BEFORE THE JUSTICES OF THE SUPREME JUDICIAL COURT
DOCKET NO. BCD-21-416

NECEC Transmission LLC, et al.,

Plaintiff-Appellants

v.

Bureau of Parks and Lands, et al.

Defendant-Appellees

Brief of Amicus Curiae Dmitry Bam

March 29, 2022

Dmitry Bam
Vice Dean and Professor of Law
University of Maine School of Law
246 Deering Ave.
Portland, Maine 04102

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

CONSTITUTIONAL PROVISIONS

OTHER AUTHORITIES

STATEMENT OF THE CASE AND SUMMARY OF THE ARGUMENT

When opponents of the New England Clean Energy Connect ("NECEC") transmission project first sought to stop construction, they proposed an initiative requiring the Public Utilities Commission ("PUC") to revoke a permit it had already granted. While that initiative was highly unusual and problematic, it is no surprise that NECEC opponents' first effort was a direct command to the PUC to bar construction of a project not then underway. Opponents undoubtedly understood that retroactive legislation interfering with a previously approved project already under construction violates fundamental rule-of-law principles and has long been considered unconstitutional. Such retroactive laws, in the words of a leading legal scholar, are a "monstrosity" and universally condemned in our legal system.

But after this Court's decision in *Avangrid* invalidated their first initiative, opponents turned to Plan B: an expressly retroactive change in the law adopted long after the permits at issue had been granted, reviewed, adjudicated, and upheld by the other two branches of government, and – to make matters worse – after significant work on the project had already been completed. Like opponents' first effort, this

legislation is invalid. By replacing a targeted directive that violates the separation-of-powers doctrine with retroactive legislation that not only raises separation-of-powers issues but is also anathema to the Due Process Clause and bedrock legal principles of vested rights, NECEC's opponents have substituted one unconstitutional initiative for another.

With permits in place, contracts signed, and half a billion dollars of construction work already completed, there is no question that this legislation is retroactive as applied to the NECEC. In fact, the Initiative proudly proclaims so on its face. By explicitly changing the law as far back as 2014[1] – over 7 years prior – the Initiative vitiates reasonable, good-faith reliance and extensive work undertaken under then-existing legal rules. The Initiative does not just change the rules after the game has begun—it changes the rules after the game has already ended. The amount of money and time spent on this project since 2014 is staggering. Going back in time to 2014 (or 2020) to revise standards for a previously-obtained permit is unfair under any understanding of the word "law." And of course, if the Court allows this ploy, nothing will stop opponents of a particular project from returning 7 or 14 or 21 years later with new

[1] The reversion to 2014 was necessary to retroactively undo the issuance of the Bureau of Parks and Land lease.

initiatives and new sets of legal rules for a wide variety of endeavors already under construction. Fortunately, under established Maine law and a long line of this Court's precedent, these types of legislative shenanigans are not permitted.

This amicus brief proceeds in four parts. First, it demonstrates that Maine's Constitution, like the constitutions (and statutes) of our sister states, prohibits retroactive legislation that interferes with vested rights. This fundamental principle of due process has been recognized in Maine for well over a century, and it has been an accepted part of the American legal tradition since the country's founding. The constitutional right in question is supported by history, public policy, and this Court's decisions in numerous cases dating back to the 1800s, including *Warren v. Waterville Urb. Renewal Auth.*, 235 A.2d 295 (Me. 1967), *Fournier v. Fournier*, 376 A.2d 100 (Me. 1977), and, most directly on point, *Sahl v. Town of York*, 760 A.2d 266 (Me. 2000). All accepted sources of legal authority—constitutional text, history, precedent, and public policy—confirm that the vested rights doctrine is a key component of Maine's Due Process Clause jurisprudence.

Second, the brief explains that this constitutional limitation, while narrow, applies to *all* legislation and to *all* levels of state government. Because the right is grounded in the Constitution's Due Process Clause, there is no principled reason for the Court to apply the right only to the actions of local or municipal government. Neither the text of the Due Process Clause nor this Court's precedent suggest that our state constitution is so limited. To the contrary, the Due Process Clause constrains any government action – state as well as local – and, for the purposes of constitutional analysis, state legislation (including legislation passed through the initiative process) should be reviewed under the same standards as municipal ordinances. Unless the Constitution expressly specifies that it limits only the actions of state or municipal governments, its proscriptions are, and should be, universal. Any reading to the contrary is inconsistent with basic principles of constitutional law and this Court's interpretation of the Due Process Clause.

Third, the brief argues that rational basis review is inappropriate for violations of the vested rights doctrine grounded in due process, as rational basis review would relegate individuals with vested property

interests to the same constitutional footing as individuals with *no* protected property interests. In *Sahl*, this Court established the proper framework to determine whether retroactive legislation runs afoul of the Due Process Clause. *Sahl*, 760 A.2d at 269-70. The *Sahl* test itself appropriately balances government interest and individual rights, requiring challengers to meet a stringent test, including a showing that actual, physical construction has already begun in good-faith reliance on valid permits. *Id*. This test will be rarely met, and this case demonstrates just how much work must be done to satisfy the *Sahl* framework. Adding a second layer of balancing on top of *Sahl* presents an unnecessary and virtually insurmountable barrier to the constitutional protection of vested rights. The rational basis test is the most deferential approach known in constitutional law, and it is the test that applies to virtually all legislation subject to constitutional challenge. Applying the rational basis test here contravenes the Court's earlier decisions and guts the vested property rights doctrine. A vested property right subject only to rational basis review is not truly "vested" at all. The Court should reaffirm its earlier decisions that no deprivation of vested rights is permitted under the Due Process Clause of the Maine Constitution and

reiterate that the *Sahl* test is the appropriate vehicle to determine whether such a deprivation took place.

