MAINE SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. Cum-24-82

Peter Masucci et al.
Plaintiffs/Appellants/Cross-Appellees

v.

Judy's Moody, LLC et al.
Defendants/Appellants/Cross-Appellees

On appeal from the Cumberland County Superior Court

Brief of Appellants, Peter Masucci et al.

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STATEMENT OF FACTS AND PROCEDURAL HISTORY

A. Procedural History

This action, which concerns title and public trust rights to the intertidal land along Maine's coastline, was initiated by Plaintiffs by filing a five-count complaint on April 22, 2021.[1] (A. 120.) On May 26, 2021, Defendants Edward Page, Christine Page, James Li, Kim Newby, and Robin Hadlock Seeley, through counsel, moved to dismiss. (A. 189.) Defendants Judy's Moody, LLC, OA 2012 Trust, and Ocean 503, LLC also moved to dismiss. (A. 142, 157, 172.) Defendants Jeffery and Margaret Parent filed answers. Plaintiffs opposed the motions to dismiss.

The motions remained under advisement for approximately eight months before the court (Cumberland County, O'Neil, J.), on April 15, 2022, issued an order dismissing several Plaintiffs,[2] Defendants,[3] and all counts

[1] Count I of the complaint seeks relief pursuant to 14 M.R.S § 5951, specifically that the court enter declaratory judgment concerning ownership of the intertidal lands; Count II asserts that the State of Maine owns the intertidal lands by virtue of U.S. Constitutional principles, including the Equal Footing Doctrine, Article IV, section 1-3; Count III asserts that current Maine case law indicating that Maine had alienated intertidal lands violates the Maine Constitution, Article 4, Part 3, section 1; Count IV asserts that public trust rights extend beyond fishing, fowling, and navigation; and Count V asserts that Defendants' deeds, construed according to current Maine law, do not generate the presumption of ownership to the low water mark, even if they benefit from said presumption, and therefore Defendants do not own the intertidal land. (A. 137-40.)

[2] Plaintiffs Charles Radis, Sandra Radis, and Bonnie Tobey were dismissed for lack of standing. (A. 79.)

[3] Claims against Defendants Edward Page, Christine Page, James Li, Kim Newby, and Robin Hadlock Seeley were dismissed pursuant to the anti-SLAPP statute.

except Count IV, concerning public trust uses. (A. 54.) The court allowed Count IV to proceed on the basis that the Law Court had not yet squarely addressed whether movement-based or research activity were permissible public trust uses. (A. 78.) On August 1, 2022, the court entered an order disposing of a number of subsequent pending motions, denying most of Defendants' motions. (A. 81.) On May 2, 2023, all remaining parties, including the Attorney General filed motions for summary judgment on Count IV. (A. 256, 274, 291, 203, 313, 323.) The court denied Plaintiffs' motion and the Attorney General's motion and granted Defendants' motions for summary judgment in a series of orders docketed February 9, 2024. (A. 93, 102, 112, 116.)

Plaintiffs timely appealed on February 21, 2024, and all other parties subsequently filed cross-appeals. (A. 50-52.)

B. Factual Background

The facts in this case are not in genuine dispute.

1. Complaint Facts Relevant to Counts I, II, III, and V

Plaintiffs can be broadly grouped into members of the public that use and depend upon the intertidal zone ("intertidal"), including at Moody Beach in Wells; owners of nearby property that do not reside on the water; owners of ocean-based businesses (including seaweed harvesting, worming, clamming, lobstering) and employees of those businesses whose livelihoods depend on

access and use of intertidal resources; seasonal tourism businesses whose clientele enjoy use of the intertidal lands; and a marine biologist that conducts research there. (A. 122-28.)

Defendants Judy's Moody, LLC, OA 2012 Trust, and Ocean 503 LLC are entities that own property on Moody Beach in Wells (hereinafter "the Moody Beach Defendants") and wrongly claim that they own the intertidal land adjacent to their upland property. (A. 128-29.) Except for lands since alienated by conveyance or statute post-1820, all intertidal land (the area between high and low water marks) along the Maine coast is owned by the State of Maine. (A. 133, 135, 138.)

2. Facts Relevant to anti-SLAPP motion to dismiss

Defendants Edward and Christine Page own property in Harpswell. (A. 59.) Defendants James Li and Kim Newby jointly own property in Friendship. (A. 60.) The Pages and Li/Newby claim to own intertidal land adjacent to their properties and they have previously raised objections to harvesters taking seaweed from the intertidal. (A. 59-60.) The Pages and Li/Newby called Marine Patrol and asserted that they owned the intertidal land and objected to the seaweed harvesting. (A. 59-60.) As a result of the Pages' calls, a harvester was ordered to stop by a Marine Patrol officer. (A. 60.) While harvesting seaweed from the intertidal lands adjacent to Defendants' property,

Defendant Newby approached Plaintiff Leroy Gilbert and told him to stop; he did not do so, prompting Newby to call Marine Patrol. (A. 61.) Plaintiff Gilbert continued to harvest seaweed, until after additional calls to Marine Patrol by Defendants, he was informed by Marine Patrol that harvesting was illegal on the property. (A. 61.)

3. Summary Judgment/Count IV facts

Ocean 503 has posted a sign on the seawall stating: "MOODY BEACH IS A PRIVATE BEACH TO THE LOW WATER MARK NO LOITERING." (A. 526.) Ocean 503 does not consider swimming, surfing, sitting, building sandcastles, or "recreating" on the beach "loitering" and therefore those activities are unrestricted by the Ocean 503 property signage. (A. 831-32.) OA 2012 displays a sign on the sea wall: "MOODY BEACH (TO YOUR LEFT) IS A PRIVATE BEACH TO THE LOW WATER MARK NO LOITERING NO DOGS ALLOWED." (A. 531.) OA 2012 does not consider walking, running, stopping and stretching, meandering, surfing, playing frisbee, building a sandcastle, sitting and fishing, or sitting in the sand for 30 minutes or less to be loitering. (A. 832-34.) Judy's Moody displays private beach signage stating "PRIVATE BEACH" attached to the seawall. (A. 835.) Judy's Moody has also posted signs stating "Private Property, No Trespassing," and referencing "low tide." (A. 529.)

Peter and Kathy Masucci live year-round at 484 Ocean Avenue and makes regular use of Moody Beach. (A. 837.) They frequent the beach year-round and engage in a variety of recreational activities on the intertidal land or water adjacent to the Moody Beach Defendants' upland property. (A. 838-41.) Defendants' signage has had a chilling effect on their use and enjoyment of the beach. (A. 839, 842.) Peter has witnessed Keith Dennis (of Judy's Moody) ask people to move into the narrow public way in the intertidal. (A. 842.)

William Connerney of 130 South Tibbetts Road in Wells walks, takes in the sights, plays "all kinds of games," body surfs, plays tennis, flies a kite, walks, jogs, picnics, and walks his dog. (A. 843.) William similarly described the chilling effect of Defendants' signage and the assertion of private ownership of the beach, and William fears confrontation with Defendants, and he has specifically altered his behavior due to apprehension. (A. 844.) He considers "fowling" to include taking pictures of birds; he considers "navigation" to include walking to a place. (A. 845.)

Plaintiffs William Griffith and Sheila Jones own the Crows' Nest Resort in Old Orchard Beach, whose guests visit Maine beaches including Moody Beach, several of whom commented that the signage made them apprehensive. (A. 845-46.) Their business and livelihood is dependent on public access to Maine's beaches. (A. 846.)

Plaintiff Amanda Moeser farms oysters and clams in the intertidal and is concerned about private ownership claims and their impact on aquaculture licenses. Plaintiff Chad Coffin clams in the intertidal and finds private claims to the intertidal make his work of harvesting clams more difficult because he faces harassment. (A. 851.) Plaintiffs Amanda Moeser, Susan Domizi, Greg Tobey, Leroy Gilbert, John Grotton, Dan Harrington, and Jake Wilson all work or run businesses that rely upon harvesting seaweed from the intertidal, and they all recreate on Maine beaches. (A. 849-53.) Susan and others are concerned that the privatization of intertidal land would affect their livelihoods due to harassment and confrontation between landowners and harvesters. (A. 849-853.)

Plaintiffs George Seaver and Robert Morse each own businesses that harvest and process rockweed. Seaver's business, Ocean Organics based in Waldoboro, harvests and processes rockweed to produce a proprietary extract growth stimulant "for application in the agriculture and turf industries." (A. 853.) Morse is co-owner of North American Kelp (NAK), which harvests rockweed in the intertidal area for products including food ingredients, animal supplements, lawn conditioners, and seaweed extracts for gardening and landscaping. (A. 858.) Both Ocean Organics and NAK sustainably harvest rockweed. (A. 855, 858-59.) Uncertainty and risk created by the *Ross* decision

has made potential investors ambivalent about investment, affecting both business value and employment prospects. (A. 857, 859.)

ISSUES PRESENTED FOR REVIEW

1. Whether the trial court erred in dismissing, pursuant to Rule 12(b)(6) and 14 M.R.S. § 556, Plaintiffs' complaint seeking declaratory relief regarding title of land over which Plaintiffs assert public trust rights and Defendants assert ownership; and

2. Whether the trial court erred in denying Plaintiffs' motion for summary judgment, while granting Defendants' motions for summary judgment, related to public trust uses in the intertidal zone, including on the basis that Plaintiffs alleged too many facts.

ARGUMENT

II. Title to Maine's intertidal zone is held by the State by operation of Article IV, Sections 1-3 of the U.S. Constitution. Those lands have not been lawfully alienated by a valid legislative enactment.

This Court has erroneously concluded that Maine surrendered title to intertidal land as a function of the Colonial Ordinance through the adoption of Massachusetts common law in the Act of Separation and the Maine Constitution. *Bell v. Wells (Bell II)*, 557 A.2d 168, 171-73 (Me. 1989); *McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 23-32, 28 A.3d 620. This legal and factual error offends foundational federal constitutional principles of state sovereignty and alienates land in a manner that is properly a function of other branches of government.

A. Title to all intertidal land vested in the State of Maine as a matter of federal constitutional law in 1820.

Upon entry into the Union in 1820, Maine assumed title to all intertidal land within the state's territorial limits as a matter of federal constitutional law.

> According to common law, the title and the dominion in lands flowed by the tide were in the King for the benefit of the nation. Upon the settlement of the Colonies, like rights passed to the grantees in the royal charters, in trust for the communities to be established. Upon 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 to the United States.

Shively v. Bowlby, 152 U.S. 1, 57 (1894). The Supreme Court extended the same title principle to the states that followed the colonies: "the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 476 (1988). The principle that states enter the Union with the same rights and title interests as the original thirteen states is known as the "Equal Footing" doctrine,[4] which the Supreme Court has consistently held is enshrined in the Constitution. *PPL Mont., LLC v. Montana*, 565 U.S. 576, 591 (2012) ("[Under] equal-footing doctrine, . . . a State's title to these lands was conferred not by Congress but by the Constitution itself." (citation and quotation marks omitted)).

The proposition that upon assumption of sovereignty, states hold fee title to the intertidal and freshwater public trust lands, has been reaffirmed in ***every single Supreme Court case*** that squarely implicated the issue. *See, e.g., PPL Mont., LLC*, 565 U.S. at 591 (Montana); *Phillips Petroleum Co.*, 484 U.S. at 476

[4] The U.S. Constitutional origin of the "Equal Footing" doctrine is Article IV, sections 1 through 3, which encompasses the Full Faith and Credit clause, the Privileges and Immunities clause, and Congressional authority to create new states and define rules and regulations for them. *See* U.S. Const. art. IV, §§ 1-3.

(Mississippi); *Shively*, 152 U.S. at 47 (Oregon);[5] *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 435 (1892) (Illinois); *Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183 (1891) (California); *Pollard v. Hagan*, 44 U.S. 212, 229 (1845) (Alabama).[6]

The only exception to this otherwise uniform rule commented on in *Phillips Petroleum* is Massachusetts, which the Supreme Court recognized "abrogated the common law for tidelands in 1641," meaning by operation of a valid *legislative* enactment that *postdated* the founding of Massachusetts Bay Colony in 1629. *Phillips Petroleum Co.*, 484 U.S. at 475 n.4; *see also Shively*, 152 U.S. at 18-19); *Storer v. Freeman*, 6 Mass. 435, 437-39 (1810).

