NO. 17-683

In the
Supreme Court of the United States

NORTH CAROLINA,

Petitioner,

v.

ALCOA POWER GENERATING, INC., AND CUBE YADKIN GENERATION LLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION FOR RESPONDENT CUBE YADKIN GENERATION LLC

MELISSA ARBUS SHERRY
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Washington, DC 20004

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondent Cube Yadkin Generation LLC

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QUESTIONS PRESENTED

Longstanding Supreme Court precedent establishes that a state's claim of sovereign ownership to the bed of a river based on navigability at statehood presents a quintessentially federal question governed by federal law. In accordance with this long line of precedent and basic principles of equal state sovereignty, the district court and the Fourth Circuit rejected North Carolina's novel argument that the 13 "original" states need not follow the federal navigability-at-statehood rule that governs in the other 37 states, and exercised jurisdiction over North Carolina's navigability-at-statehood claim.

The questions presented are:

1. Whether the Court of Appeals correctly held that a state's sovereign title to submerged lands at statehood is a question of federal law in all 50 states, including North Carolina and the rest of the 13 original states.

2. Whether the Court of Appeals properly exercised federal jurisdiction over North Carolina's navigability-at-statehood claim without expressly discussing one of the readily satisfied four factors set forth in *Gunn v. Minton*, 568 U.S. 251 (2013), when the State mentioned that four-factor test only in passing below.

PARTIES TO THE PROCEEDING

The State of North Carolina was the plaintiff below and is the petitioner here.

Alcoa Power Generating, Inc. ("Alcoa") was the defendant below and remains a nominal respondent here, but Alcoa conveyed the property at issue to Cube Yadkin Generation LLC ("Cube") effective February 1, 2017. In the proceedings below, Alcoa and Cube sought to substitute Cube pursuant to Federal Rule of Appellate Procedure 43(b). The Court of Appeals denied the motion but subsequently joined Cube as an additional party to the litigation. Cube is therefore a respondent, and is the only respondent with a continuing interest in this litigation.

CORPORATE DISCLOSURE STATEMENT

Cube Yadkin Generation LLC is 100% owned by Cube Hydro Carolinas, LLC, a Delaware limited liability company. Cube Hydro Carolinas, LLC is 100% owned by Helix Partners LLC, a Delaware limited liability company. Helix Partners LLC is 98.5% owned by Helix HoldCo LLC, a Delaware limited liability company. Helix HoldCo LLC is 87.8% owned by ISQ Cube Hydro Co-Investment Fund L.P., a Delaware limited partnership, together with ISQ Hydro Aggregator LLC, a Delaware limited liability company. Each of ISQ Cube Hydro CoInvestment Fund, L.P. and ISQ Hydro Aggregator LLC holds an indirect economic interest of 10% or more in Cube Hydro Carolinas, LLC. ISQ Hydro Aggregator LLC is majority owned by ISQ Global Infrastructure Pooling, L.P., a Cayman Islands exempted limited partnership, together with its associated investment limited partnership vehicles (collectively the "ISQ Global Infrastructure Fund"). The general partner of ISQ Cube Hydro Co-Investment Fund, L.P. and the ISQ Global Infrastructure Fund is ISQ Global Fund GP, L.P., a Cayman Islands exempted limited partnership, which is controlled by its general partner ISQ Global Fund GPGP, Ltd., a Cayman Islands exempted limited company. In turn, ISQ Global Fund GPGP, Ltd. is 100% owned and controlled by I Squared Capital, a Cayman Islands exempted limited company.

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INTRODUCTION

For more than 200 years, North Carolina repeatedly sold the bed underlying the stretch of the Yadkin River at issue here to private parties in return for money. And for more than 100 years, Alcoa Power Generating, Inc., and its predecessors (collectively, "Alcoa") owned and operated hydropower facilities on that riverbed. Alcoa bought and paid for the riverbed on which it built its four dams, recorded hundreds of deeds attesting to its ownership, consistently paid property taxes to the State, and invested more than $175 million in maintaining and improving its facilities. For the better part of a century, the State never questioned Alcoa's ownership of the riverbed. To the contrary, the State affirmatively attested to Alcoa's ownership in federal regulatory proceedings, maintaining that the segment of the Yadkin River on which the facilities were built is not and has never been navigable, and that the riverbed belonged to Alcoa.

In 2013, North Carolina abruptly changed course. After Alcoa decided to close its local smelting plant, the State brought a quiet-title lawsuit in North Carolina state court against Alcoa, claiming for the first time that *the State* owned the riverbed underlying Alcoa's hydropower facilities. The State's complaint invoked only one theory for this new claim: that the river stretch was navigable at statehood, and that its bed therefore is and always has been the sovereign property of the State. Remarkably, the State not only maintained that it was entitled to the very riverbed that it had repeatedly told federal regulators belonged to Alcoa, but also openly admitted that its position

would void *more than 100* land grants from the State, some dating back more than a century.

Relying on a long and unbroken line of this Court's cases affirming that a state's claim that it owned the bed of a river at statehood because it was navigable (*i.e.*, a "navigability-at-statehood" claim) presents a federal constitutional question, *see, e.g.*, *PPL Montana, LLC v. Montana*, 565 U.S. 576, 591 (2012), Alcoa removed the case to federal court. The courts below proceeded to reject the State's belated navigability-at-statehood claim, finding it lacking in legal or factual support. The State does not challenge the merits of that finding, but rather seeks this Court's review solely on the theory that the federal courts lack jurisdiction over its navigability-at-statehood claim.

North Carolina first urges this Court to grant review to fashion a new rule of unequal sovereignty under which the 13 "original" states are not bound by the same federal navigability rule as the 37 later-admitted states when determining whether they took title to submerged lands at statehood. That novel contention is antithetical to the equal footing doctrine repeatedly affirmed by this Court. Indeed, North Carolina has identified no authority in *any* context, navigability law or otherwise, for the proposition that the original states have *superior* footing to the later-admitted states. No court has embraced the rule North Carolina proposes, or even squarely considered the issue previously—because no other state has ever made the argument. And even now, not a single state (original or new) supports North Carolina's claim, which underscores that this issue is of little practical

importance and is exceedingly unlikely to arise again. In all events, in the improbable event that another state not only raises the argument, but also succeeds in convincing a court to embrace it, there will be time enough for this Court to review the issue in a more appropriate vehicle.

