STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

LAW COURT DOCKET NO. BCD-21-416

NECEC TRANSMISSION LLC, et al.,

Plaintiff-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.,

Defendant-Appellees

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

BRIEF OF AMICI CURIAE STATE REPRESENTATIVES SUSAN AUSTIN, SUSAN BERNARD, JON CONNOR, STEVE FOSTER, PETER LYFORD, BETH O'CONNOR, NATHAN WADSWORTH, AND DUSTIN WHITE, STATE SENATOR HAROLD STEWART III, AND PENOBSCOT COUNTY COMMISSIONER ANDRE CUSHING III IN SUPPORT OF PLAINTIFF-APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

Constitutional Provisions

INTERESTS OF THE AMICI CURIAE

Amici curiae State Representatives Susan Austin, Susan Bernard, Jon Connor, Steve Foster, Peter Lyford, Beth O'Connor, Nathan Wadsworth, and Dustin White, State Senator Harold Stewart III, and Penobscot County Commissioner Andre Cushing III are current members of the Legislature and a County Commissioner (collectively, "Amici"). Amici represent the interests of their constituents. And as elected members of the legislative branch of government, Amici have a unique interest in protecting each branch of Maine government's sovereign sphere of power, constitutionally protected by Article III, Section 2 of the Maine Constitution. They also have a unique interest in ensuring that the citizen initiative power does not disturb the constitutional balance of power between the branches.

INTRODUCTION

The 2021 Initiative that is the subject of this proceeding violates the Maine Constitution because it shares the same unconstitutional goal as its predecessor, the proposed 2020 Initiative, which this Court previously found to be unconstitutional in *Avangrid Networks, Inc. v. Sec'y of State*.[1] Both sought to use the Initiative power to overturn and permanently obstruct a single construction project, the New England Clean Energy Connect ("NECEC") Project, after the NECEC Project had received

[1] *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶¶ 34–35, 38, 237 A.3d 882.

final agency approval from the Public Utilities Commission ("PUC"), through the issuance of a Certificate of Public Convenience and Necessity for the project ("CPCN"), later affirmed by this Court,[2] and from the Bureau of Parks and Lands ("BPL") through the execution of a lease for the 0.9 miles of the transmission line that crosses public reserved lands.

Opponents first proposed a 2020 Initiative that directly compelled the PUC to reverse the CPCN issued for the NECEC Project. In *Avangrid*, this Court struck down the proposed 2020 Initiative because it exceeded the legislative authority of the people through the initiative process under the Maine Constitution.[3] The 2021 Initiative attempts to circumvent the *Avangrid* decision by adding some language of general applicability yet at the same time retroactively imposing new legislative approval requirements and geographic restrictions on the NECEC Project. It does not succeed. Close scrutiny of the text, history, and campaign of the 2021 Initiative demonstrates that it fails to address the fundamental constitutional issues of its predecessor. Its non-uniform retroactivity provisions and the prohibition on construction in the Upper Kennebec region continue to surgically target NECEC by timing and geography. Its sponsors submitted it immediately after the *Avangrid* decision, making clear that it carried the same goal as the unconstitutional proposed

[2] *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 43, 227 A.3d 1117.

[3] *Avangrid*, 2020 ME 109, ¶¶ 34–35, 38, 237 A.3d 882.

2020 Initiative. And the campaign for it focused almost exclusively on the NECEC Project.

Opponents' attempt to hide their unconstitutional purpose—undoing this Court's *Avangrid* decision—behind language of general applicability causes the 2021 Initiative to suffer from additional constitutional infirmities. First, the 2021 Initiative attempts to use retroactivity to accomplish the same end this Court rejected in *Avangrid*: to nullify a final CPCN issued by the PUC and a final lease issued by the BPL. Second, the 2021 Initiative inserts the Legislature into the purely Executive Branch process for approving high impact electric transmission line projects, permitting the Legislature to exercise executive power, in violation of the separation of powers. Third, the 2021 Initiative authorizes what is in effect a one-house legislative veto of Executive Branch PUC decisions, a power not given to the Legislature under the Maine Constitution and which violates the requirements of bicameralism and presentment for passing legislation. Fourth, the retroactivity provisions of the 2021 Initiative targets the NECEC Project, making it unconstitutional special legislation. Finally, because the 2021 Initiative was presented to the voters as a single unified bill, if the Court finds any portion of the 2021 Initiative unconstitutional, it should strike down the entire 2021 Initiative.