It follows that Maine, like all other states, took title to the intertidal land pursuant to the Equal Footing doctrine. As explained in Sections II(D)-(E), III, *infra*, neither the Colonial Ordinance, Massachusetts common law, nor Maine court decisions based on those authorities could lawfully alienate or convey the state's ownership of the intertidal lands. Rather, a legislative act would be

[5] By statute, the State of Oregon also acknowledges Equal Footing doctrine title to intertidal land, with the benefit of the Supreme Court's clear and direct pronouncement construing the state's interest. Or. Rev. Stat. Ann. §§ 274.005(8), 274.025.

[6] Most recently, the Supreme Court of Indiana fully embraced Equal Footing doctrine as "federal law," soundly rejecting arguments that challenged state title and public trust uses on constitutional grounds. *Gunderson v. State*, 90 N.E.3d 1171, 1177 (Ind. 2018), *cert. denied*, 139 S.Ct. 1167 (2019) (No. 18-462). The U.S. Supreme Court denied certiorari, apparently considering the issues settled.

required, and the applicable Maine statute reserves, rather than alienates, the state's ownership of the intertidal lands. *See* 1 M.R.S. § 5.

B. Equal Footing doctrine overrides pre-statehood instruments that would purport to place title in parties other than the state.

With few exceptions inapplicable here,[7] state ownership of intertidal lands in trust overrides pre-statehood land grants, deeds, and treaties that, but for Equal Footing doctrine, would vest title in parties that hold facially valid instruments with a perfect chain of title. *See Phillips Petroleum Co.*, 484 U.S. at 472 (affirming decision that title vested in the State of Mississippi upon statehood despite petitioners' record title "back to prestatehood Spanish land grants"); *Shively*, 152 U.S. at 58 (holding donation land claim included no title to land below high water, which vested in Defendants from the State of Oregon as "a constitutional and legal exercise" by the state); *Pollard*, 44 U.S. at 220-21 (holding that patent between plaintiff and the United States based on Spanish grants void upon Alabama's statehood and thus ineffective to pass title to land under navigable waters).

Upon statehood, those deeds, grants, and treaties are *void*. The reason is simple: to honor pre-statehood instruments would mean that a state enters the

[7] *See, e.g.*, *Knight v. United States Land Ass'n*, 142 U.S. 161, 183-84 (1891) (treaty commitments by the U.S. Federal government to Mexico controlled title question and qualified California's title claim upon entry into the Union).

Union on *unequal* terms, which is repugnant to the Constitution and state sovereignty. Important here, this rule has extended ownership to states that (like Maine) were territories that integrated the common law of their parent state upon achieving statehood. *See, e.g.*, *Pollard*, 44 U.S. at 228-29.

For Maine to be divested of title by a broad, general reference to adopting Massachusetts common law would work an unconstitutional impairment of Maine's sovereignty. For the same reasons states were not bound by pre-colonial grants and title claims by the federal government, Maine necessarily received title to the intertidal, regardless of any pre-statehood conveyances or grants.

C. *Illinois Central* and *Boston Waterfront Development Corp.* outline the limits of state power to alienate public trust land and the significant caveats impressed upon "ownership" of those lands by private entities.

Two key decisions bear on the constitutional, title, and public trust dimensions of this case: *Illinois Central* and *Boston Waterfront Development Corp.* Those cases stand for two important propositions. First, there are fundamental limits upon government authority to alienate broad swaths of public trust lands and that any such alienation must occur by legislative enactment, express grant, or both. Second, even when alienated to private parties, the grantee takes not fee simple absolute, but rather a defeasible estate

or a license, which remains subject to the public trust and may be revoked by the state acting within its powers and authority as trustee.

Illinois Central involved an 1852 city ordinance followed by an 1869 grant by the state legislature to the Illinois Central Railroad Company to the entire banks and bed of Lake Michigan within Chicago city limits for rail, warehouses, docks, and wharves, some of which had been constructed on filled submerged land. *Ill. Cent. R.R. Co.*, 146 U.S. at 433. The legislature subsequently revoked the grant in 1873. The Supreme Court upheld the revocation, commenting broadly on title and public trust principles. *See id.* The Court emphasized that the State of Illinois assumed title to the banks and submerged lands of the lake pursuant to the Equal Footing doctrine, regardless of the stipulations upon which Illinois was admitted as a territory from Virginia. *Id.* at 435. Although a state *legislature* can lawfully grant trust lands for "wharfing out" purposes, such conveyances are never a blanket abdication of state responsibility to guard public trust rights:

> It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of *legislative power* consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State

> over lands under the navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public.

Id. at 452-53 (emphasis added). Blanket grants are ***void***: "A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation." *Id.* at 453. The Court remarked that a state could no more alienate public trust lands wholesale, than surrender the police power. *Id.* at 453, 460.

Boston Waterfront Development Corp. concerned whether the owner of a wharf over the intertidal of Boston Harbor held fee simple title to the land pursuant to the "Lewis Wharf statutes" enacted in the early 19th Century. *See Bos. Waterfront Dev. Corp. v. Commonwealth*, 393 N.E.2d 356, 358 (Mass. 1979). By that time, the original commercial shipping wharves had been renovated into modern shops, offices, restaurants, and condos. The Supreme Judicial Court of Massachusetts held that the owner held fee title, qualified by a condition subsequent. *Id.* Following an extensive review of the law, including the Colonial Ordinance, the Court felt compelled to conclude that the Lewis Wharf statutes were grants, not revocable licenses, despite the fact that the terms appeared to confer licenses. *See id.* The Court qualified that conclusion,

however, by holding that title was defeasible if no longer used for the original commercial wharfing purpose. *Id.* at 367 ("We therefore hold that the BWDC has title to its property in fee simple, but subject to the condition subsequent that it be used for the public purpose for which it was granted.").

Several years before *Bell*, this Court recognized that "legislation representing a gross or egregious disregard of the public interest such as occurred in . . . *Illinois Central* . . . would be unconstitutional for failure to meet the reasonableness test of Maine's Legislative Powers Clause." *Opinion of Justices*, 437 A.2d 597, 610 (Me. 1981) (quotation marks omitted).

D. Alienation of intertidal land by a non-original colony may only be accomplished by statute or express grant.

In the few jurisdictions where the state has surrendered fee title to the intertidal, in almost every instance (Massachusetts included), this was accomplished by operation of a statute, grant, or both. Also relevant is whether the state is an original colony or entered the Union subsequently, thereby implicating the Equal Footing doctrine. Maine is a minority jurisdiction of one as a non-original colony that has held that upland owners, not the state, presumptively own to the low-water mark without an express grant or specific legislative enactment at or post-dating statehood. Notably, the U.S. Supreme

Court has *never* held that a state may alienate title to land vested in the state by operation of Equal Footing doctrine by judge-made common law alone.

1. Massachusetts

Massachusetts abrogated the English common law rule for tidelands by operation of the Colonial Ordinance, a valid legislative enactment in 1641 (recodified in 1647) that post-dated the founding of Massachusetts Bay Colony. *See Phillips Petroleum Co.*, 484 U.S. at 475 n.4. The Ordinance was annulled and was never operative in Maine pre- or post-statehood. *See McGarvey*, 2011 ME 97, ¶ 30, 28 A.3d 620.[8]

2. Virginia

The Virginia legislature passed a statute in 1679 that extended title to riparian owners on rivers and creeks to the low water mark. *Taylor v. Commonwealth*, 47 S.E. 875, 880 (Va. 1904). In 1779, the legislature enacted a statute that allowed the state to convey intertidal lands. *See Bradford v. Nature Conservancy*, 294 S.E.2d 866, 872 (Va. 1982). Prior to 1779, intertidal lands could be granted only by special act of the General Assembly. *Id.* Statutory modifications followed.

[8] The Colonial Ordinance is addressed in Section III, *infra.*

In 1819, the Virginia legislature granted presumptive title to the intertidal to upland owners, reserving public rights of fishing, fowling and hunting. *Id*. at 873-74. But the Virginia Supreme Court held that this statute applied only to land grants prior to 1780, that grants subsequent to 1780 were void, and that title to those lands not conveyed remained in the state. *Id.* Virginia thus illustrates how a state may, by specific legislation and grants, manage and lawfully alienate public trust intertidal land. It also shows that the state, not private property owners' expectations, controls trust property.

3. Delaware

Delaware public trust law provides that the upland owner owns to the low water mark. *Bickel v. Polk*, 5 Del. 325, 326 (1851). Somewhat similar to Maine, the Delaware Supreme Court appears to have accepted the rule as longstanding and unchallenged and thus settled. *See State ex rel. Buckson v. Pa. R.R. Co.*, 267 A.2d 455, 458 (Del. 1969). In declining to hold otherwise, however, the court noted that the Delaware legislature had not altered this common law rule—acknowledging that this common law principle *was* subject to change by the legislature. *Id.* ("[T]he General Assembly has not seen fit to change this rule of property.").

4. Louisiana

Unlike Massachusetts, Virginia, and Delaware, Louisiana is not an original colony, thereby implicating the Equal Footing doctrine. Louisiana courts have correctly recognized the result: "Upon admission to the United States in 1812, Louisiana, because of its inherent sovereignty, acquired title to all lands within its boundaries below the ordinary high-water mark of navigable bodies of water." *McCormick Oil & Gas Corp. v. Dow Chem. Co.*, 489 So.2d 1047, 1049 (La. Ct. App. 1986). The state then enacted legislation that set up two different regimes for navigable rivers and streams and lakes. *Id.* Louisiana owns to the ordinary high-water mark of lakes, but has alienated the intertidal of rivers and streams by statute. *Id.* As to seashore intertidal land, state title extends to "the highest tide during the winter season." La. Civ. Code Ann. art. 451. Relevant to the interplay between state and private ownership of trust land, Louisiana courts have held that where a stream becomes navigable, title passes automatically to the state. *City of Shreveport v. Noel Estate*, Inc., 941 So.2d 66, 78 (La. Ct. App. 2006) ("[W]hen the land encroached upon by a state-owned waterway forms a part of the bed of a navigable stream it becomes the property of the State . . . *and the former owner is divested of title*." (emphasis added)). Property and constitutional law are clearly different on public trust land.

E. *Bell II* and *McGarvey* misapplied Equal Footing doctrine and misconstrued the Statehood Act and Maine Constitution, committing clear logical and analytic error.

Bell II, and more recently *McGarvey*, placed undue weight on case law predating Maine's statehood, and the authority of the judicial branch to alienate public trust land, in discounting and ultimately rejecting the inescapable fact of state ownership pursuant to the Equal Footing doctrine. If instead this Court correctly starts from the proposition that Maine assumed title to all intertidal land upon statehood in 1820, accepts that alienation of that land could only be accomplished by specific legislation or grant, and confronts the utter absence of evidence that Maine's founders or the legislature ever intended to alienate 3,400+ miles of intertidal land, then there is only one plausible conclusion.

1. Bell II misunderstood the Equal Footing doctrine

Bell II addressed title, beginning with long standing Massachusetts law based on the Colonial Ordinance that upland owners presumptively hold title to low water, subject to public rights to fish, fowl, and navigate. *Bell II*, 557 A.2d at 171. The *Bell II* Court concluded that Article X, section 3 of the Maine Constitution adopted the Massachusetts rule as binding in Maine. *Id.* at 171 & n.9 ("All 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, or shall expire by their own limitation."). The Court found that adopting the

Colonial Ordinance rule did not offend any express provision of the *Maine* Constitution.[9] *Id.* at 172.

The Court dismissed the Equal Footing doctrine[10] with the flip assertion that "[a]ny such revisionist view of history comes too late by at least 157 years." *Id.* (citing *Lapish v. President of Bangor Bank*, 8 Me. 85 (1831)).[11] Noting that Massachusetts had already granted title to upland owners across the Commonwealth and territories, including Maine, the Court concluded that these broad "grants" had been ratified by the Maine Constitution. *Id.* Article X, section 5 provided that "[a]ll grants of lands" by Massachusetts before separation "shall continue in full force" upon Maine's statehood. Me. Const. art. X, § 5; *see also id.*

The *Bell II* Court read *Phillips Petroleum* and *Shively* to state that not only Massachusetts, but also Maine, abrogated the common law rule, notwithstanding the Equal Footing doctrine. *Id.* at 172-73. In dicta, the U.S. Supreme Court discussed Massachusetts law based on the Colonial Ordinance, stating: "The rule or principle of the Massachusetts ordinance has been adopted

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[9] No analysis of the federal constitution was undertaken as to title.

