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Case Note: Avangrid Networks, Inc. v. Secretary of State

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ABSTRACT

Citizen initiatives and referendums are important tools for participatory democracy. Because initiatives often concern contentious public policy matters, opponents of pending initiatives have at times turned to the courts to prevent particular initiatives from appearing on upcoming ballots. Courts typically will adjudicate such pre-election challenges when plaintiffs assert the proscribed procedural requirements for voting on an initiative have not been met or when plaintiffs allege an initiative's subject-matter is outside the constitutionally delineated scope of permissible initiative content. However, because of the ripeness justiciability doctrine that requires a concrete, certain, and immediate legal problem, courts generally will not adjudicate pre-election challenges that claim an initiative would be substantively unconstitutional if enacted. Instead, courts reserve adjudicating substantive challenges until after an election if voters approve the initiative—i.e., when the controversy has become ripe for review. In *Avangrid Networks, Inc. v. Secretary of State*, Maine's Supreme Judicial Court held that a pending initiative should be excluded from the November 2020 ballot because the initiative sought to exercise authority beyond the legislative power conferred on the electorate by the Maine Constitution. This Note argues the court's analysis improperly went beyond the limited question of whether the initiative sought to exercise power that is specifically delegated to other authorities by the State constitution and instead conducted a substantive review of the constitutionality of the measure if it were to be enacted.

I. INTRODUCTION

In *Avangrid Networks, Inc. v. Secretary of State*, the Law Court[1] was presented with the question of whether a pending ballot initiative—the proponents of which had met the procedural requirements for inclusion on the November 2020 ballot—should be excluded from the ballot because the proposed initiative fell outside of the scope of permissible power conferred on the citizenry by the direct initiative provision of the Maine Constitution.[2] Courts typically do not allow challenges to the substantive validity of pending ballot initiatives prior to elections for a variety of

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1. Maine's highest court, the Maine Supreme Judicial Court, is referred to as the "Law Court" when deciding cases in its appellate capacity. *Supreme Judicial Court*, STATE OF ME. JUD. BRANCH, https://www.courts.maine.gov/maine_courts/supreme/index.shtml [https://perma.cc/3JVB-HT2K] (last visited Apr. 22, 2021).

2. Avangrid Networks, Inc. v. Sec'y of State, 2020 ME 109, ¶¶ 1, 5, 7, 10, 237 A.3d 882.

reasons, including the justiciability doctrine of ripeness.[3] The ripeness requirement, which mandates that a case present a concrete, certain, and immediate legal problem, is generally not met in the ballot initiative context because the initiative may not pass at the ballot box.[4] Yet courts do typically allow limited pre-election review of a pending initiative when an initiative is challenged for violating subject-matter restrictions placed on the initiative process by the state constitution or enacting statute.[5]

In *Avangrid Networks*, the Law Court concluded a pending ballot initiative should be excluded from the ballot in an upcoming election "because it exceeds the scope of the legislative powers conferred" by the Maine Constitution.[6] However, this decision was not reached through an evaluation of whether the initiative violated subject-matter restrictions placed on the initiative power within the State constitution. Instead, the Law Court conducted a substantive review of whether the initiative would be constitutional if enacted.

This Note begins with a short overview of the origins of direct initiatives in the United States and the State of Maine and then outlines the three general categories of lawsuits challenging ballot initiatives before elections are held. The background information leading to this case is then discussed, followed by an evaluation of the Superior Court and Law Court decisions. This Note concludes with an argument that the Law Court erred by conducting a subject-matter review of the proposed measure that went beyond the limited question of whether the initiative sought to exercise power that is specifically delegated to other authorities by the State constitution. In doing so, the Law Court conducted a substantive review of the underlying constitutionality of the measure if enacted, an analysis that should properly be reserved for after the election—only if the initiative were to pass and the issue become ripe.

II. BACKGROUND

A. Origins of Ballot Initiatives in the United States and the State of Maine

Government consultation of the populace for political matters began in the United States at the nation's founding, when Rhode Island submitted the United States Constitution to a popular referendum.[7] Yet for more than a century following the nation's founding, no avenue existed for citizens to participate directly in the legislative process at the state level.[8] That began to change during the Populist Movement in the 1890s when direct democracy became considered an important legislative reform, and a call for "a system of direct legislation, through the initiative and referendum, under proper constitutional safeguards" was included in the

3. James D. Gordon III. & David B. Magleby, *Article: Pre-Election Jud. Rev. of Initiatives & Referendums*, 64 NOTRE DAME L. REV. 298, 304-17 (1989).

4. *See* Wagner v. Sec'y of State, 663 A.2d 564, 567-68 (Me. 1995).

5. Gordon & Magleby, *supra* note 3, at 303, 313-17.

6. *Avangrid Networks*, 2020 ME 109, ¶ 38, 237 A.3d 882.

7. Gordon & Magleby, *supra* note 3, at 298.

8. *See* Initiative, Referendum and Recall, NAT'L CONF. OF STATE LEGISLATURES (Sept. 20, 2012), https://www.ncsl.org/research/elections-and-campaigns/initiative-referendum-and-recall-overview.aspx [https://perma.cc/G8WP-2MDG].

People's Party platform of 1896.[9] In 1898, South Dakota became the first state to adopt the initiative process as part of its state constitution.[10] South Dakota's lead was followed closely by other states that added versions of the initiative process to their constitutions, including: Utah in 1900, Oregon in 1902, Nevada in 1904, and Oklahoma, which included an initiative provision in its founding constitution in 1907.[11]

In Maine in the early 1900s, there was a general frustration with the status of the state's economy, believed to be partially caused by the state government's low tax rates on timberlands and railroads.[12] Observers in Maine looked to the adoption of initiative procedures in the western states noted above, and began to view a policy of direct legislation as a potential remedy for the state's economic and governance issues.[13]

