**MAINE SUPREME JUDICIAL COURT**
**SITTING AS THE LAW COURT**

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**DOCKET NO. CUM-24-82**

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**PETER MASUCCI et al.**

*Plaintiffs/Appellants*

v.

**JUDY'S MOODY LLC, et al.**

*Defendants/Cross-Appellants*

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**APPEAL FROM THE CUMBERLAND COUNTY SUPERIOR COURT**

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# BRIEF OF CROSS-APPELLANT OCEAN 503, LLC

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## STATEMENT OF FACTS

### I. Factual Background

Ocean 503, LLC, ("Ocean 503") is a Maine limited liability company that holds title to real property located at 503 Ocean Avenue, Wells, Maine, (the "Ocean 503 Property") on the beachfront of Moody Beach. (A. 755.) The Property abuts a public way leading from Ocean Avenue to Moody Beach. (A. 756.) Mark Montesi ("Mr. Montesi") and Corliss Montesi ("Ms. Montesi) (together the "Montesis") are the only members of Ocean 503. (A. 755.) The Montesis spend about twenty percent of the year at the Ocean 503 Property and they do not rent it out to third parties. (A. 756.)

In the four or so years since they purchased the Ocean 503 Property, the Montesis and their invitees have never confronted any members of the public regarding the public's use of the intertidal zone of the Ocean 503 Property. (A. 757.) Nor have the Montesis ever asked anyone to leave or move, or called law enforcement regarding public activity within the intertidal zone. (A. 757.) As a former public-school teacher with years of experience, Mr. Montesi testified that he would never ask a child not to build a sandcastle on the Ocean 503 Property. (A. 758.)

Many beachfront properties on Moody Beach have signs indicating that Moody Beach is a private beach. (A. 756.) On the seawall surrounding a portion

of the Ocean 503 Property, there are two such signs, one of which reads "Private beach" and another which reads "Moody Beach is a private beach to the low water mark – no loitering" (the "Signs"). (A. 756.) Mr. Montesi defines "loitering" as "coming together for no purpose at all." (A. 756.)

One of these Signs faces a public way abutting the Ocean 503 Property. (A. 756.) The Signs were posted due, in part, to a concern that children would climb the seawall and injure themselves. (A. 756.) Mr. Montesi, in fact, does not have an issue with members of the public recreating or sitting within the intertidal zone of the Ocean 503 Property for the purpose of enjoying the beach, provided that no one is breaking any laws. (A. 757.)

Despite all of this, twenty-four plaintiffs ("Plaintiffs") named Ocean 503 as a defendant in a five-count Complaint seeking a declaratory judgment that (a) the State of Maine—and not Ocean 503—holds title to Ocean 503's intertidal land, and (b) "the public trust extends to whatever the state sees fit to allow and regulate exercising its sovereign police power and through its own legislative and regulatory processes" (the "Complaint"). (*See generally* A. 120-41.) Plaintiffs are individuals who engage or seek to engage in various activities on intertidal lands along Maine's coast, including "enjoying Maine's beaches"; harvesting seaweed; conducting research; and harvesting clams and shellfish. (A. 122-28.) Plaintiffs' request for declaratory judgment stemmed

from what they perceived to be "Defendants' unlawful claims to title over Maine's intertidal land." (A. 173.) In the Complaint, however, Plaintiffs did not allege specific activities in which they had engaged in the intertidal zone of the Ocean 503 Property or the ways in which Ocean 503 had prevented them from engaging in any activities, apart from the two Signs surrounding the Ocean 503 Property. (*See generally* A. 120-41.)

Ultimately, Plaintiffs' belief that Ocean 503 had actively asserted its rights against members of the public was unsubstantiated. (*See* A. 755-62.) Through discovery, Ocean 503 learned that twenty of the twenty-four Plaintiffs had never been to the Ocean 503 Property. (A. 759.) Only three Plaintiffs testified that they were certain they had been physically present within the intertidal zone of the Ocean 503 Property and none of them were familiar with the Montesis.[1] (A. 758-59.) Furthermore, of these three Plaintiffs, no one had ever been confronted or asked to leave the intertidal zone of the Ocean 503 Property, despite having engaged in activities on the Property. (A. 759.) Nor did these Plaintiffs have any personal knowledge of a single instance of Ocean 503 or anyone associated with Ocean 503 confronting any members of the public regarding their use of the intertidal zone. (A. 759.)

[1] The fourth Plaintiff, Orlando Delogu, testified that he had likely been on the Ocean 503 Property by virtue of the fact that he had walked the entirety of Moody Beach, but he was unable to identify the Ocean 503 Property. (A. 759.)

Despite their initial claims that the Signs deterred activity, Plaintiffs testified that, in fact, the Signs had not deterred them from continuing to engage in activity in the intertidal zone of the Property. (A. 760.) Specifically, the three Plaintiffs who had been to the Ocean 503 Property continued to walk on the intertidal zone, one as recently as one week prior to his deposition. (*See* A. 758-59.) Another Plaintiff played bocce ball in the intertidal zone of the Ocean 503 Property on numerous occasions the prior summer, despite having seen the Signs. (A. 760.) At worst, the Signs made one Plaintiff aware that he might be on the Ocean 503 Property, but this did not prevent him from continuing to engage in movement-based activity. (A. 760.) Plaintiffs testified that, in actuality, they selected Ocean 503 as a defendant in this matter due to the location of the Ocean 503 Property, the presence of these Signs, and the size of the house indicating that Ocean 503 was "not there on a shoestring." (A. 757.)

## II. Procedural History

On April 22, 2021, the Plaintiffs filed the five-count Complaint against seven named defendants ("Defendants"), including Ocean 503. (A. 15; *see* A. 120-41.) Count II of the Complaint asserts that the State of Maine, pursuant to the equal footing doctrine, holds title to the intertidal land (A. 138), and Count III asserts that this Court violated constitutional principles when it held otherwise (*see* A. 138-39). Notably, Counts II and III do not assert causes

of action but instead set out legal theories in furtherance of Count V, which contends that Defendants' respective deeds do not convey title to the intertidal land. (*See* A. 139-40.) Count I of the Complaint requests a declaratory judgment that the court's prospective ruling will have "statewide effect insofar as the property interests of upland owners not party to these proceedings are identical with the property interests of the Defendants in this case." (A. 137.) Count IV asserts that "the public trust extends to whatever the state sees fit to allow and regulate exercising its sovereign police power and through its own legislative and regulatory processes." (A.139.) In sum, Plaintiffs sought a declaratory judgment that, in effect, would declare the State of Maine—not Defendants—holds title, in fee, to the intertidal zone, and that the public may use the intertidal zone for whatever activities the State sees fit to allow, potentially expanding the public trust doctrine well beyond fishing, fowling, and navigation. (*See* A. 120-41.)

Ocean 503 filed its Motion to Dismiss and Incorporated Memorandum of Law On May 28, 2021 ("Ocean 503's Motion to Dismiss").[2] (A. 26, 172-85.) Ocean 503's Motion to Dismiss asserted that (a) Plaintiffs do not have standing to bring the claims set forth in the Complaint, and (b) even if Plaintiffs had

[2] Other Defendants also filed motions to dismiss the Complaint. (*See generally* A. 25-26, 31, 142-255.)

standing, their claims must fail as a matter of law. (*See generally* A. 172-85.) The Superior Court (Cumberland County, *O'Neil, J.*) entered its order on Ocean 503's Motion to Dismiss on April 19, 2022. (A. 30, 54-80.) The court found that only a subset of Plaintiffs had standing to maintain an action against Defendants, which it categorized as "(a) those who have had their access to the intertidal zone for recreational purposes significantly restricted as a result of intertidal jurisprudence . . . ; and (b) those who operate in Maine's marine economy and have had their business interests affected by the same."[3] (A. 57-58.)

The court also concluded that Count V of the Complaint sought a declaration to quiet title to the intertidal lands adjacent to the Ocean 503 Property. (A. 76-77.) The court thereafter concluded that Count V was barred by the statute of limitations. (A. 77.) The court also concluded that Counts I, II, and III failed as a matter of law because the questions had already been "asked and answered." (A. 73-76 & n.6.) With respect to Count IV, despite noting that "it is not clear from the [C]omplaint itself what activities Plaintiffs prefer to engage . . . in the intertidal area," the court applied an "expansive and broad approach" to determine that Plaintiffs might be alleging movement- or

[3] The court found that Charles Radis, Sandra Radis, and Bonnie Tobey all lacked standing. (A. 58 n.1.)

research-related activities. (A. 78.) Because this Court had not directly answered the question of whether such activities fall within the scope of fishing, fowling, or navigation, the court concluded Count IV survived Ocean 503's Motion to Dismiss. (A. 78.) With respect to Ocean 503, the court's April 19th Order resulted in a dismissal of all but Count IV of the Complaint. (*See* A. 54-80.)

Ocean 503 filed its Answer and Affirmative Defenses on August 12, 2022.[4] (A. 35; *see* Ocean 503 Answer.) Then after discovery, on May 3, 2023, Ocean 503 filed a Motion for Summary Judgement with Incorporated Memorandum of Law ("Ocean 503's MSJ"), Affidavit of Mark Montesi in Support of Ocean 503's MSJ, and Statement of Material Facts and Exhibits. (A. 38, 313-22, 755-62; Ocean 503 Mot. Summ. J., Attchs., & Exs.) Therein, Ocean 503's MSJ asserted that Count IV is nonjusticiable. (A. 313-22.) All parties thereafter submitted respective motions for summary judgment.[5]

On February 9, 2024, the court issued four separate orders addressing the arguments raised by the Parties' motions for summary judgment. (A. 49,

[4] Before filing its answer, on May 20, 2022, Ocean 503 filed its Motion for More Definite Statement with Incorporated Memorandum of Law ("Ocean 503's Motion for More Definite Statement") (A. 31), which the court denied on August 5, 2022 (A.35, *see* 81-92).

[5] Defendants Jeffery and Margaret Parent filed their Motion for Summary Judgment on that same day. (A. 38-39, 305-12.) Plaintiffs filed a Motion for Summary Judgment on May 5, 2023. (A. 39, 323-43.) Also on May 5th, the Attorney General—despite not filing any answer, crossclaim, or counterclaim in this action (*see* A. 15-39)—filed a Motion for Summary Judgment. (A. 15-39, 291-304.) OA 2012 and Judy's Moody filed their respective motion for summary judgment on May 8, 2023. (A. 39, 256-90.) The parties also participated in cross-motion practice. (*See generally* A. 42-48.)

