STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Docket No. WAS-17-142

KENNETH W. ROSS, CARL E. ROSS, and ROQUE ISLAND GARDNER HOMESTEAD CORPORATION,

Plaintiffs-Appellees,

v.

ACADIAN SEAPLANTS, LTD.,

Defendant-Appellant.

On Appeal from the Maine Superior Court
(Washington County)
Docket No. CV-2015-22

BRIEF OF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND PROPERTY AND ENVIRONMENT RESEARCH CENTER

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Pacific Legal Foundation (PLF) and Property and Environment Research Center (PERC) respectfully submit this *Amicus* brief in support of Plaintiffs-Appellees Kenneth W. Ross, Carl E. Ross, and Roque Island Gardner Homestead Corporation. Counsel for both appellants and appellees have provided written consent to the filing of this brief.

Statement of Interest of Amici

Founded in 1973, PLF defends limited government, property rights, and a balanced approach to environmental regulation in courts nationwide. PLF has extensive experience litigating property rights and environmental issues as counsel and *Amicus Curiae*. *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *U.S. Army Corps of Engineers v. Hawkes Co.*, 136 S. Ct. 1807 (2016); *Sackett v. E.P.A.*, 566 U.S. 120 (2012); *Pepin v. Division of Fisheries and Wildlife*, 467 Mass. 210, 4 N.E.3d 875 (2014).

PERC is the nation's oldest and largest institute dedicated to improving environmental quality through property rights and markets.

It has produced extensive scholarship on the environmental benefits of clear and secure property rights. PERC also participates as *Amicus Curiae* in cases, like this one, that involve private property rights, individual liberty, and environmental stewardship. *See, e.g.*, *Freeman v. Grain Processing Corporation*, 848 N.W.2d 58 (Iowa 2014); *Public Lands Access Ass'n v. Bd. of Cnty. Commissioners of Madison Cnty.*, 373 Mont. 277, 321 P.3d 38 (2014).

This case is of keen interest to PLF and PERC because it presents a substantial property rights issue that could have a significant impact on Maine's environment. As PLF and PERC's brief explains, clear and secure property rights promote responsible conservation and help resolve conflicting demands on exhaustible resources. Conversely, destabilizing property rights by expanding Maine's public trust doctrine to include uncertain and ephemeral rights will increase conflict and frustrate conservation. PLF and PERC bring a unique public policy perspective that will be useful to the Court as it considers this case.

Statement of Facts and Procedural History

PLF and PERC hereby adopt the Statement of Facts and Procedural History Advanced in Appellee's Brief.

Argument

This case raises important questions about the link between secure property rights and environmental stewardship. On one side are property owners who wish to conserve the rockweed on their private property and the ecosystem that depends on it. On the other is a company that wishes to harvest the rockweed without having to obtain the consent of the owner of the property where it grows. Resolving that conflict will require this Court to decide whether the state's public trust doctrine remains subject to the limits that have endured for nearly 200 years or whether it will be reinterpreted to include uncertain and ephemeral rights. In the former, both property rights and public trust rights are clear; in the latter, both will be murky, inevitably leading to more conflicts.

Secure and clear property rights offer the best means of amicably resolving these conflicting demands. *See* Jonathan H. Adler, *Back to the Future of Conservation: Changing Perceptions of Property Rights & Environmental Protection*, 1 N.Y.U. J.L. & Liberty 987 (2005). Recognizing the property owners' right to the rockweed growing on their land will encourage putting it to its highest use, by allowing property owners to weigh the value of conserving rockweed against what harvesters are willing to pay. If a particular property owner is indifferent to the value of conserving rockweed, secure property rights enable environmentalists, who may place a high value on conserving rockweed in particularly sensitive areas, to protect their interests by obtaining those rights. Muddying the scope of Maine's public trust doctrine, on the other hand, will encourage more conflict and litigation, rather than compromise.

