

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

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**Law Court Docket No. KEN-22-411**

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**VIRGINIA PARKER et al.,**

*Appellants,*

**v.**

**DEPARTMENT OF INLAND FISHERIES AND WILDLIFE,**

*Appellee.*

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**On Appeal from the Kennebec County Superior Court**

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**BRIEF OF AMICI CURIAE MAINE WOODLAND OWNERS, MAINE FARM  
BUREAU, AND MAINE FOREST PRODUCTS COUNCIL**

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## INTRODUCTION

Sometimes changes in law have consequences that their proponents did not anticipate. The proponents of this lawsuit are operating on the assumption that striking down Maine's law against Sunday hunting will advance the right to food by increasing access to food via hunting. But that assumption is almost certainly wrong. It is wrong because striking down the Sunday hunting law would disrupt Maine's unique system that balances private ownership of the outdoors with permissive public access. And the effect of that disruption would be to substantially decrease the amount of land that is available to the public for hunting.

If the law stops providing for one day a week when landowners who do not post their land against hunting may enjoy the outdoors without having to encounter or keep an eye out for hunters, landowners who now allow public access on the other six days will start to rethink their decision not to post their land. This is not just speculation: it is based on public opinion survey data, and on common sense. The Court should decline the invitation to interpret a new and potentially open-ended constitutional amendment in a way that the text of the amendment does not require, and that would not serve to advance the amendment's goals.

## **AMICI**

**Maine Woodland Owners** is a non-profit corporation that promotes stewardship of Maine's small woodland resources by supporting better forest management and advocating for Maine's small woodland owners. Established in 1975 to help small woodland owners manage their land, its goals are to strengthen long-term woodland ownership, to improve forest quality and health, to protect waters and wildlife habitats, to support and demonstrate good forest management, and to encourage outdoor recreation. Maine Woodland Owners advocates for the interests of its members in the state Legislature, where it promotes constructive forest policies.

The membership of Maine Woodland Owners includes many hunters, and the organization itself owns over 70 parcels of land that, with one exception due to a deed restriction, are open to hunting. Maine Woodland Owners is not opposed to hunting. But it is convinced that the law against Sunday hunting is essential to preserving Maine's unique system that balances private ownership of the outdoors with permissive public access for hunting and other forms of outdoor recreation.

**Maine Farm Bureau** is a grassroots membership organization of farmers that identifies and advocates on key issues in Augusta and Washington. The organization supports policies and practices that create

growth and prosperity for those who harvest from Maine's land and sea. In addition to supporting farms of all sizes and types, the Maine Farm Bureau campaigns for agriculture generally, from horticulture to aquaculture, and forestry, food, and fiber. The organization's focus is on production, processing, business practices, and landowner rights.

**Maine Forest Products Council** was founded in 1961, and represents more than 300 members from across the forest products industry, including paper mills, sawmills, loggers, truckers, foresters, panel manufacturers, biomass and pellet facilities, and secondary manufacturers. The Council's members own more than 8 million acres of land in Maine.

### **ARGUMENT**

As the first case to reach this Court under Maine's new Right to Food Amendment, this appeal raises novel legal issues. Because the text of the amendment is non-specific and potentially open-ended, some guiding principles may be helpful. One obvious but important guiding principle is that the Right to Food Amendment should be construed and applied so as to promote access to food. This much is clear from the amendment's text, which begins: "All individuals have a natural, inherent and unalienable right to food . . . ." The essential question in construing the amendment is whether

what the Court is being asked to do is in fact necessary to ensure that the constitutional right to food is secured.

Striking down the Sunday hunting law would not advance the right to food in Maine. Instead, over time, it would do just the opposite, by disrupting the delicate balance of public and private rights that has been worked out over the years between hunters and landowners. The probable upshot of this disruption would be that more landowners—as is their legal right—would stop letting the public hunt on their land. This would curtail, rather than expand, access to food by hunting. Because there is no reason to think the relief this lawsuit seeks would advance the amendment’s basic objective, the Court should not construe the Right to Food Amendment to do something that is not required by its text.

