STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-82

PETER and KATHY MASUCCI, ET AL,
Appellants/Cross-Appellees,

v.

JUDY'S MOODY, LLC, ET AL.,
Appellees/Cross-Appellants

On Appeal from the Cumberland County Superior Court
Docket No. RE-2021-00035

BRIEF FOR APPELLEE/CROSS-APPELLANT OA 2012 TRUST

David P. Silk, Bar No. 3136
Sidney St. F. Thaxter, Bar No. 1301
CURTIS THAXTER LLC
One Canal Plaza, Suite 1000/P.O. Box 7320
Portland, ME 04112-7320
dsilk@curtisthaxter.com
sthaxter@curtisthaxter.com

Attorneys for Appellee-Cross Appellant OA 2012 Trust

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

OTHER AUTHORITIES

I. INTRODUCTION

Appellants[1] have manufactured a controversy. The record is clear that none of the Appellants have ever been asked, by voice or otherwise, not to engage in any recreational based activities, including walking over any of the intertidal area, on properties at Moody Beach named in this action. Those activities all occur with the presumption of permission. *Almeder v. Town of Kennebunkport,* 2014 ME 139, ¶ 36, 106 A.3d 1099.[2] The notion that a sign that says: "Moody Beach (to your left)

[1] Appellants' Brief does not identify the individuals who are the appellants in this appeal. As used in this Brief the term "Appellants" refers collectively to *Pro se* Orlando Delogu and those Plaintiffs who have not been dismissed for lack of standing: William Connerney, Peter Masucci and Kathy Masucci. The other Plaintiffs dismissed for lack of standing were Judith Delogu, William Griffiths, Sheila Jones, Brian Beal, Robert Morse, George Seaver, Greg Tobey, Hale Miller, Leroy Gilbert, John Grotton, Jake Wilson, Dan Harrington, Susan Domizi, Amanda Moeser, Lori and Tom Howell, Chad Coffin, Bonnie Tobey and Charles and Sandra Radis (collectively "Dismissed Plaintiffs").The Dismissed Plaintiffs have not meaningfully challenged on appeal the Superior Court decision dismissing them for lack of standing. S*ee* Order (on Rule 12(b)(6) motions to dismiss) dated Apr. 15, 2022 (Appendix Vol.1 ("A.") at 0030, 0079); *see also* Order on Justiciability, dated Jan. 26, 2024 (A.0049, 0102). They have not identified as an issue in their Brief whether the Superior Court erred in dismissing these Plaintiffs for lack of standing. Other than the one sentence in their 79-page Brief, they have said nothing more. Appellants Blue Br. at 73 ("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.0838-41, 0843, 0849-53), have a sufficient interest and particularized injury to support standing."). They therefore have waived the issue. *Mehlhorn v. Derby*, 2006 ME 110, ¶ 11, 905 A.2d 290 ("An issue that is barely mentioned in a brief is in the same category as an issue not mentioned at all.")(citing *Holland v. Sebunya,* 2000 ME 160, ¶ 9 n.6, 759 A.2d 205). The State of Maine, Office of the Attorney General ("State") is not included within the term Appellants as the State did not assert any claims of its own. Because of this, the State concedes that the absence of a justiciable controversy between OA 2012 (and the other two beach defendants) and any of the Plaintiffs "would preclude the court from entering a judgment as to the scope of the public trust doctrine." State Blue Br. at 29.

[2] Appellants concede as much in their Blue Brief at 47 and 48. There they acknowledge that three Defendants who own property at Moody Beach (OA 2012 Trust, Judy's Moody LLC and Ocean 503 LLC) have never objected to the members of the public engaging in walking, running, bird watching, surfing and building sandcastles in the intertidal zone.

is a private beach to the low water mark no loitering no dogs allowed thank you" creates an acute fear of prosecution to give rise to an actual ripe controversy is not credible given the absence of any such occurrence at any of the three intertidal properties at Moody Beach named in this action. That Appellants' claim their use as a matter of right is "*restricted as a result of intertidal jurisdiction"* and has rested on implied permission, fails to create anything more than an academic dispute, and not an actual controversy required to confer standing to seek relief. Even if deemed preserved as in issue, this Court should affirm the Superior Court's order on standing as it pertains to the Plaintiffs that were dismissed.

On OA 2012 Trust's ("OA 2012") cross appeal, OA 2012 requests the Court conclude that the Appellants Orlando Delogu, William Connerney, and Peter and Kathy Masucci also lack standing as their claims fail for the same reasons expressed above. While this Court has recognized that when a defendant to a trespass or quiet title action is a member of the public she can raise public trust rights as a defense, it has also stated that members of the public have no standing in that capacity to seek a declaration as to the extent of public rights. As public rights that is for the State or a municipal entity to do. And here since the State has not asserted any claims of its own, the State has no basis to request or obtain declaratory relief. The Court should dismiss Plaintiffs' Complaint for lack of standing.

If the Court does not dismiss Plaintiffs' Complaint for lack of standing, the Complaint should be dismissed for Plaintiffs' failure to include indispensable parties. First, based on the assertion that the "property interests of upland owners not party to these proceedings are identical with the property interest of the Defendants in this case," Plaintiffs are seeking a determination of "statewide effect" that the State owns the fee to all of the intertidal land in the State. (A.0137 (Compl. ¶ 94)) While the State has no claims of its own, before the Superior Court it asked that court to issue a judgment to be entered on the Appellants' Count IV to apply state-wide but different than the declaratory judgment on that Count that Appellants sought, that "[p]ursuant to the public trust doctrine, Peter Masucci, Kathy Masucci, and William Connerney, as members of the public, *have the right to walk unfettered upon intertidal land in Maine,* including the Ocean 503 Intertidal Land, the Judy's Moody Intertidal Land, and the OA 2012 Intertidal Land." (A,0300-301) There are over 3,500 miles of coastline in Maine.[3] Fundamental due process requires that before these intertidal property owners' rights are adjudicated, and potentially judicially swept away, they be given notice.

Second, twenty-eight individual separate property owners at Moody Beach prevailed in *Bell II*[4] on their quiet title claim and obtained judgments of record that

[3] *See* Delogu Blue Br. at 38 n.81.
[4] As used herein, *Bell I* refers to *Bell v. Town of Wells*, 510 A.2d 509 (Me. 1986). *Bell II* refers to *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989).

they own the intertidal land of their parcels to the low water mark of the Atlantic Ocean, and that under the Colonial Ordinance the rights reserved to the public did not include recreational walking, fettered or not, or other general recreational rights. Plaintiffs apparently by happenstance due to the location of OA 2012's intertidal property at the south end of Moody Beach, named the successor in title to only one of the *Bell II* plaintiffs, OA 2012, successor to *Bell II* plaintiff Kevin Howe. The remaining prevailing parties in *Bell II* or their successors in title were not named. Appellants, and the State indirectly through its efforts to seek a judgment for the Appellants that differs from what the Appellants seek, want those quiet title judgments whitewashed. Leaving aside the res judicata bar discussed below, fundamental due process requires that before Appellants and the State seek an adjudication that would alter their quiet title judgments of record, the parties to those judgments, or their successors in interest, be named. Having not made any effort to include all necessary parties, on OA 2012's cross appeal, and to the extent this Court does not dismiss Plaintiffs' Complaint in toto against the three Moody Beach Defendants for lack of standing, this Court should remand for entry of dismissal of Plaintiffs' Complaint for failure to include necessary parties.

To the extent this Court does not remand for dismissal in its entirety the Plaintiffs' Complaint, either for lack of standing or failure to include indispensable parties, this Court should affirm the dismissal in its entirety of the Complaint

against OA 2012 because the claims stated therein are all barred by res judicata.[5] OA 2012 is in privity with a prevailing plaintiff (Kevin Howe) in *Bell II*. For his parcel at Moody Beach that OA 2012 now owns, Mr. Howe obtained a quiet title judgment of fee ownership to the low water mark of the Atlantic Ocean, and a determination that the public rights of fishing, fowling and navigation, when liberally construed, do not include general recreational rights including walking, fettered or unfettered. The Superior Court correctly concluded that Plaintiffs' claim for relief pled in Count IV of their Complaint ¶ 106 (A.0139) (seeking a declaration that "the public trust extends to whatever the state sees fit to allow and regulate exercising its sovereign police power and through its on legislative and regulatory processes") as well their fallback claim seeking to overrule *Bell II*, were barred by res judicata. That same bar applies to all of the counts of Plaintiffs' Complaint.

Appellants in their briefs do not even address anywhere res judicata. They do not anywhere assert that the Superior Court erred in holding that res judicata bars their claims in Count IV against OA 2012. Accordingly, they have waived the argument. While the Superior Court did not address whether all of Plaintiffs'

[5] This would entail this Court affirming the Superior Court judgment for OA 2012 on Count IV of Plaintiffs' Complaint as barred by res judicata, and on OA 2012's cross appeal, or as an alternative ground for affirming the judgment below on the other (title) counts, dismissing the remaining counts of Plaintiffs' Complaint against OA 2012 as all barred by res judicata.

claims are barred by res judicata, and only address Count IV, because the res judicata bar applies equally to all of Plaintiffs' claims (and to the State to the extent it is seeking relief for the Plaintiffs different in kind than the Plaintiffs' seek), all counts of the Complaint should be dismissed.

While the State does address the issue of res judicata in its Brief, having failed to assert any claims of its own, the State is in no position to advance an argument that the Appellants waived. Moreover the State's totally unsupported assertion that the passage of time between when a claim is adjudicated and the filing of subsequent action seeking a readjudication of the same claim makes the subsequent claim different would render the res judicata bar utterly meaningless. The State's alternative argument, that even if the res judicata bar applies to Plaintiffs' claims against OA 2012 (and without so saying bar the State from seeking declaratory relief for the Plaintiffs that differs from the declaratory relief they actually seek), this Court should here recognize an exception to the res judicata bar based on an "unusual situation" must be disregarded because the State did not raise the argument below, and it in any event as the *Restatement* makes clear that exception is limited to when personal liberty is at stake.