Secure property rights are also the best means of protecting Maine's rockweed and the ecosystems that depend on it. Private property owners have an incentive to ensure that any harvesting is

sustainable, meaning they must weigh the benefits of more harvesting today against the costs of less rockweed in the future. Expanding the public trust doctrine to include rockweed harvesting would undermine these incentives and risk overharvesting. If anyone can harvest at any time, that reduces the incentive to forego harvesting more today to ensure that it remains sustainable in the future, creating a tragedy of the commons. *See* Garrett Hardin, *The Tragedy of the Commons*, 162 Science 1243 (1968).[1] Maintaining the limits on the public trust rights, thus siding with the property owners, would not preclude all rockweed harvesting. To the contrary, it would ensure sustainable harvesting in the future.

Aside from these policy considerations, unmooring the public trust doctrine from those rights explicitly reserved in the Colonial Ordinance of 1647, which has, ever since, been the foundation of those rights in the common law of this state, would destabilize property rights, present intractable line drawing problems, and potentially put the state on the

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[1] *Available at* https://www.sciencemag.org/site/feature/misc/webfeat/sotp/pdfs/162-3859-1243.pdf.

hook for significant liability under the Takings Clause. To avoid these problems, this Court should reiterate that fishing, fowling, and navigation continue to "delimit the public's right to use this privately owned land." *Bell v. Town of Wells*, 557 A.2d 168, 173 (Me. 1989) (*Bell II*). Rockweed growing on private property is not encompassed by these rights but instead belongs to the private owner.

I
Secure Property Rights Are the Best Means To Resolve Competing Demands on Limited Resources

This case, like all environmental issues, is ultimately about conflicting demands on limited resources. *See* Katy Hanson, *Visions of Environmentalism, in Free Market Environmentalism for the Next Generation* 1-13 (2015) ("[A]ll environmental problems emanate from conflicting demands on limited natural resources." (emphasis omitted)). The property owners wish to conserve the rockweed on their property and the ecosystem that depends on it. Acadian Seaplants Ltd. wishes to profit from the harvesting of that rockweed. Beyond the present

conflict, this Court's decision will affect how such conflicts are resolved going forward.

Property rights have proven to be the best way to resolve, amicably, conflicting demands on exhaustible resources. *See* Adler, 1 N.Y.U. J. L. & Liberty 987. They strike a balance between competing demands by relying on prices to reveal how much each side values the resource for a particular use. *See* James E. Roper & David M. Zin, *Revealed preference theory*, Encyclopedia Brittanica (2013).[2]

Resource use inevitably involves tradeoffs. If a tree is cut down to produce firewood, for instance, it cannot be used to produce lumber or paper or conserved as habitat for wildlife. Evaluating these tradeoffs requires information about how much people value each of these competing uses, information that is not easy, perhaps impossible, to obtain without prices. *See* Terry L. Anderson & Donald R. Leal, *Rethinking the Way We Think, in Free Market Environmentalism* 14-21 (2001). Without access to this information, the best that any

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[2] *Available at* https://www.britannica.com/topic/revealed-preference-theory.

government regulator could do is guess based on political factors. *See* Terry L. Anderson & Donald R. Leal, *Free Market Versus Political Environmentalism*, 15 Harv. J.L. & Pub. Pol'y 297 (1992).

Property rights, on the other hand, reveal this information by converting these competing values into prices. *See Rethinking the Way We Think, supra* at 15. A person's willingness to pay a particular price for a resource reveals the strength of her preferences. Most people intuitively understand this when it comes to economic decisions. If one person is willing to pay $10 to cut down a tree for lumber and another is only willing to pay $5 to cut it down to make paper, the owner will choose the higher bid and the resource will be put to its highest valued use.

Prices incorporate more than just economic interests; they reflect many other values, including environmental values. *See* Terry L. Anderson, *Markets and the Environment: Friends or Foes?*, 55 Case W. Res. L. Rev. 81 (2004). If the owner of a tree values conserving it as habitat for wildlife at $12, he will not allow it to be chopped down for

either lumber ($10) or paper ($5). Similarly, an owner indifferent to the environmental benefits of conserving the tree would not cut it down if a neighbor or environmental group were willing to pay him $15 to conserve it.

