STATE OF MAINE
SUPREME JUDICIAL COURT
SITTING AS THE LAW COURT

Law Court Docket No. BCD-21-257

RUSSELL BLACK, et al.

Appellees/Cross-Appellants

v.

BUREAU OF PARKS AND LANDS, et al.

Appellants/Cross-Appellees

On Appeal from Business and Consumer Court
Docket No. BCDWB-CV-2020-29

BRIEF OF AMICUS CURIAE JOSHUA REYNOLDS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

CONSTITUTIONAL PROVISIONS

INTRODUCTION

Joshua Reynolds submits this amicus brief in support of Appellants Bureau of Parks and Lands ("BPL") and Central Maine Power Company and NECEC Transmission LLC (together, "NECEC Transmission"). He and his family have leased a private camp on BPL lands for decades. He files this brief because the unmistakable import of the trial court's decision is that any member of the general public who claims even the most tenuous connection to the public reserved land in the vicinity of the camp lot Reynolds and his family have leased from BPL may now challenge the validity of his lease in court. However this case turns out for the players in the political battle in which the NECEC project has become embroiled, the implications for Reynolds—and hundreds of similarly situated leaseholders—are disastrous. This brief highlights the unintended consequences of the trial court's decision for Reynolds and numerous other Mainers like him.

THE REYNOLDS CAMP LOT LEASE

Joshua Reynolds' family has leased a camp lot from BPL since the 1980s, when his father came upon a dilapidated shack on the edge of Seboeis Lake.[1] This rudimentary camp had been built in the 1940s or 1950s by Joshua's

[1] Information about Soboeis Lake is on the website of the Department of Agriculture, Conservation and Forestry at https://www.maine.gov/cgi-bin/online/doc/parksearch/details.pl?park_id=67.

grandfather and then abandoned. When Joshua's father rediscovered the structure in the 1980s he inquired of BPL about leasing the land it was on. A lease was executed, and the Reynolds family has used and improved the structure ever since. Their lease arrangement with BPL continues to this day.

The Reynolds lot is about an acre in size. Access to the camp located on it is by ATV or on foot along an 80-to-100-yard path from the nearest BPL road. The camp is rustic: there is no electricity or plumbing. The main room is approximately 12 feet by 20 feet, with a smaller bedroom on one end. The Reynolds family has kept the camp in good shape over the years. They use it as a place to get away, mostly in the winter, when they enjoy skiing, snowshoeing, ice fishing, and other outdoor activities.

About 10 years ago Joshua's father transferred his interest in the lease to Joshua and his brother, the current leaseholders. The lease is up for renewal at the end of 2022. Joshua has always appreciated the opportunity BPL has given him and his family to have lakefront access in such a beautiful place.

BPL has granted leases like the one Joshua Reynolds has to hundreds of Mainers. According to BPL's brief, as of March 2020 over 300 BPL leases and licenses of public lands were in effect that had not been approved by a two-thirds vote of the Legislature. *See* BPL Br. at 38. Some 288 of these are camp

lot leases.[2] If BPL and NECEC Transmission do not prevail on this appeal, the validity of every one of those leases will be called into question and subject to challenge by members of the general public who may be so inclined. That is not a tenable state of affairs for these leaseholders, as it would subject them to the threat of potential lawsuits challenging the validity of their leases by people claiming to have been affected in inchoate, generalized ways. It would also appear to subject them to burdensome administrative process before BPL simply to get their leases renewed.

Joshua Reynolds submits this brief because he believes that disputes between the executive and legislative branches of Maine's government over the leasing of public lands should be resolved by and between those branches, not by the judicial branch at the behest of members of the general public who claim somehow to have an interest in leases to which they are not parties.

ARGUMENT

At the heart of this case is a dispute over how the power to lease Maine's public reserved lands is allocated as between the executive and legislative branches. That question, however, is one the trial court should not have tried

[2] *See* Fiscal Year 2020 Annual Report, Maine Department of Agriculture, Conservation and Forestry, Bureau of Parks and Lands, at 30, https://www.maine.gov/dacf/parks/publications_maps/docs/2020LandsAnnualReport.pdf.

to answer, because the Plaintiffs/Appellees here have no cognizable legal interest in the resolution of a dispute between the executive and legislative branches. Beyond this threshold problem of standing, the judicial branch should not be stepping in to insist that the legislative branch exercise a power it has delegated, by statute, to the executive. If the Legislature believes BPL is exceeding its constitutional authority, it could easily put the agency in its place by taking back the leasing authority BPL is exercising.[3] Instead, the Legislature has for decades acquiesced in the status quo. Whether BPL is exceeding the authority the Legislature has given it is for the Legislature, not this Court at the behest of these Plaintiffs, to decide.