Lastly if for some reason this Court does not apply res judicata to bar all of Plaintiffs' claims against OA 2012 (regarding title and scope of public rights), this Court should affirm the entry of judgment below in favor of OA 2012 on all counts

of Plaintiffs' Complaint for the reasons set forth in Judy's Moody LLC's and Ocean 503 LLC's respective briefs, as well as the brief of Defendants the Pages, Newby, Li and Seeley, arguments that OA 2012 fully adopts and incorporates herein.

Appellants grievance stems from their refusal to accept that the issues they seek this Court to address have been fully litigated, and courts have not agreed with their views. They refuse to accept no as an answer. In *Bell I* after a comprehensive review of English common law, the Colonial Ordinance, and subsequent more than 200 years of cases in Maine and Massachusetts, this Court rejected the same title argument advanced here again and unanimously confirmed that:

> the Colonial Ordinance was a rule of Massachusetts common law at the time of the separation of Maine from Massachusetts. By force of article X, § 3 of the Maine Constitution and of section 6 of the Act of Separation between Maine and Massachusetts, it must be regarded as incorporated into the common law of Maine . . . under the Colonial Ordinance the owner of the upland holds title in fee simple to the adjoining intertidal zone subject to the public rights expressed in the Ordinance.

510 A.2d at 513-15.

Three years later, the *Bell II* court reached the same conclusion, stating, "[t]he elaborate legal and historical researches reflected in the extensive briefs filed with us on this second appeal fail to demonstrate any error in the conclusions we reached less than three years ago." 557 A.2d at 171. The *Bell II* court did not just

rely on *Bell I* but also engaged in its own lengthy analysis and concluded "[i]n sum, we have long since declared that in Maine, as in Massachusetts, the upland owner's 'title to the shore [is] as ample as to the upland.'" *Id*. at 173 (quoting *State v. Wilson*, 42 Me. 9, 28 (1856)). *Pro se* Delogu was an amicus in *Bell II* and the arguments he advances today are no different than those he advanced or could have advanced in that case.

Referencing the same legal theories that Plaintiffs put forth here, in *Bell II* the court held "[a]ny such revisionist view of history comes too late by at least 157 years." *Id*. at 172.[6] The *Bell II* court's holding regarding private title to intertidal land was unanimous. *See id*. at 185 (Wathen, J., dissenting) ("this Court has followed the lead of Massachusetts in describing the rights of the riparian owner expansively in terms of fee simple ownership").

---

[6] The *Bell II* court stated:

> [t]he brief of the amici curiae contends that the State of Maine on coming into the Union on separation from Massachusetts "obtained title to its intertidal lands under the 'equal footing' doctrine," a doctrine that has been most recently discussed by the United States Supreme Court in *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469 [1988]. Any such revisionist view of history comes too late by at least 157 years.* * *
>
> The *Phillips Petroleum* decision in 1988 in no way contradicts the plain and carefully explained decision in 1893 in *Shively v. Bowlby*, 152 U.S. [1 (1894)] that Massachusetts and Maine had much earlier exercised their statehood powers over their intertidal lands and had adopted rules of real property law very different from those prevailing in many other states.

Bell II, 557 A.2d at 172-73.

Many of the Plaintiffs have never been to Moody Beach. Their insistence to relitigate against OA 2012 the quiet title judgment its predecessor Kevin Howe obtained after years of litigation, *see Bell I* and *Bell II,* without even addressing the Superior Court's order dismissing them for lack of standing shows that their claims never should have been brought in the first instance, and were only brought to create the false impression of a widespread discontent. Their insistence to relitigate against OA 2012 the judgment Kevin Howe obtained, without even challenging in their appeal the Superior Court's decision barring their Count IV claims based on res judicata, shows their claims against OA 2012 should never have been brought. And the State is in no better position despite its contorted efforts to avoid the res judicata bar that would apply if it had made any direct claim against OA 2012.

Relative to the scope of public rights, this Court should reject Appellants' requested relief here, that "the public trust extends to whatever the state sees fit to allow and regulate exercising its sovereign police power and through its own legislative and regulatory processes," (A.0139 (Compl. ¶ 106)), as well beyond any plausible interpretation of the scope of rights reserved to the public under the Colonial Ordinance. That is because the relief is premised entirely on the State owning the fee of the intertidal portion of OA 2012's Moody Beach property. OA 2012 predecessor in title Kevin Howe already obtained a quiet title judgment declaring that is not the case. (A.1378-79) As to their fallback argument, in *Bell II*

the court rejected their views when it held that the public rights reserved under the Colonial Ordinance of fishing, fowling and navigation, even when liberally construed, do not encompass general recreational rights.

Res judicata core reason for existing is "to ensure the same matter will not be litigated more than once."[7] The *Restatement (Second) on Judgments* introductory comments on res judicata explains more fully why this is so:

> Finality, then, is the service rendered by the courts through operation of the law of res judicata. The finality in contemplation includes the immediate finality that is imposed on the litigation itself. It includes also imposition of finality on the dispute that gave rise to the litigation so far as it is within the means of legal process to do so. In a still broader sense, the law of res judicata cumulatively reinforces the authoritativeness of the law itself. It holds that at some point arguable questions of right and wrong for practical purposes simply cannot be argued any more. It compels repose. In substituting compulsion for persuasion, the law of res judicata trenches upon freedom to petition about grievances and autonomy of action, very serious concerns in an open society. Yet such a society requires a system of order to maintain its open structure.
>
> Indefinite continuation of a dispute is a social burden. It consumes time and energy that may be put to other use, not only of the parties but of the community as a whole. It rewards the disputatious. It renders uncertain the working premises upon which the transactions of the day are to be conducted. The law of res judicata reduces these burdens even if it does not eliminate them, and is thus the quintessence of the law itself: A convention designed to compensate for man's incomplete knowledge and strong tendency to quarrel.

[7] *Cutting v. Down East Orthopedic Assocs., P.A.*, 2021 ME 1, ¶ 10, 244 A.3d 226 (quotations and citations omitted).

> The convention concerning finality of judgments has to be accepted if the idea of law is to be accepted, certainly if there is to be practical meaning to the idea that legal disputes can be resolved by judicial process.[8]

Even if the Court holds that any of the Plaintiffs have standing, and that their Complaint seeking declarations on title and scope of rights to be of "state-wide" effect should not be dismissed for their failure to include necessary parties, and that the State can move for the entry of a declaratory judgment in the Appellants' favor that differs from the declaratory relief Appellants, at the end of the day, if res judicata means anything at all, it dictates that all of the Plaintiffs' claims against OA 2012 be dismissed as barred by res judicata.

II. STATEMENT OF FACTS AND PROCEDURAL HISTORY

OA 2012 is a Maine trust that owns oceanfront property at Moody Beach in Wells, Maine.[9] (A.0437, 0443 (OA 2012 SMF 1)) OA 2012's property

---

[8] *Restatement (Second) of Judgments*, Introduction, at 11 (1982) & Westlaw June 2024 update).

[9] As stated in *Bell II*, 557 A.2d at 170:

> Moody Beach is a sandy beach located within the Town of Wells. It is about a mile long and lies between Moody Point on the north, the Ogunquit town line on the south, the Atlantic Ocean on the east, and a seawall on the west. Moody Beach has a wide intertidal zone with a strip of dry sand above the mean high water mark. More than one hundred privately owned lots front on the ocean at Moody Beach. In addition, the Town of Wells in the past has acquired by eminent domain three lots which it uses for public access to the ocean. Each plaintiff now before the court owns a house or cottage situated on one of 28 private oceanfront lots. Each lot is about 50 feet wide and is bordered on the west by Ocean Avenue. At trial, the parties stipulated that the plaintiff oceanfront owners hold title to the parcels described in their deeds in fee simple absolute and that their parcels were bounded on the Atlantic Ocean. A public beach, now known as Ogunquit Beach,

immediately abuts the Ogunquit Beach, a public beach which the Village of Ogunquit acquired in its entirety by eminent domain.[10] (A.0437, 0443 (OA 2012 SMF 2)) OA 2012's property is about 50 feet wide. (A.0437, 0443 (OA 2012 SMF 3)) The distance from the seawall at OA 2012's property to the mean low water varies but in places is 500 to 600 feet. (A.0437-0438, 0443 (OA 2012 SMF 4)) From the seawall toward the water for a distance of about thirty feet is a dry sand area. (A.0438, 0443 (OA 2012 SMF 5)) No Plaintiff in this case is making any claim of right to use of the dry sand area. *Id*.

The portion of the Ogunquit Beach that abuts the upland portion of OA 2012's property to the south is a public way that provides access from a Town of Ogunquit parking lot to the Ogunquit Beach. (A.0438, 0443 (OA 2012 SMF 6)) There is a sign that has been in place for some time attached to the seawall that is part of OA 2012's property and facing the right of way that states: "Moody Beach (to your left) is a private beach to the low water mark no loitering no dogs allowed thank you." (A.0438, 0444 (OA 2012 SMF 7)) OA 2012 has posted on its seawall facing the ocean a sign that states: "Private Beach, No Loitering." (A.0438, 0444 (OA 2012 SMF 8)) During the summer season, OA 2012 places temporary signage

---

lies immediately to the south of Moody Beach; the Village of Ogunquit acquired that beach by eminent domain in 1925.