Environmental groups regularly use property rights and free markets to achieve publicly beneficial environmental ends, pooling the resources of their supporters to achieve ends that the supporters might otherwise be unable to on their own. *Cf.* David D. Haddock, *Why Individuals Provide Public Goods, in Accounting for Mother Nature* 261-85 (2008).[3] The Nature Conservancy, for instance, incentivizes rice farmers to provide popup wetlands for migratory birds in a region where natural wetlands have given way to development. *See* Jim Robbins, *Paying Farmers to Welcome Birds*, N.Y. Times, Apr. 14, 2014.[4] Other conservation groups have leased water rights to maintain

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[3] *Available at* http://www.hermesricerche.it/ita/semconv/WP_Haddock_1.pdf.

[4] *Available at* https://www.nytimes.com/2014/04/15/science/paying-farmers-to-welcome-birds.html.

instream flows for fish during droughts. *See* Reed Watson, *Scott River Water Trust: Improving Stream Flows the Easy Way*, PERC Case Study (2014).[5] Another is protecting a large prairie ecosystem by purchasing habitat and incentivizing its private neighbors to change their grazing activity to reduce environmental impacts. *See* Pete Geddes, *The Yellowstone of the Future*, N.Y. Times, Dec. 28, 2015.[6] Protecting the environment through property rights provides more certainty than regulations, which remain subject to shifting political winds.

This bargaining depends on clear and secure property rights. *See* Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1-44 (1960).[7] If no one is certain what rights he has and what rights others have, those who have conflicting demands to exhaustible resources will be unable to strike a compromise. This will be doubly harmful because

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[5] *Available at* https://www.perc.org/articles/scott-river-water-trust-improving-stream-flows-easy-way.

[6] *Available at* https://www.nytimes.com/2015/12/28/opinion/the-yellowstone-of-the-future.html.

[7] *Available at* https://econ.ucsb.edu/~tedb/Courses/UCSBpf/readings/coase.pdf.

it will also prevent prices from revealing the strength of the preferences for each competing use.

In this case, upholding the property owners' right to control rockweed harvesting on their property will protect clear and secure property rights and thereby encourage compromise rather than conflict. If Acadian Seaplants values harvesting rockweed more than anyone values conserving it, the company will be able to bargain with the owner for the right to harvest it. However, if the owner or an environmental group values conservation more, the seaweed will not be harvested. Protecting the property owner's rights will encourage the negotiation that will reveal how much seaweed should be harvested and where.

By undermining property rights and adding rockweed to the universe of the public trust, use of the resource will be determined by whoever harvests it first, rather than who values it most. Suppose you were an environmental group who highly valued conserving rockweed in a particularly sensitive area. If the rockweed belongs to the property

owner, your way forward is obvious: buy the rights to the rockweed and conserve it. But, if rockweed is within the public trust, it would be much harder to protect it. Rather than negotiating with an individual property owner, you would have to negotiate with everyone who might harvest the rockweed, a large and uncertain share of the public. This would present such high transaction costs that negotiation would not be a reasonable option. *See* Coase, *supra* at 15-19 (discussing the impact of high transaction costs on trading property rights).

II

Secure Property Rights Avoid a Tragedy of the Commons

Secure property rights also encourage responsible harvesting while protecting Maine's rockweed and the ecosystems that depend on it. A property owner allowing harvest must consider not only the short-term benefits of doing so but also the long-term costs, including environmental impacts. For renewable resources, like seaweed, this encourages property owners to ensure sustainability. If too much is harvested today, there may not be enough to harvest in the future,

costing the property owner future income. Interpreting public trust rights to include rockweed harvesting, however, could lead to the tragedy of the commons.

The tragedy of the commons occurs when a resource is open to anyone to use as much as he likes, giving everyone an incentive to overuse it today before others do. *See* Hardin, *supra*. The classic case is a village green, or commons, open to any villager to graze her sheep. Every villager separately weighs the benefits of adding an additional sheep against the risk of overgrazing. The benefits of additional grazing are concentrated on the individual villager and the risk of overgrazing is dispersed among all of the villagers and largely dependent on the independent actions of others. This gives each a perverse incentive to overgraze the commons before their neighbors can.

