

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 a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit**

**BRIEF OF *AMICI CURIAE* LAW PROFESSORS
IN SUPPORT OF PETITIONER**

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
STATEMENT OF INTEREST	1
SUMMARY OF THE ARGUMENT	2
ARGUMENT.....	3
I. THE COURT SHOULD CORRECT THE FOURTH CIRCUIT’S MISREADING OF CONSTITUTIONAL HISTORY	3
A. Contrary to History, the Fourth Circuit Traced Ownership of Sovereign Land in the Original States to the Federal Constitution.....	3
B. The Fourth Circuit Misinterpreted <i>PPL Montana</i> to Apply to the Original States	7
C. The Fourth Circuit’s Decision Displaces Centuries of Law from the Original States and Aggrandizes Federal Jurisdiction	9
II. THE COURT SHOULD GRANT CERTIORARI TO REPAIR THE DAMAGE TO STATE OWNERSHIP AND CONTROL OF PUBLIC TRUST WATERS	11
A. State Sovereign Ownership Is a Core Tenet of American Natural Resources Law.....	12

TABLE OF CONTENTS—Continued

	Page(s)
B. The Fourth Circuit’s Decision Potentially Eliminates State Protections of Sovereign Ownership	13
III. THE FOURTH CIRCUIT’S DECISION ALLOWS STATES TO ALIENATE SOVEREIGN LANDS THROUGH PRESCRIPTION	16
CONCLUSION	20
APPENDIX	
List of <i>Amici Curiae</i> Law Professors.....	1a

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Alabama v. Georgia</i> , 64 U.S. (23 How.) 505 (1859).....	6
<i>Alden v. Maine</i> , 527 U.S. 706 (1999).....	10
<i>Arnold v. Mundy</i> , 6, N.J.L. 1 (1821).....	4
<i>Atascadero State Hospital v. Scanlon</i> , 473 U.S. 234 (1985).....	10
<i>Bath v. Courts</i> , 459 N.E.2d 72 (Ind. Ct. App. 1984).....	14
<i>Boston Waterfront Dev. Corp. v. Commonwealth</i> , 393 N.E.2d 356 (Mass. 1979).....	14-15
<i>Broadnax v. Baker</i> , 94 N.C. 675 (1886)	14
<i>Brosnan v. Gage</i> , 133 N.E. 622 (Mass. 1921).....	14
<i>Carson v. Blazer</i> , 2 Binn. 475 (Pa. 1810)	4-5
<i>Chapman v. Kimball</i> , 9 Conn. 38 (1831)	4
<i>Coastal Petroleum Co. v. Am. Cyanamid Co.</i> , 492 So. 2d 339 (Fla. 1986)	17
<i>Commonwealth v. Vincent</i> , 108 Mass. 441 (1871)	14
<i>Coolidge v. Williams</i> , 4 Mass. 140 (1808)	5

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Danes v. State</i> , 113 N.E. 786 (N.Y. 1916)	14
<i>Ex'rs of Cates v. Wadlington</i> , 12 S.C.L. (1 McCord) 580 (1822)	4
<i>Gwathmey v. State ex re. Dep't of Env't, Health, & Nat. Res.</i> , 464 S.E.2d 674 (N.C. 1995)	13, 14, 17
<i>Home v. Richards</i> , 8 Va. (4 Call) 441 (1798)	5
<i>Idaho v. Coeur d'Alene Tribe of Idaho</i> , 521 U.S. 261 (1997).....	4, 6, 7
<i>Illinois Cent. R.R. Co. v. Illinois</i> , 146 U.S. 387 (1892).....	11, 12, 17, 18
<i>In re Water Use Permit Applications</i> , 9 P.3d 409 (Haw. 2000).....	13
<i>Martin v. Waddell's Lessee</i> , 41 U.S. (16 Pet.) 367 (1842).....	4, 6, 9
<i>McCormick Oil & Gas Corp. v. Dow Chem. Co.</i> , 489 So.2d 1047 (La. Ct. App. 1986).....	15
<i>Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning</i> , 136 S. Ct. 1562 (2016).....	10
<i>Nat'l Audubon Soc'y v. Superior Court</i> , 658 P.2d 709 (Cal. 1983).....	12, 13
<i>Nies v. Town of Emerald Isle</i> , 780 S.E. 2d 187 (N.C. Ct. App. 2015).....	13