Fourth, the brief argues that under any reasonable approach to the vested rights doctrine, (a) the Initiative is retroactive legislation as applied to the NECEC Project, (b) the Plaintiffs' rights vested when, relying on validly obtained permits, they made significant expenditures and began physical construction of the project, all in good faith, and (c) such retroactive application unconstitutionally deprives Plaintiffs of those vested rights. Of course, there is always a risk that the legislature (or the people, through the initiative process) will prospectively change their mind about hydropower, alternative energy, or transmissions lines. Thus, when a developer begins a project, whether it is a housing developing, a shopping mall, or a high-impact electric transmission line, it assumes many legitimate risks. The developer assumes the risk that the permits upon which it is relying will be found invalid on appeal under the law governing at the time they were granted. The developer also assumes the risk that the law will change prospectively, limiting its ability to operate its business under the previously obtained permits going forward. Those risks are a part of doing business. But the developer

does not assume the risk that the law will retroactively nullify earlier permits and retroactively impose a new set of standards for how those permits should have been obtained. Were that the law, no person's liberty or property could ever be safe, with the threat of retroactive legislation constantly hovering over them. That is not our law, and it is not a legal regime this Court should recognize.

QUESTION PRESENTED

Does the Maine Constitution prohibit retroactive legislation that interferes with individuals' vested rights?

STATEMENT OF AMICUS CURIAE

I am a Professor at the University of Maine School of Law. I teach and write in the areas of constitutional law, election law, and judicial power. I submit this brief to provide the Court with my perspective on the constitutional issues raised by the Citizen Initiative. Although I remain a strong proponent of direct democracy and popular government, protection of individual rights demands that legislative authority remain within its limits. Expanding legislative authority to permit retroactive deprivations of legally acquired vested rights would undermine individual rights in Maine.

This brief expresses views that are my own and not an official position of the University of Maine School of Law or the University of Maine System.

ARGUMENT

I. Maine's Constitution Prohibits Retroactive Legislation Impairing Vested Rights.

Article IV of the Maine Constitution grants the Maine legislature broad police powers, permitting legislation that protects public health, safety, welfare, and morals. The Initiative power, which also resides in Article IV, is likewise expansive, and gives Mainers a mechanism by which to exercise the legislative power partially independent of the legislature. Jeremy R. Fischer, *Exercise The Power, Play By The Rules: Why Popular Exercise of Legislative Power In Maine Should Be Constrained By Legislative Rules*, 61 ME. L. REV. 504, 505 (2009). But the Maine Constitution also sets limits on the exercise of that power. One such limit is imposed by the Due Process Clause, which has been interpreted to prohibit retroactive legislation depriving individuals and entities of their vested rights.

Throughout the United States, courts have recognized this principle, although states differ in their approaches. In "early vesting"

states, the property right vests toward the front end of the permitting process – sometimes, even as early as when the landowner or developer applies for a permit. Utah is an example of a state that takes the "early vesting" approach, allowing for rights to vest regardless of whether a permit is actually obtained. *See, e.g., Western Land Equities, Inc. v. City of Logan*, 617 P.2d 388 (Utah 1980) (expenditure of $2,225 for survey and subdivision map work sufficient to obtain vested rights). In "late vesting" states, such as California, vested rights do not arise until the landowner or developer has incurred substantial expenditure in good faith reliance on a previously issued permit. *Avco Cmty. Devs., Inc. v. South Coast Reg'l Com.*, 17 Cal. 3d 785, 132 Cal. Rptr. 386, 553 P.2d 546 (1976).

This Court has rejected the "early vesting" approach, and the mere filing of an application for a permit, and even the issuance of a permit in and of itself, does not confer a claim for legally acquired vested rights. *See, e.g.*, *City of Portland v. Fisherman's Wharf Assocs. II*, 541 A.2d 160, 164 (Me. 1988); *Sahl*, 760 A.2d at 269-70.[2] Instead, Maine has adopted

[2] A separate line of this Court's cases has recognized a different species of vested rights grounded in equity. In those cases, developers had not started construction and therefore had no claim for legally acquired vested rights. *Cf. Kittery Retail Ventures, LLC v. Town of Kittery*, 856 A.2d 1183, 1193 (Me. 2004) (an equitable claim for vested rights, based on governmental bad faith, may be possible prior to obtaining permits). Although these claims also focus on a type of vested rights, my analysis is limited to *constitutional* due process claims involving government interference with vested property rights.

an approach requiring a party to engage in physical construction with a bona fide, good-faith intent to complete the project pursuant to a validly issued permit in order to establish a claim for legally acquired vested rights. In adopting this approach, the Court has expressly endorsed the analysis and the framework embraced by Maryland in *Town of Sykesville v. West Shore Comm'cns, Inc.*, 677 A.2d 102 (Md. 1996). *See Sahl*, 760 A.2d at 269. But regardless of where on the vesting continuum Maine falls, there is no question that the vested rights doctrine is recognized in Maine.