Another example is open-access fisheries. *See* Daniel K. Benjamin, *Fisheries Are Classic Example of the "Tragedy of the*

Commons," PERC Report Vol. 19, No. 1 (2001).[8] A fisherman enjoys all of the benefit from the fish he catches today, but no benefit from the fish he leaves behind to grow or propagate, because he is unlikely to catch it or its progeny later. Due to these incentives, many fisheries have been overfished. *See* Katrina M. Wyman, *The Recovery in U.S. Fisheries*, 31 J. Land Use & Envtl. L. 149, 150 (2016).

The tragedy of the commons has a ready and proven solution: secure property rights. *See* Hardin, *supra* at 1245 ("The tragedy of the commons as a food basket is averted by private property, or something formally like it."); *see also* Adler, 1 N.Y.U. J. L. & Liberty at 1021. Someone with secure property rights to a resource has an incentive to protect it, because her future income and use is dependent on it. Recent decades have shown that this is not mere theory, but an observable fact. Resources that were formerly open-access, and thus over-utilized, have rebounded thanks to property rights.

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[8] *Available at* https://www.perc.org/articles/fisheries-are-classic-example-tragedy-commons.

Fisheries, for instance, are recovering where they are transitioning from public trust rights of open access to catch shares that recognize property rights for fishermen. *See* Jonathan H. Adler & Nathaniel Stewart, *Learning How to Fish: Catch Shares and the Future of Fishery Conservation*, 31 UCLA J. Envtl. L. & Pol'y 150, 176-88 (2013). Property rights are succeeding where regulation largely failed because they give fishermen a financial stake in the health of the fishery. Unlike under open access, a fisherman who owns a share of the allowable catch captures the benefits of catching fewer fish today to ensure that the fishery is sustainable tomorrow.

In this case, expanding the public trust doctrine to include rockweed could lead to the tragedy of the commons. Like the commons, rockweed would be available to anyone to harvest as much as he wants, subject only to government regulation. No individual harvester would have a direct incentive to harvest less today to ensure sustainability. If they make this sacrifice, someone else may harvest whatever they leave.

Recognizing the right of the property owner to decide whether, and how much, rockweed is harvested from her property, can avert the tragedy of the commons. The property owner has a direct incentive to ensure sustainability. If she allows too much rockweed to be harvested, she may be sacrificing her future income. Some property owners may decide not to allow harvesting to protect the other environmental benefits they derive from conserving rockweed, like the health of the ecosystem that depends on it.

Government regulation is often a poor substitute for secure property rights. Regulators may not have necessary information, like how much a property owner or environmental group values conserving a particular area. *See Free Market Versus Political Environmentalism*, 15 Harv. J.L. & Pub. Pol'y at 302-03. Regulation may be unstable and shift with the political winds. It tends to be one-size-fits-all, whereas the factors that affect rockweed sustainability may vary. Moreover, regulation requires active enforcement, since regulated parties' incentives are to circumvent regulation where possible. *Cf.* Richard

Conniff, *An African Success: In Namibia, The People and Wildlife Coexist*, YaleEnvironment360.com (May 12, 2011) [9] (explaining that poaching was rampant in Namibia until local communities were given property rights in wildlife). Finally, regulation may be subject to regulatory capture, controlled by self-interested industry that has a strong financial interest in steering regulation to their benefit. *See* George J. Stigler, *The Theory of Economic Regulation*, 2 Bell J. Econ. & Mgmt. Sci. 3 (1971).[10]

The advantage that secure property rights have over regulation increases when one considers the possibility that rockweed may someday need to be restored in some areas, either because of overharvesting or other environmental factors. *Cf.* Alexandra H. Campbell, et al., *Towards Restoration of Missing Underwater Forests*, 9

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[9] *Available at* http://e360.yale.edu/features/an_african_success_in_namibia_the_people_and_wildlife_coexist.

[10] *Available at* http://www.rasmusen.org/zg604/readings/Stigler.1971.pdf.

