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 APPELLANTS NECEC TRANSMISSION LLC AND AVANGRID NETWORKS, INC.

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INTRODUCTION

This appeal presents a momentous question: Is there any limit on the electorate's power to change the law retroactively to ban a specific development project, despite prior executive and judicial approval of the project and the developer's expenditure of hundreds of millions of dollars to build a substantial portion of the project in good faith reliance on those approvals? According to the Business and Consumer Court (Duddy, J.) ("Business Court"), there is no effective limit on this power.

That answer is not, and cannot be, correct. Because prudent individuals order their activities on existing law, "retrospective laws are . . . generally unjust; and . . . neither accord with sound legislation nor with the fundamental principles of the social compact." 2 J. Story, *Commentaries on the Constitution* § 1398 (2d ed. 1851). The Maine Constitution therefore limits retroactive application of state laws, including through the Due Process Clause as manifested in the vested rights doctrine, Me. Const. art. I, § 6-A, the Separation of Powers Clause, *id.* art. III, § 2, and the Contracts Clause, *id.* art. I, § 11. These limits apply to citizen initiated legislation: "voters 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).

The initiative at issue would deprive Plaintiff-Appellants NECEC Transmission LLC ("NECEC LLC") and Avangrid Networks, Inc. of the right to complete the New England Clean Energy Connect project ("NECEC" or "Project") after necessary executive agency approvals have been sought and granted and the Project is well

underway. The precedent set by allowing the retroactive application of this initiative would render any development in the State, no matter how big or how small, or how far progressed, vulnerable to discriminatory, after-the-fact legislation. Such a result would chill future economic development in Maine, frustrate efforts to address climate change, and violate basic constitutional principles.

STATEMENT OF FACTS

I. Factual Background.

A. The NECEC Project.

The NECEC, a project designed to bring 1,200 megawatts of hydropower into the regional power grid, is a billion dollar investment in New England's clean energy future. A.75-76, ¶¶ 17-18. Central Maine Power Company ("CMP") and Hydro-Québec proposed the NECEC in response to a request for proposal by Massachusetts electric distribution companies ("EDCs") for clean energy. A.80-81, ¶¶ 26-27. After the proposal was selected, CMP, Hydro-Québec (through an affiliate, H.Q. Energy Services (U.S.) Inc. ("HQUS")), and the EDCs entered into transmission service agreements ("TSAs") requiring CMP to provide 1,200 MW of transmission service on the NECEC to HQUS and the EDCs for forty years. A.81, ¶ 28. CMP later transferred the NECEC (including the TSAs) to NECEC LLC. A.82, ¶ 29. As the Public Utilities Commission ("PUC") found, the Project will reduce greenhouse gas ("GHG") emissions by up to 3.6 million metric tons annually, the equivalent of removing 700,000 cars from the road, to combat climate change. A.87, ¶ 44. The Project will also create

thousands of jobs; lower the cost of electricity in Maine; fund over $250 million in rate relief, economic development, and other benefits for Maine; and create approximately $18 million in property taxes annually. A.84-87, ¶¶ 37-44; A.264-266, ¶ 32.

The NECEC, which is divided into five segments, primarily consists of (1) a 145-mile high-voltage direct current ("HVDC") transmission line running from Canada to Lewiston; (2) a new converter station; and (3) network upgrades to CMP's infrastructure, including existing alternating current ("AC") transmission lines. A.82-83, ¶¶ 30-31. CMP secured site control of the Project corridor, most of which consists of land already devoted to power transmission, by July 2017. A.83, ¶ 33. About 0.9 miles of the corridor is on public reserved lands; in 2020, the Bureau of Parks and Lands ("BPL") issued an amended lease ("BPL Lease") to CMP, superseding a 2014 lease, allowing construction of electric transmission facilities. A.96, ¶ 75. All project-wide permits, including a Certificate of Public Convenience and Necessity ("CPCN") from the PUC and permits from the Department of Environmental Protection ("DEP"), U.S. Army Corps of Engineers ("Corps"), and U.S. Department of Energy ("DOE"), had been issued by January 14, 2021. A.84, 89, 92, 94, ¶¶ 36, 50-54, 60-61, 67.

The NECEC is an important component of regional efforts to reduce reliance on fossil fuels. A.255, ¶ 8. Fossil-fuel burning electric generators, such as NextEra Energy Resources LLC ("NextEra"), intervened in and delayed the Project's multi-year permitting process because the Project threatens their corporate interests by introducing inexpensive, clean energy into New England. A.76-79, ¶ 20.

B. The Initiative.

Opponents have twice targeted NECEC by direct initiatives – both of which were funded by NextEra and other fossil-fuel burning electric generators, who donated approximately $27 million to political action committees ("PACs") to oppose the Project. A.79-80, ¶¶ 22-23. In 2020, opponents proposed an initiative (the "2020 Initiative") that purported to direct the PUC to revoke the CPCN. This Court found the 2020 Initiative unconstitutional. *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 2, 237 A.3d 882. Only after that failed effort did the same opponents pursue the present initiative (the "Initiative"). A.99-100, ¶¶ 83-89. Five voters filed an application for the Initiative on or about September 15, 2020, five weeks after the *Avangrid* decision. A.99, ¶ 83. The Secretary of State did not certify the Initiative until February 22, 2021, only then giving it legal standing to appear on the ballot. A.103, ¶ 98. Because of their delay, including time spent pursuing the facially unconstitutional 2020 Initiative, the sponsors could not have the Secretary place the newly proposed Initiative on the ballot before November 2021 – long after NECEC LLC had undertaken substantial physical construction in good faith reliance on its valid permits (as described *infra*).

Instead of naming the NECEC specifically as the facially unconstitutional 2020 Initiative did, the new Initiative seeks to bar completion of the NECEC by retroactively amending Titles 12 and 35-A of the Maine Revised Statutes in three respects.

First, Section 1 of the Initiative mandates that any lease of public reserved land by the BPL for transmission lines and facilities is deemed to substantially alter the use

of the land within the meaning of article IX, section 23 of the Maine Constitution, eliminating the executive branch's discretion to make that determination, and therefore automatically requires approval by 2/3 vote of all members elected to each House of the Legislature. This section applies retroactively to September 16, 2014. A.99, ¶ 85.

Second, Section 4 amends 35-A M.R.S. § 3132 to require legislative – rather than solely executive – approval of the construction of "high impact electric transmission lines," and to provide that any such line crossing public lands designated by the Legislature pursuant to 12 M.R.S. § 598-A is deemed to substantially alter the land and requires approval by a 2/3 vote of all members elected to each House of the Legislature. This requirement applies retroactively to September 16, 2020. A.99-100, ¶ 86.

Third, Section 5 amends 35-A M.R.S. § 3132 to ban absolutely the construction of high impact electric transmission lines in the "Upper Kennebec Region," as defined in the Initiative, consisting of approximately 43,300 acres in Somerset and Franklin Counties. This requirement applies retroactively to September 16, 2020. A.100, ¶ 87.

The Initiative clearly targets the NECEC based on its timing, following the failed 2020 Initiative; the alignment of its retroactivity to the Project; and the statements of Initiative proponents. A.99-107, ¶¶ 88-102. The Initiative's sponsors specifically crafted its retroactive provisions to target the NECEC. A.100, ¶¶ 88-89. Further, the PACs supporting the Initiative – funded by fossil-fuel burning energy companies – repeatedly stated that the Initiative's purpose was to kill the NECEC. A.104-08, ¶¶ 102-03. No CMP Corridor issued press releases describing the Initiative as a "statewide

effort to stop Central Maine Power's 145-mile transmission line," A.101-02, ¶¶ 92-93, and claiming that it would give voters "the final say on CMP's unpopular NECEC Corridor" because "the new law will be retroactive and therefore effectively will block the project," A.102, ¶¶ 95-96. The campaign used "Vote Yes to Reject the CMP Corridor" as its theme. A.104-06, ¶ 102. Campaign materials urged voters to "ban the CMP Corridor." *Id.* The attorney for the pro-Initiative PACs stated that "this referendum essentially is aimed to defeat the CMP corridor" and denied that it applied to any other project. *Id.* ¶ 102(f), (g).

C. Construction of the NECEC.

The vote on the Initiative came well after NECEC LLC undertook substantial construction of the NECEC. As of November 2, 2021, about $449.8 million – 43% of the total cost estimate of $1.04 billion – had been spent on the Project. A.109, ¶ 109; A.207, 210, ¶¶ 10, 16; A.222. Of the approximately $250 million in benefits to Maine, NECEC LLC had already paid out about $18 million, and paid approximately $3.4 million in property taxes to municipalities. A.86, 109, ¶¶ 43, 109; A.259, ¶ 18.

The NECEC required substantial advance planning. Acquisition of necessary property rights for the corridor began in 2014. A.111, ¶ 113(a). In 2016, the project team established initial technical configurations for the Project, along with a preliminary project schedule with a proposed in-service date of December 2022. *Id.* ¶ 113(b). In 2017, the project team began the permitting process. A.110, 112, ¶¶ 110, 113(c). In 2018, upon selection of the Project, additional project personnel were added and

consultant firms were retained to conduct detailed planning and engineering design. A.110, 112, ¶¶ 110, 113(d). Due to the long lead-time to construct converter stations, an engineering, procurement, and construction contract was entered into for the converter station in August 2019, which triggered mobilization of engineers to prepare detailed plans. A.110, 112, ¶¶ 111, 113(e). In 2020, numerous construction and supply contracts were executed,[1] and the project team continued to grow with the addition of construction management, safety, and environmental compliance resources. A.110-13, ¶¶ 111-12, 113(f). All of these activities were necessary for construction. A.113, ¶ 113(g); A.238-39, ¶¶ 38-39.

NECEC LLC began construction of the Project in the field in early 2021, rather than earlier, as planned, because of permitting delays. Under the TSAs, the Project's commercial operation date ("COD") was December 13, 2022; the TSAs allowed only limited extensions of this deadline with posting of additional security. A.83, ¶ 32. Initial plans called for construction to start during 2019, but delays in the permitting process, largely caused by Project opponents, required adjustments to the schedule. A.76-79, 97, ¶¶ 20, 77; A.234, 237, 244, ¶¶ 26, 35, 56. In addition, permit requirements and restrictions for construction, court-imposed limitations, weather factors, contractor

[1] These included a contract with Northern Clearing Inc. ("NCI") for clearing the transmission corridor in September 2020; a contract with Irby Construction Company, to be implemented through a joint venture with Cianbro Corporation, ("Cianbro/Irby") to construct the HVDC transmission line in October 2020; and a contract with Sargent Electric Company to construct the AC transmission line in February 2021. A.110, ¶ 111. Other contracts include pole manufacturing contracts with TransAmerican Power Products, Inc. ("TAPP") and New Nello Operating Co., LLC ("Nello"), and contracts for timber mats with Maine-based timber manufacturers. A.110-11, ¶¶ 111-12.

sequencing, and coordination with regulators affected the schedule and in-service date. A.113-14, ¶¶ 114, 118; A.240-44, ¶¶ 45-57. When construction began, the project schedule included a COD of May 31, 2023, with an August 23, 2024 contractual deadline. A.237, 244, ¶¶ 35, 56. This "float" between the targeted COD and the contractual deadline allowed for inevitable contingencies. A.239, 244-45, ¶¶ 41-42, 58. Indeed, by November 2, 2021, the targeted COD had been delayed to December 13, 2023. A.244, ¶ 57.

To maintain the targeted COD, NECEC LLC had to start construction as soon as it received the final permit. A.123-24, ¶ 136; A.245, ¶ 59. It is critical that the Project enter commercial operation as soon as is feasible in order to, among other things, (1) realize Project benefits and (2) ensure financial viability of the Project, which is impacted by incremental costs associated with delay. A.123-24, ¶ 136. Thus, as soon as DOE issued the final major permit for the Project, NECEC LLC instructed NCI to begin clearing and other construction activities on January 18, 2021.[2] A.114, ¶ 117.

