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

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

JOSHUA H. STEIN
Attorney General of North Carolina

Matthew W. Sawchak*
Solicitor General

Ryan Y. Park
Deputy Solicitor General

Asher P. Spiller
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6400
msawchak@ncdoj.gov

*Counsel of Record

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INTRODUCTION

Alcoa[1] does not deny that the petition here raises a fundamental and unresolved question of federalism: Did the original States, when they ratified the Constitution, give the federal government the authority to decide who owns the States' sovereign lands?

Instead of addressing that question directly, Alcoa spends much of its response rehashing its trial evidence. But the merits of the underlying title dispute are not before this Court. North Carolina's petition seeks review of the Fourth Circuit's mistaken exercise of federal subject-matter jurisdiction over a state-law claim. That important jurisdictional issue is cleanly presented here.

Alcoa also claims, incorrectly, that this Court has already decided that federal law governs sovereign ownership of submerged lands in the original thirteen States. However, none of the cases that Alcoa cites even address that issue. Instead, those cases, which all involve later-admitted States, show only that the equal-footing doctrine does not apply to cases like this one.

Moreover, Alcoa does nothing to diminish the conflict between the Fourth Circuit's ruling on navigability and contrary rulings by the highest courts of at least ten original States. Alcoa tries to explain away the conflict, but cites only distinctions

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[1] Alcoa Power Generating LLP and Cube Yadkin Generation LLC are respondents here. This brief refers to both respondents collectively as Alcoa.

that the state-court decisions themselves did not make.

Next, Alcoa argues that this case is a poor vehicle to decide choice of law on navigability, because North Carolina's navigability law allegedly mirrors federal law. But that argument overlooks the navigability rules that North Carolina courts actually use. In the leading North Carolina case, the state supreme court applied navigability rules that diverge from the federal test.

Finally, Alcoa barely even addresses the second question presented, the scope of embedded-federal-question jurisdiction.

Alcoa does not deny that the Fourth Circuit's application of *Gunn v. Minton* here clashes with rulings in at least four other circuits. Those circuits disfavor federal jurisdiction in at least three circumstances that are all present here: (i) when a lawsuit is filed by a State, (ii) when the federal question does not involve a statute, and (iii) when the federal question arises in an area traditionally regulated by the States.

Applying any of these rules here would require reversal of the Fourth Circuit's jurisdictional ruling. Thus, this case is an excellent vehicle for the Court to clarify, among other things, how *Gunn* applies to state-government lawsuits.

In sum, the petition here presents important issues of federalism that have divided lower courts. Certiorari is warranted to resolve those divisions.

I. This Case Raises Fundamental, Unresolved Questions About the Retained Rights of the Original States.

A. The Constitution Did Not Strip the Original States of Their Sovereign Property.

As Alcoa agrees, when the original States ratified the Constitution, they ceded to the federal government only those powers that were "expressly provided by the Constitution itself." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985)); *see* Opp. 26. All the States' other pre-ratification powers remained intact. U.S. Const. amend. X.

No provision of the Constitution transferred the original States' sovereign lands to the federal government or subjected state property ownership to federal law. Instead, the original States "reserved [these rights] to themselves." *United States v. Texas*, 339 U.S. 707, 716 (1950); *accord Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867) ("the shores of navigable waters and the soils under the same in the original States were not granted by the Constitution to the United States, but were reserved to the several States").

North Carolina's ratification of the Constitution thus did not abridge the State's authority to define, under state law, the scope of its sovereign ownership of submerged lands. Because the Fourth Circuit's decision to the contrary overlooks the structure and history of the Constitution on an important issue of federalism, it warrants this Court's review.

B. This Court Has Never Held that Sovereign Ownership of Submerged Lands in the Original States Is a Federal Question.

Alcoa tries to explain away the discrepancies between the decision below and constitutional history by citing this Court's equal-footing cases. But those cases only underscore that federal law does not decide the scope of the original States' sovereign property rights.