[10] *Bell II,* 557 A.2d at 170, 176.

at or near the high-water mark on its property abutting the Ogunquit Beach indicating the location of various beaches, including arrows pointing to Moody Beach, a private beach and Ogunquit Beach. (A.0438, 0444 (OA 2012 SMF 9)) The purpose of the sign is to identify for those using the beach the demarcation between the Ogunquit Town beach and OA 2012's private property in Wells at Moody Beach. (A.0438, 0444 (OA 2012 SMF 10))

OA 2012 Trust has never asked, objected to, or prevented anyone from engaging in any recreational activity such as walking, running, bird watching, swimming, surfing and building sandcastles, on, over or across its tidal property. (A.0439, 0445 (OA 2012 SMF 19, 20)) None of the Appellants have had their access to OA 2012's intertidal land limited or restricted in any way, whether navigation related, recreational related and/or ocean based. (A.0439, 0445 (OA 2012 SMF 19)) Appellants' claim is that this Court's "intertidal jurisprudence" that declared the wet sand area of 28 lots located at Moody Beach to be in fact private property subject to the public's rights of use for fishing, fowling and navigation, was wrongfully decided and thus signs posted (which are nearly if not identical to the signs at issue in *Bell II*) wrongfully tell them that Moody Beach is a private beach, and thus prevent them "from using beaches they are rightfully entitled to use." (A.0122 (Compl. ¶ 1))

There are no actual facts suggesting that the "intertidal jurisdiction" and/or signs have "restricted" any of the Appellants from engaging in any recreational based activity on or over OA 2012's intertidal property. (A.0439, 0445 (OA 2012 SMF 20)) While the Appellants may have a general interest in having a court declare OA 2012's intertidal land to be public property, and not private, and declare the public's use of that land should be whatever the State, as the fee owner, dictates—a general interest even by someone with a longstanding grievance against this Court's prior decisions is insufficient to create a justiciable controversy. *See Almeder*, 2014 ME 139, ¶ 17, 106 A.3d 1099.

OA 2012's predecessor in title Kevin Howe was a plaintiff in *Bell I* and *Bell II*. (A.1378-79) By prevailing in *Bell II* he obtained a quiet title judgment that is of record that he owned the fee to the intertidal portion of his property (e.g., that it is private property) to the low water mark of the Atlantic Ocean subject to the public's rights to use his intertidal property for fishing, fowling and navigation, and that those rights did not include any recreational rights, including recreational walking. (*Id.;* A.0439, 0442, 0444-0446 (OA 2012 SMF 13, 32, 34(g) & (h)))

In *Bell II*, the court stated:

> We agree with the Superior Court's declaration of the state of the legal title to Moody Beach. Long and firmly established rules of property law dictate that the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land subject to an easement, to be broadly construed, permitting public use only for fishing, fowling, and navigation (whether for recreation or business) and any other uses

> reasonably incidental or related thereto. Although contemporary public needs for recreation are clearly much broader, the courts and the legislature cannot simply alter these long-established property rights to accommodate new recreational needs; constitutional prohibitions on the taking of private property without compensation must be considered.

Bell II, 557 A.2d at 169. The *Bell II* court expressly rejected the claim that "bathing, sunbathing, and [recreational] walking" could be considered fishing, fowling or navigation. *Id.* at 176.

Part of the testimony at the trial in *Bell II* included references to signs posted on the seawall on the Howe property, and on other seawalls, which said Moody Beach was a "private beach" and stated, "No Loitering" and/or "No Trespassing." (A.0440, 0442, 0445-0446 (OA 2012 SMF 21, 34(f))) Among claims that could have been raised in *Bell II* was whether those signs (similar in kind if not identical to those at issue in this case) somehow illegally restricted or limited otherwise permitted uses, and whether the signs somehow illegally threatened or intimidated permitted users of the intertidal area from engaging in permitted activities.

The State was an actual party in *Bell I* and *Bell II*, asserted claims including claims against Kevin Howe, and represented the public interest. *Bell,* 557 A.2d at 168; (A.0439, 0442, 0446, 1188 (OA 2012 SMF 14, 34(a) (Docket entry 111 on page 09))) *Pro se* Plaintiff Orlando Delogu was among the *amici*. *Bell II*, 557 A.2d at 168; (A.0439, 0445 (OA 2012 SMF 15)) At the request of the State, a *guardian ad litem* was appointed pursuant to 14 M.R.S. § 6656 "to represent the private

rights of all unnamed and unknown defendants who have not actually been served with process and who have not appeared in this action." *Bell II*, 557 A.2d at 168; (A.0439, 0442, 0445-0446, 1183, 1185 (OA 2012 SMF 16, 34(a) (Docket entry 75, on page 04, entry 87, page 06))) As part of the quiet title procedure, notice in 1984 was given by publication in the local newspaper advising anyone who had an interest in the intertidal properties at Moody Beach to appear and present her claim. (A.0441, 0442, 0446, 1380, 1383 (OA 2012 SMF 30, 34(a))) As of 1984, Plaintiffs William Connerney, Peter Masucci, and Kathy Masucci were of adult age and spent summers at Moody Beach. (A.0441, 0446 (OA 2012 SMF 31))

As successor in title and in privity with Kevin Howe, (A.0439, 0445 (OA 2012 SMF 18)), OA 2012's intertidal property is benefited by that quiet title judgment. (A.0439, 0442, 0445, 0446, 1378-1379, 1411 (OA 2012 SMF 18, 32, 34(a) & (h) (docket entry 274 on page 32 docket sheet and recorded judgment)))

Beach goers including the Appellants who have actually been on or over OA 2012's intertidal property based on their actions did not read the signage as restricting or limiting in any way any movement-based activity, whether called recreational, navigation or ocean-based. (A.0438, 0444, 0448-0450 (OA 2012 SMF 11)) The signs have never caused any of the Plaintiffs to not enter OA 2012's intertidal property for walking or any recreational activity. The signs at OA 2012 property are practically if not in fact the exact same signs that were part of the trial

testimony in *Bell II*. As was the case when *Bell II* was decided, hundreds of people every summer day engage in recreational activities such as walking, running, bird watching, swimming, surfing and building sandcastles, on or over OA 2012's intertidal property without restriction or interruption. (A.0438, 0444, 0450-0451 (OA 2012 SMF 12))

Like many fee owners of intertidal land in Maine, OA 2012 has never objected to recreational activity over its intertidal property, however characterized as ocean based, navigation or recreation. (A.0439, 0445, 0451-0453 (OA 2012 SMF 19)) Appellants in their Blue Brief at 47 and 48 acknowledge that three beach defendants have never objected to the members of the public engaging in walking, running, bird watching, surfing and building sandcastles in the intertidal zone. This Court has held that the public's recreational use of privately owned intertidal lands is deemed to be with a presumption of permission for "all general recreational activities." *Almeder,* 2014 ME 139, ¶ 36, 106 A.3d 1099. The court stated that "[g]eneral recreational activities include walking, sunbathing, picnicking, playing games, swimming, jet skiing, water skiing, knee boarding, tubing, surfing, windsurfing, boogie boarding, rafting, paddle boarding, snorkeling, and the like." *Almeder*, 2014 ME 139, ¶ 36 n.23, 106 A.3d 1099.

III. STATEMENT OF ISSUES (CROSS-APPEAL)

1. Did the Superior Court err in holding that Orlando Delogu, William Connerney, and Peter and Kathy Masucci have presented a justiciable

controversy and have standing to assert claims against Defendant OA 2012 when OA 2012 has never prevented them by signage or otherwise from engaging in any ocean based recreational activity, and Delogu, Connerney and Masuccis' grievances stem from this Court's decision in *Bell II*?

2. Should the Plaintiffs' Complaint in toto be dismissed for Plaintiffs' failure to present a justiciable controversy due to lack of standing?

3. Should the Plaintiffs' Complaint in toto be dismissed for failure to include necessary parties?

4. Should the Plaintiffs' Complaint in toto be dismissed as barred by res judicata?

5. With no claims of its own, does the State have any basis to seek a declaratory judgment that differs from the declaratory judgment that the Appellants' seek?

6. Can the State request this Court to issue declaratory relief on behalf of some of the Appellants that differs from the declaratory relief the State moved the Superior Court to issue in favor of several of the Appellants?

IV. ARGUMENT

1. Plaintiffs fail to present a justiciable controversy

As an initial matter this Court should determine whether the Appellants Orlando Delogu, William Connerney, and Peter and Kathy Masucci have presented a justiciable controversy. Appellants' Complaint seeks a declaration that the State of Maine holds title to the intertidal portion of OA 2012's property extending to the low water mark of the Atlantic Ocean and that as a result of State ownership, the rights of the public to use that land are whatever the State deems the uses to be. They also raise constitutional issues with prior decisions of this Court.

"'A declaratory judgment action may only be brought to resolve a justiciable controversy.'" *Black v. Bureau of Parks and Lands*, 2022 ME 58, ¶ 23, 288 A.3d 346 (quoting *Sold, Inc. v. Town of Gorham*, 2005 ME 24, ¶ 10, 868 A.2d 172). If a plaintiff cannot establish that his case is justiciable, the plaintiff's complaint must be dismissed. *See, e.g.*, *Dubois v. Town of Arundel*, 2019 ME 21, ¶ 6, 202 A.3d 524 ("Standing is a condition of justiciability that a plaintiff must satisfy in order to invoke the court's subject matter jurisdiction in the first place." (quoting *Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 7, 124 A.3d 1122)). Questions of justiciability, such as standing and ripeness, can be raised at any point in a proceeding. *See JPMorgan Chase Bank v. Harp*, 2011 ME 5, ¶ 7, 10 A.3d 718 ("standing … may be raised at any time, including during an appeal"); *Johnson v. Crane*, 2017 ME 113, ¶¶ 8-12, 163 A.3d 832 (addressing ripeness for the first time on appeal on court's own motion). This Court applies a de novo standard of review on questions of standing based on standing being viewed as a question of law. *Black v. Bureau of Parks & Land,* 2022 ME 58, ¶ 26, 288 A.3d 346.