[10] *Phillips Petroleum* had been issued by the U.S. Supreme Court after the oral argument in *Bell II* but before the decision was published.

[11] *Lapish* was the first Maine case to expressly bridge the Massachusetts Colonial Ordinance and common law rule to Maine post-statehood.

and practised on in Plymouth, *Maine*, Nantucket and Martha's Vineyard, since their union with the Massachusetts Colony under the Massachusetts Province Charter of 1692." *Shively*, 152 U.S. at 19 (emphasis added). The *Bell II* Court appeared to extend that to Maine by reference in a footnote. *See Bell II*, 557 A.2d at 172 n.11. In context, the Supreme Court was clearly referring to *the territories of Massachusetts*, including Maine from 1692 to 1819. *See, e.g.*, *Storer v. Freeman*, 6 Mass. 435 (1810) (deciding title to flats in Cape Elizabeth). Moreover, *Shively* is pure dicta; the Court was not deciding whether Massachusetts could have done so, much less Maine.

2. *McGarvey* failed to correct *Bell*'s analytic error.

McGarvey largely tracked *Bell II*'s title analysis, noting the English common law rule and Equal Footing doctrine principles, but concluding that Maine had lawfully alienated state ownership, as first stated by a Maine court in *Lapish* in 1831. *McGarvey v. Whittredge*, 2011 ME 97, ¶ 26, 28 A.3d 620 ("In Maine, the common law has been modified to create private ownership of intertidal lands subject to the public trust rights reserved to the State."). The *McGarvey* court cited the same Maine constitutional provisions, Article X, Sections 3 and 5 to affirm this transmutation of Massachusetts common law into Maine law, to mean that private ownership of the intertidal by upland owners "is solidly established" in Maine common law. *Id.* ¶ 32.

3. *Bell II* and *McGarvey* misconstrued the state constitutional provisions.

Bell II and *McGarvey* misconstrued the Maine Constitution at Article X, Sections 3 and 5 to alienate all intertidal land in Maine for at least three reasons. First, Section 3 simply adopts Massachusetts law that is not repugnant to the Maine Constitution, unless and until altered by the legislature. Federal constitutional limitations still apply and the Legislature may alter Massachusetts law. As explained in Sections II(A)-(C), *supra*, under binding Supreme Court precedent, ceding intertidal ownership by operation of a Massachusetts rule of law would violate federal constitutional principles of state sovereignty.

Second, Section 5 must be construed consistent with the factual and legal implications of Equal Footing principles. Section 5 states:

> All grants of land, franchises, immunities, corporate or other rights, and all contracts for, or grants of land not yet located which have been or may be made by the said Commonwealth, before the separation of said District shall take place, and having or to have effect within the said District, shall continue in full force, after the said District shall become a separate State.

Me. Const. art. X, § 5. Any grants within Section 5 that impaired state ownership of intertidal land would be superseded as a matter of federal constitutional law.

Third, a common law rule that generates a presumption of interpreting deeds and title ownership is not a "grant" within the meaning of Section 5. The

Equal Footing doctrine vests title to intertidal lands in the state upon achieving statehood, which would necessarily occur *after* separation of "said District." Any prior grants that would defeat Maine's title would be void, and thus would not be grants "having or to have effect within the said District."

A "grant" means "[t]o formally transfer (real property) by deed or other writing." *Grant*, Black's Law Dictionary 844 (11th ed. 2019). Even if the Colonial Ordinance were construed as a grant to upland owners,[12] the ordinance was repealed and never operative as to land in Maine. *See McGarvey*, 2011 ME 97, ¶ 30, 28 A.3d 620. As a creature of common law, the rule has no specific origin tied to land; there is no specific deed or writing that one could consult as to a parcel of intertidal land that would qualify as a "grant of land" within the meaning of Section 5.

Maine's constitutional provisions do not override the federal constitutional principles that required title vest in the state upon statehood.

F. Maine's intertidal "ownership" rule is not rooted in any enactment or instrument of conveyance.

In *McGarvey*, the Court expressly acknowledged that the Colonial Ordinance was not in effect at the time of Maine's statehood in 1820, nor was the Ordinance applicable at any time to the territory that became Maine.

[12] This interpretation is questionable and disputed by scholars, as addressed in Section III.

McGarvey, 2011 ME 97, ¶ 30, 28 A.3d 620. The repealed Colonial Ordinance wormed into Massachusetts common law, and later Maine common law, as "usage," a "custom," and heralded as "judicial legislation."[13]

Thus, there is no disputing that, as applied in Maine, this intertidal ownership rule is a creature of common law (*i.e.* cases decided by judges in discrete controversies over time). No express grant, deed, legislative enactment, or constitutional provision *expressly* alienated these lands to third parties. Until *Bell I*, no case openly commented on the statewide implications of applying this vestige of Massachusetts colonial law. *See Bell v. Wells (Bell I)*, 510 A.2d 509, 519 (Me. 1986) ("The quieting of title at Moody Beach will affect the rights of the public at that beach and may through the persuasive authority of that decision affect public rights at other Maine beaches.").

Lapish v. President of Bangor Bank was a rather ordinary title dispute over one acre of flats on the Penobscot River. 8 Me. 85, 92 (1831). In construing the deeds and deciding the case, the Law Court relied on the Colonial Ordinance and Massachusetts case law for the rule that a conveyance with a call referencing a water body is presumed to include the intertidal flats. *Id.* at 92.

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[13] "But it has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both . . . that we could not but regard it as a piece of *judicial legislation*." *Barrows v. McDermott*, 73 Me. 441, 448 (1882).

In response to arguments that the Ordinance was not applicable to Maine, the Court quoted *Storer v. Freeman*: "This ordinance was annulled with the charter, by the authority of which it was made; but from that time to the present, an usage has prevailed, which has now the force of our common law." *Id.* at 93 (quotation marks omitted).

The Court hardly approached the issue as the first Maine court to decide the question of title to the intertidal with the solemnity of the momentous consequences. Instead, the Court reflexively regarded the Colonial Ordinance and *Storer* as conclusive, immutable precedent: "Ever since that decision, as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question." *Id.* In other words, the Court seemingly felt compelled to stay the course, without any apparent consideration for Equal Footing or whether other government branches might think harder about renouncing the state's title claim to intertidal lands.

G. *Lapish* and its progeny were decided prior to clear guidance from the U.S. Supreme Court.

The key U.S. Supreme Court Equal Footing decisions were decided in the 1890s, well after the Maine decisions that purported to follow Massachusetts.

This explains how Maine courts misconceived the constitutional grant of title and the manner under which that title could be lawfully alienated.

The Supreme Court would conclude that Maine courts committed a fundamental analytical error by holding that Maine's title was irretrievably ceded by operation of Massachusetts law.

III. Even if the Colonial Ordinance is now a fixture of Maine common law, intertidal land was not conveyed.

Although the legacy of the Colonial Ordinance is the fishing, fowling, and navigating triumvirate of public trust rights and title ownership for littoral owners to low water mark, the language and history of that legislative enactment, and its actual documented influence within Maine, has not been independently scrutinized by Maine courts. This Court should not repeat the mistakes of Massachusetts courts.

The original 1641 Ordinance articulated only the rights of "howse holder[s]" to fish and fowl. Massachusetts Body of Liberties § 16 (December 10, 1641), *reprinted in* R. Perry at 148, 150. It was not until the 1647 recodification within the Body of Liberties that the language regarding the free passage of boats and vessels (navigation) was added, along with the following: "the Proprietor of the land adjoyning shall have propriete to the low water mark . . . . Provided that such Proprietor shall not by this libertie have power to

stop or hinder the passage of boats . . . ." *Compare* Massachusetts Body of Liberties § 16 (December 10, 1641), *with* Liberties Common § 2, *The Book of the General Lawes and Libertyes Concerning the Inhabitants of Massachusetts* (Boston, Mass. 1647).

Interpreting the 1647 Colonial Ordinance as a grant of title to upland owners violates almost every rule for construing legislation and property grants: that courts construe the plain language; that the intent of the parties or legislators is paramount; that language must be construed within the context and statutory scheme; and importantly, that grants of public trust lands by government are construed strictly against the grantee.

A. Plain Language and Intent

The Ordinance does not support an interpretation that fee title ownership was conveyed. Plain language and historical context indicate that a riparian or littoral property owner has personal priority rights to the intertidal, not a fee title interest to the soil.[14] The upland owner's "propriete" is described as a "liberty," meaning a right that is *personal*, not a fee interest in the land. Examining deeds to lands in Maine, commentators have shown that "propriete"

[14] *Storer*, the foundation for *Lapish*, grossly misquoted the Ordinance by substituting "hold" for "propriete": "To induce persons to erect [wharves], the common law of *England* was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall *hold* to low water mark . . . ." *Storer v. Freeman*, 6 Mass. 435 (1810) (emphasis added).

had variable meanings and, where used in the intertidal context, refers to wharfing out privileges and related uses. *See* Churchill & Yarumian, The Great Land Grab 34, 39 (2019) ("Historical research, which had included hundreds of Massachusetts deeds, never once found 'propriety' as a synonym for grant, deed, indenture, etc. . . . [i]t was always used to express rights, liberties, freedoms of actions within or tangential to the actual grant or land transaction.").

The 1647 enactment thus clarified that the upland owner has direct and perhaps superior rights to wharf out in the intertidal, provided she does not interfere with boat passage. Like a confirmation of widely understood public trust uses, the Ordinance thus expressly codified what the common law already recognized: "The common law provides owners of the land abutting a body of water certain rights or privileges different from those generally belonging to the public." *Britton v. Donnell*, 2011 ME 16, ¶ 8, 12 A.3d 39 (citation and quotation marks omitted).[15]

B. Construction in Statutory Scheme and Context

[15] "These include: (1) the right to have the water remain in place and retain, as nearly as possible, its natural character, (2) the right of access to the water, (3) subject to reasonable restrictions, the right to wharf out to the navigable portion of the body of water, and (4) the right of free use of the water immediately adjoining the property for the transaction of business associated with wharves." *Britton v. Donnell*, 2011 ME 16, ¶ 8, 12 A.3d 39 (quotation marks omitted).

Second, viewing the Ordinance within the broader context of the legislative scheme, the purpose and intent was to address rights and liberties, not to convey property and define boundaries. *See Convery v. Town of Wells*, 2022 ME 35, ¶ 10, 276 A.3d 504 ("[W]e examine the statute in the context of the entire statutory scheme."); *Windham Land Tr. v. Jeffords*, 2009 ME 29, ¶ 24, 967 A.2d 690 ("In determining the intent of the parties to the deed, we look at the instrument as a whole.").

An entirely separate provision of the Body of Liberties addressed title and grants: "Bound of townes and persons," which directed the towns and proprietors to define and set boundaries of lands. If intended to grant away the intertidal to upland owners, the logical place for such a provision to appear would be there, particularly given that the proprietors of towns were charged with managing common lands, which often included the seashore and intertidal. *See* Cheung, *Rethinking the Colonial Ordinance*, 42 Me. L. Rev. 115 at 148-51 (1990).

C. Strict Construction Against Grantee

Third, grants of land impressed with public trust—such as the intertidal—are construed *strictly* and *narrowly*, with the presumption that the state grantor did not intend to convey away trust rights "unless clear and special words" express that intent. *Martin v. Lessee of Waddell*, 41 U.S. 367, 406

(1842); *see also Bos. Waterfront Dev. Corp.*, 393 N.E.2d at 362 (noting "the long-established principle of statutory construction that in all grants, made by the government to individuals, of rights, privileges, and franchises, the words are to be taken most strongly against the grantee"). The language of the Ordinance is ambiguous at best, which, when construed strictly, yields only one plausible result: that title was not conveyed.

D. If Massachusetts law transferred title to intertidal lands, when did title vest and how?

Besides defying longstanding rules for government title grants, exactly *when* did title vest in the upland owners? In 1831 with this Court's decision in *Lapish*? In 1820 upon Maine's statehood? Or some earlier time? What if the intertidal flats were severed from the upland before that date or the upland owner's deed that contains language generating the presumption was included by a grantor that purported to convey more than she owned? Would the upland owner still take title to the intertidal notwithstanding that severance by operation of this seemingly immutable common law rule?

If clarity of title is a primary concern, a rule that arbitrarily divests title contrary to the actual intent and expectations of parties to prior transactions does not negate that concern. The idea that a different ruling would upset the stability of title is a fiction. Rather than overruling precedent, the Court would

be reaffirming title principles much older and more established than *Bell*; that was the anomaly; and overruling this comparatively recent precedent would be a return to stability, rather than a disruption.

