STATE OF MAINE

SUPREME JUDICIAL COURT

SITTING AS THE LAW COURT

LAW COURT DOCKET NO. Ken-22-411

VIRGINIA PARKER, et al.
Plaintiff-Appellant

v.

DEPARTMENT OF INLAND FISHERIES AND WILDLIFE
Defendant-Appellee.

On Appeal from the Superior Court
Kennebec County

BRIEF OF THE DEPARTMENT OF INLAND FISHERIES AND WILDLIFE

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INTRODUCTION

In this suit, Plaintiffs Virginia and Joel Parker (the "Parkers") are asking the judicial branch to enact substantial policy changes that the Parkers and their supporters have not been able to achieve through the ordinary political process. But the law is not on their side. For this reason, along with all those set forth below, the Court should not take up the Parkers' invitation.

Hunting on Sunday has been prohibited in the State of Maine for well over a century. In 2021, both houses of the Legislature approved by the requisite two-thirds vote a constitutional Right to Food, which was adopted by the people of Maine by a referendum vote in the fall of 2021.

The Parkers argue that Maine's new Right to Food Amendment preempts or otherwise nullifies 12 M.R.S.A. § 11205 (2021), Maine's longstanding ban on hunting "wild animals or wild birds on Sunday." However, the Amendment's text, alongside its legislative history and legislative intent, make clear that the Amendment does not apply to 12 M.R.S.A. § 11205. Moreover, even if part of the Amendment's text could be read to implicate 12 M.R.S.A. § 11205, that statute would be excluded

from the full Amendment's reach because the Amendment does not protect activities that constitute "poaching."

The Court should therefore affirm the Superior Court's dismissal of the Parkers' Complaint for failure to state a claim upon which relief may be granted.

LEGAL AND LEGISLATIVE BACKGROUND

III. Maine Has a Longstanding, Uninterrupted Ban on Sunday Hunting

Hunting on Sunday has been prohibited by law in Maine for well over a century. Despite numerous proposals throughout the twentieth century to repeal Maine's ban on Sunday hunting, the Legislature chose never to do so. The Sunday hunting ban was reaffirmed in 2003 when the 121st Maine Legislature enacted LD 1600, "An Act to Recodify the Laws Governing Inland Fisheries and Wildlife," which recodified and harmonized within the modern Maine Revised Statutes the entirety of Maine's hunting and fishing laws.[1]

[1] Because "the legislative intent of any statutory enactment is determined wholly as a matter of law, not fact," the Court is free to consider legislative history in determining the meaning of statutory and constitutional provisions on a motion to dismiss. *Wawenock, LLC v. Dep't of Transp.*, 2018 ME 83, ¶ 13, 187 A.3d 609; *see also id.* ¶ 13 n.7. ("[L]egislative facts 'are those a court takes into account in determining the constitutionality or interpretation of a statute.'" (quoting M.R. Evid. 201)).

Legislative proposals to repeal the Sunday hunting ban did not cease after the 2003 recodification. In the most recent 130th Maine Legislature, there were at least four different proposals to permit some form of Sunday hunting throughout parts or all of Maine. *See* App. at 102, 113, 122, 133. Three of the bills received majority "Ought Not To Pass" ("ONTP") reports from the Joint Standing Committee on Inland Fisheries and Wildlife ("IFW Committee") and were voted down by both chambers of the Legislature. *Id.* at 117, 130, 135.

As proposed, the fourth bill (LD 1033) would have permitted Sunday hunting on an individual's private property or on the private property of others from whom the hunter obtained written permission. *Id.* at 103. However, the IFW Committee amended the bill by striking its contents entirely and replacing it with a directive to the Department of Inland Fisheries and Wildlife ("Department of IFW") to undertake a number of actions, including: 1) establishing a stakeholder group of interested parties on all sides of the debate to examine issues related to allowing Sunday hunting; 2) developing a survey related to Sunday hunting; and 3) reporting the findings and recommendations of the stakeholder group to the IFW Committee by early 2022. *Id.* at 104-05. By

a 10-1 vote, the IFW Committee sent the amended LD 1033 to the Legislature with an "Ought to Pass as Amended" ("OTPA") committee report. *Id.* at 110.

The amended bill was passed unanimously by the House of Representatives ("House") on June 3, 2021, and by the Senate on July 2, 2021. It was signed by Governor Mills on July 9, 2021. The Department of IFW delivered its final report—which detailed a series of consequences for keeping, altering, or repealing the ban—on February 28, 2022.[2]

IV. Maine Adopts a Constitutional Right to Food

The Maine Constitution's "Right to Food" provision (also "the Amendment") dates back to 2015, when Representative Hickman introduced LD 783 to the Legislature.[3] *Id.* at 42. At that time, the proposed constitutional amendment explicitly referenced "hunting":

> **Section 25. Right to food.** Every individual has a natural and unalienable right to food and to acquire food for that individual's own nourishment and sustenance by hunting, gathering, foraging, farming, fishing or gardening or by barter, trade or purchase from sources of that individual's own choosing, and every individual is fully responsible for the exercise of this right, which may not be infringed.

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[2] Maine Residents', Hunters', and Landowners' Attitudes Toward Sunday Hunting, Available at: https://www.maine.gov/ifw/docs/ME%20Sunday%20Hunting%20Survey%20Rep%202022_Resp%20Mgt.pdf. (Last visited May 1, 2023).

[3] Then-Representative Hickman now serves as a member of the Maine Senate. Because he was a member of the Maine House at all times relevant to the legislative history of the Amendment, this brief refers to him as "Representative Hickman."

Id. (emphasis added). The proposed amendment received significant public testimony—both in favor and in opposition—before the Legislature's Joint Committee on Agriculture, Conservation, and Forestry ("Agriculture Committee"). The Agriculture Committee amended the proposal to detail the contours of the proposed constitutional right and to provide for exceptions where it would not apply, including in the context of "trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the acquisition of food."[4] *Id.* at 52.