A resolve to amend the State constitution to include a citizens' initiative procedure was first introduced to the Legislature in 1903 and was considered thoroughly in the following legislative session in 1905.[14] Although the proposal generated significant support—enough to pass with a majority in both the House and Senate—it failed to reach the two-thirds majority threshold necessary for amendments to the State constitution.[15] Yet support within Maine continued to grow for the citizens' initiative and referendum constitutional amendment and both major political parties supported them in their party platforms the following election season.[16] During the next legislative session, the resolve was passed in both legislative houses with the required two-thirds majority.[17] In 1908, the constitutional amendment was referred to the voters for final enactment and was approved by a vote of 53,785 to 24,542, winning a majority in every county in the state.[18] The new law became part of Maine's constitution in 1909.[19]

The amendment added seven sections to Article IV, part three of the Maine Constitution,[20] with two major provisions. The first aspect of the amendment deals with the "people's veto" which allows the electorate to conduct a referendum on any act or resolve of the Legislature.[21] The second aspect of the amendment authorizes the people to propose any "bill, resolve, or resolution" which will be submitted to the Legislature for consideration if the required number of signatures is met.[22] If the

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9. People's Party Platform Adopted at St. Louis, July 24, 1896, VASSAR COLL., http://projects.vassar.edu/1896/peoplesplatform.html [https://perma.cc/A8WN-KEK9], (last visited Apr. 22, 2021); *see also* Jeremy R. Fischer, *Exercise the Power, Play by the Rules: Why Popular Exercise of Legislative Power in Maine Should Be Constrained by Legislative Rules*, 61 ME. L. REV. 503, 506 (2009).

10. Initiative, Referendum and Recall, *supra* note 8.

11. J. William Black, *Maine's Experience with the Initiative & Referendum*, ANNALS AM. ACAD. POL. & SOC. SCI. 159, 160-61 (1912).

12. *Id.* at 161-63.

13. *Id.* at 163-64.

14. Fischer, *supra* note 9, at 507.

15. *Id.*

16. *Id*.

17. *Id.*

18. Black, *supra* note 11, at 166.

19. *Id.*

20. Fischer, *supra* note 9, at 507.

21. Black, *supra* note 11, at 166-67.

22. Me. Const. art. IV, pt. 3, § 18.

Legislature declines to enact the proposed initiative, or if the proposed statute is passed by the Legislature but vetoed by the governor, the bill will then be referred to the electors to vote directly on whether the proposed initiative should be enacted.[23]

The citizens' initiative provision was used sparingly in the decades following Maine's constitutional amendment, for a total of seven initiatives over the course of the first sixty years the option was available.[24] However, use of the initiative process in Maine ramped up starting in the 1970s.[25] Associated with the initiative process's more frequent use in recent decades, several legal challenges have led the Law Court to weigh in on the purpose of the citizens' initiative provision and the appropriate judicial review of such measures. The Law Court views the overall purpose of citizens' initiatives to be "the encouragement of participatory democracy."[26] The court has opined that through the constitutional amendment, "the people, as sovereign, have retaken . . . the legislative power, and that a particular undertaking by them to exercise that power shall be liberally construed to effectuate the purpose."[27] The ability to exercise the legislative power is not a privilege but rather a right. Citizens' initiatives "cannot be said merely to permit the direct initiative of legislation upon certain conditions. Rather, it reserves the people the right to legislate by direct initiative if the constitutional conditions are satisfied."[28]

B. Pre-Election Challenges to Ballot Initiatives

Instances of pre-election challenges to ballot initiatives can be properly distinguished into three broad categories: (1) challenges to the substance of the measure alleging it would be invalid if enacted for conflicting with a paramount law; (2) challenges based on an alleged failure to meet the constitutional or statutory procedural requirements necessary to qualify for an election; and (3) challenges alleging the subject-matter of the measure falls outside of the permissible scope for an initiative.[29]

Most courts will not allow pre-election review of the substantive validity of a measure for concerns regarding "issuing an advisory opinion, violat[ing] ripeness requirements and the policy of avoiding unnecessary constitutional questions, and . . . unwarranted judicial intrusion into a legislative process."[30] Ripeness is a justiciability doctrine that prevents "judicial entanglement in abstract disputes, avoid[s] premature adjudication, and protect[s] agencies from judicial interference until a decision with concrete effects has been made . . . ."[31] For a case to be ripe,

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23. *Id*.

24. Christine I. Dulac, *Researching Initiatives & Referenda: A Guide for Maine*, 26 LEGAL REF. SERV. Q. 97, 100 (2007).

25. *Id*.

26. Allen v. Quinn, 459 A.2d 1098, 1102 (Me. 1983).

27. Op. of the Justices, 275 A.2d 800, 803 (Me. 1971). *See also* League of Women Voters v. Sec'y of State, 683 A.2d 769, 771 (Me. 1996) ("When the people enact legislation by popular vote, we construe the citizen initiative provisions of the Maine Constitution liberally in order to facilitate the people's exercise of their sovereign power to legislate.")

28. McGee v. Sec'y of State, 2006 ME 50, ¶ 25, 896 A.2d 933.

29. Gordon & Magleby, *supra* note 3, at 302-03.

30. *Id*. at 304.

31. Johnson v. City of Augusta, 2006 ME 92, ¶ 7, 902 A.2d 855.

"there must be a genuine controversy and a concrete, certain, and immediate legal problem."[32] Speculative concerns about future hardships do not meet ripeness requirements.[33]

Substantive challenges to ballot initiatives pre-election are generally not ripe for review because the initiative may not be approved by the voters[34] and thus does not present concrete, certain, and immediate legal problems. In Maine, the Law Court has embraced the view that substantive challenges to ballot initiatives ought not be adjudicated prior to an election for lack of ripeness because "[j]usticiability requires that there be a real and substantive controversy based upon an existing set of facts, 'not upon a state of facts that may or may not arise in the future.'"[35] Adjudicating the substantive constitutionality of a ballot initiative pre-election is improper because "the initiative may never become effective. Thus, [the court is] not presented with a concrete, certain, or immediate legal problem."[36]

Conversely, courts generally do allow pre-election challenges regarding the procedural requirements of the ballot initiative process—for example, the form of the petition, minimum number of signatures, administrative deadlines, etc.[37] This makes sense when procedural limitations are considered as jurisdictional limitations because "government officials do not have jurisdiction to conduct an election on a measure if these requirements have not been met, and thus the issue is immediately justiciable."[38] Relatedly, without pre-election judicial review of procedural matters, government officials overseeing the process could abuse their discretion and refuse to perform their statutorily-mandated duties, which in the extreme could "completely nullify the initiative and referendum processes."[39] The Law Court subscribes to the view that procedural challenges are appropriate for pre-election review and has weighed in on the procedural validity of ballot initiatives on numerous occasions.[40] The court adjudicated such a challenge in a separate proceeding concerning the validity of petition signatures for the ballot initiative that is the subject of this Note.[41]

