STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-82

PETER MASUCCI, et al.
Plaintiffs-Appellants

v.

JUDY'S MOODY, LLC, et al.
Defendants-Cross-appellants

ON APPEAL FROM CUMBERLAND COUNTY SUPERIOR COURT

REPLY BRIEF OF PARTY IN INTEREST-CROSS-APPELLANT AARON M. FREY, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF MAINE

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Constitutional Provisions and Statutes

Other Authorities

INTRODUCTION

As compared with other types of property rights, the public trust doctrine is unique both in its origins and in the nature of the rights that it confers upon members of the public. Its uniqueness affects the applicability of prudential doctrines that limit who has access to the courtroom and when. It lowers the bar needed to confer standing upon members of the public. And it blunts the applicability of claim preclusion and stare decisis.

The public trust doctrine also demands an analytical framework that balances competing public and private property rights and produces reasonable results that engender public acceptance. The analytical framework of *Bell v. Town of Well (Bell II*), 557 A.2d 168 (Me. 1989), tacked in the direction of private rights: it employed an analysis that undercut the commonsense essence of Maine's common law. And it has never gained full judicial or public acceptance. *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, 206 A.3d 283, effected a course correction. It restores a balancing test that honors the adaptive nature of the common law and, because it is thus able to track the needs of society, will likely produce results that lessen the likelihood of persistent litigation over intertidal land.

The Beachfront Owners' legal strategy is clear: they do not want this Court to reach the merits of Count IV. But the Court cannot and should not avoid

it. P. Massucci, K. Masucci, and W. Connerney have standing to pursue Count IV as to walking. No necessary parties are missing from this action. Although this Court may wish to do so, it does not need to expressly overrule *Bell II* to conclude that in 2024 the public trust doctrine includes walking. Nor will such a conclusion effect a judicial taking. The Beachfront Owners who own their intertidal land—OA 2012—or who are presumed to own it—Judy's Moody and Ocean 503—do so always subject to the public trust rights to use such land, whatever those rights consist of at a particular moment in time. Just like in most other coastal states, as of 2024, Maine's public trust doctrine includes the right to walk intertidal land.

I. The trial court correctly concluded that P. Masucci, K. Masucci, and W. Connerney have standing to pursue Count IV against the Beachfront Owners.

In their cross-appeals, the Beachfront Owners contend that the trial court erred by concluding that P. Masucci, K. Masucci, and W. Connerney have standing to pursue Count IV. (Ocean 503 Red Br. 14; OA 2012 Red Br. 17-18.) Standing is a question of law that this Court reviews de novo. *Black v. Bureau of Parks & Lands*, 2022 ME 58, ¶ 26, 288 A.3d 346. Standing is prudential, not constitutional, and depends on "the circumstances that existed when the complaint was filed and the type of claim alleged" (e.g., statutory or common law). *Id.* ¶ 27.

Whether individual members of the public have standing to bring as plaintiffs a public trust claim appears to be a question of first impression for this Court, which the trial court answered correctly.[1] It concluded that P. Masucci, K. Masucci, and W. Connerney have standing to bring their common-law public trust claim because they "specified the ways in which the . . . signs and boundary markers located [on the Beachfront Owners' property] have chilled their recreational use and enjoyment of that [intertidal] land." (A. 58, 104-05, 110 (citing to *Black*, 2022 ME 58, ¶ 28, 288 A.3d 346; *Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 197 (Me. 1978)).) The Beachfront Owners make many arguments as to why the trial court erred. (Ocean 503 Red Br. 20-30; OA 2012 Red Br. 21-27.) But their arguments all fail because they misunderstand the nature of the property rights at stake.

OA 2012 characterizes Count IV incorrectly as seeking redress only for public rights. (OA 2012 Red Br. 20-21.) OA 2012 contends that the only entities that can pursue those rights as plaintiffs are the state or a municipality. (*Id.* at 2, 20-21.) The public trust doctrine confers property rights on all members of

[1] Ocean 503 agrees that this is an issue of first impression. (Ocean 503 Red Br. 20-21.) OA 2012 disagrees but that disagreement appears premised on its misreading of *Almeder v. Town of Kennebunkport (Almeder I*), 2014 ME 139, 106 A.3d 1099. (OA 2012 Red Br. 2, 21-23.) *Almeder I* does not address general standing; it addresses standing to intervene pursuant to M.R. Civ. P. 24. *Almeder I*, 2014 ME 139, ¶¶ 3-5, 16-17, 106 A.3d 1099. It also notes the difference between the two. *Id*. ¶¶ 16-17. Judy's Moody does not independently address standing. (*See* Judy's Moody Red Br. 4 n.2.)

the public, but members of the public hold those rights individually. *See Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 516 (Me. 1986) ("[U]nder the Colonial Ordinance the public right to use the intertidal zone was seen in terms of an individual freedom."); *State v. Leavitt*, 105 Me. 76, 72 A. 875, 876-77 (1909) (describing the right as a property right, not just a privilege). Although this Court has referred to the public trust rights as an easement, public trust rights are dissimilar from public prescriptive easements -- the former are reserved from the public domain—they originate with the *jus publicum*—whereas the latter may be acquired after twenty years of possession.[2] *Compare McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 24-26, 28 A.3d 620 (Saufley, C.J., and Mead, J., and Jabar, J., concurring) ("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."), *with Eaton v. Town of Wells*, 2000 ME 176, ¶ 40, 760 A.2d 232 ("Prescription . . . concerns itself wholly with the acquisition