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>Phillips Petroleum Co. v. Mississippi</i> , 484 U.S. 469 (1988).....	10, 13
<i>Pierson v. Coffey</i> , 706 S.W.2d 409 (Ky. Ct. App. 1985).....	15
<i>Pollard v. Hagan</i> , 44 U.S. (3 How.) 212 (1845).....	6, 8
<i>PPL Montana, LLC v. Montana</i> , 565 U.S. 576 (2012).....	<i>passim</i>
<i>Scott v. Willson</i> , 3 N.H. 321 (1825).....	4
<i>Shively v. Bowlby</i> , 152 U.S. 1 (1894).....	5, 13
<i>St. Regis Paper Co. v.</i> <i>N.H. Water Res. Bd.</i> , 26 A.2d 832 (N.H. 1942)	14
<i>State v. Sorensen</i> , 436 N.W.2d 358 (Iowa 1989)	17, 18
<i>Taylor v. Johnston</i> , 224 S.E.2d 567 (N.C. 1976).....	18
<i>The Point, Ltd. Liab. Corp., et al. v.</i> <i>Lake Mgmt. Ass’n, Inc.</i> , 50 S.W.3d 471 (Tenn. Ct. App. 2000).....	15
<i>The Volant</i> , 59 U.S. (18 How.) 71 (1855).....	12
<i>United States v. California</i> , 332 U.S. 19 (1947).....	19

TABLE OF AUTHORITIES—Continued

	Page(s)
<i>United States v. Oregon</i> , 295 U.S. 1 (1935).....	4, 6-7
<i>Utah Div. of State Lands v. United States</i> , 482 U.S. 193 (1987).....	4
<i>Wilson v. Forbes</i> , 13 N.C. (2 Dev.) 30 (1828).....	4
 STATUTES	
N.C. Gen. Stat. § 1-35(1)	18
N.C. Gen. Stat. § 1-45.1.....	18, 19
N.C. Gen. Stat. § 47B-2.....	16
N.C. Gen. Stat. § 47B-2(a).....	17
 OTHER AUTHORITIES	
Michael C. Blumm & Mary Christina Wood, <i>Public Trust Doctrine in Environ- mental and Natural Resources Law</i> (2d ed. 2015)	13
<i>Prescription</i> , Black’s Law Dictionary (10th ed. 2014)	16
4 Tiffany Real Prop. (3d ed. Sept. 2017 Update).....	16
Unif. L. Comm’n, <i>Marketable Title Act, Model Summary</i> (last visited Dec. 5, 2017), http://www.uniformlaws.org/Act Summary.aspx?title=Marketable%20Tit le%20Act,%20Model	16

STATEMENT OF INTEREST¹

This amici curiae brief is submitted on behalf of seventeen law professors (“Amici”) who recommend that the Court grant the State of North Carolina’s petition for certiorari. A full list of Amici appears in the appendix accompanying this brief.

Amici have dedicated their careers to teaching and writing about environmental law, property, public lands, and constitutional law, as well as the public trust doctrine. They include some of the most respected and accomplished scholars in these areas. Amici have researched and written prolifically on the origins and scope of state sovereignty over public lands, the states’ duties as trustees of those lands, and the role of the public trust doctrine in environmental and property law. Many have authored books and other writings on public lands and waters, the public trust doctrine, and natural resources. Together, this group of professors has centuries of experience teaching in a variety of legal fields.

Amici have an abiding interest in informing the Court about the history of state sovereignty over land beneath navigable waters, and the states’ sovereign legal obligations to protect vital natural resources, including the Yadkin River. As discussed in the brief below, Amici contend that the decision of the U.S. Court of Appeals for the Fourth Circuit veered from established precedent and crafted new federal con-

¹ Pursuant to Supreme Court Rule 37.2(a), amici have provided timely notice to all counsel, and all parties consent to the filing of this brief. Pursuant to Supreme Court Rule 37.6, amici state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than amici or their counsel made a monetary contribution to fund the preparation or filing of this brief.

stitutional law that undermines state sovereignty over their submerged lands. The decision sweeps aside centuries of state law that enforces protections over these lands.

SUMMARY OF THE ARGUMENT

Amici Law Professors urge the Court to grant certiorari to undo the damage to state sovereignty threatened by the decision on review, and to return the protection of sovereign lands to the states where it has resided for more than two centuries.

The Fourth Circuit's decision will have significant consequences for states' sovereign control over their submerged lands in three key ways.