STATEMENT OF RELEVANT FACTS

Central Maine Power applied for a CPCN from the PUC in September 2017.[4] The PUC conducted a rigorous review of the application. It held several extensive hearings and took testimony from witnesses, experts, and the public.[5] Opponents of the NECEC Project had several opportunities to present their objections to the PUC. On May 3, 2019, after nearly two years, the PUC granted the CPCN in a 100-page order, which evaluated the NECEC Project's impact on electricity markets, the economy, public health and safety, and scenic, historical, and recreational values.[6] This Court affirmed the PUC's grant of the CPCN for the NECEC Project in *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*.[7] In 2014, the BPL executed a lease for the project, which it later amended in 2020, for 0.9 miles of the 145-mile transmission line.[8]

Opponents of the NECEC Project pivoted to using the initiative process to stop the NECEC Project. They first collected signatures for an initiative to put on the 2020 ballot ("proposed 2020 Initiative").[9] The proposed 2020 Initiative

[4] A. 21 (Bus. Ct. Order at 6).

[5] *See id.*

[6] *See id.*; A. 84 (Compl. ¶¶ 36–37).

[7] *NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, ¶ 43, 227 A.3d 1117.

[8] *See* A. 96 (Compl. ¶ 75 & n.10).

[9] *See* A. 98 (Compl. ¶ 79).

mandated the PUC to reverse the order granting a CPCN to the NECEC Project.[10] Before the 2020 election, this Court struck the proposed 2020 Initiative in *Avangrid*, because it exceeded the scope of legislative power.[11]

Shortly thereafter, opponents of the NECEC Project proposed a modified Initiative for inclusion on the 2021 ballot ("2021 Initiative").[12] The 2021 Initiative sought to block the NECEC Project by imposing retroactive legislative majority and supermajority approval requirements for the BPL lease and the PUC-issued CPCN for the NECEC Project and by prohibiting construction of transmission lines in a key area for the NECEC Project.[13] Opponents crafted language that specifically targeted NECEC. The campaign for the 2021 Initiative confirmed that the 2021 Initiative was focused almost exclusively on the NECEC Project.[14] Ultimately, the voters approved the 2021 Initiative.[15]

STATEMENT OF ISSUES PRESENTED

I. A final agency action cannot be overturned by retroactive application of legislation. The PUC issued a CPCN for the NECEC Project after nearly two years

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[10] *See id.*

[11] *Avangrid*, 2020 ME 109, ¶ 38, 237 A.3d 882.

[12] *See* A. 99 (Compl. ¶ 83).

[13] *See* A. 99–100 (Compl. ¶¶ 85–87).

[14] *See* A. 100–06 (Compl. ¶¶ 89–102).

[15] *See* A. 108 (Compl. ¶ 104).

of discovery hearings, briefing, and deliberations. Likewise, the BPL executed a lease for the project in 2014, later amended in 2020, for 0.9 miles of the 145-mile transmission line. Can the 2021 Initiative invalidate the final PUC-issued CPCN and BPL lease by retroactively applying newly created requirements and limitations onto the NECEC Project?

II. The Maine Constitution strictly prohibits one department from exercising the power of another. The 2021 Initiative inserts the Legislature into a purely executive process by requiring affirmative legislative approval for every proposed high impact electric transmission line that receives a CPCN. Can the 2021 Initiative authorize the Legislature to exercise the power of the Executive Branch to approve specific construction projects?

III. The Maine Constitution requires that legislative action comply with bicameralism and presentment. The 2021 Initiative requires that any proposed high impact electric transmission line receive majority approval from both the Senate and the House in addition to a CPCN from the PUC. Can the 2021 Initiative add that additional requirement for approval—and essentially create a one-house legislative veto—even where that process does not comply with bicameralism and presentment to the Governor?