North Carolina also invites this Court to address the fact-bound question whether the Fourth Circuit erred by failing to explicitly discuss one of the four factors set forth in *Gunn v. Minton*, 568 U.S. 251 (2013). That request for error correction does not warrant this Court's review. Indeed, there is no error to correct. The Fourth Circuit presumably did not discuss the fourth *Gunn* factor because the State itself barely addressed it (or any other *Gunn* factor) below. And North Carolina *never* made its newfound (and unfounded) argument that the test for federal-question jurisdiction applies differently when a state is resisting federal-court jurisdiction. This Court should not address an argument that was neither pressed nor passed upon below.

STATEMENT OF THE CASE

A. Factual Background

This case arises out of North Carolina's extraordinary claim that, notwithstanding centuries of contrary representations and conduct, the State has owned the bed of a roughly 45-mile stretch of the Yadkin River ("the Relevant Segment") ever since it joined the Union. After centuries of selling land including the riverbed (and in some cases only the riverbed) to private parties, collecting property taxes from its owners, and representing to federal regulators that the Relevant Segment was a non-

navigable river stretch and its bed belonged to Alcoa, the State reversed course after Alcoa closed its nearby smelting plant. At that point, North Carolina sued Alcoa for title to the riverbed, claiming for the first time (despite the State's own prior affirmative actions, and ignoring the overwhelming historical and geological facts to the contrary) that the State "has owned and continues to own the submerged bed of the Relevant Segment … in its entirety" because the Relevant Segment was "navigable in fact" "at the time North Carolina became a state of the United States of America in 1789." JA40-41.

Remarkably, the State brought its claim on the heels of this Court's decision in *PPL Montana*, which unanimously *rejected* Montana's nearly identical claim and admonished that "[i]t is not for a State by courts or legislature … to adopt a retroactive rule for determining navigability which ... would enlarge what actually passed to the State, at the time of her admission." 565 U.S. at 604-05 (quoting *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922)). Yet that is precisely what North Carolina sought to do here.

1. A long line of this Court's cases sets forth the rule that a river is "navigable in fact" for purposes of determining whether it belonged to a state when it entered the Union if, at statehood, the river was used, or was susceptible of being used, in its ordinary condition, as a highway for commerce, over which trade and travel was or could have been conducted in the customary mode. *Id.* at 592. As both courts below correctly concluded, in findings that the State does not

challenge, the Relevant Segment does not satisfy that test.

The Relevant Segment lies within the Carolina Slate Belt, which is characterized by "very hard and erosion-resistant metavolcanic rocks that form the steepest slopes and narrowest valleys." JA889. "[T]he dominant characteristic of the Relevant Segment is bedrock," and its tumultuous geological profile—including shoals, waterfalls, ledges, and boulders—renders substantial portions "totally unnavigable." JA363, 370-72. The hydrology of the river confirms as much; high velocity, turbulence, and susceptibility to flash floods impede navigation. JA391-97. Downstream portions known as "the Falls" (a series of 7-foot vertical drops), JA901, and "the Narrows" (where the river abruptly contracts from 1,800 feet to about 60 feet wide), JA374, 904-09, would have "thwarted any attempt to navigate" the Relevant Segment by watercraft available in 1789. JA374, 410-12, 905-08. Upstream, the Relevant Segment contains six "stair-step profile, bedrock-underlain prominent shoals," JA889; *see also* JA897-99, 903, 911, and, in some places, shoals protrude from the water for more than two miles, JA370. A hypothetical boater traveling down the Relevant Segment would have had to leave the river for "portages" (*i.e.*, the carrying of a boat to avoid obstacles) some 20 times. JA397.

Historical evidence overwhelmingly confirms that the Relevant Segment was not navigable at statehood. Early towns in the region were settled more than a century after similar areas near navigable rivers and, even then, formed at the intersection of roads (rather than alongside the river). JA778. Early settlers'

records make no reference to any navigation on the Relevant Segment, instead describing it as "useless for commerce" on "account of the terrible falls and numerous rocks." JA433-50, 842. A 1796 letter from a local merchant recounting a purported journey down the Relevant Segment likewise recounts necessary portages and significant "obstructions which impeded & almost entirely prevented the passage of the Boats," which could be cleared only at the expense of "considerable sums of money, besides the labour of many persons." JA758.

Indeed, the hope of *making* the Yadkin navigable inspired a century of "herculean efforts" and significant expenditures from public officials, private citizens, and even the federal government—all to no avail. JA791; *see also* JA792-817. In the late 19th century, the Secretary of War reported to Congress that the stretch of river including the Relevant Segment contains "many shoals, rapids, and falls which entirely preclude any attempt to make it navigable." JA920.

2. Consistent with the understanding that the Relevant Segment is and always has been non-navigable, North Carolina routinely granted its bed to private parties for money. Since entering the Union, the State—like the English Crown before it—has issued more than 110 grants conveying parcels of the bed of the Relevant Segment to private owners. E.D.N.C. Doc. 188-1, Decl. of Ribelin 2-3. While some grants conveyed riparian lands that included rights to the riverbed under well-established property rules, *Ingram v. Threadgill*, 14 N.C. 59, 60 (1831), others

expressly conveyed the riverbed itself, E.D.N.C. Doc. 188-1, Decl. of Ribelin 3.

Four large grants that account for more than 50 percent of the Relevant Segment granted *only* the riverbed. *Id*. The North Carolina Supreme Court repeatedly affirmed the validity of these grants, noting that "it is certain that the Yadkin river is capable of private ownership" because it "is not a navigable stream," and that "some parts of the bed of the river have been granted to private individuals, and the validity of their titles ha[s] been upheld." *State v. Glen* (*Glen*), 52 N.C. 321, 326 (1859); *see also Cornelius v. Glen* (*Cornelius*), 52 N.C. 512, 514 (1860) ("Many persons are of opinion that [the Yadkin] is susceptible of *being made navigable*, but … it is certainly not now a navigable stream.").