First, the court held that by ratifying the Constitution, the original thirteen states somehow imbued their preexisting sovereign ownership of land beneath navigable waters with a federal character. On the contrary, these states obtained these lands—along with their sovereignty—when they separated from the British Crown, not through any federal interaction. By misreading that history, the Court of Appeals swept aside centuries of state property law in favor of federal common law. Moreover, for the first time since the end of the English colonial period, federal district courts in these states are now empowered to exercise jurisdiction to decide the scope of the original states' sovereign lands. This represents an extraordinary unsettling of federal–state relations.

Second, when it applied federal common law to the issue of riverbed title, the Court of Appeals disregarded North Carolina's laws designed to protect its sovereign lands. The court's analysis threatens to subvert countless state rules related to sovereign ownership, in favor of uniform federal rules.

Third, the court further undermined state sovereignty when it held that doctrines of prescription may divest a state of its sovereign lands. These doctrines of prescription—which include a state’s marketable title act and its law on adverse possession, both of which were employed in this case—are inapplicable in disputes involving sovereign lands. Under long-established precedent, those lands are to be held by the state in perpetual trust for the public’s benefit.

For these reasons, this Court should grant North Carolina’s petition and review this case.

ARGUMENT

I. THE COURT SHOULD CORRECT THE FOURTH CIRCUIT’S MISREADING OF CONSTITUTIONAL HISTORY.

In the decision below, the Court of Appeals announced a new interpretation of constitutional law with respect to sovereign lands in the original thirteen states. That new interpretation will strip many state courts of jurisdiction to determine which waters are subject to state ownership and control. It will also overturn centuries of substantive state law in the original states, in favor of a uniform federal standard for determining the boundaries of sovereign waters in these states. This drastic change in the federal–state balance with respect to sovereign lands calls for this Court’s intervention.

A. Contrary to History, the Fourth Circuit Traced Ownership of Sovereign Land in the Original States to the Federal Constitution.

The threshold question before the Court of Appeals was whether state or federal law should govern the

issue of a river’s navigability for the purpose of determining title to the riverbed. *See* App. to Pet. Cert. 11a–12a. States own title to the riverbed of their navigable waters as “an essential attribute of sovereignty.” *Idaho v. Coeur d’Alene Tribe of Idaho*, 521 U.S. 261, 283 (1997) (quoting *Utah Div. of State Lands v. United States*, 482 U.S. 193, 195 (1987)). In this case, North Carolina claimed that, because the Yadkin River was navigable under state law, the State owned title to the riverbed that had been appropriated by a private entity, Alcoa Power Generating, Inc. *See* App. to Pet. Cert. 4a.

Before answering the threshold choice-of-law question, the Court of Appeals had to examine the history of the chain of title to riverbeds under navigable waters in North Carolina and the other twelve original states. This analysis was necessary because the source of title determines the law that governs the scope of that title. *See United States v. Oregon*, 295 U.S. 1, 14 (1935).

For the better part of two centuries, this Court has held that, when the thirteen original states declared independence, title to their navigable waters and the soil underneath them passed directly from the British Crown to these states. *See Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842). Consistent with this history, since the early years of the Republic, the original states have applied their own laws—derived from English common law—to determine which of their waters are subject to sovereign ownership. *E.g.*, *Chapman v. Kimball*, 9 Conn. 38, 40–41 (1831); *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30, 34–35 (1828); *Scott v. Willson*, 3 N.H. 321, 324–25 (1825); *Ex’rs of Cates v. Wadlington*, 12 S.C.L. (1 McCord) 580, 582 (1822); *Arnold v. Mundy*, 6 N.J.L. 1, 76–78 (1821); *Carson v.*

Blazer, 2 Binn. 475, 477–78 (Pa. 1810); *Coolidge v. Williams*, 4 Mass. 140, 144 (1808); *Home v. Richards*, 8 Va. (4 Call) 441, 446–47 (1798). This Court has acknowledged the diverse approaches taken by the original states to identifying their sovereign waters. More than a century ago, *Shively v. Bowlby* recognized the unique historical path of sovereign ownership in these states. *See* 152 U.S. 1, 18–26 (1894) (cataloging the distinctions among the original states in their treatment of sovereign waters).