Maine's leading recent decision on the vested rights doctrine is *Sahl v. Town of York*. In *Sahl*, this Court determined that a property owner who began the construction of a motel project had a vested right to complete that project. 760 A.2d at 270. The Court established a clear and simple test to determine whether rights have vested. First, the property owner must demonstrate actual physical commencement of some significant and visible construction. Second, the commencement must have been undertaken in good faith and with the intention to continue with the construction and to carry it through to completion. And third,

the commencement of construction must be pursuant to a validly issued permit. *Id.* at 269.

The decision in *Sahl* did not break new ground but rather reaffirmed centuries of precedent. In *Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981), for example, the Court stated that "[t]he legislature has no constitutional authority to enact retroactive legislation if its implementation impairs vested rights." Similarly, in *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977), the Court explained that "[i]t is established in [Maine] that a statute which has retrospective application is unconstitutional if it impairs vested rights." And these are just some of the many cases where this constitutional doctrine has been recognized. *See, e.g., Sabasteanski v. Pagurko*, 232 A.2d 524, 526 (Me. 1967); *Inhabitants of Otisfield v. Scribner*, 151 A. 670, 671 (Me. 1930); *Adams v. Palmer*, 51 Me. 480 (Me. 1863); *Coffin v. Rich*, 45 Me. 507, 514-515 (1858). Marshall Tinkle's leading treatise on the Maine Constitution is unequivocal: the Constitution "precludes retroactive legislation that impairs vested rights . . ." MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE, at 29 (2nd ed. 2013) (citing *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275 (1823)).

This Court's approach to the vested rights doctrine "strike[s] a fine balance between the competing interests of the developer and the municipality." John J. Delaney, *Vesting Verities and the Development Chronology: A Gaping Disconnect?,* 3 WASH. U. J.L. & POL'Y 603 (2000). It does not allow the rights to vest too early simply because a developer (1) filed an application for a permit; (2) was issued a permit; (3) relied on the language of the existing ordinance; or (4) incurred preliminary expenses in preparing and submitting the application for a permit. *Sahl*, 760 A.2d at 269. By demanding actual investment and physical construction to begin, this approach leaves states and municipalities with the freedom they need to revise their land use requirements as circumstances require, and forecloses revisions only in rare circumstances where doing so retroactively would unfairly penalize substantial lawful investment made in good faith.

This Court has also—correctly, in my opinion—eliminated the "free-standing" anti-retroactivity framework that it sometimes applied when laws interfered with settled expectations, even outside the limited constitutional due process context. In *Norton v. C.P. Blouin, Inc.*, the Court held that procedural laws can be applied retroactively even with

respect to conduct that had taken place prior to their adoption. 511 A.2d 1056 (Me. 1986). *Norton* reasoned that such procedural rules are not retroactive for the purposes of the constitutional vested rights doctrine. The Court did not discuss the substantive limitations imposed by the Due Process Clause, in part because no due process claims were raised in that case, and the decision in *Norton* has nothing to do with the legally acquired vested rights at issue in this case. *Id.* at 1061.

Likewise, in *State v. L.V.I. Group*, the Court reaffirmed that retroactive economic legislation will generally be upheld unless it interferes with vested rights as guaranteed by the Maine Constitution. *State v. L.V.I. Grp.*, 690 A.2d 960 (1997). Mere upset of otherwise settled expectations is insufficient to subject retroactive laws to heightened scrutiny. *Id.* at 964. Unlike the plaintiffs in this case, the plaintiff in *L.V.I. Group* did not assert it legally acquired a vested property right under the Due Process Clause. *Norton*, *L.V.I. Group*, and *Sahl*, taken together, reaffirm that rational basis review applies to retroactive economic legislation, even when the effect of legislation is to impose new duty or liability based on past acts, *unless* the legislation impairs vested rights protected by the Maine Constitution.

Maine is one of many states that rejects retroactive legislation that interferes with vested rights. In fact, courts throughout the nation recognize vested rights in similar circumstances. For example, in *Blue Chip Properties v. Permanent Rent Control Bd.*, 170 Cal. App. 3d 648, 216 Cal. Rptr. 492 (2d Dist. 1985), the court held that landowners' substantial reliance on an issued permit created a vested right to complete a project according to the terms of the permit, despite a later prohibition on the proposal. In *Lucas v. Village of La Grange*, 831 F. Supp. 1407, 1413 (N.D. Ill. 1993), the court explained that "[w]here there has been a substantial change of position, expenditures or incurrence of obligations made in good faith by an innocent party under a building permit or in reliance upon the probability of its issuance, such party has a vested property right and he may complete the construction and use the premises for the purposes originally authorized, irrespective of subsequent zoning or a change in zoning classifications."

The *Town of Sykesville* decision by the Maryland Court of Special Appeals has been particularly influential. *See Town of Sykesville*, 677 A.2d at 110. This Court made clear that Maine law on vested rights is in accord with Maryland law. *Sahl*, 760 A.2d at 270. Maryland law, like

Maine law, leaves no doubt that the vested rights doctrine has a "constitutional foundation." *Prince George's Cnty. v. Equitable Tr. Co.*, 44 Md. App. 272, 278, 408 A.2d 737, 741 (1979). And while some states include a prohibition on retroactive legislation in their statutes, and some rely on the common law takings doctrine to reach the same results, the general principle is universally accepted and covered in all leading Property and Land Use casebooks. *See, e.g.,* THOMAS W. MERRILL AND HENRY E. SMITH, PROPERTY: PRINCIPLES AND POLICIES, at 1148 (Third Ed., 2017) (including a lengthy section on "vested rights and the canon disfavoring retroactive laws").