Eight members of the Agriculture Committee supported an "OTPA" majority report, while five members supported an "Ought Not to Pass" ("ONTP") minority report. *Id.* at 61. The House voted in favor of sending the proposed amendment to Maine voters with the requisite two-thirds supermajority (97-45) on March 22, 2016, but a majority of the Senate

[4] The amended proposal read, in full:

> **Section 25. Right to food freedom and food self-sufficiency.** All individuals have a natural, inherent and unalienable right to acquire, produce, process, prepare, preserve and consume the food of their own choosing, for their own nourishment and sustenance, by hunting, gathering, foraging, farming, fishing, gardening and saving and exchanging seeds, as long as no individual commits trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the acquisition of food. Furthermore, all individuals have a right to barter, trade and purchase food from the sources of their own choosing for their own bodily health and well-being. Every individual is fully responsible for the exercise of these rights, which may not be infringed.

rejected the proposed constitutional amendment (18-13) on the following day, and it died.

Representative Hickman introduced a second proposal for a constitutional Right to Food in the 129th Maine Legislature, again expressly referencing hunting.[5] *Id.* at 65. Testifying before the Agriculture Committee, he stated that the new proposal was "much the same as the language" he proposed in the 127th Legislature. *Id.* at 68. However, he had "considered all concerns" about the language of the proposal and "sought input from Republicans and Democrats, Independents and Libertarians, conservatives and progressives, allies and foes, farmers and fishermen, chefs, cottage food producers, homesteaders and lawyers until the language was right." *Id.*

Importantly, Representative Hickman testified that if the

[5] The initial proposal in the 129th Legislature read:

> **Section 25. Rights to food and food sovereignty and freedom from hunger.** All individuals have a natural, inherent and unalienable right to food, including the right to acquire, produce, process, prepare, preserve and consume the food of their own choosing by hunting, gathering, foraging, farming, fishing, gardening and saving and exchanging seeds or by barter, trade or purchase from sources of their own choosing, for their nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the acquisition of food; furthermore, all individuals have a fundamental right to be free from hunger, malnutrition, starvation and the endangerment of life from the scarcity of or lack of access to nourishing food.

resolution were to be ratified, it would "not invalidate state food laws or regulations currently on the books, will not invalidate any hunting or fishing laws or regulations currently on the books, and will not keep the requisite departments from enforcing those same regulations." *Id.* (emphasis added). To underscore the point, he repeated it, cautioning critics again that "no matter what else you have heard or will hear," the proposal would not "invalidate any hunting or fishing laws or regulations currently on the books" and would not "interfere with the government's ability to enforce such regulations." *Id.* at 68-69. And lest there was any ambiguity behind the drafter's intent for the proposed amendment, he concluded his testimony by reiterating for a third time that "it must be made clear once more that [the proposed amendment] will not change, repeal, preempt or nullify any laws or regulations—local, state or federal—currently on the books." *Id.* at 72.

Additionally, Representative Hickman challenged criticism that the proposal might convey some sort of governmental obligation to provide food to Mainers. *Id.* at 68. Instead, he stated that the proposal's intent was to secure an individual's right to produce one's own food and not a right to obtain food from the government—analogizing to the

federal Constitution's Second Amendment guarantee to an individual's right to keep and bear arms, which does not require the government to provide such arms to individuals. *Id.*

During the same Committee hearing, the Director of Policy and Community Engagement for the Maine Department of Agriculture, Conservation, and Forestry ("Department of Agriculture") offered testimony on behalf of the Department of Agriculture, neither for nor against the bill. *Id.* at 73. Principally, she encouraged the Agriculture Committee to draft the proposed amendment in a way that would "not impede the Department's ability to effectively license and regulate Maine food products" under then-existing standards, specifically expressing concerns regarding the proposed amendment's language regarding "purchas[ing] from sources of their own choosing." *Id.* But she also noted that she had consulted with the Department of IFW, which offered its own concerns:

> In Maine, we all owe a unique debt of gratitude and appreciation to generous landowners who afford us the privilege of public access to private property. Without them it would be far more challenging to manage Maine's fish and wildlife resources in a manner that maintains sustainability and ensures the support of all users. Creating a new constitutional right could lead to many different outcomes, some intended and some that could never be anticipated. The exact contours of constitutional rights are often not completely known until these rights are tested in court and the Maine Law Court interprets these rights. How would these bills, and their resulting constitutional rights affect existing hunting laws or landowner's rights? The precise answer to these and many more

> unanticipated questions likely will not be supplied until these issues are tested in court. There is a distinct difference between a privilege and a right, particularly when it comes to fishing and hunting.

Id. at 74. After attaching a fiscal note, nine members of the Committee issued a majority OTPA report, while four members issued an ONTP minority report. *Id.* at 78.

The House again voted in favor of sending the proposed amendment to Maine voters with the requisite two-thirds supermajority (93-47) on June 4, 2019. The following day, a majority of the Senate also supported sending the proposal to voters, but it fell short of the required two-thirds supermajority (21-14).

After the Senate failed to send the proposal to the voters, on June 10, 2019, Representative Hickman introduced a floor amendment that addressed some of the language that posed concerns for the executive branch agencies. *Id.* at 81. Specifically, he stripped the verb "acquire," and removed language regarding a right to be free from hunger. *Id.* Importantly, the amendment also *removed the term "hunting"* as one of the elements of the proposed constitutional right.[6] *Id.* The House adopted

[6] The proposal, as amended by Representative Hickman's floor amendment, read:

> **Section 25. Right to food.** All individuals have a natural, inherent and unalienable right to food, including the right to grow, raise, harvest, produce, process, prepare, preserve and consume the food of their own choosing, to save and exchange seeds and

the amendment two days after it was introduced and voted to move the proposal forward. The Senate did not act on the new language, and it was carried over to the following session of the 129th Legislature.

On February 11, 2020, Representative Hickman introduced an additional floor amendment to the proposal. *Id.* at 82. This amendment removed language that concerned the Department of Agriculture, regarding an individual's right to "barter, trade or purchase food from the sources of their own choosing."[7] *Id.* On March 10, 2020, the House approved the new language. However, the bill was eventually tabled and died at the conclusion of the 129th Legislature.