IV. The Legislature may not pass laws targeted to impose a hardship on a single entity. Both the plain text of the 2021 Initiative and its campaign history show

that it is surgically targeted to the NECEC Project. Can the 2021 Initiative nonetheless survive constitutional scrutiny simply by including some language of general applicability?

V. Unconstitutional sections of a bill cannot be severed from the rest of the bill if the Court cannot determine that the bill would have passed even without the unconstitutional provisions. The 2021 Initiative was presented to voters as a yes-or-no vote on a single, unified bill with no severability provision. Can the 2021 Initiative still survive if one or more provisions are found unconstitutional?

ARGUMENT

I. Standard of Review

This Court reviews de novo an "appeal [that] involves the interpretation of constitutional and statutory provisions."[16]

II. The 2021 Initiative Violates Separation of Powers by Retroactively Nullifying the PUC-Issued CPCN and BPL Lease for the NECEC Project.

A. Separation of Powers Prohibits New Legislation from Affecting Final Agency Actions.

Article III of the Maine Constitution divides the government into "[three] distinct departments, the legislative, executive, and judicial" and strictly prohibits the "exercise [of] any of the powers properly belonging to" one department by a

[16] *McGee v. Sec'y of State*, 2006 ME 50, ¶ 5, 896 A.2d 933.

person belonging to another department.[17] "[T]he separation of governmental powers mandated by the Maine Constitution is much more rigorous than the same principle as applied to the federal government."[18] This restriction applies if "the power in issue [has] been explicitly granted to one branch of state government, and to no other branch."[19]

For purposes of the separation of powers inquiry, "[a]gencies of the executive branch are accorded the deference to which a co-equal branch … is entitled."[20] One branch may not "interfere[] with the performance by the agency of its statutory duties."[21] It would violate the doctrine of separation of powers if "the Legislature … require[d an agency] to vacate and reverse a particular administrative decision the [agency] had made."[22] And the Legislature "cannot do indirectly what it is forbidden to do directly."[23]

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[17] Me. Const. art. III.

[18] *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982).

[19] *Id.*

[20] *New England Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009 (quotation marks and alterations omitted).

[21] *Id.* ¶ 11 (quotation marks omitted).

[22] *Avangrid*, 2020 ME 109, ¶ 35; *see also Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117 ("The Legislature may not disturb a decision rendered in a previous action . . . to do so would violate the doctrine of separation of powers.").

[23] *See Bentley v. Bentley*, 538 A.2d 279, 280 (Me. 1988) (holding Superior Court could not indirectly modify divorce judgment where it could not do so directly); *cf. Wiley v. Sampson-Ripley Co.*, 151 Me. 400, 405, 120 A.2d 289, 292 (1956) ("It is apparent that a constitutional prohibition cannot be

Applying these bedrock principles of our system of government, in *Avangrid*, this Court held that valid legislation may not directly nullify a final agency action by "direct[ing an agency], in exercising its executive adjudicatory powers, to reverse its findings and reach a different outcome in an already-adjudicated matter."[24] And, in *Grubb v. S.D. Warren Co.*, this Court held that it would "violate the doctrine of separation of powers" to do so indirectly by retroactively applying generally applicable legislation to "change the result of a previous [final] decision."[25]

B. The 2021 Initiative Retroactively Nullifies a Final Agency Action Taken by the PUC and BPL Pursuant to Authority Granted Under Maine Law.

As applied to the NECEC Project, the 2021 Initiative would authorize the Legislature to vitiate final agency actions by both the PUC, the agency responsible for permitting all transmission lines in Maine,[26] and the BPL, the agency responsible for managing all public reserved lands in Maine.[27] Under Maine law, these final

transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment." (quotation marks omitted)).

[24] *Avangrid*, 2020 ME 109, ¶ 36.

[25] *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11.

[26] *See* 35-A M.R.S. § 3132.