93-119); *see generally supra* n.5 and accompanying text. In the court's Order on Justiciability, the court dismissed several Plaintiffs' Count IV claims for lack of standing.[6] The court concluded, however, that Plaintiffs Kathy and Peter Masucci, William Connerney, and Orlando Delogu had standing to pursue Count IV against Ocean 503 because they had historically used the intertidal land on the Ocean 503 Property. (A. 110.)

In the court's Consolidated Order on Defendants' Pending Dispositive Motions, the court concluded that, "[a]s a threshold matter, the facts in Defendants' respective summary judgment records are largely immaterial or undisputed" and reasoned that the core issue "is whether, based on those records, Defendants would be entitled to a judgment as a matter of law on Count IV at trial." (A. 100.) The court found, "[d]espite Count IV's broad language, the facts in the summary judgment records chiefly concern Plaintiffs' recreational activity on Defendants' intertidal land; indeed, they primarily refer

[6] The court concluded that "[t]he Marine Industry Plaintiffs' Count IV claim against Defendants is nonjusticiable for lack of standing because their alleged injury—economic harm—is not particularized." (A. 108.) The court specifically reasoned that although "these [P]laintiffs broadly allege that upland owners' claims to own the intertidal portion of the beach seaward of their properties[,] . . . [t]here is no record evidence that Defendants' asserted ownership of their adjacent intertidal land in particular has injured the Marine Industry Plaintiffs' ability to earn a living." (A. 108.) The court further concluded that "Plaintiffs Giffith and Jones's Count IV claims are also nonjusticiable for want of standing" because there was no record evidence supporting their allegations of economic harm. (A. 109.) The court also held that "Plaintiff Judith Delogu lacks standing to pursue Count IV against Defendants" because Mrs. Delogu "has never been present or seen the signage on any part of Moody Beach, . . . [and] Mrs. Delogu's intertidal activities concern her use and enjoyment of Maine's coast in general." (A. 109.)

to recreational walking." (A. 101.) The court concluded that Plaintiffs' Count IV claims must fail as a matter of law because this Court "has clearly articulated that the common law rights of intertidal use derived from the Colonial Ordnance and held in public trust are limited to fishing, fowling, and navigation . . . and specifically rejected the argument that general recreational activity, including walking, is reasonably related to those categories." (A. 100-01 (quotation marks omitted).)

The court also concluded that the Attorney General and Plaintiffs' respective motions for summary judgment must fail because their statement of material facts did not comply with Maine Rule of Civil Procedure 56(h). (*See* A. 115, 119.) The Court reasoned that neither "the Attorney General's 129-paragraph statement of material facts, which spans 21 pages" nor "Plaintiffs' 220-paragraph statement of material facts, which spans 30 pages" could be "reasonably characterized as short and concise." (A. 115, 119.) In addition, the Attorney General's statements "include[d] legal conclusions, personal opinions, cite[d] to portions of the record containing inadmissible hearsay, lack[ed] logical organization, and frequently assert[ed] facts that [were] irrelevant to [this] litigation or [were] simply repetitive." (A. 115.) Likewise, Plaintiffs' statement of material facts "include[d] legal and factual conclusions, cite[d] to portions of the record containing inadmissible hearsay,

lack[ed] logical organization, and frequently assert[ed] facts that were irrelevant to [this] litigation or [were] simply repetitive." (A. 119.)

Plaintiffs Masucci et al. ("Appellants Masucci"), Plaintiff Orlando Delogu ("Appellant Delogu"), and the Attorney General all timely appealed. *See* (A. 49-50); M.R. App. P. 2B(c)(1); 14 M.R.S. § 1851. Defendant OA 2012 ("Cross-Appellant OA 2012"), Defendant Judy's Moody ("Cross-Appellant Judy's Moody"), and Ocean 503 timely cross-appealed. (*See* A. 51-52.) This Court granted Appellants Masucci's motion to modify briefing rules on May 15, 2024 (5.14.2024 Order Modifying Briefing Rules), and, on June 18, 2024, entered an order modifying the rules regarding the appendix (*see* 6.18.24 Order Regarding Appendix).[7] Now before this Court is Ocean 503's cross-appeal and Ocean 503's response to Appellants Masucci, Appellant Delogu, and the Attorney General's respective appellant briefs. Ocean 503 herein incorporates by reference and adopts the arguments within Cross-Appellant OA 2012 and Cross-Appellant Judy's Moody's principal briefs. *See* M.R. App. 7A(h).

[7] Appellants Masucci's principal brief does not conform with this Court's May 14, 2024, Order Modifying Briefing Rules, which states, "Each party's principal brief may exceed the page limits provided in M.R. App. 7A(f)(1) but may not exceed 75 pages *or* 18,750 words." (5.14.2024 Order Modifying Briefing Rules (emphasis added).) Appellants Masucci, by submitting a principal brief totaling seventy-nine (79) pages, have again exhibited indifference to procedural rules. (*Compare* A. 119, *with* Masucci Blue Br. 1-79.) As Appellants Masucci notes, "Courts have authority to disregard pleadings that do not comply with the rules as a sanction." (Masucci Blue Br. 70 (citing *Stanley v. Hancock Cnty Comm'rs*, 2004 ME 157, 864 A.2d 169).)

## ISSUES PRESENTED

I. Whether the Complaint must be dismissed as nonjusticiable.

II. Whether the court properly dismissed Counts I, II, III, and V for failure to state a claim upon which relief can be granted.

III. Whether the court properly granted Ocean 503's Motion for Summary Judgment with respect to Count IV of the Complaint.

## SUMMARY OF ARGUMENT

This case is demonstrative of the harm that can result when standing is not sufficiently tailored. In this action, Plaintiffs request that this Court overrule its nearly two centuries of precedent by holding that (a) the State of Maine holds fee title to the intertidal lands, and (b) the public trust rights extend to whatever the State of Maine allows under its police powers. Plaintiffs' claims are nonjusticiable, and the court erred by not dismissing the Complaint at the motion-to-dismiss and summary-judgment stages.

Specifically, because Plaintiffs are not asserting title in themselves, they do not have standing to bring Counts I, II, III, and V, which together assert a quiet title action on behalf of the State of Maine. The court should have therefore dismissed these counts without reaching its analysis under Rule 12(b)(6). With respect to Plaintiffs' Count IV claims, the court erred by too broadly reading this Court's holdings in *Black v. Bureau of Parks and Lands* and *Fitzgerald v. Baxter State Park Authority*. Because the Attorney General is best suited to assert the public rights in Plaintiffs' Count IV claims and he is not disabled from doing so, it is unnecessary for this Court to substitute the Attorney General for members of the public who have a history of use of the land at issue. Plaintiffs have also not met their burden of establishing that they meet the basic elements of standing.

Should this Court, notwithstanding these issues of justiciability, confer standing to any Plaintiff, this Court should conclude that the court correctly dismissed Counts I, II, III, and V in its Order entered on April 19, 2022. Contrary to Appellants Masucci and Delogu's contentions otherwise, the essence of this Court's function is identifying common law and applying its principles, and, in furtherance of this function, this Court has rightfully rejected Appellants' equal footing arguments for nearly two centuries. Similarly, this Court should conclude that the court appropriately granted Ocean 503's MSJ because, not only did Plaintiffs and the Attorney General fail to comply with procedural requirements, the relief that Plaintiffs and the Attorney General seek would have required that the court ignore this Court's holding in *Bell II*.

For these reasons, and those set forth *infra*, Ocean 503 respectfully requests that this Court deny Appellants Masucci, Appellant Delogu, and the Attorney General's appeals, and instruct the court to dismiss the Complaint for lack of standing. In the alternative, Ocean 503 respectfully requests that this Court deny Appellant's appeals and affirm the court's April 19th Order, Order on Justiciability, Consolidated Order on Defendants' Pending Dispositive Motions, Order on the Attorney General's Motion for Summary Judgment, and Order on Plaintiffs' Motion for Summary Judgment.

## ARGUMENT

## I. The Complaint must be dismissed as nonjusticiable.

The court should not have reached its analysis under the Maine Rules of Civil Procedure 12(b)(6) or 56 because none of Plaintiffs' claims are justiciable.[8] (*See generally* A. 56-59, 70-80, 93-111, 172-85, 313-22.) "Justiciability requires a real and substantial controversy" that allows for "specific relief through a judgment of conclusive character." *Madore v. Me. Land Use Regul. Comm'n*, 1998 ME 178, ¶ 7, 715 A.2d 157 (quotation marks omitted). "A justiciable controversy involves a claim of present and fixed rights based upon an existing state of facts." *Id.* For the reasons set forth *infra*, Plaintiffs' claims in this action are nonjusticiable, and the court erred by not dismissing the Complaint. (*See* A. 54-79, 102-10, 172-85, 313-22.) This Court should therefore deny Appellants' appeals and instruct the court to dismiss the Complaint.

### A. Plaintiffs lack standing to bring this action.

This Court "review[s] standing de novo as a question of law and . . . [is] not bound by the trial court's conclusion." *Black v. Bureau of Parks & Lands*,

[8] Ocean 503 is not cross-appealing "from a finding to which they object within an overall favorable result." *See, e.g.*, *In re Johanna M.*, 2006 ME 46, ¶ 7, 903 A.2d 331. Nor is Ocean 503 cross-appealing to "argue that alternative grounds support the judgment that is on appeal." *See* M.R. App. P. 2C(a)(1). Rather, this cross-appeal, inter alia, asserts that the court did not have jurisdiction to enter judgment in this action. *See Collins v. State*, 2000 ME 85, ¶ 5, 750 A.2d 1257.

2022 ME 58, ¶ 26, 288 A.3d 346. "[S]tanding is a threshold issue bearing on the court's power to adjudicate disputes," and this Court "may properly address this issue at this stage of the proceeding." *Franklin Property Trust v. Foresite, Inc.*, 438 A.2d 218, 220 (Me. 1981). Standing is "closely related [to the] concepts describing conditions of justiciability" and requires that a party "have a sufficient personal stake in the controversy, at the initiation of the litigation, to seek a judicial resolution of the controversy." *Madore*, 1998 ME 178, ¶ 8, 715 A.2d 157; *see generally* Alexander, *Maine Appellate Practice* §§ 201(c), 202, 204 (6th ed. 2022). "The plaintiffs have the burden of establishing standing, which is determined based on the circumstances that existed when the complaint was filed." *Black*, 2022 ME 58, ¶ 26, 288 A.3d 346. "Unless a party has standing to sue, that party's complaint is properly dismissed." *Estate of Robbins v. Chebeague & Cumberland Land Tr.*, 2017 ME 17, ¶ 10, 154 A.3d 1185.