Due to term limits, Representative Hickman was not eligible to be a member of the Maine House for the 130th Legislature. Nevertheless, a proposed constitutional Right to Food was introduced by Representative

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to barter, trade or purchase food from the sources of their own choosing, for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting of food.

[7] The proposal, as amended by Representative Hickman's second floor amendment, read:

> **Section 25. Right to food.** All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

Faulkingham. *Id.* at 85. As Representative Faulkingham testified to the Agriculture Committee: "I was proud to spend a lot of time working on this bill in the 129th Legislature with the original sponsor, Representative Craig Hickman of Winthrop." *Id.* at 86. This third proposal was nearly identical to the version of the proposal offered by Representative Hickman in his second floor amendment before the 129th Legislature.[8] Notably, the proposal did not contain some of the language in earlier iterations that had concerned the Department of Agriculture ("purchase from sources of their own choosing") or any of the language that concerned the Department of IFW ("hunting").

Like Representative Hickman, Representative Faulkingham testified that the proposed amendment was not seeking to preempt or change existing laws but was instead intended to protect individuals from unforeseen future encroachment by the government. *Id.* at 87 ("[I]f we needed this Amendment now, then it would already be too late."). And like Representative Hickman, Representative Faulkingham stressed that its purpose was to secure individual rights: "The amendment would

[8] The only difference between Representative Faulkingham's initial proposal and the final amended proposal considered by the 129th Legislature above at note 7, *supra*, is that the words "right to food, including" did not appear after the word "unalienable" in Representative Faulkingham's initial bill.

protect the right of the people to grow and raise food for their own use, but have no obligation to provide it to them." *Id.* at 89; *see also id.* ("This amendment strengthens the people's inalienable right to produce food for their own consumption—not to steal, not to trespass, not to poach . . . but to produce food for their own consumption.").

Again, the same representative from the Department of Agriculture testified neither for nor against the proposal. *Id.* at 90. She noted that the Department consulted extensively with Representative Hickman about its concerns in the previous Legislature and that he "was amenable to adjusting the language to remove references to food processing and preparation." *Id.* Significantly, with this version of the proposal that omitted references to "hunting," the Department of IFW did not offer any testimonial concerns to the Agriculture Committee. During its work session, the Committee amended the proposal by adding the words, "right to food, including," after the word "unalienable." *Id.* at 51. Thus, this version of the proposal was identical to the final proposal offered by Representative Hickman at the end of the 129th Legislature.

Ten members of the Agriculture Committee issued a majority OTPA report, while three members issued an ONTP minority report. *Id.*

at 99. The House again voted in favor of sending the proposed amendment to Maine voters with the requisite two-thirds supermajority (106-31) on June 10, 2021. Unlike in past years, on July 2, 2021, the Senate approved sending the measure to the voters with no opposition. On November 2, 2021, the people of Maine approved the constitutional amendment with nearly 61% of voters approving, and the provision now constitutes Section 25 of the Maine Constitution's Declaration of Rights.

It reads:

> **Section 25. Right to food.** All individuals have a natural, inherent and unalienable right to food, including the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being, as long as an individual does not commit trespassing, theft, poaching or other abuses of private property rights, public lands or natural resources in the harvesting, production or acquisition of food.

FACTUAL ALLEGATIONS AND PROCEDURAL HISTORY

The Plaintiffs are Virginia and Joel Parker.[9] App. 6 (¶ 1). They are married, have five children, and reside in Readfield. *Id.* at 6, 8 (¶¶ 1, 16). They rely on hunting game, especially deer, to supplement their family's nutritional needs. *Id.* (¶¶ 2, 17). Joel Parker works all five weekdays, including during the fall, and because of his work schedule cannot take

[9] All allegations are taken from the Parkers' Complaint and are assumed to be true only for purposes of this appeal.

time off during hunting season. *Id.* at 8 (¶ 18). Since Maine prohibits hunting wildlife on Sundays, Joel Parker is mostly limited to hunting on Saturdays. *Id.* Because of their family's respective work and school schedules, the Parkers enjoy only one day per week—Saturdays—when they can hunt together as a family. *Id.* (¶ 19). If Maine did not prohibit it, the Parkers would hunt on Sundays. *Id.* at 8, 11 (¶¶ 19-21, 33).

On April 27, 2022, the Parkers filed this suit alleging that Maine's prohibition on Sunday hunting, as codified at 12 M.R.S.A. § 11205, and any associated implementing regulations, violate Article I, Section 25 of the Maine Constitution and is therefore invalid. *Id.* at 12 (¶ 39). The Parkers seek a declaratory judgment stating as such, as well as an order enjoining Commissioner Camuso from enforcing the statute. *Id.*

The Commissioner filed a motion to dismiss the suit on June 10, 2022. App. at 17-39. The Superior Court (*Cashman, J.*) granted the motion on November 30, 2022, *id.* at 4, and this appeal followed.

STATEMENT OF THE ISSUE ON APPEAL

There is one issue on appeal:

1. Is Maine's statutory ban on Sunday hunting, 12 M.R.S.A. § 11205, consistent with Article I, Section 25 of the Maine Constitution?

Because the text of Article I, Section 25 of the Maine Constitution does not unambiguously create an individual right to hunt Maine's wildlife, and because the legislative history of the Amendment clarifies that its adoption was not intended to eliminate—or even undercut—any of Maine's longstanding hunting or fishing regulations, the answer is "Yes."

Moreover, even if Maine's "Right to Food" Amendment could be read to confer certain hunting rights on individuals, Maine's wildlife is owned collectively by the people of Maine as sovereign, and Article I, Section 25 of the Maine Constitution expressly permits the people of Maine to decide when and how Maine's wildlife can be taken.

Summary of the Argument

Whenever this Court reviews a constitutional challenge to a Maine Statute, it starts with the presumption that all acts of the Legislature are constitutional, which requires any challenger to meet a "heavy burden" to demonstrate otherwise.

