No. 17-683

In The Supreme Court of the United States

THE STATE OF NORTH CAROLINA,
Petitioner,

v.

ALCOA POWER GENERATING, INC. ET AL,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* AMERICAN WHITEWATER, NORTH CAROLINA WILDLIFE FEDERATION, AND YADKIN RIVERKEEPER, INC. IN SUPPORT OF PETITIONER

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INTERESTS OF *AMICI CURIAE*[1]

Amici are environmental non-profit organizations with significant experience in researching, protecting, and advocating for river resources in North Carolina and other Original States. *Amici* submit this brief to detail some troubling impacts of the Fourth Circuit's decision for property and environmental law.

American Whitewater is a conservation organization dedicated to restoring rivers to their natural condition, improving public lands management of surrounding watersheds, and protecting public floating rights for responsible recreational use.

North Carolina Wildlife Federation ("NCWF") is a conservation organization that uses advocacy, education, grassroots mobilization, and policy expertise to promote public access to North Carolina's natural resources. NCWF has over 20,000 members and twelve chapters across North Carolina, and strongly supports the public trust doctrine as a means of protecting public lands for public benefit.

Yadkin Riverkeeper, Inc. ("YRK") is an environmental organization dedicated to respecting,

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[1] Pursuant to this Court's Rule 37.6, *Amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity other than *Amici* made a monetary contribution to this brief's preparation or submission. Counsel of record for all parties were timely notified more than ten days before filing, and all parties consented by electronic mail to this brief's filing.

protecting, and improving the Yadkin River Basin through education, advocacy, and action. YRK's membership live, swim, paddle, fish, and hunt on, in, or near the Yadkin River—activities which depend upon responsible environmental stewardship.

SUMMARY OF ARGUMENT

The Fourth Circuit's opinion misinterpreted this Court's holdings regarding Original States' sovereign title to submerged lands under navigable waters. As identified in Judge King's dissent, the majority implicitly overturned two centuries of North Carolina jurisprudence regarding title to its submerged lands. In addition to misinterpreting and misapplying this Court's jurisprudence on Original States' sovereign titles to submerged lands, the Fourth Circuit misapplied the navigability-for-title test this Court enunciated in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012) for states admitted to the Union following the Constitution's ratification.

The holding below confuses long settled navigability law in North Carolina and other Original States. The Fourth Circuit's opinion calls into question real property titles, public use easements and popular access to State public trust resources, the recreation-based economy, and the ability of *Amici* to ensure compliance with federal environmental laws that protect human health. For all of these reasons, this Court should grant the State of North Carolina's Petition for Writ of Certiorari and reverse the Fourth Circuit's opinion.

ARGUMENT

I. THE FOURTH CIRCUIT MISAPPLIED THIS COURT'S HOLDINGS TO SUPPLANT THE STATE'S NAVIGABILITY-FOR-TITLE TEST AND TRANSFER SOVEREIGN TITLE.

This Court always has agreed with North Carolina that the Original States became sovereign at Independence: "[T]he people of each [original] state became themselves sovereign; and in that character hold the absolute right to all their navigable waters, and the soils under them for their own common use, subject only to the rights since surrendered by the Constitution." *Pollard v. Hagan*, 44 U.S. 212, 229-30 (1845) (quotation omitted). Original States, including North Carolina, acquired title to their lands and waters upon declaring independence from the British Crown in 1776, years before ratifying the Constitution and forming the Union. *State v. Taylor*, 304 S.E.2d 767, 770 (N.C. Ct. App. 1983) (quoting 72 Am. Jur.2d, States, Territories, and Dependencies, § 66 (1974) to explain that "[u]pon the Declaration of Independence, the people of the original thirteen states succeeded to all rights of the Crown and became the owners of all lands within the limits of the state which had not been granted to others."). Under the Constitution, Original States surrendered only Commerce Clause, admiralty, and maritime jurisdiction to the federal government. U.S. Const. art. I, § 8; U.S. Const. art. III, § 2; *United States v. Appalachian Power Co.*, 311 U.S. 377, 408-09 (1940); *Pollard*, 44 U.S. at 230-31. In fact, North Carolina ceded its western lands to

the federal government to form the State of Tennessee. *See* An Act to Accept a Cession of the Claims of the State of North Carolina to a Certain District of Western Territory, Pub. Stats. at Large, Stat. II, Ch. 6 (1st Cong., Sess. II 1790).