1. The Rule is a presumption that is rebuttable.

The rule may have installed a high degree of certainty and confidence in litigious property owners, but those beliefs are often misplaced. Upland owners have wrongly asserted, based on *Bell* and its progeny, that they own the intertidal lands when the application of legal rules of deed construction show otherwise, including in this case, *see infra* Section VI. The rule is merely a *presumption*, not a categorical legal truth. *See Presumption*, Black's Law Dictionary 1435 (11th ed. 2019) ("Something that is thought to be true because it is highly probable.") As a factual matter, intertidal land is often poorly surveyed, described, and understood with the result that ambiguity rather than clarity is the rule.[16] The full historical and title record examined back to colonial era deeds and grants shows the unfounded assumptions and pervasive myths that such a rule perpetuates, which should be of paramount concern to this Court.

[16] Richards & Hermansen, *Principles of Ownership Along Water Bodies*, 47 Me. L. Rev. 35, 36-37 (1995) (describing title ambiguities along water bodies perpetuated by practical and professional limitations and omissions).

The phenomenon of overstating one's title at the beach following *Bell* is neatly illustrated by two recent cases of this Court.

In *Mabee v. Nordic Aquafarms Inc.*, the fish farm, claiming through an upland owner, asserted rights to bury pipes in the intertidal. 2023 ME 15, 290 A.3d 79. They asserted that as upland owners, they benefitted from the Colonial Ordinance presumption. *Id.* ¶¶ 50-52. This Court concluded that the presumption was not implicated by a call along the high-water mark with the result that the intertidal land was severed from the upland. *Id.* ¶ 44.

In *Almeder v. Town of Kennebunkport*, this Court affirmed a judgment that concluded that upland owners did not own any portion of the intertidal due largely to their deed descriptions that bounded their properties by the "sea wall." 2019 ME 151, ¶ 28, 217 A.3d 1111. The Court held this was not a call to water sufficient to trigger the Colonial Ordinance presumption of ownership to low water. *Id.* ¶ 38. The Court rejected arguments that the trial court "resurrect[ed] ancient deeds to disrupt modern ownership," instead concluding that the court's title conclusion was well supported by the record. *Id.* ¶ 28. The Court further rejected arguments based on language added to later deeds, stating "these late additions do not resurrect the presumption of ownership to the low water mark." *Id.*; *see also Eaton v. Town of Wells*, 2000 ME 176, ¶ 19,

760 A.2d 232 (noting that "a person can convey only what is conveyed into them").

Indeed, like the upland owners in *Almeder*, in the wake of *Bell II*, many enterprising real estate lawyers added language to deeds of upland owners to claim intertidal land. But the application of ordinary rules of deed construction and title to the facts on the ground belie the proposition that upland ownership is equivalent to intertidal ownership.

Lapish and the subsequent cases can be reconciled by the fact that the opposing party simply did not argue or have the evidence to rebut the presumption. Moreover, in most of those cases, if viewed through Equal Footing principles or the colonial historical record, the State or town or successor to the proprietors (where applicable) that would have been in the best position to rebut the presumption was not a party, but would have been a necessary party, M.R. Civ. P. 19, further explaining how the rule took root under circumstances where with different parties and lawyers, the courts may not have reached the same conclusion.

2. Historical studies show that early colonial governments and proprietors owned and managed intertidal land.

Studies have examined historical sources and title records to conclude that early conveyances did not include intertidal land and was instead managed

like commons by pre-Statehood colonial governments and proprietors. The evidence is compelling and substantially undermines, if not disproves, the core assumption that the Colonial Ordinance was understood by contemporaries as a grant to upland owners. *See, e.g.*, Delogu, Maine's Beaches Are Public Property, Ch. 9 (2018) (recounting studies of North Yarmouth, Wells, and Kennebunkport); Churchill & Yarumian, The Great Land Grab 51-93 (2019) (analyzing 17th Century private and town deeds in Kittery, York, Wells, Cape Porpus, Saco, Cape Elizabeth, Falmouth). As in *Almeder*, if this Court were to undertake a parcel-by-parcel analysis of the entire Maine coastline, the results would show that upland owners do not own the intertidal, either by operation of a severance of the flats or having received grants from parties that did not own the underlying fee. Will this Court continue to uphold the rule regardless of what the evidence or title record shows? Municipalities cannot afford the million-dollar litigation required to prove upland owners wrong.[17]

IV. Separation of Powers (Count III)

Relevant to both title and public trust uses, this Court, by creating a "Super Common Law" beyond the Legislature's authority by cloaking that rule

[17] This Court may take judicial notice that the Town of Kennebunkport incurred fees exceeding $1.2 million to litigate *Almeder*. Donna Buttarazzi, *Court gives public access to Goose Rocks Beach*, York County Coast Star (Apr. 12, 2018), https://www.seacoastonline.com/story/news/local/york-star/2018/04/12/court-gives-public-access-to/12717145007/.

in a constitutionally protected interest for upland owners, has exceeded the powers of the judicial branch, violating Article IV §§ 1-3 of the Maine Constitution.

A. The Legislature has spoken as trustee over the State's intertidal domain. Will the Court listen?

Alienation, transfer, or waiver of the State of Maine's title interest in intertidal lands could only be accomplished by legislation with limitations.[18] The Legislature has spoken on these important issues and attempted to exercise authority. The Legislature has expressly asserted title to submerged lands and "ownership . . . by virtue of . . . any other provision or rule of law," 1 M.R.S. § 5, which would include Equal Footing ownership of intertidal land. The question in this case is whether this Court will recognize and defer to the Legislature's role in assuming and overseeing the public trust.

In 1975, to address intertidal and submerged lands that had been filled (usually for wharfing out and commercial development—consider Portland's Commercial Street), the Legislature enacted the Submerged and Intertidal Lands Act, first amended in 1981. *See* 1975 Me. Laws c. 287; 1981 Me. Laws c.

[18] Prior to *Bell*, this proposition was not controversial. *See Answers*, 118 Me. 503, 505, 106 A. 865 (1919) ("[T]he people as beneficiaries possess these public rights, the Legislature, which represents the people, has the power to abridge these rights and to grant them, or any portion of them, to private individuals or corporations . . . . Under the original ordinance they could not be conveyed by a town without legislative authority; nor can they now.").

532, § 559.[19] The purpose of the enactments was to confirm title to filled submerged and intertidal lands. Impliedly, the statutory scheme did not affect title to *unfilled* submerged and intertidal lands, which would remain owned by the State and impressed with the public trust.

The 1981 amendment was put to this Court to determine whether the statute "would be consistent with the State's legal responsibilities as trustee of the submerged lands." *Opinion of Justices*, 437 A.2d 597, 599 (Me. 1981). This Court opined that the statute would be. The Court emphatically affirmed the vitality of the State's stewardship of public trust rights:

> the public trust rights to intertidal and submerged lands in their natural, unfilled state, remain unrestricted and unimpaired. Strict laws are already in place to assure that any filling or other development of the intertidal and submerged lands is consistent with the State's public trust responsibilities; and it is open to the Legislature or the people directly to enact any further laws and regulations they deem necessary to protect those public rights.

Opinion of Justices, 437 A.2d at 610. The Public Trust in Intertidal Land Act was enacted April 25, 1986, while the *Bell I* case was still pending before this Court. *See* 12 M.R.S. § 571. The Legislature's findings and purpose state in relevant part:

> The Legislature further finds and declares that this public trust is part of the common law of Maine and generally derived from the practices, conditions and needs in Maine, from English Common

[19] The Act is now codified at 12 M.R.S. § 1862.

> Law and from the Massachusetts Colonial Ordinance of 1641-47. The public trust is an evolving doctrine reflective of the customs, traditions, heritage and habits of the Maine people. In Maine, the doctrine has diverged from the laws of England and Massachusetts. The public trust encompasses those uses of intertidal land essential to the health and welfare of the Maine people, which uses include, but are not limited to, fishing, fowling, navigation, use as a footway between points along the shore and use for recreational purposes. These recreational uses are among the most important to the Maine people today who use intertidal land for relaxation from the pressures of modern society and for enjoyment of nature's beauty.

Id. The statute declared public trust rights to include recreation, along with any other trust rights recognized by common law, with certain limitations and subject to municipal regulation. *Id.* § 573(1)-(3).

This Court in *Bell II* held that the Act was an unconstitutional taking. *Bell II*, 557 A.2d at 177. By so holding, this Court functionally rendered the Colonial Ordinance regime of title and uses a permanent fixture of Maine law, forever beyond legislative authority to change. For the reasons discussed in Section V(D), *infra*, the Court takings conclusion was demonstrably wrong.

B. The Legislature has clear authority to alter a common law rule and is better suited to developing intertidal zone policy.

Even if Maine courts had authority to alienate intertidal lands, there is no support for the proposition that said authority is exclusive and that the common law cannot be modified by the Legislature. Early cases that adopted the Colonial Ordinance rule into Maine common law explicitly recognized that

the rule could be overridden by the Legislature. *See, e.g.*, *Barrows v. McDermott*, 73 Me. 441, 448 (1882) (characterizing the Colonial Ordinance as a "piece of judicial legislation" that must be upheld "*until it shall have been changed by the proper law making power*" (emphasis added)).

If this Court remains committed to upholding the common law title rule, then the Legislature can change that rule. *See Bell II*, 557 A.2d at 192 (Wathen, J., dissenting) ("The Act is therefore within the scope of Legislature's authority to alter, abrogate, and codify the common law."); *Atl. Oceanic Kampgrounds, Inc. v. Camden Nat'l Bank*, 473 A.2d 884, 886 (Me. 1984) ("[T]he legislature is free to abrogate a longstanding rule of common law.")

The entire controversy going back to the early cases has effectively made judges into grantors, legislators, and land managers which is unusual, perhaps uncomfortable, and worthy of reconsideration. There is nothing in the cases or historical record to suggest that early decisions, *see, e.g.*, *Lapish*, 8 Me. 85 (1831), were mindful of the implications or knowingly alienated thousands of miles of intertidal land as a matter of deliberate and sound policy making. Instead, the Colonial Ordinance rule was applied in relatively inconsequential title and property disputes, as an interpretative tool and a *presumption*, rather than a sweeping grant of title across the state. *See Lapish*, 8 Me. at 92. Were they even aware of what they had done? Would the result have been the same

in *Lapish* had the State of Maine intervened and asserted, pursuant to the Equal Footing doctrine, that the true owner of the disputed flats was the State?

These unanswerable questions highlight the indisputable fact that judges can only decide the cases before them, involving the particular parties, lawyers, and claims with the idiosyncrasies and imperfections that come with them. *See Bell II*, 557 A.2d at 191 (Wathen, J., dissenting) ("The essence of the judicial power, as distinguished from the legislative, is its focus on resolving specific controversies between particular parties in litigation."). Courts are not well positioned, or even tasked, to consider how a law will apply on a grander scale or different set of facts, and whether such a rule extended statewide would serve overarching societal and governmental needs and objectives. That function is usually the task of the Legislature, which is better positioned to gather information from stakeholders and craft legal rules of general applicability. *See Lewis v. Webb*, 3 Me. 326, 333 (1825) (legislative enactments are "general and prospective; a rule for all, and binding on all. It is the province of the legislature to make and establish laws.").

The legislative role includes making modifications and adjustments if experience shows the law unworkable or if unintended consequences result. When that happens, the Legislature has full power to act without being hamstrung by the weight of history, pride, or *stare decisis*.

C. In addition to neutralizing the Legislature, this Court also sidelined the Executive Branch and the Attorney General.

The *Bell* Court's errors spring in part from fundamental misconceptions of the public trust, the state's responsibilities as trustee, and the power and responsibility to regulate the trust. Perhaps the most egregious example occurred in *Bell I*, where the Court, in determining that the State was not a necessary party, concluded that "because the plaintiffs and not the State hold the fee simple title, the trustees, if any, of Moody Beach would be the plaintiffs."[20] *Bell I*, 510 A.2d at 517. This error, which conflated fee ownership with trusteeship, and seemingly abrogated the state public trust doctrine, appears to have been corrected. *McGarvey*, 2011 ME 97, ¶ 26, 28 A.3d 620 ("In Maine, the common law has been modified to create private ownership of intertidal lands *subject to the public trust rights reserved to the State*." (emphasis added)). In distinguishing between *jus publicum* and *jus privatum* concepts, *McGarvey* clarified that even where title is held by private owners, the land remains subject to public trust rights committed to State oversight. *Id.* ¶¶ 24-26.

