STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT
LAW DOCKET NO. CUM-24-82

PETER MASUCCI, et al.

Plaintiffs-Appellants

v.

JUDY'S MOODY, LLC, et al.

Defendants-Cross-Appellants

On Appeal from the Order of the
Cumberland County Superior Court

Brief of Appellees and Cross-Appellants Edward Page, Christine Page, James Li, Kim Newby, and Robin Hadlock Seeley; and Appellees Jeffrey and Margaret Parent

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INTRODUCTION

This appeal and its underlying litigation contain two distinct sets of parties and legal issues. One set is made up of plaintiffs seeking recreational beach access and defendants who own properties on Moody Beach in Wells. The other set, broadly speaking, is made up of plaintiff rockweed harvesters seeking to overturn *Ross v. Acadian Seaplants* and defendant landowners who were sued because they objected to the unauthorized removal of rockweed from their intertidal property or advocated for the conservation of rockweed based on the *Ross* holding.

This brief is submitted on behalf the rockweed defendants, namely Edward Page, Christine Page, Robin Hadlock Seeley, James Li, Kim Newby, Jeffrey Parent, and Margaret Parent (the "Rockweed Appellees"), who were sued because they contacted Maine Marine Patrol to report unpermitted rockweed harvesting or otherwise advocated for rockweed conservation.

With the exception of Jeffrey and Margaret Parent, the Rockweed Appellees were dismissed from the litigation through a special motion to dismiss under Maine's Anti-SLAPP statute. The trial court properly found that the Rockweed Appellees had been sued because of their protected petitioning activity, which was done in reliance of this Court's 2019 holding in *Ross v. Acadian Seaplants, Ltd.*

In this appeal, Appellants seek to reargue the merits of the *Ross* decision and assert that *Ross* must be overruled. However, Appellants provide no new or

distinguishing law or facts that compel the Court to revisit, let alone overturn, its five-year-old unanimous decision in *Ross*. Appellants also ask the Court to vacate the trial court's grant of the Rockweed Appellees' Anti-SLAPP motion to dismiss. That request is similarly without merit.

On cross-appeal, the Rockweed Appellants who were dismissed under the Anti-SLAPP statute ask the Court to vacate the trial court's denial of their request for attorney's fees.

STATEMENT OF ISSUES PRESENTED ON CROSS-APPEAL

1. Whether the Superior Court erred in denying Cross-Appellants' request for attorney's fees pursuant to Maine's Anti-SLAPP statute following the court's grant of Cross-Appellants' special motion to dismiss.

ARGUMENT

I. The Superior Court Properly Dismissed Appellants' Claim that the State Owns All Intertidal Property in Maine as Contrary to Law that Has Been Settled for Centuries

Appellants seek to invalidate over 370 years of established law governing title to intertidal land in Maine. The framework for intertidal land ownership in Maine was first codified by the Colonial Ordinance of 1641-1647 ("Colonial Ordinance"), which declared that "the Proprietor of the land adjoining" tidal waters "shall have proprietie to the low water mark." *Bell v. Town of Wells*, 510 A.2d 509, 512 (Me. 1986) ("*Bell I*"). That principle has been incorporated into Maine

common law and been continuously affirmed for centuries by courts in Maine and Massachusetts without a single dissenting opinion.

Appellants' legal theory is not novel. The same argument has been advanced in briefs filed in multiple cases before the Law Court, which has rejected or ignored it every time. *See, e.g.*, *Bell v. Town of Wells*, 557 A.2d 168 (Me. 1989) ("*Bell II*"). Appellants provide no new facts or legal argument that would distinguish the current argument from past attempts.

A. Private Ownership of Intertidal Property Has Unambiguously Been the Law in what is now the State of Maine from the 1600s to the Present

Among the many Law Court cases that have addressed the issue, *Bell I* (1986) and *Bell II* (1989) contain some of the most thorough analysis of Maine's framework for private ownership of intertidal land. After a comprehensive review of English common law, the Colonial Ordinance, and subsequent cases in Maine and Massachusetts, the *Bell I* court 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, "The 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. Even so, the *Bell II* court engaged in its own lengthy analysis and concluded, "In 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. Referring to the same legal theories now advanced (again) by Appellants, the Court held, "Any such revisionist view of history comes too late by at least 157 years." *Id*. at 172. The *Bell II* court's holding regarding private title to intertidal land was unanimous. *See id*. at 185 (Wathen, J., dissenting on other grounds) ("this Court has followed the lead of Massachusetts in describing the rights of the riparian owner expansively in terms of fee simple ownership.").

Appellants call the *Bell* cases an "anomaly." (Blue Br. 31.) However, the *Bell* cases are only two decisions in an unwavering body of precedent explicitly affirming that fee simple ownership of intertidal land in Maine is held, absent some severance, by the adjacent upland property owner.

Addressing the ownership of intertidal land in Cape Elizabeth shortly before Maine became a state, the Massachusetts Supreme Judicial Court stated, "from [the time of the Colonial Ordinance] to the present, a usage has prevailed, which now

has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to low water mark." *Storer v. Freeman*, 6 Mass. 435, 438 (1810).

Eleven years after Maine statehood, the Law Court addressed the issue in *Lapish v. Bangor Bank*, 8 Me. 85 (1831). It was argued in *Lapish* that the Colonial Ordinance had never been in force in Maine. The Law Court rejected this contention, stating, "Ever since [*Storer v. Freeman*], as well as long before, the law on this point has been considered as perfectly at rest; and we do not feel ourselves at liberty to discuss it as an open question." *Id*. at 93.

In 1882, the Law Court again declared that private intertidal ownership was the law everywhere in Maine, providing compelling reasoning particularly relevant to Plaintiffs' claims:

> [The Colonial Ordinance] has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power. When a statute or ordinance has thus become part of the common law of a State it must be regarded as adopted in its entirety and throughout the entire jurisdiction of the court declaring its adoption.
>
> It is not adopted solely at the discretion of the court declaring its adoption, but because the court find that it has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside.

> It is not here and now a question whether this ordinance shall be adopted with such modifications as might be deemed proper under the circumstances of the country. It has been long since adopted in all its parts, acted upon by the whole community and its adoption declared by the courts; and now the argument of the plaintiff's counsel aims to have us declare either that it has not the force of law in certain parts of the State, or that the court may change it if satisfied that it does not operate beneficially under present circumstances. We cannot so view it.