Nonetheless, the Court of Appeals rewrote this history, and in the process greatly expanded federal court jurisdiction in an area long thought to be reserved to the original states and their courts. The court decided that the ratification of the federal Constitution broke the chain of title to navigable waters held by the states that had separated from the British Crown. *See* App. to Pet. Cert. 12a–13a. According to the court, ratification somehow re-conveyed that property from the federal government to those states. *Id.* Going further, the court held that the very sovereignty of these states “emanate[ed] from ratification” of the Constitution. *Id.* at 14a. As the dissent in the Court of Appeals noted, this decision “render[s] North Carolina’s pre-Constitution sovereignty irrelevant.” *Id.* at 34a. By tracing the original states’ sovereign property to the federal Constitution, the Fourth Circuit concluded that the navigability of these states’ waters was a matter controlled exclusively by federal law. *Id.* at 14a.

The Fourth Circuit’s constitutional analysis was based on what it termed a “constitutional insight,” rather than on constitutional text or the historical record. *Id.* at 13a. The court drew this insight from cases involving sovereign title disputes in states

admitted to the Union *after* ratification. *See id.* at 13a–15a (relying on six of this Court’s cases concerning property in later-admitted states).²

Unlike in the thirteen original states, the federal government was a necessary party to granting title to public trust lands to the later-admitted states. *Coeur d’Alene*, 521 U.S. at 283 (noting that the United States “held navigable waters in *acquired territory* for the ultimate benefit of future States” (emphasis added)). Accordingly, this Court has held that navigability is a federal question for later-admitted states, *see PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012), but not for the original states.

This Court has recognized the divergent paths that sovereign-land title took in the later-admitted states versus the original states. In *Pollard v. Hagan*, 44 U.S. (3 How.) 212 (1845), the Court held that the United States had title to the land that was to become Alabama, as a temporary trustee, when Virginia, Georgia, and France ceded the land to the federal government for the creation of the new state. *Id.* at 221; *see also Alabama v. Georgia*, 64 U.S. (23 How.) 505, 514 (1859) (discussing Virginia’s cession of land to the federal government to be conveyed to Kentucky). Similarly, in *United States v. Oregon*, 295 U.S. 1 (1935), the Court explained that before Oregon became a state, its land was “the public domain of the United States,” and the land under navigable waters

² The Court also cited a case involving the original state of New Jersey, *Martin v. Waddell’s Lessee*, 41 U.S. (16 Pet.) 367 (1842). App. to Pet. Cert. 12a–13a. But that case confirms that New Jersey received title to its sovereign lands “when the revolution took place,” not upon ratification of the Constitution. *Martin*, 41 U.S. (16 Pet.) at 410.

automatically passed to Oregon “upon her admission to the Union.” *Id.* at 6.

As these precedents show, for the later-admitted states, the federal government served as an intermediary sovereign. It held title to sovereign lands pursuant to cession by the original states or treaty with a foreign nation. When the new states encompassing those lands were admitted, those lands passed to the new states. *See id.* at 14.

The legal theory underpinning this federal–state conveyance is the equal footing doctrine. *Coeur d’Alene*, 521 U.S. at 283. This doctrine ensures that the later-admitted states enjoy sovereign ownership of the land beneath their navigable waters, thereby placing the later-admitted states on an “equal footing” with the original states. *Coeur d’Alene*, 521 U.S. at 283.

With respect to the thirteen original states, however, this Court has never held that the federal government conveyed title to sovereign land. App. to Pet. Cert. 34a (King, J., dissenting). As discussed below, the equal footing doctrine does not apply to the original states. Consequently, navigability in the original states is not a federal question.

B. The Fourth Circuit Misinterpreted *PPL Montana* to Apply to the Original States.

In its decision, the Court of Appeals relied heavily on this Court’s decision in *PPL Montana*. *See* App. to Pet. Cert. 11a–17a. That reliance was misplaced. That case concerned title in a later-admitted state, Montana; and the basis of the Court’s decision was the equal footing doctrine, which applies only to later-admitted states. *PPL Montana*, 565 U.S. at 590–91.

The reasoning in *PPL Montana* shows clearly that title to sovereign land is determined under a different set of laws in the original states than in the later-admitted states. The Court first explained that the original states developed their own laws governing sovereign lands, and the Court distinguished those laws from the English common law that the original states had inherited and altered. *Id.* at 590.³ The Court then pivoted to the later-admitted states, noting that for those states, the question of state riverbed title “assumed federal constitutional significance under the equal-footing doctrine.” *Id.* The clear implication of this statement is that riverbed title does not derive from the Constitution where the equal footing doctrine does not apply—*i.e.*, the original states.