3. More than a century ago, Alcoa began acquiring title to the bed of the Relevant Segment, and ultimately constructed and operated four federally licensed hydropower facilities along the property: High Rock Dam, Tuckertown Dam, Narrows Dam, and Falls Dam. JA885. Over the years, Alcoa publicly recorded hundreds of deeds to the riverbed, consistently paid property taxes, invested more than $175 million in maintenance and improvements, and acted as the undisputed owner of the property in all respects. JA1562-93, 1604.

For decades, North Carolina never questioned Alcoa's title. To the contrary, the State repeatedly told federal regulators that Alcoa owned the riverbed underlying its hydropower facilities. For example, in a 1937 proceeding before the Federal Power Commission ("FPC") concerning Alcoa's plans to

construct the Tuckertown Dam, North Carolina maintained that "the Yadkin-Peedee River at the Tuckertown project and below is not now and has not been a navigable stream." JA1703; *see also* JA1356. When asked whether the river was navigable at Tuckertown, the State's chief engineer responded that "it seems so ridiculous to think of it as navigable that I would have no other answer; no." JA1364. The State further explained that, "as being a nonnavigable stream, … grants have been and may be made up and down the river," JA1703, and that Alcoa had acquired its rights to the bed of the Relevant Segment "in every respect in accordance with" state law, JA1715-16.

In 1956, Alcoa returned to the FPC for a long-term license for the proposed Tuckertown Dam and its three existing dams on the Relevant Segment. In support of its application, Alcoa submitted hundreds of duly recorded deeds showing that it "acquired and now owns title to all the land and appurtenant water rights" for all four projects, including the riverbed. JA1767; *see also* JA1320-22. Again, North Carolina actively championed Alcoa's ownership. The State expressly "adopt[ed] the evidence of the applicants, and exhibits filed in support of same," "urg[ing] upon the Commission that [Alcoa's] views be accepted." JA996. The FPC granted Alcoa a 50-year license, as requested. Over the ensuing years, the State entered into numerous agreements with Alcoa acknowledging Alcoa's ownership, JA1398, 1447-50, 1515-19, 1549-53, and sought permits, licenses, and easements from Alcoa when it wanted to enter the property, JA1461-1514, 1533-37, 1769-71, 1773-75.

B. Proceedings Below

1. From 1916 to 2007, Alcoa used power from its four dams to operate an aluminum smelting factory in Badin, North Carolina, and sold any surplus power that it did not need. JA505, 1740-41. Alcoa curtailed aluminum production amid economic struggles in 2002, and continued limited production until 2007 before ultimately closing the plant in 2010. JA505. In the meantime, Alcoa applied to the Federal Energy Regulatory Commission ("FERC") to renew the 50-year license it received from the FPC in 1956. Like its 1956 application, Alcoa's 2006 application represented that Alcoa "owns all of the lands and riparian rights necessary under North Carolina law to operate and maintain" its hydropower projects. JA1374; *see also* JA505-06.

North Carolina initially supported Alcoa's FERC application, as it had in the past, but it abruptly changed course after Alcoa closed the aluminum plant. In 2013, the State filed a single-claim quiet-title lawsuit against Alcoa in state court. Despite its long history of publicly acknowledging Alcoa's ownership, collecting property taxes on the riverbed, and seeking Alcoa's permission to enter the property, the State sought a declaration that "the submerged bed of the Relevant Segment of the Yadkin River is the sole and exclusive property of the State." JA43. The State offered only one theory in support of this novel claim: that "all portions of the waters of the Yadkin River lying within" the Relevant Segment were "navigable in fact" at "the time North Carolina declared its independence from Great Britain," "at the time North Carolina became a state of the United States of

America in 1789," and "at all times thereafter." JA40. The State included with its complaint a request for document production seeking, among other things, materials demonstrating whether the Relevant Segment was "'navigable in fact,' as that term is defined in … *PPL Montana*." JA81.

2. Given the State's assertion of title on the theory that the Relevant Segment was navigable at statehood, JA40, and its express invocation of the federal navigability doctrine set forth in *PPL Montana*, JA81, Alcoa removed the case to the Eastern District of North Carolina pursuant to 28 U.S.C. §1441(a). The State moved to remand, making the novel argument that its complaint raised no federal question because while navigability-at-statehood is a federal question for "newly admitted" states, it is not a federal question for the 13 "original" states. The district court denied the State's motion, finding that "a declaration of judgment under state law that the State of North Carolina owns the portions of the Yadkin River bed at issue necessarily turns on construction of federal law"—namely, whether the Relevant Segment was navigable at statehood, a question this Court has repeatedly held is "governed by federal law." Pet.App.106a-07a.

The court held a bench trial on navigability, and the State presented its case through a single expert witness: a historian who admitted to authoring a book describing the Yadkin (contrary to his stance at trial) as a *barrier to navigation*. JA354. Alcoa called three expert witnesses: a fluvial geomorphologist who opined that the physical characteristics of the river made it non-navigable at statehood, a historian who

opined that the historical record confirms that the river was not navigable at statehood, and a marine archaeologist who opined that the types of watercraft in use at statehood could not have navigated the Relevant Segment. After a two-day trial, the court ruled that the Relevant Segment was not navigable at statehood. Pet.App.91a-92a. The court subsequently granted summary judgment to Alcoa, concluding that Alcoa demonstrated title to more than 99% of the bed of the Relevant Segment under North Carolina's Marketable Title Act and demonstrated title to the remainder under state adverse possession law. Pet.App.80a-81a, 89a.

3. North Carolina appealed, and the Fourth Circuit affirmed. In an opinion authored by Judge Niemeyer, the court rejected North Carolina's argument that this case presents no federal question, finding that century-old Supreme Court precedent establishes that a state's claim that it owns the bed of a river because it was navigable at statehood presents a federal question in *all* states, not just newly admitted ones. Pet.App.10a-18a. The court explained that North Carolina's contrary position "would result in a bizarre state of affairs with two different classes of States under the Constitution." Pet.App.16a. The majority then rejected the State's challenges to the district court's finding that the Relevant Segment was not navigable at statehood, as well as its challenges to the court's conclusion that Alcoa demonstrated its title to the bed of the Relevant Segment. Pet.App.18a-30a. Judge King dissented, accepting each of the myriad legal and factual arguments the State pressed.

