STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. CUM-24-82

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

AARON FREY, ATTORNEY GENERAL OF THE STATE OF MAINE,
Appellant/Cross-Appellee

v.

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

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

BRIEF FOR APPELLEE/CROSS-APPELLANT JUDY'S MOODY LLC

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I. INTRODUCTION

Appellants ask this Court to disregard almost two centuries of its own precedent and private property rights first recognized in 1641. They seek a declaration that the State of Maine—and not private owners—holds absolute title to the intertidal zone—the area between the low-water mark and the high-water mark up and down Maine's coastline. Accepting their claims would sweep away the entire history of coastal property ownership in Maine and Massachusetts. For good reason, no Justice of this Court or in Massachusetts has ever contemplated it.

Failing that, Appellants alternatively ask this Court to disregard long-settled precedent holding that public use of the intertidal zone is limited to fishing, fowling, navigation, and related uses. They seek a judicial declaration either that public rights in the intertidal zone include general recreational activities, or a ruling that the legislature has unlimited authority to expand the uses of the intertidal zone by statute. But neither this Court nor the legislature may simply allow the public to access and use private property without paying just compensation to the owners.

For the reasons stated below, this Court should confirm its longstanding precedent acknowledging private ownership of intertidal land subject only to limited public access for fishing, fowling, and navigation. To do otherwise after centuries of repeated reconfirmations of the private nature of the intertidal zone and reliance thereon would violate fundamental principles of stare decisis, and result in an

unconstitutional taking of thousands of parcels of private property without compensation. This Court should not go down the road Appellants invite it to travel. The judgment in favor of Judy's Moody and the other Appellees should be affirmed.

II. FACTUAL AND PROCEDURAL BACKGROUND[1]

Judy's Moody, LLC owns beachfront property at 407 Ocean Avenue along Moody Beach in Wells. Property owners along Moody Beach, including Judy's Moody, hold title down to the low-water mark, including the intertidal zone, subject to limited public rights. *See Bell v. Town of Wells*, 557 A.2d 168, 169 (Me. 1989) (*Bell II*). Along with the other Appellees, Judy's Moody was named as a defendant in a complaint filed by 24 individuals who claim a right to use the intertidal zone that is much broader than Maine law has ever recognized. These individuals—many of whom had never been to Moody Beach—sought sweeping judicial declarations that would extinguish all or most of Judy's Moody's property rights in the intertidal zone.

Judy's Moody and the other defendants moved to dismiss the complaint. The Superior Court granted the motion as to four of the five counts, holding that it was long-since settled that upland owners hold title to the intertidal zone. (A.0030, 0054–80) However, the court allowed one count to proceed on the theory that some of the

[1] Judy's Moody incorporates by reference the description of the facts contained in the briefs of the other Appellees.

activities the plaintiffs might want to engage in might be included in the reserved public rights under state law. (A.0078–79)

After discovery, all parties and the Attorney General—named as a real party in interest due to the State's interest in the intertidal zone—moved for summary judgment. (A.0038–39, 0256–343) The Superior Court denied the plaintiffs' and the Attorney General's motions on the ground that their statements of material facts were too long and included information irrelevant to the case. (A.0112–119) It granted Judy's Moody's motion for summary judgment, along with those of the other defendants. (A.0142–166) The Superior Court held that only four of the plaintiffs—Peter and Kathy Masucci, William Connerney, and Orlando Delogu—had standing to sue Judy's Moody based on "their historical use of [Judy's Moody's] intertidal land" and their evidence that "the private property signs and boundary markers located thereon have chilled their recreational use and enjoyment of that land." (A.0110) But it rejected these four plaintiffs' claims on the merits, finding that granting the requested relief would require setting aside this Court's precedent. (A.0142–166) Therefore, after previously granting Judy's Moody's motion to dismiss the other four counts, the Court granted its motion for summary judgment on the remaining count.

Plaintiffs (now the Masucci Appellants and Delogu) and the Attorney General appealed, and Judy's Moody filed a cross-appeal to preserve its right to challenge whether the Masuccis, Connerney, and Delogu have standing.

III. ARGUMENT

1. Appellants' Arguments All Require This Court to Discard Long-Settled Precedent[2]

The hundreds of pages of briefing submitted by the Masucci Appellants, Delogu, and the Attorney General boil down to three essential arguments: (1) the State holds title to the intertidal zone; (2) even if private owners hold title to the intertidal zone, that ownership is or should be subject to a substantial allowance for public recreational rights—or, at the very least, the legislature has the power to grant such rights; and (3) at the very least, walking should be recognized as a protected public right within the intertidal zone. The common thread is that the success of each of these arguments depends upon this Court's willingness to cast aside long-established precedent. If the Court does not do so, it must affirm the judgment in favor of Judy's Moody and the other Appellees.[3]

[2] Judy's Moody incorporates by reference the legal arguments made by the other Appellees to the extent they are applicable.

[3] The ordinary difference between this Court's review of the Superior Court's decision to grant a motion to dismiss and its granting of a motion for summary judgment is immaterial in this case. The answers to the legal questions presented do not turn on any disputed facts. Therefore, Judy's Moody simply addresses the legal questions at issue.

A. Long-established precedent dictates that private owners may hold title to the intertidal zone—and do hold such title at Moody Beach

Private ownership of the intertidal zone in Maine dates back nearly four centuries. In the early days of the Massachusetts Bay Colony, the government could not afford to construct necessary wharves to stimulate commerce. *See Storer v. Freeman*, 6 Mass. 435, 438 (1810). To induce private individuals to build them, the Colony enacted the Colonial Ordinance of 1641-47. *Id.*; *see also Opinion of the Justices*, 437 A.2d 597, 605 (Me. 1981) (explaining that "in order to promote the construction and maintenance of wharves," the Colonial Ordinance "vested the upland owner with title in fee simple in intertidal lands"). The Ordinance declared that the upland owner of land immediately adjacent to the intertidal zone held title down to the low-water mark. *See* Liberties Common § 2, THE BOOK OF THE GENERAL LAWES AND LIBERTYES CONCERNING THE INHABITANTS OF MASSACHUSETTS (T. Barnes ed., facsimile reprint 1975) (Mass. 1648). By the time of Independence, this principle was so deeply embedded in the common law that the Massachusetts Supreme Judicial Court spared only a sentence to explain that even after the expiration of the Ordinance, "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*, 6 Mass. at 438.