Barrows v. McDermott, 73 Me. 441, 448–49 (1882) (citations omitted).

In 2011, Chief Justice Saufley engaged in a detailed historical review of the legal framework governing ownership of intertidal land in Maine. *McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 23-32, 28 A.3d 620, 627-630. She stated that, "In Maine, as in Massachusetts, the determination of public and private ownership of the intertidal lands, an area of law derived from the prevailing interpretation of English common law, is now a matter of state common law." *Id.* ¶ 24, citing *Shively v. Bowlby*, 152 U.S. 1, 11, 14 (1894). "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." *Id.* ¶ 26. And, "Accordingly, the upland owners' fee ownership of the intertidal zone is solidly established in Maine's common law." *Id.* ¶ 32.

Thus, from *Lapish* to *Barrows* to *Bell to McGarvey* to the present, the Law Court has continuously affirmed this rule of private intertidal ownership for two centuries.[1] There is not a scintilla of uncertainty in the law on this issue.

B. Appellants' Legal Theories for Statewide Intertidal Ownership Have Been Addressed and Rejected by the Law Court

Appellants argue that the Maine Law Court has been getting it wrong for hundreds of years in every single case discussed and cited above. Appellants' arguments have already been made to and rejected by the Law Court. The *Bell II* Court stated:

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[1] *See, e.g.*, *Ross v. Acadian Seaplants, Ltd*., 2019 ME 45, ¶ 12 ("The intertidal zone belongs to the owner of the adjacent upland property, or some other person to whom that part of the land has been transferred by the upland owner, subject to certain public rights."); *Britton v. Donnell*, 2011 ME 16, ¶ 7 ("Under the common law, the land of the intertidal zone belongs to the owner of the adjacent upland property, subject to certain public rights."); *Andrews v. King,* 129 A. 298, 299 (Me. 1925) ("The well-settled construction of the Colonial Ordinance, consistently adhered to by the courts of this state and Massachusetts, is this: That it vested the property of the flats in the owner of the upland in fee . . ."); *State v. Leavitt,* 72 A. 875, 876 (Me. 1909) ("By the colonial ordinance of 1641 of the Massachusetts Bay Colony, which by usage and judicial adoption is taken to be a part of the common law of this state, the title to the seashore between high and low water mark, not exceeding 100 rods, was vested in the owner of the upland.") (internal citation omitted); *Marshall v. Walker*, 45 A. 497 (Me. 1900) ("the proprietor of the main holds the shore ... in fee, like other lands"); *Hill v. Lord*, 48 Me. 83, 94-96 (1861) ("It is argued for the defendant, with apparent seriousness, that if the plaintiff owns the upland, he has no title to the flats, but that the latter belong to the public. . . . These flats belong to the owner of the upland, as appurtenant to it."); *Moulton v. Libbey,* 37 Me. 472, 502 (1854) ("The colonial ordinance of 1641 was adopted by the Commonwealth of Massachusetts, and is common law there and in this State, with all the effect and force of a statute, and it has the sanction of the judicial tribunals, as having the effect of a valid and irrevocable grant of the fee in the soil to the riparian proprietors, subject only to the express reservations contained therein.") (Hathaway, J., dissenting on other grounds); *Deering v. Proprietors of Long Wharf,* 25 Me. 51, 64 (1845) ("By the colonial ordinance of 1641, which is a part of our law, it is declared, that in all creeks, coves and other places about and upon salt water, where the sea ebbs and flows, the proprietor of the lands adjoining, shall have propriety to the low water mark") (internal quotations omitted); *Moore v. Griffin*, 22 Me. 350, 355 (1843) ("The plaintiff having thus established his title to the farm as bounded upon the river, the ordinance of 1641 declares, that the proprietor of the land adjoining shall have propriety to the low water mark . . .") (internal quotations omitted).

> [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*. Any such revisionist view of history comes too late by at least 157 years.

Bell II, 557 A.2d at 172 (citing *Lapish*, 8 Me. at 93). The amicus curiae referred to in *Bell* was Orlando Delogu, an appellant in this appeal. Between *Bell II* and now, Mr. Delogu has submitted amicus briefs making the same legal argument in at least three Law Court appeals. *See Almeder v. Town of Kennebunkport*, 2019 ME 151; *McGarvey*, 2011 ME 97; *Flaherty v. Muther*, 2011 ME 32. In none of those cases did the Court find a reason to revisit Mr. Delogu's arguments. It need not do so now.

C. Appellants' Legal Theories for Statewide Intertidal Ownership Continue to Lack Merit

Appellants' principal theory for state ownership of intertidal land is the claim that, under the equal footing doctrine, states are automatically vested with title to intertidal land at the time they obtain statehood. (Blue Br. 9.) However, Appellants omit that this general concept under the equal footing doctrine does not apply where particular states, namely example Maine and Massachusetts, elected to alter the framework for intertidal property rights. *See, e.g., Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("it has been long established that the individual States have the authority to define the limits of the lands held in public

trust and to recognize private rights in such lands as they see fit. Some of the original States, for example, did recognize more private interests in tidelands than did others of the 13—more private interests than were recognized at common law, or in the dictates of our public trusts cases.") (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894).

The Law Court easily made this distinction when it addressed the question in *Bell II*. "The *Phillips Petroleum* decision in 1988 in no way contradicts the plain and carefully explained decision in 1893 in *Shively v. Bowlby*, 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." 557 A.2d at 172–73. Accordingly, Plaintiffs' central support for state ownership of intertidal land, the "equal footing" doctrine, is inapplicable in Maine, as held by the Law Court in 1989.

Appellants also argue that the Colonial Ordinance did not convey fee ownership of the intertidal to the adjacent upland landowner, but rather "personal priority rights." (Blue Br. 27.) The principal basis for Appellants' argument is the language of the Colonial Ordinance stating that "the Proprietor of the land adjoining shall have proprietie to the low water mark" and that "such Proprietor shall not by this libertie have power to stop or hinder passage of boats." (Blue Br.

26-27.) Appellants claim that the terms "proprietie" and "libertie" refer not to ownership but to some other lesser interest. (Blue Br. 27-28.)