When North Carolina declared its independence in 1776, its people acquired sovereign title to "all the territories, seas, waters, and harbors, with their appurtenances," within the State. N.C. Const. of 1776, Dec'l of Rights, § 25. "Originally the State of North Carolina was the owner of soil covered by water within its boundaries, whether that water be navigable or non-navigable." *Swan Island Club, Inc. v. White*, 114 F. 795, 99 (E.D.N.C. 1953), aff'd sub nom. *Swan Island Club, Inc. v. Yarborough*, 209 F.2d 698 (4th Cir. 1954).

North Carolina's title claim to the Yadkin's riverbed, therefore, comports with historical and legal precedent. "Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 377-378 (1977). Defining the extent of State ownership thus "depends on the law of each state to what waters and to what extent this prerogative of the state over the lands under water shall be exercised." *Hardin v. Jordan*, 140 U.S. 371, 382 (1891).

By protecting Original States' sovereign title to submerged lands, this Court's precedent also recognizes those states' duties as trustees of public trust resources: "the navigable waters and the soils

under them . . . shall not be disposed of piecemeal to individuals, as private property, but shall be held for the purpose of being ultimately administered and dealt with for the public benefit by the state." *Shively v. Bowlby*, 152 U.S. 1, 49-50 (1894); *Illinois Cent. R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). States "have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 483 (1988).

The Fourth Circuit misread two key Supreme Court cases. First, the court below misread this Court's landmark ruling in *Martin v. Lessee of Waddell*, 41 U.S. (16 Pet.) 367, 410 (1842). This misinterpretation enabled the Fourth Circuit to wrongly reinterpret the navigability-for-title test set forth in *PPL Montana, LLC v. Montana*, 565 U.S. 576 (2012), ultimately revoking North Carolina's sovereign title to the Yadkin's riverbed.

The Fourth Circuit read *Waddell* to hold that the Original States did not receive title to their lands upon their declaration of independence from the British Crown in 1776, and instead achieved sovereignty only after they ratified the Constitution years later. App. to Pet. Cert. 10a-14a. This reading asserts that *Waddell* relied "on the *post-Constitution* sovereignty of a State in treating navigability for title as a federal question," and disregards North Carolina's pre-Constitution sovereignty. *Id.* at 12a.

In reality, *Waddell* holds that Original States became sovereign "when the revolution took place"—long before ratification—and as sovereigns held an "absolute right to all their navigable waters, and the soils under them . . . subject only to the rights *since* surrendered by the Constitution to the general government." 41 U.S. at 410 (emphasis added). The word "since" means *subsequently*. Later, this Court reaffirmed *Waddell's* holding in *Pollard*, 44 U.S. at 229-30.

This distinction between pre- and post-Constitution sovereignty is controlling. As an Original State, North Carolina became sovereign "when the revolution took place" in 1776, years before the Constitution's ratification between 1787 and 1790. The Fourth Circuit stands alone in holding that the Constitution rather than Independence gave the Original States their sovereign land titles.

The reason the Fourth Circuit's holding is in error is simple: the Constitution did not confer title to land on any of the Original States. The Constitution's New States Clause provides that "[n]ew States may be admitted by the Congress into this union." U.S. Const. art. IV, § 3, cl. 1. That clause refers only to the later-admitted states, meaning those joining the Union after the Original States ratified the Constitution which created the United States. The Original States already held land titles by virtue of their sovereignty from the British Crown. They conveyed to the Union Commerce Clause, admiralty, and maritime jurisdiction. *See* U.S. Const. art. I, § 8;

U.S. Const. art. III, § 2; *Gibson v. United States*, 166 U.S. 269, 271-72 (1897) (granting to Congress a limited navigational servitude to regulate interstate commerce). The Original States separately deeded land to the United States by deeds of cession, as one sovereign to another.