Here, Maine's statutory ban on Sunday hunting does not conflict with the constitutional Right to Food, because the Amendment contains no reference to the word "hunting." Although the Amendment contains

the term "harvest," which can at times be used as a synonym for "hunt," that is not unambiguously the case, since "harvest" can also commonly be read to refer only to gathering crops. This ambiguity obligates the Court to look to legislative history for clarification.

When examining the legislative history of the Amendment, it becomes clear that "harvest" is best read only to include crops—or at most crops and domesticated animals—and not as a broader synonym for "hunt." The reasoning is twofold: First, the term "hunting" was once explicitly part of the Amendment's text but was later removed. Second, the Amendment's drafter and sponsor each stated consistently and repeatedly that the Amendment was not intended to alter, preempt, or in any way undercut Maine's preexisting hunting and fishing laws and regulations.

But even if the Amendment's text could be read to secure some manner of induvial hunting rights—which it does not—Maine's statutory ban on Sunday hunting would fit comfortably within the Amendment's exceptions related to "poaching."

That is the case because the Amendment protects *individual* rights to produce food. And the wildlife of Maine is not owned by any individual,

but instead by the people of Maine as sovereign, who retain the right to determine through their Legislature how—and when—their collective property may be taken by hunters. An individual taking the collective sovereign's property in violation of the sovereign's wishes—and in violation of Maine statute—constitutes "poaching," an activity which the Amendment expressly does not protect. Hence, the Amendment's built-in exceptions provide ample, alternative grounds to dismiss this action.

ARGUMENT

I. Standard of Appellate Review: In Reviewing Constitutional Attacks to Maine Statutes, This Court Applies a Strong Presumption of Constitutionality.

This Court reviews de novo the Superior Court's determination of the legal sufficiency of the Complaint under Rule 12(b)(6). *Anctil v. Cassese*, 2020 ME 59, ¶ 10, 232 A.3d 245. Complaints are properly dismissed under Rule 12(b)(6) when they fail to state a claim upon which relief can be granted. *Bean v. Cummings*, 2008 ME 18, ¶ 7, 939 A.2d 676. A motion filed pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Thompson v. Dep't of Inland Fisheries & Wildlife*, 2002 ME 78, ¶ 4, 796 A.2d 674.

In reviewing such a motion, the Court ordinarily accepts as true the factual allegations in the Complaint and decides whether, as a matter of law, the plaintiffs can prove any set of facts that would entitle them to judicial relief. *Moody v. State Liquor & Lottery Comm'n*, 2004 ME 20, ¶ 7, 843 A.2d 43. Dismissal is appropriate if "it appears beyond doubt that a plaintiff is entitled to no relief under any set of facts that he might prove in support of his claim." *Thompson*, 2002 ME 78, ¶ 4, 796 A.2d 674.

This Court interprets constitutional provisions according to their plain meaning if the language is unambiguous. *Jones v. Sec'y of State*, 2020 ME 113, ¶ 11, 238 A.3d 982. But if a constitutional provision is ambiguous, the Court must "determine the meaning by examining the purpose and history surrounding the provision." *Id.* ¶ 12 (quoting *Avangrid Networks, Inc. v. Sec'y of State*, 2020 ME 109, ¶ 14, 237 A.3d 882).

When a person challenges the constitutionality of a legislative enactment, she "bears a heavy burden of proving unconstitutionality, since all acts of the Legislature are presumed constitutional." *Id.* ¶ 18 (quoting *Goggin v. State Tax Assessor*, 2018 ME 111, ¶ 20, 191 A.3d 341); *see also In re J.*, 2022 ME 34, ¶ 12, 276 A.3d 510 ("[A]ll acts of the

Legislature are presumed constitutional.") (emphasis added) (quoting *Bouchard v. Dep't of Pub. Safety*, 2015 ME 50, ¶ 8 115 A.3d 92).

"To overcome the presumption of constitutionality, the party challenging a law must 'demonstrate convincingly' that the law and the Constitution conflict," and "'all reasonable doubts must be resolved in favor of the constitutionality' of the enactment." *Id.* (quoting *Goggin*, 2018 ME 111, ¶ 20, 191 A.3d 341); *see also In re J.*, 2022 ME 34, ¶ 12, 276 A.3d 510 (same); *Somerset Tel. Co. v. State Tax Assessor*, 2021 ME 26, ¶ 30, 259 A.3d 97 (same).

In other words, this Court historically strives to harmonize the language of duly enacted statutes with the text of the Maine Constitution whenever such a reading is possible. It should likewise do so here.

Finally, the Parkers have argued that this Court should apply strict scrutiny in its review of the Sunday hunting ban because it "conflicts with or infringes" on the Amendment. *See* Bl. Br. at 13. That is incorrect. The Superior Court dismissed the Parkers Complaint precisely because the Department argued below—and maintains here—that the Sunday hunting ban does not conflict with or infringe upon the Amendment *at all*.

The question of what level of scrutiny must be applied when reviewing a statute under a new constitutional amendment is particularly difficult. Thankfully, this Court need not answer such a complex question in this case. Nevertheless, if the Court were to decide the level of scrutiny that applies in reviewing a statute in tension with the Right to Food, the legislative history of the Amendment clarifies that the appropriate standard must be something *less* than strict scrutiny. *See, e.g.*, App. at 72 (Amendment's drafter insisting that "it must be made clear once more that [the proposed amendment] will not change, repeal, preempt or nullify any laws or regulations—Local, state or federal—currently on the books").

II. Maine's Prohibition on Sunday Hunting Does Not Conflict with Article I, Section 25 of the Maine Constitution.

Simply put, Maine's new constitutional Right to Food does not encompass a right to hunt wildlife in Maine. As detailed below, the Legislature knows very well how to draft legislation that applies to hunting. But the text of the Amendment does not mention an individual's right to "hunt"—on Sunday or any other day. Nor does the legislative history of the Amendment or the intent of the drafter at the time of its enactment imply that hunting was intended to be encapsulated within

the Right to Food. Instead, the evidence points in the opposite direction. When interpreted properly, the Amendment does not protect the activity in which the Parkers seek to engage.

