STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

No. Cum-24-82

Peter Masucci, et al.

v.

Judy's Moody, LLC, et al.

Appeal from the Cumberland County Superior Court

Brief of Joan Bissonnette as *amicus curiae* in support of the Appellees

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STATEMENT OF INTEREST

Joan Bissonnette is a shorefront property owner along Moody Beach in Wells, Maine. Her predecessor in interest was a party in *Bell v. Town of Wells (Bell II)*, 557 A.2d 168 (Me. 1989). She submits this amicus brief in support of the appellees pursuant to this Court's May 15, 2024 order, which provides that "[a]ny interested person or organization may file a brief as an amicus curiae without consent of the parties or leave of the Court."

SUMMARY OF THE ARGUMENT

This Court should reject the appellant's attempt to radically change Maine's coastal property law by overturning centuries-old precedents that have defined shorefront property rights. Since before Maine joined the Union as a state, upland property owners held title to the adjacent intertidal lands, and the public had a limited easement over those lands for fishing, fowling, and navigation. This well-settled doctrine was affirmed in *Bell v. Town of Wells (Bell II)*, 557 A.2d 557, 168 (Me. 1989)), providing clarity and stability in Maine's property law. Overturning Maine's longstanding common-law rule would disturb the legal landscape for thousands of property owners.

The appellants seek to upend this long-standing doctrine by arguing that the intertidal lands belong to the state under the United State Supreme Court's equal footing doctrine, or alternatively, by expanding the public's rights beyond the established triumvirate of fishing, fowling, and navigation. However, these arguments were thoroughly considered and rejected in *Bell II*, where the Court reaffirmed Maine's common-law tradition. The appellants' request would not only undermine Maine's established legal principles but also violate the doctrine of *stare decisis*, which is particularly strong in cases involving property rights.

Expanding the public's access rights beyond the historical triumvirate would effectively diminish the shorefront owners' right to exclude others from their property, a fundamental aspect of property ownership. Such a change would not only disrupt the settled expectations of property owners but would also implicate the Takings Clause of the Fifth Amendment. The Court in *Bell II* recognized that altering these property rights would constitute a taking, requiring just compensation.

The appellants' argument that the Court should abandon the traditional triumvirate in favor of a "reasonable balance" test, is

fundamentally flawed. This proposed test would grant the Court unprecedented power to redefine property rights on an ad hoc basis, eroding the stability on which property owners rely. The adoption of such a test would not only disturb Maine's longstanding common-law but also it would fail to adequately protect the long-recognized rights of shorefront owners, thereby effecting a taking within the meaning of the Fifth Amendment.

The Court should uphold the principles discussed in *Bell II* and reject the appellants' attempts to broaden public access rights in the intertidal zone. Overturning these precedents would lead to significant legal and constitutional challenges. The stability of Maine's property law and the rights of shorefront owners must be preserved to prevent unwarranted and unjust intrusions on private property.

ARGUMENT

I. The Court should reject the appellants' request to radically transform Maine's coastal property law by abandoning longstanding precedents that have defined landowners' rights over the intertidal lands for over two hundred years.

Since the earliest days of Maine's statehood, this Court has recognized that upland property owners hold title, in fee simple, to the adjacent intertidal lands, subject to an easement benefiting the public

"only for fishing, fowling, and navigation." *Bell v. Town of Wells (Bell II)*, 557 A.2d 168, 173 (Me. 1989); *see also Lapish v. President of Bangor Bank*, 8 Me. 85, 91 (1831). The property rights of shorefront owners have been clearly established for over two centuries: shorefront owners may exclude the public from their intertidal lands, except for those who are fishing, fowling, or navigating. *McGarvey v. Whittredge*, 2011 ME 97, ¶ 59, 62 (opinion of Levy, J.); *Bell II*, 557 A.2d at 173.