The Fourth Circuit also now stands alone in holding that Original States' titles to submerged lands depend upon the federal navigability-for-title test, incorrectly interpreting *PPL Montana*. In *PPL Montana*, this Court explicitly reconfirmed *Waddell's* holding that "for the 13 original States, the people of each state, *based on principles of sovereignty*, 'hold absolute right to all their navigable waters and the soils under them,' subject only to rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Montana*, 565 U.S. at 590 (emphasis added). Indeed, this Court recognized North Carolina as an Original State who "came early to the conclusion that a state holds presumptive title to navigable waters," *id.* (citing *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30 (1828)), and distinguished it from later-admitted Montana, which took title to its submerged lands from the federal government pursuant to the New States Clause. *See id.* at 591.

Based on its erroneous historical understanding and constitutional interpretation, the Fourth Circuit upset 200 years of North Carolina submerged lands law, and transferred the States' sovereign right to the Yadkin's riverbed to a private corporation.

II. THE FOURTH CIRCUIT'S DECISION THROWS NORTH CAROLINA'S SUBMERGED LANDS LAW INTO CONFUSION AND CLOUDS RIVERBED TITLES.

Amici are particularly concerned that the Fourth Circuit's unprecedented holding has thrown into confusion over 200 years of law governing sovereign submerged lands in North Carolina—as well as the law of other Original States—contrary to the Framers' intent. Judge King's Fourth Circuit dissent aptly warned that

> the majority's ruling will result in a sea change with respect to judicial decisions that have already recognized North Carolina's ownership of its waters and the lands thereunder. From my viewpoint, the majority's ruling could cloud land titles in North Carolina.

App. to Pet. Cert. 45a-46a. The dissent also found "the majority and the lower court have necessarily concluded that the Yadkin is not subject to the public trust."[2] *Id.* at 54a.

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[2] The public trust doctrine holds that sovereign governments hold their natural resources in trust for their citizens' benefit, and therefore must responsibly manage those public trust resources. Under this doctrine, citizens have a right to access and use public trust resources. *See* David C. Slade, Putting the Public Trust Doctrine to Work (1990) (cited in *PPL Montana*).

The holding below creates a myriad of unresolved questions clouding titles, and throws customary public access into doubt while inviting parties who have lost in state court to try these matters in federal court instead. Such questions include: Do riparian owners, formerly believed to own only to the shore, now hold title to the center of the stream? To what extent can they now control water access and use of the bed? Are ancient grants to riverbeds underlying rivers long-deemed navigable under State law, and previously held to be void *ab initio* by the North Carolina Supreme Court, now in question? What is the impact on municipal water supplies drawn from public rivers and impoundments that would now be deemed private? Must the State now obtain easements for highway bridges and other river crossings over submerged lands it has always believed to be sovereign lands? Are North Carolina's public rivers, which *Amici* use and seek to safeguard, now private if rapids, falls, or other obstructions interrupted navigation at statehood? What is the effect on long-established traditions and expectations of public enjoyment for the Yadkin and other public rivers? Are State-issued encroachments, such as those to public utilities for power line and pipeline crossings, cities and counties for water and sewer lines, and to railroads for trestles, no longer valid? Do authorizations such as permits issued by the State for riverbed mining, and water intake and discharge structures now constitute trespasses on private submerged lands or compensable takings? These issues crucial to North Carolina's citizens could require years of litigation to resolve.

Addressing all such concerns is beyond the scope of this brief, except to say that State law already has resolved these questions. *Amici* will discuss a few important examples of the havoc the majority opinion below will wreak upon North Carolina's submerged lands titles and uses, if not corrected by this Court.

The Yadkin is North Carolina's second largest river basin and provides crucial aquatic, recreational, and economic resources to the State. N.C. Wildlife Res. Comm'n, 2015 North Carolina Wildlife Action Plan 638-45 (2015).

North Carolina's policy has always been to preserve its title to and public uses of such great navigable waters. *Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39 (N.C. 1903). "In 1777, the General Assembly provided for the grant of vacant and unappropriated lands and in the law prohibited private ownership of lands under navigable waters." *Swan Island Club*, 114 F. Supp. at 99. In 1822, the North Carolina Supreme Court held that lands covered by navigable waters were not subject to entry and grant under the Act of 1777, because it was presumed that the legislature did not intend such a result, those waters "being necessary for publick purposes as common highways for the convenience of all." *Tatum v. Sawyer,* 9 N.C. (2 Hawks) 226, 229 (1822). This finding remains entrenched in State law. N.C. Gen. Stat. § 146-1 (limiting the State's alienation of lands under navigable waters in fee). The boundary of a grant on a navigable stream is the margin of the water, not the thread of the stream; therefore, a grant adjoining

navigable waters does not include the bed. *Wilson*, 13 N.C. (2 Dev.) at 35. "A land grant in fee embracing such submerged lands is void." *State ex rel. Rohrer v. Credle*, 369 S.E.2d 825, 828 (N.C. 1988).