[2] *Bell I* borrows primarily from Massachusetts caselaw to describe the public trust doctrine as an easement. *Bell v. Town of Wells (Bell I)*, 510 A.2d 509, 516-17 & n.15 (Me. 1986) (citing, among other opinions, *Butler v. Att'y Gen.*, 80 N.E. 688, 689 (Mass. 1907)). Calling it an easement invites confusion between public trust rights and true easements, as some of OA 2012's arguments make clear. (AG Reply Br., *infra*, 8-9 n.4, 10, 15-16 & n.7.) To reduce such confusion going forward, this Court should refer to the public trust doctrine as such, and not as an easement. *See Arno v. Commonwealth*, 931 N.E.2d 1, 17-18 (Mass. 2010) (explaining, including in reference to *Butler*'s use of "easement", that "use of the term[] 'easement' . . . should not, however, be interpreted as importing the manifold doctrines, limitations, and precedents that apply to these words in ordinary contexts . . . ."); *see also Almeder v. Town of Kennebunkport (Almeder I)*, Order on Motions for Reconsideration, 106 A.3d 1115, 1118-19 n.2 (2014).

of rights in the land of another . . . ." (emphasis removed)); 14 M.R.S. § 812 (2024). Instead, public trust rights to intertidal lands are analogous to the public's rights to the public reserved lands that were at issue in *Black*. *See* 12 M.R.S. §§ 1801(8)(A), 1846(1) (2024) (defining "public reserved lands" to include the public reserved lots and declaring that these lands are a public trust to which "every citizen of the State" has the privilege of "full and free access . . . together with the right to reasonable use").

In *Black*, this Court held that members of the public had standing to challenge the decision of the Bureau of Parks and Lands to lease certain public reserved lands: "Although these plaintiffs allege no specific harm beyond the transmission line's mere visibility, their history of use of the public reserved lands, occupied in part by the area encompassed in the original and subsequent leases, is sufficient to confer standing." 2022 ME 58, ¶ 28, 288 A.3d 346; *compare Cedar Beach/Cedar Island Supporters, Inc. v. Gables Real Estate*, 2016 ME 114, ¶ 2, 145 A.3d 1024 (members of the public—not the state or town—pursuing public prescriptive easement claim as plaintiffs), *with Town of Manchester v. Augusta Country Club*, 477 A.2d 1124, 1129 n.6 (Me. 1984) (leaving open "the question of whether 'the public, apart from some legally organized political entity, can lay claim to an easement by prescription.'"). Where, as here, P. Masucci, K. Masucci, and W. Connerney each hold a trust right

to use intertidal land and the landowners' actions affect their exercise of their trust right to use that land, *Black* confers standing to these individuals.

Recognizing *Black*'s low bar in the context of public trust rights to reserved land, Ocean 503 argues that *Black* and *Fitzgerald* confer standing only when the Attorney General is disabled from bringing the claims advanced by members of the public. (Ocean 503 Red Br. 21-24.) This argument is unpersuasive because *Black* decides standing without reference to the Attorney General and his ability (or not) to bring the claims advanced in *Black*.[3] 2022 ME 58, ¶¶ 27-28, 288 A.3d 346.

If the Attorney General were not able to bring a requested public trust suit because of other priorities, instead of representation conflicts, Ocean 503 would have this Court bar from the courtroom P. Masucci, K. Masucci, W. Connerney, and the fifth generation clammer dealing with a new homeowner.

[3] In contrast to *Black v. Bureau of Parks and Lands*, 2022 ME 58, ¶¶ 27-28, 288 A.3d 346, this Court considered the role of the Attorney General in *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189, 194-97 (Me. 1978), because Baxter State Park is a charitable trust and the Attorney General bears legal responsibilities to all charitable trusts—common law and statutory oversight—and is also a member of Baxter State Park's governing body. 5 M.R.S. § 194 (2024); 12 M.R.S. § 901 (2024). Unlike Baxter State Park, the public reserved lands at issue in *Black* and the intertidal lands at issue here are not charitable trusts. They were reserved from the public domain, not gifted by a private donor to the State as trustee for the public. Also, *Fitzgerald*'s applicability does not appear limited to charitable trusts. *E.g.*, *Black*, 2022 ME 58, ¶¶ 27-28, 288 A.3d 346 (citing *Fitzgerald* in standing analysis); *Roop v. City of Belfast*, 2007 ME 32, ¶ 10, 915 A.2d 966 (citing *Fitzgerald* for the proposition that "standing can be conferred for non-economic injuries and for injuries that are widely shared").

But an individual member of the public's standing to pursue their public trust rights in court is not dependent on the available resources of state or local government. Such a holding would risk vitiating the public's trust rights to intertidal land—an individual who has been harmed by a landowner's actions must wait to be sued—and is contrary to *Black* and this Court's public trust doctrine jurisprudence. *Bell I*, 510 A.2d at 517-19 & n.17 (remarking that public trust cases are often litigated without the State as a party while acknowledging that the Attorney General may nevertheless participate to represent the public interest); *e.g.*, *Ross*, 2019 ME 45, ¶ 5 n.2, 206 A.3d 283 (noting the Department of Marine Resources' participation as amicus curiae only); *McGarvey*, 2011 ME 97, 28 A.3d 620 (noting the State's participation as amicus curiae only).