**I. Striking down the Sunday hunting law would not advance the right to food in Maine.**

This Court has repeatedly acknowledged “the ‘open lands tradition’ that Maine shares with a minority of other states.” *Almeder v. Town of Kennebunkport*, 2014 ME 139, ¶ 30, 106 A.3d 1099, 1112, as corrected (Apr. 16, 2015) (quoting *Weeks v. Krysa*, 2008 ME 120, ¶ 15, 955 A.2d 234). “This tradition recognizes the State’s desire to encourage the hunting, hiking, and other outdoor activities for which Maine is celebrated and on which much of



Maine's economy is based.” *Id.* (citing 5 M.R.S. § 6200 for the proposition that “the continued availability of public access to [outdoor] recreation opportunities and the protection of the scenic and natural environment are essential for preserving the State’s high quality of life”). According to the Department of Inland Fisheries and Wildlife, “94% of Maine's forest land is privately owned, and more than half of that land area is open to the public.”<sup>1</sup>

“In Maine, landowners have traditionally allowed members of the public to use their property for a wide variety of recreational activities free of charge.” James M. Acheson, “Public Access to Privately Owned Land in Maine,” *Maine Policy Review*, Vol. 15, Issue 1 (2006) at 19. As explained by the Department of Inland Fisheries and Wildlife, “[u]nlike most other states, Maine operates under an implied permission structure, meaning that if land is not posted, it is legal to use the land.” (IFW Website.) “In total, landowners voluntarily open up more than 10 million acres of working farms and forests.” *Id.* This means that in Maine, “modern hunting could not exist without extensive public use of private land.” Peter H. Kenlan, *Maine's Open Lands: Public Use of Private Land, the Right to Roam, and the Right to Exclude*, 68 *Me. L. Rev.* 185, 193 (2016).

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<sup>1</sup> <https://www.maine.gov/ifw/programs-resources/outdoor-partners-program/explore.html> (“IFW Website”).

We are fortunate today that “[m]ost private landowners are happy to allow outdoor recreation, including hunting and fishing, on their land, as long as their property is treated with respect.” (IFW Website.) But it is important to examine the effect a change in law could have on the willingness of landowners to keep their property open to the public.

What would happen to Maine’s permissive system of public access to private land for hunting if the Sunday hunting law were struck down? Would the net impact be to increase the opportunity to hunt, and access to food via hunting? We cannot know for certain what the impact of a change in law will be until the law actually changes. But there is every reason to expect that striking down the Sunday hunting law would lead more landowners to post their land, thus reducing the land that is available to the public for hunting. A survey conducted for the Department of Inland Fisheries and Wildlife in 2022 found that if Sunday hunting were legal, 44% of landowners who own 10 or more acres and who do not currently post their land would be more likely to restrict access for hunting. *See* Responsive Management, “Maine Residents’, Hunters’, and Landowners’ Attitudes Toward Sunday Hunting” (2022) (“IFW Survey”) at 89, vi.<sup>2</sup> If anywhere near 44% of the landowners who do not post

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<sup>2</sup> Available at <https://www.mainewoodlandowners.org/sundayhunting>

their land today decided to stop letting hunters use their land for hunting, the reduction in the total amount of land that is open to hunting would be dramatic.

It is true that some landowners may not change their access policies in the first instance. But there is good reason to expect that, over time, changes in access could be even more dramatic than that 44% figure would suggest. That is because of the potential snowball effect if landowners start restricting public access to their land.

The problem, as Professor Acheson puts the point in *Maine Policy Review*, is that “posting tends to be self-reinforcing.” (Acheson, “Public Access to Privately Owned Land,” at 25.) The reason is that, “[w]hen a number of people in a small area post their land, others will follow suit to avoid excess use of their property.” *Id.* (“As one respondent put it, ‘If I am the only person with unposted land on the peninsula, my land would get all of the hunters and [the] others who used to be on a thousand acres.’”). This dynamic is primed to generate a vicious circle, with one landowner’s decision to close their land to hunting causing hunters to crowd onto neighboring properties, which in turn causes neighboring landowners to close their land to hunting, and so on. Once this self-reinforcing process gets started, it is unclear where it stops. The potential for a destructive dynamic to emerge—one that ends up doing more

to eliminate existing opportunities to hunt for food than it would to create new ones—can be avoided by leaving the Sunday hunting law on the books.

Maine’s unique combination of private ownership and public access reflects a delicate balancing of public and private interests and concerns. The current equilibrium makes public hunting on private land possible. If the Court strikes down the Sunday hunting law, the unintended consequences for access to private land for hunting would be far-reaching. And the net effect over time would be less public access to food by hunting rather than more. That should give the Court pause before it strikes down the Sunday hunting law in the name of the right to food.

The *Maine Policy Review* study found that “most of the landowners in our study sample have some conflicting beliefs about rights over Maine land,” in that “[t]hey think that landowners have the right to keep the public off their land, but they also feel that landowners should not exercise these rights unless forced to by very irresponsible behavior.” (Acheson, “Public Access to Privately Owned Land,” at 24.) One thing that could easily be interpreted by some landowners as very irresponsible behavior would be increasingly large crowds of hunters appearing on their land. And that (as just explained) would be a likely consequence of a decision striking down the Sunday hunting law for landowners who do not react to the decision by posting their land.