North Carolina sought en banc review, which was denied by a majority of the Fourth Circuit without any written dissent.

4. During the appeal, Alcoa sold the riverbed and its associated hydropower facilities to Cube Yadkin Generation LLC ("Cube"). While the Fourth Circuit declined Alcoa's and Cube's joint request to substitute Cube for Alcoa after the State opposed the motion, the Court agreed to join Cube as an additional defendant. Accordingly, while Alcoa remains a nominal party to this litigation, Cube is now the owner of the property and, as such, the real-party-in-interest in these proceedings. Like Alcoa before it, Cube has duly recorded title to all of the bed of the Relevant Segment, has continued to pay real property taxes on the riverbed (in addition to paying transfer taxes in connection with the sale), has granted easements allowing the State to access the property, and has been operating the hydropower project pursuant to a FERC license since the land transfer.

REASONS FOR DENYING THE PETITION

This case does not present any question that warrants this Court's review. North Carolina first asks this Court to fashion a rule of *un*equal sovereignty that has never been accepted by any court, has never been pressed by any other state, and even now has not garnered the support of a single other state, original or otherwise, as an *amicus*. North Carolina stands alone because its novel theory is wrong. It is well-established that "questions of navigability for determining state riverbed title are governed by federal law." *PPL Montana*, 565 U.S. at 591. Under a straightforward application of this

Court's navigability cases, the Fourth Circuit correctly rejected North Carolina's novel theory that original states are exempt from the rule that federal law governs a state's claim that it took title to riverbed at statehood because the river over it was navigable. The State's first question presented is therefore not only novel and splitless, but meritless. And in all events, this would be an exceedingly poor vehicle for consideration of that question because North Carolina's claim would fail no matter what navigability rule applies. Indeed, the State's newfound claim that it owns the bed of the Relevant Segment flies in the face of centuries of contrary conduct, including repeatedly granting the riverbed to private parties, continuously accepting property tax payment for the riverbed, and consistently representing to federal regulators that the Relevant Segment has never been navigable, and that its bed belonged to Alcoa.

As for the State's contention that the Fourth Circuit erred by declining to explicitly address one of the four *Gunn* factors, the State itself admits that this issue is fact-bound. It is also meritless, and turns largely on arguments that the State did not press below. Accordingly, the Court should deny the petition in its entirety.

I. The State's Novel Argument That The 13 Original States Have Greater Sovereign Rights Than Other States Does Not Warrant This Court's Review.

While North Carolina claims that this case presents an "exceptionally important" question, Pet.14-15, this case is exceptional only in that it is the

first and only time one of the 13 original states has claimed an exemption from the well-established federal rule that this Court has repeatedly held governs navigability-at-statehood disputes. For centuries, no state questioned the proposition that original states are bound by the same federal navigability-at-statehood rule as newly admitted states. Indeed, even now, no state—original or new—supports North Carolina's contrary claim. That is likely because this Court has repeatedly reaffirmed the bedrock principle that the United States is a union of *equal* sovereigns, each with the *same* constitutional rights. North Carolina's attempt to fashion an *un*equal footing doctrine that privileges original states has no precedential support—in navigability law or elsewhere. In all events, the question whether the same federal navigability-at-statehood rule applies in all states is neither exceptionally important nor likely to recur and has no bearing on the ultimate resolution of the State's claim. Further review is not warranted.

A. The Decision Below Does Not Conflict With Any Other Decision or Otherwise Satisfy Any Criteria for Certiorari.

There is not and could not be any division of authority on the first question presented because this is the first and only case in more than two centuries in which a state (or anyone else, for that matter) has claimed that original states are not bound by the same federal navigability-at-statehood rule as all the other states. Indeed, no court has embraced the proposition that original states have greater sovereignty than later-admitted states in *any* context, let alone in the navigability context, which is, after all, governed by

the *equal* footing doctrine. *See infra* Part I.C. That not only means that there is no disagreement among the lower courts for this Court to resolve, but also underscores that this issue is neither exceptionally important nor likely to recur. It has arisen a grand total of once in 228 years—and in the context of a state concededly trying to *void* land titles that have been duly recorded for decades, and that the state itself expressly acknowledged were valid decades ago. Even now, moreover, North Carolina could not muster a single state, original or otherwise, to support its plea for this Court's review.

Given the novelty of the issue, North Carolina cannot claim that any court (federal or state) has accepted its position that navigability-at-statehood is not a federal question in original states. Instead, the State and its *amici* attempt to conjure up division among the lower courts by claiming that various original states simply do not follow the federal navigability-at-statehood rule, and that the decision below will now force them to do so. *See* Pet.15-18; YRI.Am.Br.8-15; LP.Am.Br.9-10. In making that argument, however, they fail to abide by this Court's admonition that "any reliance upon judicial precedent [in this area] must be predicated upon careful appraisal of the *purpose* for which the concept of 'navigability' was invoked in a particular case." *Kaiser Aetna v. United States*, 444 U.S. 164, 170-71 (1979). That careful appraisal disposes of any claim of division among the lower courts, as most of the cases the State and its *amici* cite do not involve navigability-*at-statehood* title disputes, and the lone case that does applied *federal*, not state, law.