The construction of linear transmission projects like the NECEC requires careful sequencing, taking into account time-of-year restrictions to protect wildlife, environmental limitations, weather conditions, access considerations, the participation of numerous contractors, and service outage sequence plans (which have time-of-year

[2] NCI had previously mobilized pursuant to a notice to proceed. A.113, ¶ 115. Thus, NCI had already performed site surveys, installed flagging, prepared lay down areas, and retained equipment. A.114, ¶ 116. Other preparatory work also began before January 18, 2021; for example, TAPP had already begun constructing customized poles, and delivered the first poles by that date. A.114-15, ¶ 119.

restrictions). A.113, ¶ 114. The process begins with clearing, followed by the erection of structures, and the stringing of electrical conductor. *Id.* Concurrently, substation work to connect the new transmission line to the existing transmission system must be completed. *Id.* For the NECEC, this work most notably includes the construction of the converter station in Lewiston. *Id.*

Construction of the NECEC has followed this pattern. NCI began clearing trees and laying mats on the northern end of Segment 2 on January 18, 2021.[3] A.114, ¶¶ 117-18. On February 9, 2021, after NCI had conducted sufficient clearing to permit installation of the HVDC line, Cianbro/Irby installed the first structure in Segment 2. A.116-17, ¶ 123. Meanwhile, on February 1, 2021, Cianbro was authorized to mobilize and begin clearing and site development work at the converter station. A.115, ¶ 120. Work on the AC portion of the Project began in June 2021. A.119-20, ¶ 129.

As of Election Day 2021, total capital expenditures on the Project were approximately $449.8 million. A.109, ¶ 109; A.207-08, ¶ 10. NCI had cut approximately 124 miles (85.5% of the corridor), at a cost of approximately $43.1 million. A.121-22, ¶ 132. Along the HVDC portion of the line, Cianbro/Irby had installed 70 structures, set 10 more direct imbed bases, and installed caisson foundations for 4 more, at a total

[3] Other than during June and July, during which clearing was restricted under the Corps permit in order to mitigate impacts on a federally-listed bat species, NCI continued clearing the corridor as contemplated by the Project schedule through November 19, 2021, when it stopped construction at the Governor's request. A.114, ¶ 118; A.290, ¶¶ 4-5. NECEC LLC originally intended to begin clearing in Segment 1, but instead began in Segment 2 because of a temporary injunction entered by the First Circuit. A.114, ¶ 118; A.240, ¶ 46. NCI began clearing Segment 1 on May 15, 2021, two days after the First Circuit lifted the injunction. A.114, ¶ 118.

cost of approximately $38.5 million. *Id.* TAPP and Nello had delivered 570 custom-manufactured poles at a cost of approximately $38 million – more than 55% of the steel poles for the HVDC transmission line. *Id.* All other materials for constructing the HVDC line, including conductor, insulators, and fiber optic, had been manufactured, received, and stored at laydown yards along the Project route. A.258-59, ¶ 17(b); *see* A.121, ¶ 132 n.15. Along the AC portion of the line, including Segment 3 and Segment 5, contractors had installed 54 structures and modified 2 more, at a cost of approximately $18.4 million. A.121-22, ¶ 132. In addition, contractors had strung approximately 3 miles of conductor in Segment 5. *Id.* Further, Cianbro had completed more than 72% of the converter station site preparation, and another contractor had constructed critical converter station components (including custom-designed transformers), at a cost of approximately $100 million. A.115, ¶ 120. NECEC LLC had also made purchase commitments of over $312 million. A.209, ¶ 13; A.221.

II. Procedural Background.

On November 3, 2021, Plaintiffs filed a Verified Complaint for Declaratory Judgment and Injunctive Relief, A.71-135, together with a Motion for Preliminary Injunction (the "Motion") and supporting evidence, A.162-198, 203-269, asserting three constitutional claims: that retroactive application of the Initiative to the NECEC (1) unconstitutionally deprives Plaintiffs of their vested rights; (2) violates separation of powers; and (3) impairs Plaintiffs' lease with the BPL in violation of the Contracts

Clauses of the Maine and United States Constitutions. A.134. The court expedited briefing on the Motion, and held oral argument on December 15, 2021. A.9.

On December 16, 2021, the Business Court denied the Motion. A.16-70 (hereafter "Order"). The court held that the vested rights doctrine does not apply to state statutes, *see* A.36-41, while also concluding that Plaintiffs had not established vested rights, despite having begun construction in good faith, because (1) Plaintiffs were aware of opposition to the Project, and (2) there were ongoing legal challenges to Project permits and the BPL Lease, A.41-50. The court also concluded that the retroactive application of the Initiative did not violate separation of powers or the Contracts Clause. A.50-58. Based on its finding that Plaintiffs failed to prove a substantial possibility of success on the merits, the Business Court also found that the other preliminary injunction factors were not satisfied. A.59-67.

Despite denying Plaintiffs' Motion, the Business Court noted that the "applicable law . . . is uncertain on many disputed points," that "this case presents many difficult questions" with "regional and national implications," and that "Plaintiffs have legitimate counter arguments on all disputed points of law." A.17-18. The court noted that "the questions of law presented by this case are important and ought to be determined by the Law Court." A.18. The court also acknowledged that this Court "may interpret its precedents differently," conceding that "it may be a better reading of [Maine] precedent to apply the vested rights doctrine to consideration of state-wide

laws, and to conclude that the vesting factors are satisfied." *Id.*[4] Accordingly, upon motion, the court reported the case to this Court pursuant to Rule 24(c). A.12-15.

STATEMENT OF ISSUES PRESENTED

I. Whether the Business Court erred as a matter of law in assessing Plaintiffs' likelihood of success on the merits by concluding that:

a. Plaintiffs could not establish vested rights because that doctrine does not apply to state laws and because the Project faced public opposition, even though Plaintiffs lawfully invested approximately $450 million to cut over 124 miles of right-of-way and erect over 120 structures in an effort to complete the Project in a timely manner under its contracts and pursuant to valid permits;

b. The Initiative does not violate the Separation of Powers Clause, even though it purports to retroactively foreclose construction of the Project after final executive agency approvals had been obtained and, in one instance, affirmed by this Court; and

c. The Initiative does not violate the Contracts Clause, even though it purports to abrogate a lease granted by the BPL?

II. Whether the Business Court erred as a matter of law in assessing the remaining preliminary injunction factors, including by determining that the

[4] The court observed that, if this Court determined that the Initiative violates the Constitution, it would "change the trajectory" of the case because the finding "would likely satisfy the requirement for irreparable harm, supersede the will of the voters, and change the balance of harms in favor of Plaintiffs. Under those circumstances, staying the Initiative would be appropriate." A.18-19.

constitutional and economic injuries inflicted by the Initiative are not irreparable, that the long-term effects from denying injunctive relief are irrelevant to balancing of the harms, and that the public interest always favors enforcement of direct initiatives?

SUMMARY OF ARGUMENT

The Business Court made several legal errors. Most egregiously, the court nullified the vested rights doctrine as it pertains to state law, and rendered both executive permits and judicial determinations subject to revocation by initiative. The Order therefore not only sounds the death knell for the NECEC, but presents a clear hazard to future projects and to the carefully established balance among executive, legislative, and judicial powers. Reversing the Order will enforce constitutionally required limits on legislative power to retroactively ban ongoing permitted projects.

The Business Court committed legal error in concluding that Plaintiffs failed to demonstrate a likelihood of success on the merits. First, Plaintiffs are likely to establish vested rights. Under the Due Process Clause, the State may not retroactively deprive individuals of vested rights. Plaintiffs acquired vested rights by investing hundreds of millions of dollars to cut over 124 miles of corridor and erect over 120 structures, pursuant to lawfully granted permits, in a good faith effort to complete the Project in a timely manner under its contracts. Neither knowledge of a possible future change in the law nor pending permit appeals prevented Plaintiffs from legally acquiring the right to complete the Project under the law as it existed when construction began. Second, Plaintiffs demonstrated that the Initiative violates separation of powers. Opponents of

the Project have twice sought to reverse via initiative final executive and judicial actions authorizing the Project – through a prior initiative singling out the Project by name that this Court struck down as unconstitutional, and, now, through an initiative designed to accomplish the same end via retroactive application. After-the-fact legislative action cannot reverse final executive and judicial decisions. Third, the Initiative violates the Contracts Clause by retroactively abrogating a lease with the State for land used by the Project. The Initiative cannot retroactively bar completion of the Project.

The Business Court then compounded those errors by misconceiving the harms and public interest at stake. Plaintiffs will suffer irreparable harm absent injunctive relief, in the form of constitutional and economic injuries for which Plaintiffs cannot be made whole. Further, a proper balancing of harms requires consideration of the long-term harm from withholding injunctive relief. Finally, the public interest does not always favor denying a preliminary injunction when the statute being challenged was adopted via direct initiative because the limits imposed on the initiative process by the Maine Constitution are the ultimate expression of the people's will.

ARGUMENT

I. The Business Court properly granted Plaintiffs' motion to report this case pursuant to M.R. App. P. 24(c).

"Rule 24 permits parties, in limited circumstances, to obtain review from the Law Court prior to obtaining a final judgment from the trial court." *Liberty Ins. Underwriters,*

Inc. v. Estate of Faulkner, 2008 ME 149, ¶ 5, 957 A.2d 94; *see* M.R. App. P. 24. In determining whether the report is appropriate, the Court considers:

> (1) whether the question reported is of sufficient importance and doubt to outweigh the policy against piecemeal litigation; (2) whether the question might not have to be decided because of other possible dispositions; and (3) whether a decision on the issue would, in at least one alternative, dispose of the action.

Littlebrook Airpark Condo. Ass'n v. Sweet Peas, LLC, 2013 ME 89, ¶ 9, 81 A.3d 348 (quotation marks omitted). While acknowledging that Rule 24 should not be lightly invoked, A.13, the Business Court correctly reported the case under these three factors.

First, the case presents important and complex questions of law that will not only determine whether a billion-dollar clean energy project will be completed, but also clarify the legal principles governing application of retroactive laws to development projects, an issue that recurs before the Court. For example, prior to this case, no court had ever ruled that the vested rights doctrine is inapplicable to state laws. A.13-14. Resolution of these questions will affect multiple NECEC-related agency and judicial proceedings. *Id.* Second, there are no issues that would moot the legal questions now presented to this Court. *Id.* Third, affirmance would dispose of the matter as currently pleaded. A.15. Principles of judicial economy support this report, and there is no risk that a decision by this Court would be advisory in nature.

The report pursuant to Rule 24(c) "presents the Law Court with the entire case." *State ex rel. Tierney v. Ford Motor Co.*, 436 A.2d 866, 870 (Me. 1981). Accordingly, all of the issues presented to the Business Court are properly before this Court.

II. The Business Court's balancing of the injunction factors is reviewed for abuse of discretion, but its legal determinations are reviewed *de novo*.

The party seeking a preliminary injunction must demonstrate: (1) it will suffer irreparable injury absent an injunction; (2) such injury would outweigh any harm from an injunction; (3) it has a substantial possibility of success on the merits; and (4) an injunction will not harm the public interest. *Bangor Historic Track, Inc. v. Dep't of Agric.*, 2003 ME 140, ¶ 9, 837 A.2d 129. Although a preliminary injunction order is reviewed for abuse of discretion, *id.* ¶ 11, a mistake of law constitutes an abuse of discretion, *see Smith v. Rideout*, 2010 ME 69, ¶ 13, 1 A.3d 441. Legal conclusions are reviewed *de novo*. *State v. Dubois Livestock, Inc.*, 2017 ME 223, ¶ 6, 174 A.3d 308. Thus, this Court reviews the trial court's "ultimate conclusion for abuse of discretion" but its "legal rulings *de novo*." *McCreary Cnty., Ky. v. Am. Civ. Liberties Union of Ky.*, 545 U.S. 844, 867 (2005).