The *PPL Montana* Court followed this statement by discussing various precedents applying the equal footing doctrine and the history of land title in the later-admitted states. *Id.* at 591. Importantly, the Court reiterated the rule, applicable only to later-admitted states, that “[t]he United States retains any title vested in it before statehood to any land beneath waters not then navigable (and not tidally influenced), to be transferred or licensed if and as it chooses.” *Id.* This statement underscores that the Court was not referring to the original states in this section of the opinion, because the federal government did not hold title to any lands in the original states “before statehood.” This is due to the fact that the sovereignty

³ As shown above, *supra* pp. 4–5, the original states had developed their sovereign lands law long before this Court ruled in 1845 that equal footing required an implicit conveyance of sovereign lands from the federal government to later-admitted states. *See Pollard*, 44 U.S. (3 How.) at 229.

of the original states predates the sovereignty of the United States. *See Martin*, 41 U.S. (16 Pet.) at 410.

Relying on the equal footing cases, the *PPL Montana* Court proceeded to apply the federal navigability test. *PPL Montana*, 565 U.S. at 592. The Court emphasized, however, that its holding was limited to later-admitted states like Montana, when it stated that the federal test “has been used . . . to determine questions of title to water beds *under the equal-footing doctrine*.” *Id.* (emphasis added). Because the Court was deciding a case concerning a later-admitted state, it had no reason to discuss the test that would apply to land in an original state.

Accordingly, this Court should review this case and reject the Fourth Circuit’s expansion of *PPL Montana* beyond its limits.

C. The Fourth Circuit’s Decision Displaces Centuries of Law from the Original States and Aggrandizes Federal Jurisdiction.

By tracing title to sovereign land in the thirteen original states to the federal government, the Fourth Circuit concluded that federal law now governs in determining which waters and submerged lands belong to those states. *See App to Pet. Cert.* 13a.

As a result, for the four original states located in the Fourth Circuit—and potentially the other original states—centuries of public trust law has been swept aside and replaced with federal common law. *See supra* pp. 4–5 (citing decisions from the original states dating back to 1798). As North Carolina explains in its petition, this change in the law will disrupt long-settled expectations in states where there are significant differences between federal and state laws on

navigability. See Pet. Cert. 15–18. This outcome is precisely what this Court cautioned against when it upheld the application of state law to a sovereign title dispute in the not-too-distant past. See *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 483–84 (1988) (explaining that overturning a state’s sovereign title laws would be “upsetting to settled expectations,” require the adjustment of countless land titles, invalidate many land grants from the state, and undermine long-established rights of access for the public).

As a further consequence of the Fourth Circuit’s decision, litigants appearing in the federal district courts in these states may now invoke federal-question jurisdiction in disputes concerning public-trust land titles. See App. to Pet. Cert. 18a. This expansion of federal court jurisdiction comes at the expense of the jurisdiction of these states’ courts, which have decided navigability questions for centuries. This Court has recently expressed its disapproval of such displacement of state court jurisdiction as potentially “alter[ing] the usual constitutional balance.” *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1567–68 (2016); see also *Alden v. Maine*, 527 U.S. 706, 727 (1999) (“Simply put, ‘The Constitution never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself.’” (quoting *Atascadero State Hospital v. Scanlon*, 473 U.S. 234, 239 n. 2 (1985))).

Such a significant shift in the federal–state balance should not be accomplished through mere “constitutional insight.” App. to Pet. Cert. 13a. Both the challenge to federalism presented by the Fourth Circuit’s decision and the novel constitutional interpretation it announced call for this Court’s careful scrutiny.

II. THE COURT SHOULD GRANT CERTIORARI TO REPAIR THE DAMAGE TO STATE OWNERSHIP AND CONTROL OF PUBLIC TRUST WATERS.

Beyond the consequences of the Fourth Circuit's decision on constitutional law, settled property expectations, and principles of federalism, the decision deserves careful review for another reason: it undermines the obligation of the states to possess and protect important waters and underlying submerged lands as trustees for their citizens.

Due to the relationship between public trust lands and sovereignty, states may not freely bargain away title and control over these lands. *Illinois Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 453 (1892). To enforce these rules and to protect sovereign lands, the states have developed various public trust laws suited to their particular circumstances. This body of law constitutes the public trust doctrine.

Rather than address the implications of its decision on the public trust laws of the states, the Court of Appeals relied exclusively on federal navigability law to determine the scope of an original state's ownership of the land beneath its navigable waters. As the dissent noted, the majority's decision failed to apply or even recognize the public trust doctrine and its implications for sovereign ownership of navigable waterbodies. App. to Pet. Cert. 54a. By disregarding this foundational legal doctrine, the court's decision undermines the states' fiduciary responsibilities to protect the public's ownership and enjoyment of water resources in all states.