Lands under navigable waters can be conveyed free of public trust rights only by a special legislative grant, and only "if the special grant does so in the clearest and most express terms." *Gwathmey v. State ex rel. Dep't of Env't Health & Natural Res.*, 464 S.E.2d 674, 684 (N.C. 1995). The Yadkin's significance caused the legislature in 1885 to declare it[3] and the Great Pee Dee River into which it flows, to be "public highways for the free passage of boats, flats, rafts and other means of transportation." An Act to Declare the Great Pee Dee and Yadkin Rivers Public Highways, and for Other Purposes, N.C. Pub. Law (1885), ch. 212, § 1, J.A. 140-42. Six years later, the State enacted N.C. Gen. Stat. § 1-45, providing that "[n]o person or corporation shall ever acquire any exclusive right to any part of a . . . public way . . . ." The decision below directly contravenes North Carolina's statutory protections of public trust resources and State case law enshrining those protections. *Fish House, Inc. v. Clarke*, 693 S.E. 2d 208, 210 (N.C. Ct. App. 2010).

North Carolina's policy held until 2016, when the majority below abruptly upended two centuries of State law protecting its navigable waters, and cast uncertainty over the State's submerged lands titles by imposing federal law. If rivers long-considered

[3] This includes the disputed stretch of the Yadkin.

navigable are now non-navigable under the federal test, then riverbed titles would be clouded, as grants may now run to the center of the stream. *Kelly v. King*, 36 S.E.2d 220, 223 (N.C. 1945) (stating the general rule "that a description of land as bordering on a non-navigable stream carries to the thread of the stream. . . ."). Further, void grants to submerged lands underlying waters previously deemed navigable may be given new validity. Thus, owners with newly-minted titles now may attempt to control public access over waters historically part of the public domain. While State courts have consistently rejected such attempts, *see Gwathmey*, 464 S.E.2d at 688, those holdings are now uncertain.

The North Carolina State Lands Act, N.C. Gen. Stat. §§ 146-1 *et seq.,* establishes a comprehensive system for State lands management, including the disposition of limited interests in sovereign submerged lands, while protecting the public interest.[4] *See, e.g.*, *id*. §§ 146-2, 8, 11-12. Where the federal test's application deprives the State of its sovereign title, past dispositions to persons other than the riparian owner would constitute a cloud on title.[5] Previously permitted activities for water supply intakes, wastewater

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[4] "No submerged lands [defined to include lands under navigable waters by N.C. Gen. Stat. § 146-64(7)a.] may be conveyed in fee." N.C. Gen. Stat. § 146-3(1).

[5] "[A] cloud on title is itself a title or encumbrance, apparently valid but in fact invalid." *Simmons v. United States*, 280 S.E.2d 463, 466 (N.C. Ct. App. 1981) ("65 Am. Jur.2d Quieting Title § 9 defines a cloud on title as an outstanding instrument, record, claim, or encumbrance which is actually invalid or inoperative, but which may nevertheless impair the title to the property.").

treatment discharge pipes, landings and other structures would constitute trespasses.

A 2013 report on submerged lands titles reveals the scope of the pending upheaval. Program Evaluation Div., Final Report No. 2013-02 to the Joint Legislative Program Evaluation Oversight Committee (Jan. 14, 2013), https://www.ncleg.net/PED/Reports/2013/SubmergedLands.html ("PED Report"). From 1985 to 2004, North Carolina resolved all private claims to lands under navigable waters in twenty-five coastal counties, an undertaking costing more than $4.1 million. *Id.* at 1. The State does not have a similar process for its remaining seventy-five counties. *Id.* In the twenty-five coastal counties, 14,566 private claims were filed and 256 claims were recognized under the authority of N.C. Gen. Stat. §§ 113-205 to -206, using North Carolina's navigability-for-title test.[6] PED Report at 1, 5, 8, 12-13. Claims not registered by a date certain were null and void. *See Texaco, Inc. v. Short*, 454 U.S. 516, 530-31 (1982). Such claims already have been thoroughly litigated in North Carolina's courts. *See Gwathmey*, 464 S.E.2d 674 (N.C. 1995); *Credle*, 369 S.E.2d 825 (N.C. 1988); *RJR Technical Co. v. Pratt*, 453 S.E.2d 147 (N.C. 1995); *State v. Chadwick*, 229 S.E.2d 255 (N.C. Ct. App. 1976). The Fourth Circuit's opinion now may call those claims' resolution into question.