III. The Business Court's conclusion that Plaintiffs failed to demonstrate likelihood of success on the merits is the result of legal errors.

Proving a substantial possibility of success on the merits is the "sine qua non" of a preliminary injunction. *Nat'l Org. for Marriage v. Comm'n on Gov't Ethics & Elec. Pracs.*, 2015 ME 103, ¶ 28, 121 A.3d 792. The other factors operate on a sliding scale, *id.*; for example, a strong showing on the merits decreases the requisite showing of irreparable harm, *E.E.O.C. v. Astra U.S.A., Inc.*, 94 F.3d 738, 743 (1st Cir. 1996). Plaintiffs demonstrated a strong likelihood of success on their constitutional claims.[5]

[5] As the Business Court concluded, sovereign immunity does not bar Plaintiffs' claims. A.36 n.15. "[S]overeign immunity . . . does not confer upon the State a concomitant right to disregard the Constitution," *Welch v. State*, 2004 ME 84, ¶¶ 8-9, 853 A.2d 214, and thus does not apply to declaratory judgment actions challenging a

A. Plaintiffs are likely to succeed on their vested rights claim.

A vested right is one that "cannot be impaired or taken away without the person's consent." *Vested Right*, Black's Law Dictionary (11th ed. 2019). A legal right to construct a project vests where there has been (1) actual, physical commencement of significant construction, (2) undertaken in good faith, with intent to continue and complete construction, (3) pursuant to a valid permit. *Sahl v. Town of York*, 2000 ME 180, ¶ 12, 760 A.2d 266 (citing *Town of Sykesville v. West Shore Commc'ns, Inc.*, 677 A.2d 102, 104 (Md. Ct. Spec. App. 1996)).[6] As described below, Plaintiffs have demonstrated a substantial possibility of establishing legally acquired vested rights.

1. The Business Court erred by concluding that the vested rights doctrine does not apply to state statutes.

The Business Court wrongly held that state statutes, as opposed to municipal ordinances, are immune from vested rights challenges. A.36-41. The ramifications of this novel legal holding are sweeping, as it effectively grants the Legislature (or the electorate) unchecked power to adopt retroactive statutes despite detrimental reliance by private parties on existing law. Constitutional principles of due process embodied in the vested rights doctrine deny the State such *carte blanche* to trample private rights.

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statute's constitutionality, *see Ark. Dev. Fin. Auth. v. Wiley*, 611 S.W.3d 493, 498 (Ark. 2020); *Patel v. Tex. Dep't of Licensing & Regul.*, 469 S.W.3d 69, 75-76 (Tex. 2015); *Columbia Air Servs., Inc. v. Dep't of Transp.*, 977 A.2d 636, 645 (Conn. 2009); *Claremont Sch. Dist. v. Governor*, 761 A.2d 389, 391 (N.H. 1999); *Jones v. Bd. of Trs. of Ky. Ret. Sys.*, 910 S.W.2d 710, 713 (Ky. 1995); *Jones v. Me. State Highway Comm'n*, 238 A.2d 226, 229-30 (Me. 1968).

[6] An equitable (rather than legal) right to construct a project vests where legislation seeks to prohibit construction in "bad faith" or through "discriminatory enactment." *Kittery Retail Ventures, LLC v. Town of Kittery*, 2004 ME 65, ¶ 25, 856 A.2d 1183; *see id.* ¶ 32 (distinguishing between legally and equitably acquired vested rights). Plaintiffs here do not assert an equitable vested rights claim based on the Initiative proponents' bad faith. Rather, the vested rights claim presented is a legal claim, grounded firmly in the Constitution.

The vested rights doctrine is a unique species of due process claim that is more restrictive than generic due process claims because, instead of addressing prospective economic regulation, it protects settled property interests from retroactive impairment.

a. In Maine, vested rights is a constitutional doctrine that limits the exercise of state legislative power.

Plaintiffs have asserted a vested rights claim firmly grounded in the Maine Constitution's Due Process Clause. For two centuries, it has been "established in this State that a statute which has retrospective application is unconstitutional if it impairs vested rights." *Fournier v. Fournier*, 376 A.2d 100, 101-02 (Me. 1977) (citing, *e.g.*, *Berry v. Clary*, 77 Me. 482, 1 A. 360, 361 (1885); *Coffin v. Rich*, 45 Me. 507, 514-15 (1858); *Proprietors of the Kennebec Purchase v. Laboree*, 2 Me. 275, 289 (1823)); *see Merrill v. Eastland Woolen Mills, Inc.*, 430 A.2d 557, 560 n.7 (Me. 1981). Specifically, this Court has determined that the vested rights doctrine springs from the Due Process Clause, *see* Me. Const. art. I, § 6-A, stating: "[c]onstitutional restrictions of due process undoubtedly would bar legislative . . . deprivation of substantial vested rights, which they were meant to protect." *Warren v. Waterville Urb. Renewal Auth.*, 235 A.2d 295, 304 (Me. 1967).[7]

[7] This Court has also identified article I, section 1 of the Constitution as a basis for vested rights. *Laboree*, 2 Me. at 290. That section guaranteed due process prior to adoption of article 1, section 6-A. *See* David M. Gold, *The Tradition of Substantive Judicial Review: A Case Study of Continuity in Constitutional Jurisprudence*, 52 ME. L. REV. 355, 364-70 (discussing historical underpinning for due process, including early vested rights cases in *Laboree* and *Adams v. Palmer*, 51 Me. 480 (Me. 1863)). Section 6-A, which introduced redundant guarantees, *see* L.D. 33 at 2 (101st Legis. 1963), now provides the font of due process analysis. The modern grounding of Maine's vested rights doctrine in section 6-A is consistent with other states' jurisprudence. *See, e.g.*, *Mitchell v. Roberts*, 469 P.3d 901, 912 (Utah 2020) ("[T]he due process guarantee foreclosed legislative acts vitiating a person's vested rights."); *State v. Goldberg*, 85 A.3d 231, 239-40 (Md. 2014); *Bourgeois v. A.P. Green Indus., Inc.*, 783 So.2d 1251, 1257-59 (La. 2001); *Dardeen v. Heartland Manor, Inc.*, 710 N.E.2d 827, 830 (Ill. 1999); *Thorp v. Casey's Gen. Stores, Inc.*, 446 N.W.2d 457, 463 (Iowa 1989); *Rupp v. Bryant*, 417 So.2d 658, 666 (Fla. 1982). The Court's

As a constitutional due process claim, the vested rights doctrine applies to *state* – not just municipal – legislation. This Court has routinely applied the vested rights doctrine to state laws. *See, e.g.*, *Fournier*, 376 A.2d at 101-02 (the State is barred from interfering with vested rights under the Due Process Clause); *Sabasteanski v. Pagurko*, 232 A.2d 524, 526 (Me. 1967) (vested right to parcel could not be "destroyed by the validating statute"); *Inhabitants of Otisfield v. Scribner*, 151 A. 670, 671 (Me. 1930) ("A Legislature . . . may not pass any law which should take from any citizen a vested right."); *Adams*, 51 Me. at 493 (approving cases "denying the power of the Legislature to take away vested rights"); *Coffin*, 45 Me. at 511 (same); *see also Heber*, 2000 ME 137, ¶¶ 10-12, 755 A.2d 1064 (considering vested rights challenge to state law, but finding that the law was not retroactive).[8] This settled precedent remains sound.

This Court did not cast doubt on the constitutional basis of the vested rights doctrine in *Norton v. C.P. Blouin, Inc.*, 511 A.2d 1056 (Me. 1986). In *Norton*, the Court grappled with the then-prevailing distinction between substantive and procedural laws for purposes of determining when a law even operates retroactively in the first place.

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reference, in dicta, to the "common law" when discussing vested rights, *see Heber v. Lucerne-in-Maine Vill. Corp.*, 2000 ME 137, ¶ 10, 755 A.2d 1064, does not undermine the doctrine's constitutional basis.

[8] These cases contradict the Business Court's conclusion that vested rights are subordinate to the State's police power. A.39. *Baxter v. Waterville Sewerage District* did not hold that the State has limitless power to deprive a party of vested rights; rather, it simply held that a municipality may not "deprive the State of its police power" via contract. 79 A.2d 585, 589 (Me. 1951). Moreover, the Business Court's holding that state statutes are immune from the vested rights doctrine is a clear outlier; numerous states have applied that doctrine to strike down retroactive application of state, not just municipal, laws. *See, e.g.*, *Mitchell*, 469 P.3d at 912-14; *Goldberg*, 85 A.3d at 241; *Bourgeois*, 783 So.2d at 1260-61; *Thorp*, 446 N.W.2d at 463; *Rupp*, 417 So.2d at 666.

Id. at 1060 & n.5. This distinction, which the Court has since dispensed with altogether,[9] engendered substantial confusion. *Merrill*, decided in 1981, had arguably conflated the two types of laws by stating, in the context of a challenge to a procedural law, that the Legislature has no constitutional authority to enact any retroactive legislation impairing vested rights. 430 A.2d at 560-61 & n.7. Reasoning that procedural laws are not "retroactive" at all, the *Norton* Court sought to clear up the resulting confusion by criticizing *Merrill* in dicta for failing to "identify[] the source of the asserted constitutional prohibition" as to procedural laws. 511 A.2d at 1060 n.5. *Norton* thus simply clarified the constitutional distinction between substantive and procedural laws – nothing more. With respect to "substantive" laws, the *Norton* Court acknowledged, "[i]f the Legislature intends a retroactive application, the statute must be so applied *unless the Legislature is [constitutionally] prohibited from regulating conduct in the intended manner*." *Id.* (emphasis added). *Norton* declined to reach the question of whether Maine's Due Process Clause prohibited retroactive application of the law in question because the plaintiff had not raised a due process claim. *Id.* at 1061 & n.7.

Accordingly, this Court's later reliance on *Norton* in *State v. L.V.I. Group* did not undermine its long line of precedent recognizing the constitutional nature of vested rights. 1997 ME 25, ¶ 9, 690 A.2d 960. In *L.V.I. Group*, the Court cited *Norton* for the

[9] This Court has held that 1 M.R.S. § 302 – which provides a rule of construction for determining when a law applies retroactively – does not depend upon the procedural / substantive distinction parsed in *Norton*. *DeMello v. Dep't of Envtl. Prot.*, 611 A.2d 985, 987 (Me. 1992) (abrogating *Norton*). Again, as discussed above in more detail, this does not undermine separate constitutional prohibitions on retroactive application of legislation, such as interference with vested rights.

proposition that limitations on state legislative power "can only arise" from the Constitution. *Id.* By relying upon *Norton*, *L.V.I. Group* did not suggest that vested rights claims lack a constitutional basis – indeed, no vested rights claim had been asserted. *Id.* ¶¶ 7, 15. To the contrary, the Court again recognized the Due Process Clause as the basis for the vested rights doctrine by observing that the "gravamen" of the plaintiff's claim under article I, section 1 of the Maine Constitution was that of "due process" – namely, "that the Maine Constitution forbids interference with vested rights or the retroactive creation of new obligations." *Id.* ¶ 15. The doctrine of legally acquired vested rights remains grounded in the Due Process Clause, and limits state action.

b. Vested rights claims are not subject to rational basis review.

Under Maine law, a vested rights claim – though grounded in the Due Process Clause – does not trigger rational basis review. *Sahl*'s three-part test provides the proper method for determining whether a party has legally acquired vested rights. 2000 ME 180, ¶ 12, 760 A.2d 266. In that case, the Court held that the developers had vested rights because they had undertaken substantial construction, in good faith, pursuant to a valid permit. *Id.* ¶ 14. The Court did not engage in rational basis review of the governmental action, instead concluding its analysis once it determined that the developers had legally acquired vested rights. *Id.* This approach is consistent with the Court's prior precedent. *See, e.g.*, *Sabasteanski*, 232 A.2d at 526 (no rational basis review). It is also consistent with Maryland law, on which the Court relied, *see Sahl*, 2000 ME

180, ¶ 13, 760 A.2d 266 ("Maine law is in accord with" Maryland law on vested rights), which provides that the "standard for determining whether a retrospective statute is constitutional is whether the vested rights are impaired and *not* whether the statute has a rational basis," *Goldberg*, 85 A.3d at 240 (quotation marks omitted); *see Muskin v. State Dep't of Assessments & Tax'n*, 30 A.3d 962, 969 (Md. 2011); *Dua v. Comcast Cable of Md., Inc.*, 805 A.2d 1061, 1072-76 (Md. 2002) (examining vested rights doctrine).