Maine achieved statehood in 1820, carved out of Massachusetts as part of the Missouri Compromise. Eleven years later, this Court recognized that "[t]he colonial

ordinance of 1641, extending the title of riparian proprietors to low-water mark, though originally limited to the Plymouth colony, is part of the common law of Maine; and is applicable wherever the tide ebbs and flows." *Lapish v. Bangor Bank*, 8 Me. 85, 85 (1831). Without a hint of dissent, it has recognized this principle to the present day, regardless of context. *See Emerson v. Taylor*, 9 Me. 42, 43 (1832) ("The flats in controversy where the alleged trespass was committed, are claimed by both parties; each claiming them as appurtenant to his upland lot, in virtue of the Colonial Ordinance of 1641, or rather of the principle of that ordinance, as a part of our common law."); *State v. Wilson*, 42 Me. 9, 28 (1856) (setting aside criminal indictment against riverfront landowner for building a wharf on what was claimed as a public highway, noting that his "title to the shore was as ample as to the upland, and he would not be restrained from making permanent erections thereon, notwithstanding the same may have been used as a landing place, in addition to its use as a highway"); *Barrows v. McDermott*, 73 Me. 441, 448 (1882) (recognizing that the Colonial Ordinance "has been so largely accepted and acted on by the community as law that it would be fraught with mischief to set it aside"); *Sawyer v. Beal*, 97 Me. 356, 358, 54 A. 848, 848 (1903) ("In this state, under the Colonial Ordinance of 1641, as modified by that of 1647, which has become the common law of this state, the owner of land upon the seashore owns to low-water mark, unless the tide recedes more than 100 rods, although, of course, the ownership of upland

and flats may become divided by the act of the owner."); *Opinion of the Justices*, 437 A.2d at 605–06, 609–10 (recognizing fee title of upland owner in the intertidal zone and ultimately opining that the legislature could alienate the State's remaining interest in intertidal land filled before 1975); *Bell v. Town of Wells*, 510 A.2d 509, 513–15 (Me. 1986) (*Bell I*) (confirming that the Colonial Ordinance is a part of Maine common law such that "the owner of the upland holds title in fee simple to the adjoining intertidal zone"); *Bell II*, 557 A.2d at 173 ("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.'" (quoting *Wilson*, 42 Me. at 28)); *McGarvey v. Whittredge*, 2011 ME 97, ¶ 9, 28 A.3d 620 (opinion of Saufley, C.J.) ("[i]n Maine, the upland owner ordinarily has fee ownership of the intertidal land"); *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 12, 206 A.3d 283 ("[t]he intertidal zone belongs to the owner of the adjacent upland property").

Not a word in this Court's long history so much as suggests that the State ever had title to the intertidal zone. Even the dissent in *Bell II*, which criticized this Court's adoption of the Colonial Ordinance into Maine common law, recognized that "the determination of public and private rights in the intertidal land is fundamentally a matter of state law" and that "the source of the law of private ownership of the Maine shore is this Court's recognition of usage and public acceptance." 557 A.2d at 181, 184 (Wathen, J., dissenting). The dispute between the

various opinions in *Bell II*—and for that matter, *McGarvey* and *Ross*—was not about the fact of private ownership over the intertidal zone. Rather, the justices disputed the scope of public rights to use of that portion of private property.

Making matters crystal clear, this Court's *Bell* decisions concerned the very same beach at issue in this case.[4] As the *Bell II* Court explained, "[l]ong and firmly established rules of property law dictate that the plaintiff oceanfront owners at Moody Beach hold title in fee to the intertidal land ...." 557 A.2d at 169 (majority opinion). So to the extent Appellants seek a declaration recognizing State ownership of the intertidal zone, they ask this Court not only to discard two centuries of precedent, but to ignore a specific finding of fee title in the oceanfront owners along Moody Beach. Not a single justice, dissenting or otherwise, has ever suggested such a thing.

B. Maine common law recognizes some public rights to use the private intertidal zone, but cabins these rights to fishing, fowling, navigation, and uses incidental to these

Just as this Court's precedent recognizes private ownership of the intertidal zone, so it acknowledges the reservation of some public rights below the high-water mark. These, too, derive from the Colonial Ordinance. *See Bell I*, 510 A.2d at 515 ("under the Colonial Ordinance the owner of the upland holds title in fee simple to

[4] *Almeder v. Town of Kennebunkport*, 2019 ME 151, 217 A.3d 1111, is irrelevant. It simply held that the upland owners in that particular case did not hold title down to the low-water mark because their deeds did not "include a call to the water or even to the shore." *Id.* ¶ 38, 217 A.3d at 1124. The same is not true at Moody Beach. *See Bell II*, 557 A.2d at 169.

the adjoining intertidal zone subject to the public rights expressed in the Ordinance"). As this Court has explained, "[t]he Ordinance initially provides that every inhabitant has a right of fishing and fowling in the intertidal zone." *Id.* at 514. Then it recognizes a public right of navigation. *Id.* at 515. These three rights—fishing, fowling, and navigation—"were the historical purposes for which the public trust principle was developed in the common law." *Opinion of the Justices*, 437 A.2d at 607; *see also Harding v. Comm'r of Marine Res.*, 510 A.2d 533, 537 (Me. 1986) ("Historically, the public rights to be protected in management of submerged lands included navigation, fishing and fowling—common public uses.").

Before modern times, disputes over the scope of these public rights were relatively rare. But when this Court was called upon to define the scope of public rights, it hewed to those mentioned in the Colonial Ordinance. *See Deering v. Proprietors of Long Wharf*, 25 Me. 51, 64 (1845) ("The propriety in flats, under the ordinance, is similar to that acquired in any other property, subject to the rights of the community mentioned in the proviso."). So this Court protected the public's "right of mooring their vessels" in the intertidal zone "and of discharging or taking in their cargoes." *Id.* at 65; *see also Wilson*, 42 Me. at 24 ("By the proviso in the Colonial ordinance of 1641, that the owner of the flats should not hinder the passage of boats or other vessels in or through any sea, creeks or coves, to other men's houses or lands, persons had a right so to use the shore of Penobscot river, including the

right of mooring their vessels thereon, and of discharging and taking in their cargoes."). So too the public's right to navigate on the water even when it froze, *see French v. Camp*, 18 Me. 433 (1841), and the right to fish, even when that involved harvesting shellfish from the shore, *see Moulton v. Libbey*, 37 Me. 472, 490–93 (1854). None of these cases even hinted that public rights in the intertidal zone might be broader than these. *See id.* at 485 ("Whatever right the king had by his royal prerogative in the shores of the sea and of navigable rivers, he held as a *jus publicum* in trust for the benefit of the people for the purposes of navigation and of fishery.").

By the turn of the 20th century, this Court continued to describe the public trust as "the right of the public to use it for the purposes of navigation and of fishery." *Marshall v. Walker*, 93 Me. 532, 45 A. 497, 498 (1900). The *Marshall* Court explained that the upland owner may, "within the limits of the law," exercise "exclusive use and possession" over his intertidal land. *Id.* But otherwise, "[o]thers may sail over [it], may moor their craft upon [it], may allow their vessels to rest upon the soil when bare, may land and walk upon [it], may ride or skate over [it] when covered with water-bearing ice, may fish in the water over [it], may dig shellfish in [it], may take sea manure from [it], but may not take shells or mussel manure, or deposit scrapings of snow upon the ice over [it]." *Id.*; *see also Andrews v. King*, 124 Me. 361, 129 A. 298, 299 (1925) (relying on *Deering*, *Wilson*, and *Marshall* to hold that, while the private intertidal zone is unoccupied, the public has the right to use it

as a ferry landing place). These uses share one essential element in common—that they are closely related to navigation or fishing. Just as in the first century of statehood, no early 20th Century case suggested public rights in the intertidal zone were broader than that.