For example, Alcoa cites *Corvallis*, where this Court held that federal law applies to riverbeds "acquired by the State [of Oregon] at the time of its admission to the Union," because those lands "had once been the property of the United States." *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 376-77 (1977); *see* Opp. 16; *see also PPL Mont., LLC v. Montana*, 565 U.S. 576, 604 (2012) (the equal-footing doctrine applies only to land that "passed to the State upon her admission" to the Union).

That holding proves North Carolina's point. Federal navigability rules do not apply to the original States because those States were not "admi[tted] to the Union"; they *formed* the Union. Indeed, this Court explicitly observed in *Corvallis* that an "original State [is] free to choose its own legal principles to resolve property disputes relating to land under its riverbeds." 429 U.S. at 378 (citing this feature of federalism as a reason to allow later-admitted States to apply their own navigability rules in limited circumstances).

Likewise, Alcoa cites *Phillips Petroleum*, which decided that Mississippi, a later-admitted State, gained title to non-navigable tidal waters at statehood. *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 472 (1988). As Alcoa notes, in *Phillips*, the thirteen original States filed an amicus brief that pointed out the varying title rules those States had adopted for tidal waters. *Id.* at 475. Alcoa claims that the Court in *Phillips* "expressly rejected the original States' argument," Opp. 26, but the opposite is true: The Court *agreed* with the amicus brief. Citing that brief, the Court affirmed Mississippi's adoption of the tidal rule. *Phillips*, 484 U.S. at 475.[2]

Finally, Alcoa cites *United States v. Holt State Bank*, 270 U.S. 49 (1926), but that case again proves that the equal-footing doctrine applies only to lands with a federal origin. *Holt* decided "whether the lands under [a] lake were disposed of by the United States before Minnesota became a State." *Id.* at 57. That question decided ownership of the disputed lakebed, the Court explained, because the federal government could not pass title to land that it did not own. *Id.* at 55. This ownership-based rule underscores the

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[2] Alcoa's misreading of *Phillips* results from treating arguments of the petitioner, Phillips Petroleum, as if they were arguments by the original States. *See* Opp. 27. The operative passage from *Phillips* states: "our ruling today will not upset titles in all coastal States, as *petitioners* [i.e., Phillips Petroleum] intimated at oral argument." *Phillips*, 484 U.S. at 483 (emphasis added).

distinction between original and later-admitted States. The federal government never owned submerged lands in the original States.

In sum, the equal-footing cases that Alcoa cites reinforce North Carolina's position here: Because sovereign lands in the original States lack a federal origin, their ownership is exclusively a matter of state law.[3]

C. Differences in States' Sovereign Property Rights Are Simply a Function of History.

Alcoa is also wrong that applying different choice-of-law rules to sovereign-property disputes in different States creates "unequal sovereignty" that violates the equal-footing doctrine. Opp. 12. In truth, the States' sovereign property rights already differ in many ways. These differences do not offend the Constitution.

For example, in many non-original States, the federal government owns vast swaths of land. Indeed, the federal government today owns over 45% of the total land in the eleven westernmost continental states. In contrast, federal landholdings in many of

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[3] Alcoa also cites *Massachusetts v. New York*, 271 U.S. 65 (1926), but that case has nothing to do with the issues here. The case involved a state-vs.-state title dispute. As the Court explained, "title to the land in controversy depends upon the meaning and effect of [a pre-1789] treaty" between two then-sovereign States—not on any rule of federal navigability law. *Id.* at 81.

the original States are negligible. For instance, the federal government owns only 0.3% of the land in Connecticut.[4]

These disparities in sovereign property rights do not reflect unconstitutional inequalities; they reflect history.

Sovereign land in former territories has a federal origin: It was once directly owned by the United States, and it passed to the new States upon their admission to the Union. That history explains why federal law decides navigability-for-title in the later-admitted States. For those States, title to these lands was "conferred . . . by the Constitution itself." *PPL Montana*, 565 U.S. at 591; *see* U.S. Const. art. IV, § 3, cl. 1 (New States Clause).

