STATE OF MAINE

SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. Cum-24-82

PETER MASUCCI, et al.,

Plaintiffs / Appellants / Cross-Appellees

v.

JUDY'S MOODY, LLC, et al.,

Defendants / Appellees / Cross-Appellants

ON APPEAL FROM THE
CUMBERLAND COUNTY SUPERIOR COURT

BRIEF OF *AMICUS CURIAE* THE TOWN OF WELLS

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INTEREST OF *AMICUS CURIAE*

The focus of this case is Moody Beach, which is located in the Town of Wells. The Town has been increasingly caught in the middle of numerous heated disputes about public use of Moody Beach, but under current doctrine, it lacks any meaningful tools to relieve the discord. The current, judge-made law on the scope of public rights to use privately-owned intertidal lands presents an untenable, unworkable combination: it is highly constrictive (and thus treated as talismanic by some private owners), seemingly arbitrary (and thus spurned by much of the public and, likely, many private owners), and all the while deeply unclear (and thus difficult to enforce).

The Town submits this brief *amicus curiae* to urge the Court to revisit and clarify the scope of public trust rights in the intertidal zone, and to allow Maine's coastal municipalities to play a more active and useful role in regulating beach use and protecting both public and private interests.

SUMMARY OF THE ARGUMENT

This Court's decisions involving public use of the intertidal zone, beginning with *Bell II* in 1989, have resulted in deep dysfunction and conflict on Maine's privately-owned beaches. It is not that one side is unhappy while the other side is pleased; the problem is that under the current doctrine, actual protection of either side's rights is impossible, because enforcement is haphazard, unpredictable, and

responsive rather than protective. This state of affairs is entirely understandable given the lack of clear guidance provided by Maine precedent on the issue. Municipalities and other local institutions are very well equipped to administer and enforce a rational balance between private and public rights; they do it all the time. But in the specific context of privately-owned beaches, *Bell II* has made it impossible for municipalities and local law enforcement to serve that important legal and social function. The Court should overrule the irrational and constrictive trilogy of *Bell II*, and allow Maine's coastal communities – not our State's highest court – to take the lead in drawing the innumerable lines that reasonably balance the public and private rights in their own precious and unique shorelines. Most importantly, the Court should affirm that walking on the intertidal zone for any purpose, as well as low-impact recreational uses, are permissible uses of the intertidal zone as a matter of law. Even if the Court goes no further, the discord and dysfunction on Maine's beaches – and Moody Beach in particular – would be enormously reduced.

ARGUMENT

I. Maine's Coastal Municipalities Need Clear Guidance on the Scope of Public Trust Rights in Intertidal Land. The Court Should Overrule *Bell II* and Adopt the Fair, Flexible, and Administrable Standard Proposed by Then-Chief Justice Saufley in *McGarvey* and *Ross*.

Maine's 3,400 miles of coastline attract millions of visitors every year – local and tourist alike – who engage in a broad and probably innumerable array of activities on the wet sand and rock. When conflicts inevitably arise between the

users of the intertidal zone and the private owners,[1] local government officials and law enforcement are tasked with resolving those disputes, the overwhelming majority of which will never reach a court. Since 1989, however, local officials and police have undertaken that task under a cloud of uncertainty as to the scope of the public's right to use intertidal land, including that most rudimentary activity, walking. *See Bell v. Town of Wells* (*Bell II*), 557 A.2d 168, 173 (Me. 1989). The Court's fractured decisions since then have only exacerbated that uncertainty. *See Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, 206 A.3d 283; *McGarvey v. Whittredge*, 2011 ME 97, 28 A.3d 620.

The legal, historical, and jurisprudential errors in *Bell II* are amply catalogued in the Plaintiffs' and the Attorney General's briefs, as well as the authorities cited therein. In this Brief, *amicus curiae* the Town of Wells will highlight the serious practical repercussions for Maine's coastal governments arising from the current doctrine. Between *Bell II*, *McGarvey*, and *Ross*, it is profoundly difficult for local officials to determine whether any particular activity is lawful, as they are regularly called upon to do by shorefront owners and beach users alike. Municipalities and police are well positioned to facilitate community dialogue and mediate disputes about beach access and use, but only when the underlying legal principles are

[1] The Town takes no position on the Plaintiffs' claims that the State, rather than the upland owner, presumptively holds title to the intertidal zone.

rational and clear. The opacity and seeming arbitrariness of the current doctrine has caused polarization and entrenchment. Use of Maine's intertidal land affects a wide range of stakeholders and interests: private owners' peace and privacy; the public's access to this invaluable resource; land management and conservation interests; local and regional economies; and so on. *Bell II* and the current doctrine impede the rational and productive discussion of how to balance those competing interests, and municipalities are left to pick up the pieces while both sides deride their efforts.

