MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

DOCKET NO. BCD-25-259

MONTAGU REID HANKIN et al.

Plaintiffs/Appellees

v.

SARAH B. SEWALL, et al.

Defendants/ Appellants

APPEAL FROM THE BUSINESS AND CONSUMER COURT

REPLY BRIEF OF APPELLANTS SARAH B. SEWALL and THOMAS P. CONROY

Joseph G. Talbot (Bar No. 4868) jtalbot@perkinsthompson.com
Emily A. Arvizu (Bar No. 6585) earvizu@perkinsthompson.com
Shea H. Watson (Bar No. 6358) swatson@perkinsthompson.com

PERKINS THOMPSON, P.A.
One Canal Plaza,
P.O. Box 426,
Portland, Maine 04112-0426
(207) 774-2635

Counsel for Appellants Sarah B. Sewall and Thomas P. Conroy

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ARGUMENT

I. The standards of review, factual findings, and evidentiary record relevant to this Appeal.

A. There are varying standards of review applicable to the appeal and cross-appeal.

The procedural history of this case is summarized in Defendants' Blue Brief. *See* (Blue Br. 13-15). Defendants respectfully remind the Court of the following post-trial procedure, however, because (1) Claimants failed to specify any applicable standards of review in their Brief (Red Br.), and (2) the post-trial procedure guides the varying standards this Court must apply when reviewing the issues on appeal and considering the trial record in this case. For purposes of this Reply Brief, it bears repeating that the trial court issued a twenty-page decision and five-page judgment on March 17, 2025. (A. 39-70.) On March 31, 2025, Defendants filed a Motion for Further Findings of Fact and Conclusions of Law pursuant to M.R. Civ. P. 52(b). (A. 35-36); *see also* (Blue Br. 15) (providing a synopsis of Defs.' Rule 52(b) Mot.)). That same day, Claimants filed a Motion to Alter or Amend the Judgment, in which they sought to resolve certain ambiguities in the court's judgment; they did not seek additional factual findings or conclusions of law. (A. 35, 139-143). In an order dated May 19, 2025, the trial court granted Claimants' Motion to Amend and denied Defendants' Rule 52(b) Motion. (A. 49-50.) Accordingly, the March 17, 2025, Decision (A. 51-70) and Judgment, as amended on May 19, 2025 (A. 44-50), form

the operative, final judgment for purposes of this Appeal (collectively, the "Decision").[1]

The standard of review applicable to the issues raised in Defendants' appeal is set forth at pages 18-19 of the Blue Brief. As explained therein, because the trial court denied Defendants' Motion for further findings, this Court will confine its *factual* review to the explicit findings in the Decision and will determine whether those findings are supported by sufficient record evidence. (Blue Br. 19 (quoting *H & B Realty, LLC v. JJ Cars, LLC*, 2021 ME 14, ¶ 10, 246 A.3d 1176)). Then, rather than inferring findings from the record evidence, the Court will conduct a de novo review of the trial court's legal conclusions by determining whether those express factual findings, which are supported by the record evidence, are sufficient as a matter of law to support the trial court's Decision. *H & B Realty, LLC*, 2021 ME 14, ¶ 10, 246 A.3d 1176. Unlike Defendants, however, Claimants never filed a motion for further findings, s*ee* M.R. Civ. P. 52(b); (A. 35-36), and the trial court's findings and conclusions related to Claimants' easement by estoppel claim are entitled to greater deference from this Court in its review of Claimants' cross-appeal. *See infra* Section III(A).

[1] At trial, the court granted Defendants' motion for judgment as a matter of law on Claimants' Easement by Necessity and Boundary by Acquiescence claims. (A. 71-72). Claimants do not appeal that judgment. *See generally* (Red Br).

B. Claimants offer an unreliable "Statement of Fact," in which they disregard the trial court's express factual findings and rely on explicitly rejected evidence.

Notwithstanding the aforementioned standards of review, references to the trial court's Decision are noticeably absent from Claimants' eighteen-page introduction and statement of the facts; the Decision is cited for the very first time in a footnote on page 33 of the Red Brief.[2] This absence is particularly striking against the backdrop of Claimants' extensive evidentiary recap and frequent mentions of "undisputed" facts and evidence.[3] *See* (Red Br. 7- 26, 42 n.17, 46-47, 49, 52). In foregoing their opportunity to address the factual findings *actually* made by the court, Claimants push a narrative that seemingly aims to villainize Defendants and shift focus away from their own reliance on evidence expressly rejected by the trial court. Defendants now find themselves in an evidentiary and factual quandary that must be resolved prior to addressing Claimants' arguments.

1. Navy Road is not the only way to access the portion of Small Point south of the pond.

Claimants describe Navy Road as providing the sole means of access to their parcels **twenty-nine times** throughout their brief. *See* (Red Br. 8, 12, 13, 14, 17, 19,

[2] In total, Claimants' Red Brief cites to the Decision seven times; Defendants' Blue Brief includes seven citations to the Decision in the first two pages. (*Compare* (Red Br. 7-56) *with* (Blue Br. 8-9)).

[3] Following a five-day trial and the court's acknowledgment that the issues in this case presented "difficult decisions," *see* (A. 50), it is hard to fathom how the facts could possibly be described as "undisputed."

21, 24, 25, 26, 28, 29, 34, 38, 41, 42, 49 n. 19, 50, 52). This tired assertion disregards the trial court's findings and is directly contradicted by the weight of the trial evidence.

The trial court explicitly found that "[t]here are two roads serving Small Point." (A. 52, ¶¶ 3-4.) Gun Club Road provides access to the southern portions of Small Point and previously served as the primary access route until at least 1960. (A. 54-55, ¶ 13.)[4] It still serves as the primary access for certain dwellings on GCI Lot 5. *See supra* note 4. Although the court found that the owners of Lots 7, 8, 9-2, and 9-3 exclusively use Navy Road to access their properties,[5] *see* (A. 57-59, ¶¶ 25-