I. Plaintiffs do not have a cognizable legal interest in this dispute between the executive and legislative branches.

The trial court found that Plaintiffs had standing to challenge the validity of leases like the Reynolds camp lot lease based (as summarized by the trial court) on their allegations that they have "engaged in business and recreation in and around the public reserve[d] land subject to the Lease." (A. 105.) In the trial court's view, it was enough to establish standing that "[a]ll of the Private Citizen Plaintiffs assert that the Leases" would "disrupt the

[3] Joshua Reynolds is aware that the voters of Maine recently adopted legislation, via referendum, amending provisions of BPL's leasing authority in 12 M.R.S. § 1852(4). He understands that NECEC Transmission's challenge to that legislation is ongoing and does not address it further here.

environment in and around the public reserve land, resulting in harm to their continued use." *Id*.

What the trial court appears to have overlooked is that the standing issue in this case is resolved by this Court's reasoning in *Nergaard v. Town of Westport Island*, 2009 ME 56, 973 A.2d 735. Here as in *Nergaard*, the plaintiffs say they have standing to challenge a decision by a government entity based on their status as part of a larger group of members of the public who claim to be affected by the decision. The plaintiffs in *Nergaard* were residents of an island who objected to a decision to improve the town's boat-launching site based on "concerns that the increased use of the facility would worsen traffic conditions" on the island and create an "increased risk of traffic accidents at the frequently travelled intersection" near the site. *Id*. ¶¶ 5, 8. The Court rejected the argument that the plaintiffs had standing based on their status as "resident[s] of the Island who frequently drive[] by the boat-launching site to enter and exit the Island." *Id*. ¶ 14. In other words, *Nergaard* held that plaintiffs could not establish standing based on "their status as members of the driving public." *Id*. ¶ 16; *see id*. ¶ 17 ("Nergaard and Stern essentially argue that they have a particularized injury merely because they live on the Island and drive by the site frequently, risking death, injury, and damage to their property."). That was so even though the plaintiffs would indisputably have

been affected by the challenged project in their capacity as drivers living on a small island accessible only by a road that passes the proposed boat launch.

The Court determined that the plaintiffs did not have standing because the injury they alleged was not particular to them, but instead was common to everyone who used the intersection near the boat-launch site:

> Nergaard and Stern are not unique in their use of Route 144; 1638 vehicles pass by the boat ramp location each day during the summer months. There is no difference between the potential harm asserted by Nergaard and Stern and the potential harm to these 1638 drivers and to their passengers—members of the public—who use the same road on a daily basis. Nor is that harm "distinct" from the potential harm to every person who lives on or visits Westport Island.

Id. ¶ 20. In short, standing cannot be established based simply on characteristics a plaintiff shares broadly with the general public in a particular area.

The analysis here is the same. As with the intersection-user plaintiffs in *Nergaard*, there is no difference between the potential harm asserted by Plaintiffs who claim to have "engaged in business and recreation in and around the public reserve land subject to the Lease" (A. 105) and the thousands of other members of the general public who use the same lands for the same purposes. *See, e.g.*, First Am. Compl. ¶ 19 (Plaintiff Cummings alleges that she "has used public reserved lands in Maine's Western Mountains for