However, whatever Appellants may speculate about the meaning of those terms as they were used in the Colonial Ordinance almost 400 years ago, we know that the courts that were contemporary or closer in time to drafters of the Ordinance construed the language to be a conveyance of fee ownership. One of the earliest available cases that interpreted the Colonial Ordinance is *Storer v. Freman*, which stated that "To induce persons to erect [wharves], the common law of England was altered by an ordinance, providing that the proprietor of land adjoining on the sea or salt water, shall hold to low water mark." 6 Mass. 435, 438 (1810). The Storer Court further stated, "This ordinance was annulled with the charter by the authority of which it was made; but, from that time to the present, a usage has prevailed, which now has force as our common law, that the owner of lands bounded on the sea or salt water shall hold to low water mark." *Id*.

Appellants argue that *Storer* "grossly misquoted the Ordinance by substituting "hold" for "proprietie." (Blue Br. 27, n.14.) But the *Storer* Court does not quote the Colonial Ordinance at all. It provides an interpretation of the Ordinance's meaning and operation, as well as the usage that prevailed after the Ordinance was repealed. The better interpretation of *Storer's* statement that the upland owner "holds" to the low water mark is not that it is a misquotation, but

rather that it is evidence of how contemporaries of the Colonial Ordinance understood its meaning and applied it.

Similarly, Appellants' claim that the Maine Judiciary has been violating the separation of powers doctrine for 200 years in its adjudication of intertidal common law property rights is without merit. In reality, the Court's public trust cases are examples of core judicial activity, namely the adjudication of concrete property rights disputes between parties to litigation based on the interpretation of case law, statute, and constitution. Appellants' proposed remedy for what they allege is unconstitutional overreach by the judiciary is for the court to now reverse centuries of settled property law by issuing a declaration of statewide effect that would invalidate the property interests of intertidal landowners not party to these proceedings. In other words, Appellants are seeking, rather than aggrieved by, "judicial legislation."[2]

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[2] Appellants misquote a reference to judicial legislation in *Barrows v. McDermott* three times in their brief. Appellants truncate a quote from the *Barrows* Court to misstate that the development of the Colonial Ordinance into the common law of Maine must be viewed as a "piece of judicial legislation." (Blue Br. 24 & n.13, 38.) In fact, the full quote from *Barrows* stated the opposite:

> [The Colonial Ordinance] has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that <u>we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force</u> throughout the State until it shall have been changed by the proper law making power.

Barrows, 73 Me. at 448–49 (1882) (emphasis added).

Appellants are correct in one aspect: Changing the fundamental law governing the ownership of land along the entire coast of Maine is better left to the political and legislative process, within allowable constitutional parameters. The Law Court has explicitly articulated the mandate of separation of powers with respect to judicial action specifically related to the policy goal of expanding public rights in the intertidal zone:

> The solution [to beach access] 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.

Bell II, 557 A.2d at 180.

Accordingly, there is no basis for the Court to upend centuries of completely settled property law under meritless legal theories that the Court has already heard and rejected.

II. Appellants Have Not Provided Any Basis for the Court to Revisit its Unanimous Decision in *Ross v. Acadian Seaplants*

Appellants boldly demand that "This Court must overrule *Ross*." (Blue Br. 57.) However, Appellants have not provided any legal or factual argument that seriously calls the validity of *Ross* into question. Nor have Appellants identified the legal emergency that would compel the Court to completely reverse itself on a

well-reasoned, five-year-old unanimous decision that is consistent with the Court's application of the public trust doctrine over hundreds of years.

A. The *Ross* Court Applied the Same Legal Test that Appellants Ask this Court to Adopt

Appellants assert that "This Court should adopt the test from then Chief Justice Saufley's concurrence in *McGarvey*." (Blue Br. 43.) That test was applied by all seven justices in *Ross*. Under that test, all seven justices, including Chief Justice Saufley, held that the public does not have the right to take living, attached rockweed from intertidal land without the property owner's permission.

Specifically, the four-justice majority in *Ross* stated:

> Thus, we turn to the additional inquiry explained by both Chief Justice Saufley in *McGarvey* and by the *Bell II* dissent, which calls for an assessment of whether the removal of rockweed by members of the public from privately owned land is within the common law principle that looks to achieve a "reasonable balance" between the private landowner's interests and the rights held by the State in trust for the public's use of that land.
>
> In answering this question, we draw further guidance from Chief Justice Wathen's dissenting opinion in *Bell II*, which espouses the same broader view of the public trust rights described in Chief Justice Saufley's discussion of the extent of those rights in *McGarvey*. We conclude that even pursuant to that school of thought, the harvesting of seaweed attached to the intertidal land falls outside the scope of activities that can be carried out as a matter of public right.

Ross v. Acadian Seaplants, Ltd., 2019 ME 45, ¶¶ 28-29, 206 A.3d 283, 292–93 (internal citations omitted).

In her concurring opinion in *Ross*, Chief Justice Saufley called for the Court to "overrule *Bell II* once and for all" and "adopt the original Wathen analysis" from the B*ell II* dissent. *Id*. ¶ 42. Chief Justice Saufley then applied the "Wathen analysis" to the question of rockweed harvesting that was before the Court:

> We would then, as the Court has done today, conclude that, even according to the public's *common law access* rights to the intertidal zone, the public does not have the right to take attached plant life from that property in contradiction to the fee owner's wishes—not because such activity falls outside of the constrictive trilogy, but because the taking of attached flora from fee owners was not within the reasonable access contemplated when the *jus publicum* was established.

Id. ¶ 43.

Thus, even under the broad common law balancing test that Appellants ask the Court to adopt in this appeal, the Court has already rejected Appellants' claim of a public right to harvest living, attached rockweed from private intertidal land.

B. Appellants' "New" Facts Were All Squarely Before the Court in Ross

Appellants claim that the Court "must overrule *Ross*" because the *Ross* holding was based on "an erroneous factual stipulation that rockweed is a plant." (Blue Br. 57.) However, Appellants' reference to rockweed biology and taxonomy does not distinguish the current action from *Ross.* On the contrary, it reinforces that there is no distinction. Appellants' factual assertions about rockweed are functionally identical to the facts contained in the stipulated Joint Statement of Material Facts upon which *Ross* was decided ("*Ross* JSMF").