This Court should hold that the scope of public rights in the intertidal zone is that which "strike[s] a reasonable balance between private ownership of the intertidal lands and the public's use of those lands." *McGarvey*, 2011 ME 97, ¶ 57, 28 A.3d 620 (Saufley, C.J., concurring). The Court should additionally hold that transitory movement (such as walking or jogging) and low-impact recreation (subject to municipal elaboration and regulation) are reasonable uses of intertidal land as a matter of law. As a practical matter, recognizing a public trust right to walk in the intertidal zone will eliminate the vast majority of disputes as to the scope of public trust rights, because many shorefront owners take a permissive approach to the activities on their individual parcels of beach, and allowing walking would mean that the public has the ability to reach those parcels. Finally, the Court should affirm that municipalities already have the authority to regulate the public's use of the intertidal lands within their municipal boundaries. Such a holding would allow local

communities, rather than seven Justices, to take the lead in adopting their own reasonable balance between public and private rights.

A. The Current Doctrine Is Hopelessly Muddled

This Court has long recognized a "common law principle that the intertidal and submerged lands are impressed with a public trust, a principle that reflects the unique public value of those lands." *Opinion of the Justices*, 437 A.2d 597, 607 (Me. 1981); *see also Ross*, 2019 ME 45, ¶ 36, 206 A.3d 283 (Saufley, C.J., concurring in part) ("Prior to [*Bell II*], as a matter of common law, the public had long enjoyed reasonable access to the intertidal zone."); *Bell II*, 557 A.2d at 173 ("[T]he only question presented by the present appeal is the scope of the rights that the common law has reserved to the public to use [privately owned intertidal land].").

In *Bell II*, a 4-3 majority of this Court held that the common-law public trust rights did not include a "general recreational easement" on privately-owned intertidal lands. 557 A.2d at 176. In reaching that conclusion, the Court stated – for the first time – that "fishing, fowling, and navigation, liberally interpreted, delimit the public's right to use" the intertidal land. *Id.* at 173.

This Court next addressed the issue twenty-two years later, in *McGarvey*. That case addressed whether the public had the right to walk across privately-owned intertidal lands in order to enter the water and scuba dive. All six Justices agreed on the outcome (yes), but divided as to the legal basis for that conclusion. Chief Justice

Saufley, joined by Justices Mead and Jabar, would have held that fishing, fowling, and navigation do not "wholly or exclusively define the public trust rights," and that the Court should simply "continue to strike a reasonable balance between private ownership of the intertidal lands and the public's use of those lands." 2011 ME 97, ¶¶ 56-57, 28 A.3d 620 (Saufley, J., concurring). Justice Levy, joined by Justices Alexander and Gorman, would have held that there was no "compelling and sound justification" to "effectively overrule *Bell II*." *Id.* ¶¶ 66-67 (Levy, J., concurring). However, Justice Levy also concluded that scuba diving constituted "navigation" and, therefore, "walking across intertidal lands to access the ocean in order to scuba dive" is within the public trust doctrine even under *Bell II*. *Id.* ¶ 77.

In *Ross*, which involved the commercial harvesting of rockweed,[2] this Court had another opportunity to clear the air, but instead it clouded the doctrine even further. There, Justice Hjelm's opinion for the Court applied both of the *McGarvey* tests, and concluded that because that activity was not within the public rights under either test, the case did not present an "occasion to consider the vitality of the holding in *Bell II*." 2019 ME 45, ¶ 33, 206 A.3d 283. Chief Justice Saufley, joined this time by Justices Mead and Gorman, concurred to stress the incorrectness of *Bell II* and repeat her calls for it to be explicitly overruled.

[2] The Town takes no position on the ultimate holding in *Ross* that harvesting rockweed is outside the scope of the public trust.

It is unclear what remains of *Bell II*. In both *McGarvey* and *Ross*, the question of whether to overrule *Bell II* was not squarely presented because the Court was unanimous as to the outcome under either test. Moreover, in *Ross*, Justice Hjelm's majority opinion applied both tests to the activity at issue. Indeed, the Attorney General's Brief in this case reads *Ross* for the proposition that an activity falls within the public rights doctrine if it either (1) is "readily fishing, fowling, or navigation," or (2) represents a "reasonable balance between the private and public rights to the intertidal zone."[3] Attorney General's Br. at 20 (quotation marks omitted).

Not only is it unclear whether *Bell II* remains good law, but the application of *Bell II*'s test is highly indeterminate in practice, particularly as it pertains to walking. Under *Bell II*, while the public holds an easement only for "fishing, fowling, and navigation, the Court will give "a sympathetically generous interpretation to what is encompassed within" those terms, "or reasonably incidental or related thereto." 557 A.2d at 173. In Justice Levy's words, the Court has "construed those terms far beyond their traditional meanings," and has also made clear that the public has a right to walk upon the intertidal land when it is "incidental to" the three enumerated uses. *McGarvey*, 2011 ME 97, ¶¶ 62, 77, 28 A.3d 620. If navigation includes scuba diving, what about surfing? Does fowling include

[3] The Town takes no position on the correctness of this view, but agrees with the Attorney General that the law requires clarification. *See* Attorney General's Br. at 20 n.11. The Town does believe that in order to achieve such clarity, this Court must expressly overrule *Bell II* at least in part.

birdwatching? The fact that these questions must still be asked demonstrates how unsettled the existing precedent is and how little guidance it provides to municipalities placed in the unenviable position of trying to interpret and enforce it.