In this case, the appellants attempt to relitigate nearly two hundred years of settled law. This Court should reject the appellants' request to effect a sea change in Maine's coastal property jurisprudence. The appellants ask this Court to strip every private shorefront property owner of their title to the intertidal lands by holding that the seashore belongs to the state of Maine under the United States Supreme Court's equal footing doctrine. *See* Masucci Br. 8-26; Delogu Br. 30-38. They argue, in the alternative, that the Court should overrule Maine's longstanding common-law tradition and limit upland owners' right to exclude the public from their privately held intertidal lands by abandoning the "fishing, fowling, and navigation" triumvirate in favor of

the "reasonable balance" test that Chief Justice Saufley's articulated in her *McGarvey* concurrence. Masucci Br. 41-63; AG Br. 14-24.

This case is merely a repeat of *Bell II*. In that case, several upland owners brought a quiet title action against the Town of Wells, seeking a declaratory judgment and an injunction limiting the public's right to access their privately owned beach. *Bell II*, 557 A.2d at 169. The Court ruled in favor of the upland owners, affirming Maine's common-law rule that upland owners held fee simple title to the intertidal lands subject to an easement benefiting the public only for fishing, fowling, and navigation. *Id.* at 176. It also concluded that any judicial modification of these rights would constitute a taking in violation of the Maine and United States Constitutions. *Id*.

In reaching this result, the Court rejected the same arguments the appellants advance today. It dismissed the Town's equal footing argument, observing that it relied on a "revisionist view of history" that "comes too late by at least 157 years." *Id.* at 172. Instead, the Court affirmed the well-established principle that, in Maine, "the upland owner's title to the shore is as ample as to the upland." *Id.* (quotation omitted). It also rejected the Town's argument that the public has a

general recreational easement over the intertidal lands, noting that Maine's common-law history does not "support[] any such open-ended interpretation of the public uses to which privately owned intertidal land may be subjected." *Id*. at 174

This Court should not overrule *Bell II*. That decision is grounded in over two hundred years of Maine's common-law tradition. It is principled, well-reasoned, and supported by Maine's common law history. *See McGarvey*, 2011 ME 97, ¶¶ 68-77 (opinion of Levy, J.). The doctrine of *stare decisis* demands that courts reflect carefully on the wisdom embodied in the experience of its past decisions. *Id*. ¶¶ 63-65. Further, abandoning the long established property rights discussed in *Bell II* will implicate the Takings Clause of the Fifth Amendment—something the *Bell II* Court already considered. *See Bell II*, 557 A.2d at 176. This Court should not radically depart from its longstanding tradition of protecting shorefront owners' property right to the intertidal lands.

II. The Court should not overrule *Bell II*. That decision faithfully applied Maine's common-law rule and it correctly articulated the scope of the public's right to access intertidal property.

"The doctrine of *stare decisis* is the historic policy of our courts to stand by precedent and not to disturb a settled point of law." *McGarvey*,

2011 ME 97, ¶ 63. "Society's interest in being able to rely on established precedent is at its apex with regard to judicial precedents that exposit property rights." *Id.* ¶ 64. "Legal questions affecting ownership of land, once answered, should be considered no longer doubtful or subject to change." *Id.* (quoting *United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486-87 (1924)). "Such decisions become rules of property, and many titles may be injuriously affected by their change." *Id.* (quotation omitted).

Bell II is settled law and "remains binding precedent that provides a clear and reasoned explanation of the public and private rights inherent in the intertidal zone under Maine's common law." *Id.* ¶ 66 n.17. The Court should not depart from the common-law tradition. Otherwise, the property rights of intertidal landowners will be left to the discretion of what a majority of the Court deems reasonable at any given time. *Id.* ¶ 67. Property rights are not meant to be easily eroded under the guise of developing the common law. *See Bell II*, 557 A.2d at 174; *see also McGarvey*, 2011 ME 97, ¶ 59.

A. *Upland property owners are the rightful owners of the adjacent intertidal lands. The equal footing doctrine does not change this reality.*

"At common law, the title and dominion in lands flowed by the tide water were in the King for the benefit of the nation." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473 (1988) (quoting *Shively v. Bowlby*, 152 U.S. 1, 57 (1894)). After the American Revolution, "these rights, charged with a like trust, were vested in the original States within their respective borders, subject to the rights surrendered by the Constitution of the United States." *Id*. The equal footing doctrine concerns the rights of states that joined the Union after the Constitution's ratification.