Nowhere in the *Ross* JSMF is there an express stipulation that rockweed is a "plant." (A. 1259-65.) Appellants state that rockweed "is an alga which has no roots but rather secures itself by a 'holdfast,' similar to oysters, mussels, barnacles and, unlike terrestrial plants, derives its nutrients only from sea water." (Blue Br. 58-59.) The stipulated facts in *Ross* state that rockweed "is a brown macroalga" that "attaches to the substratum by disc-like 'holdfast'" and "receives nutrients from the sea when immersed during higher tides and also absorbs CO2 from both the air and seawater." (A. 1261-62.) Appellants state that "unlike plants, 'rockweed has a sex, either male or female, and releases sperm or eggs into the sea.'" (Blue Br. 59.) The stipulated facts in *Ross* state that "A given Rockweed plant is either male or female. During reproductive stages, male rockweed plants release free-floating sperm and female rockweed plants release eggs." (A. 1262.)

Furthermore, Appellants' factual assertions about rockweed were considered and incorporated into the opinions of both the Law Court and the Superior Court in the *Ross* litigation. The *Ross* Superior Court order found the following facts in determining that the public does not have the right to harvest attached, living intertidal rockweed:

> Rockweed is the common name for a species of brown intertidal seaweed, known as Ascophyllum nodosum and is found on the rocks and ledges of the coast. . . . The rockweed attaches to rocky substrates by a "holdfast" which penetrates the bedrock by up to four millimeters. . . .

> The holdfast's sole purpose is to keep the rockweed in place and is not a means to extract nutrients from the ground. Instead, rockweed receives nutrients from the sea, and absorbs CO2 from the air and seawater. . . .
>
> And rockweed plants reproduce. Male rockweed plants release free-floating sperm and female rockweed plants release eggs.

Ross v. Acadian Seaplants, Ltd, No. SC-CV-15-022, 2017 WL 1247566, at *1 (Me. Super. Ct. March 14, 2017).

And the Law Court decision in *Ross* found the following facts in affirming that the public does not have the right to harvest attached, living intertidal rockweed:

> Rockweed is the common name for several species of brown seaweed, or <u>macroalga</u>. The most abundant of the species is known by the scientific name Ascophyllum nodosum and is often found on rocks and ledges in the intertidal portions of Maine's seacoast. Rockweed is a plant. It does not grow in intertidal sand but obtains its nutrients from the surrounding seawater and air. Rockweed attaches to hard, stable objects such as ledges and rocks using a disc-like structure called a holdfast. The sole function of the holdfast is to secure the rockweed in place by penetrating the surface of substrate by up to four millimeters.

Ross, 2019 ME 45, ¶¶ 4-5 (emphasis added).

Accordingly, all of Appellants' factual assertions about rockweed were part of the record in *Ross*, were considered by the Court in *Ross*, and formed the basis for the holdings in *Ross*. There is no factual distinction between Appellants' claim in this appeal that there is a public right to harvest rockweed and the same claim that was heard and unanimously rejected in *Ross*. That includes Plaintiffs'

assertion that rockweed must be called an alga. *Id*. ¶ 4 ("Rockweed is the common name for several species of brown seaweed, or macroalga.").

C. There Is No Basis to Relitigate *Ross* where Appellants Failed to Create Any Factual Record in this Case

Appellants ask this Court to overrule *Ross* because, they argue, the *Ross* decision was based on a stipulation that "contravenes scientific fact." (Blue Br. 58.) However, in the Superior Court Appellants did not designate any expert witness, submit any expert affidavit, or conduct any discovery related to rockweed biology.

Appellants' assertions regarding rockweed biology all stem from their Statements of Material Fact on summary judgment. These assertions should be disregarded in this appeal because they would have been inadmissible at trial. *See Ocean Communities Fed. Credit Union v. Roberge*, 2016 ME 118, ¶ 7 (factual statements made on motion for summary judgment "must refer to evidence of a quality that could be admissible at trial."). Appellants' statements about rockweed biology are scientific opinion calling for expert testimony. *See Maravell v. R.J. Grondin & Sons*, 2007 ME 1, ¶ 11, 914 A.2d 709, 712–13 (Expert testimony is necessary "where the matter in issue is within the knowledge of experts only, and not within the common knowledge of lay[persons]."). As noted above, Appellants failed to designate any expert witness in the Superior Court.

Appellants' citations to their Statement of Material Facts regarding rockweed biology all rely on an affidavit from Plaintiff George Seaver. (Blue Br. 58-59; A. 855-56.) No foundation was established for Mr. Seaver's qualification as an expert to testify to this scientific opinion. As such, his opinions about rockweed biology are inadmissible. *See* M.R. Evid. 702. Appellants' brief also cites to the Maine Department of Marine Resources 2014 Fishery Management Plan for Rockweed ("DMR Management Plan"). (Blue Br. 59.) However, the DMR Management Plan was never submitted to the Superior Court, let alone submitted by affidavit of a qualified expert. Thus, the DMR Management Plan is not part of the record on appeal, and any facts Appellants assert based on this source lack foundation, M. R. Evid. 602, and are inadmissible hearsay, M.R. Evid. 802.[3]

D. Plaintiffs' Statutory Arguments Were Briefed and Heard at Oral Argument by the Court in *Ross*

Appellants claim that the seaweed harvester in *Ross* "failed to raise relevant statutes and arguments, resulting in this Court deciding the case without applicable existing statutory and common law authority. . ." (Blue Br. 58.) Specifically, with respect to statute, Appellants argue that provisions of 1 M.R.S. § 2(2-A) and 12 M.R.S. § 6001 should be read to establish public ownership of intertidal seaweed. (Blue Br. 61-61.) However, the same statutory arguments were raised in *Ross*.

[3] Defendants raised these evidentiary objections in their Opposing Statement of Material Facts and in their Opposition to Plaintiffs' Motion for Summary Judgment. (A. 1215, 1218-1223.)

The appellant in *Ross*, Acadian Seaplants, Ltd., argued the application of these statutes in its principal brief. *See* Brief of Appellant at 6, 30.[4] Now-Justice Catherine Connors submitted a brief on behalf of Amicus Maine Department of Marine Resources ("DMR") devoted almost exclusively to the claim that, "Under 1 M.R.S. § 2(2-A), live rockweed is a public resource that may be harvested in intertidal waters without the permission of private landowners." *See* Brief of Amicus DMR. DMR moved for and was granted, over opposition, the right to be heard at oral argument specifically to argue the application of 1 M.R.S. § 2(2-A). *See* Motion of DMR to Participate in Oral Argument and Order Granting Motion.