Moreover, the application of the *Bell II* test depends not just on the objective facts – the person's identity, the time of day, any accoutrements carried by the person (such as a fishing rod) – but also on their subjective intent, which makes it all the more difficult for officials to apply in practice. For instance, after *McGarvey*, walking on the intertidal zone is permissible if it is "incidental to" scuba diving. *Id.* If a person is walking up and down the beach and the police are called, how should they respond if the person says that they intend to return for recreational scuba diving and are looking for the best site to enter the water? The same goes for other forms of navigation – what if the person says that they are looking for the best place to depart for their upcoming kayak trip? If birdwatching is considered to be fowling, any recreational walker has a ready excuse. It is no use to say that a court will theoretically be available to adjudicate the truth of such claims in the context of a trespass action. These disputes rarely get that far. They must be resolved at the local, ground level. The current doctrine makes that resolution impossible.

B. The Front-Line Officials Who Encounter These Disputes – Local Officials, Law Enforcement, and Prosecutors – Need Guidance.

Municipalities and law enforcement officers are uniquely well positioned to neutralize and de-escalate conflicts over the use of the intertidal zone and to assist

the lot owners in protecting their rights against public overreach, but in order to serve that function, they need clear guidance on the law. The current doctrine is a mess of indeterminacy – both in the verbal formulation of the law and the application of that law to a particular set of facts[4] – that is impossible for local officials to apply fairly and consistently. Local officials and police who respond to a private beach owner's trespass claim face at least three difficult questions: (1) whether the scope of public rights is limited to the colonial trifecta or, as *Ross* suggests, may also include any activity that is a "reasonable balance" between public and private rights; (2) if the public rights are limited to the colonial trifecta, whether the complained-of activity is reasonably related or incidental to the three terms, as they have been "construed . . . far beyond their traditional meanings," *McGarvey*, 2011 ME 97, ¶ 62, 28 A.3d 620; and (3) whether the alleged trespasser has the subjective intent to engage in one of the enumerated activities. The current doctrine is too uncertain and the variety of

[4] This Court has heard only four cases on this issue in the last hundred years, and there is little additional guidance from Maine's trial courts. In addition to the trial court decisions underlying *McGarvey* and *Ross*, there are only two published trial court cases since *Bell II* that have addressed specific uses of the intertidal zone. *See Moody v. Rideout*, 2018 WL 3953859, at *4 (Me. Super. Ct. June 13, 2018) (holding that storage of fishing equipment on the intertidal zone was not within the scope of public rights); *Flaherty v. Muther*, No. RE-08-098, 2009 WL 2703667 (Me. Super. Ct. July 30, 2009), *vacated in part*, 2011 ME 32, 17 A.3d 640. Of these two cases, only *Flaherty* involved non-commercial activity, and when that case reached this Court, this Court found that that case did not involve a "justiciable controversy" regarding the scope of the public trust rights. 2011 ME 32, ¶ 88, 17 A.3d 640.

It's not hard to guess the reason for this sparsity of case law: few people have the time, interest, or resources to engage in lengthy civil litigation over whether they can, for instance, play wiffleball on a beach. That goes just as much for the landowner – it is far easier and cheaper to seek a no-trespass order from the police than to file a lawsuit against some beachgoer that the landowner cannot identify and does not expect to see again. Indeed, *Bell II* is the only case that this Court has heard, in at least a century, that did not directly involve commercial activity.

hypothetical "close cases" too broad for coastal town attorneys to be able to provide useful guidance to officials and police.

This indeterminacy directly and negatively impacts Maine's local governments. Disputes about the scope of public rights and the propriety of any particular activity, especially with respect to recreational activities, are routed to local officials and police rather than courts. Police must determine whether to issue a notice of trespass: if a person sits on Moody Beach to watch the sunrise, and has a fishing rod lying unused next to them, how should law enforcement respond? Towns must determine how to respond to landowners' complaints, what guidance to provide on the street and at public access points,[5] and what resources (particularly police) to allocate to a particular beach area.

Moreover, because both sides are inevitably unhappy with those municipal decisions, both sides are constantly prodding municipal officials to "do something" to clarify the rules. The Town wants to accommodate and balance both sides' interests, but *Bell II* and its progeny do not give the Town sufficient guidance or room to clarify the rules. It is a judge-made doctrine that sharply restricts public rights even beyond what most lot owners would desire.

[5] The municipal signs posted at Moody Beach are a particular flashpoint of disagreement, in large part because they constitute the only meaningful enforcement mechanism other than responding to trespass complaints, but are similarly blunt and imperfect. *See* Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 51:03, 1:21:56, 2:08:20.

Take the simple example of walking. The Defendants in this case have generally asserted that they do not "have an issue with any members of the public engaging in movement-based activity" on the beach. (A. 320; *see also* A. 262-63, 277, 284, 311-12.) But there are over 130 lots on Moody Beach, and some owners are outliers; when a beachfront owner does complain about someone walking, the police do not simply ignore the call. The public has no way to predict when and why even their most innocuous use of the beach – watching a sunrise at low tide – may be challenged. *See Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 29, 106 A.3d 1099 (noting the "rebuttable presumption that public recreational uses are undertaken with the permission of the landowner").