[27] *See* 12 M.R.S. § 1803(1)(B).

agency decisions fall squarely within the PUC's and BPL's authority and are "accorded the deference" due to any other actions of the Executive Branch.[28]

This Court struck down the 2020 Initiative because it attempted to revoke directly the CPCN issued by the PUC.[29] The 2021 Initiative accomplishes the same goal indirectly, retroactively imposing new requirements and restrictions on the NECEC Project that render the final agency actions that produced the PUC-issued CPCN and the BPL lease a nullity. An initiative cannot "do indirectly what it is forbidden to do directly,"[30] so the 2021 Initiative runs afoul of *Grubb* and violates the separation of powers.[31]

C. Retroactively Applying a Statute of General Applicability Violates Separation of Powers.

The Business Court treated the 2021 Initiative as an ordinary "statute of general applicability."[32] This assertion fails to do the work the Business Court believed for two reasons. First, as applied retroactively, a task that (remarkably) requires looking to two different dates, September 16, 2014, and September 16, 2020, the 2021 Initiative is not a generally applicable law. Both the plain text of the

[28] *New England Outdoor Ctr.*, 2000 ME 66, ¶ 10 (quotation marks and alterations omitted).

[29] *Avangrid*, 2020 ME 109, ¶¶ 36–38.

[30] *See Bentley*, 538 A.2d at 280; *cf. Wiley*, 151 Me. at 405, 120 A.2d at 292 (1956).

[31] *Grubb*, 2003 ME 139, ¶ 11.

[32] A. 52–53 (Bus. Ct. Order at 37–38).

2021 Initiative and the campaign behind it show that it specifically targeted the NECEC Project.[33] Second, *Grubb* prohibits even a law of general applicability from altering a final agency action.[34] Allowing 2021 Initiative to nullify the PUC-issued CPCN and the BPL Lease would authorize, indirectly, what this Court has forbidden directly, in violation of the Maine Constitution.

III. The 2021 Initiative Violates Separation of Powers by Allowing the Legislature to Exercise Executive Power in Approving a Transmission Line Project.

As discussed above, the Maine Constitution strictly prohibits the Legislature from exercising the power of the Executive, and by extension, the executive power of agencies.[35] The 2021 Initiative violates this prohibition. It requires the Legislature to exercise executive power by inserting itself into the purely Executive Branch process of approving each individual high impact electric transmission line.

A. Approving Construction of a High Impact Electric Transmission Line is an Exercise of Executive Power.

The Executive Branch "approves and executes" the law.[36] The PUC "functions in an executive capacity as an administrative agency" when it "render[s] a decision in a particular case when a utility has applied for a certificate of public

[33] *See infra* Part V.

[34] *Grubb*, 2003 ME 139, ¶ 11.

[35] *See supra* Part II.A.

[36] *Avangrid*, 2020 ME 109, ¶ 33 (quotation marks omitted).

convenience and necessity."[37] Virtually all of the factors listed in *Friends of Congress Square Park v. City of Portland* confirm that approval of construction of a proposed transmission line would be an act of executive power because such approval would (1) "execute[] existing law" rather than "make[] new law"; (2) not "propose[] a law of general applicability" but instead "be[] based on individualized, case-specific considerations"; (3) "implement[] existing policy or deal[] with a small segment of an overall policy question"; (4) "require[] … specialized training and experience" to evaluate transmission lines; (5) "involve a subject matter in which the legislative body has delegated decisionmaking power"; and (6) not be "an amendment to a legislative act."[38]

B. The 2021 Initiative Improperly Inserts the Legislature into the Final Step for Approval of a Transmission Line Project.

Prior to the 2021 Initiative, the executive act of approving a transmission line project was performed entirely by the PUC. While the Legislature set out the relevant criteria for evaluating such projects, the PUC applied that criteria to individual cases.[39] The 2021 Initiative requires legislative approval each time the PUC awards a CPCN to a proposed high impact electric transmission line.[40] It does not call for

[37] *Id.* ¶ 34.

[38] *Friends of Congress Square Park v. City of Portland*, 2014 ME 63, ¶ 13 n.7, 91 A.3d 601.

[39] *See Avangrid*, 2020 ME 109, ¶¶ 32–34.

[40] A. 69-70.

the Legislature to change the already-enacted criteria for such projects but simply to decide, on an individual basis and without any identified criteria for doing so, whether or not to allow each proposed project to proceed. Such approval is inherently an exercise of executive power to apply the laws rather than to make laws and an unconstitutional interference with the executive process. The Legislature may not constitutionally exercise such executive power.