Because it is the Right to *Food* amendment the Court is construing, not a right to *hunt* amendment, it bears noting that, given modern food storage technology (the refrigerator), it is not necessary that Mainers have the opportunity to acquire food by hunting every single day in order to have access to food by hunting. Instead, one can hunt one day for food to be eaten the next day. Even if the amendment is construed to create a right to obtain food by hunting, it certainly does not say that there is a right to obtain food by hunting *at any time*. Nor does it say that if other commitments a person may have made cause them to prefer to hunt on one particular day of the week, the law must be adjusted to accommodate their decisions.

Hunting is legal in Maine on 313 days of the year. Perhaps it would be easier for the Parkers to “hunt as a family,” to “travel to more remote areas of the state to hunt,” and to maximize “the time they are able to spend hunting” (Blue Br. 3) if the Sunday hunting law were struck down, and 313 days became 365. But those interests, while understandably important to the Parkers, do not go to their right to food. If the circumstances the Parkers cite are enough to make the Sunday hunting law unconstitutional, plaintiffs in the next lawsuit will claim that their schedules make it hard for them to hunt during daylight hours, and that the law against hunting at night therefore runs afoul of the Right to Food Amendment. Or that limitations on hunting seasons

are unconstitutional. Other legal restrictions on hunting would be susceptible to similar challenges. It is unclear where this would end.

Landowners count on having one day each week when they can enjoy their property without having to dress in orange and watch out for hunters. Striking down the Sunday hunting law would leave landowners more concerned about hunters on their property, and would generate increased conflict and tension between hunters and landowners. The inevitable response to this increased tension would be for more landowners to post their property. The thinking behind this reaction is nicely captured by a letter to the editor published in the *Portland Press Herald*:

Those of us who don't hunt have just *one* day a week in November when we can feel safe taking a walk in the woods: Sunday.

I do not begrudge hunters the right to hunt but as a landowner I say don't push too hard, folks. We might just decide to post "No Hunting" signs. Then you will have no days to hunt on my land.

Jan Strout, "No sympathy for time-pressed hunters," *Portland Press Herald*, March 20, 2023.

The Parkers acknowledge that restrictions on what they call "the right to harvest" are constitutional if they are aimed at "ensuring fair access to resources . . . ." (Blue Br. 1-2.) Because the practical effect of striking down the Sunday hunting law would be to reduce public access to privately owned land,

the statute this lawsuit targets is in fact one that “ensure[s] fair access to resources” for members of the public who enjoy engaging in outdoor recreation, but who do not themselves own suitable land. There is, then, a “natural resources justification” (Blue Br. 11) for the Sunday hunting law.<sup>3</sup>

The Parkers suggest that the Sunday hunting law “is a historical anachronism rooted in religious beliefs,” and thus does not serve a compelling interest. (Blue Br. 14) In fact, “Sunday closing laws . . . are recognized as being intended to provide one day of rest and recreation in each week for the greatest possible number of our citizens.” *Opinion of the Justices*, 159 Me. 410, 417, 191 A.2d 637, 641 (1963). “One purpose [of Sunday closing laws] is the elimination of concentrations of traffic and the hustle and bustle on Sundays . . . which tend to create unreasonable interference with the efforts of the vast majority of citizens to find rest and leisure on those days.” *Id.* The Sunday hunting law serves similar secular purposes today; it is not an historical anachronism.

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<sup>3</sup> The Parkers write that “IFW has publicly stated that there is no need to ban Sunday hunting for the biological needs of any animal population or for wildlife management purposes, instead characterizing the Sunday hunting ban as ‘a social issue [and] not a biological decision.’” (Blue Br. 11–12.) Left unexplained is why the “social issue” of when hunting is and is not permitted cannot have major implications for public access to natural resources.