Andrews turned out to be the last case about public rights in the intertidal zone for six decades. *See Bell II*, 557 A.2d at 187 (Wathen, J., dissenting) (noting that *Andrews* was the last such case before the *Bell* cases). Before the *Bell* cases, the Court did touch on the issue in *Opinion of the Justices*, a 1981 advisory opinion issued in response to the governor's question whether a proposed statute releasing the State's interest in certain filled intertidal land would be valid. There, the Court recognized that "[n]avigation, fishing, and fowling were the historical purposes for which the public trust principle was developed in the common law." 437 A.2d at 607. It went on to suggest that "an increasing population has led to heavy demands upon Maine's great ponds and seacoast for recreational uses" and thus that "[i]n dealing with public trust properties, the standard of reasonableness must change as the needs of society change." *Id.*

But of course, advisory opinions are not binding or precedential. *Harding*, 510 A.2d at 537. And although two of the justices who sent that opinion to the governor in 1981 were still on this Court when it decided *Bell II*, the latter case did not follow the potential path *Opinion of the Justices* had set. Chief Justice McKusick, who

joined the letter in *Opinion of the Justices*, wrote the majority opinion in *Bell II* and did not so much as cite this Court's response to the governor. A majority of this Court rejected the changed-circumstances approach, noting that "[n]o decision of either the Maine or the Massachusetts court supports any such open-ended interpretation of the public uses to which privately owned intertidal land may be subjected." *Bell II*, 557 A.2d at 174 (majority opinion). Notably, this Court chose instead to rely on an advisory opinion of the Massachusetts Supreme Judicial Court that unanimously opined that a bill granting "right of passage" for the public through private intertidal land would be unconstitutional. *See Opinion of the Justices*, 313 N.E.2d 561 (Mass. 1974). In that opinion, the Massachusetts justices plainly rejected a free-wheeling definition of public rights, noting that "[t]he rights of the public though strictly protected have also been strictly confined to these well defined areas" of fishing, fowling, and navigation. *Id.* at 567. *Bell II* followed suit.

It was against this backdrop that *Bell II* stated the now-familiar framework that permissible public uses of private intertidal land include fishing, fowling, navigation, and those "reasonably incidental or related thereto." *Bell II*, 557 A.2d at 173. The *Bell II* majority did not invent this test out of whole cloth. Rather, the justices derived it from an exhaustive historical survey, accurately noting that "all the cases in Massachusetts and Maine recognizing the common law principles of intertidal property interests read the Colonial Ordinance as having restricted the

reserved public easement to fishing, fowling, and navigation and related uses." *Id.* at 174. It was the dissent in *Bell II* that resorted to stretching the language from cases like *Marshall* and *Andrews* and granting near precedential status to *Opinion of the Justices* in its attempt to demonstrate a tradition of broader public rights. To be sure, the project of the *Bell II* dissent has gained steam in recent years. But as Appellants' various calls to overrule *Bell II* make clear, the common law's delineation of the scope of public rights on private intertidal land has stood the test of time and remains the law today.

Two modern cases relitigated the dispute between the *Bell II* majority and dissent, but neither case disturbed *Bell II*. In *McGarvey*, this Court considered whether the public has the right to cross private intertidal land to reach the ocean for scuba diving. The six-justice Court unanimously agreed that it does, but split evenly on the reasoning. Chief Justice Saufley, joined by Justices Mead and Jabar, would have recognized "the public's right to cross the intertidal land to reach the ocean for ocean-based activities." *McGarvey*, 2011 ME 97, ¶ 51, 28 A.3d 620 (opinion of Saufley, C.J.). These three justices purported to "disavow" an "interpretation" of *Bell II* that would "forever set the public's rights in stone as related to only 'fishing,' 'fowling,' and 'navigation.'" *Id.* ¶ 53. The competing opinion by Justice Levy—joined by Justices Alexander and Gorman—criticized Chief Justice Saufley's approach as one "that would effectively overrule *Bell II*." *Id.* ¶ 59 (Levy, J.,

concurring). The Justice Levy-led trio would instead have permitted scuba diving under a liberal interpretation of "navigation" consistent with *Bell II* and the preceding common law. *Id.* ¶ 77.

A similar split manifested in *Ross*. All seven justices agreed that harvesting rockweed was not a protected public use of private intertidal land. *See Ross*, 2019 ME 45, ¶ 33, 206 A.3d 283 (majority opinion); *id.* ¶ 43 (Saufley, C.J., concurring in part). But because it viewed the result as the same under either the majority or the dissenting views in *Bell II*, the majority declined to reconsider it. *Id.* ¶ 33 ("And because neither view of the public's right to use the intertidal zone accommodates the activity at issue here, we determine—contrary to the position of the concurring justices—that this case does not present us with the occasion to consider the vitality of the holding in *Bell II*.").

So *Bell II*—and the common law development that led to it—remains the law today. A majority of this Court has never held that public rights in the private intertidal zone may be divorced from the three mentioned in the Colonial Ordinance, nor that either this Court or the legislature may expand public rights as "the needs of society change." *Opinion of the Justices*, 437 A.2d at 607. Some other States have gone this route. *See Borough of Neptune City v. Borough of Avon-By-The-Sea*, 294 A.2d 47, 54 (N.J. 1972) ("The public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet

changing conditions and needs of the public it was created to benefit."). But this Court chose a different path in *Bell II*, instead reaffirming the traditional public uses and protecting longstanding private property from judicial usurpation. And it is the traditional common law as explained in *Bell II* that continues to govern today.

C. None of Appellants' or the Attorney General's arguments can prevail unless this Court overrules longstanding precedent

Laying out this precedent, it becomes clear that to accept any argument Appellants or the Attorney General make would require casting at least some of it aside. Accepting some of Appellants' contentions would require this Court to overrule not only *Bell II*, but a long line of cases dating back to Maine's statehood. But even the narrowest among the arguments found in the opening briefs cannot coexist with *Bell II*.

First, the Masucci Appellants and Delogu maintain that Maine holds title to the intertidal zone. They have various arguments—primarily that the Colonial Ordinance indicated a license to use rather than a grant of title, and that operation of the Equal Footing Doctrine would override any pre-statehood property rights—but all depend on the proposition that every justice who has ever considered the question in the history of Maine and Massachusetts has been wrong. Any such holding would require this Court to discard the entire history of coastal ownership in Maine, from *Lapish* to *Bell II* to *Ross* and everything in between.

Second, Appellants contend that even accepting private ownership of the intertidal zone, the common law permits all the activities they want to engage in. But neither the Masucci Appellants nor Delugo attempt to fit the activities they want to do in the intertidal zone—which have at one point numbered three dozen—into the common law framework the Court explained in *Bell II*. Instead, they simply argue that public rights in the intertidal zone are more expansive than fishing, fowling, and navigation. As an alternative, the Masucci Appellants propose Chief Justice Saufley's test from her separate opinions in *McGarvey* and *Ross*—an approach they have argued would permit a wide range of general recreational activities well beyond fishing, fowling, and navigation.