"[N]ew States admitted into the Union [after] the adoption of the Constitution have the same rights as the original States in the tidewaters, and in the lands under them, within their respective jurisdiction." *Id*. Therefore, upon their entry into the Union, new states "received ownership of all lands under waters subject to the ebb and flow of the tide." *Id*. at 477. Of course, "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Id*. at 475; *see also Shively*, 152 U.S. at 26. Therefore, Maine was free

to depart from the English common law rule and recognize private rights in the intertidal lands as it saw fit.

Massachusetts, for example, through an ancient colonial enactment"—*i.e.*, the Colonial Ordinance—modified the English common law by recognizing that "the title of owners of land bounded by tide water extends from high water mark over the shore or flats to low water mark, if not beyond one hundred rods." *Shively*, 152 U.S. at 18. In applying the equal footing doctrine, the United States Supreme Court honored Massachusetts' decision to modify the English common law rule by giving upland owners title to the low water mark. *Id.*

Massachusetts' common-law history is especially significant in this case. As this Court has recognized, "the Maine common law of the intertidal zone has not developed directly from English common law, but from the Massachusetts Colonial Ordinance of 1641-47." *Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 512 (Me. 1986). Long before Maine became a state, and while it was still a territory of Massachusetts, the common law of Massachusetts, provided that "the owner of shoreland above the mean high water mark presumptively held title in fee to intertidal land subject

only to the public's right to fish, fowl, and navigate." *Bell II*, 557 A.2d at 171; *see also Storer v. Freeman*, 6 Mass. 435, 438 (1810).

When Maine became a state in 1820, Massachusetts' common-law rule was "incorporated into the common law of Maine" by virtue of Article X, Section 3 of the Maine Constitution. *See Bell I*, 510 A.2d at 513. This section provides that "[a]ll laws now in force in this State, and not repugnant to this Constitution, shall remain, and be in force, until altered or repealed by the Legislature . . . ." Me. Const. art. X, sec. 3. Because "there was nothing in the pre-1820 Massachusetts common law governing title to the intertidal zone that was repugnant to the constitution of the new State," it became the common law of Maine. *Bell II*, 557 A.2d at 172. Indeed, in 1831, this Court confirmed that Massachusetts' common law applied in Maine with full force. *Lapish*, 8 Me. at 93 ("[T]he law on this point has been considered perfectly at rest.").

In this case, the appellants argue that "[a]lienation of intertidal land by a non-original colony may only be accomplished by statute or express grant." Masucci Br. 15 (bolding omitted). However, they fail to cite any authority to support this proposition. The Supreme Court has not explained *how* states may exercise "authority to define the limits of

the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips*, 484 U.S. at 475. But, even if the appellants were correct, Maine's Constitution satisfies the appellant's proposed test. By incorporating "[a]ll laws now in force in this State, and not repugnant to this Constitution," Me. Const. art X, sec. 3, the people of Maine who ratified that Constitution in 1820 expressly incorporated Massachusetts' common-law tradition and the Colonial Ordinance into Maine's own common law.

For all the same reasons discussed above, this Court already rejected the same equal footing arguments in *Bell II*. *See Bell II*, 557 A.2d at 172. Moreover, this Court has acknowledged that upland owners hold title to the intertidal lands for almost two hundred years. *See Lapish*, 8 Me. at 91-93. This property right is enshrined in Maine law. The appellants have not articulated a legitimate basis for overruling the conclusion in *Bell II* that the State of Maine does not have title to the intertidal lands.

B. *The shorefront property owners' right to exclude the public from the intertidal lands cannot be unmoored from the triumvirate of the Colonial Ordinance—fishing, fowling, and navigation.*

Bell II was not the first decision that recognized the public's right to use privately owned intertidal lands "only for fishing, fowling, and navigation." *Bell II*, 557 A.2d at 172. This so-called "triumvirate" has its roots in the Colonial Ordinance, which is the source of Maine's common law over the intertidal lands. *See id.* Historically, this Court has limited its discussion of the public's right to access intertidal lands to fishing, fowling, and navigation *See, e.g.*, *Marshall v. Walker*, 93 Me. 532, 536 (1900) (explaining that upland owners hold the shore "in fee, like other lands, subject, however, to the jus publicum, the right of the people to use it for the purposes of *navigation* and of *fishery*" (emphasis added)); *see also Barrows v. McDermott*, 73 Me. 441, 449 (1882).