Further, an unknown number of North Carolina's 5,600 dams are constructed on rivers navigable under State law. PED Report at 9. The

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[6] A map of the recognized claims is available at http://portal.ncdenr.org/web/mf/submerged-lands-maps.

State also has issued 157 utility crossing easements across rivers, creeks, and other subaqueous lands, and has permitted a number of instream sand mining operations. *Id.* at 7-10. Potential clouded titles and trespasses exist where projects are situated in waters considered non-navigable under the Fourth Circuit's decision.

As previously suggested, the Fourth Circuit's decision may cloud private titles in other original states. At least three original states—Maryland, New Jersey, and Massachusetts—follow the English common law ebb-and-flow navigability-for-title test to determine submerged lands title. *Toy v. Atl. Gulf & Pacific Co.*, 4 A.2d 757 (Md. 1939); *Cobb v. Davenport*, 32 N.J.L. 369 (N.J. Sup. Ct. 1867); *Brosnan v. Gage*, 133 N.E. 622 (Mass. 1921); Gould on Waters (2d ed. 1891) § 58[7]. The ebb-and-flow rule allows private ownership of non-tidal riverbeds regardless of whether waters were navigable-in-fact for commercial purposes at statehood. *Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 477-79 (1988); *Assateague Island Condemnation Cases Opinion No. 1 v. 222.0 Acres*, 306 F. Supp. 138, 151 (D. Md. 1969). Therefore, grants other Original States have issued to private parties for the beds of federally-navigable, non-tidal rivers are now subject to challenge under the Fourth Circuit's decision, despite established state title law.

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[7] Cited with approval in *Shively v. Bowlby*, 152 U.S.1, 31 (1894).

III. THE DECISION BELOW INVITES LIMITING ACCESS TO LARGE PORTIONS OF NORTH CAROLINA'S RIVERS FOR OUTDOOR RECREATION.

Preserving recreational access and the recreation-based economy on North Carolina's inland rivers depends upon this Court's decision to review the Fourth Circuit's opinion that disrupts established State navigability-for-title law. Historically, North Carolina courts have applied the State's navigability-for-title test and public trust doctrine to questions of recreational access to State rivers and streams. "North Carolina follows the modern 'pleasure craft test' in determining whether waters are navigable-in-fact, and therefore subject to public trust rights." Use of Navigable-in-Fact Streams without Consent of Riparian Owners, N.C. Att'y Gen. Op. (Jan. 20, 1998) ("A.G. Opinion"). As the North Carolina Supreme Court unanimously held:

> The controlling law of navigability as it relates to the public trust doctrine in North Carolina is as follows: "'If water is navigable for pleasure boating it must be regarded as navigable water, though no craft has ever been put upon it for the purpose of trade or agriculture. The purpose of navigation is not the subject of inquiry, but the fact of the capacity of the water for use in navigation.'" In other words, if a body of water in its natural condition can be navigated by watercraft, it is

> navigable in fact and, therefore, navigable in law, even if it has not been used for such purpose. Lands lying beneath such waters that are navigable in law are the subject of the public trust doctrine.

Gwathmey, 464 S.E.2d at 682 (citations omitted).

Thus, under North Carolina law, the public has the right to travel by "useful vessels" such as canoes and kayaks, "in the usual and ordinary mode" on waters which are in their natural condition capable of such use. A.G. Opinion (citing *State v. Twiford*, 48 S.E. 586, 586-87 (N.C. 1904)).

However, North Carolina's navigability-for-title test, and the public's historic understanding of its public access rights, are jeopardized by the Fourth Circuit's holding. If the decision below stands, and is found to deprive rivers navigable under the North Carolina test of their public trust status, *see* Brief of *Amici Curiae* Law Professors in Support of Petitioner, public access to thousands of river- and stream-miles will constrict dramatically.