This Court could not agree without setting aside *Bell II* and much of what came before. While one could certainly argue that some of this Court's cases gave too broad of an interpretation of fishing, fowling, and navigation, the *Bell II* Court acknowledged that these terms have been "liberally interpreted." *Bell II*, 557 A.2d at 173. The Masucci Appellants do not ask the Court to construe these terms liberally, but to render them irrelevant. In the State's history, the only opinions expressing this view are the dissent in *Bell II* and Chief Justice Saufley's three-justice concurrences in *McGarvey* and *Ross*.[5] To make those opinions the law, the

[5] Chief Justice Saufley also urged the Court to overrule *Bell II* in a solo concurrence in *Eaton v. Town of Wells*, 2000 ME 176, ¶¶ 50–55, 760 A.2d 232. There, she simply argued the Court should adopt Justice Wathen's *Bell II* dissent.

Court would have to overrule *Bell II* and much of its foundation. *See McGarvey*, 2011 ME 97, ¶¶ 62, 66, 28 A.3d 620 (Levy, J., concurring) (noting that Chief Justice's Saufley's opinion proposed to "fundamentally alter, rather than merely expand, Maine's existing common law" and that her approach "would chart a course that is in plain conflict with *Bell II*").

Indeed, several of the activities the Masucci Appellants want to do were specifically held *not* to be protected in *Bell II*. These include "bathing, sunbathing, and recreational walking" as well as "general recreation." *Bell II*, 557 A.2d at 175–76. This Court observed that permitting such activities on private intertidal land would "turn the intertidal zone of Moody Beach into a public recreational area indistinguishable from the adjacent Ogunquit Beach, which the Village of Ogunquit acquired in its entirety by eminent domain." *Id.* at 176.[6] Appellants cannot prevail unless the Court repudiates this analysis.

Third, the Masucci Appellants say that "the definition and regulation of public trust uses is committed to the discretion of the State, i.e. the Legislature." Masucci Blue Br. at 48–49. Delogu repeats a similar argument. But *Bell II* squarely rejected this position when it held the legislature's attempt to declare an easement for recreation was an unconstitutional taking. *See Bell II*, 557 A.2d at 178–79. As

[6] On the border between Wells and Ogunquit, one can walk down a public right of way onto the beach and observe the vast public beach of Ogunquit to the right, contrasted with the private Moody Beach to the left. Of course, Wells could have a public beach like Ogunquit, but it would have to pay for it just as the neighboring town did.

this Court explained, "[t]he common law has reserved to the public only a limited easement; the Public Trust in Intertidal Land Act takes a comprehensive easement for 'recreation' without limitation." *Id.* at 179. As the legislature cannot expand public rights in the intertidal zone without paying just compensation, *see id.*, it of course lacks the power or discretion to adjust these uses without reference to the common law.

Not even Chief Justice Saufley's separate opinions would have repudiated this portion of *Bell II*'s analysis. In *McGarvey*, she declined to revisit *Bell II*'s holding that the protected public uses of private intertidal land did not include general recreation. *See McGarvey*, 2011 ME 97, ¶ 48, 28 A.3d 620 (opinion of Saufley, C.J.). And in *Ross*, none of the justices would have expanded the public rights to include harvesting rockweed. Thus, it is clear that this Court could not hold the legislature has discretion to adjust the public trust uses without compensating landowners unless it repudiates existing precedent.

Fourth, and finally, the Attorney General argues that walking should be recognized as a protected public use of private intertidal land, whether as navigation broadly construed or under the freewheeling tests advocated in Chief Justice Saufley's opinions and the *Bell II* dissent. Although this is the most measured argument presented, it would still require the Court to repudiate *Bell II*, which specifically held that "recreational walking" was not a protected use. 557 A.2d at

176. The Attorney General's reliance on Chief Justice Saufley's opinions falls flat simply because they did not garner a majority of the Court, while the majority in *Ross* specifically declined to disturb *Bell II*. *Ross*, 2019 ME 45, ¶ 33, 206 A.3d 283. Were the Court to agree with the Attorney General, it would have to explicitly overrule *Bell II*.

2. Overruling Longstanding Precedent Regarding Public Use of the Intertidal Zone Would Destabilize Property Throughout the State and Effect an Unconstitutional Taking Up and Down Maine's Coastline

Having established that neither Appellants nor the Attorney General can prevail on any of their points unless this Court overrules longstanding precedent, the next question is whether the Court should do so. Overruling precedent is disfavored—as this Court has explained, "[i]t is the historic policy of our courts to stand by precedent and not to disturb a settled point of law." *Myrick v. James*, 444 A.2d 987, 997 (Me. 1982). It follows that the Court will "not disturb a settled point of law unless 'the prevailing precedent lacks vitality and the capacity to serve the interests of justice.'" *Bourgeois v. Great Northern Nekoosa Corp.*, 1999 ME 10, ¶ 5, 722 A.3d 369 (quoting *Myrick*, 444 A.2d at 1000).

Myrick propounded a list of considerations relevant to overruling precedent. Overruling may be appropriate where (1) "the conditions of society change to such an extent that past judicial doctrines no longer fulfill the needs of a just and efficient system of law," *Myrick*, 444 A.2d at 998 (quoting *Davies v. City of Bath*, 364 A.2d

1269, 1273 (Me. 1976)), (2) the change would "avoid the charge of creating 'a cultural lag of unfairness and injustice,'" *id*. (quoting *Moulton v. Moulton*, 309 A.2d 224, 228 (Me. 1973)), and (3) "the authorities supporting the prior rule have 'been drastically eroded, [and] ... the suppositions on which it rested are disapproved in the better-considered recent cases and in authoritative scholarly writings, and ... the holding of the [prior] case is counterproductive' to its purposes," *id.* at 998–99 (quoting *Black v. Solmitz*, 409 A.2d 634, 639 (Me. 1979)).

In a typical case, these considerations no doubt strike a balance between the virtues of predictability and the need to avoid the entrenchment of unwise common law rules. But this is not a typical case. The rules of law Appellants and the Attorney General seek to upend would substantially diminish the property rights not only of Judy's Moody and the other Appellees, but of thousands of non-party coastal owners throughout Maine. Even if Appellants' most farfetched arguments were correct as an original matter—and as we shall see later, they are not—Maine property owners have held the rights this Court's cases have recognized for centuries. Overruling this precedent now would not only be a mistake—it would effect a taking of coastal property up and down the coastline.

A. Stare decisis is conclusive in cases affecting property rights

Long ago, the Supreme Court of the United States observed that "[w]here questions arise which affect titles to land it is of great importance to the public that

when they are once decided they should no longer be considered open." *Minn. Mining Co. v. Nat'l Mining Co.*, 70 U.S. (3 Wall.) 332, 334 (1865). As it explained, court opinions become retrospective "rules of property" that "may affect titles purchased on the faith of their stability." *Id.* To avoid that fate, "[d]oubtful questions on subjects of this nature, when once decided, should be considered no longer doubtful or subject to change." *Id.* Any other rule would encourage "parties to speculate on a change of the law" and compel courts to "bear the infliction of repeated arguments by obstinate litigants, challenging the justice of their well-considered and solemn judgments." *Id.*

Though issued just months after the conclusion of the Civil War, the *Minnesota Mining* Court could have been writing about this case. While private ownership below the high-water mark might have once been doubtful in Massachusetts or in Maine, that time has long since passed. *See Bell I*, 510 A.2d at 513–14 (citing *Barker v. Bates*, 30 Mass. (13 Pick.) 255, 258 (1832)). Appellants are about 200 years too late to mount a credible challenge to private ownership of the intertidal zone. And while the scope of public rights in the intertidal zone has been subject to much litigation over the years, it has long since been settled that these rights are limited to activities related to fishing, fowling, and navigation, and that neither the legislature nor this Court could alter that rule without compensating affected landowners. *Bell II*, 557 A.2d at 173, 178–79. The divided nature of the

decisions in *Bell II*, *McGarvey*, and *Ross* has only encouraged more litigation, apparently premised on little more than hope that new justices will do what previous justices did not.