This Court has not retreated from *Sahl*. In *Kittery Retail*, the Court stated, in addressing a conventional due process claim based on *equitably* acquired vested rights, that courts must determine, first, whether there has been deprivation of a property interest and, second, whether that deprivation was without rational basis. 2004 ME 65, ¶ 32, 856 A.2d 1183. The plaintiff in *Kittery Retail* did not, and could not, assert a legal vested rights claim under *Sahl* to avoid rational basis review because it had not commenced construction. *Id.* Any suggestion that such claims are subject to rational basis review was therefore dicta. Indeed, the *Kittery Retail* Court acknowledged *Sahl*'s continuing vitality by distinguishing that case on the basis that *Sahl*, unlike *Kittery Retail*, involved a legal claim for vested rights based on construction. *Id.* To the extent *Kittery Retail* suggests that rational basis review applies to vested rights, it would only apply to equitable claims, which involve significantly less substantial reliance interests.

This Court's prior analysis of legally acquired vested rights is sound. Although rational basis review applies to prospective economic regulation, *State v. Haskell*, 2008 ME 82, ¶ 5, 955 A.2d 737, or retrospective economic legislation that does not implicate

substantial reliance interests, *L.V.I. Grp.*, 1997 ME 25, ¶¶ 9-10, 690 A.2d 960,[10] less deference is due to retrospective changes impinging upon vested property rights, *Dua*, 805 A.2d at 1072-76. "Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not lightly be disrupted." *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994); *see Finch v. State*, 1999 ME 108, ¶ 9, 736 A.2d 1043 (same). Under the Due Process Clause, therefore, "a justification sufficient to validate a statute's prospective application . . . may not suffice to warrant its retroactive application." *Landgraf*, 511 U.S. at 266. This is particularly true of vested rights claims.

Claims for legally acquired vested rights necessarily involve substantial reliance issues: individuals have ordered their activities and investments based on the issuance of permits under existing law, including physical construction of their projects, and have no means or reason to comply with as-yet-unknown legal standards that may be later adopted. *See Mingo Logan Coal Co. v. Envtl. Prot. Agency*, 829 F.3d 710, 736-37 (D.C. Cir. 2016) (Kavanaugh, J., dissenting) ("[T]he issuance of a permit is typically intended to, and typically does, engender reliance by the permittee."). The regulatory bargain is that developers must submit to close scrutiny but may rely upon the certainty of any approvals under existing law. Accordingly, "[w]hen a permit induces reliance, it has

[10] In *L.V.I. Group*, the Court applied rational basis review in assessing a generic due process claim relating to the retroactive application of a statute governing recovery of severance pay. 1997 ME 25, ¶¶ 9-10, 690 A.2d 960. Because *L.V.I. Group* did not involve a vested rights claim, however, that case does not suggest that a rational purpose suffices to deprive a party of the rights at stake in cases involving substantial expenditures and substantial construction. Indeed, in deciding *Sahl* as it did after *L.V.I. Group*, this Court rejected such a notion.

long been recognized that those settled expectations should not be lightly disturbed by intervening government action." *Id.* at 737. Maine law thus properly establishes less deferential scrutiny of retroactive laws impairing legally acquired vested rights.

2. The Business Court erred by concluding that Plaintiffs could not establish vested rights.

The Business Court also held, for the first time under Maine law, that a developer may not vest rights in a project until (1) all legislative efforts to oppose the project, however inchoate, have ended, and (2) all deadlines to appeal permits have expired. A.41-50. Unless reversed, this holding will subject development in Maine – including development necessary to meet urgent energy and climate change needs – to crippling uncertainty. Despite the Initiative and permit appeals, Plaintiffs acquired a vested right to complete the Project under existing law by undertaking, in good faith, substantial construction pursuant to valid permits. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266.

a. NECEC LLC commenced construction in good faith, with intent to continue and complete the Project.

The Business Court correctly found that NECEC LLC "proceeded in good faith." A.43. For a developer to legally acquire vested rights, it must begin construction "in good faith," namely, "with the intention to continue with the construction and carry it through to completion." *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quoting *Town of Sykesville*, 677 A.2d at 104). Good faith is "the absence of proof of bad faith," which manifests itself as a "deliberate false start." *Town of Sykesville*, 677 A.2d at 113-16. Thus, "good faith" focuses on "whether the act of commencing construction is undertaken

with the intention of continuing and finishing the job." *Id.* at 116. NECEC LLC has satisfied this standard. This is not a case in which a developer raced to obtain permits and prematurely began construction solely to avoid imminent legal changes; to the contrary, NECEC LLC obtained permits and began construction in the ordinary course – indeed, *later* than intended – in order to meet project schedules and contractual commitments. A.123-24, ¶ 136; A.235, 237, 239-46, ¶¶ 27, 35, 43-63.

i. Project construction occurred pursuant to a project schedule and contractual obligations.

NECEC LLC began construction of the Project with the intent to finish it. This Project has been years in the making: efforts to obtain necessary real estate interests started in 2014, initial design in 2016, permitting in 2017, and detailed planning in 2018. A.111-13, ¶ 113. Plaintiffs initially anticipated beginning construction in December 2019, but permitting caused delays. A.234, 237, ¶¶ 24, 35. NECEC LLC's commencement of construction in January 2021, as soon as the last federal permit for the Project was issued, was necessary to ensure that NECEC LLC could achieve timely commercial operation under the TSAs, which include a contractual deadline of August 23, 2024. A.123-24, ¶ 136. Starting construction as soon as all state and federal authorizations were received was critical to maintain the targeted COD. *Id.*[11] Prompt construction gave NECEC LLC the ability to meet its contractual commitments given

[11] As of January 2021, the project schedule called for commercial operation on May 31, 2023. A.244, ¶ 56. The original COD in the baseline schedule was December 13, 2022. A.227-28, 244 ¶¶ 9, 56. Accordingly, by the time construction began, NECEC LLC was already well behind its schedule.

preceding delays in permitting, while taking into account necessary allowances for future contingencies, such as delays from weather, labor issues, or procurement. A.244-46, ¶¶ 58-59, 63.[12] Prompt construction was also necessary to realize Project benefits, and ensure the Project's financial viability. A.123-24, ¶ 136.

Further, NECEC LLC did not make a "false start" on construction; rather, it continued construction, subject to permit restrictions, until November 19, 2021, when it stopped construction at the Governor's request. A.114, ¶ 118; A.241, ¶ 49; A.290, ¶¶ 4-5. This continuous construction entailed massive investments by NECEC LLC. NECEC LLC not only incurred approximately $450 million in capital expenditures, but also made over $312 million in purchase commitments to comply with the TSAs. A.209, ¶ 13; A.221; A.244-45, ¶¶ 58-60. NECEC LLC's efforts to comply with the TSAs, and its expenditures in furtherance of that effort, demonstrate its good faith.

ii. Knowledge of a possible change in law does not vitiate good faith.

Although the Business Court correctly concluded that NECEC LLC acted in good faith, it nevertheless erred by finding that NECEC LLC's awareness of a *possible* change in the law, long before such change had any legal standing even to be placed on the ballot, precluded Plaintiffs' rights from vesting. A.44. Project opponents' belated

[12] Construction immediately experienced delays because of an injunction initially entered and then lifted by the First Circuit. A.240, ¶ 46. NECEC LLC was unable to begin clearing both north along Segment 1 and south along Segment 2, as planned; instead, clearing could only begin in Segment 2, *id.*, leading to adjustments to the planned installation of poles, A.242, ¶ 52. The injunction thus led to a further delay of the expected COD to December 13, 2023. A.244, ¶ 57. This highlights NECEC LLC's need to start construction as soon as lawfully possible. A.245, ¶ 59.

decision to pursue the Initiative, however, does not undermine NECEC LLC's good faith. Beginning construction with knowledge of a possible change in law is not "bad faith." *Town of Sykesville*, 677 A.2d at 118-120. Any other conclusion would allow anti-development opponents to halt construction by merely proposing a new law.

Town of Sykesville provides useful guidance. In that case, the court held that the right to construct a telecommunications tower vested where the developer obtained necessary permits and began construction prior to amendment of the zoning law. *Id.* at 105-08, 118-120. The court found that the developer's knowledge of a pending change in law did not mean that the developer commenced construction in bad faith. *Id.* Here, where NECEC LLC obtained the necessary land rights and permits and began construction with the intent to complete it before the Initiative had even been accepted for placement on the ballot, there is likewise "nothing wrong with acting expeditiously to commence construction knowing" of the possible change in law.[13] *Id.* at 120. NECEC LLC's construction through Election Day must therefore be considered for purposes of vested rights. Developers have the right to begin construction of a permitted project in reliance on existing law, and to not be held hostage by proposal of a new law. *Id.* at 118 ("there is no absence of good faith in the commencement of construction . . . with full knowledge that legislation was then pending").

[13] Of course, as discussed below, Project opponents have nobody but themselves to blame for the fact that the Initiative had not even been accepted for placement on the ballot, and had no formal legal status whatsoever, when NECEC lawfully undertook substantial construction on the Project.

Kittery Retail and *City of Portland v. Fisherman's Wharf Associates* do not support a contrary conclusion. Both are inapposite because neither involved any construction. Instead, in both cases, the developer asserted a claim for equitable vesting based on governmental bad faith – an argument that this Court rejected in part because the developer knew of the pending change in law before it acquired title to property or obtained a permit. *See Kittery Retail*, 2004 ME 65, ¶¶ 4-6, 9, 856 A.2d 1183; *City of Portland v. Fisherman's Wharf Assocs.*, 541 A.2d 160, 161-62, 164 (Me. 1988). Accordingly, neither case suggests that knowledge of a pending (not to mention merely possible) change in the law undermines a developer's claim for legally acquired vested rights. Even if they did apply to such claims, *Kittery Retail* and *Fisherman's Wharf* stand at most for the proposition that knowledge of a potential change in law *prior* to obtaining property and permits makes it unreasonable to believe that existing law will govern the project. Neither case supports the broader proposition that knowledge of a potential change, proposed after land and permits have been obtained and with no legal standing to be placed on the ballot until after construction began, precludes vested rights. Here, the Project secured site control by July 2017, and all project-wide permits by January 14, 2021. A.83-94, ¶¶ 33-69. Construction began January 18, 2021. A.114, ¶ 117. All of these events occurred before the Secretary of State acted to place the Initiative on the ballot by certifying signatures on February 22, 2021. A.103, ¶ 98.

Sahl, similarly, does not stand for the proposition that knowledge of a potential change in the law precludes vested rights. To the contrary, the issue there was whether

the developer had *waived* vested rights by delaying construction of the second phase of a project. *Sahl v. Town of York*, 2000 WL 33676719, at *2 (Me. Super. Ct. Feb. 2, 2000), *rev'd*, 2000 ME 180, ¶ 14, 760 A.2d 266. The developer's knowledge of the pending change, therefore, was relevant not to good faith, but rather to determining whether vested rights had been knowingly relinquished by not moving quickly enough.