Based on this common-law history, the *Bell II* court rejected arguments that the public trust doctrine gave the public a "general recreational easement" over the intertidal lands. *Bell II*, 557 A.2d at 173. In *Bell II*, the Town of Wells argued that "the public rights of fishing fowling, and navigation are not exclusive," and that "the listing does not exhaust the public rights retained by the common law." *Id.* This Court,

however, rejected the Town's argument on the ground that it lacked any historical support. *Id*. at 174-75. It further explained that "all the cases in Massachusetts and Maine recognizing the common law principles of intertidal property interests read the Colonial Ordinance as having restricted the reserved public easement to fishing, fowling, and navigation." *Id*. at 174; *see also Marshall*, 93 Me. at 536.

The Town also argued that the Court should "interpret the colonial ordinance as vesting the right to allow all significant public uses in the seashore; that while fishing, fowling, and navigation may have exhausted those uses in 1647, these public uses change with time and now must be deemed to include the important public interest in recreation." *Bell II*, 557 A.2d at 174. The *Bell II* Court rejected this argument as well, explaining that "the grant of a fee interest to private parties effected by the colonial ordinance has never been interpreted to provide the littoral owners only such uncertain and ephemeral rights as would result from such an interpretation." *Id*. (quoting *Opinion of the Justices*, 313 N.E.2d 561, 567 (Mass. 1974)).

If this Court expands the scope of the public's right to access privately owned intertidal lands, it will necessarily take away the

owners' right to exclude individuals from their property. *See Bell II*, 557 A.2d at 174, 176; *cf. Atkins v. Adams*, 2023 ME 59, ¶ 23 (discussing sources explaining that a fundamental aspect of property rights is the power to exclude). Further, this Court has repeatedly "rejected the argument that the court may change" the traditional common law rule concerning the intertidal lands simply because it disagrees with the policy result. *Bell II*, 557 A.2d at 176. The principle of *stare decisis* is strong, *see McGarvey*, 2011 ME 97, ¶ 64, and this Court should not merely overturn *Bell II* and the common law history that underlies it.

1. *Bell II* does not reflect the state of the common law frozen in time in 1989. It reflects over two hundred years of history.

In this case, the appellants and the Attorney General make the same flawed argument as the Town did in *Bell II*. The Attorney General contends that the "Beachfront Owners seek to interpret *Bell II* as forever limiting the public trust doctrine to the triumvirate." AG Br. 16. He contends that such a reading of *Bell II* is "unpersuasive and does not reflect the fluid nature of the common law." *Id*. This argument is flawed, however, because it urges the Court to take a radical view of the common law that conflicts with the Constitution, and it gives this Court

extraordinary power to take away shorefront owners' right to exclude without just compensation. *See infra* at 25-29.

The Attorney General erroneously asserts that *Bell II*'s holding "is confined to 1989." AG Br. 15. In order to accept this argument, the Court must accept a radical view of the common law and disregard its own analysis in *Bell II*.

Nothing in *Bell II* suggests that the rule it announced was establishing the law for a moment in time. Instead, the Court in that case looked back hundreds of years to define the scope of the owners' right to exclude. Ultimately, the Court concluded that the public easement created by the Colonial Ordinance of 1641-47, and the common-law as it existed in 1820, established the present-day owners' rights to exclude members of the public. Overruling the triumvirate would invite future litigants to advocate for an "open-ended interpretation of the public uses to which privately owned intertidal land may be subject." *Bell II*, 557 A.2d at 174. But, neither Maine nor Massachusetts has any decision supporting such a broad view of the public's right to access the intertidal zone, or this Court's ability to change property interest. *Id*.