[4] The court described the Gun Club Road as "currently not used." (A. 54-55, ¶ 13.) Although it is correct that some Claimants testified they only use Navy Road, this finding should not be misconstrued as a finding that Gun Club Road is *unusable*. To the contrary: The trial evidence—specifically, testimony from Tevere MacFadyen, one of the three GCI shareholders, and the **only** GCI owner to testify at trial—makes clear that the Gun Club Road is still very much utilized to access GCI property. *E.g.*, (II Tr. 211:14-212:3); *see also* (A. 163-164) (depicting current access via Gun Club Road and Navy Road). In fact, it is the primary means of access for three of the five structures on Lot 5. (II Tr. 158:2 - :15, 211:14 – 212:3.) According to Tevere, the only way to access those houses by vehicle is via the Gun Club Road. (II Tr. 211:20 – 212:3.) Of the two remaining structures, one is the "Upper House" (described at length in the trial court's Decision) and the other is the "Crow's Nest," which the court accurately described as a "campsite." (A. 58-59, ¶ 29.) As Tevere testified at trial, the Crow's Nest has three walls and his brother (who built it) "was quite specific about **not wanting a driveway**." (II Tr. 181:1 - :8 (emphasis added).) Unlike other dwellings on Lot 5, the Upper House does not have running water in the winter. (II Tr. 220:21 – 221:11.) Thus, Gun Club Road is regularly plowed in the winter to ensure access to the GCI parcel (Lot 5); the Upper House driveway connecting to Navy Road is not. (II Tr. 221:12- :19.) To the extent the trial court found that Gun Club Road is unusable, that finding is clearly erroneous. *See Remick v. Martin*, 2014 ME 120, ¶ 7, 103 A.3d 552.

[5] It is difficult to reconcile the court's findings that Navy Road provides the "sole access" to Lots 7 and 8 with the evidence in the case, which shows that Gun Club Road abuts the eastern boundary of Lots 7 and 8 as it heads south to Lot 5. Lot 5 is accessible via Gun Club Road—a fact readily apparent from the face of any current map depicting Small Point and the testimony presented at trial. *See*, *e.g.*, (A. 163-164); (II Tr. 158, 211). Albert Edge also testified that a path connecting the Edge lot (Lot 8) to Gun Club Road has existed since the house was built. (III Tr. 47-49). Further, the Hankin lot (Lot 7) did not abut Navy Road until recently, when GCI gifted land to the Hankins that would extend their parcel all the way to Navy Road. *See* (Red Br. 19 n.9); (II Tr. 183-84).

26, 30-31), it never found that Lots 5, 6, or 11 are solely accessible via Navy Road, *see generally* (A. 51-70). To the extent that Lots 9-2 and 9-3 are now only accessible via Navy Road, they were subdivided from a larger property abutting Gun Club Road and owned by the Lee Family Incorporated; they could have retained easements as a part of that division. *See* (A. 247). In fact, as discussed below, at least one of those lots was sold at a discount *because* of the access issues. *See infra* p.19. Claimants did not request further findings of fact or conclusions of law and did not seek to amend the Judgment with respect to these facts or conclusions.[6] *See* (A. 139-43). Thus, Claimants' repetitive emphasis on the "sole access" via Navy Road should be treated with skepticism. *See* (A. 163-164).

2. The trial court expressly rejected the notion that Navy Road has existed since the 1800s.

Claimants repeatedly posit that Navy Road has existed since the 19th century, but this assertion is in direct conflict with the trial court's robust findings on the issue. *See* (A. 69) ("There is insufficient evidence that a road had been developed accessing the Westerly side of Small Point below Big Pond even by 1953. There was insufficient evidence of the frequency of the use of any such track, if it existed."); *see also* (A. 54-55, ¶¶ 12-13; 60-61, ¶¶ 34-37; 68-69). Claimants' properties are all south of the pond, and the court properly explained that "[t]here is insufficient

[6] Defendants sought further findings related to the use of Gun Club Road. *See* (A. 35-36); Defs.' Rule 52(b) Mot. at 4, 10-11, 13, 15, 19.

evidence for the court to characterize a consistently existing road south of the pond prior to 1960 that was any more than a path. . . .The court finds to the contrary that, at times prior to 1960, the primary access to the point and the Southerly portions of Small Point was from the Gun Club Rd." (A. 54-55, ¶¶ 12-13.) The trial court concluded that Claimants did not establish that it was "more likely than not that anyone was using [the road as it existed], or anticipated needing to use it, as the primary source of access to any parcel at any given time prior to 1960." (A. 54, ¶ 12.) The court further explained that the 1896 Spinney-Bodwell plan, referred to as the "Morton and Quimby Plan" throughout the trial, was equally unreliable, as "[m]any of the [pictured] roads never existed." (A. 60, ¶ 34.) Accordingly, the court gave the plan "no weight in determining the existence or location of a roadway down the Western side of Small Point in the 19th century." (A. 60, ¶ 34.) Likewise, with respect to the 1953 subdivision and easement deed references to use of the never-developed roads from the Morton and Quimby Plan, the court found "[t]he deed cannot be construed to convey access over the Woods road. There is nothing about the division that suggests the parties to the transaction were presuming access across the Defendants' land." (A. 61, ¶ 37.) Again, Claimants did not request further findings of fact or conclusions of law or seek to amend the Judgment with respect to these facts or conclusions. *See* (A. 139-43).

II. The trial court's conclusion that Claimants' parcels are all benefitted by prescriptive easements is unsupported by the evidence in this case and is the result of an improper legal analysis.

As a threshold matter, Defendants adequately preserved their argument as to the proper relationship analysis under *Androkites v. White*, 2010 ME 133, 10 A.3d 677, and *Hamlin v. Niedner*, 2008 ME 130, 955 A.2d 251. Defendants consistently argued at trial that given the intergenerational familial relationships among current owners and their predecessors, under *Androkites* the burden of proof should stay with Claimants to establish the element of adversity. *See* (I Tr. 10:24-11:21) (discussing *Androkites* burden shifting, the familial relationships during the relevant time period, and Claimants' burden of proof during opening statement); (V Tr. at 172:3-174:24) (explaining that adversity should not be presumed and the burden is on Claimants to satisfy their burden of proving adversity). Defendants also requested further findings of fact with respect to the same. *See* (A. 35-36); Defs.' Rule 52(b) Mot. pp. 2, 4-8, 17-22, 24 (requesting further findings relating to familial relationships and renewing argument that court must consider the relationships during the prescriptive period). Defendants alerted the trial court and Claimants to the existence of the issue on multiple occasions, and this Court should swiftly reject Claimants' suggestion to the contrary. *See*, *e.g.*, Alexander, *Maine Appellate Practice* § 402(a) at 237-38 (6th ed. 2022).

A. When applied properly, the Androkites *burden-shifting framework provides a clear process for trial courts considering increasingly common property disputes,*

ensures the ultimate burden of proof fairly rests with the party claiming the right, and serves as the antidote to the "patronizing" familial analysis that Claimants fear.