The end result is that the enforcement of the private owners' rights is reactive, ad hoc, and owner-initiated, rather than prophylactic and preventative. This is bad for everyone, because borderline or outright misconduct on the private lots cannot be readily prevented by police without consulting the owner. As one private owner recounted during a recent Select Board meeting, "I do remember once asking people to leave our beachfront property because they were drinking and behaving inappropriately in front of our children. And these kinds of things would never be allowed on a public beach." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 14:05, YouTube (2024) (emphasis added), https://www.youtube.com/watch?v=2C8CFLn1it4.

Worse, *Bell II* strikes many members of the public as arbitrary and arcane – it is, after all, based on a few sentences from dusty texts written by colonists with more in common with Oliver Cromwell than with contemporary beach users. The *Bell II* rule has no real authority on the ground. In short, the public generally does not adhere to it, the lot owners generally do not enforce it, and municipalities and law enforcement are unable to do anything other than respond to the odd trespass complaint.[6] The result is that no one's rights and interests are settled or adequately protected.

The dysfunction described above is in plain view at Moody Beach. No doubt, the Justices in the *Bell II* majority believed that their decision would largely settle the scope of public rights to use intertidal land and quiet things down. Unfortunately, they were wrong: Fast-forward thirty years, and Town officials and law enforcement have observed increasing hostility and tension on Moody Beach, which is representative of what is being experienced on many sandy beaches throughout the State. Reflecting the confusion and difficulty in enforcing the current doctrine, a substantial number of beachfront lots on Moody Beach have a "private beach" sign on its sea wall, and the lot owners are becoming more aggressive in demanding that the public stay off the beach. *See* (A. 537, 540, 837, 844-45.) One lot owner has

[6] If *stare decisis* is intended to foster stability and predictability, *Bell II* has failed. *See Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 40, 307 A.3d 1049.

"chased three little kids who were making sandcastles." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 39:44, YouTube (2024), https://www.youtube.com/watch?v=2C8CFLn1it4. Even walking through the intertidal zone has resulted in complaints by private lot owners. On the other side, there are people who abuse the leniency of private lot owners, and plenty of misconduct already occurs precisely because the current doctrine makes municipal regulation and preemptive enforcement virtually impossible. The situation is not sustainable.

C. The Reasonable Balance Test Provides the Best Framework to Facilitate the Resolution of Beach Use Disputes While Protecting Private Owners' Interests.

In the Town's view, the only viable path forward is for this Court to hold, finally, that the common-law public easement in the intertidal zone includes all uses that strike a reasonable balance between public and private rights. The legal and historical correctness of the "reasonable balance" test is again amply set forth in the Plaintiffs' and Attorney General's briefs. The Town further submits that the reasonable balance test would have salutary practical benefits, principally by allowing local governments and institutions to calibrate that balance according to site-specific conditions, needs, and interests, and then to effectively enforce that balance.

First, the Court should hold that, under a reasonable balance test, transitory movement and low-impact recreation are reasonable uses of intertidal land as a matter of law. Recognizing these uses – especially walking – would result in enormous practical benefits. Many of the Moody Beach private landowners take a relaxed, permissive approach to public use of their individual parcel of beach. But as things stand, the public has no way to access those permissive parcels, because a single unwilling owner can act as a literal gatekeeper to the rest of the beach. As a result, the public cannot reliably reach the parcels of beach where lot owners are less interested in testing the limits of the public's rights. As a result, they end up on other parcels whose owners might be fine with less intensive activities, but draw the line at more intensive activities that push the boundaries of reasonable use. Allowing walking would effectively eliminate the gatekeeping role of the outlier owners, and would allow members of the public and private owners to reach a more stable equilibrium by channeling the more intensive public uses to the more permissive parcels. And no one reasonably believes that walking through the intertidal zone, by itself, is a significant burden on the private owners' rights.[7] Thus, walking has the potential to significantly reduce both the disputes that the towns would need to resolve, and those that reach the Court system.

[7] Not one of the Defendants in this case appears to take the position that the public may not walk across that Defendant's property, although Defendant Judy's Moody, LLC does make the puzzling assertion that "[w]alking involves significant amounts of commotion." Defendant Judy's Moody, LLC's Opp. to the Att'y Gen.'s Mot. for Summary Judgment on Count IV, at 11 (June 2, 2023).

To be sure, even if the public trust doctrine is expanded to include the "reasonable balance" test, and even if transitory movement and low-impact recreation are permitted as a matter of law, there will continue to be disputes over the scope of the public's rights. But adopting the reasonable balance test would allow other institutions – particularly local governments – the leeway to resolve those conflicts openly, equitably, with input from all stakeholders and due consideration of local conditions and needs, and (not least) with authority that people will accept. For instance, take "low-impact recreation." The precise scope of that term need not be set by the courts for all time but, instead, could readily be elaborated by site-specific local regulation. No institution is better positioned than those municipalities to reach a reasonable local balance. Indeed, the Town of Wells is in the process of developing a working group to hear input from all stakeholders and develop a plan to manage Moody Beach issues moving forward (it hopes to do so outside of *Bell II*'s unnecessary constraints).