[20] This despite the Court clearly and correctly recognizing the State's trustee role over intertidal land a mere five years earlier. *See James v. West Bath*, 437 A.2d 863, 865 (Me. 1981) ("Maine's tidal lands and resources, including marine worms, are held by the State in a public trust for the people of the State."); *Opinion of Justices*, 437 A.2d 597, 610 (Me. 1981).

V. This Court should hold that Plaintiffs are lawfully engaging in permissible public trust uses of the intertidal land.

The public trust is more expansive than the Colonial Ordinance trifecta of fishing, fowling, and navigating.

A. The Common Law recognizes broader uses than fishing, fowling, and navigating.

Maine common law has long implied, if not directly stated, that the three Colonial Ordinance uses were simply illustrative of the many reasonable ocean-based uses that are and have long been permissible in the state's intertidal. It is an "erroneous assumption that the Colonial Ordinance is the exclusive and preeminent source of all public rights." *Bell II*, 557 A.2d at 180 (Wathen, J., dissenting); *see also McGarvey*, 2011 ME 97, ¶ 51, 28 A.3d 620 ("As we have held, the public may engage in activities that are not directly related to the three descriptors.").

Recognized common law uses test the limits of the seemingly strict and defined categories under which the Colonial Ordinance would place them. "Fishing" includes worm digging, clamming, and general shellfishing. *State v. Lemar*, 147 Me. 405, 409, 87 A.2d 886, 888 (1952) (worms); *State v. Leavitt*, 105 Me. 76, 78-80, 72 A. 875, 876-77 (1909) (clams); *Moulton v. Libbey*, 37 Me. 472, 489-90 (1854) (shellfish). Similarly, "navigation" includes crossing over frozen water, including by horseback or on skates, *see French v. Camp*, 18 Me. 433, 434-

35 (1841); *Marshall v. Walker*, 93 Me. 532, 536-37, 45 A. 497, 498 (1900), and can include mooring a boat to drop off passengers and load cargo, *State v. Wilson*, 42 Me. 9, 24-25 (1856).

The status required to enjoy public trust rights and the motivations for exercising one's rights have also been given a liberal interpretation, which has broadened over time. *See, e.g.*, *Bell II*, 557 A.2d at 186 (original Colonial Ordinance only granted fishing and fowling rights "to inhabitants who were householders") (Wathen, J., dissenting). Today, any member of the public may engage in recognized public trust uses for recreation, business or commerce, as well as for nourishment. *See Barrows*, 73 Me. at 449-50; *Andrews v. King*, 124 Me. 361, 363-64, 129 A. 298, 298-99 (1925).

Public uses reflected society and the era in which the controversies arose. *See McGarvey*, 2011 ME 97, ¶ 37, 28 A.3d 620 ("[Prior to Bell II] our courts had consistently acknowledged that the public trust rights in the intertidal land adapted to reflect the realities of use in each era."). Historic uses, like pre-automobile travel and driving and resting cattle, would appear foreign to modern beachgoers and have fallen out of favor as our transportation system and economy has modernized. *Bell II*, 557 A.2d at 173 n.15. Non-boat-based travel and walking or herding cattle in the intertidal clearly do not fit under any of the three Colonial Ordinance categories and would fairly open up the public

trust to a wide variety of uses by analogy. These uses conclusively disprove the idea that fishing, fowling, and navigating and activities connected thereto are the limits of public trust rights.

B. This Court should adopt the test from then Chief Justice Saufley's concurrence in *McGarvey*.

In *McGarvey*, this Court unanimously agreed that scuba diving was a permissible trust use but split on the reasoning. 2011 ME 97, 28 A.3d 620. The case brought into sharp focus the limits of interpreting fishing, fowling, and navigating when presented with a use—scuba diving—that was reasonable and recognized along Maine's shores but did not easily fit 17th Century notions.

The Saufley concurrence (joined by Justices Mead and Jabar) would have expressly overruled *Bell II* to the extent that opinion could be read to limit public trust uses to fishing, fowling, and navigating. Chief Justice Saufley instead proposed a test that public trust rights could include ocean-based uses that, consistent with common law, strike "a reasonable balance between private ownership of the intertidal lands and the public's use of those lands." 2011 ME 97, ¶¶ 49, 51-53, 57, 28 A.3d 620.

The Saufley concurrence did not work from a blank slate; she picked up right where Justice Wathen left off in his *Bell II* dissent: "I do not agree that public recreational rights in the Maine coast are confined strictly to 'fishing,'

'fowling,' and 'navigation', however 'sympathetically generous' the interpretation of those terms might be." *Bell II*, 557 A.2d at 180 (Wathen, J., dissenting). He "rejected a rigid application of the terms of the Ordinance and resorted to contemporary notions of usage and public acceptance in order to strike a rational and fair balance between private ownership and public rights." *Id*. at 188 (Wathen, J., dissenting). Citing extensive historical and common law authorities, he concluded that "[t]he rights of the public are, at a minimum, broad enough to include such recreational activities as bathing, sunbathing and walking." *Id*. at 189 (Wathen, J., dissenting). And as Plaintiffs argue in this case, confining public trust to fishing, fowling, and navigating uses would produce arbitrary and seemingly inconsistent results:

> A narrow view would recognize the right to picnic in a rowboat while resting on the foreshore but brand as a trespass the same activities performed while sitting on a blanket spread on the foreshore. The narrow view taken by the Massachusetts court does not exclude the public from walking on the foreshore as it purports; it merely requires that a person desiring to stroll along the foreshores of that state take with him a fishing line or net. In keeping with the apparent purpose of the Colony Ordinance and its past decisions, the Maine Supreme Judicial Court can refuse to draw such a delicate distinction between the rights expressly reserved in the ordinance and similar recreational activities. With such a refusal the court will avoid the anomalous result of declaring the same man a trespasser for bathing, who was no trespasser when up to his knees or neck in water, in search of a lobster, a crab, or a shrimp.

Id. (alteration, citation, and quotation marks omitted). "Given similar degrees of intensity of use, one would imagine that a shoreowner might prefer the presence of sunbathers, swimmers and strollers over fowlers and fishermen." *Id.*

Since *McGarvey*, this Court has moved towards but not yet decisively adopted that test. *See, e.g.*, *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 20, 206 A.3d 283. Chief Justice Saufley took the opportunity in *Ross* to author another poignant concurrence that again raised the missed opportunity to overrule *Bell II*:

> In 1989, the Law Court, in a sharply divided opinion, made a regrettable error, limiting public access to the intertidal zones on Maine's beaches in *Bell v. Town of Wells (Bell II)*, 557 A.2d 168 (Me. 1989). Since that time, a member of the public has been allowed to stroll along the wet sands of Maine's intertidal zone holding a gun or a fishing rod, but not holding the hand of a child.

Id. ¶ 34 (Saufley, C.J., concurring). She continued, "we would take this opportunity to correct the judicial error that restricted the rights of the public to engage in reasonable ocean-related activities that do not interfere with the upland owners' peaceful enjoyment of their own property or their right to wharf out." *Id*. ¶ 40 (Saufley, C.J., concurring).

It is against this backdrop that the present controversy, in which the Plaintiffs are engaging in a panoply of diverse uses in the intertidal, finally

presents the case and begs the holding that cases concerning Moody Beach, scuba diving, Goose Rocks Beach, and rockweed harvesting could not. This Court should thus consider then-Justice Saufley's concurrence in *Eaton v. Town of Wells:* "As long as the public's legally cognizable interest in the intertidal zones remains artificially constricted by the holding in *Bell*, each time that the public and a private landowner clash over the scope of allowed recreational use of intertidal zones, the resolution will be uncertain." 2000 ME 176, ¶ 52, 760 A.2d 232 (Saufley, J., concurring). Now is the time to quell this uncertainty. Now is the time to finally overrule *Bell*.

C. Plaintiffs are engaged in reasonable ocean-related recreational uses that do not interfere with the upland owners' peaceful enjoyment of their property.

Plaintiffs (and Defendants too) are engaging in a panoply of recreational uses in the intertidal, including but not limited to (1) walking, (2) sitting, (3) paddleboarding, (4) surfing, (5) building sandcastles, (6) bird watching, (7) running, (8) stretching, (9) walking slowly or meandering, (10) playing frisbee, (11) playing bocce, (12) boogie boarding, (13) body surfing, (14) resting, (15) looking at the water, (16) digging holes, (17) playing kickball, (18) reading, (19) playing baseball, (20) observing wildlife, (21) playing and splashing in the water, (22) jogging, (23) sitting in beach chairs, (24) beachcombing (looking for rocks, shells, crabs, periwinkles, etc.), (25) skimboarding, (26) playing tag

football (27) playing paddleball, (28) playing Whiffle ball, (29) playing catch with various balls, (30) playing in tide pools, (31) playing hand tennis, (32) flying a kite, (33) having lunch or picnicking, (34) walking a dog, (35) wading in the water, (36) standing where waves crash, and (37) academic research.[21]

Although these may be different activities, they lack meaningful distinctions when examined as a whole. The point is underscored when one considers impacts upon the private property owner, relative to a clammer disturbing the earth to dig clams, a boater ferrying passengers and cargo, or thrill-seekers skating or riding horses over the frozen waters—all of which are firmly established public trust uses under the case law. If those are fine and reasonable, why not bocce ball?

When asked, Defendants honestly conceded that they have no objections to members of the public engaged in activities such as walking, running, bird watching, surfing, and building sandcastles in the intertidal. (A. 831-34.) Though their signs state otherwise, Defendants themselves claim to not restrict

[21] Plaintiff Brian Beal is a professor of Marine Ecology at the University of Maine at Machias. Besides recreation and clamming, Professor Beal's "activities in the intertidal portion of the Maine coast . . . include performing research on commercially important shellfish, marine worms, rockweed, and other intertidal organisms." (A. 849.) Privatization of Maine's intertidal zone has had a chilling effect on Professor Beal's research opportunities. (A. 849.) Like other recreational uses, a rule that research connected to permissible public trust "fishing" uses are allowed (sea worms), while research into rockweed (under *Ross*) would not be allowed, makes arbitrary distinctions without a meaningful difference.

those activities, which would suggest that they concede these are reasonable uses that do not interfere with their property rights. (A. 831-34.)

Unlike in *McGarvey*, the question of a general recreation easement is squarely presented here. The trial court erred in denying Plaintiffs' motion for summary judgment on Count IV. This Court should hold that Plaintiffs' intertidal activities are all "reasonable ocean-related activities that do not interfere with the upland owners' peaceful enjoyment of their own property or their right to wharf out," *Ross*, 2019 ME 45, ¶ 40, 206 A.3d 283, and that general recreation, consistent with Plaintiffs' uses, is permitted.

D. Recognizing recreational uses would not be an unconstitutional taking.

Recognition of recreational rights in the intertidal would not work an unconstitutional taking of private property. The *Bell II* Court erred in holding that the Public Trust in Intertidal Land Act ("the Act") is unconstitutional. Plaintiffs in this case are engaged in recreational uses contemplated by the Act and Defendants have raised constitutional objections.

The legal authority relied upon in *Bell II* is easily distinguished in the public trust context, wherein there is already a physical invasion and easement. Private property owners have no right and thus no reasonable expectation to exclude members of the public engaged in public trust uses, and the definition

and regulation of public trust uses is committed to the discretion of the State, i.e. the Legislature. Simply put, land subject to the public trust is burdened by a significant qualification on title, and the government as trustee has broad police powers that do not implicate special "categorical" or "*per se*" taking rules. Regardless of this Court's conclusion regarding title, there would be no "taking" by recognizing recreational public trust uses.

Bell II concluded that the Act was unconstitutional primarily relying upon a 1974 Opinion of the Massachusetts Supreme Judicial Court examining a statute that granted the public the right to walk in the intertidal. *See Bell II*, 557 A.2d 168, 176-79 (Me. 1989). That 1974 opinion *preceded* the seminal U.S. Supreme Court decisions that defined the outer limits of regulatory police powers in contexts that are not analogous to state action over private property that is subject to public trust rights.