Instead of responding to Defendants' argument that Claimants failed to prove actual adversity and notice or substantively addressing the argument that the trial court failed to consider the relevant relationships, Claimants make bold and inaccurate assertions about the relationships between past and present landowners[7] and rely on a handful of unhelpful out-of-state cases with facts and legal standards distinguishable from those in our case. *See infra* section II(B). Claimants contend that that "[t]he evidence overwhelmingly supports the trial court's finding that the

[7] As detailed in Defendants' Blue Brief, to the extent this Court determines that an analysis of familial ties is necessary or proper, such analysis should be of the familial ties of the landowners *during the prescriptive periods*. Defendants maintain that the conclusion that the familial relationships were "not close enough" to presume permissive use is legally erroneous, *Androkites v. White*, 2010 ME 133, ¶¶ 17-22, 10 A.3d 677, and contradicted by the trial record, *see, e.g., Testimony of Richard Lee* (I Tr. 184:2-:15) (explaining that Jane Sewall married his uncle); (I Tr. 250:14 – 252:10) (testifying about his grandmother's monthly tea with Jane Sewall, his occasional visits to Jane's because he "enjoyed her house so much," his mother and Sarah Sewall's father being "cordial cousins" but not best friends, and the sibling relationship between Sarah Sewall's grandfather and his own grandmother); (II Tr. 24:22-:24; 51:18-:23) (Lee describing Sarah and Rebecca Sewall as "family," and agreeing that Small Point is a "fairly close knit, neighborly community"); *Testimony of Kaiulani Lee* (II Tr. 116:1 – 117:8) (confirming the familial connection between the parties, describing Elizabeth (her sister and predecessor in title) and Sarah as "very good friend[s]," and testifying about her own close relationship with Jane Sewall); *Testimony of Tevere MacFadyen* (II Tr. 186:19-187:21) (describing visits with Jane Sewall a few times a year—in Small Point and in New York, where the MacFadyens primarily resided—and testifying that his mother was "fond" of her friend/ cousin Camilla Wood); (II Tr. 235:5 – 235:16) (describing the Small Point landowners as "friends and neighbors."); *Testimony of Sarah Sewall* (IV Tr. 213:7-219:25) (describing her close life-long relationship with Elizabeth Lee and their late cousin Luke MacFadyen, describing how Small Point children "called everybody aunt" and roamed freely across the various properties, recounting time spent at Camilla Edge Lee's house, recalling how she became even closer with Tevere and Camilla MacFadyen as adults with similarly-aged children, and expressing gratitude for all the help and support that Camilla Edge Lee and Mary MacFadyen provided when her triplets were born); *Testimony of Rebecca Sewall* (V Tr. 93:18 – 96:19) (describing the close relationships between her grandmother and Camilla Sewall Edge and between the elder Hankin generation and her parents, reminiscing on family events and weddings on Small Point, spending holidays and exchanging gifts with Claimants and their mutual family members, and many similar memories common among cousins and close/ intergenerational family friends).

relationships were not close enough to explain the acquiescence or abandon the presumption of adversity." (Red Br. 35.) This confuses the relevant inquiry—whether the use was adverse *despite* the familial relationship.

As discussed in Defendants' Blue Brief, this Court's *Androkites* and *Hamlin* decisions clarify the burden shifting framework applicable to prescriptive easement and adverse possession claims when a familial connection is present. (Blue Br. 21-27) (citing *Androkites*, 2010 ME 133, 10 A.3d 677, and *Hamlin*, 2008 ME 130, 955 A.2d 251); *see also Lincoln v. Burbank*, 2016 ME 138, ¶ 31, 147 A.3d 1165 (referring to the family exception as "the blood relative exception"). This "status-based specialized exception [to the presumption of adversity] arises when the two parcels of land involved in a prescriptive easement dispute are either currently owned by members of the same family or were owned by members of the same family when the alleged prescriptive use began." John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 Marq. L. Rev. 939, 1003 (2021). Because "usually there will be little factual dispute over the existence of a familial relationship," the family exception is advantageous in that it is "narrow in scope [and] relatively easy to apply."[8] *Id.* 1002-04 (discussing, *inter alia*, Maine's familial relationship exception).

[8] Claimants describe the exception as "wooden [and] mechanistic." (Red Br. 31.) Maybe so, but property law prefers certainty and predictability. *See Brown v. Heirs of Maria Fuller*, 347 A.2d 127, 130 (Me. 1975); *Trip v. Huff*, 606 A.2d 792, 793 (Me. 1992).

When this Court's framework is properly applied, the analysis proceeds as follows:

> **Step 1:** Plaintiff must establish two of the three elements for a prescriptive easement: continuous use and knowledge/ acquiescence. If the Plaintiff establishes these elements, the analysis proceeds to Step 2.
>
> **Step 2:** The trial court applies the presumption of adversity *unless* an exception applies (such as the status-based exception for the familial relationship of the landowners during the prescriptive period). If an exception applies, the burden of proof stays with the claimants and the analysis proceeds to Step 3. If no exception applies, then the presumption of adversity arises and the burden shifts to the defendants to present evidence to rebut adversity.
>
> **Step 3:** When the familial relationship exception applies, the claimant may not rely on the presumption of adversity and instead bears the heightened burden of proving actual adversity, which requires proof that the owner had clear, unequivocal notice that their property rights are in jeopardy.

See generally Androkites, 2010 ME 133, ¶¶ 18-23, 10 A.3d 677; *Hamlin*, 2008 ME 130, ¶¶ 13-14, 955 A.2d 251; *see also Lyons v. Baptist School of Christian Training*, 2002 ME 137, ¶ 26, 804 A.2d 364.

Here, the trial court erred at Step 2. Rather than faithfully applying the familial exception and the framework set forth in *Androkites* and *Hamlin*, the trial court required Defendants to prove an absence of adversity by establishing the close, intimate nature of their familial relationships.[9] In doing so, the court conflated Steps

[9] Excluding the Hankins, the familial connection among the past and present landowners is not in dispute. *See* (A. 52-53, ¶¶ 6-8). Under the proper analysis, this fact is dispositive for purposes of determining whether the presumption of adversity applies. *See generally Androkites*, 2010 ME 133, ¶¶ 18-23, 10 A.3d 677; *Hamlin v. Niedner*, 2008 ME 130, ¶¶ 13-14, 955 A.2d 251.