This Court should diffuse the speculation. It could do so simply by adopting Justice Levy's *McGarvey* concurrence, which recognized that "[s]ociety's interest in being able to rely on established precedent is at its apex with regard to judicial precedents that exposit property rights." *McGarvey*, 2011 ME 97, ¶ 64, 28 A.3d 620 (Levy, J., concurring). Beginning with *Minnesota Mining*, a long line of Supreme Court of the United States precedent supports Justice Levy's conclusion that "[l]egal questions affecting ownership of land, once answered, "'should be considered no longer doubtful or subject to change.'" *Id.* (quoting *United States v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486–87 (1924)); *see also Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93, 110 (2014) (rejecting the government's attempt to recharacterize a property interest that the Court had previously recognized, "especially given 'the special need for certainty and predictability where land titles are concerned,'" (quoting *Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979)); *Nordlinger v. Hahn*, 505 U.S. 1, 12–13 (1992) (sustaining California's system of property tax assessment against an Equal Protection challenge in part because "an existing owner rationally may be thought to have vested expectations in his property or home that are more deserving of protection than the anticipatory expectations of

a new owner at the point of purchase"); *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) ("Considerations in favor of stare decisis are at their acme in cases involving property and contract rights, where reliance interests are involved"); *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972) ("It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."). Outside of Maine, many state high courts have also recognized the inviolability of property rights precedents. *See, e.g.*, *Bogle Farms, Inc. v. Baca*, 122 N.M. 422, 430 (1996) (when it comes to "rules affecting property or commercial transactions, adherence to precedent is necessary to the stability of land titles and commercial transactions entered into in reliance on the settled nature of the law."); *Giles v. Adobe Royalty, Inc.*, 235 Kan. 758, 767 (1984) (declining to give decision retroactive effect because "[s]uch action would force a re-examination of the title to all Kansas real estate"); " *Bott v. Comm'n of Nat. Res.*, 327 N.W.2d 838, 849 (Mich. 1982) (stare decisis must "be strictly observed where past decisions establish rules of property that induce extensive reliance").

Granting any of the relief Appellants or the Attorney General seek would shatter the reliance Judy's Moody and thousands of other property owners in Maine have placed in this Court's precedents. But more than that, it would place coastal ownership in Maine in a constant state of limbo, subject only to the whims of four members of this Court at any given time. *See McGarvey*, 2011 ME 97, ¶ 67, 28 A.3d

620 (once this Court replaced the traditional common law with an evolving standard, public rights "would be bounded only by what a majority of the Court determines to be reasonable at any given time"). After all, if Appellants succeed here, that will not be the end of the matter. Just as back lot owners and access advocates brought this suit against all prevailing precedent, so too will beachfront owners try to convince this Court to swerve back in their direction next time the Court's composition changes. If the State—or the Town of Wells—wants Moody Beach to be public, it can obtain through eminent domain either a public recreational easement or the fee title to the high-water mark. But until it has done so, the people of Maine would be better served if this Court retains its longstanding precedent.

B. Overruling longstanding precedent confirming private property rights would effect a taking of property without compensation up and down Maine's coastline

Stare decisis is typically a matter of prudence. Judges follow what has come before to promote the values of stability and predictability while avoiding the appearance of arbitrary decisionmaking. But when a decision is so manifestly wrong or unworkable that it should no longer remain the law, they retain the power to overrule it and chart a new course. Doing so does not typically offend the Constitution.

Matters affecting property rights are different because both the United States Constitution and Maine Constitution limit the government's power to take property

without compensating the owner. The United States Constitution provides "nor shall private property be taken for public use, without just compensation," while the Maine Constitution's analog says that "[p]rivate property shall not be taken for public uses without just compensation; nor unless the public exigencies require." U.S. Const. amend. V; Me. Const. art I. § 21. The Supreme Court of the United States has made clear that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Knick v. Twp. of Scott*, 588 U.S. 180, 189 (2019). In short, a decision of this Court that purports to transform private property into public property without compensation" would effect a taking. *Webb's Fabulous Pharmacies Inc. v. Beckwith*, 449 U.S. 155, 164 (1980).

First, the judiciary is not exempt from the constitutional prohibition on the taking of property without compensation. Just as the *Bell II* Court understood 35 years ago, the Takings Clause "constrains the government without any distinction between legislation and other official acts." *Sheetz v. El Dorado Cnty.*, 601 U.S. 267, 277 (2024); *see also Bell II*, 557 A.2d at 176 ("The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation."). Indeed, this understanding is why some state high courts have chosen to apply conclusive stare decisis in property cases rather than consider a change in the law that would result

in a taking. For example, the Michigan Supreme Court in *Bott* declined to expand public recreational access to lakes because to do so would risk upsetting well-settled property expectations and amount to "eliminating a property right without compensation." *Bott*, 327 N.W.2d at 849–50; *see also id.* at 852 (noting that an earlier case, *Hilt v. Weber*, 233 N.W. 159 (Mich. 1930), had overruled a series of cases "because, among other things, they worked severe injustice and constituted a judicial 'taking' without compensation"). And the Oregon Supreme Court refused the State's invitation to hold that rapid avulsion transformed private land into State property because such a decision "would raise serious questions about the taking of private property for public use without compensation." *State v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1363 (Or. 1978) (citing *Hughes v. Washington*, 389 U.S. 290, 296–98 (1967) (Stewart, J., concurring)). But now the highest court in the land has confirmed this understanding. This Court cannot adopt an understanding of Maine common law that would take Judy's Moody's property—and the property of the other Appellees and thousands of nonparties across the state—without compensation.

Second, a declaration that the State owns the intertidal zone would be what the Supreme Court has called the "paradigmatic taking"—"a direct government appropriation ... of private property." *Lingle v. Chevron U.S.A.*, 544 U.S. 528, 537 (2005). What was once Judy's Moody's fee title to the intertidal zone would become

the State's. *See Bell II*, 557 A.2d at 169 (confirming that Moody Beach owners hold fee title to the intertidal zone). This simply cannot be accomplished without just compensation. *See Lingle*, 544 U.S. at 537. Yet this Court lacks the power of the purse. *See Matter of Benoit*, 487 A.2d 1158, 1172–73 (Me. 1985) (discussing the constitutional provision prohibiting the legislature from adjusting judicial salaries as a means to "protect the separate Third Branch from the legislative powers of the purse"). A decision declaring State ownership of the intertidal zone throughout Maine might only be constitutional if accompanied by the legislature's provision of compensation for all affected landowners. The expenditure of such sums would surely be a matter of great public concern among Mainers, not all of whom might wish to spend so much money on beach property when the State already has many public beaches. But absent provision of compensation, this Court cannot declare State ownership of private property.