In contrast, the original States took title to their sovereign lands when they declared independence from the British Crown. Because the federal government played no role in granting those States ownership of their lands, state law has always decided the scope of that ownership. *See* U.S. Const. amend. X.

D. Alcoa's Theory of Federal-Question Jurisdiction Proves Too Much.

Conceding, as it must, that the equal-footing doctrine does not apply to the original States, Alcoa makes an astonishing claim: that there is federal

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[4] Carol Hardy Vincent et al., Cong. Research Serv., *Federal Land Ownership: Overview and Data* 2 (2017), https://fas.org/sgp/crs/misc/R42346.pdf.

jurisdiction here because "the question of what sovereign rights original states retained at the founding arises directly under the Constitution." Opp. 26. That view of federal-question jurisdiction would make *any* state-law issue a federal question.

Of course, Alcoa is right that federal law decides the *division* between federal powers and state powers. But once a court decides that a particular power lies on the state side of the division, the federal issue ends. As this Court has held, the *scope* of the rights that the States retained under the Constitution is governed by state law. *Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991).

Here, Alcoa concedes that the original States retained their sovereign property rights under the Constitution. Opp. 26. Therefore, North Carolina law decides the scope of those rights.

In sum, Alcoa's brief confirms that certiorari is warranted to review the Fourth Circuit's unprecedented ruling that the Constitution displaced pre-ratification property rights in the original States.

II. Alcoa Fails to Reconcile the Fourth Circuit's Ruling with Incompatible Court Decisions in the Original States.

Certiorari is also warranted because the Fourth Circuit's ruling diverges from the navigability tests of at least ten original States. Alcoa's attempts to explain away these conflicts fail.

First, Alcoa claims that the six original States with navigability rules that generate narrower sovereign ownership of submerged lands have voluntarily forfeited their federal property rights. Opp. 16. That argument overlooks history: the original States cannot forfeit federal rights by applying their own common law, because that common law *predates* the very existence of any federal rights.

Alcoa gives no example of an original State that has actually relinquished its supposedly federal property rights. None of the cases that Alcoa cites support anything of the kind. Instead, the cases make clear that the narrower navigability tests in certain original States were independently formed as a matter of state law. *See* Pet. 17.

Second, Alcoa tries to distinguish other cases by claiming that those cases merely address the distinct question of navigability-*for-public-use*, rather than navigability-*for-title*. This argument too overlooks the cases themselves, which do not follow Alcoa's distinction between navigability-for-public-use and navigability-for-title. *See* Pet. 15-18.

Indeed, the cases that Alcoa cites affirmatively contradict its argument that these States apply different navigability rules for use and title.

For instance, in *Adirondack League Club v. Sierra Club*, the New York Court of Appeals explained that, under New York law, private *ownership* of submerged lands is available only for land under non-navigable waters. 92 N.Y.2d 591, 601, 706 N.E.2d

1192, 1194 (1998). Although the dispute before the court concerned public use, the court decided the scope of use rights by applying title-based rules. *Id*.

Likewise, the Supreme Court of North Carolina has expressly applied the same navigability rules to decide both title and use. *See Gwathmey v. State ex rel. Dep't of Env't, Health & Nat. Res.*, 342 N.C. 287, 300, 464 S.E.2d 674, 681-82 (1995) (title); *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988) (use). Moreover, like the New York Court of Appeals, the Supreme Court of North Carolina has explicitly linked title and use. In *Rohrer*, for example, the court held that because "[n]avigable waters . . . are subject to the public trust doctrine," which guarantees public *use* of navigable waters, "[a] land grant in fee embracing such submerged lands is void." 322 N.C. at 527, 369 S.E.2d at 828.