2 and 3 of the proper analysis, required Defendants to satisfy a new evidentiary element, and discharged Claimants of their heightened burden of proving actual adversity and clear, unequivocal notice to the relevant property owners. *See* (A. 61-68). This contravenes this Court's recognition that "[p]lacement of the burden of proof on the family member asserting adversity is consistent with [the Court's] view that in a civil case, the party . . . [who] is seeking the benefit or protection of a law has the burden of proof on that point." *Androkites*, 2010 ME 133, ¶ 19, 10 A.3d 677.

1. Claimants propose a previously rejected, messy, and undesirable change to this Court's clear and predictable burden shifting framework.

Claimants' proposed approach, and the approach the trial court mistakenly applied, requires the party opposing the easement to carry a burden of proving that a *close* familial relationship existed in order to defeat the claim when continuous use and knowledge/acquiescence have been shown. This leads to precisely the effect that Claimants caution against and that the claimants in *Androkites* feared— "airing family laundry" by putting family relationships and dynamics on trial. *See* (Red Br. 31-35); *see also Androkites*, 2010 ME 133, ¶¶ 10-11, 10 A.3d 677.

In contrast, when the proper framework is applied, it will be unnecessary to air irrelevant "family laundry" to prove the adversity element. As this Court has already explained, because "'hostility' does not refer to the existence of a 'heated controversy or a manifestation of ill will,'" any concern that proving adversity will require "airing of family laundry" is "unfounded." *Androkites*, 2010 ME 133, ¶ 21

n. 9, 10 A.3d 677. Absent situations where "family laundry" somehow constitutes the sole evidence of actual adversity and notice, such evidence will be irrelevant to proving a prescriptive easement claim. *See id*.[10]

By upholding the framework applied by the court below, this Court would effectively require Maine trial courts to assess intimate and nuanced family dynamics solely to determine which party carries the burden of proof. Establishing familial closeness as a prerequisite to precluding application of the presumption of adversity is a messy, unpredictable misapplication of a premise that is cornerstone to the judicial resolution of property disputes: That it is the party claiming the right that has the burden of proving their claim. *Cf. Androkites*, 2010 ME 133, ¶ 19, 10 A.3d 677.[11]

2. Applying the proper burden-shifting framework, Claimants failed to satisfy their heightened burden of proving actual adversity and notice.

[10] Contrary to Claimants' argument, Defendants have never contended that courts are entirely precluded from considering evidence regarding the nature of family relationships. Instead, Defendants contend that any such evidence is properly considered in the third step of the analysis with the burden of proof remaining with the claimants. In this step, courts examine whether claimants have satisfied their burden of establishing "clear proof of hostility and actual notice." *See Hamlin*, 2008 ME 130, ¶ 13, 955 A.2d 251.

[11] And, in cases where the current owner is not part of the family, it would become virtually impossible to *ever* defeat a prescriptive easement claim. This runs counter to "every presumption that the occupancy is in subordination to the true title." *Striefel v. Charles–Keyt–Leaman P'ship*, 1999 ME 111, ¶ 4, 733 A.2d 984 (quotation marks omitted).

In light of the ample evidence in the record of the familial ties of the dominant and servient estate owners,[12] *see supra* n.7, and with the burden of proof properly placed on Claimants, the court erred in concluding that Claimants proved prescriptive rights for each of their respective properties. Under the proper analysis, Claimants needed to prove actual hostility and clear, unequivocal notice; they did not.

The law infers that uses of property owned by members of the same family "are by accommodation or permission and do not have the requisite adversity to support imposition of a prescriptive easement." *Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677; *see also* (Blue Br. 21-25, 33-34). "[P]ermission, either express or implied, negates the element of hostility." *Hamlin*, 2008 ME 130, ¶ 12, 955 A.2d 251.

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[12] As detailed in Defendants' Blue Brief, in addition to improperly shifting the burden to Defendants on the adversity element, the trial court improperly evaluated evidence arising from varying time periods when it concluded that Claimants had satisfied their burden of proving prescriptive easement rights. (Blue Br. 23-24.) This Court has been clear that "[a] prescriptive easement is created only by a continuous use for at least 20 years under a claim of right adverse to the owner, with his knowledge and acquiescence, or by a use so open, notorious, visible, and uninterrupted that knowledge and acquiescence will be presumed. Each of the elements is essential and each is open to contradiction. *The existence of all the elements for the requisite period creates a right conclusive against attack*." *Dartnell v. Bidwell*, 115 Me. 227, 98 A. 743, 744 (1916) (emphasis added). All of the elements of a prescriptive easement must exist during the same twenty-year period to establish prescriptive rights. *Id.* The trial court failed to adhere to this rule and did not provide additional findings on the issue in response to Defendants' request for further findings.

For example, and as detailed in Defendants' Blue Brief, the court found that owners of Lots 9-2 and 9-3 met "the elements of a prescriptive easement as of 2002" yet analyzed "the family relationship between the Lee family and Defendants" for the purposes of adversity, despite Defendants not holding title to the property until 2000. *See* (Blue Br. 14 n. 5, 23-24); (A. 66-67, 159-60). For other properties, the court failed to identify the specific prescriptive period, making it impossible to determine whether analysis of the relationships among Claimants and Defendants for purposes of adversity was appropriate at all. *See* (Blue Br. 14 n.5). By mixing and matching testimony of use from one time period with a lack of familial relationship during a different time period, the trial court erred and this Court should reject Claimants' invitation to engage in the same flawed analysis.

Additionally, "when property is or has been held within one family, the burden of establishing hostility is greater" and it requires "a showing that the owner had *clear, unequivocal* notice." *Id.* ¶ 13 (emphasis added) (citing 3 Am. Jur. 2d Adverse Possession § 180 (2002)).

The trial court expressly found that the relationships between the parties were "close enough to presume permission, at times, to play a game on the yard of another, or walk across the property of another[, but] not close enough to allow one family to presume permission to use a road across the property of another as primary access to their parcel." (A. 52-53, ¶¶ 6-7) (footnotes omitted). In addition to being legally erroneous, *see supra* II(A), this finding is not supported by the record.