PLOS One e84106 (2014).[11] This restoration work can be difficult and expensive. However, secure property rights can incentivize this work, by giving the individual or group who undertakes it rights to the benefit they create. *Cf.* Josh Eagle, *A "right to reef out" could encourage private investments in coastal restoration*, PERC Report, Vol. 33, No. 2 (2014).[12]

III

Expanding Public Trust Rights Would Destabilize Property Rights, Present Myriad Line-Drawing Problems, and Expose the State to Significant Takings Clause Liability

The public trust doctrine is a common law doctrine derived from Roman law that protects the public's rights to navigate and fish in the ocean and certain other waters. *PPL Montana, LLC v. Montana*, 565 U.S. 576, 603-04 (2012); *but see* James L. Huffman, *Speaking of Inconvenient Truths—A History of the Public Trust Doctrine*, 18 Duke Envtl. L. & Pol'y F. 1 (2007) (arguing that the modern public trust bears little resemblance to any Roman law antecedent). In the United States,

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[11] *Available at* https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3885527/pdf/pone.0084106.pdf.

[12] *Available at* https://www.perc.org/articles/21st-century-wharf.

the public trust doctrine is a matter of state law and its scope varies by state. *See PPL Montana*, 565 U.S. at 603-04. Similarly, states vary on whether the land between the mean high tide and mean low tide is public land or private land. *See id.*

In Maine, the abutting property owner owns this intertidal land, subject to public trust rights; a rule that dates back to the Massachusetts Bay Colony's Colonial Ordinance of 1647. *McGarvey v. Whittredge*, 2011 ME 97, ¶¶ 8-16, 26-28, 28 A.3d 620.That ordinance, which became part of Maine's common law after it separated from Massachusetts, acknowledged public rights to three activities: "fishing," "fowling," and "navigation." *Id.* ¶¶ 28-29, 28 A.3d 620.

Although this Court has liberally interpreted these terms to include activities traditionally treated as within them or inseparable from them, they continue to "delimit the public's right to use this privately owned land." *Bell II*, 557 A.2d at 173. In *Bell II*, coastal property owners challenged a state law purporting to expand the public trust rights to include general recreation. *Id.* at 176-77. In siding with

the property owners, this Court held that public trust rights are limited to the three categories recognized in the Colonial Ordinance. *Id.* at 173-74. Expanding public trust rights beyond them would destabilize property rights, present impossible line-drawing problems, and subject the state to significant liability under the Takings Clause. *See id.* at 173-78.

A. Expanding the Public Trust Beyond Its Traditional Limits Will Destabilize Established Property Rights

The Court's decision in *Bell II* is well grounded. When this Court recognized that the Colonial Ordinance had become part of the state's common law, it explained that departing from the ordinance would destabilize property rights and frustrate property owners' expectations. *See Lapish v. President, etc., of Bangor Bank*, 8 Me. 85, 93 (1831). "'[T]hat being a settled rule of property, it would be extremely injurious to the stability of titles, and to the peace and interest of the community, to have it seriously drawn in question.'" *Bell v. Town of Wells*, 510 A.2d 509, 513 (Me. 1986) (*Bell I*) (quoting *Barker v. Bates*, 30 Mass. 255, 258 (1832)).

The passage of nearly 200 years has only increased the importance of this factor. Yet, recently, the question whether the Colonial Ordinance continues to delimit the public's right to use privately owned land along the coast divided this Court. In *McGarvey v. Whittredge*, the Court considered whether the public has a right to cross intertidal land to scuba dive. 2011 ME 97, 28 A.3d 620. The Court unanimously held that it does, but divided on the rationale. Three justices concluded that scuba diving is not "navigation" but reasoned that it should be permitted nonetheless because crossing intertidal lands for purposes of scuba diving, an "ocean-based activity," is nonetheless consonant with the roots of the common law." *Id.* ¶ 51-53, 28 A.3d 620. The other three justices concluded that scuba diving is a form of navigation, under the "sympathetically generous" interpretation the Court had previously given that term. *See id.* ¶ 68, 28 A.3d 620; *see also Bell II*, 557 A.2d at 173.