Ocean 503 also argues that the Attorney General is "best suited" to bring Count IV. (Ocean 503 Red Br. 24-26.) The Attorney General is certainly well suited to bring public trust claims regarding intertidal land. *Superintendent of Ins. v. Att'y Gen.*, 558 A.2d 1197, 1199-2000 (Me. 1989); *cf. Bell I*, 510 A.2d at 517 (suggesting strongly—albeit unpersuasively—that the State is not the trustee of the public's trust rights in intertidal land). But so are P. Masucci, K. Masucci, and W. Connerney. Unlike the Attorney General in his official capacity, P. Masucci, K. Masucci, and W. Connerney walked the intertidal land at the Beachfront Owners' property, were confronted by their

unwelcoming signs and boundary markers, and have had their walks negatively affected by seeing such signs and boundary markers. (A. 57-59, 102-06, 109-11; *e.g.*, A. 546-47, 549-74.) And, as noted above, the contours of the public trust doctrine have sometimes been litigated without the Attorney General's participation as a party. *E.g.*, *Ross*, 2019 ME 45, 206 A.3d 283; *McGarvey*, 2011 ME 97, 28 A.3d 620; *Bell I*, 510 A.2d at 517 n.17.

Rather than attempting to distinguish *Black*, OA 2012 contends that *Almeder v. Town of Kennebunkport (Almeder I)*, 2014 ME 139, 106 A.3d 1099, defeats standing here because P. Masucci, K. Masucci, and W. Connerney are similarly situated to the backlot owners (Backlot Owners) in *Almeder I*. (OA 2012 Red Br. 21-23.) This contention fails. In *Almeder I*, this Court concluded that the Backlot Owners lacked standing to intervene pursuant to M.R. Civ. P. 24 to establish either a public prescriptive easement claimed by the Town of Kennebunkport on behalf of the public or a private easement. *Almeder I*, 2014 ME 139, ¶¶ 3-5, 16-17, 106 A.3d 1099. *Almeder I* acknowledges the difference between general standing and Rule 24 standing, *id.* ¶¶ 16-17; but it does not resolve whether individuals like P. Masucci, K. Masucci, and W. Connerney have general standing to pursue a public trust claim.[4] *Black* does resolve that issue,

[4] OA 2012 suggests that in *Almeder I* this Court vacated the trial court's holding as to the scope of the public trust doctrine because the Backlot Owners lacked standing. (OA 2012 Red Br. 21.) This is incorrect. The Backlot Owners did not pursue a public trust claim in

however, and, as the trial court correctly concluded, P. Masucci, K. Masucci, and W. Connerney clear the bar that *Black* sets.

Next, OA 2012 and Ocean 503 argue that the circumstances that existed at the time the complaint in this matter was filed are not sufficient to confer standing. (OA 2012 Red Br. 25-27; Ocean 503 Red Br. 27-28.) They argue that there can be no real and substantial controversy between P. Masucci, K. Masucci, W. Connerney and the Beachfront Owners absent personal confrontations, threatened trespass actions, calling the police, or arrests. (OA 2012 Red Br. 24, 26, 27; Ocean 503 Red Br. 27-28.) Such antagonistic circumstances would certainly also confer standing, but fortunately—for the sake of civility—*Black* does not require such confrontations. *Black*, 2022 ME 58, ¶ 28, 288 A.3d 346. When a landowner challenges the scope of public trust rights by posting signs or affixing boundary markers, individual members of the public who use the intertidal land in question for a particular activity and are affected by those signs and boundary markers have standing to adjudicate

Almeder I. 2014 ME 139, ¶¶ 4-5 & n.5, 106 A.3d 1099. The State pleaded the public trust doctrine as affirmative defense to the plaintiffs' title claims, which the trial court had not yet adjudicated when it issued its order declaring the scope of the public trust doctrine. *Id.* ¶¶ 4-5 & n.6, 13, 36, 106 A.3d 1099. Because there was thus no public trust claim before this Court in *Almeder I*, this Court vacated the trial court's holding that the public trust doctrine includes all ocean-based activities. *Id.* ¶ 36; *Almeder I*, Order on Motions for Reconsideration, 106 A.3d at 1118-19 (explaining in greater detail its conclusion that the scope of the public trust doctrine was not properly before the Law Court).

whether the activity in question is protected by the public trust doctrine. *See id.* ¶¶ 27-28.

OA 2012 also argues, based on *Almeder I*, that P. Masucci, K. Masucci, and W. Connerney lack standing because their use of the Beachfront Owners' intertidal land is presumed to occur with the Beachfront Owners' permission. (OA 2012 Red Br. 1, 17 (citing *Almeder I*, 2014 ME 139, ¶ 36, 106 A.3d 1099).) This Court has clarified that stray sentence from *Almeder I*, however:

> To avoid any misreading of the decision [in *Almeder I*], we reiterate our statement that the presumption of permission regards only the existence of a public recreational prescriptive easement, and *does not apply to or trump* the separate analysis of the extent of the public's rights in the intertidal zone pursuant to the public trust doctrine.