First, Claimants' testimony that they never asked for permission to use Navy Road does not mean they did not *have* permission. *See Falvo v. Pejepscot Indus. Park, Inc*., 1997 ME 66, ¶¶ 10-11, 691 A.2d 1240 (holding there was no hostility where claimants used defendants' land in the same manner as other nearby residents who received permission, even though claimants never sought permission). The record makes clear that use of Navy Road was always subject to permission granted by the landowners. *See, e.g., Testimony of Richard Lee* (I Tr. 242:3-245:24) (discussing granting permission to use the Navy Road between 1972-1987; explaining that certain folks would be recognized and permitted and others would be asked to leave); (II Tr. 54:12-57:2) (describing efforts to prevent "people without

permission" from accessing Small Point and the Small Point landowners creating stickers to identify who had permission to use the road); *Testimony of Kaiulani Lee* (II Tr. 94:7-:25) (explaining her understanding that "we were allowed to use [Navy Road]" and that "Nobody ever said we shouldn't, or we couldn't."); *Testimony of Tevere MacFadyen* (II Tr. 234:23 – 235:16) (testifying about an email he sent to Defendants, in which he wrote, "**we are obviously beholden to all the rest of you who allow us to cross your property en route to our own**," and explaining he previously hoped the landowners could exchange reciprocal easements "as friends and neighbors."). In fact, Claimants recognized that their use was subordinate to the upstream landowners. *See*, *e.g.*, *Testimony of Tevere MacFadyen* (II Tr. 234:23 – 235:16); *Testimony of Albert Edge* (III Tr. 49:6 – 50:3) (testifying that he received a $20,000 price reduction when purchasing lot 9-3 to account for access issues). Permission was further manifested in the issuance of Small Point car stickers, requests that non-Small Pointers leave, a rope placed at the top of Navy Road until 2002 to prevent use by non-permitted visitors and other efforts to block access for unpermitted use, and the intergenerational history and attitudes towards sharing Small Point property held by family and friends. *See*, *e.g.*, (I Tr. 242:22-245:24, 275:23-277:9); (II Tr. 47:22-48:8, 54:12-57:2, 59:11-60:1, 61:2-:5, 93:21-94:25, 99:1- :15, 110:20-112:14, 233:3 - :25, 234:23-235:16).

With respect to the element of notice, the trial court found only that the manner of using Navy Road was such that "owners of the servient estate *should be aware* that their rights are at stake." (A. 64.) This is not the required proof, and there is nothing in the evidence that would support a finding of "clear, unequivocal notice." This error alone is enough to reverse the trial court's decision—especially so since Claimants failed to introduce *any* evidence to show that Defendants or their predecessors were provided "clear, unequivocal notice" that their property rights were in jeopardy.[13]

When the proper framework is applied, it is clear that Claimants failed to satisfy their burden of proving adversity and notice. Because "all parties were fully on notice in the trial court that adversity was an issue, and the sworn testimony and agreed facts presented to the trial court are not consistent with a claim of adversity of use[,]" reversal (not remand) is the appropriate remedy on this appeal. *Androkites*, 2010 ME 133, ¶ 1 n.2, 10 A.3d 677.

B. Claimants' argument that the trial court faithfully applied this Court's burden shifting framework misses the mark.

[13] With respect to the Edge parcel (Lot 8), the trial court appeared to rely heavily on the fact that Navy Road was used for "sole access," *see* (A. 64), in a manner that should have put Defendants on notice. As discussed above, *see supra* note 5, Lot 8 has never been solely accessible by Navy Road. Findings related to adversity and notice are similarly deficient for the other Claimants' parcels. *See*, *e.g.*, (A. 65) (finding that GCI Lot 5 use was adverse, without further discussion); (A. 66) (implying that use for Lots 9-2 and 9-3 was adverse because the Lee family "clearly felt the right to use the road was established as they created two parcels with access only by Navy Road at the time of the subdivision."). *But see* (A. 67) (explaining that finding of adversity for Lots 9-2 and 9-3 hinged on presumption of adversity).

In support of their argument, Claimants improperly rely on distinguishable cases from other jurisdictions.[14] For example, Claimants' reliance on *Totman v. Malloy*, 725 N.E.2d 1045 (Mass. 2000), is misplaced because—unlike Maine—that jurisdiction does not recognize a familial exception. *See* (Red Br. 31-32, 34); *compare Totman*, 725 N.E.2d at 1047 ("[W]e have never applied a presumption or inference of permissive use arising from a familial relationship."), *with Androkites*, 2010 ME 133, ¶ 18, 10 A.3d 677. Reliance on *O'Neal v. Love*, 593 S.W.3d 39, 43-44 (Ark. App. 2020), is equally misplaced. *See* (Red Br. 31). The *O'Neal* court found that the claimant was not related to the defendant's predecessor in title during the relevant prescriptive period and, even if there had been a familial relationship, the claimant met her burden of proving the heightened hostility and notice elements. *Id.* at 43-44. In contrast, no such findings were made by the trial court in this case, and Claimants do not suggest otherwise in response to Defendants' argument. *See generally* (Red Br).

Claimants also cite *Beitz v. Buendiger*, 174 N.W. 440, 441 (Minn. 1919), for the proposition that the presumption of permissive use will be stronger among parent

[14] One such case is an unreported trial court decision. (Red Br. 32) (citing *Brown v. Houston Ventures, LLC*, No. Civ. A. 2046-S, 2003 WL 136181 (Del. Ct. Ch. Jan. 3, 2003)). Although the court in *Brown* concluded the claimant proved the element of adversity, notwithstanding the familial relationship between owners during part of the prescriptive period, it is notable that the court did not apply a presumption of adversity and instead required the claimant to prove the element of adversity. *Id*. *6-*7. Additionally, the court observed that different jurisdictions employ different presumptions and evidentiary standards when dealing with adverse or prescriptive claims. *Id*. *6. Maine is one of those jurisdictions, and *Brown* hardly stands for the proposition Claimants insinuate.

and child than estranged siblings. (Red Br. 32-33.) Even so, *Beitz* supports Defendants' argument that a claimant must satisfy a heightened burden of proving adversity and notice when a familial connection exists between the parties and/or their predecessors. *See Beitz*, 174 N.W. 440, 441 ("In all cases where the original entry or occupation was permissive the statute will not begin to run until an adverse holding is declared and notice of such change is brought to the knowledge of the owner."); *see also* (Blue Br. 19-25).