A plaintiff may not invoke the court's subject-matter jurisdiction if it does not show that it has standing. *Homeward Residential, Inc. v. Gregor*, 2015 ME 108, ¶¶ 18-19, 122 A.3d 947. When a party lacks standing, a complaint should be dismissed because the matter is not properly before the court for consideration on the merits. *See Bank of Am., N.A. v. Greenleaf*, 2015 ME 127, ¶ 8, 124 A.3d 1122

("A plaintiff's lack of standing renders that plaintiff's complaint nonjusticiable—i.e., incapable of judicial resolution.").

"[T]o have standing to seek … declaratory relief, a party must show that the challenged action constitutes 'an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical.'" *Madore v. Me. Land Use Regulation Com'n*, 1998 ME 178, ¶ 13, 715 A.2d 157 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)).

The "basic purpose and requirements [of standing] are clear. A party must assert a personal stake in the outcome of the litigation and present a real and substantial controversy touching on the legal relations of parties with adverse legal interests." *Collins v. State*, 2000 ME 85, ¶ 5, 750 A.2d 1257 (quoting *Franklin Prop. Trust v. Foresite, Inc.*, 438 A.2d 218, 220 (Me. 1981)). "Without this standing requirement, courts would be called upon to decide issues lacking the concrete and adversary qualities which denote a true legal controversy." *Nichols v. City of Rockland*, 324 A.2d 295, 297 (Me. 1974).

In addition to demonstrating a definite and personal legal right at stake, *see Nichols,* 324 A.2d at 297, the plaintiff must also show that the alleged injury is specific to the plaintiff, and must seek redress for the plaintiff's own rights, not the rights of the public. *See Buck v. Town of Yarmouth*, 402 A.2d 860, 861 (Me. 1979); *Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257. The plaintiff's alleged injury must be

concrete and defined by a legal harm that is "fairly traceable to the challenged action" of the adverse party. *Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257.

In this case, based on the undisputed material facts, none of the Plaintiffs have presented any real and substantial controversy specific to them, as opposed to the general public, and have failed to articulate *any* injury that they have allegedly suffered, much less the requisite showing of "particularized injury" fairly traceable to the conduct of OA 2012.

On the same facts as presented here, in an unanimous opinion, in *Almeder,* this Court found that the back lot owners lacked standing to seek a declaration effectively on whether *Bell II* was wrongfully decided. The court therefore vacated the Superior Court's broad declaration entered in favor of the State (who asserted no claims of its own) that the "public's right to fish, fowl, and navigate includes the right to cross the intertidal zone of the Beach to engage in all 'ocean-based' activities, which it defined as such 'waterborne activities as jet-skiing; water-skiing; knee-boarding or tubing; surfing; windsurfing; boogie boarding; rafting; tubing; paddleboarding; and snorkeling,' but not including 'swimming, bathing or wading; walking; picnicking or playing games.'" *Almeder,* 2014 ME 139, ¶ 12, 106 A.3d 1099 (quoting the vacated declaration).

The facts in *Almeder* are remarkably similar here, that the public including back lot owners used the intertidal area at issue for a broad range of recreational

activity without interruption from the upland owners and that signs posted on the dry sand by the upland owners that said "No Trespassing" were ignored and thus did not prevent usage of the intertidal area.

> Beachgoers have not asked the Beachfront Owners for permission to use the Beach for these general recreational purposes because they felt they had a right to use the Beach for such purposes. They have asked permission from the relevant Beachfront Owners for activities beyond "ordinary beach type recreational uses," however, such as storing boats on the dry sand or hosting a party or wedding on the Beach.
>
> The Beachfront Owners have requested that beachgoers leave the property when beachgoers were drinking alcohol or engaging in loud, disruptive, or potentially dangerous activities. Rarely has a Beachfront Owner otherwise ever requested that a beachgoer "move along." Testimony indicated that it would be impractical to ask beachgoers engaged in ordinary recreational activity to leave.
>
> Although several Beachfront Owners have, in recent years, posted 'no trespassing' signs around their properties, the signs were intended to keep people off of the Beachfront Owners' landscaped property and private access ways rather than any portion of the sand itself. As to the wet or dry sand portions of the Beach, the court found that beachgoers would have ignored the signs and continued to use the Beach as they always had.

Id. at ¶¶ 9-11.

This Court did so for the following reasons. First and foremost, the court held that the Superior Court erred in finding that the group of back lot owners who regularly used Goose Rocks Beach for recreational purposes had rights distinct from the public at large so as to have standing to seek declaratory relief. Rather this Court reasoned that "[n]otwithstanding their proximity to the Beach, the Backlot Owners did not demonstrate any interest in the Beach itself—as opposed

to any paths leading to the Beach in which they might claim an interest—beyond that of any member of the public who has a history of using the Beach or, even more broadly, of any person who happens to live near a scenic location." *Id.* ¶ 17. The same analysis applies here, the interests the Appellants' assert are no different than any member of the public could assert.

No matter how dressed up, the Appellants' standing is also no different in kind than those of the backlot owners in *Almeder,* and they are no different than the claims any member of the public could make. While they say that the signs posted in the upland that say Moody Beach is a private beach, no loitering and no dogs allowed creates an apprehension, they do not allege that with respect to the three Moody Beach defendants that they have been asked to leave or to not engage in ocean based recreational activities. They do not identify anyone who has not walked on the beach defendants' intertidal property due to the signs. They have not identified anyone who has not used that intertidal property for ocean based recreational activities.

Based on their actions the Appellants (and everyone else) have ignored the signs. Based on actions, the signs have not been read by Appellants as barring on the three beach defendants' intertidal parcels for ocean based recreational activities. The Appellants' assertions are a ruse, they are not here defending against

a trespass action, and no actual threat against them (or anyone) from any of the beach defendants of a trespass action exist.

With respect to OA 2012's intertidal property, to the extent the issue has been preserved, the Superior Court correctly held that the Dismissed Plaintiffs lack standing to pursue claims against OA 2012. They have never been to Moody Beach where OA 2012's intertidal property is located, (A.0439, 0445 (OA 2012 SMF 23)), and their claim of a right to OA 2012's intertidal property is no different than the rights that could be asserted by any member of the public. Having never been to Moody Beach, and more particularly having never been on OA 2012's property, and having failed to identify any instance in which OA 2012 prevented or restricted them (or anyone else for that matter) from engaging in any movement-based activity on or over OA 2012 property, (A.0439, 0445 (OA 2012 SMF 23)), there is no basis for the Dismissed Plaintiffs to show any injury or threat of injury fairly traceable to the conduct of OA 2012. That is likely why they have waived the issue on appeal.

With respect to the Appellants, the Superior Court erred in concluding they had standing.

Pro se Plaintiff Orlando Delogu has been to Moody Beach, but is not aware of the location of OA 2012's property, and in any event has never been prevented from engaging in any recreational based activity over the entire beach, such as

walking, running, bird watching, swimming, surfing and building sandcastles, which necessarily involves the OA 2012 property. (A.0441, 0446 (OA 2012 SMF 26)) Given that the backlot owners in *Almeder* who visited Goose Rocks Beach every day did not possess any claim distinct from the public, Plaintiff Orlando Delogu's few visits in connection with publicizing this lawsuit and his longstanding academic disagreement with this Court's "intertidal jurisprudence," do not clothe him in any manner different than that of the public.[11] The Superior Court erred in concluding *Pro se* Plaintiff Orlando Delogu had standing in this case to pursue his claims against OA 2012.

The same holds true for back lot owners Plaintiffs Peter and Kathy Masucci and William Connerney. The Masuccis are back lot owners and access Moody Beach at the opposite end of Moody Beach from where OA 2012's property is located. (A.0441, 0446 (OA 2012 SMF 27, 28)) While they believe they have walked over OA 2012's property, they testified that they have never been prevented or restricted from engaging in activities such as walking, running, bird watching, swimming, surfing and building sandcastles, on or over OA 2012's property. (A.0441, 0446 (OA 2012 SMF 27, 28))

[11] In his Blue Brief's Table of Authorities, *Pro se* Plaintiff Delogu lists four of his own publications as support for his assertion that this Court's intertidal jurisprudence for the last 200 years or more has been incorrectly decided. *See* Delogu Blue Br. at v.

Back lot owner Plaintiff William Connerney believes he has walked across OA 2012's property, but he too testified he has never been prevented or restricted from engaging in any walking, running, bird watching, swimming, surfing and building sandcastles on or over OA 2012's property. (A.0441, 0446 (OA 2012 SMF 28))

As held in *Almeder*, these three Plaintiffs' status as back lot owners who make use of the beach on a regular basis, without more, does not confer on them any status beyond that of the public. They are not facing or being threatened with arrest and prosecution. *See Bell I*, 510 A.2d at 510 (stating that a member of the public could assert public trust rights as a defense to a trespass or quiet title action). The Superior Court erred in not dismissing Plaintiffs Delogu's, Connerney's and the Masuccis' claims against OA 2012 for lack of standing.

Second, in *Almeder* the court stated that the State, representing the public, "did not file a claim for a declaratory judgment or any other cause of action raising the public trust doctrine." 2014 ME 139, ¶ 36, 106 A.3d 1099. Due to the absence of a claim of its own, the Superior Court lacked any basis to grant the State declaratory relief. *Id.* The same analysis applies here. Like in *Almeder,* the State here has not asserted any claims in its own right but has instead elected to ride the coattails of others. Therefore there is no independent basis to grant the State any declaratory relief.