The Court should not embrace a free-floating interpretation of the public trust doctrine. Doing so would destabilize property rights,

undermining the very reasons why this Court incorporated the Colonial Ordinance into the state's common law. *See Lapish*, 8 Me. at 93. "Society'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 at ¶ 64, 28 A.3d 620. [13] As explained above, clear and secure property rights are essential to resolving conflicting demands on limited resources. *See* Part I, *supra*. Altering the historic understanding that the public trust right is limited to fishing, fowling, and navigation will make it more difficult to resolve these conflicts amicably. If no one can be certain what rights property owners have and what rights the public has, compromise and negotiation will be more difficult, leaving little choice but to resort to litigation. This would harm both property owners and conservation, by making it more

[13] Under either of the approaches followed in *McGarvey*, the appropriate result here is to affirm the motion court's decision. Simply put, harvesting rockweed attached to the intertidal owner's fee is neither fishing, fowling, nor navigation no matter how liberally interpreted those terms are. Nor is it consistent with the roots of the common law. *See* footnote 14 *Infra*.

difficult for environmental groups to protect rockweed in sensitive areas. *See* Part I, *supra*.

B. An Uncertain and Ephemeral Interpretation of the Public Trust Doctrine Will Present Myriad Line Drawing Problems for the Courts

Unmooring the public trust doctrine from the Colonial Ordinance's rights to fishing, fowling, and navigation will also present myriad line drawing problems, and require this Court to hear endless litigation to resolve them. Whereas now the scope of the public trust is relatively clear, notwithstanding this Court's "sympathetically generous" interpretation, the alternative would result in "uncertain and ephemeral rights[.]" *Bell II*, 557 A.2d at 174 (quoting *Opinion of the Justices*, 365 Mass. 681, 688, 313 N.E.2d 561, 567 (1974) (holding that the public trust does not include walking along the beach unless related to fishing, fowling, or navigation). If the public trust can be expanded to include seaweed harvesting, why not sunbathing, picnicking, or Frisbee-throwing?

This Court rejected the earlier invitation to create a free-roaming public trust doctrine in *Bell II* precisely because it could "find no principled basis" for picking which activities would be allowed and which would not. That remains true and a contrary decision would call into question all of this Court's prior cases limiting public trust rights. *See Bell II*, 557 A.2d at 173-74; *McFadden v. Haynes & DeWitt Ice Co.*, 86 Me. 319, 325, 29 A. 1068, 1069 (1894) (no public right to cut ice from privately owned intertidal land); *Moore v. Griffin*, 22 Me. 350, 356 (1843) (no public right to take mussel-bed manure from privately owned intertidal land).

C. Expanding the Public Trust Doctrine Beyond Its Traditional Limits Would Subject the State to Substantial Takings Liability

Expanding the scope of the state's public trust doctrine could also subject the state to significant liability under the Takings Clause. That clause recognizes an individual right to compensation anytime the government takes private property for a public use, including by regulation that too greatly restricts the use or depletes the value of

private property. *See Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 539 (2005); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992). In *Stop the Beach Renourishment, Inc. v Florida Department of Environmental Protection*, a plurality of the Supreme Court of the United States recognized that the Takings Clause is not limited to the Legislature and the Executive, but applies to the Judiciary as well. 560 U.S. 702, 713-25 (2010). "If a legislature *or a court* declares that what was once an established right of private property no longer exists, it has taken that property[.]" *Id.* at 715.

This Court has also held that a judicial decision converting private property into public property causes a judicial taking. *See Bell II*, 557 A.2d at 176-79. "The judicial branch is bound, just as much as the legislative branch, by the constitutional prohibition against the taking of private property for public use without compensation." *Id.* at 176. A court causes a judicial taking whenever it reinterprets the state's established common law to convert a private right into a public one.