The universal acceptance of these court decisions demonstrates why the project's opponents initially attacked the NECEC through the 2020 Initiative, prior to construction. That Initiative had numerous constitutional problems, and this Court correctly concluded that it violated the separation of powers doctrine. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, 237 A.3d 882. But this Court's decision in *Avangrid* forced NECEC opponents to fall back to Plan B and propose retroactive changes in the present Initiative – an approach that has historically been rejected in the English and American legal tradition.

The principle that retroactive legislation interfering with vested rights is unconstitutional has a long history and is anathema to the rule of law and prohibited throughout the United States. *See United States v. The Schooner Peggy*, 5 U.S. (1 Cranch) 103, 110 (1801) ("[I]n mere private cases between individuals, a court will and ought to struggle hard against a construction which will, by a retrospective operation, affect the rights of parties . . . ."); *see also Reynolds v. McArthur*, 27 U.S. (2 Pet.) 417, 434 (1829) ("It is a principle which has always been held sacred in the United States, that laws by which human action is to be regulated, look forwards, not backwards; and are never to be construed retrospectively unless the language of the act shall render such construction indispensable."). The principle existed for hundreds of years in common law under the doctrine of estoppel. And although the doctrine of estoppel is generally invoked in private disputes, courts relied on this same principle in developing the vested rights doctrine under state constitutions. *See generally*, VESTED RIGHTS AND EQUITABLE ESTOPPEL, SF08 ALI-ABA 913, 915 (2000). Recognizing the common-law origins of this foundational principle, Justice Story wrote in his leading treatise on constitutional jurisprudence that retrospective laws are "generally unjust" and do not

"accord with sound legislation nor with the fundamental principles of the social compact." 2 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES, § 1398 (Melville M. Bigelow ed., 1994) (1833). At this point, there is little doubt that the right is grounded in state constitutional protections. *Prince George's Cnty.*, 44 Md. App. at 278, 408 A.2d at 741 (explaining that the vested rights doctrine, "which has a constitutional foundation, rests upon the legal theory that when a property owner obtains a lawful building permit, commences to build in good faith, and completes substantial construction on the property, his right to complete and use that structure cannot be affected by any subsequent change of the applicable building or zoning regulations."); *Mitchell v. Roberts*, 2020 UT 34, ¶ 41, 469 P.3d 901, 912, reh'g denied (July 13, 2020) (discussing the constitutional foundation of the vested rights doctrine under the due process clause of Utah's Constitution and holding that Utah laws "viewed the guarantee of due process as a limitation on legislative power" and that the due process "guarantee foreclosed legislative acts vitiating a person's vested rights").

Although retroactive laws are disfavored, they are not categorically prohibited under the Maine Constitution unless they fall within certain

categories. The most well-known category of unconstitutional retroactive laws consists of *ex post facto* laws. *See* ME. CONST. ART I., § 11 ("The Legislature shall pass no . . . ex post facto law . . . ."). These criminal statutes punish individuals for conduct made illegal only after they engage in the conduct. The key question in this case is whether retroactive laws that deprive individuals or entities of vested rights also fall within a category of prohibited retroactive legislation under the Due Process Clause. The answer is yes. The historical antipathy towards retroactive legislation impairing vested rights is reflected in this Court's decisions recognizing that impairment as constitutionally prohibited, and the decisions of other state courts throughout the country. *See, e.g., Coffin*, 45 Me. at 514-515; *Laboree*, 2 Me. at 275; *see also* David M. Gold, *The Tradition of Substantive Judicial Review*, 52 ME. L. REV. 355 (2000) (explaining that even before the Due Process Clause of the Maine Constitution was adopted, courts struck down legislative acts that interfered with vested rights under article 1, section 1 of the Constitution).

Not only does the vested rights doctrine find support in the history of the Constitution and this Court's case law, but it is strongly supported

by public policy and basic fairness. The Business Court's reasoning leaves virtually no limit on legislative power to retroactively change the legal standards applicable to individuals' actions and rights. This severe limitation of the vested rights doctrine in Maine would lead to troubling consequences. Under the Business Court's approach, it does not matter for purposes of assessing the validity of retroactive state laws how far a project has progressed, and it does not matter how much money was expended. It is hard to imagine that any individual or business would take on the risk of starting a construction project if, seven years from the start date, the law could be retroactively changed to undo all that work. Upholding the Initiative (1) undermines Maine's regulatory system, (2) makes it significantly more challenging to expand the infrastructure for renewable energy, and (3) will drive businesses and economic development out of the state.

Retroactive legislation interfering with vested rights is not just unconstitutional and contrary to public policy; it is incompatible with the rule of law. *See, e.g.*, Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1179 (1989) ("[U]ncertainty has been regarded as incompatible with the Rule of Law. Predictability . . . is a needful

characteristic of any law worthy of the name."). Some of the brightest legal scholars in our nation's history have echoed these principles. In the words of Justice Cardozo, "[l]aw as a guide to conduct is reduced to the level of mere futility if it is unknown and unknowable." BENJAMIN N. CARDOZO, THE GROWTH OF THE LAW 3 (1924). We should not tolerate this kind of uncertainty here in Maine.