It would be particularly inappropriate to hold for the first time in this case that knowledge of a potential change in the law precludes a claim for legally acquired vested rights, given that opponents pursued the Initiative in bad faith. Both the context of and the campaign for the Initiative makes it clear that it targeted the NECEC. Competing fossil-fuel fired generators that would be harmed by the introduction of inexpensive, clean energy into the New England market funded the Initiative (to the tune of $27 million). A.107-08, ¶ 103. Further, the individuals that pursued the unconstitutional 2020 Initiative also sponsored the present Initiative – which, because of their own prior failure to comply with constitutional requirements, could not be enacted or even placed on the ballot before construction began. A.79-80, 98-99, ¶¶ 22, 79-83. The Initiative is a transparent effort to carry on the 2020 Initiative's anti-NECEC efforts; indeed, its sponsors admit that the retroactivity provisions are targeted at the NECEC. A.100-07, ¶¶ 89-97, 101-102. The campaign focused relentlessly on the NECEC, and its advocates denied that it applied to any other project. A.104-07, ¶ 102. Because the Initiative is a targeted attempt by market competitors to kill the NECEC, Plaintiffs' knowledge of it should not affect their vested rights; otherwise,

parties could act in bad faith with impunity, knowing that the proposal of even overtly discriminatory legislation will foreclose vesting of rights.

Although it may be justifiable to conclude that rights do not vest as a matter of equity where a developer has notice of a pending change to the law prior to obtaining necessary land and permits, the considerations are far different where the developer has already secured necessary permits and undertaken substantial construction in reliance on existing law. This is particularly true for large, multi-year developments, which are sure to attract opposition. There is no more certain path to uncontrolled NIMBYism than to allow the mere *possibility* of a legal change to prevent vesting of rights under existing law, particularly when such changes are pursued in bad faith.

iii. Even if a proposed change can bar good faith construction, the proposal must be sufficiently concrete and have legal standing through official action before that happens.

Even if Plaintiffs' knowledge of the proposed Initiative was relevant, there is certainly no reason to find that possible legal change sufficiently concrete to preclude vesting of rights prior to certification of petition signatures. Before presentation of a proposal to the relevant legislative body, the mere possibility of a legal change does not deprive a developer of good faith. *1350 Lake Shore Assocs. v. Healey*, 861 N.E.2d 944, 953-54 (Ill. 2006). A less stringent rule would result in "manipulation by objecting neighbors" and would "discourage property owners from seeking to develop their property." *Id.* A bill can bar vesting of rights only after some "official action" has been

taken—at the very least, for initiatives, certification of signatures. *See Kauai Cnty. v. Pac. Standard Life Ins. Co.*, 653 P.2d 766, 777-79 (Haw. 1982) (finding pre-certification expenditures in good faith).[14] Any other conclusion would require developers to freeze construction upon an application by just five Maine voters. 21-A M.R.S. § 901. Issuance of an initiative petition is insufficient—proponents still must undertake the extraordinary effort of gaining tens of thousands of signatures, *see* Me. Const. art. IV, pt. 3, § 17, a process that is far from certain to succeed during the best of conditions (not to mention during the pandemic prevailing in 2020) and is not complete until the Secretary of State certifies the validity of sufficient signatures. Mere preliminary steps, however public, toward initiating a potential legal change – which may never lead to any vote, much less enacted legislation – are not enough.[15]

Accordingly, to the extent the Court finds that Plaintiffs' knowledge of legislative opposition matters and thus determines the substantiality of construction as of some date prior to November 2, 2021, this Court should conclude that Plaintiffs' knowledge of opposition prior to February 22, 2021, is irrelevant. The Business Court found it persuasive that NECEC LLC knew of opposition to the Project as far back as the failed 2020 Initiative, *see* A.45, but finding that NECEC LLC could not vest rights based on its knowledge of an unconstitutional effort to stop the Project, after NECEC LLC

[14] *Fisherman's Wharf* is not inconsistent with this rule—in that case, signatures were certified before the developer obtained a permit. 541 A.2d at 161.

[15] Accordingly, Avangrid, Inc.'s disclosure of the proposed Initiative in its 10-Q and 10-K reports filed with the SEC, *see* A.45, has no bearing on Plaintiffs' legal rights. Even after the Initiative was certified to be placed on the ballot, its adoption remained purely speculative.

successfully defeated the 2020 Initiative in court, would deprive Plaintiffs of the benefit of that successful legal challenge. Similarly, the court wrongly relied upon October 30, 2020, the date the Secretary of State issued the petition for the Initiative, as the date when NECEC LLC was put on sufficient notice of a potential change in the law. *Id.* Issuance of the petition is no different than the submission of an application for an initiative. Before the signatures are actually collected, vetted, and determined by the Secretary of State to meet the constitutionally required threshold for inclusion on the ballot, the "pending change" has no legal standing, and is speculative.

b. NECEC LLC completed substantial physical construction.

NECEC LLC timely undertook "actual physical commencement of some significant and visible construction" on the Project. *Sahl*, 2000 ME 180, ¶ 12, 760 A.2d 266 (quotation marks omitted). Significantly, the Business Court did not determine that NECEC LLC's construction was insubstantial, but rather acknowledged that "the Project is substantially complete." A.43. Instead, the court made the erroneous legal conclusion, addressed above, that rights cannot vest after acquiring knowledge merely of a possible change in law. Once that error is corrected, the substantiality of NECEC LLC's construction efforts lawfully undertaken cannot be seriously questioned.

As this Court has observed, rights vest when a developer "demonstrates a commitment to the purpose for which the permit was granted by effecting substantial changes and incurring substantial expenses to further the development." *Sahl*, 2000

ME 180, ¶ 12, 760 A.2d 266 (quoting *Town of Orangetown v. Magee*, 665 N.E.2d 1061, 1064 (N.Y. 1996)). Courts measure "substantial construction" in terms of "whether the amount of completed construction is *per se* substantial in amount, value or worth." *AWL Power, Inc. v. City of Rochester*, 813 A.2d 517, 522 (N.H. 2002); *see Sahl*, 2000 ME 180, ¶¶ 12, 14, 760 A.2d 266. Further, in determining whether there has been substantial expenses, courts consider "liabilities relating directly" to construction. *AWL Power*, 813 A.2d at 521. Construction on the NECEC easily meets this threshold, at any relevant date. *See, e.g.*, *Town of Orangetown*, 665 N.E.2d at 1064-65 (rights vested where, after a permit issued, developer spent over $4 million on improvements).

By November 2, 2021, NECEC LLC had undertaken substantial construction on the Project under its permits. NCI had cut approximately 124 miles (85.5%) of the corridor, at a cost of $43.1 million; Cianbro/Irby had installed approximately 70 structures along the HVDC line, along with additional bases and foundations, at a cost of $38.5 million; an additional 54 structures had been installed along the AC line, at a cost of $18.4 million; hundreds of custom poles had been constructed; 3 miles of conductor had been strung; and contractors had largely completed site work for the converter station and built critical converter station components (such as transformers), for approximately $100 million. A.115, 121-22, ¶¶ 120, 132. In addition, contractors had delivered millions of dollars of additional materials by Election Day. A.121-22, ¶ 132 & n.15. In all, total capital expenditures by that date were approximately $449.8 million – 43% of the total Project cost estimate. *Id.*; A.207-08, ¶ 10. NECEC LLC had

incurred additional costs of approximately $39.1 million, including operating expenses and allowance for funds used during construction. A.209, ¶ 13; A.221. By any measure for any project, that constitutes substantial construction and substantial expenditures.

Even measured as of February 22, 2021, the date the Secretary of State certified the petition signatures for the Initiative and therefore the earliest possible date legally relevant for determining a "cutoff" for good faith construction, NECEC LLC's construction efforts and expenditures were still more than sufficiently substantial. As of that date, the amount of capital expenditures on the Project, inclusive of project management costs, was approximately $199 million. A.117, ¶ 124. NCI had cut over 10 miles of corridor, laying over 1,000 mats for access, and performed approximately $8.3 million of clearing and related construction activities. Cianbro/Irby had installed 9 structures on the HVDC line, at a cost of approximately $15 million. *Id.* TAPP had delivered 24 custom poles for approximately $7.4 million. *Id.* In addition to capital expenditures, other Project costs as of February 28, 2021, totaled approximately $16.9 million. A.209, ¶ 13; A.221. Further, as of February 2021, NECEC LLC had made purchase commitments of $378 million. *Id.* In sum, there is no straight-faced argument that NECEC LLC failed to undertake substantial construction.

c. NECEC LLC was entitled to rely upon its existing valid permits and lease to undertake construction.

Finally, the Business Court erred by concluding that Plaintiffs failed to show that construction has been undertaken "pursuant to a validly issued building permit." *Sahl*,

2000 ME 180, ¶ 12, 760 A.2d 266. The court did so by adding a new criterion, never before required by this Court: that the permit not only be "validly issued," but that it *also* be final in the sense that all possible appeal rights are exhausted. Superimposing this new requirement onto the vested rights doctrine constitutes legal error.

NECEC LLC did not begin construction until all project-wide permits had been secured. A.114, ¶ 117. The Project received the last permit necessary to begin construction on January 14, 2021, and construction began promptly thereafter. A.83-94, 114, ¶¶ 33-69, 117. Further, local permits as needed have been obtained in a timely manner in accordance with the Project schedule. A.95, ¶ 71. All of these permits are valid. This Court affirmed the CPCN, *see NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n*, 2020 ME 34, 227 A.3d 1117; the Superior Court denied opponents' motion for stay of the DEP permit, *see NextEra Energy Res., LLC v. Dep't of Envtl. Prot.*, Dkt Nos. KEN-AP-20-27, SOM-AP-20-04 (Me. Super. Ct. Jan. 11, 2021);[16] and the First Circuit found that opponents are not likely to succeed in their challenge to the Corps permit, *Sierra Club v. Army Corps of Eng'rs*, 997 F.3d 395 (1st Cir. 2021). As these decisions show, NECEC LLC was justified in starting construction under lawfully issued permits.

The fact that there are ongoing appeals does not preclude vested rights. *Sahl* never mentioned a requirement that all permits must be final in the sense found by the

[16] Although the DEP has suspended its permit pending this Court's ruling, it only did so because of the Initiative. It would be entirely circular and unfair to conclude that the suspension of the DEP permit in light of the Initiative undermines NECEC LLC's vested rights challenge to the Initiative.

Business Court, and rightly so. Freezing construction until all appeal periods have expired would cripple infrastructure development. Because appeal periods for certain federal permits, including the Corps permit here, extend for *six years*, 28 U.S.C. § 2401(a), major developments would be subject to shifting legal landscapes for an unreasonable length of time if a finality rule were adopted.[17] Affidavit of Paul Franceschi, ¶¶ 40–46 (dated Nov. 24, 2021).

The best rule is set forth in *Town of Sykesville*, a case that this Court has cited with approval. There, the court acknowledged that "if a landowner elects to proceed with construction, knowing full well that upon direct judicial review a presumptively valid building permit may be invalidated and a presumptively vested right may be divested, that landowner proceeds at his own risk." 677 A.2d at 127 (quotation marks omitted); *see Conservation Law Found., Inc. v. Maine*, 2002 WL 34947097, at *2-3 (Me. Super. Ct. Jan. 28, 2002) (construction does not moot permit appeal). But, as the court went on to note, the corollary to that principle is that a landowner *can* proceed and vest rights as against subsequent legislative changes. *Town of Sykesville*, 677 A.2d at 127.[18] Thus,

[17] Consider an example: a challenge is filed 5 ½ years after permit issuance, and two years elapse before it is affirmed on appeal. Seven years after the permit is issued, while the appeal is ongoing, a citizen initiative effort begins. The initiative finally makes it to voters a year later. Even assuming the initiative loses, construction (under the Business Court's rule) still could not safely begin for at least 8 years—perhaps closer to a decade if the initiative is adopted and successfully challenged in court. There is no conceivable basis on which major developments could survive a framework such as this.