For instance, the State emphasizes that some original states "continue to follow the English rule, which limits sovereign ownership to tidal waters," instead of following the federal rule, which allows states to claim title to the beds of *all* rivers (tidal or not) that were navigable in fact in statehood. Pet.17. But that is readily explained by the fact that the federal navigability-at-statehood inquiry governs only whether a state took title to the bed of a river *at statehood*. While federal law "fix[es] the initial boundary line between fast lands and the riverbeds at the time of a State's admission to the Union," after statehood, the "force of that doctrine [i]s spent." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370-71 (1977). Accordingly, although a state (whether original or later admitted) must look to federal law to determine whether it took title to the riverbed *at statehood*, it is free to apply its own law to decide whether to *relinquish* the riverbed to which it was entitled at statehood. *See, e.g.*, *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 475 (1988) ("the individual 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"). This relationship between federal and state law is not only well-established, *see, e.g.*, *Corvallis*, 429 U.S. at 381, but also parallels sovereign immunity law. Federal law (applicable uniformly to all 50 States) dictates the minimum degree of sovereignty states retain, but state law determines the degree to which states choose to waive that immunity. *See, e.g.*, *Alden v. Maine*, 527 U.S. 706, 737 (1999).

There is thus no conflict between the navigability rule reiterated by the decision below and the narrower

rule that some states have chosen to adopt as a matter of state law to determine whether to retain the beds of their navigable rivers. While these states *could have* retained title to the beds of all of their rivers that were navigable at statehood, they chose not to do so. Because the federal navigability-at-statehood rule applies only to determine ownership *at statehood*, nothing in the decision below displaces a state's decision to relinquish title, or would force any state to "transfer riverbeds from private landowners to the States." Pet.17.

North Carolina's reliance on Virginia law suffers from the same defect. North Carolina claims that Virginia law conflicts with federal law because Virginia recognizes state ownership only up to the "mean *low*-water mark," while federal law recognizes it up to the "mean high tide line." Pet.17. But that is just another example of a state choosing not to retain all the riverbed to which it was constitutionally entitled at statehood. Again, the decision below does not "displac[e] Virginia's state-law rule" as to how much riverbed to retain or "unsettl[e] private ownership of coastal lands between the high and low tidelines" in Virginia (or Massachusetts, which North Carolina maintains has a similar rule). Pet.18 & n.4.

North Carolina's professed concern for the settled rights of property owners in *other* states is also difficult to reconcile with its acknowledgement that its position in this case would retroactively void *more than 100* land grants from the State to private parties, some dating back more than two centuries, and transfer all of that long-ago bought-and-paid-for (and thoroughly taxed) property back to North Carolina.

See, e.g., CA4 Doc. 22, Br. of Appellant 17, 28. As this Court has recognized in rejecting similarly retroactive claims, there is a fundamental difference between a state embracing a navigability rule that *limits* the riverbed to which it claims title and a state trying to "adopt a retroactive rule for determining navigability which … would enlarge what actually passed to the state, at the time of her admission." *Brewer-Elliott*, 260 U.S. at 87.

North Carolina's claims of conflicts with the navigability tests employed by various other original states fare no better, as the State once again fails to heed this Court's caution that navigability cases "cannot simply be lumped into one basket." *Kaiser Aetna*, 444 U.S. at 170-71. North Carolina claims that the federal navigability-at-statehood rule reaffirmed by the Fourth Circuit conflicts with (1) South Carolina law, which provides that "waters are considered navigable if they support 'use by small fishing or pleasure craft,' even if the rivers are interrupted by occasional rapids and falls," Pet.16 (citing *State v. Head*, 330 S.C. 79, 91-92 (1997)); (2) New Hampshire law, which "recognize[s] navigability based on recreational use," Pet.16 (citing *Hartford v. Gilmanton*, 101 N.H. 424, 425-26 (1958)); and (3) New York law, which both "recognize[s] navigability based on recreational use," Pet.16 (citing *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 603-04 (1998)), and provides that "small interruptions in a vessel's ability to traverse a waterway do not defeat a finding of navigability," Pet.16 (citing *Danes v. State*, 219 N.Y. 67, 70-71 (1916)). But only one of the cases the State cites in support of those claims actually involves a navigability-at-statehood title inquiry.

Head addressed navigability only in the context of public use, to determine whether "the public ha[d] an easement in use of *the waterway"* even though "the adjacent property owners h[e]ld title … to … *the stream bed*." 330 S.C. at 86 (emphasis added). *Adirondack League* likewise concerned only whether the public had the right to use a river, not who owned its bed. 92 N.Y.2d at 600-04. As *PPL Montana* made clear, states are free to apply their own law to determine the scope of "public access to the waters above [river]beds for purposes of navigation, fishing, and other recreational use," even if the beds of those rivers may be privately owned. 565 U.S. at 603. Because "the contours of that public trust" over *the water* "do not depend on the Constitution," *id.* at 604, the Fourth Circuit's decision in no way disturbs the navigability tests that states use to determine them.[1]

As for the remaining cases, contrary to the State's contention, *Gilmanton* did not "recognize navigability based on recreational use," Pet.16, but rather only briefly referenced navigability principles in the course of concluding that the public's right to use a pond that concededly belonged to the state did not convey a corresponding right to use the surrounding private riparian property. *See* 101 N.H. at 425-27. And while

[1] That likewise disposes of the claims by the State's *amici* that the decision below threatens state public access and natural resource preservations laws. YRI.Am.Br.15-25; LP.Am.Br.11-13. This Court rejected the same argument in *PPL Montana* when it confirmed that the federal navigability rule for determining title at statehood does not disturb the states' power to determine the scope of "public access to the waters above those beds for purposes of navigation, fishing, and other recreational use." 565 U.S. at 603.

Danes at least involved title to a riverbed, that 1916 case invoked *federal* law for the proposition the state cites (which, at any rate, did not actually concern portages). *See* 219 N.Y. at 71 (citing *St. Anthony Falls Water Power Co. v. St. Paul Water Comm'rs*, 168 U.S. 349 (1897), for the proposition that, "[i]n order to be navigable, it is not necessary that it should be deep enough to admit the passage of boats at all portions of the stream"). Accordingly, *Danes* suggests only that *federal* law was not as clear about the impact of interruptions on the navigability-at-statehood inquiry in 1916 as it is after *PPL Montana*—which is hardly surprising given that the Court granted certiorari in *PPL Montana* to resolve that question.

In short, North Carolina's novel claim that original states need not follow the federal navigability-at-statehood rule has never been considered—let alone embraced—by any court, so there is accordingly no conflict for this Court to resolve. Indeed, if the decision below truly threatened to disrupt the law of all the original states, one would have expected those states to take up North Carolina's cause. Their conspicuous silence speaks volumes.