If the Court were to uphold the 2021 Initiative, then a similar mechanism could allow for direct legislative exercise of executive power in other contexts. For example, the Legislature could require that state prosecutors submit every proposed indictment for legislative approval before proceeding with a criminal prosecution or require that the Department of Labor submit every approved application for unemployment to the Legislature for approval before paying benefits. These functions do not fall within the Legislature's constitutional role; they fall within the exclusive province of the Executive.

IV. The 2021 Initiative Violates the Constitutional Process for Legislative Action Because It Allows a Single House of the Legislature to Invalidate Agency Action Without Bicameralism or Presentment.

If the Court were to believe that legislative approval or disapproval of specific construction projects is an appropriate exercise of legislative power rather than executive power, the 2021 Initiative would then be facially unconstitutional because it would establish a *de facto* one-house legislative veto of agency decisions. The

Legislature can only act consistently with the authority given to it under the Maine Constitution, which requires bicameralism and presentment.

The United States Constitution also requires bicameralism and presentment, and this Court has approvingly cited *INS v. Chadha,*[41] which invalidated federal efforts to create a one-house legislative veto for violations of those principles. As other state and lower federal courts have already held, those principles do not permit the type of roving legislative veto over executive action that the 2021 Initiative attempts to create.

A. The 2021 Initiative Creates a One-House Legislative Veto because the Failure to Approve a Proposed Transmission Line is Legislative Action.

Section 4 of the 2021 Initiative requires that a high-impact electric transmission line "obtain[] the approval of the Legislature" "[i]n addition to obtaining a certificate of public convenience and necessity" before the project can move forward.[42] The disapproval of a proposed transmission line "alter[s] the legal rights, duties and relations of persons … outside the Legislative Branch"[43] because the recipient can no longer move forward with construction of the proposed line

[41] *Opinion of the Justices*, 2015 ME 107, ¶ 44 n. 11, 123 A.3d 494 (citing *INS v. Chadha*, 462 U.S. 919 (1983)).

[42] A. 69-70.

[43] *Chada*, 462 U.S. at 952; *see also Blank v. Dep't of Corr.*, 462 Mich. 103, 114, 611 N.W.2d 530, 536 (2000).

permitted by the CPCN. If even one house of the Legislature disapproves, the CPCN is nullified. As federal and state courts alike recognize, an "approval of the Legislature" mechanism of this kind that impacts every proposal that comes before an agency is, in reality, a legislative veto.[44]

B. The Additional Legislative Process—Essentially Giving Either the Senate or House a Veto—Created by the 2021 Initiative Violates the Bicameralism and Presentment Requirements of the Maine Constitution.

The fact that this legislative veto can be triggered by the unilateral action of either house of the Maine Legislature compounds the infirmity. The Maine Constitution requires that legislative action occur through (i) bicameralism—"[e]very bill … shall have passed both Houses"—and (ii) presentment—"[e]very bill … shall be presented to the Governor, and if the Governor approves, the Governor shall sign it.[45] Both serve important purposes. Bicameralism "assures that the legislative power [is] exercised only after opportunity for full study and

[44] *See, e.g.*, *City of New Haven, Conn. v. United States*, 809 F.2d 900, 905, 906 & n.17 (D.C. Cir. 1987) ("requir[ing] prior legislative approval of proposed [permanent] impoundments" is a "legislative veto provision" that is unconstitutional under *Chadha*); *State ex rel. Barker v. Manchin*, 167 W. Va. 155, 160, 170, 279 S.E.2d 622, 626, 632 (1981) (law "provid[ing] that no agency rule or regulation shall become effective until it has been presented to and approved by the [Legislative Rule-Making Review] Committee" "constitutes a legislative veto power comparable to the authority vested in the Governor"); *Blank*, 462 Mich. at 108, 115, 611 N.W.2d at 533, 536 (law "requir[ing] administrative agencies to obtain the approval of a joint committee of the Legislature or the Legislature itself before enacting new administrative rules" "are similar to the legislative veto struck down in *Chadha*").