Arguments regarding application of 1 M.R.S. § 2(2-A) and other statutes administered by DMR were also made in briefs of other amici in *Ross*. *See* Brief of Amicus Hale Miller at 6, 10; Brief of Amici North American Kelp[5] et al. at 3, 5, 7, 9, 13, 15. The Appellee landowners in *Ross* submitted a responsive brief opposing these claims. *See* Appellees' Reply to Amici at 1-11.

Had the Law Court felt compelled to give credence to this argument, it could have. *See In re Anthony R.*, 2010 ME 4, ¶ 9, 987 A.2d 532, 534 (noting exception to the appellate waiver rule); *Hormel v. Helvering*, 312 U.S. 552, 557 (1941) ("There may always be exceptional cases or particular circumstances which will

[4] The briefs and other documents from the *Ross* litigation cited in this brief were submitted to the Superior Court in this action and are part of the record on appeal.
[5] North American Kelp is the company owned by Plaintiff Robert Morse. (A. 858.)

prompt a reviewing or appellate court, where injustice might otherwise result, to consider questions of law which were neither pressed nor passed upon by the court or administrative agency below.”). However, as noted by Appellants, the *Ross* Court declined to reach the issue. 2019 ME 45, ¶ 5 n.2.

Following judgment, the appellant Acadian Seaplants, Ltd. moved for reconsideration, in which it again argued the application of 1 M.R.S. § 2(2-A) and 12 M.R.S. § 6001. *See* Appellant’s Motion for Reconsideration. In a three-sentence order signed by the clerk, the Law Court denied reconsideration.

The Superior Court in *Ross* also had the opportunity to address the application of statutes administered by DMR, finding them to be irrelevant to the ownership of attached intertidal rockweed. *Ross v. Acadian Seaplants, Ltd*, No. SC-CV-15-022, 2017 WL 1247566, at *3 (Me. Super. Ct. March 14, 2017) (“The statutory framework by which DMR regulates marine resources has no place in determining property rights, including public easements, which are typically determined by common law.”).

Accordingly, Appellants’ statutory arguments regarding the harvest of rockweed are not newly before the Court. They were argued at length in *Ross* and need not be revisited here.

E. <u>Appellants’ Statutory Argument Fails on the Merits</u>

Even if the Court were to reach Appellants’ statutory argument, the statutes

at issue do not create state ownership of living, attached rockweed growing on private intertidal property.

1. 1 M.R.S. Section 2(2-A) Addresses Only Those Resources Seaward of the Intertidal Zone

Section 2(2-A) states, in relevant part: "The State of Maine declares that it owns and shall control the harvesting of the living resources of the seas adjoining the coastline for a distance of 200 miles or to the furthest edge of the Continental Shelf, whichever is greater." 1 M.R.S.A. § 2(2-A). The term "coastline" in this provision should be read to mean the mean low tide line, i.e. seaward of the intertidal zone.

While the term coastline is not defined under Maine law, it is defined in the U.S. Submerged Lands Act as "the line of ordinary low water along that portion of the coast which is in direct contact with the open sea . . . ." 43 U.S.C.A. § 1301(c) (emphasis added). As discussed below, the federal Submerged Lands Act and 1 M.R.S. Section 2, including Section 2(2-A), are interrelated statutes that were enacted and amended as part of an ongoing dispute between the state and federal government regarding jurisdiction over areas seaward of the low tide line. As such, the definition of "coastline" in the federal Submerged Lands Act should be applied to the term as used in Section 2(2-A). *See State v. Jack*, 125 P.3d 311, (Alaska 2005) (applying terms of U.S. Submerged Lands Act to interpret undefined term "water offshore from the coast of the state" in state statutory provision establishing

state's marine jurisdictional boundaries). Thus, by its terms Section 2(2-A) addresses only those resources seaward of mean low tide. That excludes the intertidal zone.

Furthermore, defining the term coastline as the low tide line is consistent with the purpose of 1 M.R.S. Section 2, including Section 2(2-A), which was to assert jurisdiction over areas seaward from mean low tide to the furthest distance possible against a competing jurisdictional claim of the federal government. This purpose is evident based on the context of the statute's enactment. In 1947, the U.S. Supreme Court held that the federal government, and not the individual states, had sovereignty over areas extending from mean low tide seaward. *United States v. California*, 332 U.S. 19 (1947). In 1953, Congress passed the Submerged Lands Act, which granted coastal states ownership of the area extending from <u>mean low tide</u> out to sea for a distance of three miles. 43 U.S.C.A. §§ 1301-1315.

In response, Maine, through passage of 1 M.R.S. Section 2 (including Section 2(2-A)), and several other Atlantic coast states sought to assert jurisdiction against the federal government over areas greater than three miles from the coastline.[6] This constellation of events makes clear that the enactment of Section

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[6] In 1975, the Supreme Court confirmed that the United States was entitled, to the exclusion of the states, to exercise sovereign rights over the water and the seabed of the Atlantic Ocean more than three geographical miles seaward from mean <u>low tide</u>. *United States v. State of Maine*, 420 U.S. 515 (1975).

2(2-A) was concerned solely with establishing the seaward boundary of jurisdiction between the State and the federal government.

The legislative history of the statute confirms this. In response to a question about whether asserting the State's marine jurisdiction out to 200 miles, as set forth in Section 2(2-A), interfered with federal jurisdiction, one senator responded:

> The 200-mile limit is perhaps the prerogative of the federal government, and this [Section 2(2-A)], along with that of other states which have been passing this legislation, is intended to do just that, to encourage everybody to get together and see if we can iron out the particular problems that go with that distance.

Floor debate on L.D. 1192 (Legis. Rec. 4174-75) (1973). Thus, contrary to merely codified existing law, Amicus Brief of DMR at 19, Section 2(2-A) was a deliberate, albeit ultimately unsuccessful, attempt to extend the State's jurisdictional reach seaward beyond that recognized by the courts and Congress.

Accordingly, the term "coastline" in Section 2(2-A) should be interpreted as delineating the State's jurisdiction over areas extending from the mean low tide line to the furthest reach of the State's jurisdiction. That area does not include the intertidal zone, which is the only place that rockweed grows. Thus, Appellants' claim that Section 2(2-A) means that seaweed growing in the intertidal zone is "owned by the State of Maine" (Blue Br. 62), is without merit.