The Court erroneously concluded that allowing recreational use of the intertidal would deprive private property owners of the right to exclude and distinguished the Act from other Maine regulatory enactments. *Id.* at 177-78. The Court also relied on several Supreme Court decisions to hold that the Act created an analogous permanent physical invasion or public easement, for which compensation would be required. *Id.*

1. Regulatory Takings, Categorical Takings, and Exactions

The Fifth Amendment of the U.S. Constitution and Article 1, Section 21 of the Maine Constitution prohibit the "tak[ing]" of private property "without just compensation." U.S. Const. amend. V; Me. Const. art. I, § 21. This Court's takings jurisprudence closely tracks Supreme Court precedent: "The government . . . is not required to pay a property owner every time it enacts a law that adversely affects property interests . . . [but] if regulation goes too far it will be recognized as a taking." *MC Assocs. v. Town of Cape Elizabeth*, 2001 ME 89, ¶ 4, 773 A.2d 439 (citations omitted). Whether a regulation constitutes a taking is a case-specific inquiry that employs an "ad hoc" balancing test.[22]

The Supreme Court has held that regulations that impose a permanent physical invasion are not subject to the ordinary *ad hoc* test, but instead are considered takings "per se" or "categorical takings," even if the impact is *de minimis* and government interest substantial. *MC Assocs.*, 2001 ME 89, ¶ 46, 773 A.2d 439. The Supreme Court has also recognized a third subcategory of regulatory takings, which prohibit the government from imposing permitting

[22] "Relevant factors to be considered in the determination include the 'economic impact of the regulation on the claimant . . . , the extent to which the regulation has interfered with distinct investment-backed expectations [and] the character of the governmental action.'" *MC Assocs. v. Town of Cape Elizabeth*, 2001 ME 89, ¶ 5, 773 A.2d 439 (quoting *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978)).

conditions that bear an insufficient nexus to the "legitimate state interests" at issue.[23] *See Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 837-38 (1987).

2. Cases Discussed in *Bell II* and Physical Occupation

Kaiser Aetna concerned whether a public navigational easement imposed on an owner of a private pond and marina constituted a taking. The private pond was previously inaccessible from waters of the United States and not navigable prior to dredging and improvement by the owner, which investments were undertaken by the owner based on government representations that a public easement would not apply. *Kaiser Aetna v. United States*, 444 U.S. 164, 167, 179 (1979). The Court, applying the *ad hoc* test, concluded that the public right of navigational access imposed by the Army Corps constituted a taking, largely based on the owner's reasonable investment-backed expectations that the pond and marina would remain private. *Id.* at 178-79.

In *Pruneyard Shopping Ctr. v. Robins*, the Supreme Court held that a California requirement that a business permit free speech activities and pamphlet distribution at a shopping center did *not* rise to a taking. 447 U.S. 74, 83-84 (1980). The Court again applied the *ad hoc* factors and distinguished

[23] The standard requires the court to evaluate whether an "'essential nexus' exists between the 'legitimate state interest' and the permit condition exacted by the city. If [the court] find[s] that a nexus exists, [the court] must then decide the required degree of connection between the exactions and the projected impact of the proposed development." *Dolan v. City of Tigard*, 512 U.S. 374, 386 (1994).

Kaiser Aetna, concluding that the "physical inva[sion]" of the owner's property was not determinative and that the requirement did not impair the value of property or upset reasonable expectations given that the business was open to and visited by thousands of members of the public. *Id.*

In *Loretto*, the Supreme Court considered a law requiring landlords to allow cable companies to install cable wires and boxes on their buildings. The Court held that the cable equipment was a "permanent physical occupation," that would be a taking *per se*, even if the economic impact was slight and public interests significant. *See Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 426 (1982). The Court expressed concern that a permanent physical occupation (1) deprived the owner of the right to sole possession and to exclude the occupier; (2) denied the owner power to exert control over the property's use; and (3) diminished the value of the property to a prospective purchaser for those reasons. *Id.* at 435-36. The Court further explained: "The permanence and absolute exclusivity of a physical occupation distinguish it from temporary limitations on the right to exclude." *Id.* at 435 n.12.

The *Loretto* physical occupation rule has been further refined, beginning with *Nollan.* In *Nollan*, the commission conditioned the owner's permit to demolish and reconstruct a seasonal residence upon granting a public easement to connect two public beaches. *Nollan*, 483 U.S. at 828. The easement

was to be located over the owner's private property, upland of the high-water mark, over dry sand areas over which the public had no easement or public trust rights. *Id.*

The Court did not apply the *Loretto* rule, but subjected the government action to greater scrutiny, requiring a "nexus" between a permit condition exacted by the government and a legitimate state interest. Because the public easement lacked a sufficient nexus to the state interest in conserving public views of the ocean resource, the Court held that a taking had occurred. *Id.* at 837. Notably, the Court concluded that if the commission instead required the owner to grant a public viewing spot unobstructed by the development as a condition of the permit, this would have had a sufficient nexus to pass constitutional scrutiny and would not be a taking. *Id.* at 836-37.

3. The *Bell II* Court's analysis missed critical distinctions.

The *Bell II* Court's analysis was underdeveloped and oversimplified, missing critical material distinctions in the case law and private property ownership in the public trust context, as regulated by the State.

In every single one of the cases (*Loretto*, *Kaiser Aetna*, *Pruneyard*, *Nollan*) the private property owner held title in fee simple absolute, without any existing easement or public rights. When the Court expressed concerns about state-mandated occupations or invasions that impaired the owner's right to

exclude, those owners truly had exclusive rights to exclude, possess, and control their property. *See Dolan*, 512 U.S. at 393 (describing grant of public easement as interfering with "right to exclude others . . . one of the most essential sticks in the bundle of rights that are commonly characterized as property."). Compare private "ownership" of the intertidal, which is subject to trust rights of the general public that are largely unqualified and equal to or greater than the "owner," leaving them with no right or expectation of exclusive possession or control. *McGarvey*, 2011 ME 97, ¶ 33, 28 A.3d 620 ("[T]he upland owner has no 'exclusive right' to the portion of the flats on which there is no wharf or pier . . . .").

An ordinary easement is a substantial qualification on title. *See, e.g.*, *Kinderhaus N. LLC v. Nicolas*, 2024 ME 34, ¶ 34, ___ A.4th ___ (access easement gave dominant estate an unqualified right to cut and remove ornamental trees to the full width of the easement). If the easement area is defined, the holder "is entitled to use the entire granted area" and the servient estate cannot control or restrict use to a specific area. *See Mill Pond Condo. Ass'n v. Manalio*, 2006 ME 135, ¶ 6, 910 A.2d 392. The servient property owner has no right to unreasonably interfere with the easement holder's use of the easement, which may preclude them from growing trees, erecting fixtures, or maintaining obstructions. *See id.*; *Flaherty v. Muther*, 2011 ME 32, ¶ 63, 17 A.3d 640 ("The

owner of a servient estate may 'not materially impair, nor unreasonably interfere' with the use of a right-of-way." (citations omitted)).

Public trust rights, if construed as an easement, represent an extraordinary easement. The universe of "dominant estate owners" is vast. Hundreds or thousands of people from around the world[24] with bait buckets and fishing equipment could crowd every square inch of an owner's intertidal, 24 hours a day, 7 days a week, 365 days a year, and the property owner would have no right whatsoever to exclude them and seemingly no remedy to limit use if individually they acted within the scope of public trust rights.

The *Bell II* Court erred in concluding that recognizing recreation as a public trust right would constitute a physical occupation requiring compensation. *Bell II*, 557 A.2d at 178 (citing 1967 authority that physical occupations necessarily require compensation). Decades of subsequent Supreme Court decisions clarified that "[n]ot every physical *invasion* is a taking." *Loretto*, 458 U.S. at 435 n.12 (emphasis in original). Indeed, even in finding the public easement a taking in *Nollan*, the Court conceded that a public

[24] There is no limitation that the "public" is limited to residents of the municipality, state, or United States. Thus the Quebecois of Canada that frequent southern Maine in the summer, or anyone in the entire world, has the same right as a Wells resident to engage in public trust uses of the intertidal zone.

easement more narrowly related to the state interest would have been constitutional. *Nollan*, 483 U.S. at 836-37.

This case is most like *Pruneyard*, wherein the Court declined to apply the categorical analysis despite a physical invasion and upheld the state action. 447 U.S. at 83-84. That distinction—turning upon whether the public has access irrespective of the government regulation—remains controlling. *See Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2076-77 (2021) (construing *Pruneyard* and stating "[l]imitations on how a business generally open to the public may treat individuals on the premises are readily distinguishable from regulations granting a right to invade property closed to the public.").

4. There is no taking under the *ad hoc* factors.

This Court should recognize Plaintiffs' recreational uses of the intertidal and reject any arguments, based on *Bell II*, that this would constitute a taking. Had the *Bell II* Court recognized the categorical analysis was not appropriate given public access, and instead applied the *ad hoc* factors, the Court would have concluded that the Act easily passes constitutional muster. *See supra* n.22.

Given the existing significant public trust rights that encumber the property, an owner's expectation of the right to exclude a distinct class of recreational users would have a slight economic impact, if any, and cannot be said to have interfered with any *reasonable* expectation. *Bell II* considered

recreational use for the first time. Before that, a private property owner had no reasonable expectation of the right to exclude a member of the public engaged in recreation. The dissent concluded that recreational uses were within public common law rights, and thus the Act did not constitute a taking. *Bell II*, 557 A.2d at 191 (Wathen, J., dissenting). Given the ongoing conflict on the beaches and numerous decisions of this Court that have held an upland owner did not own the intertidal, a property owner's belief in a right to exclude a recreator remains unreasonable as a matter of law.

The state interest is substantial:

> These recreational uses are among the most important to the Maine people today who use intertidal land for relaxation from the pressures of modern society and for enjoyment of nature's beauty. The Legislature further finds and declares that the protection of the public uses referred to in this chapter is of great public interest and grave concern to the State.

12 M.R.S. § 571. This statement remains just as true today.

This Court should reject any constitutional takings arguments.

E. *Ross* must be overruled.

1. Harvesting seaweed in the intertidal zone is and has been a public trust right since "time immemorial."

This Court must overrule *Ross* because in this case, the Court (1) is not constrained by an erroneous factual stipulation that rockweed is a plant; (2) may consider statutes illustrating theLegislature has made the policy

determination—consistent with longstanding common law—that seaweed is a marine organism among resources owned and controlled by the State; and (3) in light of (1) and (2), the Court may finally conduct a legal analysis that does not start from the faulty predicate assumption that seaweed is privately owned and thus harvesting seaweed unreasonably burdens private property owners.

2. *Ross* holds that removing plants from the intertidal is not a cognizable public trust right.

In *Ross*, this Court, based on concessions that seaweed was a plant and indistinguishable from terrestrial plants growing in beach soil, and thus not "fishing," held that "rockweed attached to and growing in the intertidal is the private property of the adjacent upland landowner." *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶¶ 27, 33, 206 A.3d 283. The Defendant there failed to raise relevant statutes and arguments, resulting in this Court deciding the case without applicable existing statutory[25] and common law authority showing seaweed harvesting was, until *Ross*, a longstanding public trust use.

3. Seaweed is an alga, not a plant.

The defendant in *Ross* stipulated that rockweed was a plant, but this contravenes scientific fact. Rockweed is not a plant; it is an alga which has no

[25] The Court did not reach arguments raised here on grounds of waiver. *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 5 n.2, 206 A.3d 283 (emphasis added).

roots but rather secures itself by a "holdfast," similar to oysters, mussels, barnacles and, unlike terrestrial plants, derives its nutrients only from sea water. *See* DMR Fishery Management Plan at 4 (rockweed attaches to the substratum by a disc-like "holdfast"); (A. 855-56.); *see also The Judicial Privatization of Wild Seaweed in Maine,* Leoni, Reiter and Post, Natural Resources & Environment (ABA), Vol. 36, No. 3, Winter 2022, page 2; Sarah M. Reiter et al., *The Future of the Public Trust: The Muddied Water of Rockweed Management in Maine*, 25 Ocean & Coastal L.J. 325, 355 (2020) ("[T]he Court's decision in *Ross v. Acadian Seaplants Ltd.* . . . lacks a scientific foundation . . . . [T]reatment of Rockweed as a terrestrial plant fails to consider taxonomic, phylogenetic, biological, or ecological data. Scientifically, Rockweed is not a plant."). In addition, unlike plants, "rockweed has a sex, either male or female, and releases sperm or eggs into the sea." (A. 856.); DMR Fishery Management Plan at 5. Seaweed thus does not derive nutrients from the soil (*jus privatum*) but rather the sea water (*jus publicum*).

This Court should hold that seaweed is a reasonable public trust use that is, consistent with taking live shellfish, squarely within the public's rights.