[45] Me. Const. art. IV, pt. 3, § 2; *see also Payne v. Sec'y of State*, 2020 ME 110, ¶ 27, 237 A.3d 870 ("The legislative process for enactment is not complete until the Governor has had the opportunity to consider the bill …. The approval of the governor was the last legislative act which breathed the breath of life into these statutes and made them a part of the laws of the State." (quotation marks omitted)).

debate."[46] Presentment "check[s] whatever propensity a particular [legislature] might have to enact oppressive, improvident, or ill-considered measures."[47]

When a legislature wishes to reserve for itself the opportunity to override some form of agency action—assuming, unlike the present case, that doing so would not offend other separation of powers principles—it must enact override legislation that enjoys the imprimatur of both legislative houses and either the signature of the executive or a veto override. The Maine Administrative Procedures Act ("APA") reflects this principle. For "major substantive rules," the APA provides that a proposed rule will go into effect either if "[l]egislation authorizing adoption of the rule . . . is enacted into law" or if the "Legislature fails to act on the rule."[48] Thus, the Legislature may reject agency action only by enacting affirmative legislation that satisfies bicameralism and presentment. Failure of either or both houses of the Legislature to act will result in preservation of the status quo under the APA: the agency action will take effect.

Similarly, when the United State Congress delegated authority to the Supreme Court of the United States to promulgate rules of practice, procedure and evidence in the federal courts, it required that the Supreme Court present the proposed rules

[46] *Chadha*, 462 U.S. at 951.

[47] *Id.* at 947–48

[48] 5 M.R.S. § 8072.

to Congress at least seven months before they go into effect in order to give Congress a chance to decide whether to set aside some or all of those of the provisions.[49] But Congress may only prevent proposed rules from going into effect through affirmative legislation that satisfies the requirements of bicameralism and presentment.[50]

In contrast to the APA review provision and to the process for Congressional review of the Federal Rules, the 2021 Initiative sidesteps any such requirements. Rather, the 2021 Initiative empowers either the Senate or the House, acting unilaterally, to prevent any given agency action from going into effect, dispensing with the need for concurrence by both houses or the Governor's signature. Article IV of the Maine Constitution does not permit this.

V. The 2021 Initiative Unconstitutionally Targets the NECEC Project.

"[I]t can never be within the bounds of legitimate legislation, to enact a special law . . . dispensing with the general law, in a particular case."[51] The Legislature may not target legislation and exempt a single person from otherwise applicable law,[52] or

[49] *See* 28 U.S.C. § 2074.

[50] *See Chadha*, 462 U.S. at 954–55.

[51] *Maine Pharm. Ass'n v. Bd. of Comm'rs of Pro. of Pharmacy*, 245 A.2d 271, 273 (Me. 1968) (quoting *Lewis v. Webb*, 3 Me. 326, 336 (1825)).

[52] *See id.*; *Opinion of the Justices*, 402 A.2d 601, 602 (Me. 1979); *Look v. State*, 267 A.2d 907, 910 (Me. 1970).

seek to burden a particular person.[53] As other states have recognized, if "the classification adopted by the legislature … is logically and factually limited to a class of one," "the law create[s] an illusory class [and is] prohibited special legislation."[54]

A. The Text of the 2021 Initiative Shows a Clear Intent to Target the NECEC Project.

Here, although some of the language of the 2021 Initiative provides a thin gloss of general applicability, the retroactivity provisions reveal the intent to target the NECEC Project. The retroactivity provisions are crucial; without them, Maine law would treat the 2021 Initiative prospectively, and, therefore, it would not apply it to the NECEC Project.[55] Opponents of the NECEC Project needed the retroactivity provisions in the 2021 Initiative to accomplish their singular goal of blocking the NECEC Project.

The 2021 Initiative contains two retroactivity provisions that are, remarkably, more than six years apart. First, the retroactivity provision in Section 1 makes the

[53] *See Avangrid*, 2020 ME 109, ¶ 36 n.10 ("Even with respect to special legislation, the Legislature may not enact a private resolve singling out an individual for unique treatment."); *Pennsylvania Tpk. Comm'n v. Com.*, 587 Pa. 347, 351, 899 A.2d 1085, 1087 (2006) (holding that an act that burdens "a single public employer: appellee Pennsylvania Turnpike Commission" by "mandat[ing] collective bargaining with the Commission's first-level supervisors … is unconstitutional special legislation").