2. *An Interpretation of Section 2(2-A) that Vests Ownership of Attached Intertidal Rockweed in the State Would Be Unconstitutional*

Under the same analysis that this Court applied in *Bell v. Town of Wells*, an interpretation of Section 2(2-A) in which the State asserts ownership over rockweed and other plants growing on private intertidal property would result in an unconstitutional taking without compensation. 557 A.2d 168 (1989) ("*Bell II*").

In *Bell II*, the Court addressed the Legislature's declaration that the public's rights in the intertidal area included the "right to use the intertidal land for recreation." 12 M.R.S. § 573(1)(B). The Court invalidated the recreational use statute on the basis that it constituted an uncompensated taking of private property for public use. *Bell II*, 557 A.2d at 177.

Specific to living, attached intertidal seaweed, the Court has established a common law private right of ownership. *Ross*, 2019 ME 45, ¶ 33 ("rockweed attached to and growing in the intertidal zone is the private property of the adjacent upland landowner.") The Court recognized that this private right of ownership existed since at least the mid-1800s. *Id.* ¶ 36, n.12 (Saufley, J., concurring) ("Activities of the public prohibited in the intertidal zone before *Bell II* included . . . harvesting seaweed, *Hill v. Lord*, 48 Me. 83, 100 (1861) . . ."). It is axiomatic that the Legislature cannot, consistent with constitutional limitations, simply declare State ownership of otherwise private land or resources without just compensation.

In any event, because the meaning of "coastline" under Section 2(2-A) excludes intertidal property, the Court can avoid the constitutional takings question

and conclude that Section 2(2-A) applies only to State ownership of living resources of the seas in the area between mean low tide and the three-mile limit of the marginal sea. *See Town of Baldwin v. Carter*, 2002 ME 52, ¶ 9 ("If at all possible, we will construe the statute to preserve its constitutionality.").[7]

III. The Trial Court Correctly Granted Appellees' Anti-SLAPP Special Motion to Dismiss

In its Order dated April 15, 2022, the Superior Court granted the special motion to dismiss filed by Appellees and Cross-Appellants Edward Page, Christine Page, James Li, Kim Newby, and Robin Seeley (collectively "PLNS Appellees") pursuant to Maine's Anti-SLAPP statute, 14 M.R.S. § 556. The Pages, James Li, and Kim Newby own intertidal properties on which rockweed was commercially harvested without their permission. (A. 59-61, 190-93.) In response, the Pages, Li, and Newby contacted the Maine Marine Patrol to report the unauthorized harvest. (*Id.*) Robin Seeley is an advocate for rockweed conservation who was a consultant in the *Ross* litigation, has submitted testimony to the Legislature and lobbied the Maine Department of Marine Resources, and publishes a website on which, among other things, she informs intertidal landowners of their right to withhold

[7] A holding by the Court that the State's ownership of all "living resources of the sea" under Section 2(2-A) includes attached intertidal rockweed would extend beyond rockweed to include other important intertidal plants such as salt hay and eelgrass. It would also conflict with the State's timber trespass statute, which states, "Without permission of the owner a person may not . . . Cut down, destroy, damage or carry away any forest product, ornamental or fruit tree, agricultural product, stones, gravel, ore, goods or property of any kind from land not that person's own." 14 M.R.S. § 7552(2).

permission to harvest rockweed pursuant to *Ross v. Acadian Seaplants, Ltd*. Ms. Seeley also owns intertidal property. (A. 61, 65, 193.) The Superior Court properly found that the PLNS Appellees had engaged in protected petitioning activity that was the basis for being sued by Appellants and granted the special motion to dismiss. (A. 64-66, 70.)

Appellants challenge the dismissal solely on the grounds that the PLNS Appellees "did not engage in petitioning activity" or that the "trial court erred in concluding that [Appellants'] claims were 'based on' Defendants' petitioning activity." (Blue Br. 66 & n.30, 68.) On the contrary, as held by the trial court, Appellants chose to sue the PLNS Appellees in this action precisely because of their petitioning activity. (A. 64-66.) Furthermore, Appellants' action against the PLNS Appellees is the kind of suit the Anti-SLAPP statute seeks to guard against.

A. <u>The Conduct for which Appellees Were Sued Is Petitioning Activity</u>

In arguing that Appellants did not sue the Rockweed Defendants based on their petitioning activity, Appellants claim that "Defendants' statements to Marine Patrol reflect mistaken beliefs which are not material to the court's adjudication of Plaintiffs' claims." (Blue Br. 68.) This statement is inaccurate and misunderstands the test applied under the Anti-SLAPP statute.

Under the first step of the Anti-SLAPP analysis, the defendant must establish "that the claims against him are based on his exercise of the right to

petition pursuant to the federal or state constitutions." *Weinstein v. Old Orchard Beach Family Dentistry, LLC*, 2022 ME 16, ¶ 5, 271 A.3d 758, 763–64. At this step of the analysis, which is the only one challenged by Appellants, it is irrelevant whether the defendant's statements are "mistaken."[8] They must only constitute protected petitioning activity.

As determined by the trial court, under the statute's broad definition, "there can be little doubt that the Pages and Li & Newby's reports to Marine Patrol were an exercise of their right to petition" because the "reports constitute 'any written or oral statement to a[n] . . . executive . . . body.'" (A. 62) (quoting 14 M.R.S. § 556). Similarly, "Ms. Seeley's writings and advocacy in support of rockweed conservation constitute petitioning activity" because they "are all 'statements reasonably likely to enlist public participation in an effort to effect' legislative or judicial consideration" of rockweed conservation. (A. 65) (quoting 14 M.R.S. § 556). In addition, Ms. Seeley's statements constitute petitioning activity under the Anti-SLAPP statute because they are "reasonably likely to enlist public participation" regarding "consideration or review of an issue by a legislative, executive or judicial body." 14 M.R.S. § 556.

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[8] Appellants' assertion that the PLNS Appellees' statements were "mistaken" is based on Appellants' hypothetical legal landscape in which the Court has vacated its unanimous holding in *Ross* and has reversed centuries of decisions holding that intertidal land in Maine is susceptible to private fee ownership.

B. Appellants Sued the PLNS Appellees Because of their Petitioning Activity

Appellants argue that "Defendants' purported petitioning activity and the content of the speech therein is not the basis of Plaintiffs' claims." (Blue Br. 68.) However, of the thousands or tens of thousands of Maine landowners who claim title to intertidal property, Appellants chose to sue the landowners who called Marine Patrol or otherwise publicly advocated for the conservation of rockweed. As stated by the trial court:

> If the Plaintiffs' decision to name the Pages, Li, and Newby had nothing to do with their reports to Maine Marine Patrol, then it is curious why every single shorefront property owner who claims title to adjacent intertidal land is not named in this suit. The reason for the Pages and Li & Newby's involvement, as evidenced by the complaint itself, is their respective reports to Maine Marine Patrol.