4. As a matter of common law dating back to 1820 and "time immemorial" before that, seaweed has been a public resource held in trust by the State.

The misclassification of rockweed as a rooted terrestrial plant in *Ross*, while important to that decision, does not control the legal fact that seaweed harvesting is a public trust use and has been since statehood. The Maine legislature, and numerous states across the country, consider marine organisms, including seaweed, public trust resources. Sarah M. Reiter et al., *The Future of the Public Trust: The Muddied Water of Rockweed Management in Maine*, 25 Ocean & Coastal L.J. 325, 327 (2020).

Dating back to 1820, and "from time immemorial" before that, citizens of Maine have held a public trust right to access rockweed and other seaweeds in the intertidal. *See* R.S. ch. III, § 5 (June 14, 1820). The 1820 statute ostensibly governed Kennebunk and Wells, but evidences established common law uses and social understanding that the people of newly-formed Maine "have been accustomed" to "the privileges of obtaining clams, sea-weed, rockweed from the beaches or flats" from "*time immemorial*" and that those use rights shall continue. R.S. ch. III, § 5 (June 14, 1820) (emphasis added). Similar historic enactments confirmed this common law understanding in neighboring Massachusetts. *See* Mass. Gen. Laws Ch. 247, § 5 (1859) ("[a]ny person may

take and carry away kelp or other sea-weed between high and low water mark").[26]

The *Ross* Court's common law analysis was also incomplete in reconciling applicable case law. The Court concluded in a footnote that seemingly conflicting Maine cases addressing seaweed were not dispositive. *Ross*, 2019 ME 45, ¶ 27 n.10, 206 A.3d 283 (discussing *Hill v. Lord* and *Marshall v. Walker*). With clarity around the science and common law of seaweed, those cases can be easily reconciled by distinguishing the taking of *live* marine organisms from *dead* ones. *Compare Marshall v. Walker*, 93 Me. 532, 536-37, 45 A. 497, 498 (1900) (harvesting live clams considered public trust right, but not to "take shells or mussel manure"), *with Hill v. Lord*, 48 Me. 83, 100 (1861) (seaweed "washed ashore by the tides . . . is much more analogous to the *jus alluvionis*[27] of riparian owners").

5. The Legislature has expressly asserted ownership and regulatory authority over seaweed as a marine resource.

In legislation dating back to 1975, the Maine Legislature has declared that the State of Maine alone "owns and shall control the harvesting of the living

[26] Maine courts "shall take judicial notice of the common law and statutes of every other state." 16 M.R.S. § 402.

[27] *Alluvion*, Black's Law Dictionary 97 (11th ed. 2019) ("An accumulation of soil, clay, or other material deposited by water.")

resources of the seas adjoining the coastline . . . . Control over the harvesting of these living resources shall be by licenses or permits issued by the Department of Marine Resources." 1 M.R.S. § 2-A. A "marine resource" means "all renewable marine organisms and the entire ecology and habitat supporting those organisms." 12 M.R.S. § 6001(27). A "marine organism" is defined as "any animal, plant or other life that inhabits waters below head of tide."[28] 12 M.R.S. § 6001(26). The Legislature has defined those public trust resources, including seaweed, as owned by the State of Maine, not upland owners.

The legal framework that Plaintiffs relied upon to establish and grow their businesses and livelihoods along the coast of Maine was premised upon the understanding that seaweed belongs to all, not just those that are fortunate enough to own upland property. That public trust right had been unquestioned and undisturbed until *Ross*.

F. Public trust uses are better addressed by the Legislature than the courts.

Here again courts are not in the best position to craft intertidal policy, which is more appropriately a legislative function. *See supra* Section IV. The current case law (*Bell II*, *Ross*) has created more confusion and controversy than solutions and has shown the limits of judicial intervention to create

[28] "Head of tide" means the intertidal land. 36 M.R.S. § 1132(5).

broadly applicable rules. Is there a difference between swimming, which is allowed, and bathing, which is not allowed? How much time must a person tread water before they are no longer considered a trespassing bather? Is body surfing navigation? How lazy can a fisherman be before she is considered a trespasser? Can a lobsterman set a trap on the shore and wait for the tide to come in?

Ross similarly illustrates the perils of elevating incomplete legal analysis, analogy, and procedure over science, and making policy without input from regulatory, academic, and industry experts. Respectfully, judges are not scientists and courts are at a disadvantage in rendering policy decisions without the resources available to other branches of state government, including the Department of Marine Resources. The case law only highlights the need to place the public trust back where it belongs: in the hands of an elected legislature.

VI. The trial court erred in dismissing Count V, which alleged that these discrete Defendants do not own the intertidal land at issue.

Count V of the Complaint asserts that Defendants do not own the intertidal area abutting their upland properties based on the language of the deeds in their chains of title (A. 139-40), which do not include a call to water. Even if the Colonial Ordinance presumption is valid, Defendants here do not

benefit from it. *See, e.g.*, *Almeder v. Town of Kennebunkport*, 2019 ME 151, ¶ 37, 217 A.3d 1111 ("Because the beach may be conveyed separately from the upland, an owner only benefits from this presumption 'where a grant of property specifically includes a call to the water.'" (citation omitted)). "[A] grantor cannot convey more than he or she owns." *Id.*

Defendants claim to hold title to the intertidal lands abutting their upland properties, but if these Defendants do not own the property, then they have no right to opine, much less interfere with Plaintiffs' public trust uses.

The trial court erred in dismissing Count V of Plaintiff's Complaint, describing the claim as a "declaration quieting title to intertidal lands adjacent to the upland property owned by the Defendants, in the State of Maine" (A. 76), and finding that the statute of limitations for bringing such a cause of action had run over a century ago.[29] Contrary to Rule 12(b)(6) and pleading standards, the court acknowledged that this characterization of Count V as "an action to quiet title" was not what Plaintiffs pled. (A. 76.) The Court's characterization was in error.

Plaintiffs seek a negative declaratory judgment that Defendants do not own the property. *See* 14 M.R.S. § 5953 ("No action or proceeding shall be open

[29] It is unclear when the trial court concluded the statute of limitations began to run, as both the year 1899 and the 17th Century deeds are cited. (A. 77.)

to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect."). In substance, the requested declaration of rights would mean that Defendants have no right to post signage and exclude them and other public trust users from the intertidal. The court was required to accept as true the allegation that Defendants do not own the property at issue. M.R. Civ. P. 12(b)(6). There is a live and ongoing controversy so long as Defendants assert rights to exclude Plaintiffs, by asserting ownership, posting signage, calling Marine Patrol, and other similar actions—conduct for which the statute of limitations has not run. *Cf. Britton v. Dep't of Conservation*, 2009 ME 60, ¶ 20, 974 A.2d 303.

The Superior Court erred in characterizing the claim as one to quiet title and dismissing Count V on statute of limitations grounds.

VII. The trial court erred in granting Defendants' special motions to dismiss pursuant to 14 M.R.S. § 556.

This Court should vacate the Superior Court's decision to grant Defendants' anti-SLAPP motions.

A. Legal Standard for anti-SLAPP special motion.

"SLAPP is an acronym for Strategic Lawsuits Against Public Participation." *Thurlow v. Nelson*, 2021 ME 58, ¶ 8, 263 A.3d 494. The purpose of Maine's anti-SLAPP statute is to prevent plaintiffs from filing lawsuits

designed "to stop citizens from exercising their political rights or to punish them for having done so." *Id.* (citation omitted). Adjudication of an anti-SLAPP special motion requires that the court first "determine whether the claims against the moving party are based on the moving party's exercise of the right to petition pursuant to the federal or state constitutions." *Id.* ¶ 12. The first step requires the moving party to show that the claims subject to the special motion to dismiss are "based on some activity that would qualify as an exercise of the defendant's First Amendment right to petition the government." *Schelling v. Lindell*, 2008 ME 59, ¶ 7, 942 A.2d 1226. If the moving party fails to meet this initial burden, the special motion to dismiss must be denied.[30] *Thurlow,* 2021 ME 58, ¶ 12, 263 A.3d 494.

This Court reviews a grant of special motion to dismiss *de novo*.

B. The statute is inapplicable because this is not a "SLAPP Suit" and Defendants did not engage in petitioning activity.

Plaintiffs' claims do not implicate the anti-SLAPP statute. Upland landowners do not own the intertidal land they claim to own, and even if they did, they have no right to deny the harvesters access for the purpose of harvesting rockweed. Plaintiffs have brought a meritorious lawsuit in good

[30] Plaintiffs only challenge the first step in this appeal. If the moving party does not meet their burden on the first step, the motion must be denied. *Thurlow,* 2021 ME 58, ¶ 22, 263 A.3d 494.

faith, and their claims are in no way designed to delay, distract, or punish the Defendants for exercising speech rights. Plaintiffs sued Defendants because they wrongly assert ownership of the intertidal and have denied harvesters—including Plaintiff Leroy Gilbert—the right to take seaweed.

Thus, the trial court erred in concluding that the statute applies here.

C. The trial court erred in dismissing these claims based on its own finding that dismissal was "in part" based on petitioning activity.

SLAPP suits are filed *solely* for the purpose of retaliating against or punishing defendants for engaging in their right to petition. *See, e.g.*, *Thurlow,* 2021 ME 58, ¶ 8, 263 A.3d 494. The trial court misapplied this standard in concluding the lawsuit was based on "at least in part, [Defendants'] petitioning activity." (A. 64.) Although Plaintiffs maintain that the present suit is not based on Defendants' call to Marine Patrol, even a suit based "in part" on petitioning activity does not fall within the statute and therefore is not subject to dismissal. *See, e.g.*, *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, ¶ 14, 202 A.3d 1189 (holding that the statute's protections inapplicable, even where a portion of the conduct would qualify as "petitioning activity").

D. The trial court erred in concluding the claims were "based on" Defendants' petitioning activity.

Unlike in the typical defamation SLAPP cases, Defendants' purported petitioning activity and the content of the speech therein is not the basis of Plaintiffs' claims. *Cf. Desjardins v. Reynolds*, 2017 ME 99, ¶ 11 & n.3, 162 A.3d 228. Defendants' speech is at most collateral factual background to the central dispute: ownership of intertidal land and public trust uses therein. Defendants' statements to Marine Patrol reflect mistaken beliefs which are not material to the court's adjudication of Plaintiffs' claims, which are meritorious regardless of whether Defendants called patrol.

The trial court concluded that the suit was "based on" Defendants' petitioning activity because Plaintiffs did not sue every upland owner in Maine, inferring that they sought to retaliate for Defendants' reports. (A. 65.) This assumption is unfounded. Plaintiffs maintain broad discretion to formulate their claims and parties to join in an action, M.R. Civ. P. 20, unless "complete relief cannot be accorded among those already parties." M.R. Civ. P. 19. There would be no occasion to add property owners along the coast that do not object to seaweed harvesting. Plaintiffs sued Defendants because they have taken a legal position that is disputed and harms Plaintiffs' livelihoods.

Further, the fact that the Attorney General has taken positions aligned with Plaintiffs clearly shows that this is not a SLAPP suit but a legitimate controversy concerning intertidal lands. Adjudicating the dispute requires court intervention on the merits, not procedural gimmickry.

E. Broad interpretation of the anti-SLAPP statute unconstitutionally denies Plaintiffs access to the courts.

Lastly, Plaintiffs will have been unconstitutionally denied access to the courts if the statute is interpreted to bar their claims. Under the court's logic, defendants enjoy summary dismissal and civil immunity from legitimate suits merely because they also happened to engage in conduct that would constitute petitioning activity. Property disputes are commonplace, but this case illustrates the quick escape hatch available to defendants so long as they phone the police before a complaint is filed. A defendant would need only bring a special motion to dismiss citing the police report to dismiss the case without a hearing on the merits. Had the Moody Beach Defendants called the police on Plaintiffs, the trial court would seemingly have been required to dismiss claims against them too.

This Court should vacate the trial court's dismissal of Plaintiffs' claims against those Defendants pursuant to Maine's anti-SLAPP statute.

VIII. The trial court erred in denying Plaintiffs' motion for summary judgment based on the number of Rule 56 statements.

Courts have authority to disregard pleadings that do not comply with the rules as a sanction. *See, e.g.*, *Stanley v. Hancock County Commissioners*, 2004 ME 157, 864 A.2d 169.[31] Subsequent decisions were affirmed by this Court where voluminous factual statements around simple issues rose to a sanctionable abuse of Rule 56. *See, e.g.*, *First Track Invs., v. Murray, Plumb & Murray*, 2015 ME 104, 121 A.3d 1279 (affirming denial of summary judgment in a case with four parties with 257 individual facts). This case is decidedly not those.