[54] *Sierra Club v. Dep't of Transportation of State of Hawai'i*, 120 Haw. 181, 203–04, 202 P.3d 1226, 1248–49 (2009) (quotation marks omitted).

[55] *See* 1 M.R.S. § 302; *Carignan v. Dumas*, 2017 ME 15, ¶ 18, 154 A.3d 629 ("[A]ll statutes will be considered to have a prospective operation only, unless the legislative intent to the contrary is clearly expressed or necessarily implied from the language used." (quoting *Coates v. Me. Emp't Sec. Com.*, 406 A.2d 94, 97 (Me. 1979)).

restrictions on leasing land retroactive to September 16, 2014.[56] Second, the retroactivity provision in Section 6 makes both the legislative veto provision and the prohibition on construction in the Upper Kennebec Region retroactive to September 16, 2020.[57]

The wide disparity between the retroactivity provisions ensures that the 2021 Initiative surgically targets different milestones for the NECEC Project. The retroactivity provision for leases stretches so much further back because NECEC Transmission LLC's predecessor obtained the lease that far back. And the 2021 Initiative did not make all of its other provisions retroactive to September 2014 because its proponents apparently had no interest in inadvertently hindering any other project that may have begun work before the NECEC Project.

Therefore, although the 2021 Initiative did not explicitly call out the NECEC Project by name, the peculiar retroactivity provisions ensured that the 2021 Initiative logically and factually targeted the NECEC Project.[58] The Business Court erred in

[56] A. 69.

[57] A. 70.

[58] *See Sierra Club*, 120 Haw. at 203–04; *Haman v. Marsh*, 237 Neb. 699, 717, 718, 467 N.W.2d 836, 849 (1991); c*f. Wal-Mart Puerto Rico, Inc. v. Juan C. Zaragoza-Gomez*, 174 F. Supp. 3d 585, 608 (D.P.R.), *aff'd* sub nom. *Wal-Mart Puerto Rico, Inc. v. Zaragoza-Gomez*, 834 F.3d 110 (1st Cir. 2016) (striking down an amended Alternative Minimum Tax whose highest tax bracket was specifically calculated so that "only Wal-Mart PR met that threshold").

disregarding the significance of the text of the retroactivity provisions. The 2021 Initiative is unconstitutional special legislation.

B. The History and Campaign of the 2021 Initiative Show a Clear Intent to Target the NECEC Project.

In addition to the plain text of the 2021 Initiative, its history and campaign show an intent to target the NECEC Project. In the face of any ambiguity, the courts interpret a law "in light of its legislative history and other indicia of legislative intent."[59] In the analogous context of equal protection analysis, courts may consider "[t]he historical background of the decision" and "the specific sequence of events leading up to the challenged decision," "particularly if it reveals a series of official actions taken for invidious purposes."[60] The improper motivations of prior versions of a bill inform the motivations of subsequent versions.[61]

This Court held that the 2020 Initiative unconstitutionally targeted the CPCN issued for the NECEC Project.[62] Shortly after that decision, opponents of the NECEC Project submitted the 2021 Initiative at issue here. The "specific sequence of events" confirms that the 2021 Initiative shared the same unconstitutional purpose

[59] *Wawenock, LLC v. Dep't of Transportation*, 2018 ME 83, ¶ 7, 187 A.3d 609.

[60] *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 267, 97 S. Ct. 555, 564, 50 L. Ed. 2d 450 (1977).

[61] *United States v. Carrillo-Lopez*, No. 320CR00026MMDWGC, 2021 WL 3667330, at *7 (D. Nev. Aug. 18, 2021) ("[T]he background of the Act of 1929 is relevant to the eventual passage of Section 1326 in 1952 . . . . The Court concludes that … the Act of 1929 was motivated by racial animus.").

[62] *Avangrid*, 2020 ME 109, ¶¶ 5, 35–36.

as the 2020 Initiative, even though the proponents modified its text. The campaign for the 2021 Initiative confirmed this unconstitutional purpose. As the Business Court recognized, "supporters of the Initiative consistently emphasized that voting for it would block the Project corridor," and "[t]he advertising in support of the Initiative was so targeted that a voter would be forgiven for not realizing the law would have any effect other than obstructing the Project."[63] It erred in failing to consider this legislative history in interpreting the 2021 Initiative, which is unconstitutional special legislation.