(A. 65.) The trial court also found that "it is clear from the complaint that the Plaintiffs' decision to name Seeley as a Defendant in the instant suit is a direct result of her rockweed conservation advocacy." (*Id*.)

Appellants' decision to sue Ms. Seeley is particularly telling. In their complaint Appellants alleged that Ms. Seeley has published material "falsely suggesting that upland owners may deny permission for harvesters to cut rockweed on intertidal land abutting their property." (A. 129.) And that "Ms. Seeley's activities create confusion about the legal rights of landowners and seaweed harvesters." (A. 130.) Appellants also state that "Defendant Seeley has engaged in

a campaign to convince other shorefront owners to call law enforcement in order to deny access to seaweed harvesters." (A. 1292.)

In reality, Ms. Seeley has, among other conservation advocacy, simply quoted from and accurately summarized the holding of *Ross v. Acadian Seaplants,* namely that "the public may not harvest living rockweed growing in and attached to the privately-owned intertidal zone." 2019 ME 45, ¶ 14. This is representative text from Ms. Seeley's website:

> Landowners can protect and conserve their rockweed beds simply by saying "no thank you" when a harvester requests permission to cut. Why? Because private landowners, not the state, own the private intertidal area from high tide to low tide, and also own the seaweed attached to that intertidal area, by unanimous Maine Supreme Court decision of 2019.

(A. 1375.)

Thus, Appellants sued Ms. Seeley for the sole reason that she publicly advocated for rockweed conservation based on an accurate representation of this Court's decision in *Ross*, which Appellants refuse to recognize as valid law. Appellants similarly sued the other PLNS Appellees for their reliance on *Ross* in reporting the unauthorized harvest of rockweed to Marine Patrol.

Appellants' argument that "a suit based 'in part' on petitioning activity does not fall within the statute" (Blue Br. 67) is also unsupported. Appellants cite to *Hearts with Haiti, Inc. v. Kendrick*, 2019 ME 26, 202 A.3d 1189, for the proposition that "the statute's protections [are] inapplicable, even where a portion

of the conduct would qualify as petitioning activity." (Blue Br. 67.) That is not an accurate characterization of *Hearts with Haiti*, in which "Few of the [defendant's] statements include any call to action; rather, the statements include multiple threatening or derogatory messages. Such statements are fundamentally different from those that we have previously held to be protected by the anti-SLAPP statute." 2019 ME 26, ¶ 13. The Court went on to state that "where a lawsuit alleges a string of tortious and defamatory conduct, only a small portion of which possibly includes petitioning activity, the protections of the anti-SLAPP statute are not applicable." *Id*. ¶ 14. Thus, the facts in *Hearts with Haiti* are unrelated to the facts in this action, in which the actions by the PLNS Appellees (reports to Marine Patrol and conservation advocacy) that led to Appellants suing them consist entirely or overwhelmingly of protected petitioning activity.

Accordingly, the trial court correctly found that Appellants' claims against the PLNS Appellees were based on the exercise of their right to petition.

C. Appellants' Litigation Against the Rockweed Appellees Constitutes a SLAPP Suit that the Anti-SLAPP Statute Seeks to Guard Against

The purpose of the Maine Anti-SLAPP statute is "to guard against meritless lawsuits brought with the intention of chilling or deterring the free exercise of the defendant's First Amendment right to petition the government by threatening would-be activists with litigation costs." *Schelling v. Lindell*, 2008 ME 59, ¶ 6. As discussed below, Appellants' suit against the Rockweed Defendants is 1) meritless

and 2) likely to deter Appellees and others from exercising their right to petition. Thus, Appellants' action against the Rockweed Appellees is precisely the kind of suit the Anti-SLAPP statute seeks to guard against.

1. Appellants' Suit Against the Rockweed Appellees Has No Legal Merit

Appellants argue that their action against the Rockweed Defendants is not a SLAPP suit because they "have brought a meritorious lawsuit." (Blue Br. 66.) In support of this argument, Appellants state, "Upland landowners do not own the intertidal land they claim to own, and even if they did, they have no right to deny the harvesters access for the purpose of harvesting rockweed." (*Id.*) In other words, to justify their lawsuit as meritorious, Appellants must posit a world with a legal framework that is the exact opposite of existing, well-settled law in Maine.

As discussed in Section I above, there are centuries of unwavering judicial opinions holding that in Maine intertidal land is privately owned, presumptively by the upland owner or, if it has been conveyed separately, by another landowner. In Appellants' version, the judiciary has just been getting it wrong over and over for hundreds of years. And the question of whether the public has the right to cut rockweed without the permission of the intertidal landowner was answered with a definitive "no" by the Court in *Ross v. Acadian Seaplants*, 2019 ME 45.

Appellants also argue that "the fact that the Attorney General has taken positions aligned with Plaintiffs clearly shows that this is not a SLAPP suit but a

legitimate controversy concerning intertidal lands." (Blue Br. 69.) In fact, the Attorney General has never argued that all intertidal land in Maine is owned by the State or that the public has the right to harvest rockweed without landowner permission. The Attorney General's brief in this appeal is focused on a single substantive issue: "Whether Maine's common-law public trust doctrine includes walking." (AG Blue Br. 11.)

When the question of whether the public trust doctrine includes the right to harvest rockweed was adjudicated in *Ross*, the Attorney General chose not to participate in the litigation. When the Maine Department of Marine Resources, a state agency typically represented by the Attorney General, submitted an amicus brief in *Ross* arguing for a public right to harvest rockweed, it did so by retaining an attorney (now-Justice Catherine Connors) at a private-practice law firm. Thus, Appellants' attempt to legitimize their suit against the Rockweed Defendants by claiming alignment with the Attorney General is entirely unsupported.

Thus, with respect to the Rockweed Defendants, Appellants' lawsuit is "meritless." *See Schelling*, 2008 ME 59, ¶ 6.