recreational uses since approximately 1970 and plans to continue to do so.") (A. 160); ¶ 21 (Plaintiff Johnson "has spent her leisure time hiking and canoeing in Maine's North Woods since 1971, and plans to continue to do so.") (A. 160); ¶ 24 (Plaintiff Smith's "interests include hunting, fishing, and birding throughout the Maine Woods, including its public reserved lands") (A. 161). These geographically nonspecific references to the use of a vast wilderness—the public reserved and nonreserved lands held in fee by Maine consist of 635,712 acres, with more than 1.3 million additional acres subject to conservation and access easements[4]—are insufficient to establish standing. *See, e.g.*, *Pollack v. U.S. Dep't Of Justice*, 577 F.3d 736, 742–43 (7th Cir. 2009) ("When governmental action affects a discrete natural area, and a plaintiff merely states that he uses unspecified portions of an immense tract of territory, such averments are insufficient to establish standing.") (quotation marks omitted). Rather than being "unique in their use" of the leased land, *Nergaard*, 2009 ME 56, ¶ 20, 973 A.2d 735, Plaintiffs allege simply that, while recreating somewhere in the Maine woods, they may experience the same harms that would be experienced by everyone else in the region. As with the

[4] *See* Fiscal Year 2020 Annual Report to the Joint Standing Committee on Agriculture, Conservation and Forestry (Maine Dept. of Agriculture, Conservation and Forestry, March 1, 2021), at 3, available at https://www.maine.gov/dacf/parks/publications_maps/annual_reports.html#lar.

Plaintiffs in *Nergaard*, their status is indistinguishable from that of countless other members of the general public.

Although it did not factor into the trial court's analysis, three Plaintiffs claim to have a particularized interest in a scenic view that the corridor would allegedly disrupt: Plaintiffs Stevens and Towle say they run boating or fishing businesses in locations where the corridor may be visible (A. 161–62), while Plaintiff Buzzell claims to own property with a view that the corridor will affect (A. 159). These objections are to visual impacts of the corridor that will affect everyone in the area, just like the increased traffic at the intersection in *Nergaard* would have affected everyone on the island. The Law Court has made clear that "evidence of a blocked view is necessary to demonstrate a particularized injury that is based on views." *Blanchard v. Town of Bar Harbor*, 2019 ME 168, ¶ 15, 221 A.3d 554. Here, no actual blocked view has been demonstrated or even alleged. Nor can Plaintiffs Stevens or Towle turn potential impacts on a view that would be experienced by the public generally into an injury that gives them in particular standing to sue simply by alleging that some of the people who would be looking at the impacted view would be customers of their business.

Nor can Plaintiff Buzzell meet the particularized injury requirement by alleging that, although he would be looking at the same view everyone else

would be looking at, he would be looking at it from property he owns that appears to be located miles away from the leased site. Even if it were theoretically possible to establish standing based on ownership of a piece of property from which other property might, in the distance, be viewed, Buzzell fails to allege an essential (to his theory at least) fact about his alleged potential injury: the distance between his property and the leased land. *See* First Am. Comp. ¶ 17 (alleging only that his land is "near" the leased land) (A. 159). If Buzzell's property abutted the leased land, he presumably would have said so. *See Blanchard*, 2019 ME 168, ¶ 14, 221 A.3d 554 ("We have applied a 'minimal' threshold for standing where the challenging party is an abutter."). In fact, as reported in NECEC Transmission's Motion to Dismiss, research on Google Earth reveals that "Buzzell's property is more than 5 miles away from the leased land as the crow flies." (Mot. to Dismiss, Aug. 28, 2020, at 17 n.9.) If anyone within a five-mile radius could claim a particularized injury sufficient to establish standing based simply on their concern about being able to *see* something that displeased them in the distance, the prudential limitations the doctrine of standing is supposed to achieve would be illusory. *See Ricci v. Superintendent, Bureau of Banking*, 485 A.2d 645, 647 (Me. 1984) ("[T]he central inquiry is whether the party seeking judicial relief has suffered an injury in fact distinct from the harm experienced by the public at large.").

Buzzell offers no specific allegation, much less evidence, as to how the view from his own property is in fact adversely affected. *See Blanchard*, 2019 ME 168, ¶ 15, 221 A.3d 554 ("[E]vidence of a blocked view is necessary to demonstrate a particularized injury that is based on views.").