The importance of the Sunday hunting law is inadvertently demonstrated by the analogy the Parkers offer to a hypothetical ban on potato harvesting on Tuesdays. *See* Blue Br. 16 (arguing that the Sunday hunting law “is no less arbitrary than a statutory ban on potato harvesting on Tuesdays.”) Unlike the Sunday hunting law, which is essential to there being one day a week when people can enjoy the outdoors without fear of being mistaken for game by hunters, a ban on potato harvesting on Tuesdays would serve no rational purpose. *See* Megan Gray, “History of hunting deaths invites question of reform,” *Portland Press Herald*, Sept. 22, 2019 (updated Sept. 23, 2019) (“Since 1988, three women were fatally shot on their own properties by hunters” in Maine who mistook them for deer).<sup>4</sup> And since people do not

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<sup>4</sup> This 2019 *Press Herald* story suggests the potential for expanded hunting in Maine creating a backlash:

Karen Wood died hanging laundry in her backyard in November 1988. Megan Ripley died walking with her brother behind her family’s home in December 2006. Karen Wrentzel died digging for gemstones on her property in October 2017.

Each woman died without knowing a hunter was on her land because he never needed to ask to be there.

Each woman died because that hunter thought he saw a deer and shot her instead.

Maine has long allowed hunters to use private property without permission unless posted signs explicitly tell them to stay away. The deaths of the three women are flares in the simmering debate about whether that tradition needs to change.



harvest potatoes on other people's land, and potato harvesting does not have the negative externalities that hunting has, the hypothetical law the Parkers propose serves only to demonstrate what an actual "arbitrary" law would look like.

The hunting season and limits on the number of animals a hunter may take<sup>5</sup> are set to ensure that hunting in Maine remains sustainable. *See* 12 M.R.S. § 10051 (establishing the Department of Inland Fisheries and Wildlife "to preserve, protect and enhance the . . . wildlife resources of the State; to encourage the wise use of these resources; . . . to provide for effective management of these resources; and to use regulated hunting . . . as the basis for the management of these resources whenever feasible.") The Parkers acknowledge that restrictions on hunting are constitutional if they are "aimed to protect natural resources . . ." (Blue Br. 1–2.) To the extent that this requires limitations on the volume of hunting that is permitted, the ultimate effect of allowing Sunday hunting could end up being that hunting seasons are shortened to offset the added hunting days. It is unclear how this would advance the right to food.

The Parkers claim that the Sunday hunting law is "not narrowly tailored." (Blue Br. 15.) But as explained above, Maine's unique system of

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<sup>5</sup> [https://www.maine.gov/ifw/docs/2022\\_2023\\_SeasonBagLimits.pdf](https://www.maine.gov/ifw/docs/2022_2023_SeasonBagLimits.pdf)

widespread public access to private land for outdoor recreation reflects a careful balancing of competing interests. Pulling on the wrong thread could cause what has been sewn together with care over time to unravel. The Court should not take that risk.

**II. Striking down the Sunday hunting law would negatively impact other outdoor activities in addition to hunting.**

If landowners start posting their property, there is no reason to think they would stop at posting against hunting *on Sundays*—or even just against hunting. Once the posting starts, the restrictions on public access are sure to multiply; we should be under no illusion that the newly posted signs will be limited to “No Hunting on Sundays,” or even just “No Hunting”—as opposed to the default “No Trespassing.” In other words, the impact of striking down the Sunday hunting law would go far beyond hunting. As the Executive Director of the Maine Woodland Owners put the point last year in testimony before to Legislature on a bill that would have lifted restrictions on Sunday hunting, “[t]here is no single issue that would result in more loss of access to private land, for all purposes, than Sunday hunting.” (Testimony of Tom Doak, Executive Director, Maine Woodland Owners, In Opposition to Sunday Hunting Bill LD 2014 (130th Legislature).)

The public enjoys permissive access to private land in Maine for outdoor recreation generally. “People hunt on land owned by others, run their snowmobiles and [ATVs] on it, and use the land for activities such as bird watching and cross country skiing. In northern Maine, people take hiking and canoeing trips in which they camp on land owned by others for days on end.” (Acheson, “Public Access to Privately Owned Land,” at 19.) To give just one example, the Department of Agriculture, Conservation and Forestry points out that of Maine’s “[o]ver 14,000 miles of interconnected trails,” most are on private land, meaning that “without the use of private land, most trails wouldn’t exist.”<sup>6</sup> The Department notes that “your ability to ride is a privilege that is granted to you by the landowner.” *Id.*

Outdoor recreation is important to Maine’s economy. This key economic engine could be put at risk if landowners start to feel differently about letting the public use their land. See James Michael Acheson and Julianna Acheson, “Maine land: private property and hunting commons,” *International Journal of the Commons*, Vol. 4, No. 1 (February 2010) at 558 (“Maine has a longstanding policy of encouraging landowners to allow the public to use their property to boost tourism, Maine’s largest industry. If access to private lands were cut off,