A. State Sovereign Ownership Is a Core Tenet of American Natural Resources Law.

Sovereign ownership of land beneath navigable waters is part of the bedrock of American natural resources law. Predating the Constitution itself, the doctrine has roots in Roman civil law and English common law. *See PPL Montana*, 565 U.S. at 603.

Since a state's ownership of these lands derives from its sovereignty, the state's title to these lands is "different in character from that which the state holds in lands intended for sale." *Illinois Cent.*, 146 U.S. at 452. "The state can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government and the preservation of the peace." *Id.* at 453; *see also Nat'l Audubon Soc'y v. Superior Court*, 658 P.2d 709, 724 (Cal. 1983) ("[The public trust] is an affirmation of the duty of the state to protect the people's common heritage of streams, lakes, marshlands and tidelands, surrendering that right of protection only in rare cases when the abandonment of that right is consistent with the purposes of the trust.").

The states therefore have a duty to not only possess and control sovereign lands, but to protect those resources as trustee for the public beneficiaries. *See The Volant*, 59 U.S. (18 How.) 71, 75 (1855) ("This power results from the ownership of the soil, from the legislative jurisdiction of the State over it, and from its duty to preserve unimpaired those public uses for which the soil is held."). These principles have been affirmed repeatedly by this Court and by state constitutions, statutes, and common law throughout

this country. *See generally* Michael C. Blumm & Mary Christina Wood, *Public Trust Doctrine in Environmental and Natural Resources Law* (2d ed. 2015) (compiling authorities from the United States and worldwide).

Each state has developed its own public trust doctrine to protect its sovereign ownership of critical waters and the lands underneath them. *See Phillips Petroleum*, 484 U.S. at 483. States have expanded, and in some cases limited, the waters subject to public trust protections, “according to [each state’s] own views of justice and policy . . . as it considered for the best interests of the public.” *Shively*, 152 U.S. at 26.

For instance, in North Carolina, public trust protections extend to navigable waters, *Gwathmey v. State ex re. Dep’t of Env’t, Health, & Nat. Res.*, 464 S.E.2d 674, 678 (N.C. 1995), as well as dry-sand beaches, *Nies v. Town of Emerald Isle*, 780 S.E. 2d 187, 196–97 (N.C. Ct. App. 2015). In other states, the doctrine extends to tributaries of navigable waters, *Nat’l Audubon Soc’y* 658 P.2d at 721, nonnavigable tidewaters, *Phillips Petroleum*, 484 U.S. at 472–73 (applying Mississippi law), and groundwater, *In re Water Use Permit Applications*, 9 P.3d 409, 445–47 (Haw. 2000).

It is against this doctrinal backdrop that North Carolina’s quiet-title action must be considered.

B. The Fourth Circuit’s Decision Potentially Eliminates State Protections of Sovereign Ownership.

As discussed above, the states have developed their own rules for identifying waterways that are subject to public trust protections. Applying the federal title test without considering the impact of state public

trust law, as the Court of Appeals did here, undermines the diverse forms of the public trust doctrine recognized and applied by the states.

In North Carolina, as in many states, the navigability test for state sovereign ownership is broader than the federal standard applied in *PPL Montana*. A waterway in the state is navigable if it may be traversed by small craft used for pleasure and not just commercial vessels. *Gwathmey*, 464 S.E.2d at 682; *see also* Pet. Cert. 16–17 (citing navigability-for-title tests in South Carolina, New Hampshire, and New York that are also broader than the federal test). Additionally, unlike the federal test, navigability under North Carolina law is not necessarily defeated by the need to portage. *Broadnax v. Baker*, 94 N.C. 675, 681 (1886); *see also Danes v. State*, 113 N.E. 786, 787 (N.Y. 1916) (reaching the same conclusion with respect to New York law).

Moreover, in some states, even waters that are not categorized as navigable may nonetheless belong to the state in its sovereign capacity as public trustee. *E.g.*, *Commonwealth v. Vincent*, 108 Mass. 441, 441 (1871) (commonwealth owns great ponds larger than 20 acres); *St. Regis Paper Co. v. N.H. Water Resources Bd.*, 26 A.2d 832, 837–38 (N.H. 1942) (state owns lakes and large natural ponds); *Bath v. Courts*, 459 N.E.2d 72, 75 (Ind. Ct. App. 1984) (state holds all freshwater lakes in public trust).