In motion practice and discovery, Defendants challenged each individual Plaintiffs' standing to participate in the litigation.[32] Establishing each Plaintiffs' uses pertinent to Count IV, with Defendants' anticipated summary judgment arguments, required Plaintiffs to provide a factual basis for the court to adjudicate the claims and defenses raised. Plaintiffs submitted 230 statements

[31] In *Stanley* case the defendant employer filed for summary judgment with a 191-paragraph statement of facts and then argued for summary judgment against a whistleblower claim brought by a former employee. 2004 ME 157, 864 A.2d 169. There was only one issue in dispute in that case—the employer's motivation for terminating the employee. *See id.*

[32] After the Motion to Dismiss, there remained 24 parties: 18 Plaintiffs and 5 Defendants plus the Attorney General. The parties then engaged in very limited discovery. Plaintiffs deposed representatives from Judy's Moody, LLC, OA 2012, and Ocean 503, LLC. Defendants deposed only a small number of Plaintiffs. Counsel for Jeffrey and Margaret Parent agreed on stipulated facts rather than depositions. At the end of discovery, the parties filed cross motions for summary judgment.

of fact. With 23 parties, the statement of facts averages 10 facts per party. Each statement of fact was short and succinct. Plaintiffs organized the statements by party and described how each person engages intertidal land pertinent to their standing to obtain the requested declaratory relief.

Plaintiffs' facts were, with few exceptions, uncontested. Of the first 220 facts presented, Judy's Moody denied only two. OA 2012 Trust denied 9 facts, and Ocean 503, LLC denied 14. (A. 860-939.) Adjudicating 14 contested facts was not onerous or burdensome. (A. 940-1010.) In terms of scale, this is an insignificant number compared to the cases cited by the court for the authority to disregard pleadings that rise to an abuse of summary judgment practice.

Moreover, this case does not turn on a factual dispute; the parties have a legal dispute. Unfortunately, Defendants (other than the Parents) declined Plaintiffs' proposed stipulations and instead each filed their own motions and fact statements, which substantially overlapped among Defendants. Collectively the Defendants submitted 137 statements of fact. To keep the file as simple as possible, Plaintiffs admitted all but 16 of these facts, mostly qualifications supported by the record. (A. 285, 443-46, 753-54, 763-65.)

Rather than adjudicate unnecessary objections and irrelevant qualifications, the trial court wholly declined the exercise invoking *Stanley* and *First Tracks*. The court abused its discretion. Plaintiffs recognize this matter

involved a large record and numerous issues, but it is plainly unfair to penalize Plaintiffs when Defendants contributed to making the record so complex.[33]

Because this case and the circumstances are a far cry from cases in which this Court affirmed denial of summary judgment as a sanction, this Court should hold that the court abused its discretion.

IX. Plaintiffs Clearly Have Standing

The trial court erred in concluding certain Plaintiffs lack standing. Whether a plaintiff has standing is dependent on the unique context of the claim, *Lindemann v. Comm'n on Governmental Ethics & Election Practices*, 2008 ME 187, ¶ 8, 961 A.2d 538, and considers whether the plaintiff is the party best suited to bring a particular claim. *Roop v. City of Belfast*, 2007 ME 32, ¶ 7, 915 A.2d 966. Plaintiffs must demonstrate a sufficient personal stake in the outcome of the controversy to warrant court intervention, *Mortgage Elec. Registration Sys. v. Saunders*, 2010 ME 79, ¶ 7, 2 A.3d 289, showing they have suffered a "particularized injury" that affects their property, pecuniary, or personal rights and is distinct from the harm experienced by the public at large.

[33] Here, Defendants filed lengthy objections and qualifications to simple uncontroversial factual statements. For example: fact 152 states that Chad Coffin uses the intertidal for clamming. What follows from Judy's Moody is a paragraph long objection and then a qualification that has nothing to do with the simple relevant fact asserted. (A. 1193-94.) Fact 215 states that "Robert Morse helped design and build a rockweed harvest machine that went into operation in 1995 and is still in use today." (A. 1234.) Defendant Parent responded with one paragraph of objections and a second paragraph of qualifications. Neither paragraph addressed the substance of the factual assertions.

Nergaard v. Town of Westport Island, 2009 ME 56, ¶ 18, 973 A.2d 735; *see also Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 196-97 (1978); *Black v. Bureau of Parks & Land*, 2022 ME 58, ¶ 28, 288 A.3d 346.

Plaintiffs represent various stakeholders and social groups, including commercial fishing, scientific research, tourism, and recreation. Although representative of the public interests at stake, each are individually and uniquely affected parties. Plaintiffs assert that they have rights to the intertidal that Defendants contest; upland owners' assertion of ownership and control over the intertidal negatively impacts Plaintiffs and diminishes their use and enjoyment or imperils their livelihood. This case therefore presents a justiciable controversy regarding the parties' legal rights warranting judicial intervention. They clearly have standing to request that the Court adjudicate the title and trust use issues.

The trial court correctly concluded that Peter Masucci, Kathy Masucci, William Connerney, and Orlando Delogu have standing to assert claims against the Moody Beach Defendants. (A. 110.) The court should have gone farther, as the other Plaintiffs either by their recreational use of the intertidal land, or their business and economic livelihood therein, (A. 838-41, 843, 849-53), have a sufficient interest and particularized injury to support standing.

With respect to the "Marine Industry Plaintiffs," the court stated that "their alleged injury—economic harm—is not particularized." (A. 108.) The court also stated that "[t]here is no record evidence that [the remaining][34] Defendants' asserted ownership of their adjacent intertidal land in particular has injured the Marine Industry Plaintiffs' ability to earn a living." (A. 108.) The court specifically noted that it was not sufficient to infer that Plaintiffs Morse and Grotton incurred economic harm because they are unable to purchase seaweed harvested from the intertidal land of Defendants. (A. 108.) The remaining Marine Industry Plaintiffs were dismissed via generalized statements that did not analyze the factual circumstances of those plaintiffs.

In reversing course as to the Marine Industry Plaintiffs between the April 2022 order and the January 2024 order, the court erred by imposing a heightened standard and requiring a specific pecuniary loss. The Industry Plaintiffs' livelihoods connected to seaweed harvesting alone distinguish them from the public at large. To the extent that the decision was based on generalized disputes about seaweed harvesting on intertidal land, had the anti-SLAPP motions to dismiss not been granted, although not required for standing, there would be Defendants with a direct legal dispute with Plaintiffs regarding

[34] At the time the motions for summary judgment were adjudicated, anti-SLAPP motions to dismiss had been granted, dismissing those Defendants who had specifically asserted title and dominion over their intertidal land and sought to exclude seaweed harvesters.

seaweed: Plaintiff Leroy Gilbert and Defendants Li and Newby, (A. 61), which amounted to sufficient standing in *Ross* and should also be adequate here. *See Ross*, 2019 ME 45, ¶¶ 5-6, 206 A.3d 283.

X. Stare Decisis

"*Stare decisis* is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991), but instead reflects a somewhat dubious policy judgment that "in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Agostini v. Felton*, 521 U.S. 203, 235–36 (1997). "When governing decisions are unworkable or are badly reasoned, '[the Supreme Court] has never felt constrained to follow precedent.'" *Payne*, 501 U.S. at 827-28. "[P]roponents of *stare decisis* tend to invoke it most fervently when the precedent at issue is least defensible." *Gamble v. United States*, 139 S. Ct. 1960 (2019).

This Court has on more than one occasion proclaimed that "[w]hile we recognize the unquestioned need for the uniformity and certainty the doctrine [of *stare decisis*] provides, we have also previously recognized the dangers of a blind application of the doctrine merely to enshrine forever earlier decisions of this court." *McGarvey*, 2011 ME 97, ¶ 54, 28 A.3d 620. The Court, in determining whether to revise precedent, considers five factors: (1) consistency, (2) anomaly, (3) workability, (4) reliance, and (5) policy. *Finch v.*

U.S. Bank, N.A., 2024 ME 2, ¶ 40, 307 A.3d 1049. For the reasons argued herein, this Court should conclude that the weight of factors requires the Court to overturn *Bell* and *Ross*.

Although decided nearly 35 years ago, cracks in the jurisprudential foundation of *Bell* formed 25 years ago. *See Eaton v. Town of Wells*, 2000 ME 176, ¶ 49, 760 A.2d 232 (Saufley, J., concurring) ("I would overrule Bell"). Concurring opinions of this Court, led by Chief Justice Saufley, further eroded the precedent at nearly every opportunity. *See McGarvey*, 2011 ME 97, ¶ 53, 28 A.3d 620 (Saufley, C.J., concurring) ("To the extent that *Bell II* can be read to forever set the public's rights in stone as related to only 'fishing,' 'fowling,' and 'navigation,' we would expressly disavow that interpretation."); *Ross*, 2019 ME 45, ¶ 35, 206 A.3d 283 (Saufley, C.J., concurring) ("[W]e would take this opportunity to explicitly overrule *Bell II*.").

This Court has recently applied and thus functionally embraced the Saufley test. *See Ross*, 2019 ME 45, ¶ 28, 206 A.3d 283 (considering whether seaweed harvesting strikes "a reasonable balance between the private landowner's interests and the rights held by the State in trust for the public's use of that land" (quotation marks omitted)). Meaning that, from dissent, to a lone concurrence, to two split-decision concurrences, the drum beat to overrule *Bell* should be, by now, deafening. Because the Saufley test is rooted in

longstanding common law principles, the consistency and reliance factors, on balance, favor discarding *Bell*. When considering the breadth of Maine's common law, comparing the rule to other jurisdictions, and noting the substantially negative academic treatment, the case is an undeniable anomaly.

Bell has perpetuated rather than resolved conflict on the beach. It is not well understood, and has proven to be a poor and unworkable policy. The Saufley test more appropriately allows reasonable uses, placing the onus on the property owner to prove that a use is an unreasonable interference with their rights. This returns the court to adjudicating cases rather than making policy.

For different but no less compelling reasons, *Ross* must be overruled. *Ross* is a mere five years old and represents a decision unmoored from legal precedent, legislative policy, and science. The case was decided seemingly in a vacuum, without reference to clearly applicable common law and controlling statutory authority, R.S. ch. III, § 5 (June 14, 1820); 12 M.R.S. § 6001; and an apparent misreading of the case law, *Hill v. Lord*, 48 Me. 83, 100 (1861). *Ross* thus added another strange chapter to Maine's reputation as an outlier in public trust law. Commentators have highlighted the anomaly of the precedent. *See* Tarlock & Robison, Law of Water Rights and Resources § 8:20, n.1 (July 2020) ("[*Ross*] will probably remain unique to Maine given its twisted and unclear public trust jurisprudence."). The Legislature's express policy decision that

seaweed is a public marine resource owned by the state, standing alone, is adequate authority to discard *Ross*.

Respectfully, *Bell* and *Ross* must be overruled and public trust rights—consistent with the federal and state constitution, Maine statutes, and longstanding common law—must be restored.

CONCLUSION

For the foregoing reasons, the trial court erred in dismissing Plaintiffs' complaint and denying Plaintiffs' motion for summary judgment. Although ordinarily, the judgment would be vacated and remanded, the Court should decide this action for declaratory relief as an original matter because the case presents purely legal issues, proper resolution is clear, and failure to consider them now would work a "miscarriage of justice." *Parker v. Dep't of Inland Fisheries & Wildlife*, 2024 ME 22, ¶ 16, ___ A.4th ___. Plaintiffs thus respectfully request that this Court declare that (1) the State of Maine owns the intertidal zone; (2) Defendants do not own the intertidal land at issue here and have no right to exclude or interfere with public use, including by posting signage; (3) Plaintiffs are engaged in lawful public trust uses; (4), the public may engage in reasonable ocean-related activities in the intertidal zone that do not interfere with the upland owners' peaceful enjoyment of their own property or their

right to wharf out; and (5) harvesting seaweed is a lawful use in the intertidal zone pursuant to common law and statute.

Respectfully submitted by:

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Certificate of Conformance

I hereby certify that although this brief exceeds seventy-five (75) pages, the word count, excluding those portions of the brief excluded pursuant to Rule 7A(f)(3), does not exceed 18,750 words, as allowed pursuant to the Court's order of May 15, 2024.

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