In sum, based on this Court's analysis in *Almeder,* Appellants' constant but erroneous views that this Court has for centuries wrongfully rejected Statewide ownership of intertidal lands, or as put by the Superior Court, their disagreement with this Court's "intertidal jurisprudence," does not rise to the level of "the concrete and adversary qualities which denote a true legal controversy." *Nichols*, 324 A.2d at 297. *Bell II* already decided at Moody Beach the contours of the public's legal interests. Based on signs that Appellants have ignored in engaging in ocean based recreational activities on and over OA 2012's intertidal property, it cannot plausibly be said that those signs create an apprehension sufficient to create an actual or imminent threat of a trespass action being commenced against them so as to avoid the court issuing an advisory opinion.

This Court should hold that the Appellants also lack standing and dismiss their Complaint in its entirety. *See Bank of New York v. Dyer*, 2016 ME 10, ¶ 11, 130 A.3d 966 (stating that a party that lacked standing "never had the rights necessary to get through the courthouse door and pursue its claim in the first place" (alteration and quotation marks omitted)).

2. Plaintiffs failed to include indispensable parties

Plaintiffs have not joined in this action all of the prevailing property owners in *Bell II* or their successors in title, (A.0442, 0446, 1388-1389 (OA 2012 SMF 33, 34(a) (reference docket entries 265 through 293))), all other intertidal property

owners at Moody Beach, or other owners of intertidal property located in the State. Yet they seek a declaration that the State "holds title to all intertidal lands" in the State (with the exception of "discrete parcels alienated to facilitate marine commerce"). (A.0140 (Compl., Count V, at 21)) Their claims must be dismissed for failure to include indispensable parties.

"When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration and no declaration shall prejudice the rights of persons not parties to the proceeding." 14 M.R.S. § 5963. In *Boothbay Harbor Condominiums, Inc. v. Department of Transp*., 382 A.2d 848, 853 (Me. 1978), this Court held that in the absence of neighboring waterfront property owners whose fishing and flowage rights could be adversely impacted, the Superior Court could not adjudicate those rights through a declaratory judgment action:

> [P]laintiff's fishing and flowage rights may not properly be adjudicated in the absence of those persons, not here made parties to the action, required to be parties under 14 M.R.S.A. § 5963, i. e., those " . . . who have or claim any interest which would be affected by the declaration . . . ." Plaintiff's flowage rights should not be determined in the absence of other owners of land surrounding Campbell's Cove whose interests would be affected thereby. Plaintiff's fishing rights should not be determined in a proceeding to which the appropriate State agencies are not parties, the State having responsibility to regulate all fishing activities in its waters. *Woods v. Perkins*, 119 Me. 257, 110 A. 633 (1920).

Given that all of the Moody Beach intertidal property owners' rights will be affected by the declaration that Plaintiffs seek, including those plaintiffs who prevailed in *Bell II*, as well as all other intertidal owners in the State (except perhaps, "discrete parcels alienated to facilitate marine commerce")(A.0056) it would be improper to adjudicate Plaintiffs' claims in the absence of these parties.[12]

The prevailing parties in *Bell II*, a quiet title action, were the owners of twenty-eight separate parcels at Moody Beach. The State was a party to that action, along with the Town of Wells and others. The judgments are of record. (A.1408-1414) The other prevailing twenty-seven lot owners or successors in title are indispensable parties given that relief Plaintiffs (of "state-wide effect") will nullify quiet title judgments of record that title to those twenty-seven properties extends to the low water mark of the Atlantic Ocean and that the public rights reserved by the Colonial Ordinance do not include general recreational activates including walking unfettered. Separate from standing, Plaintiffs' Complaint should be dismissed for failure to include indispensable parties.

3. Plaintiffs' claims are barred by Res Judicata

OA 2012's predecessor in title Kevin Howe was one of the successful plaintiffs in a quiet title action culminating in the Law Court's decision in *Bell II*.

[12] In *Almeder* this Court noted that "[a]fter determining that all ninety-five owners of beachfront parcels were necessary parties to the litigation, the court ordered service of the complaint on each pursuant to M.R. Civ. P. 19(a)." *Almeder,* 2014 ME 139, ¶ 3 n.3, 106 A.3d 1099.

Bell II, 557 A.2d 168 (Me. 1989); (A.0439, 0442, 0444-0445, 0446, 0451, 1378-1379, 1411 (OA 2012 SMF 13, 18, 32, 34)) As noted above, in *Bell II*, this Law Court held that walking on or over the plaintiffs' intertidal land at Moody Beach for recreational purposes is not a form of navigation. *Bell II,* 557 A.2d at 169. The Superior Court in *Bell II* also determined that the each of the plaintiff's title included the intertidal land to the low water mark of the Atlantic Ocean. *Id.* To the extent the Court views Plaintiffs' claims presented here as somehow different from those presented in *Bell II*, there is no doubt that all of their claims could have been presented in *Bell II*. Thus, even if Plaintiffs have presented a justiciable controversy, and have not failed to include indispensable parties, with respect to OA 2012's intertidal land, both the title and scope of public rights, this Court must dismiss all of the Plaintiffs' claims on the grounds of res judicata.

As this Court recently stated in *Federal National Mortgage Association v. Deschaine*, 2017 ME 190, ¶ 15, 170 A.3d 230:

> The doctrine of res judicata prevents "a party and its privies ... from relitigating claims or issues that have already been decided." *Portland Co. v. City of Portland,* 2009 ME 98, ¶ 22, 979 A.2d 1279. The doctrine "has two components: collateral estoppel, also known as issue preclusion, and claim preclusion." *Wilmington Tr. Co. [v. Sullivan-Thorne],* 2013 ME 94, ¶ 7, 81 A.3d 371 (quotation marks omitted). Claim preclusion, which is the component at issue in this case, "bars the relitigation of claims if: (1) the same parties or their privies are involved in both actions; (2) a valid final judgment was entered in the prior action; and (3) the matters presented for decision in the second action were, or might have been, litigated in the first action." *Id.* (quotation marks omitted).

With respect to the first element, the same parties or privies are involved. OA 2012 is privy to Kevin Howe as successor in title, the Plaintiffs here are in privy with the defendants in *Bell II*. The State was a party in *Bell II*, and therein represented the public. (A. 0439, 0445 (OA 2012 SMF 14)) The State is a party in interest in this case and moved to obtain declaratory relief on Appellants' Count IV claim but sought relief for them different from the relief that those Appellants sought.

In *Bell II* all the users of plaintiffs' property other than those claiming under a recorded instrument were named as defendants. *Bell II,* 557 A.2d at 169 n.1. At the State's request a *guardian ad litem* (Ralph Austin, Esq.) was appointed to represent the private rights of all unnamed and unknown defendants, who may have an interest in the *Bell II* plaintiffs' property. *Id*. at 168*;* (A.0439, 0445 (OA 2012 SMF 16)) Notice of the quiet title action was published in the local paper. (A.0441, 0442, 0446, 1380, 1383 SMF 30, 34(a) (Docket 4, 6 19))) Forty owners of non-oceanfront lots (so called "Back Lot owners") located on the other side of Ocean Avenue intervened as defendants. *Bell II*, 557 A.2d at 169 n.1. (A.0442, 0446, 1478 (OA 2012 SMF 34(a)))

Privies to the defendants in *Bell II* include the Plaintiffs here who as members of the public were represented by the State and to the extent here they assert non-public interests, they are successors to those users of the Moody Beach

intertidal property represented by the *guardian ad litem.* Finally, OA 2012,'s predecessor in title Kevin Howe was a plaintiff in *Bell II.* (A.0439, 0444-0445, 1378-1379 (OA 2012 SMF 13)) Appellants on appeal do not assert that the first element is not met.

On the second element there is a final judgment in *Bell II*. (A.0442, 0446, 1378-1379, 1411 (OA 2012 SMF 32, 34(h))) Appellants on appeal do not assert otherwise.

On the third element, the matters for decision here, fee ownership and scope of public rights, including whether walking as a recreational activity is a permitted use under the Colonial Ordinance, were in fact raised and decided in *Bell II*, or if this Court somehow deems otherwise, without doubt certainly could have been raised in *Bell II*.

Moreover, whether the signs at issue here could be viewed as unlawfully restricting access also could have been raised in *Bell II*. At the bench trial in *Bell II,* Moody Beach ocean front owners testified to a long history of sign posting on the Howe's seawall oriented to the abutting Ogunquit Town beach that stated: "Private Beach" and in general other signs including signs stating "Private Beach to low water mark, no loitering please." (A.0440, 0445 (OA 2012 SMF 21))[13] They

[13] Moody Beach ocean front property owners testified that many of the plaintiffs placed signs either in the sand (A.1467, 1470, 1474), or on their seawall steps (A.1463); the signs carried messages such as "No Trespassing" (A.1467), "Private Beach to Low Water Mark, No Loitering

also testified as to elsewhere at Moody Beach numerous signs were posted on seawalls and in the dry sand that stated, "no trespassing." (A.0440, 0442, 0445, 0446, 1462-1475 (OA 2012 SMF 21, 34(f))) With the signs in *Bell II* being no different than the signs at issue in this case, including signs posted on the Howe property, whether these signs could be read to restrict or limit any permitted activity on or over what is now OA 2012's property could have been litigated in *Bell II*. Appellants here do not assert the third element is not met.

In *Deschaine*, 2017 ME 190, ¶¶ 18, 19, 170 A.3d 230, the court applied the following standard to determine whether claims preclusion applied.