Beyond the various tests for state title, the states have also developed various protections for public use of waters. These use protections often cover waters that are not owned by the state under the state's public trust doctrine. *See, e.g.*, *Brosnan v. Gage*, 133 N.E. 622, 624 (Mass. 1921) (public has right of passage for commercial and pleasure craft on nontidal navigable streams not subject to state ownership); *Boston*

Waterfront Dev. Corp. v. Commonwealth, 393 N.E.2d 356, 359–60 (Mass. 1979) (public can access private land between low-tide and high-tide line, even though private property extends to low-tide marker); *Pierson v. Coffey*, 706 S.W.2d 409, 412 (Ky. Ct. App. 1985) (public has right to commercial and recreational boating and temporary anchorage on private riverbeds); *McCormick Oil & Gas Corp. v. Dow Chem. Co.*, 489 So.2d 1047, 1049 (La. Ct. App. 1986) (public has right to use privately held banks of navigable waters); *The Point, Ltd. Liab. Corp., et al. v. Lake Mgmt. Ass’n, Inc.*, 50 S.W.3d 471, 476 (Tenn. Ct. App. 2000) (public has right to use navigable rivers, even where the riverbed may be privately owned because the river is not necessary for commerce).

The Fourth Circuit’s failure to consider North Carolina’s public trust laws that protect its sovereign ownership puts at risk all of the above state laws, as well as countless others. If a federal court may consider the federal navigability test alone to determine whether a private entity owns a riverbed, without consideration of the effects on state sovereign ownership and the state’s public trust doctrine, each state’s unique public trust rules may be rendered meaningless. This is true for the title rules under the public trust doctrine; it is also true for rules protecting public use where title to submerged land is held privately.

To preserve these long-established state rules, this Court should review this case to clarify that sovereign ownership protected by the public trust doctrine is still relevant in the application of title rules, whether a court is applying federal or state title rules. Even if the title rules would permit riverbed ownership to pass to a private party, this Court should clarify that any such title would remain subject to protections

for the public's use of and access to those waters, according to the state's public trust doctrine.

III. THE FOURTH CIRCUIT'S DECISION ALLOWS STATES TO ALIENATE SOVEREIGN LANDS THROUGH PRESCRIPTION.

The decision of the Court of Appeals undermines state sovereign ownership in yet another way. The court held that waters subject to the public trust doctrine may be alienated through a state's inaction over time (or by prescription, as this term is used in property law⁴). *See* App. to Pet. Cert. 27a–30a. This holding undercuts the public trust doctrine's purpose of protecting sovereign control of navigable waters for future generations of citizens.

To reach this conclusion, the Court of Appeals applied two sources of law that permit title to pass through prescription: North Carolina's Marketable Title Act, N.C. Gen. Stat. § 47B-2, and the equitable doctrine of adverse possession. App. to Pet. Cert. 27a–30a. Both of these legal doctrines are designed to simplify title transactions by fending off “ancient interests in land.” Unif. L. Comm'n, *Marketable Title Act, Model Summary* (last visited Dec. 5, 2017), <http://www.uniformlaws.org/ActSummary.aspx?title=Marketable%20Title%20Act,%20Model>; *see* 4 Tiffany Real Prop. § 1134 (3d ed. Sept. 2017 Update) (“[T]he policy behind statutes which permit the acquisition of title by adverse possession consists in the settlement and repose of titles.”). These concepts are inapplicable where the land in question is intended to remain with

⁴ *Prescription*, Black's Law Dictionary (10th ed. 2014) (“The extinction of a title or right by failure to claim or exercise it over a long period.”).

the sovereign in perpetuity. *See Illinois Cent.*, 146 U.S. at 452–53.

The Marketable Title Act states that a person who “ha[s] been vested with any estate in real property of record for 30 years” has record title to that property. N.C. Gen. Stat. § 47B-2(a). Thus, as the Act was applied in this case, as long as a private party has possessed a riverbed for thirty years, the people can be forever stripped of ownership of that property, even if that riverbed was subject to sovereign ownership under the state’s navigability precedent. *See App. to Pet. Cert. 27a–29a*. Presumably, this rule would apply even if the state (or its agent) had no authority to convey the property to begin with—for instance, if the state’s public trust rules forbade the transfer. *See Gwathmey*, 464 S.E.2d at 684 (holding that public trust lands may not be conveyed to a private party without “a special grant from the General Assembly expressly conveying lands underlying navigable waters in fee simple and without reservation” (emphasis in original)).