Under the Attorney General's view, this Court can disturb centuries of common law property principles whenever the winds of public opinion changes. Of course, the common law (and the Constitution) recognizes concrete property rights—rights that cannot be taken away merely by judicial fiat (at least not without just compensation). *Id*. The Attorney General's argument simply ignores the fundamental principle that "[l]egal questions affecting ownership of land, once answered, should be considered no longer doubtful or subject to change." *McGarvey*, 2011 ME 97, ¶ 64.

Limiting the public's easement to fishing, fowling, and navigation does not necessarily mean the common law is frozen in time. This Court has repeatedly explained that it will give a "sympathetically generous" interpretation to the meaning of these terms. *Id*. ¶ 68; *Bell II*, 557 A.2d at 173. Judge Levy did so in *McGarvey* by analogizing scuba diving to navigation. *See McGarvey*, 2011 ME 97, ¶ 74-77. The Court, therefore, can continue to adapt the public trust doctrine to accommodate the public's need so long as those needs fall within the historically protected scope of activities—*i.e.*, fishing, fowling, and navigation.

2. Since *Bell II* was decided, this Court has not abandoned the common-law triumvirate.

The Attorney General urges this Court to overrule *Bell II*'s holding that the public's right to access intertidal lands is limited to fishing, fowling, and navigation. He contends: "Since *Bell II*, this Court has retreated from using the triumvirate to determine whether the public trust doctrine includes a particular use of intertidal lands." AG Br. 19 (emphasis omitted). In support of this proposition, the Attorney General cites *McGarvey* and *Ross*. These cases, however, did not walk back Maine's common-law rule. In fact, the Court considered and applied *Bell II*'s triumvirate in both of these cases.

In *McGarvey*, this Court unanimously held that "the public has a right to walk across intertidal lands to reach the ocean for purposes of scuba diving." *McGarvey*, 2011 ME 97, ¶ 1. The Court, however, was equally divided in its reasoning. "When a fragmented court decides a case and no single rationale explaining the result enjoys the assent of [a majority of] Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds." *Marks v. United States*, 430 U.S. 188, 193 (1977).

Three justices reached this conclusion by applying a novel rule that is untethered from the traditional triumvirate. Instead, these justices asked "whether the common law should be understood to include th[e] activity," which members of the public seek to do on privately-owned intertidal lands, even when those activities fall outside the scope of fishing fowling, or navigation. *McGarvey*, 2011 ME ¶ 49 (Saufley, C.J., concurring). Three other justices reached this conclusion by applying the traditional common-law triumvirate. *Id.* at ¶ 77 (opinion of Levy, J.). Justice Levy articulated this result on the narrowest ground because it did not require the Court to overrule *Bell II* or the longstanding common-law principles described in that opinion. *Cf. Marks*, 430 U.S. at 193.

Justice Levy rejected Chief Justice Saufley's reasoning because it "would effectively overrule *Bell II* by concluding that fishing, fowling, and navigation "do not and have never, until *Bell II*, been understood to wholly or exclusively define the public trust rights." *McGarvey*, 2011 ME 97, ¶ 59. Justice Levy explained that the Chief's approach "would bestow upon the public a general right to cross privately-owned intertidal land to gain access to the ocean—a newfound right that would exceed even the

most 'sympathetically generous' interpretation of fishing, fowling, and navigation." *Id.*

In this case, the Attorney General makes the same mistake as the *McGarvey* concurrence. As Justice Levy explained: "By asserting that fishing, fowling, and navigation do not 'wholly or exclusively define the public trust rights,' the concurrence proposes a holding that would fundamentally alter, rather than merely expand, Maine's existing common law." *Id.* ¶ 62. Further, Chief Saufley's view is unsupported by the common law history. *See Bell II*, 557 A.2d at 172-74. "The right to fish, fowl, and navigate has been the touchstone for determining the scope of the public's common law right to intertidal lands, and absent a compelling reason, it should remain so." *McGarvey*, 2011 ME 97, ¶ 78.