A. The Right to Food Amendment does not mention "hunting," and its references to "harvest" and "harvesting" cannot unambiguously be read to be synonymous with "hunting."

When examining a right under the Maine Constitution, this Court "interprets the constitutional . . . provision according to its plain meaning if the language is unambiguous." *Jones*, 2020 ME 113, ¶ 11, 238 A.3d 982; *see also Voorhees v. Sagadahoc Cty.*, 2006 ME 79, ¶ 6, 900 A.2d 733 ("Because the same principles employed in the construction of statutory language hold true in the construction of a constitutional provision, we apply the plain language of the constitutional provision if the language is unambiguous."). But if the constitutional "provision is ambiguous, [the Court] [will] determine the meaning by examining the purpose and history surrounding the provision." *Jones*, 2020 ME 113, ¶ 12, 238 A.3d 982 (quoting *Avangrid*, 2020 ME 109, ¶ 14, 237 A.3d 882) (second alteration in *Jones*).

As noted above, the Amendment says nothing about "hunting." And the Parkers' preference to hunt wildlife on Sundays cannot be

characterized as a wish to "save and exchange seeds." Nor do they allege that it is a desire to "grow," "raise," or "consume" the "food of their own choosing." Instead, relying primarily on the language in the Amendment providing "the right to . . . harvest . . . and consume the food of their own choosing for their own nourishment, sustenance, bodily health and well-being," they argue that 12 M.R.S.A. § 11205 inhibits their ability to "harvest food for their own consumption through hunting." App. at 11 (¶ 32). But the Amendment's use of the terms "harvest" and "harvesting" does not support the Parkers' claims.

Nowhere in the Maine Revised Statutes are the isolated terms "harvest" or "harvesting" defined, though they are used on numerous occasions as part of the definition of other statutory terms. For example, under Title 29-A, regarding Maine's motor vehicle laws, "Farming" is defined to include "dairying; raising livestock, freshwater fish, fur-bearing animals or poultry; producing, cultivating, growing and harvesting fruit, produce or floricultural or horticultural commodities." 29-A M.R.S.A. § 101(23) (2021) (emphasis added).[10] Here, animals are

[10] The same verbiage is used in Title 7's (Agriculture and Animals) subchapter on "Agritourism Activities."

"raised," while plants are "harvested." The same Title defines "Fish truck," in part, as a "motor truck used primarily to harvest and transport fish or marine animals." *Id.* § 101(24). In this circumstance, animals are capable of being "harvested," though the activity is done by a "motor truck" and not an individual.

Perhaps the most relevant part of the Maine Revised Statutes as it relates to this suit is Title 12, involving "Conservation." There, Part 13's (IFW) definitional section provides a definition for "hunt," which includes "harvesting": "To 'hunt' means to pursue, catch, take, kill or harvest wild animals or wild birds or to attempt to catch, take, kill or harvest wild animals or wild birds." 12 M.R.S.A. §10001(31) (2021). Title 12's definition of "hunt" indicates "harvesting" constitutes a subset of activities that qualify as hunting—not the other way around. Thus, under this definition, the Parkers' desire to "harvest food . . . through hunting," App. at 11 (¶ 32), is not possible. Instead, under 12 M.R.S.A. §10001(31), an individual may be able to "hunt food through harvesting," but not the reverse.

Moreover, under Title 12, to "harvest" an animal must mean something different than to "pursue," "catch," "take," or "kill" the animal.

If "harvest" were read to mean the same thing as any of those other verbs, the term would be rendered "mere surplusage, and 'because no language is to be treated as surplusage if it can be reasonably construed, [courts] must give meaning to this language."[11] *State v. Brown*, 2019 ME 41, ¶ 18, 205 A.3d 1 (quoting *State v. McLaughlin*, 2018 ME 97, ¶ 16, 189 A.3d 262). Hence, under the Maine Revised Statutes, the term "harvest" cannot be read to unambiguously cover the activity in which the Parkers seek to engage.

Common dictionaries provide little assistance in clarifying the ambiguity inherent in the word "harvest." Merriam-Webster's online dictionary[12] provides five entries for the transitive verb "harvest":

> 1) To gather in (a crop): reap. 2) To gather, catch, hunt, or kill (salmon, oysters, deer, etc.) for human use, sport, or population control. 3) To remove or extract (something, such as living cells, tissues, or organs) from culture or from a living or recently deceased body especially for transplanting. 4) To accumulate a store of. 5) To win by achievement.

Of these five entries, the second and third definitions could arguably

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[11] Below, the Parkers criticized the use of the canon against surplusage as it relates to the term "harvest" in the Amendment but employed the canon to the Amendment term "poaching." *Compare* App. 144 with App. 147. Such contradictory applications only underscore the ambiguity of the Amendment's language and the need to consider its legislative history.

[12] *Harvest*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/ (entry for "Harvest") (last visited May 1, 2023).

cover the activity banned under 12 M.R.S.A. § 11205, but the other three do not.

Similarly, dictionary.com[13] provides three potential definitions for the transitive verb "harvest"—

> 1) To gather (a crop or the like); reap. 2) To gather the crop from: *to harvest the fields*. 3) To gain, win, or use (a prize, product, or result of any past act, process, etc.): *She has finally harvested the rewards of her dedication*.

None cover the type of hunting activity sought by the Parkers on Sundays. As with the Maine Revised Statutes, contemporaneous dictionaries do not unambiguously indicate that Maine's Right to Food encapsulates the hunting of wildlife.

On rare occasions, this Court has wrestled with the term "harvesting" under Maine law. In *Ross v. Acadian Seaplants, Ltd.*, 2019 ME 45, ¶ 24, 206 A.3d 283, it held that the "harvesting" of rockweed from the intertidal zone could not reasonably be considered "fishing" because rockweed is a plant. In *Wuori v. Otis*, 2020 ME 27, ¶ 4 n.2, 226 A.3d 771, the Court noted that "harvest" did not appear in the statute at issue but is subject to several potential meanings:

> [Harvest] is defined as "to gather in (a crop, etc.)" or "to catch, shoot, trap, etc. (fish or game), usually in an intensive, systemic way, as for commercial purposes." (quoting "Harvest," Webster's New World College Dictionary (5th

[13] *Harvest*, Dictionary.com, https://www.dictionary.com/ (entry for "Harvest") (last visited May 1, 2023).

ed. 2016), and as "[to] catch or kill (animals) for human consumption or use," Harvest, New Oxford American Dictionary (3d ed. 2010)).