> [W]e must determine whether the same cause of action was before the court in the prior case. We define a cause of action through a transactional test, which examines the aggregate of connected operative facts that can be handled together conveniently for purposes of trial to determine if they were founded upon the same transaction, arose out of the same nucleus of operative facts, and sought redress for essentially the same basic wrong.... Claim preclusion may apply even where a suit relies on a legal theory not advanced in the first case, seeks different relief than that sought in the first case, or involves evidence different from the evidence relevant to the first case. [*Wilmington Tr. Co. v. Sullivan-Thorne*, 2013 ME 94, ¶ 8, 81 A.3d 371] (citations, alterations, and quotation marks omitted).
>
> Claim preclusion "is grounded on concerns for judicial economy and efficiency, the stability of final judgments, and fairness to litigants." *Id.* ¶ 6. The doctrine promotes those goals by preventing a party "from splintering his or her claim and pursuing it in a piecemeal fashion by

---

Please" (A.1471), or simply "Private Property." (A.1473.) At the southern end, near Ogunquit Beach, William Case and plaintiffs Leo Shannon and John Howe erected a sign in 1975 at Howe's property (on the Ogunquit Beach line) which said, "Private Beach." (A.0442, 0446, 1462-1475 (OA 2012 SMF 34(f)))

> asserting in a subsequent lawsuit other grounds of recovery for the same claim that the litigant had a reasonable opportunity to argue in the prior action." *Johnson [v. Samson Const. Corp.]*, 1997 ME 220, ¶ 7, 704 A.2d 866 (quotation marks omitted).

Under the doctrine of claim preclusion even if the Appellants' claims in this case are somehow viewed as different from the claims litigated in *Bell II*, it is clear that those claims could have been raised and litigated in *Bell II*, as Appellants' claims here all arise out of "the same nucleus of operative facts, and sought redress for essentially the same basic wrong." *Deschaine,* 2017 ME 190, ¶ 18, 170 A.3d 230.

In *Goumas v. State Tax Assessor*, 2000 ME 79, ¶ 11, 750 A.2d 563, this Court affirmed on res judicata grounds an action challenging the State's authority to tax income earned at the Portsmouth Naval Shipyard, premised on the contention that the yard is located in New Hampshire and not in Maine. The plaintiff had been part of an earlier class action lawsuit that sought the same remedy in the subsequent action. The court held he could not relitigate the claim.

> Moreover, Goumas seeks exactly the same remedy in the matter before us as he did in the class action—a judicial determination that the State of Maine may not impose an income tax on him because his income was earned in New Hampshire. Because Goumas has already litigated his claim that the State of Maine may not impose an income tax upon his Shipyard earnings for the tax years 1992 through 1995 as well as other years, and failed to prevail in that litigation, he may not now relitigate the same cause of action.

Id. ¶ 11, 750 A.2d 563.

The Superior Court's conclusion that res judicata applies is a legal determination that this Court reviews de novo. *Gray v. TD Bank, N.A.,* 2012 ME 83, ¶ 10, 45 A.3d 735. Plaintiffs have not advanced any argument in their briefs that the Superior Court erred in dismissing Count IV of the Complaint against OA 2012 as barred by res judicata. *Pro se* Appellant Delogu's Blue Brief does not address anywhere therein res judicata.

The other Appellants too fail to address res judicata anywhere in their briefs.[14] They too have waived the issue whether the Superior Court in granting judgment in favor of OA 2012 that Count IV of the Complaint is barred by res judicata. To the extent the court concludes that any of the Plaintiffs have standing, and have not failed to include indispensable parties, either through OA 2012's cross appeal or as an alternative basis to affirm the judgment below in favor of OA 2012, on the remaining counts this Court should affirm the judgment entered below in favor of OA 2012 that all of the Plaintiffs' claims against OA Trust are barred by res judicata.

That leaves the State. The State did not assert any claims of its own. *Almeder* held that in the absence of asserting claims, the State lacks any basis to

[14] Rather than address the issue whether the Superior Court erred in dismissing their remaining claim as barred by res judicata, at the very end of their Blue Brief starting at page 75, Appellants use three pages to discuss stare decisis. The Appellants ignore that the Superior Court granted judgment in favor of OA 2012 and against Appellants on Count IV of the Complaint on the basis that their claims are barred by res judicata. *See* Superior Court's Consolidated Order on Defendants' Pending Dispositive Motions dated January 26, 2024 at 5-8, 9. (A.0097-0100, 0101)

seek declaratory relief. *Almeder,* 2014 ME 139, ¶ 36, 106 A.3d 1099. Given by failing to raise and brief the issue, the Appellants have waived the issue of whether the Superior Court erred in barring Count IV of the Complaint based on res judicata, the State has no basis here to press an argument that the Appellants have waived.

Even if the court allows the State to advance an issue waived by the underlying party, the State's argument that res judicata has not been met, or should not apply, to bar against OA 2012 the claims stated in Count IV of the Complaint is without merit. Here the State does not dispute that OA 2012 as successor it title to Kevin Howe is in privity with a plaintiff in *Bell II,* that the State was a party to *Bell II*, that the State sought the same relief in that case as it asked the Superior Court to issue for some of the Appellants here, that unfettered walking is a right the public has to do over what was then Kevin Howe's intertidal land (now OA 2012's land) under the Colonial Ordinance, that those property interests were adjudicated and embodied in a final quiet title judgment, and that Kevin Howe prevailed.

The relief Appellants seek in Count IV of their Complaint is not the relief the State asked the Superior Court to grant to them in this matter. Below the State sought the following relief:

> For the reasons set forth in his supporting memorandum of law, the AG moves this Court to include the following holding as part of an

> entry of summary judgment in favor of Plaintiffs on Count IV: Pursuant to the public trust doctrine, Peter Masucci, Kathy Masucci, and William Connerney, as members of the public, *have the right to walk unfettered upon intertidal land in Maine,* including the Ocean 503 Intertidal Land, the Judy's Moody Intertidal Land, and the OA 2012 Intertidal Land.

Attorney General's Motion for Summary Judgment on Count IV of Plaintiffs' *See* Complaint at 1-2 dated May 2, 2023 (emphasis supplied). (A.0291-0292) *See also* Attorney General's Memorandum of Law in Support of Motion for Summary Judgment at 1, 6, 8-11 (stating "unfettered" nine times in arguing that the court should declare in its judgment for some of the Plaintiffs that under the Colonial Ordinance, and over all intertidal lands in the State, the public has the right to walk *"unfettered"*). (A.0293-0304) The relief Plaintiffs sought was that "a wide range or recreational/commercial uses on intertidal land" be declared uses permitted under the Colonial Ordinance. Delogu Blue Br. at 3.

Besides res judicata, OA 2012 asserted below that any "unfettered" right to walk across OA 2012's intertidal property would mean that if OA 2012 occupied its own intertidal land for a wedding, memorial service, or family reunion, the public could demand that OA 2012 vacate the area of its property because the public's unfettered right to cross would trump the landowner's rights. *See Mill Pond Cond Ass 'n v. Manalio*, 2006 ME 135, ¶ 6, 910 A.2d 392 ("If the grant of an easement expressly details its specific boundaries ... the owner of the right of way is entitled to use the entire granted area, and is not limited to what is necessary or

convenient ... Similarly, where the grant of an easement is clearly for the purpose of allowing free and convenient passage over a lot from every feasible point necessary for enjoyment of the easement, restriction of access to a particular point is impermissible." (citations omitted)). And in contrast to public beaches that by municipal ordinance regulate walking (thus making walking not unfettered), OA 2012 would have no such ability to impose any restrictions on the public's walking given that "unfettered" means "not controlled or restricted" in any way. https://www.merriam-webster.com/dictionary/unfettered (last visited July 31, 2024). That means the Town of Ogunquit which regulates walking on that town's beach may not so do.[15] Clearly, what the State sought below to be entered as a declaratory judgment for some of the Appellants, "unfettered walking," would clash with regulations on walking imposed on public beaches. Before this Court in its appeal, in its 32-page Brief, and after mentioning "unfettered walking" nine items in its memorandum of law submitted to the Superior Court, the State has dropped entirely the word "unfettered." It is as if the State never asked for the Superior Court to issue the declaration for Appellants that the State did in fact

[15] The Town of Ogunquit regulates that Town's public beach, a beach that directly abuts OA 2012's property, *see Bell II*, 557 A.2d at 177, and regulates public use thereof related to walking on or over intertidal land, including hours when the walking can occur, how one must be clothed when walking, whether one can smoke and drink alcohol when walking, and whether and when dogs are permitted to join in the walking. Town of Ogunquit Code of Ordinance, Ch. 147-18, 147-19 and 147-21. *See* https://ecode360.com/33477590 (last visited on July 31, 2024).

request. The State provides no basis for asking this Court to issue a declaratory judgment (for the Appellants) that differs from what the State requested below.

Layered on top of the State's change in its request for the declaratory relief to be issued on Appellants' claim, the State in both instances is requesting t the declaratory relief different from that the Appellants seek. By Count IV, the Appellants primarily seek a declaration that the public rights to the intertidal land should be whatever the State deems the uses to be. (A.0139, 0140-141, 0328 (Compl. ¶ 106 & Prayer for Relief at 21-22; Plaintiffs' Mot. Summ. J. (May 2, 2023) at 6 (stating that "[t]he issue presented to this court in Count IV is rather simple: the Public Trust is more expansive than Colonial Ordinance trifecta of fishing, fowling, and navigating. Appellants assert that pursuant to Maine common law, the scope of permissible common law uses is broader than those three activities (and broader than uses connected with them) and furthermore, that 'the public trust extends to whatever the state sees fit to allow and regulate exercising its sovereign police power and through its own legislative and regulatory processes.' (Compl. Count IV)"))(A.0328); Delogu Blue Br. at 65-66 (stating the Count IV "is a fallback argument" and seeks a determination that *Bell II* wrongfully decided that the 1986 Public Trust in Intertidal Land Act was unconstitutional, and therefore the State can exercise whatever police powers over OA 2012's land it deems necessary untethered to the Colonial Ordinance).