As North Carolina's second largest river basin, with 5,862 stream miles and 22,988 lake acres across twenty-one counties spanning 7,221 square miles and serving 1.6 million people, J.A. 39, 269, 515-18, the Yadkin powers Cube's four hydroelectric dams, and previously powered Alcoa's now-defunct aluminum smelter, while simultaneously supporting a substantial recreation-based industry, discussed below.

If the Yadkin riverbed is not owned by the State and subject to the public trust doctrine, Western North Carolina's fly-fishing streams or other mountain rivers likely will be subject to private ownership. Econ. Dev. P'ship of N.C., Western North Carolina Fly Fishing Trail, https://www.visitnc.com/story/western-north-carolina-fly-fishing-trail (last visited Dec. 3, 2017). The decision below invites riparian owners to file federal question lawsuits to claim title to publicly-accessed trout streams, many of which have waterfalls or rapids. It is unclear if such streams would be considered navigable under the federal navigability-for-title test, threatening the public's access to these public trust fishing resources. The same is true of Maryland and Virginia's inland rivers—all within the Fourth Circuit's jurisdiction—as well those inland rivers within Connecticut, Delaware, Massachusetts, New Hampshire, New Jersey, New York, and Pennsylvania, Original States with their own established navigability-for-title laws. *See* Pet. for Cert. 15-18.

IV. PUBLIC ACCESS ROLLBACKS FINANCIALLY HARM BUSINESSES, WITH ESTIMATED BILLION-DOLLAR LOSSES.

North Carolina's rivers provide premier sport fishing and paddling opportunities, which power the State's $28-billion outdoor recreation industry, directly employing 260,000 people and paying workers $8.3 billion annually. Outdoor Indus. Assoc., North Carolina (2017), https://outdoorindustry.org/wp-content/ uploads/

2017/07/OIA_RecEcoState_NC.pdf; *see* Craig Holt, *2017 Top North Carolina Bass Fishing Spots*, Game and Fish Magazine (Mar. 15, 2017) (naming two locations within the disputed stretch as premier bass fishing locations); Econ. Dev. P'ship of N.C., Swim in Waters that Soak into You, https://www.visitnc.com/rivers-lakes (last visited Dec. 3, 2017) (listing several inland river-based paddling and outdoor companies). Trout fishing in mountain streams alone generated $239.8 million in revenue in North Carolina in 2014. Responsive Mgmt. & Southwick Assocs., Mountain Trout Fishing: Economic Impacts on and Contributions to North Carolina's Economy (2015). Approximately 350,000 persons annually float the New River, one of North Carolina's many mountain rivers. Pub. News Serv., *A River Runs Through It: Water Recreation Builds NC Economy* (July 24, 2017), http://www.publicnewsservice.org/2017-07-24/environment/a-river-runs-through-it-water-recreation-builds-nc-economy/a58615-1. All of these economically-significant activities depend upon river access.

If the Fourth Circuit decision stands, river access, along with property titles and livelihoods, will be jeopardized, requiring further litigation to establish rights under the Fourth Circuit's holding. This Court should review this case to prevent enormous harm to North Carolina's recreation industry.

V. THE FOURTH CIRCUIT'S OPINION PREVENTS NORTH CAROLINIANS FROM PROTECTING PUBLIC TRUST WATERS AND WILDLIFE RESOURCES.

Private ownership of the Yadkin's riverbed diminishes public access not just for recreational use but also for environmental testing. If the beds of the State's great rivers can be subjected to private ownership, the owners can seek to prevent the public from collecting water, sediments, and aquatic organism samples for environmental testing. These restrictions prevent citizens from vindicating their rights under the federal Clean Water Act ("CWA") and Resource Conservation and Recovery Act's ("RCRA") citizen suit provisions, which enable the public to protect the region's vital drinking water and wildlife resources through sampling, monitoring, and litigation. CWA, 33 U.S.C. § 1365 (2016) (authorizing citizen suits under the CWA); RCRA, 42 U.S.C. § 6972 (2016) (authorizing citizen suits under RCRA). Both the CWA and RCRA are remedial statutes, intended to be broadly construed and enacted to ensure environmental quality through government and private action. *See Ne. Marine Terminal Co. v. Caputo*, 432 U.S. 249, 268 (1977) (citing *Voris v. Eikel*, 346 U.S. 328, 333 (1953)) (explaining that remedial legislation "must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.").