Here, too, some definitions of "harvest" recognized by the Court would cover the Sunday hunting activity the Parkers wish to pursue, while others do not.

Finally, when interpreting statutes and other legal language, this Court has frequently applied the canon of construction known as *ejusdem generis*, which stands for the proposition that words used in a series should be interpreted in light of the words that surround them. *See, e.g.*, *Badler v. Univ. of Me. Sys.*, 2022 ME 40, ¶ 7; *Snow v. Bernstein, Shur, Sawyer & Nelson, P.A.*, 2017 ME 239, ¶ 22, 176 A.3d 729; *New Orleans Tanker Corp. v. Dep't of Transp.*, 1999 ME 67, ¶ 7, 728 A.2d 673; *Penobscot Nation v. Stilphen*, 461 A.2d 478, 489-90 (Me. 1983) (invoking *ejusdem generis* construction when it is supported by legislative history).

Here, the word "harvest" appears in the Amendment surrounded by methods of food generation that all constitute food production: ". . . the right to save and exchange seeds and the right to grow, raise, harvest, produce and consume the food of their own choosing for their own nourishment . . ." Me. Const. art. I, § 25. Thus, it is entirely plausible that "harvest" could—and as the legislative history discussed below

demonstrates, in fact should—be read to include only the harvesting of crops or animals grown, raised, and belonging to an individual, not the broader wildlife of Maine.[14]

At the very least, the term "harvest" is ambiguous. Because "harvest" as used in the Amendment does not unambiguously protect hunting activity, the Court's precedents obligate it to "determine the meaning by examining the purpose and history surrounding the provision."[15] *Avangrid*, 2020 ME 109, ¶ 14, 237 A.3d 882.

B. Legislative history and purpose demonstrate that Maine's constitutional right to food was not intended to invalidate the Legislature's Sunday hunting ban.

The legislative history, purpose, and intent of the Amendment's drafters establish that Maine's constitutional Right to Food does not implicate hunting. As noted above, an explicit reference to a right to obtain food by "hunting" was included in the first two proposals for the

[14] The Amendment's reference to "poaching" as an exception to the Right to Food does not negate such an interpretation, as argued by the Parkers below. *See* App. 146-47. For example, a beef farmer could easily engage in the "poaching" of another's domesticated cattle without implicating Maine's wildlife.

[15] Both in their opening brief and below, the Parkers sought to explain in some detail how the term "harvest" can be used synonymously with the concept of hunting. *See, e.g.*, Bl. Br. at 9-10, App. 140-45. The Commissioner does not deny that "harvest" can indeed at times be used to refer to hunting activity. But the Parkers conflate the idea that "harvest" *can* refer to hunting activity with the notion that it *must* be read to do so.

Amendment, but it was removed from the second proposal in the 129th Legislature—by the Amendment's drafter—after the Department of IFW expressed reservations about the proposed language. App. at 74, 81. References to "hunting" were kept out of the third proposal that passed the 130th Legislature, and therefore the Department of IFW did not express any reservations about the language to the Agriculture Committee as it had with previous proposals.

Nor is there any question that the Legislature knows how to use specific language to address "hunting" generally or "Sunday hunting" specifically, when it desires to do so. *Cf. DaimlerChrysler Corp. v. Exec. Dir., Me. Rev. Servs.*, 2007 ME 62, ¶ 17, 922 A.2d 465 ("Clearly, had the Legislature wanted [a specific provision], it could have easily done so, as evidenced by the explicit mechanism the Legislature provided" in a different provision of the Maine Revised Statutes); *Arsenault v. Sec'y of State*, 2006 ME 111, ¶ 17, 905 A.2d 285 (following the same method of statutory interpretation); *see also* 12 M.R.S.A. § 10001(31) (definition of "hunt"); App. at 104 (requiring Department of IFW to study expansion of hunting to Sundays); App. at 114, 123, 134 (proposals to permit certain forms of Sunday hunting). Likewise, it would make no logical sense for

the 130th Legislature to require the Department of IFW to create a working group and draft a comprehensive report regarding the benefits and drawbacks of expanding hunting to Sundays if the Legislature was already enshrining such a right in the Maine Constitution.

Finally, "pronouncements of the legislators during their initial consideration of the [proposal]" are an important indicator of legislative intent. *See Me. Ass'n of Health Plans v. Superintendent of Ins.*, 2007 ME 69, ¶ 47, 923 A.2d 918. And statements by the Amendment's drafter and sponsor could not be any clearer that the Amendment was not intended to alter Maine's ban on Sunday hunting (or for that matter any other Maine hunting and fishing laws or regulations).

As the drafter of the Amendment, Representative Hickman emphatically stressed—on multiple occasions—it would "not invalidate <u>any hunting</u> or fishing laws or regulations currently on the books" and would "not keep the requisite departments from enforcing those same regulations." App. at 68 (emphasis added); *see also id.* at 68-69 (same); *id.* at 72 ("[I]t must be made clear once more that [the proposed Amendment] <u>will not change, repeal, preempt or nullify any laws or regulations</u>—local, state or federal—currently on the books.") (emphasis

added). Likewise, in his testimony before the 130th Legislature, the Amendment's sponsor, Representative Faulkingham, made clear that he was not sponsoring the Amendment in order to alter existing laws, but merely to protect "future generations" from government incursion. *Id.* at 87 ("Rarely are amendments adopted when they are needed. They are adopted many years before, by legislators who had the foresight to pass them for the benefit of future generations.").