Most importantly, under a reasonable balance test, municipalities would be able to engage in more effective regulation of the public's use of the intertidal zone. In the Public Trust in Intertidal Land Act ("PTILA"), the Legislature affirmatively and specifically authorized municipalities "to exercise their police powers to control public use of intertidal land, except where such exercise is superseded by any state law." 12 M.R.S. § 573(3), *declared unconstitutional on other grounds* in *Bell II*,

557 A.2d at 176-77. Even the PTILA's affirmative delegation of authority was likely unnecessary, because municipalities already have the authority to create and enforce such regulations under home rule. *See* 30-A M.R.S. § 3001. Eliminating the constrictive trilogy of *Bell II* would free municipalities to regulate beach access and balance public and private interests prospectively and preemptively, rather than trying to predict exactly how constrictively the courts will interpret "fishing, fowling, and navigation."

Municipal governments are very well equipped to develop and enforce rules balancing public and private rights in land use activities; they do it all the time in other contexts. The Lot Owners have argued that recognizing public trust rights in the intertidal zone to include passive recreation or transitory walking would turn every private beach in the State "into the Fourth of July." Defendant Judy's Moody, LLC's Opp. to the Att'y Gen.'s Mot. for Summary Judgment on Count IV, at 11 (June 2, 2023). But that is just not accurate. Towns could, and beach towns presumably would, develop a variety of ordinances and policies regarding the use of intertidal lands, to address and respond to local concerns and conditions on a beach-by-beach basis.[8] They could impose hour and noise limits, restrict access for dogs

[8] To be sure, if the Legislature or a municipality attempted to expand the public's rights beyond a "reasonable" balance between public and private rights, the courts may still provide a backstop. *See Batchelder v. Realty Resources Hosp., LLC*, 2007 ME 17, ¶ 23, 914 A.2d 1116. But reasonableness is not one-size-fits-all, and adaptation to local conditions would be inherent in any reasonableness test. *See, e.g., Flaherty v. Muther*, 2011 ME 32, ¶ 71, 17 A.3d 640 (stating that the reasonableness of a gate would be considered "in light of the nature of the easement").

and animals, control the number and density of visitors, and regulate or prohibit any number of specific activities. These kinds of highly specified, reticulated rules and ordinances could be more easily and preemptively enforced than the reactive blunderbuss of a trespass claim. In the end, municipalities are well positioned to ensure that all interests are heard and protected. The only thing that currently stops them from fulfilling this important function on Maine's beaches is *Bell II*.

In addition, a reasonable balance approach would "encourage ongoing mutual engagement and honest dialogue on competing perspectives outside the courtroom." Timothy M. Mulvaney, *Walling Out: Rules and Standards in the Beach Access Context*, 94 S. Cal. L. Rev. 1, 29 (2020); *see also* Carol Rose, *Crystals and Mud in Property Law*, 40 Stan. L. Rev. 577, 608-09 (1988) (noting that relatively "muddy" legal standards can animate social and community discussion). Municipal government and community organizations would serve as excellent incubators for these conversations, not just as to the scope of public rights and reasonableness of particular activities, but how best to enforce the rules that are adopted.[9] What works in one town may not work in another, but municipalities could look at others' experiences to guide their own regulations.

[9] Adopting a reasonable balance test, and affirming that the Legislature and municipal governments have the authority to shape and regulate the balance between public and private rights locally (rather than statewide), would also go a long way to assuaging one of the *Bell II* majority's principal concerns: that courts should not "engage in legislating" by setting forth the precise scope of the public trust rights, and that the "political processes" should "define the nature and extent of the public need." 557 A.2d at 176.

Such an approach is neither unduly optimistic nor impractical. It is reflected in the actual experience of other jurisdictions. For example, in Oregon, the courts have long held that the public has a right "to make recreational use of the [privately owned] 'dry-sand' area of Oregon's beaches between mean high tide and the upland permanent vegetation line." *McDonald v. Halvorson*, 780 P.2d 714, 715 n.2 (Or. 1989) (en banc) (citing *State ex rel. Thornton v. Hay*, 462 P.2d 671 (Or. 1969)). But the government obviously does not abandon landowners to mob access, with courts as their only recourse. Rather, the Oregon Parks and Recreation Department has broad authority "to maintain and to promulgate rules governing use of the public of" the beach property. Or. Rev. Stat. Ann. § 390.660. Under this authority, the state agency has adopted rules that strictly regulate visitor conduct, *see* Or. Admin. Code § 736-021-0100; limit access for pets and animals, *see id.* § 736-021-0070; require permits for commercial or large group activities, *see id.* § 736-021-0130; and have a variety of enforcement mechanisms, including the ability to exclude persons from the beach area "to protect public health and safety, to provide security, to avoid user conflicts, or for other reasons deemed necessary," *id.* § 736-021-0040(7). Public hearings and town hall meetings – the cornerstones of local democratic political processes – are routine.[10]