Finally, courts generally allow pre-election challenges as to whether the subject-matter of a ballot initiative is within the confines of what is allowed by state constitutions.[42] State constitutions or statutes authorizing ballot initiatives typically require that initiatives do certain things, like propose constitutional amendments or statutes. Some also explicitly prohibit ballot measures from addressing certain

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32. Clark v. Hancock Cnty. Comm'rs, 2014 ME 33, ¶ 19, 87 A.3d 712 (quoting Marquis v. Town of Kennebunk, 2011 ME 128, ¶ 18, 36 A.3d 861).

33. *Id.* at ¶ 20.

34. Gordon & Magleby, *supra* note 3, at 310.

35. Lockman v. Sec'y of State, 684 A.2d 415, 420 (Me. 1996) (quoting Connors v. Intern. Harvester Credit Corp., 447 A.2d 822, 824 (Me.1982)); *see also* Wagner v. Sec'y of State, 663 A.2d 564, 567-68 (Me. 1995) ("Any determinations about the constitutionality of the initiative if enacted would be premature at this time and more appropriately left for specific challenges in the future.").

36. *Wagner*, 663 A.2d at 567.

37. Gordon & Magleby, *supra* note 3, at 313.

38. *Id.* at 314.

39. *Id.* at 315.

40. *See* Friends of Cong. Square Park v. City of Portland, 2014 ME 63, ¶ 1, 91 A.3d 601; Morris v. Goss, 147 Me. 89, 90, 83 A.2d 556, 557-58 (1951).

41. Reed v. Sec'y of State, 2020 ME 57, ¶ 1, 232 A.3d 202.

42. Gordon & Magleby, *supra* note 3, at 313.

topics, such as appropriations, administrative matters, the court system, or zoning.[43] A major rationale for adjudicating subject-matter challenges pre-election is similar to that of procedural challenges, namely that the proponents of an initiative may not have the right to make use of the initiative process at all.[44] For subject-matter challenges, "the factual controversy—whether these requirements are met—exists before the election."[45] Prior to the *Avangrid Networks* ruling, the Law Court also seemed to have endorsed this view, though with regard to the "people's veto" rather than the direct ballot initiative.[46]

C. The Public Utilities Commission and the New England Clean Energy Connect Project

The Public Utilities Commission (hereinafter "the Commission") regulates electric, natural gas, telecommunications, and water utilities throughout Maine.[47] The Commission was created by Maine's Legislature in 1913 to have experts regulate and control all public service corporations in a way that would allow for swifter and more equitable investigations of conditions, hearings of parties, and grants of relief, than otherwise possible if the Legislature retained control.[48] In creating the Commission, the Legislature delegated its entire authority to regulate and control public utilities to the Commission.[49] Among its many responsibilities, the Commission is tasked, by statute, with approving the construction of new transmission lines through the granting of a certificate of public convenience and necessity.[50] The statutes governing the Commission do not lay out comprehensive guidelines for when a transmission line should be granted a certificate of public convenience and necessity.[51] However, the Commission has promulgated specific, legislature-approved rules regarding the filing requirements and standards for granting these certificates.[52]

In 2008, Massachusetts enacted legislation requiring electricity distribution

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43. *Id.* at 303.

44. *Id.* at 314 ("The issue raised is not the hypothetical question whether the law, if passed, would be constitutionally defective; rather, it is the present and ripe question whether the measure's proponents are entitled to invoke the direct legislation process at all. The case is concrete and specific, and the record will not be improved by waiting until after the election to see how the law is applied in a specific case.").

45. *Id.*

46. *See Morris*, 147 Me. at 89, 93-94, 105-09, 83 A.2d at 556, 559, 565-67 (1951) (determining the people's veto was not available for emergency tax legislation because the Constitution exempted emergency legislation from the referendum process); Moulton v. Scully, 111 Me. 428, 444-51, 89 A. 944, 952-55 (Me. 1914) (declining to delay a resolve of the Legislature removing the Sheriff of Cumberland County because there was no need to allow for time for a petition for a people's veto as the impeachment power of the Legislature was beyond the scope of the people's veto power).

47. *About MPUC*, ME. PUB. UTILS. COMM'N, https://www.maine.gov/mpuc/about/index.shtml [https://perma.cc/JLS3-EHDL] (last visited Apr. 22, 2021).

48. *In re* Searsport Water Co., 118 Me. 382, 108 A. 452, 457 (1919).

49. Mechanic Falls Water Co. v. Pub. Utils. Comm'n, 381 A.2d 1080, 1090 (Me. 1977).

50. 35-A M.R.S.A. § 3132 (2019) ("[A] person may not construct any transmission line . . . unless the commission has issued a certificate of public convenience and necessity approving construction.").

51. *Id.* § 3121(6) ("In its order, the commission shall make specific findings with regard to the public need for the proposed transmission line.")

52. 65-407 C.M.R. ch. 330 (2012).

companies to solicit and enter into long-term contracts for clean-energy generation.[53] Central Maine Power and Hydro Renewable Energy, a United States affiliate of Hydro-Quebec, submitted a bid for the New England Clean Energy Connect project (NECEC).[54] In 2017, Central Maine Power filed a petition with the Commission for a certificate of public convenience and necessity in order to construct a 145.3 mile transmission line from the Canadian border in Beattie Township to the city of Lewiston.[55]

Extensive public comment and evidentiary hearings were held on the proposed project between 2018 and early 2019.[56] In May 2019, the Commission voted unanimously to grant Central Maine Power a certificate of public convenience and necessity for the NECEC project.[57] NextEra Energy Resources, LLC, an opponent of the newly approved transmission line, appealed the Commission's decision to the Law Court, which affirmed the Commission's decision.[58] The court determined sufficient evidence existed in the record to support the Commission's decision, and that proper procedure had been followed.[59]