[18] The *Town of Sykesville* rule remains good law. In *Powell v. Calvert Cnty.*, 795 A.2d 96, 101 (Md. 2002), the court suggested that "nothing can vest or even begin to vest" until court approvals are obtained. In that case, however, no permit had issued. Thus, *Powell* stands for the proposition "that rights cannot vest *without the acquisition of a valid permit and substantial construction* until all necessary approvals, including all final court approvals, are obtained." *Sherwood Hill Improvement Ass'n v. TTV Props. III, LLC*, 2018 WL 566466, at *8 (Md. Ct. Spec. App. Jan. 26, 2018) (quotation marks omitted). Beginning construction changes the analysis; "[o]therwise, . . .

although a developer may not by starting construction prevent a permit improperly granted in the first instance from being reversed on appeal, developers may begin construction and in so doing vest rights to construct a project in accordance with the law *as it existed at the time construction began*, regardless of pending appeals.

By the same token, the appeal of the BPL Lease does not preclude rights vesting. Both NECEC LLC and the BPL maintain that the lease is valid, and that case is presently pending before this Court. NECEC LLC bears the risk that the lease may be found invalid based on the law then existing. Nevertheless, by beginning construction before the Superior Court ever made an adverse finding regarding the lease, NECEC LLC vested its right to have the validity of the BPL Lease assessed in light of the law as it existed when construction began – not under a new, retroactive standard. *Id.*

B. Plaintiffs are likely to succeed on their separation of powers claim.

The Business Court erroneously concluded that Plaintiffs were unlikely to prevail on their claim that the Initiative violates article III, section 2 of the Maine Constitution by usurping both executive and judicial powers.[19] A.50-55. That provision states: "No person or persons, belonging to one of [the legislative, executive, or judicial] departments, shall exercise any of the powers belonging to either of the others, except

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an individual might never be able to vest rights in order to insulate themselves from subsequent changes in zoning." *Id.* Cases in other states precluding vested rights until all appeal periods have passed, *see, e.g.*, *Donadio v. Cunningham*, 277 A.2d 375, 382 (N.J. 1971); *In re Broad Mountain Dev. Co., LLC*, 17 A.3d 434, 445 (Pa. Commw. Ct. 2011), have done so in the context of municipal zoning cases involving short appeal periods and thus have not grappled with the practical reality of developments like the NECEC.

[19] Contrary to the Business Court's statement, *see* A.50, Plaintiffs bring their separation of powers claim only under the Maine Constitution, not under the U.S. Constitution.

in the cases herein expressly directed or permitted." Me. Const. art. III, § 2. Like the vested rights doctrine, separation of powers minimizes "the danger of subjecting . . . the rights of one person to the tyranny of shifting majorities." *I.N.S. v. Chadha*, 462 U.S. 919, 961-62 (1983) (Powell, J., concurring). "The more that the 'independence of each department, within its constitutional limits, can be preserved, the nearer the system will approach the perfection of civil government, and the security of civil liberty.'" *Avangrid*, 2020 ME 109, ¶ 24, 237 A.3d 882 (quoting *Lewis v. Webb*, 3 Me. 326, 329 (1825)). The Initiative undermines this fundamental principle of ordered government.

This "strict separation of powers between the three branches of government" under the Maine Constitution, *Bossie v. State*, 488 A.2d 477, 480 (Me. 1985), is "much more rigorous" than under the U.S. Constitution, *State v. Hunter*, 447 A.2d 797, 799 (Me. 1982). The "test under the Maine Constitution is a narrow one: 'has the power in issue been explicitly granted to one branch of state government, and to no other branch? If so, article III, section 2 forbids another branch to exercise that power.'" *Bossie*, 488 A.2d at 480 (quoting *Hunter*, 447 A.2d at 800). Thus, the separation of powers inquiry under the Maine Constitution is "formal" rather than "functional," *id.*, in that, unlike federal law, the Maine Constitution does not merely prohibit one branch from going *too far* in impairing another branch's powers; rather, *any* exercise of another branch's power is forbidden, *Hunter*, 447 A.2d at 799–800. Thus, neither the Legislature nor the people utilizing the legislative power may exercise powers reserved to the executive branch,

including agencies, *N.E. Outdoor Ctr. v. Comm'r of Inland Fisheries & Wildlife*, 2000 ME 66, ¶ 10, 748 A.2d 1009, or the judiciary, *L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960.

1. The Initiative usurps executive powers by prohibiting construction of a project already authorized by the executive.

The Constitution vests the power to execute the law in the Governor. *Opinion of the Justices*, 2015 ME 27, ¶ 5, 112 A.3d 926 (citing Me. Const. art. V, pt. 1, §§ 1, 12). The Initiative usurps this executive power by reversing final agency approval of the NECEC. If retroactively applied to the Project, the Initiative would require the reversal of the CPCN for the Project (Section 5) and would authorize the Legislature to reach back and undo what the PUC and BPL have finally approved (Sections 1 and 4). Retroactive application of the Initiative therefore would not simply "supplement[] . . . existing law," A.53; rather, it would disrupt an otherwise final executive action.

This Court has foreclosed that outcome: legislation may not be used to reverse a final executive agency determination. *Avangrid*, 2020 ME 109, ¶ 36, 237 A.3d 882; *Grubb v. S.D. Warren Co.*, 2003 ME 139, ¶ 11, 837 A.2d 117. In *Grubb*, this Court considered the retroactive application of a new statutory standard for calculating worker benefits, and held that it could not be applied to a final benefits determination. The court observed that the new statutory standard "d[id] not, nor could it, change the result of a previous decision," even though it could be applied retroactively to pending benefit applications. 2003 ME 139, ¶ 11, 837 A.2d 117. The court concluded that the "Legislature 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." *Id.* The Court reiterated this standard in *Avangrid*, striking down the 2020 Initiative that would have directed the PUC to reverse its order granting the CPCN for the Project. 2020 ME 109, ¶¶ 1, 5, 237 A.3d 882. The Court held that "the Legislature would exceed its legislative powers if it were to require the [PUC] to vacate and reverse a particular administrative decision" because such an action is "executive in nature." *Id.* ¶ 35.[20]

The Initiative runs afoul of this precedent by impermissibly interfering with a final decision of the PUC that has been affirmed by this Court. All high-impact electric transmission lines require a CPCN, which the PUC granted to NECEC LLC on May 3, 2019, after engaging in an exhaustive review lasting over 19 months. A.84, ¶¶ 35–36. Section 5 of the Initiative, which modifies the statute governing CPCNs, 35-A M.R.S. § 3132, nevertheless purports to retroactively prohibit construction of high-impact electric transmission lines in the "Upper Kennebec Region," as defined, "the construction of which had not commenced as of [September 16, 2020]." A.100, ¶ 87; A.70. Accordingly, on its face, the Initiative invalidates the CPCN because the Project's current permitted route crosses this region and construction on the Project did not begin until January 2021. A.100, 114, ¶¶ 88, 117. Thus, Section 5 of the Initiative

[20] A new legislative standard may be applied retroactively to *pending* agency proceedings. *Morrissette v. Kimberly-Clark Corp.*, 2003 ME 138, ¶¶ 12-13, 15, 837 A.2d 123; *see MacImage of Me., LLC v. Androscoggin Cnty.*, 2012 ME 44, ¶ 23, 40 A.3d 975; *Bernier v. Data Gen. Corp.*, 2002 ME 2, ¶ 17, 787 A.2d 144. This Court, however, has never approved legislative reversal of final agency action.

requires the PUC to revoke the CPCN authorizing the Project.[21] As applied to the NECEC, the effect is no different than the effect of the unconstitutional 2020 Initiative.

Likewise, Sections 1 and 4 retroactively authorize that which *Avangrid* held unconstitutional: legislative cancellation of a project approved by the executive branch. The BPL's execution of the BPL Lease is final agency action; yet, Section 1 inflicts an additional, after-the-fact super-majority approval requirement to BPL's decision, thereby impermissibly authorizing the Legislature to "change the result" of that decision. *Grubb*, 2003 ME 139, ¶ 11, 837 A.2d 117. Section 4 retroactively authorizes legislative veto of the CPCN, already finally approved by the PUC and upheld after challenge by this Court. A.74-75, ¶¶ 9, 11; *see NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117.[22] In sum, *Avangrid* held that an initiative could not directly reverse a final permit; so also, an initiative cannot authorize the Legislature to reverse a final permit.[23]

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[21] The State argued before the Business Court that the Initiative is self-executing and that no one need enforce it. Putting aside the fact that *someone* will have to interpret the scope of the "Upper Kennebec Region," which is subject to multiple constructions, the PUC is the agency tasked with enforcing Title 35-A and authorizing the construction of transmission facilities. *See* 35-A M.R.S. §§ 103, 3132(6)(A). The CPCN explicitly authorizes what the Initiative now prohibits. Therefore, the PUC must ultimately take action under the Initiative.

[22] The egregious violation of separation of powers wrought by Section 4 comes into even sharper focus when one considers that Section 4 does not even contemplate presentment to the Governor. *See* Me. Const. art. IV, pt. 3, § 2 (requiring presentment of "[e]very bill or resolution, having the force of law"). Instead, the plain language of the Initiative carves the Governor out of the legislative process. *See, e.g.*, *Blank v. Dep't of Corr.*, 611 N.W.2d 530, 536–38 (Mich. 2000) (requirement that legislature approve agency rules "violates the enactment and presentment requirements . . . and violates the separation of powers provision"). Read reasonably, Section 4, retroactively applied, operates as a purely legislative veto of executive agency approvals by the PUC, and to add insult to injury, interferes with the Governor's constitutional mandate to faithfully execute the law.

[23] Sections 1 and 4 are not severable from the remainder of the Initiative given that legislative approval is such "an integral part of the [Initiative] that the [voters] would only have enacted the statute as a whole." *Bayside Enters., Inc. v. Me. Agr. Bargaining Bd.*, 513 A.2d 1355, 1360 (Me. 1986). The very title of the Initiative—"An Act to Require Legislative Approval of Certain Transmission Lines . . ."—supports this conclusion. *See also* A.70, Initiative, Summary ("This initiated bill requires the approval of the Legislature for the construction of high-impact electric transmission lines . . .."); A.101-02, ¶¶ 93, 96.

The Constitution prohibits the Legislature from "exercis[ing] *any of the powers*" belonging to the executive branch. Me. Const. art. III, § 2 (emphasis added). Because the "purpose and effect" of retroactively applying the Initiative to the NECEC "is to dictate" the PUC's and BPL's exercise of their "executive-agency function in a particular proceeding," it is constitutionally infirm. *Avangrid*, 2020 ME 109, ¶ 35, 237 A.3d 882. On this basis alone, Plaintiffs are likely to succeed on their separation of powers claim.

2. The Initiative usurps judicial powers by reversing the outcome of a final judgment of this Court.

The Constitution vests all judicial powers in this Court. Me. Const. art. VI, § 1. The Initiative usurps the judicial power because it would effectively reverse a final judgment rendered in a previous action by requiring the PUC to vacate a CPCN that has been affirmed by this Court. *NextEra*, 2020 ME 34, ¶ 43, 227 A.3d 1117.

It is well established under Maine law that the separation of powers doctrine prohibits legislative reversal of a final judgment as to the parties in that action. *L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960 ("[A] final judgment in a case is a decisive declaration of the rights between the parties, and the Legislature cannot disturb the decision . . . as to the parties in that action."); *Lewis*, 3 Me. at 332–33 (holding that the Constitution does not "authorize a re-examination of the cause"); *see Plaut v. Spendthrift Farm*, 514 U.S. 211, 219-27 (1995) (citing *Lewis*).[24] In *Lewis*, the Court held that the

[24] The same is true of agency determinations. *See Grubb*, 2003 ME 139, ¶¶ 9, 11, 837 A.2d 117 (Workers' Compensation Board decisions are subject to the rules of res judicata); *see also Quirion v. Pub. Utils. Comm'n*, 684 A.2d 1294, 1296 (Me. 1996) (res judicata applies in the context of a PUC decision).

Legislature cannot "set aside a judgment or decree of a Judicial Court, and render it null and void," even via a law that did not expressly require an outcome different than that reached by the court. 3 Me. at 332-37.