[10] Other jurisdictions have similar regulatory schemes. The California Coastal Commission, for instance, has the statutory duty to ensure public access to California's beaches while protecting "public rights, rights of private property owners, and natural resource areas from overuse." Cal. Pub. Res. Code §

Similarly, under Scotland's Land Reform Act 2003, the public was provided with broad rights of "responsible access" to the shoreline. John A. Lovett, *Progressive Property in Action: The Land Reform (Scotland) Act 2003*, 89 Neb. L. Rev. 739, 782 (2011). The consequence is that "landowners, access takers, and local officials were encouraged to enter into a long term, evolving dialogue about how to accommodate each other's needs – landowners' legitimate land management interests, homeowners' privacy and personal enjoyment needs, and the public's interest in responsible access taking." *Id.*; *see also id.* at 784 ("The question of how far this zone of reasonable privacy and enjoyment should extend in any particular case is left to local authorities, landowners, and access takers to sort out on their own, and ultimately, when these parties cannot reach agreement among themselves, to the courts.").

Bell II imposed an artificial restriction on public use of the intertidal zone that has led to uncertainty, dysfunction, and the erosion of public confidence on all sides. The beachgoing public does not know the scope of its rights or how strictly the private owners will restrict access; the private owners do not know how best to protect their own interests or how far they may go in enforcing them; and

30210. In carrying out those duties, government entities are directed to "take[] into account the need to regulate the time, place, and manner of public access depending on the facts and circumstances in each case," including "adjacent residential uses." *Id.* § 30214. The Commission also has broad authority to "conduct a workshop on any matter [or] any subject that could be useful to the [C]ommission." *Id.* § 30326; *see also Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. 2015) (noting that public rights in privately-owned beaches are often regulated by municipalities).

municipalities are stuck in the middle with their hands tied. By finally overruling *Bell II*, the Court would allow municipalities and other local institutions to balance all interests on an ongoing basis and provide ready, predictable enforcement of those rules, rather than leaving it to the courts to issue decisions once every decade. The Court should adopt the "reasonable balance" test.

II. The Superior Court Erred in Concluding that Count V Is Time-Barred.

The trial court also erred in dismissing Count V of the Complaint. While the Town does not have a direct interest in the resolution of Count V as such, the trial court's ruling that Count V is time-barred would profoundly destabilize Maine property law and title to countless properties across the state. It would, for instance, prevent a municipality from bringing a claim to establish that it has better title to the intertidal zone than the upland owner, à la *Almeder v. Town of Kennebunkport*, 2019 ME 151, 217 A.3d 1111. Because the trial court raised the issue *sua sponte* and without briefing, and the parties' briefs in this Court have not addressed it in detail, the Town writes to explain the serious flaws in the trial court's ruling.

In Count V, Plaintiffs seek a declaration that the Defendants "do not hold title to the intertidal lands adjacent to their property." (A. 140.) The trial court concluded that Count V sought "a declaration quieting title to" the intertidal lands adjacent to the Defendants' upland parcels. (A. 76-77.) The trial court then explained that because the "conveyances [the Complaint] seeks to invalidate were made in the

seventeenth century, . . . Count V is time barred by the applicable statute of limitations." (A. 77.)

In order to correct the trial court's error, this Court need go no further than to recognize that the Plaintiffs' claims in Count V are based on the Defendants' conduct and the dispute about the scope of the parties' rights, not title as such.[11] However, the Court should also be wary of the trial court's broad and unduly simplistic holding that the statute of limitations for a declaratory judgment action relating to title to real property is six years. That suggestion is directly at odds with Maine statute and fundamental principles of real property conveyance, and would functionally obviate the entire doctrine of adverse possession.

Title 14 M.R.S. § 801 sets forth a twenty-year statute of limitations "for the recovery of lands," which this Court has "interpreted to be subject to the general elements of adverse possession." *Johnson v. Town of Dedham*, 490 A.2d 1187, 1189 (Me. 1985). In other words, the so-called limitations period for a true title-holder to

[11] Count V is nothing like a quiet title action, or any other kind of real action. Indeed, Count V makes no claim whatsoever as to who does own the intertidal lands adjacent to the Defendants' property. *See Oakes v. Town of Richmond*, 2023 ME 65, ¶ 32 n.11, 303 A.3d 650 (noting that because plaintiff did not claim title to the property in question, but rather was claiming "that the [t]own should not be taxing her," her declaratory judgment claim was not time-barred). Rather, Plaintiffs' claims in Count V are more aptly characterized as anticipatory challenges to a potential trespass claim that might be asserted by Defendants: the Plaintiffs (who would be defendants in that trespass suit) could challenge the Defendants' ownership as an affirmative defense. Another appropriate analogy would be to nuisance: Plaintiffs are claiming that they have rights in the intertidal zone with which the Defendants are unlawfully interfering. In either event, the timeliness of the suit does not depend on when the Defendants did or did not acquire the property in question: it depends on when the dispute arose between Plaintiffs and Defendants as to whether the Defendants may restrict the Plaintiffs' use of the intertidal zone. *See Miller v. Miller*, 2017 ME 155, ¶ 12, 167 A.3d 1252.

bring a real action to recover lands is simply the flip side of an adverse possession claim.[12] If the person in possession of the land, lacking actual title, cannot establish the elements of adverse possession, then the real title-holder is not time-barred from recovering the property, whether the claim comes 25 or 225 years after the real title-holder obtained title. This is true whether the title-holder brings a real action or a declaratory judgment action – a declaratory judgment action "is time-barred only if relief on a direct claim would also be barred." *Stone v. Williams*, 970 F.2d 1043, 1048 (2d Cir. 1992).