Under Maine law, "standing is prudential, not constitutional." *Black*, 2022 ME 58, ¶ 27, 288 A.3d 346. This Court may therefore "limit access to the courts to those *best* suited to assert a particular claim." *Id.* (quotation marks omitted) (emphasis added). "Just what particular interest or injury is required for standing purposes and the source of that requirement . . . varies based on the type of claims being alleged." *Id.* (quotation marks omitted). Nevertheless, the "basic purpose and requirements [of standing] are clear."

*Franklin Property Trust*, 438 A.2d at 220. To have standing, a plaintiff must establish that (1) they "have a personal stake in the outcome of the litigation"; (2) there is a "real and substantial controversy"; (3) such controversy "touch[es] on the legal relations of parties"; and (4) the parties have "adverse legal interests." *Id.* "Without these [four] elements, the concrete adverseness crucial to the illumination of legal issues and the proper exercise of judicial power cannot be assured."[9] *Id.* at 220-21.

Here, the individual members of the public who have brought this action do not have standing to (1) challenge Defendants' title to the intertidal zone; or (2) assert public rights on behalf of the State of Maine nor against Ocean 503.

1. *Plaintiffs lack standing to bring Counts I, II, III, and V—which assert the State of Maine holds title to the intertidal land—because no Plaintiff has standing to bring a quiet title action against any Defendant.*

The court aptly summarized Counts I, II, III, and V of the Complaint as "seek[ing] to establish the State of Maine's ownership, in fee, of all intertidal

[9] With respect to the first element, the plaintiff must establish that they have a "judicially protected interest" at stake. *Smith v. Allstate Ins. Co.*, 483 A.2d 344, 346 (Me. 1984). Under the second element's real and substantial controversy requirement, the plaintiff must establish that the controversy "involves a claim of present and fixed rights based upon an existing state of facts." *Madore*, 1998 ME 178, ¶ 7, 715 A.2d 157 (quotation marks omitted). This Court's jurisprudence under the third element often examines the (1) purposes and the source of the parties' legal relationship, and (2) whether the plaintiff has established that they are the best suited to assert a particular claim. *See, e.g.*, *Madore*, 1998 ME 178, ¶¶ 7-11, 715 A.2d 157 (explaining which judicially protected interests must be at stake in actions concerning land use); *see also Black*, 2022 ME 58, ¶ 27, 288 A.3d 346. The fourth element's "adverse legal interest," often referred to as a "particularized injury," requires that the plaintiff's establish that their injury is "*distinct from the harm suffered by the public-at-large*." *Collins*, 2000 ME 85, ¶ 6, 750 A.2d 1257 (emphasis added).

lands." (A. 73.) It therefore should strike this Court as odd that these four counts are not brought by the State of Maine, but instead by individual members of the public. (*See* A. 120-41.) Because Plaintiffs do not have standing to bring this quiet title action on behalf of the State of Maine, this Court should deny Appellants' appeal and hold that the court should have dismissed Counts I, II, III and V for lack of standing.

i. Counts I, II, III, and V, read in concert, cannot be viewed as anything other than an action to quiet title to the intertidal land.

Appellants Masucci mistakenly assert that the court wrongly characterized Count V as a quiet title action. (*See* A. 5, 73, 76-77; Masucci Blue Br. 64-65.) According to Appellants Masucci, Plaintiffs were "seek[ing] a negative declaratory judgment that Defendants do not own the property." (Masucci Blue Br. 64-65.) Contrary to their assertions, and as the court correctly explained, "[a] declaratory judgment action cannot be used to create a cause of action that does not otherwise exist," (A. 76 & n.9 (citing *Colquhoun v. Webber*, 684 A.2d 405, 411 (Me. 1996); *Hodgdon v. Campbell*, 411 A.2d 667, 668 (Me. 1980))), and when viewed together, Counts I, II, III, and V cannot be seen as anything other than an action to quiet title with respect to ownership of the intertidal zone (*see* A. 76-77 & n.9).

For example, Count II of the Complaint asserts that the State of Maine, pursuant to the equal footing doctrine, holds title to intertidal land (A. 138), and Count III questions whether this Court violated constitutional principles when it held otherwise (*see* A. 138-39). Reciprocally, Count V contends that Defendants' respective deeds did not convey title to the intertidal land. (*See* A. 139-40.) Finally, Count I of the Complaint does not assert any new claims, and merely requests a declaratory judgment that the court's prospective ruling will have "statewide effect." (A. 137; *see also* A. 73 n.6.)

When viewed in concert, these four counts allege that the State of Maine—and not upland owners—owns, in fee, all intertidal lands. *Compare* (A. 137-40), *with* 14 M.R.S. § 6651. Critically, Plaintiffs have already confirmed that they are not claiming title in themselves to the intertidal land at issue, and, as a result, Plaintiffs do not have standing to bring a quiet title action. (*See* A. 138; Pl. Opp. Def. Mot. Dismiss at 4.)

ii. <u>Plaintiffs lack standing to bring a quiet title action because they do not claim title in themselves to the intertidal land at issue.</u>

This Court has recently explained that "it is unclear how someone who claims no title has standing to pursue an action to quiet title." *Oaks v. Town of Richmond*, 2023 ME 65, ¶ 32 n. 11, 303 A.3d 650 (citing *Adoption of Paisley*, 2018 ME 19, ¶ 23, 178 A.3d 1228; *Kondaur Cap. Corp. v. Hankins*, 2011 ME 82,

¶¶ 13-14, 25 A.3d 960); *see also Bell v. Town of Well*, 510 A.2d 509, 515 (Me. 1986) ("*Bell I*") (explaining that a plaintiff, in a quiet title action, "ha[s] the burden of proving title in themselves both to the intertidal land and the upland"). Requiring that a plaintiff claim title in themselves to the land at issue is also consistent with the plain language of the quiet title statute. *See* 14 M.R.S. § 6651. The quiet title statute specifically affords standing only to persons who are "in possession of real property, *claiming an estate of freehold*" or "who ha[ve] conveyed such property or any interest therein with covenants of title or warranty, upon which he may be liable," and requires that the plaintiff "stat[e] the source of *his* title." *Id.* (emphasis added).

Here, Plaintiffs have failed to meet their burden of establishing that they have standing to bring Counts I, II, III, or V of the Complaint. Plaintiffs unmistakably concede that they do not claim title to the intertidal land adjacent to the Defendants' property. (*See* A. 138 ("Maine then, not upland owners, hold title to its intertidal lands . . . ."); *see also* Pl. Opp. Def. Mot. Dismiss at 4 ("Plaintiffs in this case do not claim title to public trust land for themselves.").) Plaintiffs are not best suited to assert Maine's title.[10] To hold otherwise would result in an improper exercise of judicial power and, from a

[10] Despite being the best suited to assert quite title actions on behalf of the State of Maine, the Attorney General has not brought any quiet title claims here. (*See generally* R.; A. 291-304; AG Blue Br.)

practical standpoint, would open the floodgates to individual members of the public bringing similar actions against upland owners across the State of Maine. (*See* A. 137 (claiming that this action will have *"statewide effect"* (emphasis added)).) This Court should therefore hold that the court erred by not dismissing Counts I, II, III, and V of the Complaint for lack of standing.

*2. Plaintiffs lack standing to bring their Count IV claims because the Attorney General is best suited and able to assert the public trust rights on behalf of the State of Maine.*

The trial court also erred when it denied Ocean 503's motion to dismiss Count IV of the Complaint due to Plaintiffs lacking standing. (*See* A. 77-79.) The thrust of Plaintiffs' Count IV claims is that the State of Maine has title and control over intertidal land, and, as such, the State may expand or limit the public trust rights as the State sees fit. (See A. 139.) It is therefore curious that Plaintiffs are, yet again, asserting the State of Maine's rights on its behalf.

This Court has recognized that a legally organized public entity has standing *as a plaintiff* to assert public trust rights in the intertidal zone. *See Bell I,* 510 A.2d at 517 (explaining that "the Town [of Wells] would [clearly] have standing as a plaintiff to assert [public trust rights] in the intertidal zone"). With respect to individual members of the public, this Court has explained that "[a]n individual defendant may assert [public trust rights] *as a defense* in a trespass or quiet title action." *Id.* (emphasis added). This Court, however, has

yet to decide the issue of standing directly presented in this action. That is, whether an individual member of the public has standing *as a plaintiff* to assert, on behalf of the public-at-large, purported public trust rights in the intertidal zone against an upland owner. Irrespective of whether or how this Court decides to address this question, this Court should conclude that Plaintiffs do not have standing to bring this action.

Here, the court and Appellants read this Court's holdings in *Fitzgerald* and *Black* too broadly. (*See* A. 110; Masucci Blue Br. 72-73.) In those two cases, as explained more fully *infra*, this Court considered whether certain individual members of the public have standing to assert public rights only where the Attorney General was disabled from asserting those public rights on behalf of the State of Maine. *See Fitzgerald v. Baxter State Park Auth.*, 385 A.2d 189, 195-96 (Me. 1978); *Black*, 2022 ME 58, ¶¶ 11, 27-30, 288 A.3d 346. Here, the Attorney General is the best suited to assert the public trust rights and is not disabled from doing so. This Court should therefore conclude that Plaintiffs do not have standing to bring their Count IV claims, and the Complaint must be dismissed.

i. *Fitzgerald* and *Black* must be read in the context of the Attorney General being disabled from asserting the public rights at issue.

In *Fitzgerald*, this Court only reached the question of whether individual members of the public had standing *after* it concluded that the Attorney General was disabled from asserting the public's rights. 385 A.2d at 195-96. In *Fitzgerald*, five individual members of the public brought an action against the Baxter State Park Authority, which "[t]he State of Maine, as the trustee of Baxter State Park, has designated . . . as its agent to satisfy the terms of the [t]rust." *Id.* at 191-92, 195. Specifically, the plaintiffs sought an equitable injunction against the Baxter State Park Authority to prevent a scheduled cleanup of damage caused by "a severe blowdown" in Baxter State Park. *Id.* at 193-94. Before reaching the merits of the plaintiffs' claims, however, this Court first addressed issues of the plaintiffs' standing. *Id.* at 194-97.

This Court began its standing analysis by considering which entity or person had the responsibility and authority of seeing that the Baxter State Park trust was properly administered. *Id.* at 194-96. Although this Court declined to directly address this general issue, this Court reasoned that the Attorney General had the common-law and statutory duty of enforcing the Baxter State Park trust, and it "use[d this] precept as a starting point for discussing the plaintiffs' standing." *Id.* at 195.