Almeder I, Order on Motions for Reconsideration, 106 A.3d 1115, 1118-19 n.2 (2014) (emphasis added). Count IV pertains only to the public trust doctrine, to which no presumption of permission applies, much less to defeat standing. *Id*.

Finally, Ocean 503 contends that it "does not have a sufficient stake in litigating issues of public trust rights as it affects the statewide intertidal zone and the public-at-large." (Ocean 503 Red Br. 28.) This argument, which does not address the standing of P. Masucci, K. Masucci, and W. Connerney, is contrary

to Ocean's 503 assertion of title to the intertidal land abutting its property. Also, Ocean 503's active participation in this matter suggests otherwise.

II. No additional parties are necessary to adjudicate Count IV.

Also in their cross-appeal, the Beachfront Owners argue—albeit briefly—that the trial court should have dismissed Count IV for failure to join all prevailing parties in *Bell II* because, they contend, adjudicating the merits of Count IV will nullify the quiet-title judgments obtained by the prevailing parties in *Bell II*.[5] (OA 2012 Red Br. 27-29.) Whether all the prevailing parties in *Bell II* should have been joined as defendants pursuant to 14 M.R.S. § 5963 (2024) or M.R. Civ. P. 19 or is a question of law that this Court reviews de novo.[6] *See Efstathiou v. Payeur*, 456 A.2d 891, 892-93 (Me. 1983). The trial court did not err on this issue.

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[5] OA 2012 raised this argument in its motion for summary judgment, which argument Judy's Moody and Ocean 503 joined. (A. 256-57, 288-89, 313.) The Beachfront Owners did not move the Court to join as parties here the prevailing parties in *Bell II*. *But see* 2 Harvey & Merritt, Maine Civil Practice § 19:8 at 564 (3d, 2023-2024 ed. 2023) (supplying sample "[m]otion by defendant to bring in additional defendant"). The trial court, which dismissed Count IV against OA 2012 as barred by res judicata, did not otherwise address the Beachfront Owners' necessary or indispensable parties argument. (A. 100, 101.)

[6] Despite mostly using the "indispensable" language of M.R. Civ. P. 19(b), OA 2012's argument appears to be based on 14 M.R.S. § 5963 (2024), rather than on M.R. Civ. P. 19(a) or M.R. Civ. P. 19(b). (OA 2012 Red. Br. 18, 27-29.) Regardless, 14 M.R.S. § 5963 "should be interpreted in accordance with Rule 19(a)," which addresses necessary parties. 2 Harvey & Merritt, *Maine Civil Practice* § 19:1 at 550, 552-53 (3d, 2023-2024 ed. 2023). "Even if [14 M.R.S. § 5963] does not control Rule 19, the policy it reflects should presumably lead to the same result under Rule 19(b)." *Id.*

A declaration that the common-law public trust doctrine includes walking will not nullify the quiet-title judgments obtained by the prevailing parties in *Bell II*. The prevailing parties in *Bell II* will continue to own to the low-water mark, subject to the public's trust right to use their intertidal land. Also, those prevailing parties do not need to be named as parties in this action pursuant to 14 M.R.S. § 5963 or M.R. Civ. P. 19(a) because they do not claim an ownership interest in the Beachfront Owners' intertidal land. *See Efstathiou*, 456 A.2d at 892-93 (concluding that a town is necessary party to an action that would define the boundaries of a public way); *Boothbay Harbor Condos., Inc. v. Dep't of Transp.*, 382 A.2d 848, 853 (Me. 1978) (concluding that dam owner may not have his flowage rights adjudicated without naming as parties those owners of land over which dam owner claims flowage rights).

In addition, the persuasive effect of a judgment declaring the scope of the public trust doctrine does not mandate that all prevailing parties in *Bell II*, or all owners of intertidal land in Maine, be parties to Count IV. *E.g.*, *Ross*, 2019 ME 45, ¶¶ 1-2, 206 A.3d 283 (adjudicating, in the absence of all owners of intertidal land, the scope of the public trust doctrine); *McGarvey*, 2011 ME 97, ¶¶ 1-7, 28 A.3d 620 (same); *Andrews v. King*, 124 Me. 361, 129 A. 298, 298-99 (1925) (same); *see Bell I*, 510 A.2d at 519.

Count IV can be fully adjudicated as between P. Masucci, K. Masucci, W. Connerney and the Beachfront Owners. All the prevailing parties in *Bell II*, and all owners of intertidal land in Maine, are not necessary (or indispensable) parties here.

III. The trial court erred by concluding that claim preclusion bars Count IV against OA 2012.

OA 2012 next contends that the Attorney General's claim preclusion argument is not properly before this Court because P. Masucci, K. Masucci, and W. Connerney did not brief it on appeal and the Attorney General did not plead, but should have pleaded, his own public trust claim. (OA 2012 Red Br. 35-36.) OA 2012 further argues that allowing Count IV against OA 2012 would render claim preclusion meaningless. (OA 2012 Red Br. 41-42.) These arguments are unpersuasive.