Retroactive application of Sections 4 and 5 to the Project would violate this principle. This Court held in *NextEra* that the NECEC met all of "the applicable statutory standards [under Title 35-A] for a CPCN," thereby affirming the PUC's issuance of the CPCN. 2020 ME 34, ¶ 1, 227 A.3d 1117. That decision is final.[25] Retroactive application of Sections 4 and 5 of the Initiative to the Project, which amend the applicable statutory standards for a CPCN, would render the *NextEra* decision null and void by compelling a contrary conclusion: that the NECEC does *not* meet "the applicable statutory standards" under Title 35-A. *Id.* Section 5 would require the PUC to reopen its proceedings and revisit the determination that was affirmed by this Court. Indeed, and even more egregiously than in *Lewis*, the Initiative makes it clear that the prior outcome – approval of the Project by both the executive branch and affirmed by the judicial branch – must now be legislatively reversed. Section 4 of the Initiative, moreover, authorizes the Legislature to effectively overrule this Court's determination that the Project satisfies the relevant requirements of Title 35-A – without creating any

[25] Because there is no "pending" proceeding with respect to the CPCN, the Business Court erred by relying on *MacImage*. *See* A.54. *MacImage* upheld the constitutionality of legislation impacting a pending judicial proceeding, 2012 ME 44, ¶ 27, 40 A.3d 975, not a final judicial order. Moreover, *MacImage* even acknowledged that applying a law to a pending proceeding may violate separation of powers. *Id.* ("The constitutional separation of powers is not *always* undermined when the Legislature passes legislation that 'affects cases that are pending in the judicial system.'" (quoting *Bernier*, 2002 ME 2, ¶ 17 n.7, 787 A.2d 144)). This acknowledgment highlights the severity of separation of powers concerns in the context of final proceedings.

new substantive standards. By imposing new retroactive requirements *after* this Court's decision, the Initiative renders an essential function of Maine's judiciary futile.

Because it "authorize[s] a re-examination" of the applicable CPCN requirements, *Lewis*, 3 Me. at 332, thereby "disturb[ing] the decision" in *NextEra, L.V.I. Grp.*, 1997 ME 25, ¶ 11 n.4, 690 A.2d 960, the Initiative cannot survive constitutional scrutiny. *See Plaut*, 514 U.S. at 219–27 (a legislative attempt to overturn a prior judicial decision violates the separation of powers); *see also Varga v. Stanwood-Camano Sch. Dist.*, 2007 WL 2193740, at *5 (W.D. Wash. July 27, 2007) ("Retroactive legislation that contravenes a prior judicial decision violates the separation of powers doctrine.").

3. The Business Court erred by concluding that the separation of powers doctrine is not implicated on the basis that the Initiative is generally applicable.

The Business Court rejected these arguments and attempted to distinguish *Avangrid* based on a single, erroneous rationale: namely, that the Initiative does not violate the separation of powers doctrine "so long as the law itself is one of general applicability." A.53. Under Maine law, however, the mere fact that a law is generally applicable does not mean that it can be applied retroactively to reverse final agency and judicial decisions. Thus, while the present Initiative comes in a garb different than the 2020 Initiative, that distinction does not change the separation of powers analysis—the relevant question is what effect the law has. A wolf in sheep's clothing is still a wolf.

The Business Court's conclusion that the Initiative does not impinge upon the executive's prerogatives is directly foreclosed by *Grubb* and *Avangrid*. The new statutory

standard for worker compensation benefits considered in *Grubb* was, on its face, generally applicable—it "applie[d] to *all* benefit calculations," with both prospective and retroactive effect. 2003 ME 139, ¶ 12, 837 A.2d 117 (emphasis added) (citing 39-A M.R.S. § 224 (Supp. 2002)). Indeed, "[t]he Legislature made very clear that section 224 is to be given the broadest possible application." *Id.* ¶ 18 (Clifford, Calkins, JJ., concurring). Neither its general applicability nor its "broad application," however, could save the constitutionality of the statute as applied to the plaintiff's final agency determination. *Id.* ¶ 11. *Avangrid* applied the principles of *Grubb* to a particularly egregious circumstance – a transparently targeted initiative that was so narrowly drawn (reversing a single agency proceeding) that it did not even qualify as legislation, 2020 ME 109, ¶¶ 35-36, 237 A.3d 882 – without narrowing or limiting *Grubb*'s holding to that extraordinary situation.[26] The unconstitutional ends that Project opponents have consistently pursued – reversal of final executive and judicial action – cannot be accomplished by adopting new means, namely, transparently targeted retroactivity.

For the same reasons, the Business Court erred in concluding that the Initiative does not invade the powers of the executive and the judiciary. Maine's separation of

[26] To be clear, Plaintiffs' claim is that the Initiative is substantively unconstitutional, as applied retroactively to the NECEC, because it violates separation of powers even if it is sufficiently broad to qualify as legislation. *See Grubb*, 2003 ME 139, ¶¶ 11-12, 837 A.2d 117; *see also In re Dunleavy*, 2003 ME 124, ¶¶ 18-19, 838 A.2d 338 (successful as-applied separation of powers challenge to statute). Accordingly, Plaintiffs' argument does not turn on whether the Initiative as applied prospectively is "legislative" in nature under the nine factors listed in *Avangrid*. *See Avangrid*, 2020 ME 109, ¶ 30, 237 A.3d 882 (quoting *Friends of Cong. Square Park v. City of Portland*, 2014 ME 63, ¶ 13 n.7, 91 A.3d 601). The Business Court's reliance on *Friends of Congress Square Park* is therefore misplaced, as the sole inquiry in that case was whether the citizens' initiative at issue was "administrative" or "legislative" in nature. 2014 ME 63, ¶¶ 8-11, 91 A.3d 601. In any event, *Friends* dealt with municipal actions not subject to article III, section 2.

powers doctrine is not cabined to that narrow subset of legislation *expressly* directing the outcome of a specific adjudicated proceeding. *See generally Patchak v. Zinke*, 138 S. Ct. 897, 905 (2018) (stating that the "simplest example" of a statute that violates the separation of powers is one that states, "In *Smith v. Jones*, Smith wins"). Rather, under Maine's rigorous doctrine, the violation also occurs when the Legislature enacts a statute that "professes to accomplish in an indirect and circuitous manner, that which the existing laws forbid." *Lewis*, 3 Me. at 332–33. It therefore does not "make[] any difference" whether the Initiative is generally applicable. *Plaut*, 514 U.S. at 227–28. As the Supreme Court stated in *Plaut*:

> To be sure, a general statute such as this one may reduce the perception that legislative interference with judicial judgments was prompted by individual favoritism; but it is legislative interference with judicial judgments nonetheless. Not favoritism, nor even corruption, but *power* is the object of the separation-of-powers prohibition. The prohibition is violated when an individual final judgment is legislatively rescinded for even the *very best* of reasons . . . .

Id. at 228. Here, too, any desire by a segment of the electorate to stop the NECEC Project via Initiative, A.53, cannot trump constitutional limitations to the legislative power enshrined in article III, section 2. "When retroactive legislation requires its own application in a case already finally adjudicated, it does no more and no less than 'reverse a determination once made, in a particular case,'" and it constitutes a "clear violation of the separation-of-powers principle." *Plaut*, 514 U.S. at 225 (quoting THE FEDERALIST NO. 81, at 545 (Alexander Hamilton). Such is the case here.

It is thus irrelevant to the separation of powers analysis that the Initiative's plain statutory language does not expressly reverse the PUC's or BPL's final agency decisions, as the 2020 Initiative purported to do, or that the Initiative does not specifically vacate this Court's judgment in *NextEra* by stating "in *NextEra Energy Resources v. Maine Public Utilities Commission*, NextEra wins." *See Patchak*, 138 S. Ct. at 905. Rather, as set forth above, the Constitution demands that the Court inquire whether the Initiative—as applied retroactively to the NECEC—has the effect of infringing upon the powers granted to the executive branch through its agencies, the PUC and BPL, *see* Me. Const. art. V, pt. 1, §§ 1, 12, or the judiciary, *see* Me. Const. art. VI, § 1, by reversing final determinations rendered in specific proceedings. As described *supra*, the Initiative doubly offends by usurping both executive and judicial powers.

C. Plaintiffs are likely to succeed on their Contracts Clause claim.

The Constitution forbids giving statutes retroactive effect when the legislation would violate the Contracts Clause." *MacImage*, 2012 ME 44, ¶ 23 n.10, 40 A.3d 975; *see* U.S. Const. art. I, § 10; Me. Const. art. I, § 11. In determining whether a law violates the Contracts Clause, a court must determine whether it substantially impairs a contractual relationship, *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 244 (1978), and if so, whether that impairment is "reasonable and necessary to serve an important government purpose," *U.S. Trust Co. of N.Y. v. New Jersey*, 431 U.S. 1, 25 (1977). *See Kittery Retail*, 2004 ME 65, ¶ 38-41 & n.7, 856 A.2d 1183. As other courts have found, voiding a lease on state lands unconstitutionally impairs the contract rights of

leaseholders—here, NECEC LLC. *See, e.g.*, *Lipscomb v. Columbus Mun. Separate Sch. Dist.*, 269 F.3d 494, 514 (5th Cir. 2001).

First, retroactive application of the Initiative would substantially impair the BPL Lease. NECEC LLC has obtained a lease for approximately 0.9 miles of public reserved lands, A.96, ¶ 75, that grants NECEC LLC the right to construct towers, wires, and all other structures necessary for the transmission of electricity, A.137-154.[27] The terms of the lease do not authorize unilateral termination by the State; instead, it provides that the State only "reserves the right to terminate" the lease "to the extent permitted under the provisions contained in paragraph 13 Default." A.137.[28] Therefore, absent default by NECEC LLC – which has not happened here – the lease does not contemplate termination by the State. Applying the Initiative retroactively to abrogate the lease, contrary to its terms, would deprive NECEC LLC of the benefit of its bargain by rendering it void. *See Sveen v. Melin*, 138 S. Ct. 1815, 1822 (2018) (substantial impairment exists when the legislation "undermines the contractual bargain"). There can be no greater impairment of a contract. *See Allied*, 438 U.S. at 245-48 (observing that "[t]he

[27] Although opponents have challenged the validity of the lease in *Black v. Cutko*, Law Court No. BCD-21-257, by operation of M.R. Civ. P. 62(e), the appeal of the decision in *Black* automatically stayed any legal effect of the trial court's ruling. Indeed, BPL acknowledged in *Black* that "the lease remains in effect." BPL Opp'n to Senator Black's Motion to Lift Automatic Stay at 4, *Black v. Cutko*, Law Court No. BCD-21-257 (Sep. 7, 2021). The *Black* plaintiffs accordingly moved to lift the automatic stay pursuant to Rule 62(g), which relief was not granted. *See* Order, *id.* (Sep. 15, 2021).