This remains true even if Appellants are correct about the Equal Footing Doctrine or the original interpretation of the Colonial Ordinance (although they're not, see *infra*). Even if *Lapish* was wrong to incorporate the Colonial Ordinance into Maine common law, the property rights this Court recognized are now so well established that they cannot be taken without compensation. As this Court long ago understood, the Colonial Ordinance "was not merely an enactment. It was a declaration of existing claimed rights and liberties." *Conant v. Jordan*, 107 Me. 227,

77 A. 938, 938 (1910). Some of those—like the right to fish in the State's Great Ponds, *see id.*—are rights the public enjoys in common. But others, like the Ordinance's recognition of private title to the low-water mark, were for the benefit of private owners. These rights are equally well established. And if "a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Env't Prot.*, 560 U.S. 702, 715 (2010) (plurality opinion) (emphasis deleted).[7]

Third, even maintaining private ownership, an expansion of public rights in the intertidal zone likewise would effect a taking. Dating back to before statehood, coastal owners in Maine have enjoyed the right to exclude the public from trespassing on their private intertidal land, subject only to a "reserved public easement limited to fishing, fowling, and navigation." *Bell II*, 557 A.2d at 176. Appellants' proposal would eviscerate this right, effectively transforming Moody Beach and other similarly situated places into public beaches and leaving Judy's Moody with mere naked title to its intertidal land. Neither this Court nor the State in general can accomplish this result without compensating the landowners.

[7] While only four justices joined Justice Scalia's plurality opinion in *Stop the Beach*, the Court unanimously incorporated the opinion's analysis last term in *Sheetz*. 601 U.S. at 276–77.

"The right to exclude is 'one of the most treasured' rights of property ownership," one that is "universally held to be a fundamental element of the property right." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 149–50 (2021) (quoting *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982), and *Kaiser Aetna v. United States*, 444 U.S. 164, 179–80 (1979)). The Supreme Court of the United States has treated it as such. In *Cedar Point*, it held that a California regulation that required agricultural employers to permit union organizers onto their property for three hours per day, 120 days per year "appropriates a right to invade the growers' property and therefore constitutes a per se physical taking." *Id.* at 149. In *Nollan v. California Coastal Commission*, 483 U.S. 825, 831 (1987), it recognized that the California Coastal Commission could not require a beachfront property owner to grant a public easement across his private beach without compensation. In *Loretto*, it found an imposition of cable equipment no larger than "a child's building block" in an apartment effected a per se physical taking. 458 U.S. at 438 (describing the equipment and explaining that the "cable installation on appellant's building constitutes a taking under the traditional test"); *id.* at 448 n.6 (Blackmun, J., dissenting) (comparing the size with the child's block). And in *Kaiser Aetna*, the Court held that the government could not declare a public navigational servitude over a private marina "without invoking its eminent domain power and paying just compensation." 444 U.S. at 180. Simply put, the government cannot appropriate a

private owner's right to exclude without paying for it. *Cedar Point*, 594 U.S. at 149 ("Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude."); *Kaiser Aetna*, 444 U.S. at 179–80 (the right to exclude "falls within this category of interests that the Government cannot take without compensation").

Bell II's decision to invalidate the legislature's attempt to declare a public recreational easement in the intertidal zone is consistent with these precedents. Consistent with *Kaiser Aetna*, *Nollan*, and *Cedar Point*, *Bell II* understood that declaring public access to private property is a *per se* physical invasion taking rather than a regulatory restriction on the use of private property. *See Bell II*, 557 A.2d at 178. Courts typically evaluate takings challenges to use restrictions under a multifactor test derived from the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). *See Cedar Point*, 594 U.S. at 148 ("To determine whether a use restriction effects a taking, this Court has generally applied the flexible test developed in *Penn Central*, balancing factors such as the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action."). But this ad hoc test does not apply when the government takes the owner's right to exclude. Instead, "[w]henever a regulation results in a physical appropriation of property, a per se taking has occurred, and *Penn Central* has no place." *Id.* at 149.

Cedar Point confirmed that *Bell II*'s takings analysis was correct. This Court should reaffirm it even irrespective of stare decisis concerns.

The Masucci Appellants say that "[t]he legal authority relied upon in *Bell II* is easily distinguished in the public trust context, wherein there is already a physical invasion and easement." Masucci Blue Br. at 48. But they provide no authority for the proposition that because limited public rights already exist, the government may take more public rights without paying just compensation. This novel theory would enable the government to strip a private owner's right to exclude for only a pittance by condemning a limited public easement at first, taking the rest for free later once the initial condemnation had undermined the owner's right to exclude. Yet the right to exclude is not "an empty formality, subject to modification at the government's pleasure." *Cedar Point*, 594 U.S. at 158. The public's right to a slice of cake does not allow the government to take the rest of the cake for no charge.

Perhaps the closest Appellants come to supporting their theory is *PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980). It is true that *PruneYard*'s analysis—and its holding that a state may require a private shopping mall generally open to the public to allow individuals to pass out leaflets, *id.* at 78, 83—stands in some tension with the Supreme Court's precedent protecting the right to exclude. Yet that is why the Court has repeatedly marginalized *PruneYard*'s holding, confining it to situations where the property owner already held his property open to

the general public. *Cedar Point*, 594 U.S. at 156–57; *Horne v. Dep't of Agric.*, 576 U.S. 350, 364 (2015); *Nollan*, 483 U.S. at 832 n.1. Judy's Moody, of course, does not hold its property open to the public as a commercial proprietor would, and the license state law gives the public is substantially narrower than the one a commercial shopping mall voluntarily grants to its customers.[8]

Maybe more to the point is that the public rights protected under the common law's reference to the Colonial Ordinance function as "longstanding background restrictions on property rights." *Cedar Point*, 594 U.S. at 160. That a property owner lacks the right to exclude individuals who "enter property in the event of public or private necessity" or "to effect an arrest or enforce the criminal law" does not erode his right to exclude the rest of the world from engaging in activities that are not "traditional common law privileges to access private property." *Id.* at 160–61. No property owner ever had the right to exclude these invasions in the first place. *See id.* In Maine, these common law privileges include the Colonial Ordinance triad of fishing, fowling, and navigation, but they do not include general recreation or "ocean-based activities." *McGarvey*, 2011 ME 97, ¶ 51, 28 A.3d 620 (opinion of

[8] The Masucci Appellants seem to argue that the potentially broad nature of the protected public uses of private intertidal land render the land open to the public in the same way as the shopping mall in *PruneYard*. But members of the public may visit shopping mall for any reason or no reason, while the public rights recognized in the intertidal zone are for limited purposes only. And Judy's Moody cannot truly be said to "hold open" its intertidal property even for these limited purposes—it does so only because its title is burdened by these public rights. For all other purposes, it retains the right to exclude. To say otherwise would blow a large hole in the Supreme Court's protection of the right to exclude.