A ruling in favor of the Appellants does not handcuff the government or unduly constrain legislative power, even with respect to this very project. To understand why, it is important to differentiate a retroactive law that impairs vested rights from a prospective law that disrupts expectations. Most prospective laws will affect expectations. If, for example, Maine decided to ban (or tax, at a higher rate) the use of clean energy, or the operation of transmission lines, that would undoubtedly disrupt the Appellants' expectations. But that disruption alone is not unconstitutional and Appellants are protected from such laws only by the political process, and perhaps the takings doctrine, but not due process. Douglas W. Kmiec & John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 HASTINGS CONST. L.Q. 525, 528 (1987) ("Almost all laws operate retrospectively in that they

must defeat the subjective expectations of those who planned their conduct according to the existing law.").

* * * *

Case law (from Maine and elsewhere), history, public policy, and basic notions of fairness all point in one direction: the doctrine of vested rights is an important constitutional limitation on legislative power. Because the right is so narrowly tailored and difficult to satisfy, only the most extreme and extraordinary legislation violates the *Sahl* principle. As applied to Appellants, this Initiative presents the rare category of circumstances where retroactive legislation is constitutionally prohibited under the Due Process Clause.

II. The Due Process Clause Limits State and Local Government.

Rights-based provisions in our state and federal constitutions impose important limits on the government. The Due Process Clause of the Maine Constitution is one of those rights-based provisions. *Cf. Schendt v. Dewey*, 246 Neb. 573, 520 N.W.2d 541 (1994) (holding that the legislature's power to change a statute of limitations is subject to only two restrictions, both of which are grounded in the due process clause of the state constitution); *Mitchell*, 2020 UT 34, ¶ 41, 469 P.3d at 912

("[E]arly Utahns viewed the guarantee of due process as a limitation on legislative power. They understood that the due process guarantee foreclosed legislative acts vitiating a person's vested rights."). This Court has long made clear that *state* statutes are unconstitutional when they retroactively impair vested rights. *Fournier*, 376 A.2d at 101-102; *Coffin*, 45 Me. at 514-15. In *Warren v. Waterville Urb. Renewal Auth.*, this Court recognized that the vested rights doctrine is grounded in the Due Process Clause and explained that "[c]onstitutional restrictions of due process undoubtedly would bar legislative . . . deprivation of substantial vested rights, which they were meant to protect." 235 A.2d 295, 304 (Me. 1967). In case after case, the Court has discussed the vested rights doctrine in analyzing state laws, not just municipal ordinances. *See Sabasteanski*, 232 A.2d at 526; *Fournier*, 376 A.2d at 100; *Adams*, 51 Me. at 480; *Coffin*, 45 Me. at 514-15. It is true, of course, that the vested rights doctrine is frequently *invoked* in cases against municipal government, often in the context of zoning. But the mere fact that the vested rights doctrine is most likely to be violated at the local level does not alter the fact that the doctrine is grounded in the Due Process Clause, and the Due Process Clause limits all state action.

Even when constitutional language appears to limit only some government actors, courts have often interpreted that language more broadly. For example, the First Amendment to the United States Constitution begins with the words "*Congress* shall make no law . . ." U.S. CONST. AMEND. I. Despite that express limitation, the Supreme Court has held that the First Amendment applies to all branches of federal government. *See* Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1244 (2015) ("American constitutional practice . . . has always viewed the First Amendment as relevant to the conduct of the entire federal government, not just Congress.").

Regardless, the Due Process Clause contains no such limitation and is not limited in its scope. There is nothing in the text to suggest that the Due Process Clause operates differently with respect to different levels of government. The clear language of the Clause confirms that every level of Maine's government is subject to the limitation, and states may not deprive individuals of due process any more than municipalities. *See, e.g., In re Stanley*, 133 Me. 91, 174 A. 93, 95 (1934) (applying due process analysis to a state statute requiring common carrier of freight by

motortruck to obtain certificate of public convenience and necessity); *Danforth v. State Dep't of Health & Welfare*, 303 A.2d 794, 798 (Me. 1973), abrogated by *Lassiter v. Dep't of Soc. Servs. of Durham Cty., N. C.*, 452 U.S. 18, 101 S. Ct. 2153, 68 L. Ed. 2d 640 (1981) (applying due process analysis to hold that counsel must be appointed in a state custody proceeding). The Equal Protection Clause, which is part of the same constitutional provision in Section 6-A, also applies to state legislation. *See Measurex Sys., Inc. v. State Tax Assessor*, 490 A.2d 1192, 1193 (Me. 1985). In fact, unlike the Due Process Clause in the Fourteenth Amendment, which expressly requires state action, section 6-A of the Maine Constitution "does not limit the prohibition to the state or any of its subdivisions." MARSHALL J. TINKLE, THE MAINE STATE CONSTITUTION: A REFERENCE GUIDE, at 46 (2nd ed. 2013). The text of the Due Process Clause demands an expansive reading; a crabbed interpretation that limits the vested rights analysis only to the municipal context is inconsistent with that text.

There is also no theory of constitutional law to support this distinction, and such an interpretation would constitute a massive expansion of legislative power. Municipalities are subdivisions of the

State, and constitutional limits that apply to them also apply to the State as a whole. The Business Court's approach permits the Legislature to pass retroactive laws with impunity, depriving individuals of rights that have long been recognized under Maine law, when the same actions by a municipal government would be held unconstitutional. Such a distinction makes no sense, and it has not been recognized in Maine or anywhere else in the country.

And just as the Due Process Clause limits the power of the Maine Legislature, the same limits apply to citizen initiatives. As the Supreme Court has stated, "[v]oters may no more violate the Constitution by enacting a ballot measure than a legislative body may do so." *Citizens Against Rent Control/Coal. for Fair Hous. v. City of Berkeley*, 454 U.S. 290, 295 (1981). This Court has been clear that an initiative is to be treated as legislation for constitutional analysis. *League of Women Voters v. Sec'y of State*, 683 A.2d 769, 771 (Me. 1996) ("Since by the initiative process the people of Maine are exercising their legislative power, the constitutional validity of a citizen initiative is evaluated under the ordinary rules of statutory construction.").