This Court then concluded that, although the Attorney General is responsible for enforcing the Baxter State Park trust, the Attorney General was disabled from bringing suit because "[t]he Attorney General [was] himself a member ex officio of the Baxter State Park Authority . . . [and] the chief attorney for the trustee." *Id.* at 195. This Court—only after it concluded that "[t]he Attorney General could not properly take in litigation a position adverse to a state agency on which he sits and for which he acts as counsel"—considered whether someone, "*[b]y forces of necessity*," other than the Attorney General could enforce of the Baxter State Park trust. *Id.* (emphasis added). It was in the context of the Attorney General's conflict of interest that this Court held the plaintiffs, as actual users of Baxter State Park, had established a "*sufficient* direct and personal injury." *Id.* at 196 (emphasis added).

Similarly, in *Black*, it was only within the context of the Attorney General being disabled from bringing the claims themselves that this Court held the individual plaintiffs' "history of use of the public reserved lands . . . [was] sufficient to confer standing." 2022 ME 58, ¶¶ 11, 27-30, 288 A.3d 346. In *Black*, the individual plaintiffs brought an action against the Maine Bureau of Parks and Land after it leased approximately 1,200 acres of public reserved land to Central Maine Power for the purpose of building a high-capacity electric transmission line. *Id.* ¶ 9. The plaintiffs specifically "asserted that a state

agency entrusted with management of public lands had acted in excess of its authority." *Id.* ¶ 27.

Like in *Fitzgerald*, the Attorney General—as counsel for the Maine Bureau of Parks and Land—was disabled from asserting the public's rights because the Attorney General could not properly take a position in litigation adverse to the Bureau of Parks and Lands. *Compare Fitzgerald*, 385 A.2d at 195-96, *with Black*, 2022 ME 58, 288 A.3d 346 (listing the Attorney General as counsel for the Bureau of Parks and Land). Thus, this Court's holding in *Black* (that the plaintiffs' "history of use of the public reserved lands . . . is sufficient to confer standing") was only within the context of the Attorney General's conflict of interest and inability to assert the claims themselves. *See Black*, 2022 ME 58, ¶ 28, 288 A.3d 346.

ii. <u>In this case, the Attorney General is best suited and able to assert the public trust rights on behalf of the State of Maine.</u>

This Court has long-recognized that the State of Maine, in sections 3 and 5 of Article 10 of the Maine Constitution, confirmed the grant of "the intertidal land in fee to the upland owners" and "reserved [the] public easement limited to fishing, fowling, and navigation." *See, e.g.*, *Bell v. Town of Wells*, 557 A.2d 168, 176 (Me. 1989) ("*Bell II*"); *McGarvey v. Whittredge*, 2011 ME 97, ¶ 26, 28 A.3d 620 ("In Maine, the common law has been modified to create private ownership

of intertidal lands subject to the public trust rights reserved to the State."). Under normal circumstances, the Attorney General is responsible for enforcing the public's rights held in trust by the State of Maine. *See* 5 M.R.S. § 191(3); *Bell I*, 510 A.2d at 520 ("[T]he Attorney General, as the chief law officer of the State, has the power and duty to institute, conduct and maintain such actions and proceedings as he deems necessary for the protection of public rights and to defend against any action that might invidiously interfere with the same." (quotation marks omitted)).

Plaintiffs' Count IV claims unmistakably challenges the scope of the public's right to use the statewide intertidal zone for recreational activities. (*See, e.g.*, A. 137, 139.) For the foregoing reasons, the Attorney General, "as the chief law officer of the State," is best suited to bring the State of Maine's reserved public trust rights.[11] *See Bell I*, 510 A.2d at 519 (quotation marks

[11] This interpretation is also consistent with this Court's jurisprudence in analogous areas of the law. For example, in cases where public trust rights intersect with public nuisance law, this Court has explained that although

> the plaintiff may have more need or occasion than other persons to make use of the public right to the unimpeded navigation of the cove, and her land may be more damaged by the violation of that right, the right itself is still public and not private. Her ownership of land on the cove gives her no greater nor different right to navigate it. Every other citizen has the same right in kind and degree. The plaintiff may have a greater interest than others in the right, and a greater need of its enforcement, but that does not change the public right into a private right.

*Whitmore v. Brown*, 102 Me. 47, 65 A. 516, 521 (1906). In *Whitmore*, this Court explained that for an individual member of the public "[t]o enforce the public right for his benefit, he must set the public agencies in motion." *Id.* at 520. This Court even went so far to say that—even if the plaintiff had a well-founded apprehension that "the officials, influenced by local, political, or other immaterial

omitted). Moreover, unlike in *Fitzgerald* and *Black*, there is no governmental agency implicated in this action, and the Attorney General does not have any apparent conflict of interest, as evidenced by his participation in these proceedings.[12] (*See generally* A. 120-41.)

Because the Attorney General is best suited to bring these particular Count IV claims and is not disabled from doing so, this Court need not consider whether Plaintiffs' alleged use is sufficient to confer standing. *See, e.g.*, *Fitzgerald*, 385 A.2d at 196; *Black*, 2022 ME 58, ¶¶ 11, 27-30, 288 A.3d 346. Irrespective of whether this Court holds that Plaintiffs' Count IV claims are best asserted in an action brought by the Attorney General, this Court should conclude that these particular Plaintiffs have not established that they meet the fundamental elements of standing.

considerations, may improperly neglect, and even refuse, to act upon application, and thus leave her helpless"—the plaintiff's "remedy against recalcitrant public officers is in some other procedure." *Id*. at 521.

[12] The Attorney General—despite not bringing these claims himself nor filing any answer, crossclaims, or counterclaims—has demonstrated he has no conflict through his participation throughout these proceedings. (*See* A. 120.) The Attorney General has opposed motions (*see* A. 27, 33), filed a motion for summary judgment (*see generally* A. 291-304), appealed the court's denial of the Attorney General's motion for summary judgment (see A. 52), and submitted an Appellant brief arguing that the public trust rights include walking (*see generally* AG Blue Br.).

iii. Irrespective of whether this Court holds that Plaintiffs' Count IV claims are best asserted in an action brought by the Attorney General, Plaintiffs have not met their burden of establishing a justiciable controversy.

Here, Plaintiffs are attempting to assert claims that will purportedly have statewide impacts and impact the public-at-large. (*See* A. 137.) Plaintiffs, however, have not named as defendant all upland owners across the State of Maine.[13] (*See* A. 120-41.) Instead, Plaintiffs have named Ocean 503 as a representative defendant because of the location of its property, the presence of signs, and the size of its house. (A. 757.)

Yet, even within this narrowed scope, Plaintiffs have still failed to establish any of the fundamental elements of standing for the following four reasons. *See Franklin Property Trust,* 438 A.2d at 220 21. First, Plaintiffs have failed to establish that they have a sufficient personal stake in the outcome of this litigation. Critically, only three Plaintiffs can say with any certainty that they have been to Ocean 503's property (A. 758-59), and no Plaintiff has ever been confronted or asked to move or leave by Ocean 503 (A. 95-96, 759).

Second, Plaintiffs have also failed to establish that a real and substantial controversy exists in this action. To the contrary, Ocean 503 has never called the police on the public, nor threatened to litigate the public rights that

[13] It is unlikely that Plaintiffs could maintain such an action either.

Plaintiffs assert here. (A. 757-58.) In addition, Plaintiffs have revealed that—notwithstanding their claims in this action—Plaintiffs have continued to walk, play games, or engage in other alleged recreational activities in the intertidal zone of Ocean 503's property. (A. 760.) A declaration that Plaintiffs may engage in movement-based activity in the intertidal zone on the Ocean 503 Property will therefore not make any real difference for these Plaintiffs.

Third, Plaintiffs have failed to establish that that Plaintiffs' and Ocean 503's legal interests are sufficiently adverse. As discussed *supra*, the Attorney General is the chief law officer for the State of Maine and has the duty to bring necessary actions for protection of public rights. Ocean 503, however, does not have a sufficient stake in litigating issues of public trust rights as it affects the statewide intertidal zone and the public-at-large. Rather, Ocean 503's legal interest is centered on maintaining title to its property. Saliently, Ocean 503 has never confronted Plaintiffs or asked them to move from the intertidal zone. (A. 757-58.)

Forth, and finally, this case is demonstrative of the harm that results when standing is not sufficiently tailored. Here, representative plaintiffs have targeted Ocean 503 as a representative defendant because of the location of its property, the presence of signs, and the size of its house, despite Ocean 503 never confronting any member of the public recreating on its intertidal land.

(A. 757; *see* Masucci Blue Br. 73.) If this degree of adversity is a sufficient basis to confer standing, this Court can expect individual members of the public to start bringing public trust actions against upland owners across the coast of Maine, irrespective of those owners' conduct. As Plaintiffs concede, "interests of upland owners not party to these proceedings are identical with the property interests of the Defendants in this case." (A. 137.) Not only will these cases unjustifiably place financial and emotional strain on the upland owners, as evidenced by the present action, they will also strain judicial resources. *See Lewiston Daily Sun v. Sch. Admin. Dist. No. 43*, 1999 ME 143, ¶ 13, 738 A.2d 1239 ("The demands upon [the courts] are too heavy for it to commit any of its limited resources of time and effort to reviewing the legal correctness of action below at the behest of a person to whom our decision in no alternative will make any real difference." (quotation marks omitted)).

### B. Because Plaintiffs lack standing to bring this action, this Court should deny Appellants' appeals and instruct the court to dismiss the Complaint.

Because Plaintiffs lack standing to bring all counts of the Complaint, this Court should hold that the court erred by not dismissing the Complaint in full. (*See* A. 54-80, 102-11, 172-85, 313-22.) Specifically, the court should have never analyzed whether Plaintiffs had failed to state a claim under Rule 12(b)(6). (*See* A. 70-79.) The court should have instead recognized that

Counts I, II, III, and V of the Complaint, in concert, merely allege a quiet title action to land that Plaintiffs do not assert title in themselves. (*See* A. 120-31.) The court should have thereafter concluded that Plaintiffs lack standing to assert the State of Maine's title on the State's behalf. *See Bell I*, 510 A.2d at 515; *Oaks*, 2023 ME 65, ¶ 32 n. 11, 303 A.3d 650 ("[I]t is unclear how someone who claims no title has standing to pursue an action to quiet title.").