The trial court's reliance on *Fitzgerald v. Baxter State Park Authority*, 385 A.2d 189 (Me. 1978), is misplaced, as that case turned on the unique circumstances of one particular public park. The plaintiffs in *Fitzgerald* had sued to enforce the terms of the charitable trust that established Baxter State Park, and the Court observed that "[i]t is long-established law, coming down from at least as early as Elizabethan England, that the community has an interest in the enforcement of (charitable) trusts . . . ." *Id*. at 194 ("There can be no doubt that retention and use, under the State's trusteeship, of the donated property for such purposes is a charitable trust.") (quotation marks omitted). The problem was that, under Maine law, it is the responsibility of the Attorney General to enforce charitable trusts, *id*. at 195, and "[i]n the particular circumstances of this case . . . the Attorney General [was] disabled from fulfilling his statutory duty and bringing suit against the State of Maine" due to conflicts of interest. *Id*. It thus fell to the private plaintiffs to enforce the terms of the charitable trust. Here, there is no charitable trust, the Attorney General is not disabled from enforcing the law, and thus there is no need for

private plaintiffs to step into the Attorney General's shoes. *Fitzgerald* is not dispositive here.

If there is any disagreement between the executive and legislative branches as to the scope of BPL's authority that is something they can work out themselves. Or either branch could formally seek an interpretation by this Court. Without doubt Plaintiffs/Appellees do not speak for the legislative branch; they lack standing to assert the Legislature's interests. And they have insufficient cognizable interests of their own to give them standing to sue on their own behalf.

II. The Legislature specifically gave BPL the authority to issue leases, and if it believed BPL was exceeding its authority it would have said so.

Disputes over the validity of leases given by BPL to people like Joshua Reynolds and his family are not for members of the general public to instigate or for Maine's courts to resolve. The Legislature has authorized BPL to lease public reserved land for the purposes and on the terms set forth in 12 M.R.S. § 1852. Under that statute BPL has granted leases to Joshua Reynolds and hundreds of others like him. For over two-and-a-half decades the Legislature has never objected to BPL leasing lands under section 1852 without first obtaining legislative approval.

The Legislature voted in favor of amending the Maine Constitution to add Article IX, Section 23 for the purpose of shifting the balance of power with respect to the disposition of public lands. BPL has issued hundreds of leases of public land since the adoption of the amendment, with no record of the agency having sought legislative approval of any of them—all while BPL has reported every one of the leases to the Legislature on an annual basis. *See* 12 M.R.S. § 1853 (reporting requirement).[5] If the Legislature believed BPL was exceeding its authority it could have reeled the agency in simply by passing new legislation. Instead, the Legislature has repeatedly acquiesced to the leases. "It is a well accepted principle of statutory construction that when an administrative body has carried out a reasonable and practical interpretation of a statute and this has been called to the attention of the Legislature, the Legislature's failure to act to change the interpretation is evidence that the Legislature has acquiesced in the interpretation." *Thompson v. Shaw's Supermarkets, Inc*., 2004 ME 63, ¶ 7, 847 A.2d 406. It is for the Legislature—not members of the general public or the courts—to police the boundaries of executive and legislative control where neither branch has sought judicial intervention.

[5] *See* https://www.maine.gov/dacf/parks/publications_maps/annual_reports.html (recent annual reports).

Maine law gives BPL the power to issue a camp lot lease to Joshua Reynolds. Until this lawsuit was filed, no one had ever suggested that the agency did not have that power. Under the trial court's ruling, however, the Reynolds lease is invalid because BPL did not determine, before issuing the lease, that it would not reduce or substantially alter the leased land. *See* Me. Const. art. IX, § 23. The law does not require BPL to make this determination.

The Reynolds camp lot lease is authorized by 12 M.R.S. § 1852(5), which provides that BPL "may lease campsites, garages, depots, warehouses and other structures located on public reserved land, or sites for the same," just as the lease at issue in this litigation is authorized by 12 M.R.S. § 1852(4)(A) (BPL "may lease the right . . . to: . . . Set and maintain or use poles, electric power transmission and telecommunication transmission facilities . . . ."). The Court's determination in this case will therefore necessarily affect the Reynolds family lease and all of the hundreds of other leases issued under Section 1852.

Article IX, Section 23 of the Maine Constitution provides that public land "may not be reduced or its uses substantially altered except on the vote of 2/3 of all the members elected to each House." Leases do not "reduce" public land, as Maine retains ownership—so the question under Section 23 with respect to

leases is whether they substantially alter it. And the Legislature has determined, categorically, that certain types of leases do not.