[28] The lease terms do not authorize future legislative impairment. NECEC LLC agreed to comply with federal, state, and local laws governing the *use* of the leased for the transmission of electricity. A.142, ¶ 6(m) ("Lessee shall be in compliance with all Federal, State and local statutes . . . now or hereinafter enacted which may be applicable to Lessee *in connection to its use of the Premises*." (emphasis added)); A.138-39, ¶ 3 (defining lessee's "use of the Premises"). Paragraph 6(m) is not a blanket acquiescence to all future statutory changes of any nature, and certainly not to a retroactive statute authorizing unilateral termination of the approved lease.

severity of the impairment measures the height of the hurdle the state legislation must clear," and applying close scrutiny to retroactive law).[29]

Second, retroactive application of the Initiative to the BPL Lease is not reasonable and necessary to serve an important state purpose. Where the State is a contracting party, courts owe no deference to legislative judgments regarding whether the impairment is reasonable because the impairment implicates the State's own self-interest – whether financial or otherwise. *Kittery Retail*, 2004 ME 65, ¶ 38, 856 A.2d 1183 (no deference if "the State . . . is a contracting party"); *see U.S. Trust*, 431 U.S. at 28 (no deference where impairment implicated State's interest in, among others, environmental protection).[30] Further, courts have held that an impairment is not reasonable if the "problem sought to be resolved by [the] impairment of the contract existed at the time the contractual obligation was incurred." *Univ. of Haw. Pro. Assembly v. Cayetano*, 183 F.3d 1096, 1107 (9th Cir. 1999) (quoting *Mass. Comty. Coll. Council v. Massachusetts*, 659 N.E.2d 708, 713 (Mass. 1995)). Thus, regardless of the level of

[29] The Contracts Clause analysis in this case is closely related to the vested rights principle that a law is "unconstitutional if, when applied retrospectively, it would alter or impair the nature of a person's title in property." *Fournier*, 376 A.2d at 102; *see Sabasteanski*, 232 A.2d at 525-26 (no constitutional power to retrospectively alter vested rights in property). The fact that the relevant contract gives NECEC LLC a leasehold interest, *i.e.*, a property right, *see H&B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 13, 246 A.3d 1176, strengthens NECEC LLC's legal interest. *See Fournier*, 376 A.2d at 102 (citing *Portland Sav. Bank v. Landry*, 372 A.2d 573 (Me. 1977) (prohibiting retroactive application of law shortening the redemption period available to a mortgagor after default under the Contracts Clause)).

[30] The reason for this rule is "a simple constitutional principle: *government must keep its word*." Laurence Tribe, American Constitutional Law § 9-7 at 619 (2d ed. 1988); *see Rediscovering the Contract Clause*, 97 HARV. L. REV. 1414, 1429 (1984) ("the imperative that government accommodate private expectations by acting only pursuant to rules fixed and announced beforehand demands that the legislature's discretion to repudiate the state's own obligations be strictly constrained." (footnote omitted)).

deference afforded, the State violated the Contract Clause by terminating the BPL Lease when the purported state interest of requiring legislative approval of public land leases existed when the parties entered the lease. *U.S. Trust*, 431 U.S. at 31. This conclusion is buttressed by the fact that the retroactivity clause of Section 1—reaching back to a mere 3 months before BPL and CMP entered into their original 2014 lease agreement—targets this specific contract. *See* A.100, 102, 104-07, ¶¶ 90, 95–96, 102; A.146, ¶ 23. The Initiative cannot retroactively abrogate the BPL Lease in such circumstances.

IV. The Business Court's weighing of the other preliminary injunction factors was tainted by legal error.

Plaintiffs' strong showing of likelihood of success on the merits reduces the necessary showing on the remaining preliminary injunction factors. *Astra U.S.A., Inc.*, 94 F.3d at 743. Plaintiffs have carried their burden as to each factor.

A. The Business Court erred by concluding that neither constitutional injury nor non-redressable economic harm is irreparable.

An "irreparable injury" is one "for which there is no adequate remedy at law." *Bar Harbor Banking & Tr. Co. v. Alexander*, 411 A.2d 74, 79 (Me. 1980). The Business Court concluded that a constitutional violation is irreparable only if it creates imminent threat of civil or criminal liability or invades certain limited rights. A.59-61. It also concluded that economic injury is never irreparable, and in this case is speculative. A.62-63. The court erred; Plaintiffs will suffer irreparable harm absent an injunction.

First, "a prospective violation of a constitutional right constitutes irreparable injury." *Gordon v. Holder*, 721 F.3d 638, 653 (D.C. Cir. 2013) (quotation marks omitted);

see Am. Trucking Ass'ns v. City of Los Angeles, 559 F.3d 1046, 1058 (9th Cir. 2009); *Condon v. Andino, Inc.*, 961 F. Supp. 323, 331 (D. Me. 1997). A threatened constitutional violation alone thus satisfies the irreparable injury prong. *Davis v. Dist. of Columbia*, 158 F.3d 1342, 1346 (D.C. Cir. 1998) (suits alleging "threatened invasion of a constitutional right do not ordinarily require proof of any injury other than the threatened constitutional deprivation itself"). Even if it were necessary to show a threat of penalties, Plaintiffs face such a threat: comply with the Initiative or risk fines. *See, e.g.*, 38 M.R.S. § 349 (DEP may impose penalties); 35-A M.R.S. § 1508-A (same for PUC). Further, violations of due process and separation of powers – not just infringements of free speech – cause irreparable harm. *Gordon*, 721 F.3d at 653; *City of Evanston v. Barr*, 412 F. Supp. 3d 873, 886 (N.D. Ill. 2019). Courts have similarly found that the loss of vested property rights is irreparable because real property interests are of unique importance. *See K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 915 (1st Cir. 1989); *South Lyme Prop. Owners Ass'n v. Town of Old Lyme*, 121 F. Supp. 2d 195, 204-05 (D. Conn. 2000); *Wal-Mart Stores, Inc. v. Cnty. of Clark*, 125 F. Supp. 2d 420, 429 (D. Nev. 1999).

Second, the economic harm here is neither compensable nor speculative. Economic injuries are irreparable where monetary damages are not available or otherwise do not constitute adequate relief. *See Rosario-Urdaz v. Rivera-Hernandez*, 350 F.3d 219, 221–22 (1st Cir. 2003) (irreparable harm where plaintiff suffered economic damages, but could not recover against state entity). The question, therefore, is not whether the injury is economic, but whether it can be compensated. In this proceeding,

Defendants cannot make Plaintiffs whole for their economic injuries from delay. *Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429 (irreparable harm in vested rights case because delay costs could not be recovered from county). And those injuries are far from speculative. A.260-64, ¶¶ 24-31. Plaintiffs face prohibitive delay-driven costs exceeding $110 million for just an 18-month delay. A.261-62, ¶¶ 26-28. The Business Court never considered these costs, or Plaintiffs' inability to recover them. Moreover, no party contested Plaintiffs' evidence that even an 18-month delay – hardly excessive for a full trial and appeal in a case of this complexity – would make it unlikely that the Project could achieve commercial operation before the contractual deadline of August 23, 2024, or the extended deadline of August 23, 2025. A.124, ¶ 137; A.262-64, ¶¶ 30-31; A.245-46, ¶ 61.[31] The record therefore demonstrates that delayed construction threatens cancellation of the Project.

B. The Business Court erred by declining to consider the harm that would flow from failing to enter an injunction.

In concluding that balancing the hardships weighed against an injunction, the Business Court erred by ignoring all of the long-term harms from failing to enter an injunction and all of the long-term benefits from granting an injunction. A.63-66. The court's skewed approach was improper as a matter of law.

[31] The Business Court speculated that Plaintiffs could renegotiate this deadline, faulting Plaintiffs for failing to explain why that is impossible. A.63. The possibility of renegotiating the TSAs with the EDCs, however, is unknowable. One thing is uncontradicted: the TSAs contractually obligate Plaintiffs to complete the project by August 23, 2025 at the very latest and failure to grant an injunction threatens that date.

First, the court's erroneous irreparable harm analysis affected its balancing of hardships. The court's failure to recognize the import of a constitutional violation meant that it failed to weigh that injury against any injury from temporarily enjoining the Initiative. *See Gordon*, 721 F.3d at 653 (potential deprivation of constitutional right outweighs countervailing interests). Similarly, the court neglected to consider that Plaintiffs would confront massively escalated costs related to demobilization, remobilization, and increased fixed costs as well as lost revenues – costs that threaten the viability of the Project. A.261-62, ¶¶ 26-29; A.245-46, ¶¶ 61-62. Its failure to weigh that injury in the balancing of harms was also erroneous. *See Wal-Mart Stores, Inc.*, 125 F. Supp. 2d at 429 (increased costs from delay weighed in favor of injunction).

Second, the court improperly tilted the scales by expressly excluding from its analysis the harm that would flow from halting the Project and losing its many benefits to Maine. As this Court has already recognized, the Project will (1) produce an average of 1,600 jobs annually during construction and 300 jobs during operation; (2) enhance transmission and supply reliability; (3) lower electricity costs; (4) remove upwards of 3.6 million metric tons of carbon emissions annually from the atmosphere (the equivalent of removing 700,000 cars from the road) in an effort to fight climate change; and (5) provide approximately $250 million in rate relief, economic development, and other benefits to Maine and its residents. A.264-68, ¶¶ 32-33; *see NextEra*, 2020 ME 34, ¶ 30, 227 A.3d 1117. The DEP likewise found that the Project would address "the single greatest threat to Maine's natural environment," namely, climate change, by

reducing GHG emissions. A.90, ¶ 53. These and the other project benefits stand to be lost to the State forever if the Project is cancelled. A.264-69, ¶¶ 32-34.

C. The Business Court erred by concluding that the method of adopting a law affects the public interest analysis.

The Business Court also erred in assessing the public interest by focusing exclusively on the public's interest in enforcing a direct initiative. The means of adopting legislation is irrelevant to the public interest analysis; popular enactment does not preclude injunctive relief by fixing the public interest in favor of the challenged statute. It "is clearly in the public's interest" to enjoin a constitutional violation, *City of Evanston*, 412 F. Supp. 3d at 887, whether that violation stems from representative or direct democracy. The Constitution is itself "the will of the people," and its expression of that will prevails over any initiative. *Opinion of the Justices*, 2017 ME 100, ¶ 8, 162 A.3d 188. To find otherwise undermines the role of judicial review in safeguarding constitutional rights, and flies in the face of prior judicial consideration of challenges to direct initiatives. *See id.*; *see also* Erwin Chemerinsky, *Challenging Direct Democracy*, 2007 MICH. ST. L. REV. 293, 294-301 (2007). Just as enactment of a law by a veto-proof legislative majority is irrelevant to the public interest, so is enactment by popular vote.

The court's narrow approach once again led it to ignore the many benefits of the Project – including its support of hundreds of jobs, increased transmission reliability, reduced GHG emissions, and economic benefits package – all of which demonstrate that the public interest will be served by an injunction. *See W. Watersheds Proj. v. Salazar*,

692 F.3d 921, 923 (9th Cir. 2012) (weighing public interest in the "goal of increasing the supply of renewable energy and addressing the threat posed by climate change"); *W. Watersheds Proj. v. Bureau of Land Mgmt.*, 774 F. Supp. 2d 1089, 1003-04 (D. Nev. 2011) (public interest favored allowing project to proceed because it created hundreds of jobs, promoted important "clean energy goals" by reducing GHG emissions, and would lead to millions of dollars in taxes), *aff'd* 443 F. App'x 278 (9th Cir. 2011); *Columbia Gas Transmission, LLC v. 1.092 Acres of Land in Tp. of Woolwich*, 2015 WL 389402, at *5 (D.N.J. Jan. 28, 2015) (considering public interest in "reliability of the energy infrastructure"). The court also disregarded the fact that – based on its many benefits – the PUC determined that there is a "public need" for the NECEC Project. *See* 35-A M.R.S. § 3132(6). Viewed more broadly as the proper legal standard requires, the public interest supports entry of an injunction.

CONCLUSION

The Maine Constitution prohibits the exercise of legislative power to deprive a developer of the right to complete a project, after executive agencies have issued final permits (in certain instances, affirmed by this Court) authorizing construction and operation of the project, and after substantial construction has been undertaken and substantial expenditures have been made. Likewise, the Constitution prohibits legislative interference with final agency and judicial decisions, and the impairment of contracts. Because the Initiative contravenes basic constitutional guarantees, this Court should vacate the Order and direct the Business Court to enter a preliminary injunction.

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CERTIFICATE OF SERVICE

I, John J. Aromando, Esq., hereby certify that pursuant to agreement of the parties, a copy of this Brief of Appellants NECEC Transmission LLC and Avangrid Networks, Inc. was served via email only upon counsel at the address set forth below on February 16, 2022:

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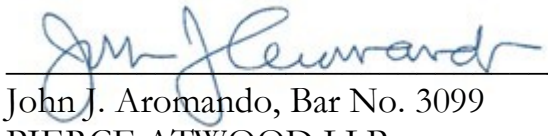

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