In short, the text of the Due Process Clause, centuries of decisions by this Court, and bedrock principles of constitutional law all confirm that the Clause limits state action, whether undertaken by the state legislature, the people through the initiative process, or local government.

III. The Court Should Not Apply Rational Basis Review For Violations of Individual Rights.

To determine whether the government has run afoul of a constitutional limit, this Court, like other state and federal courts, has developed various tests, tailored to the specific limitation and rights in question. "Some fundamental rights trigger intermediate scrutiny, while others are protected only by reasonableness or rational basis review. Other fundamental rights are governed by categorical rules, with no formal 'scrutiny' or standard of review whatsoever." Adam Winkler, *Fundamentally Wrong About Fundamental Rights*, 23 CONST. COMMENT. 227, 229 (2006). For the due process limitation at issue in this case – the prohibition on retroactive laws that impair vested rights – going back over two centuries this Court has developed and applied a categorical test, *see Laboree*, 2 Me. at 275, culminating in the three-factor test described in *Sahl*.

The Business Court, on the other hand, suggested that regardless of the categorical rule reflected by *Sahl*, legislation that survives rational basis review should nevertheless be upheld. It is generally true that when economic legislation, including retroactive economic legislation, does not interfere with legally vested rights, it need only survive the deferential rational basis test. *See Kittery Retail,* 856 A.2d at 1193. Under the Due Process Clause, laws *that do not implicate rights* are, indeed, subject to rational basis review. "[T]he concept of rational basis review—the idea that *all* legislation at a minimum must be rationally related to a legitimate government purpose—generally is not controversial." Sharon E. Rush, *Whither Sexual Orientation Analysis?: The Proper Methodology When Due Process and Equal Protection Intersect*, 16 WM. & MARY BILL RTS. J. 685, 693 (2008) (emphasis added). The rational basis test, in other words, sets the floor for all state legislation.

But the three-part *Sahl* framework is rendered superfluous if, even in cases involving actual, physical commencement of construction undertaken in good faith pursuant to a valid permit, the government need only satisfy rational basis review. There would be no need to determine if a vested right exists if it has no more protection than mere

prospective economic interests. Adding a second layer of balancing is not only superfluous but undermines the Court's *Sahl* analysis. Not surprisingly, the *Sahl* court did not even hint that was the proper analysis and did not itself engage in rational basis review. Nor does *Town of Sykesville*, on which *Sahl* expressly relied. *See also State v. Goldberg*, 85 A.3d 231, 240 (Md. 2014) ("If a retrospectively-applied statute is found to abrogate vested rights . . . it is irrelevant whether the reason for enacting the statute, its goals, or its regulatory scheme is 'rational.'" (quotation marks omitted)). Applying rational basis review to retroactive legislation that impairs vested rights ignores this Court's decision in *Sahl* and eviscerates the constitutionally protected right altogether, rendering it meaningless.

The *Sahl* test inherently balances the government's interest and the need for flexibility with respect to land use regulations with a developer's interest in certainty. There is no reason to invoke rational basis review when the Court has developed a categorical test for analyzing vested rights claims. The categorical test, announced most recently in *Sahl*, is clear, workable, and predictable. It is consistent with categorical tests throughout constitutional law. *See Michigan v. Jackson*,

475 U.S. 625 (1986) (applying categorical rule to the right to counsel); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008) (using a categorical approach for the right to bear arms); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (concluding that a categorical *per se* standard is appropriate when government denies property owners all economically viable use of land); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390 (1798) (identifying four categories of laws that violate *ex post facto* principles). Such tests allow courts to determine whether a constitutional violation took place and protects the invaded right. And such a categorical test is precisely what this Court has created to analyze the validity of retroactive legislation impairing constitutionally-protected vested rights. There is no reason to abandon centuries of caselaw and suddenly adopt the rational basis test for retroactive legislation impairing vested rights, thereby gutting the vested rights doctrine.

IV. The Initiative Is Retroactive Legislation That Interferes with Vested Rights.

Because the Maine Constitution prohibits retroactive deprivation of vested rights, this Court must address three questions: first, whether the Initiative constitutes retroactive legislation, second, whether Appellants' rights have vested, and third, if the answer to both questions

is yes, whether the legislation impairs those rights. I will address these points in turn.

A. The Initiative Legislates Retroactively

There should be no question that the Initiative legislates retroactively – it tells us so.

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

When reviewing legislation, courts are often asked to determine whether legislation has a retroactive effect. While this task can sometimes prove challenging when the legislation itself is ambiguous, it is important because retroactive legislation is so heavily disfavored in the law that courts typically seek to avoid a retroactive reading unless the law is clear. *Terry v. St. Regis Paper Co.,* 459 A.2d 1106, 1109 (Me. 1983); *Opinion of the Justs.*, 370 A.2d 654, 668 (Me. 1977) ("In general, retroactivity in legislation is disfavored"). In particular, retroactive application of laws that contradict previous judicial constructions risks allowing the legislature to overrule courts, violating core separation of powers principles. *See, e.g.*, *Johnson v. Morris*, 87 Wash. 2d 922, 926 n.3, 557

P.2d 1299, 1303 n.3 (1976). And, as will be shown below, "any legislation that takes away a vested right is considered retroactive and is disfavored or outright prohibited." Craig J. Konnoth, *Revoking Rights*, 66 HASTINGS L.J. 1365, 1386 (2015).