Likewise, *Ross* is not instructive. In that case, the Court unanimously held that "the public may not harvest living rockweed growing in and attached to the privately-owned intertidal zone." *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 14. The Court reached this decision by considering the "two analytical frameworks articulated in *McGarvey*." *Id.* The Court concluded that the public did not have a right to harvest rockweed because it did not fall under any of the traditionally

recognized activities—fishing, fowling, or navigation. *Id.* ¶ 23-24. It also concluded that harvesting rockweed is not an activity that "reason[ably] balance[s]" private landowners' interests against the public's interest in using the intertidal lands. *Id.* at 28.

The Court's consideration of the "reasonable balance" test is not an endorsement of that test. In *Ross*, the majority observed that "[t]he nature and extent of the public's interest in the intertidal zone has been a subject of much debate, litigation, and judicial writing." *Id.* ¶ 13. It also observed that there are "[d]iffering views within this Court regarding the nature and scope of the public's right to use the intertidal zone." *Id.* By refusing to recognize a right to harvest rockweed under the traditional triumvirate or under the more recently proposed "reasonable balance" test, the Court simply explained that none of the proposed tests offer the public a right to harvest rockweed. The Court's discussion in *Ross* does not show that the Court has retreated from the common-law triumvirate.[1]

[1] A majority of the Court refused, as Chief Justice Saufley proposed in her concurring opinion, to overrule *Bell II*. *See Ross*, 2019 ME 45, ¶ 42. The fact that the Court could have overruled *Bell II*, but chose not to, further demonstrates that it has not walked away from the common-law triumvirate.

3. The Attorney General's proposed "reasonable balance test" inadequately protects the long-recognized property rights of littoral owners.

The "reasonable balance" test bursts open all limits that protect the shorefront property owners' interests. It provides an "open-ended interpretation of the public uses to which privately owned intertidal land may be subjected." *Bell II*, 557 A.2d at 174. And it places in the hands of this Court the ability to reduce shorefront owners' right to exclude others. As Justice Levy observed in *McGarvey*, the adoption of the "reasonable balance test" would "be bounded only by what a majority of the Court determines to be reasonable at any given time." *McGarvey*, 2011 ME 97, ¶ 67. Property owners do not have such ephemeral property rights, and any expansion beyond fishing, fowling, or navigation would be a serious intrusion on property rights.

This protection is inadequate under Maine's common law (and under the state and federal Constitutions). In *Bell II*, the Court rejected a request to expand the intrusion into shorefront owners' right to exclude the public, explaining that "the grant of a fee interest to private parties effected by the colonial ordinance has never been interpreted to provide the shorefront owners only such uncertain and ephemeral rights as

would result from such an interpretation." *Bell II*, 557 A.2d at 175 (quoting *Opinion of the Justices*, 313 N.E.2d at 567). In other words, the *Bell II* Court observed that the common law affirmatively defined the outer limits of the public's right to access the intertidal lands and the upland owners' right to exclude the public from those lands.

The "reasonable balance test" does not reasonably balance the property owners' interest. Because under Maine's common law they already have the right to exclude individuals who are not fishing, fowling, or navigating, *see id.* at 176, the adoption of any balancing test that expands the public's easement over the intertidal lands is merely a Trojan horse for taking away the shorefront owners' long-established rights to exclude the public without paying just compensation.

III. Overruling *Bell II* would effect an unconstitutional taking in violation of the Fifth Amendment.

The Takings Clause, which applies to the states through the Fourteenth Amendment, prevents the government from taking "private property . . . for a public use without just compensation." U.S. Const. amend. V; *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147 (2021)."The Constitution does not limit the Takings Clause to a particular branch of government." *Sheetz v. County of El Dorado*, 601 U.S. 267, 276 (2024).

Therefore, "[i]f a court declares that what was once an established right of private property no longer exists, it has taken that property." *Stop the Beach Renourishment v. Fl. Dep't of Env'tl Protection*, 560 U.S. 702, 716 (2010) (plurality opinion) (emphasis omitted); *see also Bell II*, 557 A.2d at 176 ("The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without just compensation.").

