is proposed here is not legislation."**

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[98] See *supra* fn. 27-30 and accompanying text.
[99] See *supra* fn. 69-79 and accompanying text.
[100] 3 Me 326 (1825).
[101] Id. at pgs. 332-333; a full reading of the *Lewis* holding is warranted; see also *supra* pgs. 3, 13, and 24.
[102] 111 Me 428, 89 A. 944.
[103] Id. at pg. 953.

Amicus would urge this Court to so hold, and to declare this 2nd Initiative unconstitutional.

CONCLUSION

Amicus would note that the Initiative presently before the Court contains no severability provision. The Appellees (initiators) have long argued that the Initiative is a single integrated bill. Efforts to separate provisions in the Initiative into separate ballot questions did not prevail, see *Caiazzo v. Sect. of State*.[104] It follows then that if this Court finds any of the Initiative's six Sections constitutionally barred, or otherwise invalid, the Initiative as a whole is invalid. Appellees at that point could seek to invoke severability arguments. To prevent any such belated effort, Amicus has presented five issues/arguments that address all Sections of the Initiative separately; these arguments point out the breadth of error in this Initiative, and errors in the Business Court's sustaining of the Initiative. These errors violate multiple provisions of the Maine constitution, the U. S. Constitution, and both Maine and Federal case law.

In sum, with or without a severability provision, the five issues/arguments presented viewed separately, and surely taken together, evidence the fact that the Initiative presently before the Court is unconstitutional. Amicus urges the Court to so hold.

[104] 2021 ME 42, 256 A3d 260.

March 29, 2022

Respectfully Submitted

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CERTIFICATE OF SERVICE

I, Orlando E, Delogu, hereby certify that on or before March 30, 2022 copies of my letter to the clerk of the Maine Supreme Judicial Court and my Amicus Brief supporting Plaintiffs/Appellants NECEC Transmission LLC, Avangrid Networks Inc., et al *in re* Law Court Docket No. BCD-21-416 have been hand delivered, sent electronically, or by First Class Mail (postage prepaid) to all of the counsel named below at the addresses shown. Additionally, an electronic copy of the brief has been sent to the Clerk of the Maine Supreme Judicial Court.

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