This Court has recognized Congress' intention to encourage citizen suits to supplement government action intended to protect environmental and human

health. *See, e.g.*, *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 133 (1998) (Stevens, J., concurring) (Souter, J., and Ginsburg, J., joining) (recognizing citizen suits' utility in supplementing and ensuring government action); *Hallstrom v. Tillamook Cty.*, 493 U.S. 20, 21 (1989) (Marshall, J., dissenting) (recognizing Congress' intention to encourage citizen suits). Without access, *Amici* cannot collect the information necessary to bring citizen suit challenges to protect public trust water and wildlife resources, and consequently, the public. Environmental organizations similar to *Amici* already encounter problems accessing the Cape Fear River's public trust waters to collect samples near Duke Energy's coal ash impoundments. Letter from Robert Epting, Attorney for the Cape Fear Riverkeeper, to Sheriff Richard Webster (Mar. 19, 2014), http://f.cl.ly/items/3K0u2D341L3Z2M1i1x07/PDF%20letter%20to%20sheriff%2003%2019%2014.pdf.pdf.

The ecological health of public trust resources like water, fish, and wildlife can best be protected by the public trust beneficiaries, the people who use these resources. A river too polluted to drink, swim, or fish infringes the public's rights to these resources. Therefore, these public trust uses restrict the government's power to deprive the people of these resources by allowing private ownership.

Water is a public trust resource protected by the North Carolina Constitution. N.C. Const. art. XIV, § 5 (1972) ("It shall be the policy of this State to conserve and protect its lands and waters for the benefit of its citizenry . . . ."). Accordingly, State law

establishes that the State holds its water resources in trust for its citizens, N.C. Gen. Stat. § 143-211 (2016), and broadly defines those water resources to include "any stream, brook, swamp, lake, sound, tidal estuary, bay, creek, reservoir, waterway, or other body or accumulation of water . . . that is contained in, flows through, or borders any portion of this State . . . ." *Id.* § 143-212(6). North Carolina specifically extends public ownership to those waters supporting wildlife, public trust resources discussed in the following section. *Id.* § 113-129(17) (defining public trust "wildlife resources" to include "the entire ecology supporting such birds, mammals, fish, plant and animal life, and creatures"); *see also RJR Technical Co.*, 453 S.E.2d at 150. The Yadkin's public trust water is a critical regional drinking water source. As the trial court recognized "[t]he Yadkin River provides drinking water for over 700,000 North Carolinians." Order Denying Defendant's Motion for Summary Judgment, J.A. 220.

This ownership dispute arose from Alcoa's ownership assertions made in its application for a CWA Section 401 Certificate ("401 Certificate") from the North Carolina Department of Environmental Quality. *See* Complaint ¶¶ 33-39, J.A. 42-43, Aug. 2, 2013. Obtaining a 401 Certificate is a prerequisite step to obtaining a federal dam operating license, which is granted only to parties that own or have legal interests in project lands, *see* FPA, 16 U.S.C. §§ 796-97, including riverbeds, and grants to those parties the right to certain water flow volumes. *See id.* § 803. Although the FPA establishes that licensees' water rights exist outside of the dam

licensing process, *id.* §§ 797(b), 821, and licensees' powers are limited to those "specifically granted in the license," *Great N. Ry. Co. v. Washington Elec. Co.*, 86 P.2d at 214 (Wash. 1939) (citing *Ford & Son, Inc. v. Little Falls Fibre Co.*, 280 U.S. 369 (1930)), private licensees often sell water withdrawal rights to other parties. *See, e.g.*, City of Albemarle & Yadkin Inc., Water Agreement (Apr. 6, 1987), http://www.stanlycountync.gov/wp-content/upLoads/2013/01/FinalExecutedYadkinRelicensingSettlementAgreement_05.06.13.pdf (illustrating typical water withdrawal contracts, here entered into by Alcoa's predecessor in interest, Yadkin Inc.).