Secondary and without regard to any balancing of interests, they ask this Court to declare that "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." Appellants' Blue Br. at 78-79. Other than premised on the State owning the fee to what has been adjudicated to be OA 2012's intertidal land , Appellants never sought a declaration that they have a right under the Colonial Ordinance to "unfettered" walking. Having not filed any claim of its own, the State has not identified any basis for it to seek declaratory relief for the Appellants that is different from the declaratory relief the Appellants' seek.[16] The Court should so hold, that by having not asserted any claims of its own, the State waives any right to request entry of declaratory relief for the Appellants that is different from the declaratory relief the Appellants' seek.

[16] Rule 56(a) states that a "party seeking to …obtain a declaratory judgment may move …for summary judgment in the party's favor." M.R. Civ. P. 56(a). It does give the State without claims of its own to move for summary judgment (1) in favor of another party and (2) that differs from the judgment the actual party seeks. OA 2012 below asked that the court to strike the State's motion for summary judgment. *See* Defendant OA 2012 Trust's Opposition to Plaintiffs' and the State's Motions for Summary Judgment on Count IV of the Complaint (June 2, 2023) at 1, 3, n.4. Since the court denied the State's motion for non-compliance with the rule, it did not address what basis existed for the State to file its own summary judgment on Count IV of Plaintiffs' Complaint seeking a declaration for the Plaintiffs that was not the declaratory relief that the Plaintiffs' sought in their own motion.

Assuming the State can even make the argument given it has been waived by the Appellants, the State asserts the res judicata bar should not apply to Appellants' claims because while the relief they are requesting in this action is exactly the same relief the State and others sought in *Bell II*, and Appellants are in privity with parties in *Bell II*, this subsequent action is not the same as the earlier action due to the passage of time. State Blue Br. at 26-27.[17] According to the State, the common law "lens" the court uses to determine property ownership, rights and interests always changes, and that therefore makes a subsequent action asserting the exact same claim and seeking the exact same relief as the earlier fully adjudicated action not the same. This argument is without merit. If adopted by this Court it would render the doctrine of res judicata meaningless. No final adjudication of title and property interests would ever serve as a bar to a later action raising the same claim between the same parties or privies, because with the passage of time, the subsequent and identical claim between identical parties seeking the identical relief will as a matter of law be deemed different. This argument is not supported by any decisional authority and the State cites none.[18]

---

[17] The State concedes that in 1989 "*Bell II* adjudicated OA 2012's title" and "the scope of the public trust doctrine." State's Blue Br. at 26. The State then recites the judgment obtained as including a time element ("*that as of 1989* the public's trust rights were limited to fishing, fowling and navigation")(*id.* at 27)(emphasis added), when no such time element was included in the judgment or decision.

[18] *Wozneak v. Town of Hudson*, 665 A.2d 676 (Me. 1995) has no application here. That case did not involve an adjudication of property rights through a quiet title action. Rather the case simply

The State's argument would overturn all of this Court's decisions that barred subsequent claims based on res judicata as all of those cases included a passage of time between the first adjudication and the commencement of the subsequent action seeking the same relief. Following the State's proposition would render quiet title and all other judgments meaningless. Finality would never occur because passage of time does not stop running.

The State then suggests that even if the third element is met, that the passage of time does not in fact make the identical claim different, this Court should not apply res judicata to bar Plaintiffs' claims based on an exception for an "unusual situation[]." State Blue Br. at 28. The State never raised this argument before the Superior Court in its opposition to OA 2012's motion for summary judgment on Count IV. *See generally* Attorney General's Memorandum of Law in Opposition to OA 2012 Trust's Motion for Summary Judgment on Count IV of Plaintiffs Complaint filed June 1, 2023 (no mention of any exception). Having failed to raise this argument below, the State cannot raise it now. *Office of the Public Advocate v.*

---

held that a when a property owner is denied a land use permit, she is not barred by that fact alone from filing a new application and seeking judicial review of that subsequent denial. *Compare Wozneak with Town of North Berwick v. Jones*, 534 A.2d 667 (Me. 1987)(holding that a final adjudication of fact or law in an administrative proceeding before a quasi-judicial municipal body has the same preclusive effect as a final adjudication in a formal court proceeding). *See also City of Lewiston v. Verrinder*, 2022 ME 29, ¶ 8, 275 A.3d 327; *Goumas v. State Tax Assessor*, 2000 ME 79, ¶ 11, 750 A.2d 563; *Hebron Acad., Inc. v. Town of Hebron,* 2013 ME 15, ¶ 28, 60 A.3d 774.

Public Utilities Com'n, 2023 ME 77, ¶ 28, 306 A.3d 633 (arguments that could have been but were not presented below cannot be raised on appeal); *Teele v. West-Harper*, 2017 ME 196, ¶ 11 n.4, 170 A.3d 803 ("[A] party waives an issue on appeal by failing to raise it in the trial court, even where the issue relates to a constitutional protection.").

Even if this Court entertains the argument it is without merit. The State cites but does not quote the *Restatement (Second) of Judgments* § 26(f) & cmt. 1 (1982 & Westlaw June 2024 update) to suggest that the *Restatement* allows for exceptions to the res judicata bar in "unusual situations." State's Blue Br. at 28. But the State omits what the *Restatement* describes as unusual situations. That is because the *Restatement* shows clearly this case does not fall within the rare category of an unusual situation.

First, Section 26(f) of the *Restatement* is located in the Topic heading of "Personal Judgments" and not "In Rem Proceedings," which includes quiet title judgments. Section 30 of the *Restatement* addresses the latter and does not contain any such exception for "unusual situations." Because quiet title actions "purport[] to bind all persons in the world with respect to interests in the property … [i]f the necessary prerequisites to the exercise of such jurisdiction are met … the judgment is valid and will have the purported effect." *Restatement (Second) of Judgments* §

30 & cmt. a (1982 & Westlaw June 2024 update). *Bell II* was a quiet title action. *Bell II*, 557 A.2d at 169.

Second, the "unusual situation" exception stated in Section 26(f) even if applicable to in rem judgments does not apply as it pertains to when "personal liberty" is at stake, such as when someone is confined. That Section provides:

> (1) When any of the following circumstances exists, the general rule of § 24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:
> …
> (f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.
> …
> (2) In any case described in (f) of Subsection (1), the plaintiff is required to follow the procedure set forth in §§ 78- 82.

Restatement (Second) of Judgments § 26 (1982 & Westlaw June 2024 update).

The comment note elaborates that the exception in subsection (f) pertains to when "personal liberty" is at stake, such as when someone is confined through civil commitment or a custody order, or in the divorce context when the grounds for divorce are the same as in a prior proceeding.[19] Even if the argument has been

[19] The *Restatement* further provides when "based on a clear and convincing showing of need … extraordinary circumstances" exist pertaining to personal liberty, the required procedure to be followed is as provided in Sections 78-82. *Restatement (Second) of Judgments* § 26 cmt. i. The State makes no mention of these added elements because the Appellants have not followed those procedures. Those procedures include seeking relief from that judgment either through an

preserved, the *Restatement* provides no support for the State's effort to suggest that there is basis to avoid the res judicata bar here.

In sum, either through OA 2012's cross appeal or as an alternative basis to affirm the judgment below in favor of OA 2012, this Court should hold that all of the Plaintiffs' claims stated in their Complaint against OA 2012 are barred by res judicata, that res judicata also bars the State from seeking indirectly through Count IV of Plaintiffs' Complaint the relief the State seeks on Plaintiffs' behalf (different in kind from the relief Plaintiffs actually seek through that count).

4. Plaintiffs have failed to state claims on which relief can be granted

The Superior Court correctly dismissed Counts I through III and Counts V of Plaintiffs' Complaint for failing to state claims on which relief can be granted.

The premise of these Counts is that this Court has for centuries misapprehended the law and exceeded its authority, and thus all of its decisions regarding the nature of intertidal ownership under the Colonial Ordinance, that the upland owner of a lot bounded by the sea or tidal waters owns the fee to low water, were wrong. As Appellee Ocean 503 LLC demonstrates more fully in its Red Brief (adopted herein by reference), the Plaintiffs lack standing to bring title claims (whether through a declaratory judgment or quiet title action) and much of what

---

independent action filed with the court that entered the judgment or a Rule 60(b) motion filed with the court that entered the judgment. *See id*.

Pro se Delogu argues in his Blue Brief was not raised below. As Appellee Judy's Moody LLC states more fully in its Red Brief, the now purely academic arguments Plaintiffs raise were heard and correctly rejected in *all* prior decisions by this Court.

Leaving aside lack of standing and lack of actual or imminent controversy, lack of indispensable parties and the res judicata bar, any one of which should cause the Court to dismiss Plaintiffs' claims, with respect to the scope of public rights, it is respectfully submitted that for the reasons expressed in *Bell II* through the opinion of the court written by then Chief Justice McKusick, *Bell II* was correctly decided. *See also Opinion of the Justices*, 365 Mass. 681, 688, 313 N.E.2d 561, 567 (1974); *Michaelson v. Silver Beach Improvement Ass'n.*, 342 Mass. 251, 259, 173 N.E.2d 273, 278 (1961): *Butler v. Attorney General*, 195 Mass. 79, 80 N.E. 688 (1907).

All that is presented today is a redo of the exact same arguments adjudicated in *Bell I* and *Bell II* but presented in absence of any actual controversy. None of the three Moody Beach defendants here have taken any action with respect to any of the Plaintiffs that have prevented them from engaging in any ocean based recreational activity that falls within the presumption of permission identified in *Almeder. See supra* 13-15.

To the extent stare decisis principles are at all applicable to Plaintiffs' claims against OA 2012 (as set forth above res judicata applies)[20] for the reasons stated in the red briefs submitted by Defendants Judy's Moody LLC and Ocean 503 LLC, neither the Plaintiffs, nor the State (with no claims of its own) have shown that *Bell II* should be overruled.