A. The Attorney General's claim preclusion argument is properly before this Court.

Although P. Masucci's, K. Masucci's, and W. Connerney's primary brief does not address claim preclusion, the Attorney General's primary brief does. Where, as here, two parties are aligned and one of the parties' briefs on appeal addresses a preserved argument, the argument is not waived. *See New England Whitewater Ctr., Inc. v. Dep't of Inland Fisheries & Wildlife*, 550 A.2d 56, 59 & n.5 (Me. 1988). Contrary to OA 2012's argument (OA 2012 Red Br. 35-36 (citing

Almeder I, 2014 ME 139, ¶ 36, 106 A.3d 1099)), it does not matter that the Attorney General has not pleaded his own public trust claim. Again, this case is not *Almeder I*. Unlike in *Almeder I*, there is a public trust claim before this Court—Count IV. (AG Reply Brief, *supra*, 8-9 n.4 (explaining the procedural posture of *Almeder I*).) When the Attorney General is named in a complaint as a party-in-interest, he does not need to plead an additional public trust count to participate in the adjudication of the existing public trust count where, as here, the Attorney General is aligned with P. Masucci, K. Masucci, and W. Connerney.

OA 2012 contends that the Attorney General is not aligned with P. Masucci, K. Masucci, and W. Connerney because the Attorney General asks the Court to vacate the trial court's judgment on Count IV only as to walking, whereas P. Masucci, K. Masucci, and W. Connerney cast a wider net. (OA 2012 Red Br. 39-40.) But the parties are aligned on the fundamental issue before the Court: they each contend that *McGarvey's* reasonable balance test must be part of the analysis used to determine the scope of the public trust doctrine and that applying that test makes clear that walking is a public trust right. (*Compare* Masucci Blue Br. 41-48, *with* AG Blue Br. 14-24.) The alignment is not broken by the Attorney General's narrow focus within Count IV on the one activity over

which the Attorney General readily perceives a justiciable controversy—(unfettered) walking.[7]

B. Allowing Count IV to proceed against OA 2012 will not render meaningless the common-law doctrine of claim preclusion.

OA 2012 next argues that allowing Count IV to proceed against OA 2012 will render meaningless claim preclusion because much of property law is

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[7] As Ocean 503 and OA 2012 observe, the Attorney General—in attempt to lessen the Beachfront Owners' concerns over "unfettered walking"—refers in his primary brief to "walking" instead of "unfettered walking," which is the phrase that he used before the trial court. (Ocean 503 Red Br. 57 n.24; OA 2012 Red Br. 37-39.) There is no difference between the two terms. The adjective was used to make clear that the Attorney General meant "walking for the sake of walking" as opposed to walking with a fishing pole or a shotgun. *Ross*, 2019 ME 45, ¶¶ 34, 41, 206 A.3d 283 (Saufley, C.J., and Mead, J., and Gorman J., concurring) (stating that the public trust doctrine should include "the right to walk unfettered" upon intertidal land).

Unfettered walking does not mean legally unrestricted walking (*see* Ocean 503 Red Br. 57 n.24; OA 2012 Red Br. 38) because use of intertidal land, like most everything, is subject to the legislative power. Me. Const. art. IV, pt. 3, § 1; 12 M.R.S. § 573(3) (2024) ("Municipalities shall have jurisdiction to exercise their police powers to control public use of intertidal land, except where such exercise is superseded by any state law."), *declared unconstitutional on other grounds by Bell II*, 557 A.2d at 176-77; *Parker v. Dep't of Inland Fisheries & Wildlife*, 2024 ME 22, ¶ 18, 314 A.3d 208 (statutes presumed constitutional). Unfettered walking also does not mean that a member of the public could demand that a landowner move a wedding ceremony or memorial service taking place on their intertidal land. (OA 2012 Red Br. 37.) First, people typically do not that. They may stop and gaze, especially at a wedding, and then they walk around it, not through it. Regardless, the public trust doctrine allows members of the public to use intertidal land, not to exclude the landowner from that land. OA 2012 cites to *Mill Pond Condominium Association v. Manalio*, 2006 ME 135, 910 A.2d 392, as the legal source of its concerns, but *Mill Pond* dealt with a deeded easement, *id.* ¶¶ 1-2, 6, and the doctrines that apply to deeded easements do not apply to the public trust doctrine. *Arno*, 931 N.E.2d at 17-18 ("[U]se of the term[] 'easement' . . . should not, however, be interpreted as importing the manifold doctrines, limitations, and precedents that apply to these words in ordinary contexts . . . ."); *see Almeder I*, Order on Motions for Reconsideration, 106 A.3d at 1118-19 n.2.

common law. (OA 2012 Red Br. 41-42.) This argument is overblown. The public trust doctrine is unlike other areas of property law. Public trust rights to intertidal land are reserved rights that develop along with society; such rights are not transferred, enlarged, or extinguished by deed. Other property rights and interests—fee title, deeded easements, restrictive covenants, conservation easements, licenses—are established and conveyed by signed and dated written instrument, which are interpreted to give effect to the intent of the parties that created it. *Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, ¶ 26, 290 A.3d 79 (recounting principles of deed interpretation). The progression of society does not change the language of a particular deed. Allowing Count IV to proceed against OA 2012 will not eliminate claim preclusion, as it applies to all of property law.

C. Even if OA 2012 has satisfied all three elements of claim preclusion, this Court should apply an unusual circumstances exception and adjudicate Count IV against OA 2012.