B. This Case Is an Exceptionally Poor Vehicle.

North Carolina's conflation of public use law and navigability-at-statehood law also dooms its claim that the outcome of this case may have been different had state law applied. Once again, that argument confuses the test North Carolina courts use to determine whether the public has a right to access *the water*, and the separate and narrower test they use for determining whether the riverbed is capable of private

ownership. *See, e.g.*, *Glen*, 52 N.C. at 325-27 (explaining distinctions between the two).

For example, the State claims that while portages defeat a navigability claim under federal law, *see PPL Montana*, 565 U.S. at 597-98, that is not necessarily the case under North Carolina law. *See* Pet.15 (citing *Broadnax v. Baker*, 94 N.C. 675, 681 (1886)). But *Broadnax* is not a title case; it addresses navigability solely to determine whether the public had a right "to use the waters of a navigable river as a highway." 94 N.C. at 680. The State also claims that while the federal test requires evidence of "*commercial* navigation of a river," Pet.16, North Carolina law provides that "water is navigable if it can be traversed by any 'useful vessel[],' including 'small craft used for pleasure,'" Pet.15 (citing *Gwathmey v. State ex rel. Dep't of Env't, Health, & Nat'l Res.*, 342 N.C. 287, 300 (1995)). But *Gwathmey*, like *Broadnax*, is not a title case; it addressed navigability solely to determine whether the public had the right to use the water over submerged lands that the parties *had stipulated* were privately owned. 342 N.C. at 291.

As for North Carolina cases that actually deal with navigability in the context of title, if anything, they apply a test that is even narrower than the federal test (as is permissible for a state to do, *see supra* pp.16-17). *See, e.g.*, *Glen*, 52 N.C. at 325-27. And the North Carolina courts have repeatedly held that the Yadkin River is not navigable and that its bed is capable of private ownership, *see, e.g.*, *id.* at 326; *Cornelius*, 52 N.C. at 514, which confirms that the State's belated navigability claim would fare no better under state law than under federal law.

That is unsurprising, as the evidence overwhelming establishes that the Relevant Segment is not and has not ever been navigable. The State itself expressly took that position when it supported Alcoa's title claims before federal regulators in the 1930s and 1950s, where its own chief engineer opined that it "seems … ridiculous to think of it as navigable." JA1364. And precisely because the State previously agreed that the river was *not* navigable at statehood, it has granted its bed to private parties more than 100 times over the centuries—grants that the State admittedly is now seeking to void. A case in which the State is trying to escape federal court in hopes of effectuating a massive uncompensated taking is hardly an ideal vehicle for this Court's review. Indeed, the overwhelming evidence of both non-navigability and Alcoa's ownership of the riverbed by deed, all of which is unchallenged in the State's petition, raises the uncomfortable prospect that the State seeks a forum that will alter the law, rather than apply it.

C. Navigability-at-Statehood Is a Federal Question for All 50 States.

Not only is the State's argument novel, splitless, and of little practical importance, but it is also wrong on the merits. As the decision below correctly concluded, disputes regarding whether a state took title to submerged lands at statehood are governed by federal law in all 50 states. While North Carolina's assertion that the original 13 states are immune from the federal navigability-at-statehood law that governs the other 37 states may be novel, this Court has had multiple occasions in multiple contexts to reaffirm that the United States is a union of equal sovereigns.

See, e.g., *Coyle v. Smith*, 221 U.S. 559, 567-68 (1911); *Shelby Cty., Ala. v. Holder*, 133 S. Ct. 2612, 2623-24 (2013). Indeed, the navigability-at-statehood law that governs in the 37 non-original-but-still-equal states is a product of the oft-reaffirmed *equal* footing doctrine. *See infra* pp.24-26. And there is *no* authority, whether in this context or any other, for the proposition that original states are somehow more equal than others. North Carolina's claim to superior footing and unequal sovereignty thus manages to be both novel and foreclosed by this Court's precedents.

1. The State's declaratory-judgment action claimed title on the theory that the Relevant Segment was "navigable in fact" "at the time North Carolina became a state of the United States of America in 1789." JA40. The unmistakable basis for that claim is well-established: "[T]he States, in their capacity as sovereigns, hold title to the beds under navigable waters." *PPL Montana*, 565 U.S. at 589. And what law governs such inquiries is equally well-established: "questions of navigability for determining state riverbed title are governed by federal law," *id.* at 591, because they concern the attributes of "constitutional sovereignty" each state retained when it joined the Union, *Corvallis*, 429 U.S. at 381; *see also, e.g.*, *United States v. Oregon*, 295 U.S. 1, 14 (1935) ("[T]he question, whether the waters within the state under which the lands lie are navigable or nonnavigable, is a federal, not a local, one."); *United States v. Utah*, 283 U.S. 64, 75 (1931) ("The question of navigability … is a federal question."); *United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) ("[n]avigability, when asserted as the basis of a right arising under the Constitution of the United States"); *Brewer-Elliott*,

260 U.S. at 87 ("[T]he navigability of [a] stream is not a local question for the state tribunals to settle.").

North Carolina concedes, as it must, that navigability-at-statehood is a federal question in states that were later admitted to the Union. The State contends, however, that original states are not bound by the same federal rule that governs in other states when claiming that they took title to riverbed at statehood because the river was navigable. That novel argument finds no support in any decision of this Court. To the contrary, the Court has expressly stated that the same federal navigability-at-statehood rule applies to *all* states, "whether they are original states … or states admitted into the Union since the adoption of the Constitution." *Massachusetts v. New York*, 271 U.S. 65, 89 (1926). Even widening the lens, North Carolina identifies no case in *any* area in which the Constitution has been interpreted to apply differently in "original" versus "newly admitted" states. Instead, this Court has repeatedly affirmed that the United States is a union of *equal* sovereign states. *See, e.g.*, *Coyle*, 221 U.S. at 567-68.