Following the Commission's grant of the certificate of public convenience and necessity, opponents of NECEC began gathering signatures for a citizens' initiative proposing a resolution that would require the Commission to amend its existing order and deny the request for a certificate of public convenience and necessity.[60] The text of the initiative in question reads:

> *Sec. 1. Amend order. Resolved:* That within 30 days of the effective date of this resolve and pursuant to its authority under the Maine Revised Statutes, Title 35-A, section 1321, the Public Utilities Commission shall amend "Order Granting Certificate of Public Convenience and Necessity and Approving Stipulation," entered by the Public Utilities Commission on May 3, 2019 in Docket No. 2017-00232 for the New England Clean Energy Connect transmission project, referred to in this resolve as "the NECEC transmission project." The amended order must find that the construction and operation of the NECEC transmission project are not in the public interest and that there is not a public need for the NECEC transmission project. There not being a public need, the amended order must deny the request for a certificate of public convenience and necessity for the NECEC transmission project.[61]

Proponents of the initiative challenging the transmission line submitted more than the required number of signatures, and the Secretary of State determined the initiative petition was valid.[62] The Secretary of State's verification of the ballot initiative was unsuccessfully challenged in superior court and eventually affirmed by the Law Court.[63] The plaintiff in that case asserted the Secretary of State should

53. NextEra Energy Res., LLC v. Me. Pub. Utils. Comm'n, 2020 ME 34, ¶ 2, 227 A.3d 1117.
54. *Id.*
55. *Id.* ¶ 1.
56. *Id.* ¶¶ 5-9.
57. *Id.* ¶ 10.
58. *Id.* ¶¶ 11, 43.
59. *Id.* ¶ 43.
60. Avangrid Networks, Inc. v. Sec'y of State, 2020 ME 109, ¶ 5, 237 A.3d 882.
61. *Id.*
62. Reed v. Sec'y of State, 2020 ME 57, ¶ 10, 232 A.3d 202.
63. *Id.* ¶¶ 1, 8.

have invalidated more of the initiative's signatures,[64] a pre-election challenge that fell squarely within the permissible procedural category discussed above.

D. Superior Court Decision

On May 12, 2020, shortly after the Law Court affirmed the Secretary of State's verification of the petition signatures, Central Maine Power's parent company, Avangrid Networks, LLC, filed a complaint against the Secretary of State.[65] Avangrid sought (1) "a declaratory judgment that the initiative exceed[ed] the scope of the legislative powers reserved to the people," among other claims, and (2) an injunction to prevent "the Secretary from including the initiative on the November 3, 2020 ballot."[66] Industrial Energy Consumer Group, whose members are large industrial energy consumers that obtain permits from the state,[67] and the Maine State Chamber of Commerce intervened as plaintiffs.[68] These plaintiffs, along with Avangrid, argued that the initiative should not be submitted to the electors because it exceeded the scope of the legislative power of the direct initiative provision by usurping executive and judicial branch powers.[69]

NextEra Energy Resources, LLC, along with Mainers for Local Power, a political action committee funded by natural gas companies,[70] and nine Maine citizens who stated they wished to vote for the initiative at the November election,[71] intervened as defendants.[72] These defendants argued that the plaintiffs' constitutional challenges were not ripe for judicial review before the election and that because the required signatures were obtained, the initiative must be submitted to the voters.[73]

The superior court dismissed the complaint, finding the plaintiffs' challenges to the initiative were substantive and not appropriate for pre-election review.[74] The court began by consulting Law Court decisions and the text of the initiative provision within the Maine Constitution to note that, in general, "pre-election review is not available to consider challenges to the validity of proposed initiative legislation if it were to be enacted."[75] In the court's view, the bar on pre-election review of the substantive validity of proposed initiatives is consistent with the purpose of the direct initiative provision within the Constitution: to encourage citizen participation in

64. *Id.* ¶ 1.

65. *Avangrid Networks*, 2020 ME 109, ¶ 7, 237 A.3d 882.

66. *Id.*

67. Brief for Appellant Industrial Energy Consumer Group at 3, Avangrid Networks, Inc. v. Sec'y of State, No. CV-20-206, 2006 Me. Super. LEXIS 90 (No. CUM-20-181), 2020 WL 6581246.

68. *Avangrid Networks*, 2020 ME 109, ¶ 1, 237 A.3d 882.

69. *Id.* ¶ 11.

70. Steve Mistler, *Gas Companies to Spend $6M to Boost Opposition to CMP Transmission Project*, ME. PUB. (Jul. 16, 2020, 2:42 PM), https://www.mainepublic.org/post/gas-companies-spend-6m-boost-opposition-cmp-transmission-project [https://perma.cc/6NZW-4ZVE].

71. Avangrid Networks, Inc. v. Sec'y of State, No. CV-20-206, 2020 Me. Super. LEXIS 90, at *2, n.1 (Jun. 29, 2020).

72. *Avangrid Networks*, 2020 ME 109, ¶ 7, 237 A.3d 882.

73. *Avangrid Networks*, 2020 Me. Super. LEXIS 90, at *2.

74. *Id.* at *13.

75. *Id.* at *8-9.

democracy.[76] The court acknowledged that Law Court decisions have indicated there are instances in which limited pre-election judicial review is appropriate to determine if the subject-matter of a proposed initiative is within the scope of the people's legislative authority.[77] However, those Law Court decisions dealt with proposed initiatives that conflicted with other procedural requirements within the Maine Constitution, not with challenges to the substantive validity of the initiatives if enacted.[78]

In its decision, the superior court recognized that the plaintiffs raised serious separation of powers issues in that the initiative, if enacted, would overturn a single executive branch agency order against the findings of that agency and the Law Court's affirmance of that order.[79] But the court explained that these separation of powers concerns merged with the plaintiffs' principle argument that the initiative was beyond the scope of the people's legislative power.[80] Thus, the plaintiffs actually asserted a substantive challenge to the validity of the initiative which was only appropriate to review after the election if the initiative was passed by the voters.[81] The superior court therefore dismissed the complaint and the plaintiffs promptly appealed the dismissal to the Law Court.[82]