The Second Restatement of Judgments acknowledges that unusual circumstances may warrant an exception to claim preclusion. *See* Restatement (Second) Judgments § 26(f) & cmt. i. (Westlaw June 2024 Update). OA 2012

argues that the circumstances here are not unusual. (OA 2012 Red Br. 43-45.) As shown below, OA 2012's argument is unpersuasive.

Consider the effects of concluding that claim preclusion bars Count IV against OA 2012. This Court must adjudicate Count IV regardless because P. Masucci, K. Masucci, and W. Connerney have standing to bring Count IV against Judy's Moody and Ocean 503; no additional parties must be joined to adjudicate Count IV; and claim preclusion does not bar Count IV against Judy's Moody and Ocean 503 (neither they nor their privies were parties in *Bell II*). *See Portland Water Dist. v. Town of Standish*, 2008 ME 23, ¶ 8, 940 A.2d 1097 (reciting elements of claim preclusion). And although the justiciable controversy between P. Masucci, K. Masucci, W. Connerney and Judy's Moody and Ocean 503 arises on specific parcels of intertidal land, public trust rights to intertidal land inhere in intertidal land statewide. Consequently, this Court's public trust jurisprudence applies statewide, not only to the specific intertidal parcels giving rise to the controversy. *E.g.*, *Ross*, 2019 ME 45, ¶¶ 2, 33, 206 A.3d 283; *see Bell I*, 510 A.2d at 519 ("[T]he persuasive authority of that decision [may] affect public rights at other Maine beaches.").

Put another way, public trust rights do not vary from one parcel of intertidal land to another. The public trust doctrine includes digging for clams, or it does not. The public trust doctrine includes harvesting rockweed, or it

does not. The public trust doctrine includes walking, or it does not. And so on. Holding that claim preclusion bars Count IV against OA 2012 would either be meaningless—because of the persuasive application of this Court's judgment in this case as to all intertidal lands—or would result in an unworkable patchwork—different public trust rights existing on different parcels of intertidal land—which is wholly inconsistent with the nature of these rights. This case presents unusual circumstances.

OA 2012 is correct that the Attorney General did not ask the trial court to apply an exception to claim preclusion if it determined that OA 2012 satisfied all three elements of claim preclusion. (OA 2012 Red Br. 42.) Nevertheless, equity allows this Court to consider whether the unusual circumstances presented here warrant an exception to claim preclusion. *Almeder I*, Order on Motions for Reconsideration, 106 A.3d at 1119-21. Especially because the public trust rights are likened to an "individual freedom," "the public's access to scarce resources such as sandy beaches in Maine is a matter of great importance and extraordinary public interest," and this issue is purely legal. *Id.* at 1121; *Bell I*, 510 A.2d at 516; *August Realty, Inc. v. Inhabitants of Town of York*, 431 A.2d 1289, 1289-90 (Me. 1981) (observing that this Court has flexibility to consider purely legal issues not raised by the parties because such issues do not require fact-finding).

IV. This Court need not expressly overrule *Bell II* to conclude, as it should, that the public trust doctrine includes walking.

The Beachfront Owners contend that this Court cannot conclude that the public trust doctrine includes walking without first expressly overruling *Bell II* because *Bell II* supplies the governing analytical framework—is the activity fishing, fowling, and navigation? (the trilogy analysis)—and because *Bell II* specifically addresses walking. (Ocean 503 Red Br. 50-51, 52-53; Judy's Moody Red Br. 15-19.) This contention should be rejected because, as shown below, the Court has already moved beyond the trilogy analysis. As an initial matter, the trilogy analysis failed to command a majority in *McGarvey*. 2011 ME 97, ¶¶ 1, 48-58, 28 A.3d 620 (Saufley, C.J., and Mead, J., and Jabar, J., concurring). Moreover, although *Ross* began with the trilogy analysis, it did not end with it. 2019 ME 45, ¶¶ 20, 28-32, 206 A.3d 283. If the trilogy analysis still controlled, it would have commanded a majority in *McGarvey* and *Ross* would have stopped its analysis there.[8]

Although *Bell II* did consider walking, it did so in the context of evaluating whether the public trust doctrine includes all general recreational activities; the

[8] Because *Ross* has already changed the test for determining whether the public trust doctrine includes a particular activity, the time for analyzing the stare decisis factors has long passed. To the extent this Court considers such an analysis necessary, the *Bell II* dissent, Chief Justice Saufley's concurring opinion in *McGarvey*, and the concurring opinion in *Ross* amply lay out the historical, legal, and practical infirmities of *Bell II*.

Court was not considering the activity of walking in isolation, which was its typical practice both before and after *Bell II*. *McGarvey*, 2011 ME 97, ¶ 55 n.15, 28 A.3d 620 (Saufley, C.J., and Mead, J. and Jabar, J., concurring) (characterizing the activities at issue in *Bell II* as a general recreational easement); *Bell II*, 557 A.2d at 173-76; *e.g., Ross*, 2019 ME 45, ¶ 1, 206 A.3d 283 (rockweed harvesting); *McGarvey*, 2011 ME 97, ¶ 1, 28 A.3d 620 (crossing intertidal land to scuba dive); *Moulton v. Libbey*, 37 Me. 472, 489-90 (1854) (harvesting shellfish). And despite *Bell II*'s adoption of the trilogy analysis, *Bell II* does not appear to have considered whether walking constituted "navigation" as that term was defined and understood by the public in 1989.[9] *Bell II*, 557 A.2d at 175.