There is a very good reason why no one save a lone treatise author, *see* Pet.21 (citing David Slade, *Putting the Public Trust Doctrine to Work* (1990)), has ever embraced the State's contrary position: because it is incompatible with the very concept of an equal footing doctrine. The whole point of that doctrine is to ensure that new states enter the Union with the *same* "rights, sovereignty, and jurisdiction … as the original states." *Pollard v. Hagan*, 44 U.S. 212, 230 (1845). The equal footing doctrine thus demands that "the *same* principle" of navigability that governed in "the 13

original states" also "appl[y] to States later admitted to the Union, because the States in the Union are coequal sovereigns under the Constitution." *PPL Montana*, 565 U.S. at 590-91 (emphasis added). If each of the 13 original states could use its own navigability rule to determine what riverbed it owned as a consequence of its sovereignty at statehood, it would be impossible to apply the "same" principle to the new states, and the equal footing doctrine could not operate coherently.

Precisely to avoid such problems, this Court has explained that treating the navigability-at-statehood inquiry "as turning on … varying local rules would give the Constitution a diversified operation where uniformity was intended." *Holt State Bank*, 270 U.S. at 56. Put simply, there is no such thing as the *un*equal footing doctrine under which the original 13 states can lay special claim to the beds of non-navigable rivers at statehood.

2. In arguing that original states are not bound by the same federal navigability rule as other states, North Carolina insists that the equal footing doctrine was established to determine the rights of newly admitted states, not the rights of original states. That misses the point. The *equal footing doctrine* is not the source of the principles that govern the retained sovereignty of the states. The source of those rights is the Constitution. The equal footing doctrine is just the doctrine through which this Court extended to later-admitted states the *same* sovereign rights that original states retained under our founding document. If anything, then, North Carolina's argument gets matters exactly backward: Navigability-at-statehood

claims raise an even more quintessentially federal issue in original states because the question of what sovereign rights original states retained at the founding arises *directly* under the Constitution, whereas the question arises only *indirectly* for the other 37 states by operation of the equal footing doctrine.

That follows from a straightforward application of this Court's precedent. As the Fourth Circuit correctly explained, this Court first announced the principles governing sovereign ownership of lands beneath navigable waters in *Martin v. Lessee of Waddell*, 41 U.S. 367 (1842). There, the Court faced competing claims to title to land beneath a navigable waterway in New Jersey, an original state: One party claimed title under a pre-statehood grant from the English Crown, while another claimed title under post-statehood New Jersey law. *Id.* at 407-08. The Court explained that resolution of their dispute turned on first principles of constitutional sovereignty: "[W]hen the revolution took place, the people of each 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 to the general government." *Id.* at 410. Because of the constitutional nature of the navigability-at-statehood inquiry, the Court squarely held that federal law controlled whether anyone other than the state could have claimed title to the riverbed at statehood. *Id.* at 417-18.

This Court reiterated the federal—indeed, *constitutional*—nature of the navigability-at-

statehood inquiry in *Pollard*. There, one party claimed title under a pre-statehood patent from the United States, while another claimed title under post-statehood Alabama law. 44 U.S. at 219-20. In resolving the dispute, the Court again emphasized that navigability-at-statehood presents a matter of "great importance to all the states of the union" because it concerns "the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments." *Id.* at 220. The Court held applicable to *all* states *Waddell*'s holding that the "shores of navigable waters, and the soils under them, were not granted by the Constitution to the United States, but were reserved to the states respectively." *Id.* at 230. Taken together, then, *Waddell* and *Pollard* confirm that the same federal navigability-at-statehood rule applies to *all* states, "whether they are original states … or states admitted into the Union since the adoption of the Constitution." *Massachusetts*, 271 U.S. at 89.

This Court recognized as much not only in *Massachusetts*, but also in *Phillips Petroleum*. That case concerned a particular aspect of the navigability-at-statehood test—namely, whether the waters that were influenced by the tide at statehood qualify as navigable even if they were not navigable in fact. The 13 original states filed an *amicus* brief urging the Court to reject the tidal rule, arguing that embracing it would "upset titles" in their states because most of them had divested themselves of title to the beds of waters that were tidal but not navigable in fact long ago. *Phillips Petroleum*, 484 U.S. at 483 & n.12. Although this Court adopted the tidal rule and expressly rejected the original states' argument, it did

so based on the understanding that the federal rule it adopted *would* apply to original states. The Court concluded that the rule would not disrupt title in those states because (as discussed, *see supra* pp.16-17) nothing in federal law prohibits states (original or new) from relinquishing title to riverbed to which they were constitutionally entitled at statehood. *Id.* *Phillips Petroleum* thus reinforces the conclusion that original states are bound by the same federal navigability-at-statehood rule as all other states.

3. North Carolina fares no better with its claim that the navigability-at-statehood doctrine is just a federal common law property rule that "applies only when the lands at issue have a federal origin." Pet.21. That contention cannot be reconciled with this Court's repeated pronouncements that a "State's title to lands underlying navigable waters within its boundaries is conferred not by" a land grant from the federal government, "but *by the Constitution itself*." *Corvallis*, 429 U.S. at 374 (emphasis added). Nor can it be reconciled with *Waddell*, *Massachusetts*, or *Phillips Petroleum*, each of which treated navigability as a federal issue in original states. North Carolina tries to dismiss *Waddell* as a diversity case, Pet.22, but this Court could not have been clearer that it deemed who owned the riverbed at statehood a question of federal, not state, law. *See Waddell*, 41 U.S. at 417-18. Indeed, it would have made no sense to extend the rule established in *Waddell* to new states in *Pollard* if that rule were not a constitutional one.

Corvallis likewise provides no support for the notion that the navigability-at-statehood rule is just a federal common law property rule. Contrary to the

State's contentions, *Corvallis* did not hold federal law inapplicable to the submerged land dispute before it "[b]ecause the land at issue had not been transferred directly from the United States." Pet.19. *Corvallis* held federal law inapplicable because the dispute did not concern whether Oregon took title to the riverbed "*at the time of its admission to the Union*," 429 U.S. at 376 (emphasis added), but rather concerned only what the state could do with the bed of the concededly navigable water at issue *after* statehood. *Corvallis* therefore stands only for the undisputed proposition that while federal law "fix[es] the boundaries of the riverbed acquired by the State at the time of its admission to the Union," *id.* at 376, it does not control what a state may do with the bed of a navigable river thereafter. *See supra* pp.16-17. That proposition in no way supports the State's contention that navigability is a federal question only when a federal land transfer is involved.[2] North Carolina's attempt to fashion a new rule of unequal sovereignty that privileges some states over others thus is not only novel and splitless, but incorrect.