Finally, Claimants cite to the Restatement (Third) of Property and C.J.S. on Adverse Possession in support of the blurred burden shifting framework applied below, but neither treatise lends credence to Claimants' argument. (Red Br. 32.) Although Claimants' quoted language does appear in Restatement (Third) of Property: Servitudes § 2.16 cmt c., that same section (and comment) also addresses the different standards applied in various jurisdictions when dominant and servient estate owners are family members. Claimants' subsequent citation to 2 C.J.S. Adverse Possession § 120 (Westlaw May 2025 Update), for the proposition that a familial relationship must be "close" to overcome the presumption of adversity is carefully selected and a bit misleading. *See* (Red Br. 32). Conspicuously, the topic sentence for § 120 provides: "**Generally, as among family members, a person holding possession against other family members may claim title by hostile or**

adverse possession only on a showing more substantial than required to show hostility as to strangers." (Emphasis in original).

Different jurisdictions apply different presumptions and exceptions with respect to the adversity element (also known as the hostility element), but Maine's caselaw is clear: The presumption of adversity will not apply in adverse or prescriptive disputes where the servient and dominant estate owners during the prescriptive period were members of the same family, and the claimant will be held to the heightened burden of proving adversity and actual notice. Facts and circumstances surrounding such familial relationships may be relevant to the element of adversity, but it is inappropriate to consider those facts and circumstances for purposes of determining whether to apply an evidentiary presumption, and the trial court erred by doing so in this case.

C. The facts of this case present an opportunity to adopt a "friendly neighbor" exception, which encourages neighborly accommodation and is good policy for Maine.

In response to Defendants' invitation to this Court to recognize a friendly-neighbor exception to the presumption of adversity, Claimants argue that this is an inopportune vehicle for adopting the exception and, regardless, the exception is bad policy for Maine. (Red Br. 36-41.) Claimants' arguments are half-hearted and unconvincing.

Claimants contend that this is an inappropriate case in which to adopt a friendly-neighbor exception because "the familial and social relationships between the landowners have already been scrutinized at length by the trial court, and nothing would be gained by re-analyzing the landowners' relationships under an alleged 'friendly neighbor' rubric." (Red Br. 37.) But this is precisely why this case is an ideal vehicle for considering adoption of the exception, *because* the relationships have been scrutinized at length and there is clear factual support for concluding that the friendly-neighbor relationships justifying adoption of the exception existed here among the landowners. *See* (Blue Br. 31-33).

Claimants do not dispute that factual support for the exception existed but instead argue that any "friendly neighbor" analysis would be useless because (1) the analysis would be the same as under the family exception, and (2) use of the easement here "is a far cry from the beneficial, but not really necessary, uses at issue in most of the cases cited by Appellants." *See* (Red Br. 37-38). Claimants' logic that the analysis would be the same suffers from the same flaw as their misconception of the family exception; namely, they envision a "closeness" requirement in both. *See* (Red Br. 36). However, as explained above, there is no "closeness" requirement for the family exception and there should not be one for a "friendly neighbor" exception

either.[15] As laid out above, the second step of the analysis concerns whether an exception applies and thus precludes application of the presumption of adversity. The facts in the record support application of a "friendly neighbor" exception. *See, e.g., Testimony of Reid Hankin*, (I Tr. 137:11-:16) (when asked whether they were "so close with any of the land owners upstream on Na[v]y Road that [they] felt like [they] had their tacit permission," Hankin responded, "Yes, we always felt there was no resistance. We haven't heard anything that said we couldn't use Navy Road."); *Testimony of Richard Lee* (II Tr. 51:18-:23) (agreeing that Small Point is a "neighborly community"); *Testimony of Tevere MacFadyen* (II Tr. 234:23-235:16) (explaining he previously hoped the landowners could exchange reciprocal easements "as friends and neighbors.").

Similarly, Claimants' suggestion that their use is a "far cry from the beneficial, but not really necessary" uses of the cases cited, *see* (Red Br. 8), is undermined by the trial court's findings and the weight of the evidence in the record that the Lots are not solely accessible by Navy Road. *See supra* section I(B)(1). Moreover, the

[15] In some cases, it is true that proof of close relationships will rebut the presumption of adversity when the evidence shows that permission can be inferred from the context of those relationships. *See generally* Restatement (Third) of Property: Servitudes § 2.16 (Am. L. Inst. 2000). However, in certain cases—like the present one—there will not be a need to rebut the presumption, because an exception will apply that precludes a claimant from relying on the presumption of adversity in the first instance. For example, a counter-presumption of permissive use will arise when the evidence shows that the neighborly relationship implied permission, or "that a custom existed in the neighborhood for neighborly accommodation by permitting use of neighboring land for access to . . . public roads." *Id*. Here, the overwhelming weight of the evidence compels the conclusion that the neighborly relationships and customs either preclude the presumption of adversity or rebut it.

evidence of a historic custom of neighborly accommodation is so strong in this case that it compels the conclusion that, since its initial construction in the 1960s, use of Navy Road has always been subject to the landowners' permission with respect to the portion(s) of Navy Road over their respective properties. *See supra* pp.18-19 (citing testimony about community permission and efforts to prevent use by non-Small Pointers). In short, despite Claimants' contentions to the contrary, the facts of this case present an opportune vehicle for adoption of the "friendly neighbor" exception.

Claimants' admonitions that a "friendly neighbor" exception "would effectively render the presumption of adversity a dead letter" are unfounded. (Red Br. 38-39.) This Court has already demonstrated an unwillingness to apply a "friendly neighbor" exception where the trial court made a finding that no such friendly neighbor relationship existed. *See Riffle v. Smith*, 2014 ME 21, ¶ 9, 86 A.3d 1165; *Lincoln v. Burbank*, 2016 ME 138, ¶ 31, 147 A.3d 1165. Recognition of the exception does not, and demonstrably will not, result in application of that exception in every prescriptive easement case between neighbors, as Claimants fear.