Below, the Parkers cited to a legislative summary as evidence that the removal of "hunting" from the Amendment should not be read as an intent to remove hunting from the Amendment's protections. *See* App. at 148 (citing App. at 81). But summaries of floor amendments are authored by unelected staff members of the Office of the Revisor of Statutes. The better place to look for legislative intent are statements by the duly elected drafters and sponsors of the Amendment, who consistently stated they were not seeking to upset any Maine hunting or fishing laws.[16]

[16] Moreover, summaries of floor amendments are not infallible. The very legislative summary that the Parkers cited below contains an obvious error: It states that one purpose of House Amendment A was "Specifying that the right to food does not allow an individual to abuse private property rights or abuse public lands or natural resources in the harvesting of food." *See* App. at 81. But that language had *already* been included in the proposal as introduced by Representative Hickman in the 129th Legislature, and was not part of House Amendment A, which the legislative summary was purportedly describing. *Compare* App. at 65 with App. at 81.

As with the United States Congress, the Maine Legislature should not be presumed to "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 468 (2001); *see also Conservation Law Found., Inc. v. Pruitt*, 881 F.3d 24, 32 (1st Cir. 2018). And taken as a whole—the Amendment's text, legislative history, and legislative intent dictate that the Legislature hid no such elephants here: Maine's Right to Food does not implicate, preempt, or invalidate 12 M.R.S.A. § 11205, the Legislature's decision to prohibit hunting on Sundays.

Against the backstop of the Legislature's entitlement to a "presumption of constitutionality" and this Court's precept that "'all reasonable doubts must be resolved in favor of the constitutionality' of the enactment," the Superior Court correctly ruled that this suit fails as a matter of law. *See Jones*, 2020 ME 113, ¶ 18, 238 A.3d 982 (quoting *Goggin*, 2018 ME 111, ¶ 20, 191 A.3d 341). Thus, the Parkers cannot meet their "heavy burden" of "demonstrating convincingly" that the ban conflicts with the Maine Constitution. *Id.*

III. Even If the Amendment Can Be Construed to Enshrine Individual Hunting Rights, a Statutory Ban on Sunday Hunting Is Outside Its Sweep Because the Amendment Does Not Protect Activities That Constitute "Poaching"

Because Maine's constitutional Right to Food does not implicate hunting—as laid out above in Part II—the Court need not consider the exceptions built into the Amendment. Nevertheless, even if the first portion of the Amendment's text *could* be construed in isolation to encompass hunting, 12 M.R.S.A. § 11205 would be excluded from the Amendment's reach because the Amendment does not protect activities that constitute "poaching" and/or "abuses of . . . natural resources." As explained below, because the wildlife of Maine is owned collectively by the people of Maine, as sovereign, who retain the authority through their representative Legislature to regulate the taking of said wildlife as they wish, taking wildlife in violation of statutory law enacted by the people's Legislature constitutes "poaching."

A. The wildlife of Maine is not owned by any individual, but collectively by the people of Maine as sovereign.

Throughout history, this Court has consistently reaffirmed the principle that the wildlife of Maine is not owned by any individual, but instead collectively by the people of Maine, as sovereign. *See, e.g.*, *State*

v. McKinnon, 153 Me. 15, 18, 133 A.2d 885, 887 (1957) ("The fish in the waters of the state, and the game in its forests, belong to the people of the state, in their sovereign capacity, who, through their representatives, the legislature, have sole control thereof, and may permit or prohibit their taking.") (quoting *State v. Snowman*, 46 A. 815, 818 (Me. 1900)). In other words, "[t]he animals which are objects of the hunt are naturally wild. There is no right of individual ownership as they are property of the sovereignty." *Id.* (emphasis added).

Because Maine's wildlife is owned collectively by the people, as sovereign, "[t]he state of Maine has the unquestioned authority to 'conserve, protect and regulate its wildlife.'" *Animal Welfare Inst. v. Martin*, 588 F. Supp. 2d 70, 99 (D. Me. 2008) (quoting *McKinnon*, 153 Me. at 18, 133 A.2d at 887); *see also Holbrook Island Sanctuary v. Inhabitants of Town of Brooksville*, 161 Me. 476, 486, 214 A.2d 660, 666 (1965) ("The control of wildlife rests with the State."). That authority extends to the regulation of when, where, and by what means individuals may take the sovereign people's wildlife in the form of hunting. *See Holbrook*, 161 Me. at 488, 214 A.2d at 666 ("The State may where it will and when it will prohibit hunting on any land within the State. . . . [I]t is the policy of the

State and not the wish of the individual which controls the protection and preservation of the wildlife of our State.").

Despite unsupported assertions by the Parkers to the contrary below, App. at 149-51, nothing in the Amendment's text or history indicates that the Amendment was intended to alter the Maine people's sovereign ownership of Maine's wildlife.[17]

B. Regulations of Maine's wildlife fall under the Amendment's exception for "poaching."

Because the people of Maine as sovereign collectively own Maine's wildlife and enjoy the authority to regulate their collective property through their representative Legislature, the only question that remains is whether taking Maine's wildlife against the legislated wishes of the people constitutes "poaching" under the Right to Food. The answer is "yes."

The terms "poaching" and "poach" are not defined by the Maine Revised Statutes. Nor is either term used in Maine Revised Statutes at

[17] Below, the Parkers asserted that by passing the Amendment, the people of Maine "chose to elevate certain individual rights, and thus, necessarily, to *forfeit* at least some of their ability to limit those rights through their representative Legislature." App. at 150 (emphasis in original). Such a crabbed interpretation of the Amendment raises far more questions than it answers: If the Amendment transformed the ownership rights regarding Maine's wild game, where in the plain language of the provision—or for that matter any of its legislative history—can such evidence of a revolutionary overhaul be found? The Parkers provided no answer to that question.

all. Black's Law Dictionary likewise provides no relevant guidance in interpreting the terms "poach" or "poaching" as used in Maine's Right to Food. This Court appears to have only used either term twice in its two centuries of precedent, and neither decision provides any guidance on what the term could mean as written in the context of the Amendment. *See State v. Lipham*, 2006 ME 137, ¶ 2, 910 A.2d 388; *Barrows v. McDermott*, 73 Me. 441, 450 (1831).