Regardless, *Bell II* did not consider whether walking alone struck a reasonable balance. Instead, *Bell II* considered the burden on the landowner of allowing all recreational activities. *Id.* at 176-76. Those are different burdens. Further, *Bell II* did not consider walking as of 2024.

[9] *Bell II* considered walking in reference to *Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974), a non-binding opinion issued twenty-five years earlier in the state from which Maine had separated 169 years prior. *Bell II*, 557 A.2d at 175; *Opinion of the Justices*, 313 N.E.2d at 566 (citing Massachusetts opinions from 1822, 1851, and 1911). *Bell II's* discussion of walking is not convincing. *McGarvey*, 2011 ME 97, ¶ 55 n.15, 28 A.3d 620 ("We do not find these authorities persuasive for the proposition that the public may not traverse the intertidal lands to reach the ocean for purposes other than fishing, fowling, and navigation.") (Saufley, C.J., and Mead, J., and Jabar, J., concurring).

Ocean 503 observes that applying *Ross*'s analytical framework would allow the Court to reexamine the common-law import of past uses of intertidal land based on changes occurring over the passage of time. (Ocean 503 Red Br. 53.) Ocean 503's observation is correct. That is the point. The common law must be allowed to evolve over time. Consequently, the prudential common-law doctrines of claim preclusion and stare decisis will be less available in this one area of the common law. That does not mean that the litigation floodgates will open, nor will it necessarily result in all recreational activities being declared public trust rights over time (unless perhaps society changes drastically). Instead, adhering to *Ross*'*s* analytical framework, which considers the trilogy and, if needed, applies a reasonable balance test, should necessarily yield reasonable, balanced results that the public accepts.

For example, if this Court were to determine that Count IV presents a justiciable controversy as to sunbathing, it may conclude that sunbathing is not a public trust right because it is not readily fishing, fowling, or navigation and its non-transitory nature unduly burdens the landowner. If many people are sunbathing on a parcel of intertidal land at low tide—towels, chairs, tents, coolers, umbrellas—that activity may well interfere with the landowners' ability to host a wedding or memorial service. Balanced results, especially if explained by a unanimous decision of this Court, will not typically invite

successive litigation because it seems unlikely that a different result would obtain in 2030. This is the wisdom of such a test. The changes to society that would need to occur for a different holding to obtain would likely take decades because society does not typically change overnight. As for whether sunbathing could be considered a public trust right in 2100? That hypothetical cannot be and need not be answered now. The Court does not know what the Maine coastline or society will look like then.

For now, and in addition to the fact that walking is navigation, walking passes the reasonable balance test because it is a low-impact transitory activity. Concluding that the public trust doctrine includes walking would not turn Moody Beach into Ogunquit Beach. *See Bell II,* 557 A.2d at 176. Rather, it would simply allow P. Masucci, K. Masucci, and W. Connery to fully enjoy their walks without fear of confrontation with the Beachfront Owners or police.

V. Concluding that public trust doctrine includes walking will not violate the Takings Clause of either the Maine Constitution or the United States Constitution.

The Beachfront Owners next contend that this Court would effect a judicial taking if it declares walking to be a public trust right. (Judy's Moody Red Br. 28-34.) Upon close examination, this argument vanishes like footsteps on intertidal land with the incoming tide.

The United States Constitution and Maine Constitution both prohibit the taking of private property for public use without just compensation. U.S. Const. amend. V; Me. Const. art. I, § 21. The Supreme Court of the United States last considered judicial takings in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702 (2010). *Stop the Beach's* judicial takings theory did not command a majority. *Id*. at 706, 713-28; *Pavlock v. Holcomb*, 35 F.4th 581, 586 (7th Cir. 2022 ("[O]nly four justices endorsed the argument that a court decision settling disputed property rights under state law could, in some circumstances, violate the Takings Clause.").

Since then, the federal circuit courts have avoided the issue. *Pavlock*, 35 F.4th at 587. The Supreme Court recently observed, however, without expressly discussing judicial takings, that "[t]he [United States] Constitution's text does not limit the Takings Clause to a particular branch of government." *Sheetz v. Cnty. of El Dorado*, 601 U.S. 267, 276 (2024). Similarly, this Court remarked, in the context of adjudicating the constitutionality of the Public Trust in Intertidal Lands Act, 12 M.R.S. §§ 571-573, that the judicial branch is bound by each Constitution's Takings Clause. *Bell II*, 557 A.2d at 177-78.

Because *Sheetz* arose in the context of legislative action—conditional fees imposed by a municipality for a development permit—not judicial action, 601 U.S. at 271-72, *Sheetz* does not shed light on the test proposed by the *Stop the*

Beach plurality as to what constitutes a judicial taking. *Compare Sheetz*, 601 U.S. at 274, 278-79 (discussing the different categories of takings), *with Stop the Beach Renourishment*, 560 U.S. at 713 (same). Assuming like the Seventh Circuit did recently that the *Stop the Beach* plurality's proposal would supply the applicable test, this Court must determine the following: In declaring that Maine's common-law public trust doctrine includes walking, would the Court be declaring "that 'what was once an established right of property no longer exists'"? *Pavlock*, 35 F.4th at 587-88 (quoting *Stop the Beach Renourishment*, 560 U.S. at 715 (plurality opinion)). The answer to this question is no.