Likewise, the court erred by misinterpreting this Court's holdings in *Fitzgerald* and *Black* to broadly extend standing to individual members of the public who merely alleged they have used the land at issue. (*See* A. 110.) When viewed in context, *Fitzgerald* and *Black* must be more narrowly construed. These two cases stand for the proposition that—although the Attorney General is best suited to assert the public rights held in trust by the State of Maine—when the Attorney General is disabled from asserting the public rights, an individual who has established they used the land at issue may, *by forces of necessity*, have sufficient standing. *See Fitzgerald,* 385 A.2d at 196; *Black*, 2022 ME 58, ¶¶ 11, 27-30, 288 A.3d 346. Here, the Attorney General is best suited to bring these specific Count IV claims and is not disabled from doing so, *if he so chooses.* Finally, even if Plaintiffs did have standing to bring this action, Plaintiffs have failed to establish they meet the fundamental elements of standing. Accordingly, this Court should dismiss the appeal and

instruct the court to dismiss the Complaint. *See Estate of Robbins*, 2017 ME 17, ¶ 10, 154 A.3d 1185 ("Unless a party has standing to sue, that party's complaint is properly dismissed.").

## II. The court properly dismissed Counts I, II, III, and V of the Complaint for failure to state a claim upon which relief can be granted.

Even if Plaintiffs have standing to bring this action, the court properly dismissed Counts I, II, III, and V of the Complaint for failure to state a claim. (*See generally* A. 54-80.) When a court has dismissed claims pursuant to Rule 12(b)(6), this Court "review[s] the legal sufficiency of the complaint de novo, viewing the complaint in the light most favorable to the plaintiff to determine whether it sets forth elements of a cause of action or alleges facts that would entitle the plaintiff to relief pursuant to some legal theory." *Oceanic Inn, Inc. v. Sloan's Cove*, *LLC*, 2016 ME 34, ¶ 16, 133 A.3d 1021 (quotation marks omitted).

### A. Count II was properly dismissed for failure to state a claim.

In Count II, Plaintiffs requested a declaration stating that, pursuant to the equal footing principles underlying Article IV, §§ 1-3, of the United States Constitution, Maine gained title to its intertidal land upon statehood and the State continues to hold such title. (A. 137.) The court properly dismissed Plaintiffs' request for such a declaration by concluding Count II failed to state a

claim as a matter of law because this Court "addressed and dispelled" the equal footing argument in *Bell II* and has not reversed its holding since that time. (A. 73-75.)

1. *In Bell II, this Court unequivocally rejected Appellants' equal footing doctrine arguments, and this Court's subsequent decisions have reiterated that rejection.*

This Court, in *Bell II*, unequivocally rejected the equal footing argument that Plaintiffs again assert in their appeal and explained,

> Any such revisionist view of history comes too late by at least 157 years. *See Lapish v. Bangor Bank*, 8 Me. at 93 (1831). Prior to separation the Commonwealth of Massachusetts had already granted to the upland owners fee title in the intertidal land within its entire territory including the District of Maine. Contrary to the amicus argument,[14] there was nothing in the pre–1820 Massachusetts common law governing title to the intertidal zone that was repugnant to the constitution of the new State. As already noted, in absence of such repugnance, article X, section 3 of the Maine Constitution declared that all laws in force in the District of Maine in 1820 would remain in force in the new State.

*Bell II*, 557 A.2d at 172. More recently, in *McGarvey*, this Court affirmed its *Bell II* rejection of Plaintiffs' Count II claims and painstakingly mapped out the history of private ownership of intertidal lands from the crown's ownership to enactment of the Colonial Ordinance to its incorporation into Maine's common

[14] It is also of note that Appellant Delogu argued these same points as *amici curiae* in *Bell II*. Appellant Delogu acknowledges as much, stating that his "arguments and supporting materials" asserting Maine's ownership of intertidal land "were all available to the *Bell* courts but were either ignored altogether or summarily brushed aside." (Delogu Blue Br. 29.)

law. *See McGarvey*, 2011 ME 97, ¶¶ 24-32, 28 A.3d 620. In doing so, this Court acknowledged the United States Supreme Court's confirmation in *Phillips Petroleum Co. v. Mississippi* that all new states to the Union acquired title to its intertidal lands pursuant to the doctrine "*unless and until it modified this traditional common law.*" *Id*. ¶ 25 (emphasis added) (citing *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988)).

As this Court made clear in *McGarvey*, Maine has in fact modified the traditional common law notion that the State retains title to intertidal lands. *Id.* ¶ 31. Altering the English common law to induce settlers to build wharves at private expense, the Colonial Ordinance of 1641-47 provided for private ownership of intertidal lands, which persisted as a usage having full force as Massachusetts common law even after the expiration of the Ordinance.[15] *See Storer v. Freeman*, 6 Mass. 435, 438 (1810); *see also McGarvey*, 2011 ME 97, ¶¶ 26-30, 28 A.3d 620. Subsequently, when Maine gained statehood in 1820,

[15] On appeal, Appellants Masucci and Delogu have argued that the plain language and intent of the Colonial Ordinance "does not support an interpretation that fee title ownership was conveyed. Plain language and historical context indicate that a riparian or littoral property owner has personal priority rights to the intertidal, not a fee title interest to the soil. The upland owner's 'propriete' is described as a 'liberty,' meaning a right that is *personal*, not a fee interest in the land." (Masucci Blue Br. 27; *see also* Delogu Blue Br. 12-13.) Appellants Masucci go on to discuss "the broader context of the legislative scheme" and argue against strict construction of the Ordinance's language. (Masucci Blue Br. 28-29.) Appellants Masucci and Delogu did not argue before the court that the Colonial Ordinance's language could not be interpreted to convey fee title ownership in intertidal land and they have, therefore, waived any such arguments. *See Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209.

the framers of the Maine Constitution officially incorporated Massachusetts common law into Maine common law, including Massachusetts' grant of title to intertidal lands. *McGarvey*, 2011 ME 97, ¶ 31, 28 A.3d 620; *see also* Me. Const. art. X, §§ 3, 5; *Bell I*, 510 A.2d at 513-14 ("By force of article X, § 3 of the Maine Constitution and of section 6 of the Act of Separation between Maine and Massachusetts, it must be regarded as incorporated into the common law of Maine.") (footnotes omitted)).

Eleven years after Maine achieved statehood, this Court "confirmed that the prevailing usage of private intertidal land ownership expressed in the Massachusetts court's decision in *Storer* was part of Maine's common law." *McGarvey*, 2011 ME 97, ¶ 31, 28 A.3d 620. Since statehood, Maine law regarding private ownership of intertidal land "has been considered as perfectly at rest." *Lapish v. Bangor Bank*, 8 Me. 85, 93 (1831); *see also Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 11, 206 A.3d 283; *McGarvey*, 2011 ME 97, ¶ 31, 28 A.3d 620; *Bell II*, 557 A.2d at 171; *Bell I*, 510 A.2d at 514; *Ogunquit Beach Dist. v. Perkins*, 138 Me. 54, 21 A.2d 660, 662-63 (1941) (citing *Shively v. Bowlby*, 152 U.S. 1 (1894); *Conant v. Jordan*, 107 Me. 227, 77 A. 938, 939 (1910) ("[The Colonial Ordinance] has been judicially adopted, not in the sense that the court extended it to this state, but that the court found it extended by the public itself, as the expression of a public right, so acted upon and acquiesced in as to have become

a settled, universal right."); *State v. Leavitt*, 105 Me. 76, 72 A. 875, 876-77 (1909) ("It is therefore settled law that each state, unless it has parted with title, *as by the colonial ordinances referred to*, owns the bed of all tidal waters within its jurisdiction.") (emphasis added); *Barrows v. McDermott*, 73 Me. 441, 448-49 (1882) ("But [the Colonial Ordinance] has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both . . . that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State . . ."") (collecting cases); *Pike v. Munroe*, 36 Me. 309, 313 (1853); *Deering v. Proprietors of Long Wharf*, 25 Me. 51, 64 (1845); *Emerson v. Taylor*, 9 Me. 42, 43 (1832).

This Court's rejection in *Bell II* of Appellants' arguments regarding the equal footing doctrine aligned with case law from 1831 forward and case law following *Bell II* has only reiterated that rejection.

*2. U.S. Supreme Court equal footing jurisprudence does not foreclose private ownership of intertidal lands.*

Despite this Court's continuing rejection of Plaintiffs' Count II claims, Appellants Masucci and Delogu contend that this Court has, over the course of nearly two hundred years, repeatedly misapplied the equal footing doctrine and, in doing so, has "offend[ed] foundational federal constitutional principles

of state sovereignty[.]" (Masucci Blue Br. 8; *see* Delogu Blue Br. 38.) Appellants Masucci and Delogu draw on a number of U.S. Supreme Court decisions to support their position that this Court's recognition of private intertidal ownership exceeds federal limits on state alienation of intertidal land, resulting in a direct conflict with the U.S. Constitution. In doing so, Appellants misunderstand, misstate, or misconstrue their relied upon U.S. Supreme Court opinions.

i. <u>The U.S. Supreme Court has recognized and affirmed state authority to define the limits of public trust land and to recognize private rights in intertidal lands.</u>

A review of the U.S. Supreme Court decisions relied upon by Appellants reveals a consistent deference given by the U.S. Supreme Court to state courts' state-law determinations on post-statehood developments in intertidal title divestment to private owners. For example, in *Phillips Petroleum Co. v. Mississippi*, a U.S. Supreme Court decision heavily relied on by Appellants Masucci and Delogu, the Court explained that "it has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." 484 U.S. 469, 475 (1988) (citing *Shively v. Bowlby*, 152 U.S. 1, 26 (1894)). *Phillips* drew from *Shively v. Bowlby*, an 1894 decision that the Court recognized as the "seminal case in American public trust jurisprudence." *Id*. at 473

(citing *Shively v. Bowlby*, 152 U.S. 1 (1894)). In providing an overview of the Court's decisions on public and private rights in land below the high-water mark, the *Shively* Court noted that "[t]he common law of England upon this subject . . . is the law of this country, except so far as it has been modified by the charters, constitutions, statutes, or usages of the several colonies and states." *Shively*, 152 U.S. 1, 14 (1894). The *Shively* Court then proceeded to summarize the laws of the states and colonies, including those of Massachusetts, that modified the common law of England to afford "greater rights and privileges in the shore," noting that "the nature and degree of such rights and privileges differed in the different colonies, and in some were created by statute, while in others they rested upon usage only." *Id*. at 18.