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<sup>6</sup> [https://www.maine.gov/dacf/parks/about/snowmobile\\_program.shtml](https://www.maine.gov/dacf/parks/about/snowmobile_program.shtml)

there would be a substantial loss to businesses in inland areas serving people who come to hunt, fish, snowmobile, hike, camp, and do bird watching. These activities depend, in large measure[,] on having access to privately owned land.”) Legalizing Sunday hunting could also drive down interest in participating in other forms of outdoor recreation in Maine: 62% of respondents to the IFW Survey indicated that their participation in outdoor recreation would be impacted by Sunday hunting, including 28% who said it would be affected “a great deal.” (IFW Survey at 62.) More than half of respondents (51%) said their participation in outdoor recreation would change if hunting were allowed on Sundays. *Id.* at 64. And a full two-thirds of those who say Sunday hunting would impact their outdoor recreation choices indicated that they would avoid going into the woods or decrease their participation. *Id.* at 66. This is what striking down the Sunday hunting law would mean in practice.

### **III. The Right to Food Amendment should not be used as a tool for judicial policymaking.**

It would be one thing if the text of the Right to Food Amendment made clear that the Sunday hunting law was unconstitutional; that would supersede arguments about the practical implications of striking it down. But the actual constitutional text says nothing about hunting on Sundays. On top of the

compelling evidence the Attorney General points to that passage of the Right to Food Amendment could not have been intended as a *de facto* repeal of the Sunday hunting law, in dealing with a not-very-specific and potentially open-ended constitutional amendment the Court should err on the side of caution before wielding it to rewrite the Maine statute books. *See In re Evelyn A.*, 2017 ME 182, ¶ 25, 169 A.3d 914, 922 (“Statutes are presumptively valid, with reasonable doubts resolved in favor of constitutionality.”); *State v. S. S. Kresge, Inc.*, 364 A.2d 868, 872 (Me. 1976) (“One challenging the constitutionality of a statute bears a heavy burden of proving unconstitutionality since all acts of the Legislature are presumed constitutional.”).

Striking down the Sunday hunting law would advance the interest of these particular plaintiffs in being able to hunt at a specific time. But there is no reason to think that the net effect on the right to food or on access to food in Maine would be positive. Because striking down the Sunday hunting law would not advance the right to food in Maine, the Court should not read the amendment as a reason to do what the Parkers are demanding. Absent clear direction from the Constitution, which is nowhere to be found in this case, the law on Sunday hunting should be made by the Legislature, not by this Court. *See MSAD 6 Bd. of Directors v. Town of Frye Island*, 2020 ME 45, ¶ 32, 229 A.3d 514, 523 (“[I]t is appropriate for the legislature rather than the court to make

the policy decision regarding what is practicable in a given situation.”)  
(quotation marks omitted).

Proponents of Sunday hunting have repeatedly tried to get the Legislature to change the law: just since 2000, over two dozen bills that would have allowed Sunday hunting have been submitted to the Legislature; not one passed. About a third of the general population (34%) supports Sunday hunting; over half (54%) are opposed. (IFW Survey at iii.)

As the Attorney General has demonstrated, it is abundantly clear from the legislative history that the Right to Food Amendment was not intended to supersede the Sunday hunting law.<sup>7</sup> If it applies to hunting at all, the amendment should not be read simply to maximize opportunities for these particular plaintiffs to hunt. It should instead be read to secure the right to

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<sup>7</sup> Coverage of the amendment’s passage in the *Press Herald* gave no hint that it had anything to do with Sunday hunting:

Supporters used the campaign to make the case the amendment would ensure the right to grow vegetables and raise livestock in an era when corporatization threatens local ownership of the food supply. They positioned the amendment as a chance for Mainers to take control of the food supply back from large landowners and giant retailers with little connection to the community.

Opponents cast the drive as deceptively vague. They also said it represented a threat to food safety and animal welfare, and could encourage residents to try to raise cows in their backyards in cities like Portland and Bangor.

Patrick Whittle, “Maine voters pass the nation’s first ‘right to food’ amendment,” *Portland Press Herald*, Nov. 2, 2021 (updated Nov. 3, 2021).

food for all Mainers. For the reasons given above, there is no reason to think that striking down the Sunday hunting law would have that effect.

### **CONCLUSION**

Because striking down the Sunday hunting law would not advance the right to food in Maine, the Court should not do it.

Dated at Portland, Maine this 4th day of May, 2023.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I, Jonathan Mermin, hereby certify that today I caused to be served two copies of this brief by U.S. mail, first class postage prepaid, and by electronic mail on the following:

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Dated at Portland, Maine this 4th day of May 2023.

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