III. LAW COURT DECISION

A. Summary of the Decision

The Law Court identified the narrow issue in the case as "whether the proposed citizens' initiative falls within the scope of the citizens' constitutional power to legislate" as created by Article IV, Part 3, Section 18 of the Maine Constitution.[83] The court ultimately answered this question in the negative, concluding that the initiative would improperly interfere with an executive agency's adjudicatory power and thus was beyond the scope of the people's power to initiate legislation.[84] To reach this conclusion, the court first considered the appropriateness of pre-election review of initiatives generally.[85] Then, it turned its focus to the subject-matter of the initiative at issue and examined separation of powers principles, the legislative character of the citizens' initiative constitutional provision, and the nature of the powers held by the Public Utilities Commission.[86]

In evaluating pre-election review of initiatives, the court first reiterated the superior court's view that the constitutionality of the substance of a proposed initiative is not ripe for judicial review pre-election.[87] Legal challenges of this sort

76. *Id.* at *9.
77. *Id.* at *8.
78. *Id.* at *8-9.
79. *Id.* at *14.
80. *Id.* at *10-11.
81. *Id.* at *11-12.
82. Avangrid Networks, Inc. v. Sec'y of State, 2020 ME 109, ¶ 1, 237 A.3d 882.
83. *Id.* ¶ 10.
84. *Id.* ¶¶ 35-38.
85. *Id.* ¶¶ 16-22.
86. *Id.* ¶¶ 23-35.
87. *Id.* ¶ 16.

are not ripe because there is no "concrete, certain, or immediate legal problem," as the initiative may not be enacted.[88] Relatedly, the court pointed to multiple "Opinion of the Justices"[89] indicating that initiatives proposing substantively unconstitutional bills are not subject to pre-election judicial review because of the mandatory language within the Constitution that an initiative "shall be submitted to the electors."[90] Conversely, the court noted that challenges as to whether an initiative has met procedural requirements are appropriate for pre-election review.[91] The court previously reviewed such a procedural challenge regarding the validity of the petition process for the initiative at issue in this case.[92]

Similarly, the court determined that challenges asserting an initiative is outside of the permissible subject-matter of the citizen's initiative power are also reviewable pre-election.[93] The court looked to *Wagner v. Secretary of State*, a case where opponents of a pending ballot initiative asserted that the initiative was beyond the scope of the initiative power because it proposed a constitutional amendment, not legislation, and that the bill would be substantively unconstitutional if enacted.[94] The court in *Wagner* addressed whether the pending initiative actually proposed a constitutional amendment.[95] After determining it did not, the court stopped short of deciding the second question because the issue of whether the bill would be substantively unconstitutional if enacted was not ripe for review.[96] Thus, *Wagner* illustrated for the *Avangrid* court that judicial review of the subject-matter of a pending initiative, in order to determine if the proposed bill is within the scope of Section 18 power, is ripe for review pre-election.[97] After answering this threshold question, the court turned its analysis to the nature of the initiative power and the character of the initiative in this case.

The court began this analysis by briefly outlining the constitutional imperative of separation of powers among the three branches of government.[98] In doing so, the court framed the central question as "whether the initiative proposes an act that is

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88. *Id.* ¶ 16 (quoting Wagner v. Sec'y of State, 633 A.2d 564, 567 (Me. 1995)); *see also* Lockman v. Sec'y of State, 684 A.2d 415, 420 (Me. 1996) ("Justiciability requires that there be real and substantial controversy based upon an existing set of facts, not upon a state of facts that may or may not arise in the future.").

89. *Avangrid Networks,* 2020 ME 109, ¶ 17, 237 A.3d 882. Either branch of the Legislature and the Governor can request the Justices of the Supreme Judicial Court to offer a non-binding opinion on important questions of law. *See* Me. Const. art. VI, § 3; Op. of the Justices, 673 A.2d 693, 695 (Me. 1996).

90. *Avangrid Networks*, 2020 ME 109, ¶ 17, 237 A.3d 882 (quoting Me. Const. art. IV, pt. 3, § 18, cl. 2); *see Op. of the Justices*, 673 A.2d at 697, 698; Op. of the Justices, 623 A.2d 1258, 1264 (Me. 1993).

91. *Avangrid Networks*, 2020 ME 109, ¶ 18, 237 A.3d 882.

92. *Id.*; *see also* Reed v. Sec'y of State, 2020 ME 57, ¶ 1, 232 A.3d 202.

93. *Avangrid Networks*, 2020 ME 109, ¶ 22, 237 A.3d 882.

94. *Id.* ¶ 21 (citing Wagner v. Sec'y of State, 633 A.2d 564, 566-67 (Me. 1995)).

95. *Wagner*, 633 A.2d at 567.

96. *Id.* at 567-68.

97. *Avangrid Networks*, 2020 ME 109, ¶ 22, 237 A.3d 882; *see also* Gordon & Magleby, *supra* note 3, at 314 ("Procedural and subject matter requirements could be viewed as jurisdictional limitations; government officials do not have jurisdiction to conduct an election on a measure if these requirements have not been met, and this issue is immediately justiciable.")

98. *Avangrid Networks*, 2020 ME 109, ¶ 24, 237 A.3d 882.

not legislative and is therefore not within the people's right to initiate legislation."[99] The court then explained how the initiative power is legislative in nature. Tellingly, the initiative provision itself is situated in part 3 of Article IV, the title of which is "Legislative Power."[100] Further, the direct initiative provision is titled, "Direct initiative of legislation."[101] The text of Section 18 authorizes electors to propose any "bill, resolve, or resolution."[102] Although the provision uses the terms "bill, resolve, or resolution" rather than "legislation," the Law Court has previously construed these terms to be legislative acts that "hav[e] the force of law."[103]

The court then pointed to examples where it previously advised certain topics were not within the power of electors to initiate.[104] These examples include a 1963 *Opinion of the Justices* that advised that citizens cannot initiate the issuance of bonds[105] and a 1996 *Opinion of the Justices* that advised that citizens cannot initiate a de facto amendment to the United States Constitution.[106] Further, in *Moulton v. Scully*, the court determined the people's veto power could not be used to check the Legislature's impeachment power, because the impeachment power is separate and distinct from the Legislature's lawmaking power, which is subject to the people's veto.[107]

To complete its analysis of whether the subject-matter of the proposed initiative was within the permissible scope of Section 18 legislative power, the court turned to the power held by the Public Utilities Commission.[108] The court reasoned that regulation of public utilities is within the exclusive authority of the Legislature,[109] and the Legislature "delegated its entire authority over [that regulation] to the Commission."[110] While the Commission exercises its legislative power when rulemaking as an executive agency, the Commission also has an adjudicatory role in executing the law.[111] "A basic tenet of administrative law is that rulemaking is a quasi-legislative act, and that adjudication is a quasi-judicial act."[112] The Commission acts in its quasi-judicial executive capacity when it holds hearings and issues a decision on an application for a certificate of public convenience and necessity.[113] Final adjudicatory decisions are subject to judicial review, rather than

99. *Id.*; Me. Const. art. III.