Nearly ninety years after *Shively*, the *Phillips* Court addressed the concern that its decision in *Phillips*, recognizing State of Mississippi ownership of its tidelands, would have "sweeping implications" outside of Mississippi. *Phillips*, 484 U.S. at 482. The Court reiterated its words in *Shively v. Bowlby*, explaining that "there is no universal and uniform law upon the subject; but . . . each State has dealt with the lands under the tide waters within its borders according to its own views of justice and policy." *Id.* at 483 (quoting *Shively*, 152 U.S. at 26). The Court concluded in *Philips* that the lands at issue became property of the State of Mississippi upon statehood and affirmed the state

court's holding "because we find no reason to set aside that court's state-law determination that subsequent developments did not divest the State of its ownership of these public trust lands." 484 U.S. 469, 484-85 (1988). The Court thus clarified that the *Phillips* decision did "not upset titles in all coastal States" particularly where "many coastal States, as a matter of state law, granted all or a portion of their tidelands to adjacent upland property owners long ago." *Id*. at 483 & n.12 (citing to *Storer v. Freeman*, 6 Mass. 435, 437-39 (1810)).

ii. The State of Maine, following statehood, has recognized private ownership of intertidal land for nearly two hundred years.

Unlike in Mississippi, subsequent developments in Maine *did* divest the State of its ownership of intertidal land, and this Court has repeatedly recognized as much. For the nearly two hundred years since Maine gained statehood, this Court has confirmed private ownership of intertidal lands. *See, e.g., Ross*, 2019 ME 45, ¶ 12, 206 A.3d 283 ("The intertidal zone belongs to the owner of the adjacent upland property, or some other person to whom that part of the land has been transferred by the upland owner."); *McGarvey*, 2011 ME 97, ¶ 23, 28 A.3d 620 ("In Maine, we have always recognized private ownership of the intertidal land as a part of our common law."); *Britton v. Donnell*, 2011 ME 16, ¶ 7, 12 A.3d 39, 42 ("Under the common law, the land of the intertidal zone belongs to the owner of the adjacent upland property,

subject to certain public rights."); *Bell II,* 557 A.2d at 173 ("[W]e 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.") (internal quotations omitted); *Bell I*, 510 A.2d at 515 ("[T]he owner of the upland holds title in fee simple to the adjoining intertidal zone subject to the public rights expressed in the [Colonial] Ordinance."); *Matthews v. Treat*, 75 Me. 594, 598 (1884); *Duncan v. Sylvester*, 24 Me. 482, 486 (1844).

iii. *Illinois Central R.R. v. Illinois* does not stand for the proposition that a state can never grant tidal lands to private owners; rather, it illustrates the limitations of those grants.

Appellants Masucci and Delogu argue that U.S. Supreme Court precedent forecloses a recognition of private ownership of intertidal land because such "[b]lanket grants are ***void***" under *Illinois Central R.R. v. Illinois*. (Masucci Blue Br. 14; Delogu Blue Br. 24-26.) Appellants, however, misread *Illinois Central* with respect to the following two points: (1) the grant of submerged land in *Illinois Central* was a grant of fee ownership from the State to a single private corporation; and (2) the grant was an abdication of all state control over the lands under navigable waters. *See generally, Ill. Cent. R. Co. v. Illinois*, 146 U.S. 387 (1892).

The specific grant at issue in *Illinois Central* involved a grant of "all the right and title of the state in and to the submerged lands, constituting the bed

of Lake Michigan" to "[a] corporation created for one purpose, the construction and operation of a railroad," thus converting said corporation "into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally." *Id*. at 450-51.[16] The grant in *Illinois Central* was revocable, in part, because it granted title to one single corporation, not to a broad class of private owners. *Id.* at 455.

Furthermore, this Chicago grant of the harbor to a single corporation "placed [the land] entirely beyond the direction and control of the state." *Id.* at 452-54. The Court held that the "blanket grant" in *Illinois Central* was an abdication of all state control over the lands under navigable waters and "[s]uch abdication is not consistent with the exercise of that trust which requires the government of the state to preserve such waters for the use of the public." *Id*. at 453.

In contrast, Maine's recognition of private ownership of lands under tidal waters does not inherently involve an abdication of all state control over such

[16] By contrast, Justices of the Law Court observed in a 1981 *Opinion* on the validity of the Submerged Lands Act here in Maine that a release of "any State right to a large and diverse class of property owners" is of an entirely different character than the grant in *Illinois Central* "in which the entire harbor of Chicago was placed in the hands of a single corporation." *Opinion of the Justs*., 437 A.2d 597, 607 (Me. 1981).

lands.[17] While *Illinois Central* presents some limitations to a state's alienation of public trust lands, Maine's long-standing recognition of private ownership of intertidal lands is not of the nature or degree of the grant with which the U.S. Supreme Court was concerned in *Illinois Central.*

*Illinois Central* therefore does not stand, as Appellants Masucci and Delogu contend, for the proposition that a state may never recognize private ownership of tidal lands. To the contrary, even while upholding the revocation of a grant of the entirety of the submerged lands of Lake Michigan off the Chicago waterfront to a private corporation, the U.S. Supreme Court began its opinion with the affirmation that "[i]t is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong 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 (1892).

[17] When the Justices of the Law Court opined on the Submerged Lands Act, the Justices noted that "by releasing title to these filled lands, the State has not lost any of its broad regulatory authority over them. Under its inherent police power, the State may extensively regulate private property in the public interest" and in fact was already doing so. *Opinion of the Justs.*, 437 A.2d at 608-09.

In summary, this Court has already rejected the equal footing argument pressed by Plaintiffs in Count II and, in recognition of that rejection, the court properly dismissed this claim. Maine's recognition of private ownership of intertidal lands is not repugnant to Maine's case law or the Maine Constitution. For nearly two hundred years, this Court has recognized and affirmed private ownership of intertidal lands within the State of Maine. Appellants' attempts at recasting *Bell I and II* as significant departures from this Court's precedent regarding intertidal ownership are unconvincing and unsupported. Furthermore, Maine's recognition of private ownership is also not in conflict with U.S. Supreme Court jurisprudence, which demonstrates a level of deference to state court decisions in this area. As this Court has affirmed time and again, the continued recognition of private ownership of intertidal lands does not violate equal footing principles.

### B. Count III of the Complaint was properly dismissed because this Court's recognition of private ownership of intertidal lands does not violate separation of power principles.

In Count III of their Complaint, Plaintiffs sought a declaration stating that, pursuant to the Maine Constitution, only the Legislature has the authority to alienate Maine's intertidal land, and this Court is therefore constitutionally barred from doing so. (*See* A. 138-39.) The court properly dismissed Count III for failure to state a claim upon which relief could be granted, noting that

"[u]nder no set of facts that the Plaintiffs may prove, will they be able to invalidate the prior effects of the Law Court's intertidal jurisprudence." (A. 75-76.)

1. *The essence of judicial function is identifying common law and applying its principles.*

Undeterred, on appeal Appellants Masucci and Delogu continue to argue that, by recognizing private ownership of intertidal land, this Court has "exceeded the powers of the judicial branch, violating Article IV §§ 1-3 of the Maine Constitution." (Masucci Blue Br. 34-35.) Contrary to this assertion, the recognition of private ownership of intertidal land is borne out of this State's common law. *See, e.g.*, *McGarvey*, 2011 ME 97, ¶¶ 8-11, 28 A.3d 620. As the court correctly explained, "Identifying what the common law is, as the Law Court did in *Bell I*, and invalidating a legislative attempt to alter the common law that runs afoul of the Constitution, as the Law Court did in *Bell II*, is the very essence of the judicial function." (A. 76.) Courts are bound to apply as governing law an applicable common law principle and to decline to do so in favor of a judicially selected principle is reversible error. *See Hilton v. State*, 348 A.2d 242, 247-48 (Me. 1975).

The separation-of-powers doctrine requires that Maine courts adhere to the long-established common law principle of private ownership of intertidal

land unless and until it is replaced by a legislative act that conforms to the constitutional requirements for the taking of private property. *See Bell II*, 557 A.2d at 176-77; *Barrows*, 73 Me. at 448 ("[The Colonial Ordinance] has been so often and so fully recognized by the courts both in this State and in Massachusetts as a familiar part of the common law of both, throughout their entire extent, without regard to its source or its limited original force as a piece of legislation for the colony of Massachusetts Bay, that we could not but regard it as a piece of judicial legislation to do away with any part of it or to fail to give it its due force throughout the State until it shall have been changed by the proper law making power.").

2. *Although the common law provides for private ownership of intertidal land, the common law can be modified by legislative action so long as such action conforms with constitutional requirements for the taking of private property.*

In conjunction with their claims of judicial overreach, Appellants Masucci and Delogu assert that "[a]lienation of intertidal land by a non-original colony may only be accomplished by statute or express grant." (Masucci Blue Br. 15; *see* Delogu Blue Br. 38-44.) The only authority Appellants cite for this proposition is a 1919 *Opinion of the Justices*. 118 Me. 503, 106 A. 865, 867 (1919). However, this opinion begins with the statement, "[u]nder the peculiar, but settled, law of Maine and Massachusetts, originating in the Colonial

Ordinance of 1641-47," and goes on to affirm that tidal ownership rights are firmly rooted in common law.[18] *Id.* Appellants have not and cannot point to a single authority in support of their contention that alienation of intertidal land could only be accomplished through statute or grant.

This is not to say, as Appellants Masucci mistakenly contend, that the common-law recognition of private ownership is "a permanent fixture of Maine law, forever beyond legislative authority to change." (Masucci Blue Br. 37.) Certainly, the Legislature could alter the tidal land ownership scheme and acquire for the State fee title to intertidal lands along Maine's coastline; however, any such act by the Legislature must conform to the constitutional requirements for the taking of private property.[19] *See Bell II*, 557 A.2d at 176-77; *McGarvey*, 2011 ME 97, ¶ 65, 28 A.3d 620.

The Legislature is not foreclosed from acquiring for the State title to intertidal land, but doing so must be constitutional. Until the Legislature endeavors to alter the common law while adhering to constitutional principles, this Court is well within its authority to "identif[y] the colonial ordinance as the

[18] Even if this *Opinion* offered support to Appellants' argument, "an advisory opinion binds neither the Court nor the individual Justices who gave the opinion." *Harding v. Comm'r of Marine Res.,* 510 A.2d 533, 537 (Me. 1986).

[19] This taking of fee title of intertidal land in Maine, as Appellants Masucci and Delogu propose, would be well beyond the mere expansion of public rights contemplated in the Public Trust in Intertidal Land Act, an expansion which this Court deemed a taking. *See Bell II*, 557 A.2d at 176-77; *McGarvey*, 2011 ME 97, ¶ 65, 28 A.3d 620.

common law of this state, interpret[ ] that common law to define what rights are held by whom, and shield[ ] the beneficiaries of this common law from legislation which offends constitutional principles." (A. 76.) As such, the court properly dismissed Count III of the Complaint.