5. The Superior Court correctly denied the Plaintiffs' and State's motions for summary judgment for failure to comply with the rule on content of statement of material facts

Both the Plaintiffs and the State assert that the Superior Court abused its discretion in denying their summary judgment motions.

With respect to Plaintiffs' motion the court stated:

> Here, Plaintiffs' 220-paragraph statement of material facts, which spans 30 pages, cannot be reasonably characterized as short and concise. *See* M.R. Civ. P. 56(h). The statement includes legal and factual conclusions, cites to portions of the record containing inadmissible hearsay, lacks logical organization, and frequently asserts facts that are irrelevant to the instant litigation or simply repetitive. Based on the manner in which Plaintiffs have availed themselves of the summary judgment process, the Court denies their motion for summary judgment.

(A.0119 (Order on Plaintiffs' Motion for Summary Judgment (Jan. 26, 2024)))

With respect to the State's motion, the court stated:

> In this case, the Attorney General's 129-paragraph statement of material facts, which spans 21 pages, cannot be reasonably

[20] Noting that unlike stare decisis, the rule of res judicata is a "universal inexorable command." *Burnet v. Coronado Oil & Gas Co*., 285 U.S. 393, 405-406, (1932) *(*Brandeis, J., dissenting), quoting *Hertz v. Woodman*, 218 U.S. 205, 212 (1910).

> characterized as short and concise. *See* M.R. Civ. P. 56(h). The statement includes legal conclusions, personal opinions, cites to portions of the record containing inadmissible hearsay, lacks logical organization, and frequently asserts facts that are irrelevant to the instant litigation or simply repetitive. *See Stanley* [v. *Hancock Cnty. Comm'rs*,], 2004 ME 157, ¶ 28, 864 A.2d 169 (stating that the Law Court "discourage[s] organizing statements of material facts by tracking the averments made in several affidavits submitted in support of the statements, where such organization results in the same fact being repeated multiple times"). Based on the manner in which the Attorney General has availed himself of the summary judgment process, the Court denies his motion for summary judgment.

(A.0115 (Order on the Attorney General's Motion for Summary Judgment (Jan. 26, 2024)))

This Court's review for an abuse of discretion involves three questions: "(1) whether the court's factual findings are supported by the record according to the clear error standard, (2) whether the court understood the law applicable to the exercise of its discretion, and (3) whether the court's 'weighing of the applicable facts and choices [was] within the bounds of reasonableness.'" *Bayview Loan Servicing, LLC v. Bartlett*, 2014 ME 37, ¶ 10, 87 A.3d 741 (quoting *Bradbury v. City of Eastport,* 2013 ME 72, ¶ 12, 72 A.3d 512 (quotation marks omitted)).

Other than asserting that their statement was "organized," Appellants do not in their Blue Brief challenge the Superior Court's finding that that their statement "includes legal and factual conclusions, cites to portions of the record containing inadmissible hearsay, lacks logical organization, and frequently asserts facts that

are irrelevant to the instant litigation or simply repetitive." They do not assert that court misapprehended the legal standard, both the summary judgment rule pertaining to statement of material facts and this Court's decisions on interpretation of the rule. They focus on the number alone and say in the context of this case the number of facts that they asserted was not unreasonable, and that the Defendants are to blame. Appellants' Blue Br. at 70-71.

Given they do not challenge the Superior Court's finding that their statements included "legal and factual conclusions, cites to portions of the record containing inadmissible hearsay, … and frequently asserts facts that are irrelevant to the instant litigation or simply repetitive" they have not shown that the Superior Court exceeded the bounds of its discretion in denying their motion.

The same holds true for the State. The State asserts that the Superior Court abused its discretion because its statement was organized and adds since it is acting in the public interest, the court should impose a lesser standard on the State to show abuse of discretion, one that is "minimally differential." Still even assuming this Court should apply to the State a different standard of review than applicable to other civil litigants, nowhere does the State challenge the Superior Court's finding that the State's statement impermissibly included "legal conclusions, personal opinions, cites to portions of the record containing inadmissible hearsay …frequently asserts facts that are irrelevant to the instant litigation or simply

repetitive." These unchallenged findings alone even under a "minimally differential" standard serve to show even if the State's statement was organized, that the Superior Court did not abuse its discretion in denying the State's motion for entry of a summary judgment on Count IV of Plaintiffs' Complaint (seeking relief different in kind then that sought in the Plaintiffs' own motion).[21]

V. CROSS-APPEAL

OA 2012 incorporates herein by reference the arguments advanced above on its cross appeals.

See supra at 18-27 on the issue whether the Superior Court erred in holding that Plaintiffs Orlando Delogu, William Connerney, and Peter and Kathy Masucci have standing to pursue Count IV of their Complaint against OA 2012.

See supra 18-27 on the issue whether all of counts in the Complaint against OA 2012 should be dismissed for lack of standing.

See supra 27-29 on the issue whether all of counts in the Complaint against OA 2012 should be dismissed for failure to include necessary parties.

See supra 29-45 on the issue whether all of the counts in the Complaint should be dismissed as barred by res judicata.

[21] To the extent the Court holds that the Superior Court abused its discretion in denying the State's summary judgment motion for non-compliance with rules governing submission of statements of material fact not in dispute, this Court should hold it was harmless error as no basis existed for the State, without claims of its own, to file its motion seeking declaratory relief for the Plaintiffs that differed from the declaratory relief the Plaintiffs sought in their own motion.

See supra 35-40 on the issue whether the State can request that a judgment be issued for the Appellants that differs from the judgment the Appellants' sought and if whether the State can request from this Court a judgment be entered for the Appellants that differs from the request the State made to the Superior Court.

VI. CONCLUSION

Former Chief Justice McKusick's conclusion in *Bell II* carries the same force today as when written 35 years ago:

> As development pressures on Maine's real estate continue, the public will increasingly seek shorefront recreational opportunities for the 20th and 21st century variety, not limited to fishing, fowling and navigation. No one can be unsympathetic to the goal of providing such opportunities to everyone, not just to those fortunate enough to own shore frontage. The solution under our constitutional system, however, is for the State or municipalities to purchase the needed property rights or obtain them by eminent domain through the payment of just compensation, not to take them without compensation through legislative or judicial decree redefining the scope of private property rights. Here, whatever various visitors to Moody Beach may have thought, the state of the title to the intertidal land was never in any doubt under the Maine Constitution and relevant case law, and owners, occupiers, buyers, and sellers of shorefront land were entitled to rely upon their property rights as so defined. In the absence of State regulation to the extent permitted by the police power, that is the meaning of our constitutional prohibitions against the taking of private property without just compensation.

Bell II, 557 A.2d at 180.

For the reasons discussed above, OA 2012 requests that this Court affirm the following Superior Court's orders:

- Order (Apr. 15, 2022) (granting OA 2012's motion to dismiss filed pursuant to Rule 12(b)(6))

- Consolidated Order on Defendants' Pending Dispositive Motions (Jan. 26, 2024) (barring Plaintiffs' claims by the doctrine of res judicata)

- Order on Justiciability (Jan. 26, 2024) (Plaintiffs Judith Delogu, William Griffiths, Sheila Jones, Brian Beal, Robert Morse, George Seaver, Greg Tobey, Hale Miller, Leroy Hilbert (*sic)*, John Grotton, Jacke Wilson, Dan Harrington, Susan Domizi, Amanda Moeser, Lori and Tom Howell and Chad Coffin lack standing)

- Order on Plaintiffs' Motion for Summary Judgment (Jan. 26, 2024)

- Order on The Attorney General's Motion for Summary Judgment (Jan. 26, 2024)

And on OA 2012's cross appeal the Court should vacate that portion of Order on Justiciability (Jan. 26, 2024) holding that Appellants have standing, and remand for dismissal of the Plaintiffs' Complaint in its entirety for lack of standing and justiciable controversy, or in the alternative for failure to include necessary parties and/or barred by res judicata.

Dated: August 2, 2024

David P. Silk, Bar No. 3136
Sidney St. F. Thaxter, Bar No. 1301
CURTIS THAXTER LLC
One Canal Plaza, Suite 1000
P.O. Box 7320
Portland, Maine 04112-7320
(207) 774-9000
dsilk@curtisthaxter.com
sthaxter@curtisthaxter.com

Attorneys for Appellees/Cross-Appellant
OA 2012 Trust

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2024, I caused two copies of the foregoing APPELLEE BRIEF OF APPELLEE/CROSS APPELLANT OA 2012 TRUST to be served on counsel for the parties listed below, pursuant to Rule 7A(i)(1) of the Maine Rules of Appellate Procedure via U.S. Mail, and an electronic copy, addressed as follows:

Keith P. Richard, Esq.
Benjamin E. Ford, Esq.
Sandra L. Guay, Esq.
ARCHIPELAGO
1 Dana Street
Portland, ME 04101
krichard@archipelagona.com
bford@archipelagona.com
sguay@archipelagonacom

Joseph G. Talbot, Esq.
Emily A. Arvizu, Esq.
PERKINS THOMPSON, P.A.
P.O. Box 426
Portland, ME 04112-0426
jtalbot@perkinsthompson.com
earvizu@perkinsthompson.com

Lauren E. Parker, AAG
Scott W. Boak, AAG
OFFICE OF THE ATTORNEY GENERAL
6 State House Station
Augusta, ME 04333-0006
lauren.parker@maine.gov
scott.boak@maine.gov

Gordon R. Smith, Esq.
VERRILL DANA LLP
One Portland Square
Portland, ME 04102-4054
gsmith@verrill-law.com

Orlando Delogu, *Pro Se*
640 Ocean Avenue, Apt. 319
Portland, ME 04103
orlandodelogu@maine.rr.com

Dated: August 2, 2024

_____
David P. Silk, Bar No. 3136
CURTIS THAXTER LLC