The limitations period is lengthy, and the adverse possession standard high, because "there is every presumption that the occupancy is in subordination to the true title." *Hamlin v. Niedner*, 2008 ME 130, ¶ 11, 955 A.2d 251 (quotation marks omitted). As this Court has repeatedly explained, "a deed may convey only property that was owned by the grantor." *Wells v. Powers*, 2005 ME 62, ¶ 4, 873 A.2d 361; *see also Almeder*, 2019 ME 151, ¶ 38, 217 A.3d 1111 (noting that where centuries-old deeds did not include the intertidal zone, subsequent deeds in the chain of title did not "resurrect the presumption of ownership to the low water mark"). Thus, this Court routinely examines aged deeds and chains of title to determine who holds title

[12] It bears noting that a true "quiet title" action is something highly specific, and that a declaratory judgment action seeking to establish title to property is not really akin to a quiet title action – in many cases, the better analogy is to an action for the recovery of lands. *See Lewien*, 432 A.2d at 802 ("Unlike quiet title proceedings, a real action is only available to one out of possession who can prove an estate in the realty that entitles him to recover possession."); 3 Me. Civil Practice § 80A:7 (3d ed., Oct. 2023 Update) ("'Quiet title actions' and 'real actions' are distinct proceedings requiring different allegations in the complaint.").

to the intertidal zone. *See Mabee v. Nordic Aquafarms Inc.*, 2023 ME 15, 290 A.3d 79 (holding that plaintiffs had established title to intertidal land based on language in 1946 deed that severed upland from the intertidal zone); *Almeder*, 2019 ME 151, ¶¶ 27-28, 44-60, 217 A.3d 1111; *Eaton v. Town of Wells*, 2000 ME 176, ¶¶ 10-26, 760 A.2d 232 (examining centuries-old grants and deeds to determine title to portion of Wells Beach); *Rand v. Symonds*, 120 Me. 126 (1921) (where person in possession of land had not established title by adverse possession, the Court examined deeds from 1730s and 1740s to determine title).

The illogic and drastic consequences of the trial court's ruling can be seen with a basic example. Say that Person C owns Blackacre but does not reside there. C's neighbor, A, is selling his own property to B, and mistakenly conveys Blackacre to B as well. Under the trial court's analysis, C – the true owner – would be categorically barred from challenging B's title to Blackacre after six years have run from the deed from A to B, without any consideration of whether B can meet the elements of adverse possession. In other words, after a mere six years and with no showing of adverse possession, the deed from A to B would have effectively divested C of Blackacre. That is not the way that real property conveyances and adverse possession work, and it is no exaggeration to say that the trial court's analysis would shake the foundations of Maine property law.

The trial court cited *Efstathiou v. Aspinquid, Inc.*, 2008 ME 145, 956 A.2d

110, for the proposition that "[a]n action to quiet title is a civil action to which the six-year statute of limitations applies." (A. 77.) But *Efstathiou* was a simple fraud claim, not a title dispute. In that case, the plaintiff and defendant conveyed their property to a corporation owned by the defendant's family. *Id.* ¶ 6. Nearly twenty years later, in the midst of the parties' divorce, the plaintiff brought a quiet title action in which she alleged that her consent to the 1986 transfer had been induced by the defendant's fraud. *Id.* ¶ 10. In other words, although the plaintiff's claim may have been denominated as a quiet title claim, it was more like a simple fraud claim (which would clearly be governed by the six-year statute of limitations in 14 M.R.S. § 752) than an action brought by the true title-holder for the recovery of lands possessed by another. *Efstathiou* certainly does not alter the basic principles of Maine law that a person can only convey what they have, and that the statute of limitations for real actions includes the elements of adverse possession.

As noted, these issues are not really presented in this case, and the Court should resolve this case without examining the precise limitations period for all declaratory judgment actions relating to title to real property. The Town offers these points solely to direct the Court's attention to the important principles and nuances that the trial court's analysis failed to address.

CONCLUSION

For the foregoing reasons, the Town urges the Court to clarify the scope of the public trust doctrine and adopt the reasonable balance test. The Court should also hold that walking and low-impact recreation are reasonable uses of the intertidal zone as a matter of law. The Court should further acknowledge that while municipalities may not expand the scope of the public trust rights, they do have the power – and, in many cases, are the best-placed institutions – to regulate public use and access to privately-owned intertidal lands.

Dated: August 2, 2024

/s/ Amy K. Tchao

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ADDENDUM

In connection with its foregoing Brief, the Town of Wells offers the following excerpts from public testimony during recent meetings of the Town of Wells Select Board. These meetings were held to give the public and beachfront property owners alike an opportunity to discuss their concerns regarding public use of Moody Beach. The excerpts are transcribed from the publicly available recordings of these meetings, and URLs will be included with each excerpt.