### C. Count V was properly dismissed for failure to state a claim.

Even if Plaintiffs had standing to bring a quiet title action on behalf of the State of Maine, Count V is time barred by the six-year statute of limitations. As the court correctly noted, a declaratory judgment action "cannot be used to revive a cause of action that is otherwise barred by the passage of time." (A. 76-77 (citing *Hodgdon v. Campbell*, 411 A.2d 667, 668 (1980); *Sold Inc. v. Town of Gorham*, 2005 ME 24, 10, 868 A.2d 172).) Because the six-year statute of limitations applies to quiet title actions, *see Efstathiou v. The Aspinquid Inc.*, 2008 ME 145, ¶ 14, 956 A.2d 110, the court properly dismissed Count V after concluding that "even viewed in the most favorable light possible, this action to quiet title to the intertidal lands in the State of Maine has been brought 120 years too late" (A. 77). The court properly dismissed Count V where Appellees do not have standing to assert the claim on behalf of the State of Maine or the general public, *see supra* pp. 16-20, Appellees claim no title in themselves, and the claim is barred by the statute of limitations.

## III. The Court properly granted Ocean 503's Motion for Summary Judgment with respect to Count IV of the Complaint.

Even if this Court concludes that Appellants have overcome the myriad jurisdictional issues in this action discussed, *see generally supra* pp. 14-31, the court properly granted Ocean 503's MSJ as to Count IV of the Complaint and, in doing so, correctly reasoned that "granting Plaintiffs' requested relief would require setting aside established [Law Court] precedent, which is outside the bounds of this Court's jurisdiction." (A. 101.)

This Court reviews the grant of a motion for summary judgment *de novo* and "consider[s] the evidence in the light most favorable to the party against whom summary judgment was entered to determine if a genuine issue of material fact exists." *Efstathiou*, 2008 ME 145, ¶ 13, 956 A.2d 110, 116. This Court's "review of the evidence is a narrow one, focused on the parties' statements of material facts and the record evidence to which the statements refer." *Holmes v. E. Maine Med. Ctr.*, 2019 ME 84, ¶ 14, 208 A.3d 792, 797 (quotation marks omitted). "A fact is material if it has the potential to affect the outcome of the suit, and a genuine issue of material fact exists when a fact-finder must choose between competing versions of the truth, even if one party's version appears more credible or persuasive. However, when the matter remains one of pure speculation or conjecture, or even if the

probabilities are evenly balanced, a defendant is entitled to a [summary] judgment." *Id*. ¶ 15.

For this Court to grant Plaintiffs' requested relief in this action, this Court would need to first overturn *Bell II*. Doing so would constitute a substantial deviation from stare decisis. More critically, such a substantial deviation would be based on Plaintiffs' severely underdeveloped facts. In addition, this Court would need to overlook Appellants Masucci and Delogu's failure to conduct any analysis with these underdeveloped facts. Should this Court nevertheless decide to reach Plaintiffs' Count IV claims, this Court's analysis should be limited to walking.

### A. To either grant Appellants' requested relief or accept the State of Maine's construction of recreational walking as "navigation," this Court would need to first sidestep stare decisis and overturn *Bell II*.

Through the course of this matter, Appellants' Masucci and Delogu's request for relief has morphed from a request for a declaration that "the public trust extends to whatever the state sees fit to allow and regulate" into a request for recognition of a general recreation easement. *Compare* (A. 139), *with* (Masucci Blue Br. 48; Delogu Blue Br. 50-64). Yet, in *Bell II*, this Court

unequivocally rejected a similar request by the Town of Wells, holding that a general recreation easement

> cannot be justified as encompassed within or reasonably related to fishing, fowling, or navigation. . . . [T]here is no basis in law or history for declaring a public easement for general recreation. That 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.

*Bell II*, 557 A.2d at 173, 175-76. As such, Appellants Masucci, Delogu, and Attorney General's requested relief requires overturning Maine's public trust jurisprudence to date.

Below and now on appeal, Appellants Masucci ask this Court to overturn *Bell II*, arguing that stare decisis does not foreclose such a result. (Masucci Blue Br. 75-78.) The doctrine of stare decisis "exists because respect for legal precedent lends stability to the law and enables the public to place reasonable reliance on judicial decisions affecting important matters." *McGarvey*, 2011 ME 97, ¶ 63, 28 A.3d 620 (Levy, J., concurring). This Court does not overrule its precedent "without a compelling and sound justification." *Id*. While "stare decisis does not carry the same force and weight in every context," *Finch v. U.S. Bank, N.A.*, 2024 ME 2, ¶ 40, 307 A.3d 1049, "[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. "Such decisions become rules of property, and many titles may be injuriously affected by their change." *Id*. (quoting *United State v. Title Ins. & Tr. Co.*, 265 U.S. 472, 486-87 (1924)). As this Court previously cautioned,

> Because Maine's roughly 3500 miles of ocean coastline are a defining feature of both the state and its people, any judicial decision that reformulates the legal standard by which the competing rights of private landowners and the public to use intertidal land are determined must explicitly account for the principle of stare decisis. The concurrence would chart a course that is in plain conflict with *Bell II* without providing compelling and sound justification for this new direction.

*Id.* ¶ 66 (Levy, J., concurring). Appellants Masucci's stated justification for overruling *Bell II* is that it has "perpetuated rather than resolved conflict" and "is not well understood, and has proven to be a poor and unworkable policy." (Masucci Blue Br. 77; *see also* Delogu Blue Br. 61-64.) Appellants propose resolving the conflict by recognizing a general recreational easement, thereby tossing out the "rules of property" and "injuriously affect[ing]" titles all along the coastline.

The Attorney General, on the other hand, does not seek a complete overhaul of *Bell II*'s rejection of a general recreational easement; instead, it urges this Court to recognize the more limited right of recreational walking. (AG Blue Br. 21.) Contrary to the Attorney General's assertion that such a recognition does not require overturning *Bell II*, as discussed *infra*, the Attorney

General's contention that recreational walking is "navigation" is at direct odds with *Bell II,* which expressly rejected recreational walking as beyond the scope of the Colonial Ordinance triumvirate of fishing, fowling, and navigation. *Bell II*, 557 A.2d at 175-76. Recreational walking may be incidental to navigation, but, under *Bell II*, it is not, in and of itself, navigation. Recognizing recreational walking as "navigation," as the Attorney General urges this Court to do, therefore also requires overturning *Bell II*.

Alternatively, Appellants Masucci propose that this Court overrule *Bell II* and adopt the reasonable-balance analytical approach of Chief Justice Saufley's concurrence in *McGarvey*. *See* 2011 ME 97, ¶¶ 49-57, 28 A.3d 620 (Saufley, C.J., concurring); (Masucci Blue Br. 43). The reasonable-balance approach, consistent with the approach advocated for in Justice Wathen's dissent in *Bell II*, represents a "return to the roots of the common law" under which public rights are developed generously but "in a manner that d[oes] not unreasonably interfere with the rights of the riparian owner." *McGarvey*, 2011 ME 97, ¶¶ 41, 53, 28 A.3d 620. Under this approach, this Court looks at the underlying facts of the controversy and considers "contemporary notions of usage and public acceptance in order to strike a rational and fair balance between private ownership and public rights." *Bell II*, 557 A.2d at 188 (Wathen, C.J., dissenting).

Appellants Masucci argue the reasonable-balance approach is warranted because it "plac[es] the onus on the property owner to prove that a use is an unreasonable interference with their rights" and "returns the court to adjudicating cases rather than making policy." (Masucci Blue Br. 77.) Appellants Masucci, however, do not provide any justification for shifting the burden to property owners to prove unreasonable interference. Appellants Masucci also fail to demonstrate how adopting this approach will decrease "conflict on the beach," particularly where this approach requires a balancing of interests, a task hardly suited to the average beach-goer on a sunny day.

In keeping with its reluctance to explicitly argue for a complete overturning of *Bell II*, the Attorney General has argued that this Court can adopt the reasonable-balance approach without overturning *Bell II* because *Bell II* established the scope of the public trust doctrine in 1989, not in 2024, and the common law is not static but instead adaptable. (AG Blue Br. 15-20.) The public trust doctrine, according to the Attorney General, "is necessarily imbued with the capacity for growth," and, as other states have recognized, can "adapt[ ] over time."[20] (AG Blue Br. 17.)

[20] This growth and adaptation over time that is recognized in other states responds to "new situations as they ar[i]se," in recognition of the fact that "the public trust doctrine is a forward-looking doctrine that is flexible enough to accommodate *future uses* and to protect against *unforeseen harms* to the public's ability to use public trust resources." *Chernaik v. Brown*, 367 Or. 143, 161, 475 P.3d 68, 79 (2020) (emphasis added); *see also Gunderson v. State, Indiana Dep't of Nat. Res.*,

Like Appellants Masucci and Delogu, the Attorney General provides no justification for why this Court should depart from its precedent and no explanation of why recreational walking in 2024 requires a re-examination. Recreational walking on intertidal lands is not a "new situation" or a "future use"; it was squarely at issue in *Bell II*. *See* 557 A.2d 168, 175-76 (Me. 1989). Accepting the Attorney General's argument that the *Bell II* decision merely "declared the scope of the public trust doctrine in 1989, not in 2024," (*see* AG Blue Br. 15), invites re-litigation of those activities already decided. The Attorney General's construction of the common law does not just allow adaptation in the face of changing circumstances or future uses; it allows for re-examination of past uses solely on the basis of the passage of time. This is precisely what the doctrine of stare decisis is intended to prevent.

Regardless, even if this Court were inclined to overturn *Bell II* and formally adopt the reasonable-balance approach articulated in Chief Justice Saufley's *McGarvey* concurrence, as explained more fully *infra*, Appellants have not presented this Court with a sufficient opportunity to do so. Specifically, Appellants failed to (1) plead and develop sufficient facts upon which this Court

90 N.E.3d 1171, 1188 (Ind. 2018) (stating that 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") (emphasis added) (internal quotation marks omitted).

could consider, under the reasonable-balance approach, Plaintiffs' alleged uses of Ocean 503's intertidal zone and the burden placed on Ocean 503; and (2) engage in the reasonable-balance analysis before the court and have therefore waived the argument.

### B. This case does not properly present this Court with an opportunity to overrule *Bell* nor adopt the reasonable-balance approach articulated in *McGarvey v. Whittredge*.

Although Appellants Masucci and Delogu have now had years to provide, articulate, and develop facts pertaining to their activities within the intertidal zone, they have failed to sufficiently meet their burden of doing so. Despite Plaintiffs, at the summary judgment stage, and Appellants Masucci, now on appeal, allege a non-exhaustive list of more than thirty-five activities in which they have generally engaged in the intertidal zone, this list is devoid of any factual support.[21] (*See, e.g.*, A. 334; *see also* Masucci Blue Br. 46-47.)