Saufley, C.J.). So while Judy's Moody never had the right to exclude the public from engaging in fishing, fowling, and navigation in the intertidal zone, it does have the right to exclude the public from engaging in recreational activities that do not fit within those parameters as the common law has defined them.[9] Taking that right without compensation is unconstitutional.[10]

The same is true of the Attorney General's more modest argument that walking along the intertidal zone is a protected public right. While the Attorney General prudently argues that walking should be understood as a component of navigation,[11] it is already well-established that walking is *not* a protected use of the intertidal zone. *Bell II*, 557 A.2d at 175–76. Were this Court to rule otherwise now, it would still require a declaration of public rights that have never before existed.

[9] It likely goes without saying, but the same analysis applies to Appellants' urging that the Court overrule *Ross* and permit harvesting rockweed in the intertidal zone. This is an even broader request, as even Chief Justice Saufley's application of her own approach would not expand public rights so far. *Ross*, 2019 ME 45, ¶ 43, 206 A.3d 283 (Saufley, C.J., concurring in part) ("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").

[10] The Masucci Appellants and Delogu also argue that the legislature has discretion to expand public trust rights. This same analysis precludes that result. Expanding public rights in the intertidal zone without compensating landowners is a taking, whether the legislature or this Court does it. *See Sheetz*, 601 U.S. at 276–77. And Delogu's argument that the Supreme Court has never characterized a "public use right" as a physical invasion of private property, Delogu Blue Br. at 62–63, borders on the frivolous. The Supreme Court did just that in *Cedar Point*, *Nollan*, and *Kaiser Aetna*.

[11] The Attorney General's argument that this Court has "retreated" from the common law formulation it described in *Bell II* is incorrect. As noted in the first section, Chief Justice Saufley's separate opinions in *McGarvey* and *Ross* had the support of only three justices and do not represent any doctrinal change. It is true that several justices have expressed disagreement with *Bell II*'s statement of longstanding common law, but it is not true that the *Court* has retreated from *Bell II*. And it certainly has not repudiated *Bell II*'s direct holding that "recreational walking" is not a protected public use of intertidal land.

That is no less a taking of Judy's Moody's right to exclude than is the imposition of a public recreational easement. Although the compensation due for the narrower easement might be substantially less, the government still cannot take it for free. *See Cedar Point*, 594 U.S. at 153 ("The duration of an appropriation—just like the size of an appropriation—bears only on the amount of compensation." (citation omitted)).

* * *

There are many reasons this Court should not entertain Appellants' jarring request to overrule centuries of precedent about the ownership of intertidal land in Maine. But even if the Court were inclined to do so, it could not without imposing upon the State the obligation to pay for the property rights taken from Judy's Moody, the other Appellees, and thousands of nonparty coastal owners. For this reason alone, the Court should affirm the judgment below.

3. Appellants' Position on Intertidal Ownership Is Wrong as an Original Matter

There is no way around the fact that Appellants ask this Court to disregard two centuries of precedent to hold that Maine should have had title to intertidal land since statehood—or before. Yet even if we were to ignore or minimize that precedent, it doesn't follow that this Court should or would adopt Appellants' position. Even leaving the world of settled precedent (which, again, we should not

do when considering long-settled property rights), Appellants' arguments fall flat. This Court should reject them even if it were writing on a blank slate.

Appellants' arguments boil down to two propositions. First, Appellants urge that the Colonial Ordinance did not grant or recognize private title to intertidal lands, but only a license that may be revoked by the State at any time. Second, they maintain that the Equal Footing Doctrine establishes state ownership and overrides any pre-statehood instruments that might have granted title to private owners. Neither argument would be persuasive even if Appellants were not faced with dozens of contradictory cases from both Maine and Massachusetts.

A. The Colonial Ordinance granted upland owners title to the intertidal zone, and Maine was well within its rights to recognize this

The Colonial Ordinance declared that "in all creeks, coves, and other places, about and upon salt water where the sea ebbs and flows, the Proprietor of the land adjoyning shall have proprietie to the low water mark where the Sea doth not ebb above a hundred rods, and not more wheresoever it ebbs farther." *Bell II*, 557 A.2d 182 (Wathen, J., dissenting) (reciting the Colonial Ordinance included in Section 2 of the "liberties common"); *McGarvey,* 2011 ME 97, ¶ 26 n.10, 28 A.3d 620 (reciting the Colonial Ordinance included in the 1658 edition of *The Laws and Liberties of Massachusetts)*. It then protected the public's right to navigation by ensuring that the owner "shall not by his libertie have power to stop or hinder the

passage of boats or other vessels in, or through any sea creeks or coves to other mens houses or lands." *Id.* Further passages ensured the public's right to fish or fowl in these waters, and the public right to "pass and repasse on foot through any mans proprietie for that end." *Bell II*, 557 A.2d 182.

The plain language of the Ordinance supports the unanimous conclusion of Maine and Massachusetts courts that it recognized private fee title to the intertidal zone. The structure of the Ordinance does not support the argument that it conveyed a mere license to use the land above the low-water mark for the purpose of building wharves and the like. Although the colonial authorities surely did intend to foster commerce, *see Storer*, 6 Mass. at 438; *Opinion of the Justices*, 437 A.2d at 605, the *means* chosen to advance those ends was to grant private title subject to a reservation of public rights. That is why the Ordinance first declares that the proprietor of the upland parcel shall also be the proprietor down to the low-water mark. Instead of starting from the premise that the intertidal land should be public and granting a license to private individuals, the Ordinance began by making it private and proceeded to recognize a limited public license consistent with the colony's public trust obligations.

Resisting this conclusion, Appellants rely on *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387 (1892). That case is of limited value. *Illinois Central* involved a dispute between a private railroad company and the state of Illinois over title to

submerged portions of Lake Michigan. The company's claim was grounded in a state statute that granted "all the right and title of the state of Illinois in and to the submerged lands constituting the bed of Lake Michigan ... in fee to the said Illinois Central Railroad Company" subject to a restriction that the company could not sell it. *See id.* at 448–49. Illinois argued that the legislature lacked the power to make such a conveyance of submerged land to a private owner.

The Court ultimately agreed with Illinois, but only after it recognized the "settled law in this country" that ownership of the tidelands "belong[s] to the respective states within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters." *Id.* at 435. Indeed, the majority understood that granting private property rights over submerged land may in many instances *enhance* the people's enjoyment of the public rights of navigation and commerce. *See id.* at 452. But it seemed to construe the grant at issue in the case as too broad, because it would "sanction the abdication of the general control of the state over lands under the navigable waters of an entire harbor or bay, or of a sea or lake." *Id.* at 452–53. That's why it held that the legislature's purported grant to the railroad must have been a revocable license. *See id.* at 453 ("A grant of all the lands under the navigable waters of a state has never been adjudged to be within the legislative

power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.").[12]

Illinois Central cannot possibly stand for the proposition that the Colonial Ordinance, too, must have been a mere license. For one, the Supreme Court has repeatedly recognized the propriety of Maine's rule that upland owners hold title to the low-water mark. Just two years after *Illinois Central*, the Court remarked that "[t]he rule or principle of the [Colonial Ordinance] has been adopted and practiced on in Plymouth, Maine, Nantucket, and Martha's Vineyard, since their union with the Massachusetts colony under the Massachusetts province charter of 1692." *Shively v. Bowlby*, 152 U.S. 1, 19 (1894). Almost a century later, it again noted that "many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 483 (1988) (citing *Storer*, 6 Mass. at 438, among others). Though these proclamations may technically have been dicta, they are consistent

[12] The ultimate holding confused the dissent, which wondered why the general rule that states may alienate public trust land would not apply to the legislature's grant of fee title to Illinois Central. *See Illinois Central,* 146 U.S. at 467 (Shiras, J., dissenting) ("[I]t is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable.").

with *Illinois Central* and strong evidence that the Court itself does not read that case to prohibit States from recognizing private ownership of the intertidal zone.[13]

Put simply, the Supreme Court has itself distinguished the private title granted by the Colonial Ordinance and recognized in Maine common law from the attempted grant in *Illinois Central*. That case has never been read to prohibit States from granting private owners fee title in intertidal land, so long as the rights of the public are preserved. Appellants' reading of *Illinois Central* clashes not only with centuries of Maine and Massachusetts precedent, but with the long held understanding of the Supreme Court of the United States.