VI. The 2021 Initiative is Not Severable.

When "it is impossible to determine that the legislation would have been enacted except as an entirety, if one portion offends the Constitution, the whole must fall."[64] The entire 2021 Initiative is unconstitutional. But even if the Court were to find that only part of the 2021 Initiative were unconstitutional, it should strike the entire Initiative because it cannot sever the unconstitutional provisions from the remainder of the law.

Maine law treats initiatives differently from ordinary legislation. In *Caiazzo v. Sec'y of State*, the Court upheld the Secretary of State's decision to "read[] the initiated bill in the conjunctive and draft[] a single, concise ballot question

[63] A. 52 (Bus. Ct. Order at 37).

[64] *Town of Windham v. LaPointe*, 308 A.2d 286, 292 (Me. 1973).

describing the single Act that was circulated to the voters for signature and presented to the Legislature for enactment before being referred to referendum."[65] This Court recognized that the "process for a direct initiative … mak[es] it difficult … for the Secretary of State to conclude … that issues addressed in a single initiated bill are severable and can be enacted or rejected separately without negating the intent of the petitioners."[66] Here, the 2021 Initiative, which does not include a severability clause, differs from ordinary legislation because, from the beginning, the voters always received the 2021 Initiative as a single, unified, proposed act.

Thus, the Citizen's Guide to the Referendum Election published by the Secretary of State explains that a "A YES vote is to enact the initiated bill in its entirety," and that "A NO vote opposes the initiated bill in its entirety." [67] A voter relying on this official guide would reasonably conclude that the 2021 Initiative was a package deal that would survive or fall "in its entirety." "[S]plintering a single bill that was proposed to be presented for a yes-or-no vote into multiple pieces of

[65] *Caiazzo v. Sec'y of State*, 2021 ME 42, ¶ 27, 256 A.3d 260.

[66] *Id.* ¶ 23 (quotation marks omitted).

[67] Me. Dep't of the Sec'y of State., Maine Citizen's Guide to the Referendum Election at 7 (Nov. 2, 2021), *available at* https://www.maine.gov/sos/cec/elec/upcoming/pdf/11-21citizensguide.pdf. Courts can take judicial notice of public records at any stage of a proceeding, including on appeal. *See* M.R. Evid. 201(b), (d); *D'Amato v. S.D. Warren Co.*, 2003 ME 116, ¶ 13 n.2, 832 A.2d 794; *State v. Moulton*, 1997 ME 228, ¶ 17, 704 A.2d 361.

legislation might be inconsistent with the intent of those who drafted or signed the petition."[68]

In short, there is no basis to believe that the voters believed any of the provisions of the 2021 Initiative could or should be severed from the others, especially because the Act does not contain any severability provision and the campaign focused on the NECEC. And the presumption of severability applicable to ordinary legislation should not apply to initiatives. Ordinary legislation may go through multiple revisions and have provisions added or removed prior to voting. But the text of the 2021 Initiative remained constant. And ordinary legislation may encompass multiple related and unrelated issues. But the 2021 Initiative had a single unified purpose: to stop the NECEC Project. Therefore, the Court should not sever any unconstitutional provisions from the rest of the 2021 Initiative.

CONCLUSION

Opponents of the NECEC Project failed to block it when multiple state agencies evaluated the Project. They failed to block it in subsequent judicial challenges to those actions. And they failed with the 2020 Initiative because this Court found it unconstitutional. Opponents may not now disturb the delineated, sacred powers granted to the three distinct branches of Maine government without

[68] *Caiazzo*, 2021 ME 42, ¶ 24.

similarly running afoul of the Constitution. For the foregoing reasons, Amici request that this Court declare the 2021 Initiative unconstitutional and grant Appellants the requested relief.

WHEREFORE, the Court should vacate the order of the Business and Consumer Court and remand with instructions to enter a preliminary injunction.

Respectfully submitted, dated at Bangor, Maine this 30th day of March, 2022.

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CERTIFICATE OF SERVICE

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