Although no North Carolina court has addressed this question, it is doubtful that the state’s courts would have agreed with the Court of Appeals that state’s sovereign lands should be subject to the Marketable Title Act. Instead, North Carolina likely would have joined other states’ high courts that have addressed this question, and decided that their legislatures never intended to “casually dispose of irreplaceable public assets” through an act designed to merely simplify land title transactions. *Coastal Petroleum Co. v. Am. Cyanamid Co.*, 492 So. 2d 339, 344 (Fla. 1986); *see State v. Sorensen*, 436 N.W.2d 358, 362 (Iowa 1989) (“[W]e cannot ascribe to the legislature an intention that [sovereign lands] be permitted to be lost by default.”).

The Court of Appeals failed to appreciate or acknowledge the unique character of a state's sovereign ownership of public trust lands when it applied the Marketable Title Act. The court held that the Act should apply because North Carolina courts had applied it to other state-owned land. *See* App. to Pet. Cert. 29a. However, the case cited by the Fourth Circuit for this reasoning did not involve public trust land. *See Taylor v. Johnston*, 224 S.E.2d 567, 572 (N.C. 1976). Moreover, as this Court has held, sovereign lands are not subject to alienability to the same degree as other lands held by the state. *Illinois Cent.*, 146 U.S. at 452 (holding that title to public trust lands is "different in character from that which the state holds in lands intended for sale"). Accordingly, a state's marketable title act may not divest the people of their sovereign lands "by default." *Sorensen*, 436 N.W.2d at 362.

The Court of Appeals also disregarded the state's public trust rules protecting sovereign land when it applied another doctrine of prescription—adverse possession. App. to Pet. Cert. 29a–30a. Under North Carolina's law on adverse possession, the state can lose title to land if another person exclusively possesses the land for thirty years. N.C. Gen. Stat. § 1-35(1). But North Carolina law specifically forbids the use of adverse possession to alienate public trust lands. *Id.* § 1-45.1 ("Title to real property held by the State and subject to public trust rights may not be acquired by adverse possession.").

The Fourth Circuit sidestepped this statute by holding, without citation to state authority, that North Carolina was required to present evidence of its title ownership during the prescription period to apply the statutory exception. App. to Pet. Cert. 30a. This

reasoning fails to account for the remaining language in the statute, which states that public trust rights “are established by common law as interpreted by the courts of this State.” N.C. Gen. Stat. § 1-45.1. Thus, the State did not need to provide evidence of deeds to the riverbed to show that it was public trust land. It could, and did, show through state case law that the river was navigable, and therefore was owned in a sovereign capacity, protected by the public trust doctrine.

As the dissenting opinion below recognized, and as shown above, applying these two doctrines of prescription to sovereign lands is “antithetical to the public trust doctrine.” App. to Pet. Cert. 67a, 70a. This Court agreed when it confronted an analogous scenario involving title to the ocean floor along the California shoreline. *See United States v. California*, 332 U.S. 19 (1947). It held that land that the government holds “in trust for all the people” may not be divested through “ordinary court rules designed particularly for private disputes,” including “acquiescence, laches, or failure to act.” *Id.* at 40. The same reasoning applies to state marketable title acts and the doctrine of adverse possession, both of which concern a titleholder’s “failure to act.”

In sum, the decision of the Court of Appeals erroneously permits the use of prescription to divest a state of its public trust lands. This proposition offers another compelling reason to grant certiorari to correct the court’s misunderstanding of state sovereign landownership.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

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APPENDIX

APPENDIX

List of *Amici Curiae* Law Professors

(Affiliations are provided for identification purposes only.)

1. Hope Babcock, Georgetown University Law Center
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4. John C. Dernbach, Widener University Commonwealth Law School
5. Tim Duane, University of San Diego School of Law
6. Myrl L. Duncan, Washburn University School of Law
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8. James R. May, Widener University Delaware Law School
9. Patrick C. McGinley, West Virginia University College of Law
10. Joel A. Mintz, Nova Southeastern University
11. Patrick Parenteau, Vermont Law School
12. Zygmunt Plater, Boston College Law School
13. Ann Powers (Professor Emerita), Elisabeth Haub School of Law at Pace University
14. Alison Rieser (Professor Emerita), University of Maine School of Law
15. Jonathan Rosenbloom, Drake University School of Law

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16. A. Dan Tarlock (Professor Emeritus), Chicago-Kent College of Law
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