B. The Equal Footing Doctrine does not prevent Maine from choosing to continue the pre-statehood rule recognizing private title in the intertidal zone

Finally, Appellants lean on the Equal Footing Doctrine, asserting that Maine courts have always been wrong in permitting private ownership of the intertidal zone. But Equal Footing does not mean what Appellants think it means. Even if one accepts the dubious premise that title to all intertidal land within Maine reverted to the State in 1820 even though Massachusetts had recognized private title in those

[13] Appellants suggest that only the legislature can recognize private ownership of public trust lands. They describe this as a sort of separation of powers problem. But the Supreme Court of the United States has long understood that States may do this through common law as well. *See Shively*, 152 U.S. at 18 ("but the nature and degree of [private] rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only"); *see also infra* Part III.1.B. Massachusetts and Maine courts did not *create* private title below the high-water mark, but simply recognized its existence. *See Storer*, 6 Mass. at 438 ("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").

lands, *but see Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198, 205, 209 (1984) (California could not assert public trust over tidelands on parcel derived from a pre-statehood Mexican land grant when it failed to assert its interest in federal patent proceedings),[14] nothing would have prevented Maine from recognizing private ownership on its own, as this Court did in 1831.

It is well established that disposition of equal footing lands after statehood is a matter of state law. As the Supreme Court explained, "[u]pon statehood, the State gains title within its borders to the beds of waters then navigable," but "[i]t may allocate and govern those lands according to state law" subject only to the United States' interest in interstate and foreign commerce. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012). Thus, even if none of the pre-statehood instruments were effective—and even if the Colonial Ordinance had never existed—this Court would have been well within its rights in *Lapish* to declare that private upland owners may hold title to the low-water mark subject to the preservation of certain public rights. The Michigan Supreme Court did precisely this in the 21st century, resolving a dispute over the ownership of the shore of Lake Michigan by recognizing private title to the low-water mark subject to a limited public trust easement up to the high-water mark. *Glass v. Goeckel*, 703 N.W.2d 58, 71, 74–75 (Mich. 2005).

[14] *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), on the other hand, seems to stand only for the proposition that "[t]he Federal Government ... cannot dispose of a right possessed by the State under the equal-footing doctrine of the United States Constitution." *Summa Corp.*, 466 U.S. at 205 (citing *Pollard*).

It is true that the Indiana Supreme Court in *Gunderson v. State*, 90 N.E.3d 1171 (Ind. 2018), found Indiana holds exclusive title to the shore of Lake Michigan up to the high-water mark. But the *Gunderson* court did not imagine that the Equal Footing Doctrine compelled this result. Rather, equal footing merely established that Indiana gained exclusive title to the high-water mark when it achieved statehood. *See id.* at 1181 ("We hold that ... Indiana at statehood acquired equal-footing lands inclusive of the temporarily-exposed shores of Lake Michigan up to the natural OHWM."). *Gunderson* agreed that what happens next is a matter of state law. *Id.* at 1182 (citing *Phillips Petroleum*, 484 U.S. at 475). And as a matter of state law, the court distinguished—however unpersuasively—nineteenth century precedent establishing that private owners could hold title to the beds of the Ohio River down to the low-water mark, simply finding that the rule in those cases "has no application to other equal-footing lands within Indiana, including the shores of Lake Michigan." *Id.* at 1184. The Equal Footing Doctrine compelled none of this—the court just as easily could have found the rule applicable and declared that lakefront owners own to the low-water mark, just as it had done in the river cases.[15]

[15] After *Gunderson*, property owners sued in federal court arguing that Indiana had taken their land below the lake's high-water mark. Aside from problems of federal jurisdiction, the district court was skeptical of their takings claim because it thought that "the *Gunderson* decision [was] not a radical departure from previously well-established property law in Indiana." *Pavlock v. Holcomb*, 532 F.Supp.3d 685, 701 (N.D. Ind. 2021), *aff'd* 35 F.4th 581 (7th Cir. 2022). The same is not true here, where private ownership of the intertidal zone has been established for centuries.

Glass and *Gunderson* represent two different choices under state law. Even leaving aside pre-statehood history, *Lapish* chose a path similar to *Glass*. Nothing in federal law precludes that choice. Simply put, the Equal Footing Doctrine has nothing to say about the correctness of this Court's precedent recognizing private ownership of the intertidal zone.

IV. CROSS-APPEAL

The Superior Court erred in failing to dismiss for lack of standing the claims Plaintiffs Peter and Kathy Masucci, William Connerney, and Orlando Delogu asserted in Count IV of their Complaint. As the basis for the error, Judy's Moody joins and incorporates herein the arguments advanced by the other beach Appellees (OA 2012 Trust and Ocean 503 LLC) on this issue.[16]

For the reasons expressed more fully in OA 2012 Trust's brief, Judy's Moody also states (1) that by not briefing the issue, the other Plaintiffs have waived any claim that the Superior Court erred in dismissing their claims against Judy's Moody for lack of standing, (2) that as an alternative ground for affirming the judgment entered below on Counts I–III and Count V is that all of the Plaintiffs lack standing and/or failed to include necessary parties given the scope of declarative relief they seek, of "State-wide" effect; (3) that as the Attorney General has conceded, if none

[16] As it did below, Judy's Moody also argues that only the State may assert whatever public trust interest it might have in the intertidal zone. *See Weeks v. Smith*, 81 Me. 538, 18 A. 325, 326 (1889); *see also Parker v. Town of Milton*, 726 A.2d 477, 481 (Vt. 1998). It incorporates the argument of the other beach Appellees on this point as well.

of the Plaintiffs have standing, the Attorney General, having made no claims of its own, has no basis to seek relief; (4) that the Superior Court did not err in denying Plaintiffs and the Attorney General's motions for summary judgment; and (5) that the Attorney General lacked any basis to seek relief different than that sought by the Plaintiffs given that the Attorney General did not assert any claims of his own.

V. CONCLUSION

For the reasons stated above, and those stated by the other Appellees which Judy's Moody incorporates by reference, this Court should affirm the judgment below.

Dated: August 2, 2024

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CERTIFICATE OF SERVICE

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

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