That is precisely what a more expansive interpretation of the public trust doctrine would do. *See id.*; *see also* Janice Lawrence, Note, Lyon *and* Fogerty*: Unprecedented Extensions of the Public Trust*, 70 Cal. L. Rev. 1138 (1982). The effect of such a decision is to impose an easement on private property for the benefit of the public. *See Bell II*, 557 A.2d at 176. Because an expansion of the public trust doctrine would allow the public to physically occupy private property over the objection of the owner, it would cause a particularly severe form of taking. *See id.* at 178; *see also Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982); Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) ("The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, *never* deny compensation for a physical takeover." (emphasis in original)).

It does not matter that public trust rights already burden private property. A judicial decision expanding those rights causes a taking. *See Bell II*, 557 A.2d at 178 ("The fact that the common law already has reserved to the public an easement in intertidal land for fishing, fowling, and navigation, and for related uses . . . does not mean that the State can, without paying compensation to the private landowners, take in addition a public easement for general recreation."). Because this easement would be imposed on all privately owned intertidal land along Maine's roughly 3,500 miles of coastline, the potential takings liability would be significant indeed. *See McGarvey*, 2011 ME 97 at ¶ 66, 28 A.3d 620.

Courts should be extremely hesitant to effect a judicial taking because, unlike the legislation, the Court acts "without the benefit of having had the political processes define the nature and extent of the public need[.]" *Bell II*, 557 A.2d at 176. Courts also act "free of the practical constraints imposed on the legislative branch of government

by the necessity of its raising the money to pay for any easement taken from private landowners." *Id.*

As the court below held, harvesting rockweed from private property is not within the public's right to engage in fishing, fowling, or navigating on the ocean. Although this is not the first time this Court has heard a case concerning the right to harvest seaweed in the intertidal zone, it has not squarely addressed the application of the public trust to it. This is primarily because in the earlier case, the would-be harvester conceded that "seaweed belongs to the owner of the soil upon which it grows, or is deposited[.]" *See Hill v. Lord*, 48 Me. 83, 99 (1861). Harvesting rockweed from private property is neither within the "obvious meaning" of fishing or navigation, nor is it within a sympathetically generous interpretation. *See Moore v. Griffin*, 22 Me. at 355-56 ("The language of the reservation in the [Colonial Ordinance] cannot be extended beyond the obvious meaning of the words fishing and fowling."). Expanding the public trust doctrine beyond the rights recognized in the Colonial Ordinance, including to grant a public right

to harvest rockweed from private property, would cause a judicial taking. "The common law has reserved to the public only a limited easement;" any enlargement of it is a taking that requires compensation. *See Bell II*, 557 A.2d at 179.[14]

Conclusion

The best means to resolve the conflicting demands to an exhaustible resource, like rockweed, is to embrace clear and secure property rights. Ruling for the property owners will allow rockweed to be put to its highest use, be that harvesting it or conserving it, by attaching prices to those uses. Property rights will also avoid a tragedy

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[14] To the extent this Court believes that the public trust doctrine can be modified based on current trends, the trend for allocating resources (unlike navigation and public access) is to move away from public trust principles in favor of property rights. *Cf.* Reed Watson, *Public Wildlife on Private Land: Unifying the Split Estate to Enhance Trust Resources*, 23 Duke Envtl. L. & Pol'y F. 291 (2013). Fisheries, a resource traditionally allocated through the public trust, have been overfished because they were unowned and ineffectively regulated. *See* Part II, *supra*. To remedy this problem, governments are relying on property rights to create better incentives for sustainable use. *See id.* Therefore, to the extent that current trends are relevant to this Court's decision, they favor recognizing the coastal property owner's right to the rockweed that grows on her property.

of the commons and thereby ensure that rockweed harvesting is sustainable. For those reasons and others, this Court should decline the invitation to expand the public trust rights beyond fishing, fowling, and navigation and affirm the decision below.

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Respectfully submitted,

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Certificate of Service

I hereby certify that on August 4, 2017, I caused two copies of the foregoing BRIEF OF AMICI CURIAE OF PACIFIC LEGAL FOUNDATION AND PROPERTY AND ENVIRONMENT RESEARCH CENTER to be served on counsel for the parties listed below, by depositing the same in the United States Mail, first class, postage prepaid, addressed as follows:

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