In Appellants' Masucci's Statement of Material Facts, each "fact" related to activities is merely a naming of the activity itself; and fails to establish, for example, where the activities occurred, when they occurred, how often they occurred, for how long they occurred, or who participated. (*See, e.g.*, A. 334; *see also* Masucci Blue Br. 46-47.) This Court, in *Bell II*, declined to recognize

[21] With respect to the Ocean 503 Property specifically, the facts developed below supported Appellants having engaged in only about seven of those activities. *Compare* (A. 334 *and* Masucci Blue Br. 46-47), *with* (A. 758-760.)

more limited recreational uses when the analysis was based on nothing more than assumed facts, holding that "[a] public easement for bathing, sunbathing, and recreational walking cannot be justified on the factual assumption that it is 'no more burdensome' on the private landowner than the Colonial Ordinance easement for fishing, fowling, and navigation." *Bell II*, 557 A.2d at 175. To perform a proper reasonable-balance analysis, there must be facts demonstrating that no greater burden is placed on the private landowner, *see Ross*, 2019 ME 45, ¶ 30, 206 A.3d 283, and Appellants have failed to develop the record in this regard.[22]

The record in the present matter does not provide the concrete and precise facts for analysis that was developed in *Ross*. The record in this case contains insufficient facts and therefore does not present this Court with an opportunity to adopt and apply the reasonable-balance approach. The lack of

[22] Appellants Masucci and Delogu's vague facts are in stark contrast to the public trust cases that developed that precise and concrete facts necessary to this Court's analysis of whether a disputed activity was a use within the scope of the public trust. *See, e.g.*, *Ross*, 2019 ME 45, ¶¶ 3-6, 206 A.3d 283 (laying out facts submitted to the court which detail the nature and characteristics of rockweed, the process and frequency of defendant's harvesting activity, and the conflict between the parties that precipitated the lawsuit). In *Ross*, this Court examined the process of harvesting rockweed to determine reasonableness of the burden imposed on the owner of the intertidal land, noting that "the nature of the interference consists of cutting and removing marine plants . . . with the use of specialized equipment and skiffs that have a multi-ton capacity." *Id*. ¶ 31. With these facts, this Court was able to analogize the harvesting activity to other uses that the Court had held were outside of the public trust doctrine. *Id*.

facts in the record necessary to properly perform a reasonable-balance analysis is not the result of insufficient fact-finding efforts on the part of the Appellees.[23]

### C. Appellants waived their reasonable-balance adoption arguments by failing to perform the analysis themselves.

Even assuming there were enough facts to properly perform a reasonable-balance analysis, neither Appellants Masucci nor Appellant Delogu have conducted anything more than a perfunctory analysis, thereby waiving their argument. *See Holland v. Sebunya*, 2000 ME 160, ¶ 9 n.6, 759 A.2d 205, 209 (deeming abandoned an argument where, on appeal, appellant's brief contained only a restatement of the issue). For example, Appellants Masucci simply conclude that their enumerated activities "lack meaningful distinction" from those which this Court has already recognized as within the public trust rights and imply that the impacts of Appellants' activities on private property owners are similarly minimal. (Masucci Blue Br. 47.) Appellants Masucci's conclusory statements regarding the reasonableness of their activity and the minimal burden it imposes on private owners is pulled directly from their

[23] Cross-Appellant Ocean 503 filed a Motion for More Definite Statement, served Appellants with discovery requests, and deposed Appellants, all in an attempt to gain further insight into the activities in which Appellants were engaged in the intertidal zone of the Ocean 503 Property. (*See, e.g.* A. 31; *see generally* R.) Appellants' claims pertained largely to their activity on the coast of Maine generally and many could not confirm that they had actually set foot on the Ocean 503 Property. For those Appellants who were certain they had engaged in activity on the Ocean 503 Property, they were able to provide little specific information with respect to their activities there. As such, the factual deficiencies in the record are unlikely to be remedied by a remand to the trial court for further fact-finding.

Motion for Summary Judgment. (*Compare* Masucci Blue Br. 47, *with* A. 334-35.) Yet, both before the court and now on appeal, Appellants Masucci have failed to perform any actual reasonableness analysis and thereby waived the issue of whether their alleged activities constitute a reasonable balance of private ownership and public rights.

### D. The Attorney General's reasonable-balance analysis underscores the factual infirmities of this case and should be rejected by this Court.

In an attempt to save the Count IV claims on appeal, the Attorney General has engaged in a limited analysis of the narrower issue of whether walking[24] represents a reasonable balance of public rights and private landowner interests. (AG Blue Br. 22-24.) The State's analysis underscores the factual issues that permeate this case and illustrates that this case does not present this Court with an opportunity to formally adopt the reasonable-balance analytical framework.

As with the Appellants Masucci and Delogu's reasonable-balance analysis, the Attorney General's attempt to balance the public rights with the

[24] Before the court, the Attorney General argued that the court "should hold that, pursuant to the public trust doctrine, [Plaintiffs] . . . have the right to walk unfettered across intertidal land in Maine . . .". (A. 303.) On appeal, the Attorney General has apparently dropped the "unfettered" language and argues that recreational walking generally represents a reasonable balance of public rights and private landowner's interests. (*See* AG Blue Br. 22.) The Attorney General's initial request for recognition of a public right to walk unfettered on intertidal land is antithetical to the "reasonable balance" approach. By definition, unfettered means unrestricted and an unrestricted right cannot be balanced against a countervailing right.

private landowner's interests is largely devoid of facts from the record and is instead dependent on broad generalizations. With respect to the public rights, the Attorney General points to the intertidal land's "power to calm the mind," its "majesty and allure," and its position as an "antidote in these digital, anxious, and stratified times." (AG Blue Br. 23.) Looking at the underlying citations, these "facts"[25] are derived from vague statements made by Plaintiffs during depositions which were not clearly tied to use of the Ocean 503 Property. With respect to the burden imposed, the Attorney General does not include a single citation to the record to support its conclusion that walking imposes no burden on the private landowner's interests, other than to state that it is already occurring.[26] (AG Blue Br. 23-24.) The lack of facts in this matter should give this Court pause in engaging in Appellants Masucci, Appellant Delogu, and the Attorney General's purely academic attempts at expanding the scope of the public trust doctrine.

[25] As discussed *infra* pp. 59-60, the court properly denied the Attorney General's Motion for Summary Judgment because, in part, the Attorney General's statement of material facts "include[d] legal conclusions, personal opinions, cite[d] to portions of the record containing inadmissible hearsay, lack[ed] logical organization, and frequently assert[ed] facts that are irrelevant to the instant litigation or simply repetitive." (A. 115.)

[26] The fact that individual Plaintiffs may presently walk in the intertidal zone of the Ocean 503 Property does not indicate that the burden imposed on Ocean 503 by the general public recreationally walking would be minimal. If anything, Plaintiffs' walking on Ocean 503 Property without Ocean 503 interfering highlights the lack of controversy required for justiciability, but it does not suggest that such activity imposes no burden on Ocean 503's interests.

## IV. The Court properly denied the AG and Plaintiffs' motions for summary judgment.

Rule 56(h) requires that a motion for summary judgment be supported by a "short and concise" statement of material facts. M.R. Civ. P. 56(h)(1). "If a party submits an unnecessarily long, repetitive, or otherwise convoluted statement of material facts that fails to achieve the Rule's requirement of a separate, short, and concise statement, the court has the discretion to disregard the statement and deny the motion for summary judgment solely on that basis." *Stanley v. Hancock Cnty Comm'rs*, 2004 ME 157, ¶¶ 27-29, 864 A.2d 169 (criticizing, sua sponte, a 191-paragraph statement of material facts); *see also First Tracks Inv's., LLC v. Murray, Plumb & Murray*, 2015 ME 104, ¶ 3, 121 A.3d 1279 (noting that the trial court "would have been well within its discretion . . . to have denied summary judgment" when the parties' statements were "repetitive and duplicative, lack a chronological organization, and contain many facts that are entirely irrelevant to the litigation"). Here, based upon the manner in which the AG and Plaintiffs "availed themselves of the summary judgment process," (*see* A. 291-304, 323-43, 830-59), court properly exercised its discretion in denying both the Attorney General's and Plaintiffs' respective motions for summary judgment where Plaintiffs and the Attorney General filed a 220-paragraph and 129-paragraph statement of material facts, respectively,

both of which "include[d] legal conclusions, personal opinions, cite[d] to portions of the record containing inadmissible hearsay, lack[ed] logical organization, and frequently assert[ed] facts that are irrelevant to the instant litigation or simply repetitive." (A. 115, 119.)

## CONCLUSION

This case is demonstrative of the harm that can result when standing is not sufficiently tailored. Plaintiffs' claims are nonjusticiable, and the court erred by not dismissing the Complaint at the motion-to-dismiss and summary-judgment stages of these proceedings. This Court should hold that Plaintiffs do not have standing to bring quiet title on behalf of the State of Maine. This Court should further hold that the court erred by too broadly reading this Court's holdings in *Black v. Bureau of Parks and Lands* and *Fitzgerald v. Baxter State Park Authority*. Because the Attorney General is best suited to assert the public rights in Plaintiffs' Count IV claims and he not disabled from doing so, it is unnecessary for this Court substitute the Attorney General for members of the public who have a history of use of the land at issue. Finally, should this Court, notwithstanding these issues of justiciability, confer standing to any Plaintiff this Court should conclude that the court correctly dismissed Counts I, II, III, and V and appropriately granted summary judgment to Ocean 503.

For the reasons set forth in this brief, Ocean 503 respectfully requests that this Court deny Appellants Masucci, Appellant Delogu, and the Attorney General's appeals, and instruct that the court dismiss the Complaint for lack of standing. In the alternative, should this Court decide to confer standing to any Plaintiff, Ocean 503 respectfully requests that this Court deny Appellant's appeals and affirm the court's April 19th Order, Order on Justiciability, Consolidated Order on Defendants' Pending Dispositive Motions, Order on the Attorney General's Motion for Summary Judgment, and Order of Plaintiffs' Motion for Summary Judgment.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

Undersigned counsel for Ocean 503 hereby certifies that it has complied with Maine Rule of Appellate Procedure 7A(i) by (1) filing ten printed copies and one emailed copy of this brief to the Clerk of the Law Court; and (2) providing two printed copies to each party who are either separately represented or unrepresented, and one emailed copy to each party that has provided a proper email address with their appearance on appeal.

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## CERTIFICATE OF CONFORMANCE

Undersigned counsel for Ocean 503 hereby certifies that this brief conforms with this Court's May 15, 2024, Order Modifying Briefing Rules, and does not exceed 75 pages or 18,750 words.

_____

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