2. Appellants' Suit against the Rockweed Appellees Has the Effect of "Chilling or Deterring" other Similarly Situated Landowners from Contacting Marine Patrol

Appellants express lofty goals of rewriting Maine law. But the vehicle they have chosen is to sue individuals who have done nothing other than advocate for

rockweed conservation or contact Marine Patrol to help stop what is unequivocally illegal – the removal of rockweed without landowner permission. Plaintiffs' suit against the Rockweed Defendants is analogous to a burglar suing a homeowner that called the police to report a theft. That the burglar wishes the law were different does not legitimize the lawsuit.

Appellants claim that an affirmance of the trial court's Anti-SLAPP dismissal will mean that they "have been unconstitutionally denied access to the courts" and that the dismissal in this case "illustrates the quick escape hatch available to defendants so long as they phone police before a complaint is filed." (Blue Br. 69.) These exaggerations are without substance. The Anti-SLAPP dismissal in this matter was confined to the unique facts before the trial court: plaintiffs who had no colorable claim to title, did not assert title in themselves, claimed the right to take private property from other people's land without permission, and then sued only those people who spoke up by calling the Marine Patrol or advocating for rockweed conservation.

Appellants also argue that their "claims are in no way designed to delay, distract, or punish the defendants for exercising their free speech rights." (Blue Br. 67.) But that is exactly what their suit accomplishes. The Rockweed Defendants have been forced to bear the expense and inconvenience of this litigation solely because they acted in accordance with this Court's holding in *Ross*. It is reasonable

to expect that Appellants' suit has had or will have the effect of "chilling or deterring" the Rockweed Defendants other similarly situated landowners from contacting Marine Patrol to report unauthorized rockweed harvest. *See Schelling v. Lindell*, 2008 ME 59, ¶ 6.

Accordingly, the trial court's grant of the special motion to dismiss serves the purpose of the Anti-SLAPP statute because Appellants' refusal to acknowledge the *Ross* decision and centuries of private intertidal ownership in Maine is meritless, and because suing the Rockweed Defendants likely has had or will have the effect of deterring other would-be activists and property owners from the free exercise of their First Amendment right to petition.

IV. The Trial Court Erred in Denying PLNS Appellees' Request for Attorneys' Fees After Granting their Special Motion to Dismiss

The trial court found that, despite prevailing on the Anti-SLAPP special motion to dismiss, the PLNS Appellees were not entitled to attorney's fees because "Plaintiffs' suit was not filed with the malintent that the Anti-SLAPP [statute] was enacted to punish and dissuade." (A. 90.) The trial court's insistence on a finding of "malintent" to award attorney's fees is not tethered to the language and purpose of Maine's Anti-SLAPP statute, 14 M.R.S. § 556, nor to the Court's guidance on appropriate grounds for award of attorney's fees under the statute. As such it was legal error and an abuse of discretion for the trial court to deny the PLNS Appellees' request for attorney's fees. *See Pollack v. Fournier*, 2020 ME 93, ¶ 21,

237 A.3d 149, 155 (Law Court "review[s] a court's decision to award attorney fees for an abuse of discretion . . . To the extent that interpretation of a statute is required in conjunction with the award or denial, we review the statutory construction de novo.")

A. The Trial Court's Denial of Attorney's Fees Is Not Supported by the Text or Purpose of the Anti-SLAPP Statute

The Anti-SLAPP statute provides, "If the court grants a special motion to dismiss, the court may award the moving party costs and reasonable attorney's fees, including those incurred for the special motion and any related discovery matters." 14 M.R.S. § 556. Thus, the trial court's reliance on a finding of malintent to award attorney's fees is not supported by the text of the statute.

"The question of whether to award costs corresponds to the policy goals of the anti-SLAPP statute." *Stanley Cottage, LLC v. Scherbel*, 2015 WL 4977716, at *5 (Me. Super. June 10, 2015). The Court has articulated two principal goals of the statute. The first is to shield defendants from meritless litigation. *See Pollack*, 2020 ME 93, ¶ 24 ("[A] court may use the merit of a case as a measure of whether attorney fees are appropriate . . . because the anti-SLAPP statute is aimed at preventing litigation that has no chance of succeeding on the merits.") (internal quotations omitted); *Franchini v. Investor's Bus. Daily, Inc.*, 981 F.3d 1, 7 (1st Cir. 2020) ("The stated purpose of Maine's anti-SLAPP statute is to shield defendants from the burden of meritless litigation."); *Schelling v. Lindell*, 2008 ME 59, ¶ 6,

942 A.2d 1226, 1229 (anti-SLAPP statute "designed to minimize the litigation costs associated with the defense of ... meritless suits"); *Stanley Cottage, LLC v. Scherbel*, 2015 WL 4977716, at *5 (Me. Super. June 10, 2015) ("The Court is more apt to award a party its costs when the claims against it are lacking in merit.").

The second principal policy goal of the anti-SLAPP statute "is to provide protection for a citizen's fundamental right to petition the government, a right that the Legislature has given priority by enacting the anti–SLAPP statute." *Desjardins v. Reynolds*, 2017 ME 99, ¶ 18. Neither of these purposes are furthered where the trial court requires a showing of "malintent" on the part of plaintiffs to award attorney's fees. As such, it was error for the trial court to deny the PLNS Appellees' request for attorney's fees on the basis that it believed "that the Plaintiffs' suit was not filed with the malintent that the Anti-SLAPP [statute] was enacted to punish and dissuade." (A. 90.)

As discussed in Section III(C) above, Appellants' claims against the PLNS Appellees are meritless and likely have had or will have the effect of "chilling or deterring" landowners from exercising their right to petition by contacting Marine Patrol to report unauthorized rockweed harvest. Accordingly, an award of attorney's fees would further the principal goals of the Anti-SLAPP statute.

CONCLUSION

For the foregoing reasons, the Rockweed Appellees respectfully request that the Court rule as follows:

- AFFIRM the Superior Court's dismissal of Appellees' title claims (Counts II, III, and V) pursuant to M.R. Civ. P. 12(b)(6);
- DENY Appellants' request for the Court to overrule *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45;
- AFFIRM the Superior Court's dismissal of all claims against the PLNS Appellees pursuant to Maine's Anti-SLAPP statute, 14 M.R.S. § 556; and
- VACATE the Superior Court's denial of the PLNS Appellees' request for reasonable attorney's fees pursuant to Maine's Anti-SLAPP statute, 14 M.R.S. § 556.

Dated at Portland, Maine this 2nd day of August 2024.

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