Lastly, Claimants final argument against recognition of the "friendly neighbor" exception is that it "is ill-suited to illuminating the adversity inquiry" because "[u]nder Maine law, adversity is about the user's state of mind, not the servient owner's." (Red Br. 40) (emphasis in original). Claimants' citation to

Androkites as support of this proposition is puzzling because *Androkites* expressly states that "the prescriptive user's state of mind is no longer relevant in prescriptive easement claims." *Androkites*, 2010 ME 133, ¶ 16 n.7, 10 A.3d 677. Adversity is not reliant on the subjective intent of the claimant, and a "friendly neighbor" exception would operate as an exception to the presumption of adversity in the same vein as the family exception, whereby "'the landowner is reasonably entitled to regard the use as permissive unless specifically informed of the contrary fact.'" *Id.* ¶ 18 (quoting 4 Richard R. Powell, *Powell on Real Property* § 34.10[2][c]). [16]

As with the family exception, in cases where a "friendly neighbor" relationship exists, application of the exception does not preclude the claimant from successfully proving a prescriptive easement; it merely requires that such claimant prove adversity and actual notice. As in the family exception context, a "friendly neighbor" exception aligns with this Court's recognition that "'the law generally disfavors findings of adverse possession,' and that 'there is every presumption that the occupancy is in subordination to the true title.'" *Id.* ¶ 20 (quoting *Hamlin*, 2008 ME 130, ¶ 11, 955 A.2d 251) (alterations omitted). Adopting this neighborly

[16] And, even if a user's state of mind was relevant to the analysis, it would support Defendants' argument. *See Glidden v. Belden*, 684 A.2d 1306, 1318 (Me. 1996) (holding that a claimant's erroneous belief that they have rightful access to a road "precludes any inference that their use of the road was accompanied by an assertion of a claim of right to use in disregard of the owner's rights; that is, the [claimants] had no intent to use adversely to an owner."); *see also Jordan v. Shea*, 2002 ME 36, ¶ 30, 791 A.2d 116 (same). Claimants in this case testified to holding a similar belief to the claimants in *Glidden*. *See supra* pp.18-19.

exception also embodies this Court's recognition that permission—express *or implied*—negates adversity. *See Hamlin*, 2008 ME 130, ¶ 12, 955 A.2d 251; *see also* 4 Powell, *Powell on Real Property* § 34.10 (2025) (explaining that an exception to the presumption of adversity will exist where the relationship between the landowner and claimant is such "that the landowner is reasonably entitled to regard the use as permissive unless specifically informed of the contrary fact.").[17]

D. The trial court erred in declaring that the scope of a prescriptive easement benefiting Lots 9-2 and 9-3 allows for construction of a single-family residence.

Claimants defend the court's declaration that the scope of prescriptive easements benefitting Lots 9-2 and 9-3 allows for construction of a single-family residence on each lot by contending that the court's conclusion "was amply supported by the record . . . as well as by this Court's holding in *Gutcheon*." (Red Br. 45) (quoting A. 67-68). The issue with Claimants' argument is that (1) there is no record evidence regarding the use of Navy Road for residential access to Lots 9-2 and 9-3 specifically because they remain undeveloped to date, and (2) this fact distinguishes this matter from *Gutcheon*, where the dominant estates had already

[17] Whether the presumption of adversity (and/or a family or neighborly exception) should apply in this case has always been in dispute. Like the claimants in *Androkites*, Claimants here were "fully on notice" that adversity was an issue and that they may be required to introduce evidence of actual adversity and clear, unequivocal notice; they failed to do so. *See Androkites*, 2010 ME 133, ¶ 1 n.2, 10 A.3d 677. As the party claiming the right, it was Claimants' obligation to present all evidence at trial, but they chose to put all their eggs in one basket and rely on the presumption, rather than present *any* evidence of actual adversity—likely because they could not and cannot prove actual adversity or notice. While evidentiary presumptions aim to facilitate the effective presentation of trial evidence, surely they are not intended to serve as a "get out of jail free card" for Claimants otherwise unable to meet their burden of proof.

been converted to residential use and there was actually ample evidence that the conversion did not "*currently* create an unreasonable burden on the servient estate." *See Gutcheon v. Becton*, 585 A.2d 818, 822-23 (Me. 1991) (emphasis added) (noting that the owner of the servient estate testified that the access road was not visible from his residence and there was no evidence of increased noise).

Here, it is unclear how the record could contain "ample" evidence for an overburdening analysis of the impact of the change to residential use when not only do Lots 9-2 and 9-3 remain undeveloped, but also there was testimony that there are no imminent plans for constructing residences.[18] (Blue Br. 43) (II Tr. 108:23-109:25); (III Tr. 37:2-:8). As such, to the extent Lots 9-2 and 9-3 are benefitted by a prescriptive easement, the trial court should have confined its declaration "[b]ased on its finding of the use during the prescriptive period" and "should have declined to go beyond that basic declaration." *See Bray v. Grindle*, 2002 ME 130, ¶ 19, 802 A.2d 1004.

[18] In *Bray*, where the dominant estate owner testified that "he was building a house on his property, did not presently intend to run utilities to it, and owned and resided in another house" in the same town, this Court opined "it is impossible to determine whether he sought to use the road to access the new house on a year round, daily basis or only seasonally or intermittently." *Bray v. Grindle*, 2002 ME 130, ¶ 18, 802 A.2d 1004. As such, this Court held that "there was insufficient evidence to decide whether increased use by [the dominant owner] would be a natural and foreseeable development and whether it would unreasonably burden the enjoyment of the servient tenement[.]" *Id*. If there was insufficient evidence in *Bray* to conduct an overburdening analysis, it is unclear how there could be "ample" evidence for the same analysis here.

III. This Court should affirm the trial court's rejection of easement by estoppel.[19]

A. The trial court explicitly found that Claimants did not meet their burden of establishing conduct necessary for such a claim.

Claimants challenge the trial court's ruling on their easement by estoppel claim and argue that the trial court made both factual and legal errors. (Red Br. 47-55). They contend that the trial court "misapprehended the import of the facts of this case," and note that "the trial court did not make any express factual findings related to the easement by estoppel claim." (Red Br. 52.) Notwithstanding Claimants' contention to the contrary, the trial court *did* make express factual findings—it found that the conduct required for an estoppel claim did not exist here. (A. 69.) Relying upon *Bathport Bldg., Inc. v. Berry*, 490 A.2d 663, 665-66 (Me. 1985), the court wrote, "[i]n some circumstances, conduct by the servient estate may preclude them from denying the existence of an easement. The court is not persuaded any such conduct is found here." (A. 69.)

[19] The section of Claimants' brief addressing this issue is captioned "Alternatively, the Undisputed Evidence Requires that the Court Find an Easement by Estoppel and Estoppel by Deed." (Red Br. 47.) Defendants decline to engage in an analysis of estoppel by deed because at trial, Claimants were explicitly asked what claim they were pursuing and clarified it was "easement by estoppel" and not anything else. *See* (V Tr. 118:20-120:10). As such, Claimants waived any claim of "Estoppel by Deed." Even if this Court were inclined to indulge Claimants' arguments that Defendants are estopped from denying the existence of an easement based on "undisputed facts" showing that Defendants "signed and accepted deeds referencing the broad rights of others, which necessarily includes Appellees, to use the road," (Red Br. 53), such "facts" were undermined by Claimants' own expert at trial. *See* (IV Tr. 42:7 – 43:1) (confirming that the deed language "together with any interest in and to the Navy Road, so called to be used in common with others" relates to rights appurtenant to properties to the north of the Sewall-Conroy Property).