Merriam-Webster's Online Dictionary provides seven definitions for the word "poach," five of which could potentially relate to the text of the Amendment:[18]

> 1) To encroach upon especially for the purpose of taking something. 2) To trespass for the purpose of stealing game. Also: to take game or fish illegally. 3) To trespass on. // A field poached too frequently by the amateur. 4) To take (game or fish) by illegal methods. 5) To appropriate (something) as one's own.

Similarly, Dictionary.com provides two definitions of the term "poaching" that could plausibly relate to this suit, as well as five plausible definitions of "poach":[19]

> 1) The illegal practice of trespassing on another's property to hunt or steal game without the landowner's permission. 2) Any encroachment on another's property, rights, ideas, or the like. 3) To trespass, especially on another's game

[18] *Poach*, Merriam-Webster Online Dictionary, https://www.merriam-webster.com/ (entry for "Poach") (last visited May 1, 2023).

[19] *Poaching*, Dictionary.com, https://www.dictionary.com/ (entry for "Poaching") (last visited June 9, 2022); *Poach*, Dictionary.com, https://www.dictionary.com/ (entry for "Poach") (last visited May 1, 2023).

> preserve, in order to steal animals or to hunt. 4) To take game or fish illegally. 5) To trespass on (private property), especially in order to hunt or fish. 6) To steal (game or fish) from another's property. 7) To take without permission and use as one's own: to poach ideas; a staff poached from other companies.

Some of these definitions involve trespassing on another's property. Others involve only the taking of property—including fish and game—illegally or without permission. And some definitions incorporate both elements.

Because "poaching" can be defined simply as taking fish or game illegally—regardless of whether one trespasses on someone else's property—an individual hunting the sovereign people's wildlife outside the permissible regulations enacted by the people through their Legislature could be considered to be engaging in "poaching" for purposes of the Amendment.

Moreover, this interpretation is consistent with the legislative purpose of the Amendment: to preserve *individuals*' rights to produce food for themselves, not to create an obligation on others or the government to provide food to individuals. *See, e.g.*, App. at 68 ("[T]he amendment could somehow be misconstrued to grant greater governmental authority over providing food to people, rather than securing and protecting individual rights (it does not)); *id.* at 88-89

("Some have said that if an amendment called Right to Food is passed, that the government must provide food to people. That is not the case. . . . The amendment would protect the right of the people to grow and raise food for their own use, but have no obligation to provide it to them.") (emphasis in original).

Hence, Maine's statutory ban on Sunday hunting in 12 M.R.S.A. § 11205 can be read in harmony with the Constitution's Right to Food, even if the Amendment were determined to convey certain hunting rights to individuals. If there any doubt persists as to which way the Amendment text should be construed in this case, this Court's longstanding presumption of constitutionality that the Court applies to duly enacted statutes breaks any tie. *Somerset Tel.*, 2021 ME 26, ¶ 30, 259 A.3d 97; *Jones*, 2020 ME 113, ¶ 18, 238 A.3d 982.

IV. The Sunday Hunting Ban's Origins Are Irrelevant.

Both below and in their opening brief to this Court, the Parkers focused on the purportedly biblical origins of 12 M.R.S.A. § 11205. *See, e.g.*, Bl. Br. at 11; App. at 151-52. Such contentions read more like an Establishment Clause or Equal Protection Clause challenge—which the Parkers have not brought—than a challenge pursuant to Maine's

constitutional Right to Food.[20] At any rate, the Legislature's motivations for passing the original ban in the nineteenth century are a red herring. The relevant questions here are whether the ban on Sunday hunting was intended to be eradicated by the Right to Food Amendment (no); and whether the people of Maine maintain the right to regulate their shared interest in the State's wildlife (yes).

Just last year, this Court reasserted that Maine's constitutional right to bear arms—which includes a provision stating that the "right shall never be questioned"—is not absolute, but instead is subject to regulations by the Maine Legislature. *See In re J.*, 2022 ME 34, ¶ 14. Maine's constitutional Right to Food should be held to the same standard.

Considering the ambiguity of the word "harvest," the clear legislative intent of the drafter and sponsor, and the poaching exception written into the Amendment that can reasonably be construed to allow the people of Maine to regulate their collectively owned property, as a matter of law the Parkers cannot meet their "heavy burden of proving

[20] Any such challenge—if properly brought—would fail. *See McGowan v. State of Md.*, 366 U.S. 420, 445 (1961) (upholding Sunday closing laws in the face of an Establishment Clause challenge); *Kittery Motorcycle, Inc. v. Rowe*, 320 F.3d 42, 50 (1st Cir. 2003) (holding that Sunday closing laws are not a violation of the Equal Protection Clause under rational basis review).

unconstitutionality" by "demonstrat[ing] convincingly that the statute and the Constitution conflict." *Id.* ¶ 12.

CONCLUSION

Maine's ban on Sunday hunting has existed for well over a century. And it complies with the Constitution. The Legislature and the people of Maine are actively engaged in a dialogue about what changes—if any—should be made to the ban. The Court should not permit this suit to be used as a vehicle to circumvent that democratic process.

For these and all the reasons set forth above, the Commissioner respectfully asks that the Court affirm the Superior Court's decision dismissing this action.

DATED: May 4, 2023

Respectfully submitted,

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STATE OF MAINE

SUPREME JUDICIAL COURT
Sitting as the Law Court
Docket No. Ken-22-411

VIRGINIA PARKER, et al.,
Plaintiff-Appellant

v.

COMMISSIONER OF INLAND FISHERIES AND WILDLIFE,
Defendant-Appellee.

CERTIFICATE OF SIGNATURE AND COMPLIANCE

I am filing the electronic copy of a brief with this certificate. I will file the paper copies as required by M.R. App. P. 7A(i). I certify that I have prepared (or participated in preparing) the brief and that the brief and associated documents are filed in good faith, conform to the page or word limits in M.R. App. P. 7A(f), and conform to the form and formatting requirements of M.R. App. P. 7A(g).

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