A taking within the meaning of the Fifth Amendment occurs "[w]henever the government physically acquires private property for a public use." *Cedar Point*, 594 U.S. at 147. This rule applies even when the government takes only an easement for public use. *Kaiser Aetna v. United States*, 444 U.S. 164, 180 (1979) ("[If] the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *see also Nollan v. Cal. Coastal Comm.*, 483 U.S. 825, 831 (1987) (holding that if government required petitioners to "make an easement across their beachfront available to the public . . . to increase public access . . . we have no doubt there would have been a taking"). When a taking occurs, the Constitution "imposes a clear and categorical

obligation to provide the owner with just compensation." *Cedar Point*, 594 U.S. at 147.

The changes to Maine's common law that the appellants and the Attorney General seek do not withstand constitutional scrutiny. The federal Constitution protects property rights that arise out of state common law. *Stop the Beach*, 560 U.S. at 715. Because the common law of this state recognizes that upland owners hold title to the intertidal lands, and they can exclude the public who are not fishing, fowling, or navigating on the intertidal lands, *see Bell II*, 557 A.2d at 176, modifying either of these rules is a taking under the Fifth Amendment. By expanding the public's right to access privately owned intertidal lands, the Court would necessarily eliminate the upland owners' right to exclude from those lands, thereby effecting a taking.

The Court in *Bell II* already confronted this issue in favor of the upland owners. It observed that "a state, under the guise of interpreting its common law, cannot sanction a physical invasion of the property of another" without just compensation. *Bell II*, 557 A.2d at 178 n.21. "The common law has reserved to the public only a limited easement." *Id*. at 178. The fact that the common law already has reserved to the public an

easement in intertidal lands for fishing, fowling, and navigation . . . does not mean that the State can, without paying compensation to the private landowners, take in addition a public easement for general recreation." *Id.* Even if this Court does not *now* recognize an easement for general recreation, any expansion of the scope of the public easement beyond the triumvirate would effectively take property from the upland owners by limiting their right to exclude the public from their land.

This Court is not unsympathetic to the public's interest. It observed: "As development pressures on Maine's real estate continues, the public will increasingly seek shorefront recreational opportunities for the 20th and 21st century variety, not limited to fishing fowling and navigation." *Id.* at 180. "No one can be unsympathetic to the goal of providing such opportunities to everyone, not just to those fortunate enough to own shore frontage. The solution under our constitutional system, however, is for the State of municipalities to purchase the needed property rights or obtain them by eminent domain through the payment of just compensation, not to take them without compensation through legislative or judicial decree redefining the scope of private property rights." *Id.*

Maine has 3,500 miles of coastal property that would be affected by a decision to expand the public's easement on privately held intertidal lands. *See McGarvey*, 2011 ME 97, ¶¶ 66. If the Court takes their right to exclude, these property owners, as non-parties to the suit, "would be able to challenge in federal court the taking effected by the state supreme-court opinion to the same extent that he would be able to challenge in federal court a legislative or executive taking." *Stop the Beach*, 560 U.S. at 727-28; *see also Bell II*, 557 A.2d at 176. Overruling *Bell II* has the potential to invite a tidal wave of litigation. Therefore, the Court should reject the appellants' request to upend centuries of settled property law.

CONCLUSION

This Court should reaffirm two hundred years of Maine's common-law jurisprudence: upland owners hold title to the intertidal lands and may exclude the public from those lands except for those fishing, fowling, or navigating. Any other result will injuriously affect title to 3,500 miles of Maine's coastal property, and would effect an unconstitutional taking of that property without just compensation.

Respectfully submitted,

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By her attorneys,

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Dated: August 2, 2024 By: /s/ Suzanne Brunelle

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CERTIFICATE OF SERVICE

I certify that a copy of this amicus brief has been served on counsel of record by email and U.S. mail in accordance with M.R. App. P. 7A(i) to the following individuals:

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CERTIFICATE OF COMPLIANCE

I certify that this amicus brief does not exceed the great of 40 pages or 10,000 words in compliance with M.R. App. P. 7A(f)(1):

Dated: August 2, 2024 By: /s/ Suzanne Brunelle
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