Section 1852 authorizes the leasing of public lands for specified purposes. In so providing, the Legislature made clear that such leases would not be deemed to reduce or substantially alter the land within the meaning of Article IX, Section 23, and that no further Legislative approval is required before BPL may issue a lease. The Legislature has defined "substantially altered" to mean "changed so as to significantly alter physical characteristics in a way that frustrates the essential purposes for which that land is held by the State." 12 M.R.S. § 598(5). The Legislature has further directed that "[t]he essential purposes of public reserved . . . lands are the protection, management and improvement of these properties for the multiple use objectives established in section 1847." 12 M.R.S. § 598(5). And Section 1847 in turn broadly declares that the public interest demands that "the public reserved lands be managed under the principles of multiple use to produce a sustained yield of products and services by the use of prudent business practices and the principles of sound planning and that the public reserved lands be managed to demonstrate exemplary land management practices . . . ." 12 M.R.S. § 1847(1).

By including Section 1852 in Title 12, the Legislature has made clear that leases given under that section do not "frustrate[] the essential purposes for which that land is held by the State." 12 M.R.S. § 598(5). If they did, the Legislature would not have authorized them. Put another way: the Legislature would not have granted BPL specific leasing authority if it understood that such authority contravened the legislatively defined purposes for which BPL held the land. Instead, the Legislature gave BPL leasing authority in Section 1852 to help it realize the purposes for which public reserved lands should be used. Because the leases do not frustrate the essential purposes for which the land is held, they do not substantially alter the land within the meaning of Article IX, Section 23. *See* 12 M.R.S. § 598(5). The Legislature's decision to define "substantially altered" by reference to whether an alteration frustrates Maine's "essential purposes" in holding land is presumptively constitutional. *State v. McGillicuddy*, 646 A.2d 354, 355 (Me. 1994) ("We presume a statute is constitutional and will invalidate it 'only if there is a clear showing by 'strong and convincing reasons' that it conflicts with the Constitution."). There has been no showing sufficient to overcome that presumption.

Neither Section 1852 nor Article IX, Section 23 require that BPL engage in any specific process before entering into a lease, and they certainly do not require the particular process the trial court imposed. Nor does the Maine

Administrative Procedure Act, as a lease of land is neither a rulemaking nor an adjudicatory proceeding. *See* 5 M.R.S § 8002(1), (9). Rather than sounding the alarm about purported procedural defects in BPL's process, the Legislature has enacted statutes that have for decades authorized BPL to issue leases to the Reynolds family and others without resort to any specific process. The Legislature created, and therefore has obviously been aware of, the rules governing BPL leases. It has acquiesced in what BPL has been doing for decades. That is because what BPL has been doing is consistent with the law established by the Legislature itself.

The executive and legislative branches agree that the leases given to Joshua Reynolds and others under Section 1852 do not reduce or substantially alter public lands and that no administrative process is necessary before they may be issued. The leases are therefore valid. If the Legislature believes BPL is exceeding its authority, it is free to assert further control over the situation. The Legislature could enact a statute curtailing BPL's authority. It could change the categories of leases that BPL may issue. It could change the definition of "substantially altered." It could require BPL to establish an administrative process allowing third-party challenges to the issuance of leases and fund the hiring of the additional public employees that would be needed to implement such a process for the hundreds of leases BPL issues. It

could have joined in this lawsuit. The Legislature has done none of these things. And these are not things that the judicial branch, acting at the behest of a handful of members of the general public with no material interest in the lands at issue, can or should impose on its own.

CONCLUSION

The trial court's order conjures up the appearance of a conflict between the executive and legislative branches where no actual conflict exists, on behalf of members of the general public who have no legally cognizable interest in the conflict they seek to generate. The order should therefore be vacated.

Dated at Portland, Maine this 15th day of December, 2021.

Respectfully submitted,

/s/ Sigmund D. Schutz

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CERTIFICATE OF SERVICE

I, Sigmund D. Schutz, hereby certify that I have on this day, December 15, 2021, caused to be served a copy of Brief of Amicus Curiae Joshua Reynolds on counsel of record by electronic mail and U.S. mail, first class postage prepaid, at the following addresses:

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Dated at Portland, Maine this 15th day of December 2021.

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