Maine's common law, including its property law and public trust doctrine, are matters of state law. *See Stop the Beach Renourishment*, 560 U.S. at 707. In Maine, intertidal land is susceptible of private ownership but always subject to the public's rights to use such land pursuant to Maine's common law public trust doctrine. *Ross*, 2019 ME 45, ¶¶ 11-13, 206 A.3d 283. The Beachfront Owners' right to exclude certain activities from intertidal land unquestionably exists, but its parameters cannot be and have never been definitively fixed for all time. *See id.* ¶ 13. Exactly what activities comprise the public trust doctrine is not a closed, fully delineated set; such an inflexible rule would be antithetical to the common law. This Court cannot limit the

application of the public trust doctrine by freezing development of this area of the common law. *Glass v. Goeckel*, 703 N.W.2d 58, 65-66, 74, 78 (Mich. 2005).

Declaring that walking is a public trust right will not take away a proverbial stick from the Beachfront Owners' bundle: They will still own intertidal land subject to Maine's common law public trust doctrine. *Id.* at 66, 74, 78. That is the only property right they ever had, and this decision will not change that fact. Ross, 2019 ME 45, ¶ 20, 206 A.3d 283 ("[T]he right of the public—the *jus publicum*—was engrafted into Maine common law."); *Glass*, 703 N.W.2d at 66, 78 ("Because private littoral title remains subject to the public trust, no taking occurs when the state protects and retains that which it could not alienate: public rights held pursuant to the public trust doctrine."); *see also Arno*, 931 N.E.2d at 17-19 (noting that *jus publicum* rights in landowner's parcel should be reflected in a new title certificate as "easement").

Also, as the *Bell II* dissent and this Court's post-*Bell II* jurisprudence has made clear, *Bell II* was always infirm. *Ross*, 2019 ME 45, ¶¶ 34-42, 206 A.3d 283 (Saufley, C.J., and Mead, J., and Gorman, J., concurring) (observing that *Bell II*'s reasoning is erroneous and that *Bell II* has been "loosened"); *McGarvey*, 2011 ME 97, ¶¶ 53, 55-57, 28 A.3d 620 (Saufley, C.J., and Mead, J., and Jabar, 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."); *Eaton*, 2000 ME 176, ¶¶ 50-51, 760 A.2d 232 (Saufley, J., concurring) (asserting that *Bell II* was wrongly decided and should be expressly overruled); *Bell II,* 557 A.2d at 180-181 (Wathen, Roberts, and Clifford, JJ., dissenting) (describing *Bell II* as based on erroneous assumptions and as inaccurately defining the scope of the public trust doctrine); *cf. Gunderson v. Indiana Dep't of Natural Res.*, 90 N.E.3d 1171, 1184 (Ind. 2018) ("[T]o the extent *Bainbridge* has generated reliance interests in land extending to the low water mark, decisions from this Court subsequent to that case have significantly narrowed its holding, adopting instead a more expansive view of public trust rights along the Ohio River."). Declaring that walking is a public trust right will not interfere with any reasonable reliance interests of owners of land along Maine's coast.

Although *Bell II* did not present this Court with the opportunity to evaluate walking in isolation, as opposed to one activity in a much larger set, this case does. And only one "commonsense" result obtains: walking is a public trust right. *Glass*, 703 N.W.2d at 74.

VI. Maine Rule of Civil Procedure 56(c) allows for entry of judgment on Count IV in favor of P. Masucci, K. Masucci, and W. Connerney.

In the Attorney General's view, the trial court abused its discretion in summarily denying his motion for summary judgment. (AG Blue Br. 28-31.)

Likewise, P. Masucci, K. Masucci, and W. Connerney submit that the court abused its discretion in summarily denying their motion for summary judgment. (Masucci Blue Br. 70-72.) The Beachfront Owners contend otherwise. (Ocean 503 Red Br. 59-60; OA 2012 Red Br. 47-50.) Although the Attorney General maintains his view on this point, there is no reason to belabor the issue. On appeal, this Court is presented with only issues of law on cross-motions for summary judgment that contain no genuine disputes of material fact. (A. 100; Judy's Moody Red Br. 4 n.3.). Thus, even if this Court were to determine that the trial court was within its discretion to deny both the Attorney General's and P. Masucci's, K. Masucci's, and W. Connerney's motions for summary judgment, this Court may still direct the trial court to enter judgment on Count IV as to walking against the Beachfront Owners and in favor of P. Masucci, K. Masucci, and W. Connerney pursuant to M.R. Civ. P. 56(c). "Summary judgment, when appropriate, may be rendered against the moving party." *Id.*

CONCLUSION

On Count IV, for the reasons stated above and in the Attorney General's opening brief, this Court should conclude that the public trust doctrine includes walking, vacate the judgment of the trial court, and direct the court to enter

judgment in favor of P. Masucci, K. Masucci, and Connerney and against OA 2012, Judy's Moody, and Ocean 503 as to walking.

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Respectfully submitted,

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