- "[T]he police officers involved need clear guidance and guidelines regarding permissible use. Is walking navigation? What is fishing? Can a fisherman sit? Must he or she have a pole? My mother once caught [a fish] with a pillowcase." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 51:25, YouTube (2024), https://www.youtube.com/watch?v=2C8CFLn1it4.

- "I hope or suggest that you work out a game plan with your police officers. I have had personal experience with the officer at Moody Beach. You know, he did his job, but he was also caught in the middle of, you know, folks that were saying, you know, the beach is open and the homeowner who was irate . . . . But the officer was then caught in the middle - so what's right what's wrong? Some of us thought that the deed did not clear that particular house down to the low tide mark, and the truth was that nobody really knows. So without some game plan, some operating model that we all know about, I'm concerned . . . ." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 1:29:26, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "The tensions that have been increased over the last couple of years has been on the part of the people using the beaches, coming onto private property, and they are harassing homeowners. One of our neighbors actually got punched in the face last year, and they are afraid to even say things . . . it is amazing the amount of trash that is left . . . the actions of the people you ask to go . . . the wildlife. . . ." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 1:08:12, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "We have always welcomed people from around the neighborhood out to sit in front of our house. We have never kicked anybody off the beach. I will say the one time we did, we had twelve motorcycle guys come down on the

beach, carrying . . . a keg of beer. Went down and walked through the public access way, sat down on the beach and said 'F you, we're here to party.' And boom box – this is what Moody Beach will turn in to if you open it up." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 1:17:01, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "We've never kicked anyone off the beach. But when people start urinating on the stairs, and defecating under the stairs, and breaking bottles and leaving it for me to pick up with a ninety-three-year-old mother, I don't need that nonsense." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 1:45:09, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "I do remember once asking people to leave our beach front property because they were drinking and behaving inappropriately in front of our children. And these kinds of things would never be allowed on a public beach." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 14:05, YouTube (2024), https://www.youtube.com/watch?v=2C8CFLn1it4.

- Now imagine, two years ago, my children were probably nine and seven at the time, to our utter dismay when one day, it was high tide, we couldn't access public way 3, we went down to public way one. We walked the beach. We weren't even set up – and my two young children and my husband and I were being yelled at by a property owner, that we can't be on the beach. Yelling at us – telling us to get off her property. Mind you, this was not even near her property – the construction of her wall. We were halfway down the beach. My children were scared, they didn't know what was happening. They didn't understand why she owned, for what they see, the public area of the beach, how can she own that? My son didn't understand why he couldn't ride his little RV car. My daughter didn't understand why my husband couldn't turn her into a sea fan mermaid. How am I supposed to explain this to my children when I have a disgruntled woman who is yelling at me and my little children?" Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 51:04, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "My first introduction to the beach was in 2018 when I moved here. . . . I was told very impolitely to get off the beach, and frankly a little stronger

language than that, but that is what I was told, walking my dog – and I was told to get off the beach. And I did it, in order to avoid confrontation." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 1:13:55, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "It all became truly ugly for me last summer, when my college-aged granddaughter was lying on the beach with her friend. And they were thirty and forty feet away – at least –from the wall. As I approached them, the first-tier owner walked towards them and told them they were on a private beach – the beach was almost empty – and had to get off. The girls were dumbstruck and didn't know what to say. I told him we had been here before and never had an issue before the signs went up. He said we could stay for the time being, but not to do it again because he was going to have his family of eleven the next day and wanted the beach clear for them . . . the next day I walked by that area. Chairs were everywhere but no one was sitting in them. . . . nobody was visiting." Town of Wells, *Wells Select Board Meeting at 6PM on 5/21/2024*, at 57:42, YouTube (2024), https://www.youtube.com/watch?v=OhnBcZNcjmQ.

- "We decided one September evening to have a sunset picnic at dead low tide and ventured down toward the beach. There was no one on the beach. Literally, no one on the beach. We set up our chairs, little table, and unpacked. A few minutes later, a homeowner approached us and said we had to leave, that this was a private beach. I said I knew that because we lived only a stone's throw away. But we were at the low tide mark, the beach was completely empty, and we were just having a sweet little picnic. He persisted and said there had been some 'riff raff' on the beach. So, my daughter and I packed up our gear, and moved down three houses far in front of an unoccupied home. We started to set-up again, and the same homeowner once again came out and insisted we leave, even though we weren't in front of his home." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 24:50, YouTube (2024), https://www.youtube.com/watch?v=2C8CFLn1it4.

- "Last year he chased three little kids who were making sandcastles, and he chased them off his beach." Town of Wells, *Wells Select Board Meeting at 6PM on 6/10/2024*, at 39:44, YouTube (2024), https://www.youtube.com/watch?v=2C8CFLn1it4.

CERTIFICATE OF SERVICE

I, Oliver Mac Walton, hereby certify that on this 2nd day of August, 2024, I served two (2) copies of the foregoing Brief of *Amicus Curiae* upon the parties and counsel to the subject appeal as follows:

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