100. *Avangrid Networks*, 2020 ME 109, ¶ 27, 237 A.3d 882; Me. Const. art. IV, pt. 3.

101. *Avangrid Networks*, 2020 ME 109, ¶ 27, 237 A.3d 882; Me. Const. art. IV, pt. 3, § 18.

102. Me. Const. art. IV, pt. 3, § 18.

103. *Avangrid Networks*, 2020 ME 109, ¶ 26, 237 A.3d 882 (quoting Moulton v. Scully, 111 Me. 428, 448, 89 A. 944 (1914)).

104. *Avangrid Networks*, 2020 ME 109, ¶ 28, 237 A.3d 882.

105. Op. of the Justices, 159 Me. 209, 214-15, 191 A.2d 357, 359 (1963).

106. Op. of the Justices, 673 A.2d 693, 697 (Me. 1996).

107. *Avangrid Networks*, 2020 ME 109, ¶ 29, 237 A.3d 882 (citing *Moulton*, 111 Me. at 447-51, 89 A. at 944).

108. *Avangrid Networks*, 2020 ME 109, ¶ 32, 237 A.3d 882.

109. Auburn Water Dist. v. Pub. Utils. Comm'n, 156 Me. 222, 225, 163 A.2d 743, 744 (1960).

110. New England Tel. & Tel. Co. v. Pub. Utils. Comm'n, 470 A.2d 772, 778 (Me. 1984).

111. *Avangrid Networks*, 2020 ME 109, ¶ 33, 237 A.3d 882 (citing 35-A M.R.S.A. §§ 104, 1301-1323 (2020)).

112. *Id.* ¶ 33 (quoting Forest Ecology Network v. Land Use Regul. Comm'n, 2012 ME 36, ¶ 45 n.11, 39 A.3d 74).

113. *Id.* ¶ 34 (citing 35-A M.R.S.A. §§ 1304, 3132(2), (6) (2020)).

legislative review, in that they can be appealed directly to the Law Court.[114]

The court ultimately concluded the initiative should not be placed on the November ballot because the proposed initiative was not legislation.[115] The court reasoned the proposed initiative is "not legislative in nature because its purpose and effect is to dictate the Commission's exercise of its quasi-judicial executive-agency function."[116] While the Legislature can place constraints on how the Commission exercises its legislative functions, "the Legislature would exceed its legislative powers if it were to require the Commission to vacate and reverse a particular administrative decision the Commission has made."[117] In short, the court concluded that the initiative was actually seeking to mandate an executive action, not a legislative action, and thus the constitutional prerequisite requiring an initiative to propose a "bill, resolve, or resolution" had not been met.[118] Accordingly, the court remanded the case to the "Superior Court to enter a declaratory judgment that the initiative fails to meet the constitutional requirements for inclusion on the ballot because it exceeds the scope of the legislative powers conferred by Article IV, Part 3, Section 18 of the Maine Constitution."[119]

B. The Law Court Should Have Reserved Substantive Review for After the Election (If the Issue Then Became Ripe)

In *Avangrid*, the Law Court correctly recognized the three general categories of lawsuits challenging ballot initiatives and referendums pre-election, as articulated by Gordon and Magleby.[120] While substantive challenges to the validity of an initiative, if enacted, must wait until after the election, questions of whether an initiative has met procedural or subject-matter requirements are appropriate for pre-election judicial review.[121] As Gordon and Magleby articulate, procedural and subject-matter challenges do not involve the same justiciability issues that substantive challenges do, and can be understood as jurisdictional limitations on government officials.[122] "[G]overnment officials do not have jurisdiction to conduct an election on a measure if these [procedural and subject-matter] requirements have not been met, and this issue is immediately justiciable."[123]

Yet, Law Court guidance up until this decision suggests that the appropriate review for subject-matter challenges is more limited than the review the Law Court undertook in *Avangrid*. Prior rulings and opinions indicate that a proposed initiative should only be invalidated in a subject-matter challenge when the initiative explicitly

114. *Id.* ¶ 34 (citing 35-A M.R.S.A. § 1320(1) (2020)).
115. *Id.* ¶ 37.
116. *Id.* ¶ 35.
117. *Id.* ¶ 35.
118. *Id.* ¶¶ 35, 37.
119. *Id.* ¶ 38.
120. Gordon & Magleby, *supra* note 3, at 302-03.
121. *Avangrid Networks*, 2020 ME 109, ¶¶ 16, 18, 22, 237 A.3d 882.
122. Gordon & Magleby, *supra* note 3, at 314.
123. *Id*.

clashes with specific other provisions in the Maine or Federal Constitutions.[124]

However, in *Avangrid*, the Law Court's analysis of the powers of the Public Utilities Commission and whether the Legislature would have the power to enact this type of measure goes too far. Although the court asserted that it conducted a subject-matter review to determine whether the initiative fell within the scope of the people's initiative power, the court actually conducted a substantive review of the constitutionality of the proposed bill if enacted. This type of substantive review is not proper pre-election as it implicates the doctrine against advisory opinions, unnecessarily draws the courts into contentious political disputes, requires courts to rule on issues not yet ripe, and restricts the electorate's ability to express popular opinion.[125] Instead, the Law Court should have applied its previous decisions in *Wagner v. Secretary of State*, *Morris v. Goss*, and *Moulton v. Scully*, as guiding cases for determining the appropriate scope of pre-election subject-matter challenges.[126] In *Wagner v. Secretary of State*, the plaintiffs, opponents of a pending ballot initiative, asserted that the initiative was an attempt to amend the Maine Constitution and that it would be unconstitutional if enacted.[127] The initiative provision within the Maine Constitution explicitly prohibits use of the initiative process to amend the state constitution.[128] The court determined that "the proposed initiative legislation does not present us with a subject-matter beyond the electorate's grant of authority."[129] The court reached this result because, "on its face, the proposed initiative legislation is not a constitutional amendment. It identifies itself as a statutory enactment."[130] The court then declined to evaluate the constitutionality of the initiative if enacted because that question was not ripe for consideration.[131] Inherent in this decision is the premise that if the initiative was, on its face, a constitutional amendment, the court would have stepped in to invalidate it as violating the subject-matter restriction contained within Section 18.