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[2] If anything, that strained view of navigability law just makes the State's position even more anomalous. If navigability-at-statehood really were a federal question only when riverbed first belonged to the federal government, then later-admitted states that were not created out of federal territories, such as Maine, West Virginia, and Hawaii, also would not be bound by the federal navigability-at-statehood rule. Indeed, that is North Carolina's position. *See* CA4 Doc. 49, Reply Br. of Appellant 7. That patchwork approach to the navigability-at-statehood inquiry finds no support in this Court's cases and "would give the Constitution a diversified operation where uniformity was intended." *Holt State Bank*, 270 U.S. at 56.

II. The State's Fact-Bound Argument Concerning The Application Of One *Gunn* Factor Does Not Warrant Review.

North Carolina's second question presented seeks only fact-bound error correction—in a case with no error to correct. The State does not ask this Court to resolve any legal question, let alone a legal question that has divided the lower courts. Instead, the State simply asks this Court to review whether the Fourth Circuit erred by not explicitly discussing the fourth *Gunn*/*Grable* factor—namely, whether the federal question on which this case turned was "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258; *see also Grable & Sons Metal Prods., Inc. v. Darue Eng'g and Mfg.*, 545 U.S. 308, 314 (2005). That question is not worthy of this Court's attention.

Moreover, it is no surprise that neither court below explicitly addressed the fourth *Gunn* factor. North Carolina never even mentioned any of the *Gunn* factors in the district court. And while the State did at least address them in its opening brief in the Fourth Circuit, it abandoned them in its reply brief and did not invoke them once during its 53 minutes of oral argument. For good reason: The federal question of whether the Relevant Segment was navigable at statehood was "(1) necessarily raised, (2) actually disputed, (3) substantial, and (4) capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Gunn*, 568 U.S. at 258.

Indeed, even now, the State challenges only one of those factors: whether navigability-at-statehood

disputes are capable of resolution by federal courts without "disrupting the federal-state balance." *Id.*[3] More than a century of federal courts entertaining such claims confirms that the answer is yes. *See supra* Part I.C. So does this Court's decision in *Grable*, which likewise involved a quiet-title action that turned on federal law. In concluding that federal courts could exercise jurisdiction over that case without disrupting the federal-state balance, this Court declared itself "in venerable company, quiet-title actions having been the subject of some of the earliest exercises of federal-question jurisdiction over state-law claims." *Grable*, 545 U.S. at 315. Just like the quiet-title actions that turned on federal tax law in *Grable*, quiet-title actions that turn on federal navigability law are sufficiently "rare" to "portend

[3] While the State offhandedly claims in the body of its petition that the other factors were not satisfied either, its question presented is explicitly limited to whether the Fourth Circuit "err[ed] by exercising removal jurisdiction … without considering the disruption to the federal-state balance." Pet. i; *see also* Pet.4-5, 22; Sup. Ct. R. 14.1(a) ("Only the questions set out in the petition, or fairly included therein, will be considered by the Court."). At any rate, the State challenges the first two factors only on the ground that navigability is not a federal question in original states, *but see supra* Part I.C, and the third only on the ground that application of law to fact is not a "substantial" federal question. But federal question jurisdiction extends to "controvers[ies] respecting the validity, construction *or effect* of federal law," *Grable*, 545 U.S. at 313 (emphasis added; alteration omitted), and the scope of a state's sovereign rights to lands under navigable waters is clearly a substantial federal question, as it is of "great importance to all the states of the union," *Pollard*, 44 U.S. at 220.

only a microscopic effect on the federal-state division of labor." *Id.* at 315, 319.

The State claims this case is different because it involves a quiet-title claim by a state, and there is a "special rule" under the fourth *Gunn* factor that counsels against removal when a state is the party opposing removal. Pet.5, 24-27. But the Fourth Circuit did not address that argument because the State never raised it. That makes this a wholly unsuitable vehicle for considering whether states are entitled to special solicitude under the fourth *Gunn* factor, as the issue was neither pressed in nor passed upon by either court below.[4]

In all events, the State concedes that removal of cases in which a state is a party is appropriate when "'removal serves an overriding federal interest.'" Pet.25 (quoting *Nevada v. Bank of Am.*, 672 F.3d 661, 676 (9th Cir. 2012)). Navigability-at-statehood claims present just such an interest. This Court long ago, and again very recently, recognized the strong temptation "'for a state by courts … to adopt a retroactive rule for determining navigability which … would enlarge what actually passed to the state, at the time of her admission.'" *PPL Montana*, 565 U.S. at 604-05 (quoting *Brewer-Elliott*, 260 U.S. at 88). That temptation is on full display here: North Carolina seeks to escape federal court in hopes of persuading its

[4] This would also be a poor vehicle for exploration of the fourth *Gunn* factor because it is not even clear that the *Gunn* factors apply to navigability-at-statehood disputes. Because a state's title to the bed of a navigable river is "conferred … by the Constitution itself," *Corvallis*, 429 U.S. at 374, navigability-at-statehood claims arguably arise *directly* under the Constitution.

own courts to allow it to reclaim riverbed that it sold to private parties more than a century ago and has thoroughly taxed and otherwise recognized as private property in all respects. The overriding federal interest in ensuring that state courts do not "give the Constitution a diversified operation where uniformity was intended," *Holt State Bank*, 270 U.S. at 55-56, more than suffices to make this navigability-at-statehood claim appropriate for resolution in the federal courts.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for certiorari.

Respectfully submitted,

MELISSA ARBUS SHERRY
LATHAM
& WATKINS LLP
555 Eleventh Street, NW
Washington, DC 20004

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
LAUREN N. BEEBE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Respondent Cube Yadkin Generation LLC

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