Contamination from adjacent lands not only contributes to public water supply pollution, but also settles into the riverbed, which then becomes a pollution repository directly affecting aquatic wildlife—another public trust resource. N.C. Gen. Stat. § 113-131(a) ("The marine and estuarine and wildlife resources of the State belong to the people of the State as a whole."); *see* N.C. Gen. Stat. § 1-45.1 (establishing North Carolinians' public trust rights to hunting and fishing).

It is public knowledge that riverbed-adjacent land on which Alcoa's former aluminum smelter and hazardous waste disposal sites are located polluted the Yadkin with heavy metals, polychlorinated biphenyls ("PCBs"), polycyclic aromatic hydrocarbons ("PAHs"), lead, and other hazardous

contaminants. *See, e.g.*, Brief of Stanly County, Before the N.C. Envtl. Review Comm'n. (undated)[8].

Alcoa represents it has sold the riverbed to Cube while this title dispute remains in litigation. Joint Motion of Defendant-Appellee Alcoa Power Generating, Inc. and Interested Non-Party Cube Yadkin Generation LLC to Substitute Party, or, in the Alternative, Motion to Reconsider Denial of Defendant-Appellee's Motion to Substitute at 2, *North Carolina v. Alcoa Power Generating, Inc.*, 853 F.3d 140 (4th Cir. 2016) (No. 15-2225). As the new owner, Cube is subject to the terms of its 401 Certificate. The 401 Certificate's water quality and sediment pollution provisions do not require Cube to remediate the hazardous contaminants flowing from Alcoa's[9] riverbed-adjacent land, and merely directs it to monitor the known contamination into the foreseeable future. N.C. Dep't of Envtl. Quality, North Carolina 401 Water Quality Certification (Feb. 3, 2017). Alcoa's new subsidiary corporation, Badin Business Park LLC, currently is contesting a CWA stormwater and wastewater discharge permit that requires Badin Business Park to eliminate cyanide and limit other hazardous discharges into the Yadkin. Prehearing Statement of Badin

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[8] The brief and exhibits are available at https://www.ncleg.net/gascripts/DocumentSites/browseDocSite.asp?nID=12&sFolderName=\Archives\Working%20Groups\Alcoa%20-%20Stanly%20County%20-%20FERC%20Re-licensing\Stanly%20briefing%20info.

[9] Alcoa has begun transferring title to its riverbed-adjacent lands to Badin Business Park LLC, a wholly-owned subsidiary of Alcoa, registered with the North Carolina Secretary of State on August 26, 2016.

Business Park LLC, 17 EHR 07316 (N.C. Office of Admin. Hearings Nov. 30, 2017).

By denying the State's ownership, the Fourth Circuit has enabled private owners to prohibit citizens from sampling riverbeds for sediment contamination, and removed the State's ability to sue the private owner for natural resource damages to the riverbed. *See* N.C. Gen. Stat. § 143-215.90 (limiting liability to damage done to public resources); Complaint ¶¶ 25-26, J.A. 40.

The Yadkin supports an array of fish and wildlife, N.C. Wildlife Res. Comm'n, 2015 North Carolina Wildlife Action Plan 639-40 (2015), including largemouth bass and flathead catfish, which in turn support human life. Certain species, including bass and catfish, consume and concentrate in their bodily tissues contaminants in riverbed sediments, including PCBs. N.C. Dep't of Health & Human Servs., Health Consultation 5 (2009), *available at* https://www.atsdr.cdc.gov/hac/pha/badinlakefishtissue/badinlakehc09-18-2009.pdf. These fish are a dietary staple for many residents who consume well beyond the recommended zero-to-one catfish or largemouth bass meal per week, putting themselves at risk for neurological and developmental health defects. *Id.* at 1-7; Catherine E. LePrevost et al., *Need for Improved Risk Communication of Fish Consumption Advisories to Protect Maternal and Child Health: Influence of Primary Informants*, 10 Int'l J. Envtl. Research Pub. Health 1720, 1721-22 (2013). Under private ownership, these harms likely will continue in perpetuity, while current or subsequent property

owners may preclude the public's access and ability to protect its public trust resources.

CONCLUSION

For the foregoing reasons, the State of North Carolina's Petition for Writ of Certiorari should be granted and the opinion below should be reversed.

Respectfully submitted,

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