Furthermore, in *Morris v. Goss*, the Law Court determined that the people's veto provision of the Constitution cannot be used to nullify emergency legislation passed by the legislature.[132] In that case, opponents of a newly passed piece of emergency legislation sought a writ of mandamus to compel the Secretary of State to accept petitions invoking the people's veto.[133] The Maine Constitution provides that acts of the Legislature shall not take effect until ninety days after the recess of the session in which they are passed.[134] Importantly, however, "emergency bills" are not subject

124. *See, e.g.*, Wagner v. Sec'y of State, 663 A.2d 564 (Me. 1995); Morris v. Goss, 147 Me. 89, 83 A.2d 556 (1951); Moulton v. Scully, 111 Me. 428, 89 A. 944 (1914).

125. Gordon & Magleby, *supra* note 3, at 304-12.

126. Wagner v. Sec'y of State, 663 A.2d 564 (Me. 1995); Morris v. Goss, 147 Me. 89, 83 A.2d 556 (1951); Moulton v. Scully, 111 Me. 428, 89 A. 944 (1914).

127. *Id.* at 566-67.

128. Me. Const. art. IV, pt. 3, § 18 ("The electors may propose . . . any bill, resolve or resolution . . . but not an amendment to the State Constitution . . . .").

129. *Wagner*, 663 A.2d at 567.

130. *Id.*

131. *Id.* at 567-68.

132. Morris v. Goss, 147 Me. 89, 110, 83 A.2d 556, 567 (1951).

133. *Id.* at 90, 83 A.2d 557-58.

134. Me. Const. art. IV, pt. 3, § 16.

to the ninety-day waiting period.[135] The ninety-day window is critical for the exercise of the people's veto because petitions to initiate such a referendum must be submitted to the Secretary of State within that timeframe.[136] In *Morris*, the court determined that the Legislature made appropriate use of emergency legislation, and that the legislation would not have to wait ninety days to go into effect, and thus that emergency legislation is not subject to the people's veto.[137]

Finally, in *Moulton v. Scully*, the court considered a similar question of whether the Legislature's impeachment authority is subject to the people's veto after the Legislature passed a "resolution" initiating impeachment proceedings for the Sheriff of Cumberland County.[138] The court answered this question in the negative.[139] It reached this conclusion by distinguishing the lawmaking power of the Legislature as defined by Article IV of the Constitution from the Legislature's impeachment authority, "powers somewhat akin to those of a judicial tribunal," contained in a different portion of the Constitution, Article IX, Section 5.[140] The court noted the measure passed by the Legislature was

> in no sense a legislative act, as a law nor a proposed law, but was rather in the nature of a complaint in a criminal proceeding. It was the first step in setting in motion the machinery of removal, and in exercise of an extraordinary power . . . entirely apart from the ordinary powers of legislation . . . .[141]

The court further reasoned that if the impeachment authority contained within Article IX were subject to the people's veto power from Article IV, it would "effectually deprive the Legislature of the power thereby expressly conferred, because if no resolve of this nature can take effect until the expiration of at least ninety days after adjournment . . . the Legislature . . . would then have ceased to be in session and no trial could be had at all."[142]

In addition to the above rulings concerning the scope of the people's initiative and referendum powers, the Legislature has propounded similar questions to the Law Court.[143] While these opinions are not binding precedent of the court,[144] they are instructive of the court's view on referendum and initiative power. In 1963, the Legislature asked the court whether the citizen's initiative could be used to initiate the issuance of bonds.[145] To answer this question, the court looked to Article IX, Section 14, the portion of the Constitution governing issuance of bonds, and determined that the Section "effectively intervenes to prevent the submission to referendum of a proposal of a bill for the issuance of bonds."[146] Similarly, in 1996,

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135. *Id.*
136. Me. Const. art. IV, pt. 3, § 17.
137. *Morris*, 147 Me. at 110, 83 A.2d at 567.
138. Moulton v. Scully, 111 Me. 428, 431-33, 89 A. 944, 946-47 (1914).
139. *Id.* at 446-47, 89 A. at 953.
140. *Id.* at 447, 89 A. at 953.
141. *Id.* at 449, 89 A. at 954.
142. *Id*.
143. *See generally* Op. of the Justices, 673 A.2d 693 (Me. 1996); Op. of the Justices, 159 Me. 209, 191 A.2d 357 (1963).
144. *See generally Op. of the Justices*, 673 A.2d at 695.
145. *Op. of the Justices*, 159 Me. at 214, A.2d at 359.
146. *Id.* at 215, 191 A.2d at 360.

the Legislature asked the court whether electors, through the citizens' initiative provision, can direct the Legislature to make an application to the United States Congress for a constitutional convention.[147] The court said no, responding that Article V of the U.S. Constitution "specifically reserves the power to propose amendments to Congress and the state legislatures."[148]

The cases and opinions detailed above all stand for the same proposition—that the people's veto and citizens' initiative powers do not extend to subject-matters that are specifically conferred to other actors by the Maine or United States Constitutions. In *Wagner*, the limitation against use of initiatives for state constitutional amendments was contained within the citizen's initiative provision itself.[149] In *Morris*, the limitation preventing use of the people's veto on emergency legislation came from the constitution's exemption of emergency legislation from the ninety-day waiting period.[150] In *Moulton*, the constraint on use of the people's veto to check the Legislature's impeachment authority came from the constitution's separate grant of impeachment power in Article IX and its inherent incompatibility with the people's veto provision in Article IV.[151] Similarly, although not binding precedent, the Law Court has advised that Article IX's governance of issuing bonds precludes the electors from doing so using Article IV initiative power,[152] and that Article V of the United States Constitution prevents electors from using the citizens' initiative provision to propose amendments to the United States Constitution.[153] Whether it be for bonds, state or federal constitutional amendments, impeachment or otherwise, a power is beyond the appropriate subject-matter of a people's veto or citizens' initiative if it is expressly conferred elsewhere within the state or federal constitution.