Unlike Defendants, however, Claimants never filed a motion for further findings. *See* M.R. Civ. P. 52(b); (A. 35-36). Therefore, rather than confining its review to the trial court's express factual findings on the easement by estoppel claim (which, in any event, are adequately supported by the record) this Court will also "assume that the trial court made all findings necessary to support its judgment, if those findings are supported by the record." *Young v. Lagasse*, 2016 ME 96, ¶ 13, 143 A.3d 131. Further, because Claimants had the burden of proof at trial, this Court will only overturn the trial court's estoppel findings if it is satisfied Claimants have "show[n] that the evidence *compels* a contrary finding." *Id* ¶ 8 (emphasis added). Because the court did not clearly err in finding that Claimants were unsuccessful in carrying their burden to establish conduct necessary for a claim of easement by estoppel, Claimants' cross-appeal necessarily fails. *See Grant v. Hamm,* 2012 ME 79, ¶14, 48 A.3d 789; M.R. Civ. P. 52(b).

B. Regardless, Maine courts have not recognized Claimants' theory of easement by estoppel.

As Defendants noted at trial, (V Tr. 169:21-170:15), the case law in Maine recognizes a limited theory of "easement by estoppel" in situations where the grantor conveys the land that is described as being bounded by a street or road. *Sprague Corp. v. Sprague*, 855 F. Supp. 423, 433 (D. Me. 1994) ("Maine courts have recognized only a limited theory of easements by estoppel which arise by implication when a grantor conveys land that is described as being bounded by a street or road.

Under this theory, grantees who purchased land, in reliance upon a reasonable belief that they were entitled to use the easements shown on the grantor's plan, will be found to possess an easement by estoppel."); *see also, e.g., Brown v. Dickey*, 106 Me. 97, 75 A.382, 384 (1909); *Dorman v. Bates Mfg. Co.*, 82 Me. 438, 19 A. 915, 916 (1890); *Bartlett v. Bangor*, 67 Me. 460, 465 (1878); *Murch v. Nash*, 2004 ME 139, ¶ 12, 861 A.2d 645; Knud E. Hermansen & Donald R. Richards, *Maine Roads and Easements*, 48 Me. L. Rev. 197, 226 (1996); (V Tr. 169-70). That is not, however, the situation here.

Without explicitly stating so, Claimants invite this Court to adopt a new form of easement based in the principle of equitable estoppel. Claimants cite to the Restatement (Third) of Property to support their proposition that "[a]n easement by estoppel is created where 'the owner or occupier of land permitted another to use that land under circumstances in which it was reasonable to foresee that the user would substantially change position believing that the permission would not be revoked, and the user did substantially change position in reasonable reliance on that belief.'" (Red Br. 48) (alteration omitted). Claimants have not, however, identified any Maine case law adopting this framework.[20]

[20] Moreover, the Restatement principle cited only comes into play "[i]f injustice can be avoided only by establishment of a servitude[.]" *See* Restatement (Third) of Property: Servitudes § 2.10 (2000). The comments go on to provide that "[i]n determining what is just, courts should be careful not to penalize persons who engage in neighborly acts of courtesy and cooperation by permitting others to use their land." *Id*. cmt. d.

Rather than rely on Maine law, Claimants again cite to cases from outside Maine, without addressing why this Court should consider following those other jurisdictions. Furthermore, their proposed definition of an easement by estoppel relies on supposedly "undisputed facts," but those facts are, in fact, disputed. *See supra* section I(B). If, as Claimants suggest, there is "law which makes clear that an easement by estoppel may, indeed, be established by tacit (but clear) approval in some circumstances – circumstances that unquestionably are present here," they have not identified it. This Court should decline Claimants' implicit invitation to apply Claimants' novel theory of easement by estoppel.

CONCLUSION

For the reasons set forth in Defendants' Blue Brief and reiterated here in this Reply Brief, Sarah B. Sewall and Thomas P. Conroy respectfully request that this Court grant their appeal and vacate the court's order granting prescriptive rights for the benefit of Lots 5, 6, 7, 8, 9-2, 9-3, and 11.[21] Additionally, Defendants request that this Court deny Claimants' cross-appeal and affirm the trial court's finding that no easement by estoppel was proven here.

Respectfully submitted,

/s/ Emily A. Arvizu

[21] Defendants note that Claimants did not address Defendants' assertion that the trial court erred when it failed to treat Lots 5 and 11 as distinct for the purposes of the prescriptive easement analysis. Defendants maintain their position that this was error and stand on the Blue Brief regarding this issue.

Emily A. Arvizu (ME Bar No. 6585)
Joseph G. Talbot (ME Bar No. 4868)
Shea H. Watson (ME Bar No. 6358)
Attorneys for Appellants Sarah B. Sewall and Thomas P. Conroy

PERKINS THOMPSON, P.A.
One Canal Plaza, P.O. Box 426
Portland, Maine 04112-0426
(207) 774-2635
jtalbot@perkinsthompson.com
earvizu@perkinsthompson.com
swatson@perkinsthompson.com

CERTIFICATE OF SERVICE

Undersigned counsel for Defendants Sarah B. Sewall and Thomas P. Conroy hereby certify that they have complied with Maine Rule of Appellate Procedure 7(c), as modified by this Court's Order on Motions Regarding Appendix, dated September 2, 2025, by (1) electronically filing one emailed copy of this brief to the Clerk of the Law Court; and (2) serving one emailed copy to each party who are either separately represented or who is unrepresented and has opted into electronic service.

/s/ Emily A. Arvizu
Emily A. Arvizu (ME Bar No. 6585)
Joseph G. Talbot (ME Bar No. 4868)
Shea H. Watson (ME Bar No. 6358)
Attorneys for Appellants Sarah B. Sewall and Thomas P. Conroy

PERKINS THOMPSON, P.A.
One Canal Plaza, P.O. Box 426
Portland, Maine 04112-0426
(207) 774-2635
jtalbot@perkinsthompson.com
earvizu@perkinsthompson.com
swatson@perkinsthompson.com