Therefore, to avoid a finding of unconstitutionality, courts generally disfavor reading a statute retroactively. *See, e.g.*, *Sohn v. Waterson*, 84 U.S. 596 (1873) (interpreting a Kansas law prospectively to avoid holding it unconstitutional); *Hayes v. Clinkscales*, 9 S.C. 441, 449-54 (1878) (interpreting a South Carolina statute to apply only prospectively to avoid holding it unconstitutional as retroactive legislation). This Initiative, however, raises no difficult interpretive question whether it is retroactive: the Initiative itself tells us so. With blunt transparency, the Initiative announces, in November 2021, that it is changing the law with respect to a process that operated as far back as 2014. All of a sudden, what we all thought was the law for the last decade was not actually the law. The Initiative, in other words, cannot be read any other way than a retroactive law.

In fact, retroactivity is a key aspect of the Initiative. Because all the project-wide permits have already been granted and upheld through

numerous levels of review and appeal, and construction on the project has already begun, the undoing of those permits was essential to stop the project after the effort to commandeer the administrative branch officials who approved the permits was rejected by this Court. *See Avangrid Networks, Inc.*, 237 A.3d at 882. Of course, if the Initiative did nothing more than legislatively overrule a prior administrative decision, it would violate this Court's decision in *Avangrid*. Therefore, the Initiative goes further, retroactively changing the law with respect to a project already well underway and establishing new retroactive criteria for obtaining a CPCN. The legislature can change those rules for future CPCN applicants, but not for a project that has already been approved by the PUC and this Court. But the mere fact that the legislation has a prospective component makes it no less retrospective when applied to this construction project.

B. Plaintiffs Have Established Vested Rights

This Court has previously held that a right vests when there has been (1) actual, physical commencement of construction, (2) undertaken in good faith, and (3) pursuant to a valid permit. *Sahl*, 760 A.2d at 266-69. It is hard to think of a more perfect example of a vested right where

not only have years passed since valid permits were granted, but hundreds of millions of dollars have been spent on actual, physical construction.

1. Valid permits have been issued.

I will limit my observations to the constitutional issues raised by the vested rights doctrine. I have not reviewed the PUC's work, nor the decisions of other administrative agencies or Maine courts with respect to their analysis of permit validity. I can only assume, given the many years of extensive review, that the permits which have been issued are valid under the law as it existed until the retroactive change promulgated by the Initiative.

Although I cannot opine on the validity of the permits, I want to address an important aspect of how the vested rights analysis should be conducted. Under the *Sahl* framework, the question is whether valid permits have been issued under the law as it existed when they were issued. The fact that some of the permits are still being reviewed on appeal is certainly relevant to whether Plaintiffs will be able to complete the project – but not as to whether rights have vested to proceed under existing law. If Maine courts conclude that some of the issued permits

are invalid *under law as it existed when they were issued*, Plaintiffs might be divested of their right to complete the NECEC, at least with respect to those permits. But the Business Court's analysis went a step further, suggesting that the mere fact that appeals are ongoing can undermine Plaintiffs' ability to vest rights to construct the NECEC under the law as it existed at the time construction began. That is incorrect. To offer an analogy, after a game-winning touchdown, officials can review the play to determine whether the receiver was in-bounds when he caught the ball. But officials cannot, seven years after the game ends, change the rule making touchdowns scored in 2014 only worth 4 points instead of 6. Maine courts and executive agencies have the power to do the former. But the Maine Legislature does not have the power to do the latter. And that is precisely what this Initiative does.

2. Construction has already begun.

Just as there no doubt that valid permits have been issued, there is little doubt that actual construction has begun. This project is no longer in the planning stage and there are visible signs of work having been undertaken. *See AWL Power v. City of Rochester*, 813 A.2d 517, 521-22 (N.H. 2002) (substantial visible construction supports a finding of vested

rights). Trees have been cut. Structures have been installed. Materials have been purchased and manufactured. We have all seen the images of the work that has taken place.

3. Plaintiffs acted in good faith.

The Business Court properly found that Plaintiffs acted in good faith, with the intention to complete the project. *Sahl,* 760 A.2d at 269. There is no indication that Plaintiffs rushed into this project in order to make a vested rights argument. The mere knowledge that efforts are underway to change the law, especially through an unconstitutional Initiative, does not amount to bad faith. Construction can never begin if mere threat of a potential legal change were enough to prevent vesting of rights. Opponents of a project could forestall it indefinitely by seeking to change the law, or by seeking to place a new Initiative on the ballot every year. And the developer might even waive its vested rights by failing to engage in construction in a timely manner while waiting for legislative certainty. *See Sahl*, 760 A.2d at 270. Property owners would be trapped in a catch-22.

That is why knowledge of potential legal changes on the horizon should not be a factor in how courts analyze the good faith prong. The

analysis in *Town of Sykesville* is instructive. There, the court held that once valid permits were in hand, knowledge of future changes in the law does not negate a finding of good faith. 677 A.2d at 118-120. There is no "absence of good faith in the commencement of construction . . . with full knowledge that legislation was pending." *Id.* at 118. Not only would a contrary rule be unfair, but it would be unworkable, requiring courts to figure out when a mere hypothetical threat of proposed legislation, or the mere fact that signatures for an Initiative have been gathered (or are being gathered), divests an entity of its rights. Instead, the Maryland approach in *Town of Sykesville*, and this Court's approach in *Sahl*, offer the appropriate rule: when construction may legally start, legally starting construction does not negate a finding of good faith regardless of the developer's knowledge of a potential change in the law.