Yet in *Avangrid*, the subject-matter of the proposed initiative, directing the Public Utilities Commission to find NECEC is not in the public interest and to deny a certificate of public convenience and necessity, is plainly not a power allocated to other authorities within the Maine Constitution. The subject-matter of the proposed initiative is not, "on its face," outside the scope of the direct initiative power.[154] To get around this and reach its final result in the case, the Law Court analyzed whether the initiative sought to exercise power that was sufficiently legislative in nature.[155] After evaluating the power and nature of the Public Utilities Commission, the court reasoned that directing a new outcome that overturns an agency's quasi-judicial executive branch final decision, is not a use of legislative power and thus outside the permissible realm of citizens' initiative subject-matter.[156] But, in conducting such an analysis, the court goes beyond a limited review of the subject-matter of the initiative, and instead conducts a substantive review of the constitutionality of the proposed measure if it were to be enacted. In determining whether the proposed

147. *Op. of the Justices*, 673 A.2d at 697.
148. *Id.*
149. *See* Wagner v. Sec'y of State, 663 A.2d 564 (Me. 1995); Me. Const. art. IV, pt. 3, § 18.
150. Morris v. Goss, 147 Me. 89, 110, 83 A.2d 556, 567 (1951).
151. Moulton v. Scully, 111 Me. 428, 449, 89 A. 944, 953-54 (1914).
152. Op. of the Justices, 159 Me. 209, 215, 191 A.2d 357, 360 (1963).
153. Op. of the Justices, 673 A.2d 693, 697 (Me. 1996).
154. Wagner v. Sec'y of State, 663 A.2d 564, 567 (Me. 1995).
155. Avangrid Networks, Inc. v. Sec'y of State, 2020 ME 109, ¶¶ 22-35, 237 A.3d 882.
156. *Id.* ¶ 35.

resolve is legislation, the court is essentially determining whether it would be constitutional for the Legislature to pass such a bill, a determination the court would not be able to conduct before such a bill were enacted.

Unless called upon to do so in a "solemn occasion," the judicial branch categorically does not pass judgment on or invalidate bills pending before the Legislature.[157]

> To express a view as to the future effect and application of proposed legislation would involve the Justices at least indirectly in the legislative process. The separation of powers mandated by article III, section 2, of the Maine Constitution requires that we avoid any such intrusion on the functions of other branches of government. The question of the effect of a statute and its future application is not within the constitutional power of the Justices . . . .[158]

The citizen's initiative power is "simply a popular means of exercising the plenary legislative power."[159] Yet the *Avangrid* court invalidated the substance of a proposed initiative in a way it would be prohibited from doing if the initiative were a regular bill being considered by the Legislature.

In 2019, the Legislature enacted a similar, though not identical, resolve in which it directed the Public Utilities Commission to approve a contract for the Aqua Ventus offshore wind project.[160] The Aqua Ventus resolve did not involve the exact separation of powers concerns at issue in *Avangrid*, because the Commission had not already issued a final judgment that the Legislature was seeking to overturn. However, if the Commission had issued a final decision, and the Legislature sought to direct the Commission to overturn it as the ballot initiative at issue in this case would, the judicial branch could not invalidate such a resolution until after it had been enacted. In such a scenario, the Legislature may well have been unconstitutionally usurping power of the executive or judicial branch, but the courts would not be able to reach that determination until the issue was ripe for review after the resolution was passed.

Prior Law Court guidance lends strong support to the notion that, although citizens' initiatives should be subject to pre-election judicial review considering their subject-matter, an initiative should only be invalidated if it seeks to exercise power in a way plainly inconsistent with the Maine Constitution because that power is expressly conferred on other authorities. In *Avangrid*, the court expands the scope of pre-election subject-matter review of initiatives and effectively conducts a substantive review of the constitutionality of the proposed measure if enacted. Courts would not conduct such an analysis of a bill pending before the Legislature and should not do so for measures proposed through the citizens' initiative provision.

IV. CONCLUSION

This Note argues the Law Court erred in its analysis that the proposed initiative was not sufficiently legislative to fall within the permissible subject-matter of the

157. *See* Me. Const. art. III, §§ 1, 2; Op. of the Justices, 2017 ME 100, ¶¶ 11-15, 162 A.3d 188.
158. Op. of the Justices, 437 A.2d 597, 611 (Me. 1981).
159. League of Women Voters v. Sec'y of State, 683 A.2d 769, 771 (Me. 1996).
160. Resolves 2019, ch. 87.

citizens' initiative provision of the Maine Constitution. This Note does not assert that the resolve would be substantively constitutional if passed by the legislators. Indeed, as discussed in the superior court decision, the plaintiffs raised valid separation of powers concerns that could certainly lead a court to deem the resolve unconstitutional.[161] But, that determination should be reserved for after the election when the controversy becomes ripe for review, if the electors vote the measure into effect. This decision by the Law Court may lead to more pre-election litigation challenging the subject-matter of pending initiatives. If so, it is possible the court will follow the precedent set in this case and conduct analyses that are akin to a substantive constitutional review of the measure if it were to be enacted. Such decisions may well invalidate more initiatives pre-election and deprive the electors of the opportunity to weigh-in on important policy issues. Such a result would frustrate "the broad purpose of the direct initiative . . . the encouragement of participatory democracy."[162]

161. Avangrid Networks, Inc. v. Sec'y of State, No. CV-20-206, 2020 Me. Super. LEXIS 90, at *10-11 (Jun. 29, 2020).

162. Allen v. Quinn, 459 A.2d 1098, 1102 (Me. 1984).