Plaintiffs had the relevant permits in hand and relied on existing law to begin the project in a timely manner with the intent to complete it. That is enough to satisfy the good faith prong of the *Sahl* test.

C. This Retroactive Legislation Impairs Plaintiffs' Vested Rights

Because the Initiative is retroactive, and Plaintiffs' rights have vested, the remaining question is whether the Initiative impairs those vested right. Of that there can be no doubt. The project's opponents made clear that their intent was to stop this project although construction had already begun. If this Court upholds the Initiative, that is exactly what will happen. By undoing all the work performed since 2014, the Initiative effectively ends the NECEC project. This, unquestionably, constitutes an impairment.

CONCLUSION

Thousands of people have invested tens of thousands of hours and hundreds of millions of dollars supporting, opposing, reviewing, adjudicating, litigating, and now even constructing this transmission project. But despite that long journey, the legal issue in *this* case can be resolved by a simple syllogism:

1. The Maine Constitution prohibits retroactive legislation that impairs vested rights. *See* ME. CONST. ART. I, § 6-A; *Sahl*.

2. The Initiative is retroactive legislation, Plaintiffs' rights have vested, and the Initiative impairs those vested rights.

3. Therefore, the Initiative is unconstitutional.

Because the major and the minor premises are relatively uncontroversial and straightforward, the conclusion is unavoidable.

But while the legal analysis may be mundane, the implications of this case are anything but. Retroactive legislation poses a threat to the rule of law, and retroactive legislation that violates the vested rights doctrine is, along with *ex post facto* laws, the most dangerous kind of retroactive legislation. This Court should heed the words of Lon Fuller, one of the greatest American legal philosophers, who wrote that "a retroactive law is truly a monstrosity. Law has to do with the governance of human conduct by rules. To speak of governing . . . today by rules that will be enacted tomorrow is to talk in blank prose." LON L. FULLER, THE MORALITY OF LAW 53 (1964). The Maine Constitution is not, and should not become, blank prose.

Respectfully submitted,

/s/ Dmitry Bam

Dmitry Bam
Professor of Law
University of Maine School of Law
246 Deering Ave.
Portland, Maine 04102

CERTIFICATE OF SERVICE

I, Dmitry Bam, hereby certify that pursuant to agreement of the parties, a copy of this Brief of Amicus Curiae Dmitry Bam was served via email only upon counsel at the address set forth below on March 29, 2022:

John J. Aromando, Esq. jaromando@pierceatwood.com
Jared S. des Rosiers, Esq. jdesrosiers@pierceatwood.com
Joshua D. Dunlap, Esq. jdunlap@pierceatwood.com
Sara A. Murphy, Esq. smurphy@pierceatwood.com
Pierce Atwood LLP
Merrill's Wharf
254 Commercial Street
Portland, Maine 04101

Jonathan R. Bolton, Esq. Jonathan.bolton@maine.gov
Assistant Attorney General
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006

Philip M. Coffin III, Esq. pcoffin@lambertcoffin.com
Jeffrey D. Russell, Esq.
Cyrus E. Cheslak, Esq.
Lambert Coffin
PO Box 15215
Portland, Maine 04101

James Kilbreth, Esq. jkilbreth@dwmlaw.com
David M. Kallin, Esq. dkallin@dwmlaw.com
Jeana M. McCormick, Esq. jmccormick@dwmlaw.com
Oliver Mac Walton, Esq. owalton@dwmlaw.com
Drummond Woodsum
84 Marginal Way, Suite 600
Portland, ME 04101

Timothy Woodcock, Esq. twoodcock@eatonpeabody.com
P. Andrew Hamilton, Esq. ahamilton@eatonpeabody.com
Jonathan A. Pottle, Esq. jpottle@eatonpeabody.com
Casey M. Olesen, Esq. colesen@eatonpeabody.com
Eaton Peabody
80 Exchange Street
P.O. Box 1210
Bangor, ME 04402

Sigmund D. Schutz, Esq. sschutz@preti.com
Anthony W. Buxton, Esq. abuxton@preti.com
Robert B. Borowski, Esq. rborowski@preti.com
Jonathan G. Mermin, Esq. jmermin@preti.com
Preti Flaherty Beliveau & Pachios LLP
P.O. Box 9546
Portland, ME 04112

Benjamin K. Grant, Esq. bgrant@mcteaguehigbee.com
McTeague Higbee
P .0. Box 5000
Topsham, ME 04086

Robert Cheverie, Esq. rcheverie@cheverielaw.com
Robert M. Cheverie & Associates, P.C.
333 East River Drive, Suite 101
East Hartford, CT 06108

Gerald F. Petruccelli, Esq. gpetruccelli@pmhlegal.com
Petruccelli Martin & Haddow, LLP
P.O. Box 17555
Portland Maine 04112

Christopher Roach, Esq. croach@rrsblaw.com
Roach Ruprecht Sanchez & Bischoff, P.C.
527 Ocean Avenue, Suite 1
Portland, Maine 04103

Dated: March 29, 2022

/s/ Dmitry Bam

Dmitry Bam
Professor of Law
University of Maine School of Law
246 Deering Ave.
Portland, Maine 04102