This linkage is no accident. The whole point of the English-common-law rule that the sovereign owns submerged land under navigable waters is to protect "public use" of those waters. *Shively v. Bowlby*, 152 U.S. 1, 14 (1894). This origin explains why the same navigability test governs use and title alike.

In sum, nothing in Alcoa's brief diminishes the conclusion that at least ten original States apply their own laws to decide navigability. The Fourth Circuit's ruling that federal law governs navigability clashes directly with these state-law doctrines.

III. Alcoa Is Wrong that the Questions Presented Would Not Affect the Outcome in this Case.

Alcoa next claims that this case is a poor vehicle to decide whether federal law decides navigability-for-title in the original States. Alcoa argues that North Carolina's navigability test is similar to the federal test. Opp. 20. Alcoa's arguments are not only wrong, but irrelevant to the vitality of the petition.

The questions presented here involve subject-matter jurisdiction over this *kind* of case—not the merits of a single title dispute. Here, moreover, subject-matter jurisdiction is outcome-determinative. If North Carolina prevails on either of the questions in the petition, the federal courts need to dismiss this case for lack of subject-matter jurisdiction.

In any event, Alcoa is wrong that North Carolina navigability law does not differ from federal law. As the petition describes, the North Carolina courts apply state-specific rules for deciding navigability that differ markedly from the federal test. *See Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 462; Pet. 15-16.

Alcoa dismisses *Gwathmey* as "not a title case," Opp. 21, but as discussed above, that description defies *Gwathmey* itself. The *Gwathmey* opinion uses the word "title" forty-seven times. 342 N.C. at 287-310, 464 S.E.2d at 676-88.

Alcoa is also wrong to claim that North Carolina courts have already found the Yadkin River non-navigable. *See* Opp. 7. None of the cases that Alcoa cites involved the forty-five-mile segment of the

Yadkin that is at issue here. *See Cornelius v. Glen*, 52 N.C. (1 Jones) 512, 514 (1860); *State v. Glen*, 52 N.C. (1 Jones) 321, 326 (1859). The fact that *other parts* of the Yadkin are non-navigable says nothing about the navigability of the segment here. *See* App. 52a.

In sum, Alcoa has not shown that a decision by this Court would be anything short of outcome-determinative.

IV. This Case Is an Excellent Vehicle For Deciding Important Questions on Embedded-Federal-Question Jurisdiction.

This case also presents an ideal vehicle to clarify the scope of federal-question jurisdiction over state-law claims. *See Gunn v. Minton*, 568 U.S. 251, 258 (2013).

Under *Gunn*, before a federal court may exercise embedded-federal-question jurisdiction over a state-law claim, the court must first decide that the state claim is "capable of resolution in federal court without disrupting the federal-state balance approved by Congress." *Id.*

As the petition describes, the circuits have divided sharply on the meaning of *Gunn*'s federalism test. For example, at least four circuits apply per se rules that clash with the Fourth Circuit's exercise of jurisdiction here:

- Under one of these per se rules, when a State files state-law claims in its own courts, the Ninth Circuit allows removal only when it "serves an overriding federal interest."

Nevada v. Bank of Am. Corp., 672 F.3d 661, 676 (9th Cir. 2012).

- In contrast, when "states have traditionally been dominant" in a particular legal area, the Fifth Circuit forbids removal. *Singh v. Duane Morris LLP*, 538 F.3d 334, 339-40 (5th Cir. 2008).

- When an asserted federal interest has no anchor in a federal statute, the Eighth and Eleventh Circuits "disfavor federal involvement." *Great Lakes Gas Transmission, LP v. Essar Steel Minn. LLC*, 843 F.3d 325, 334 (8th Cir. 2016); *accord Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1302-03 (11th Cir. 2008).

Alcoa does not deny that the Fourth Circuit's decision clashes with these rules. Nor could it: had the Fourth Circuit applied any of these rules here, it would have rejected jurisdiction. After all, this lawsuit was filed by a sovereign State, involves an area of law traditionally decided by States, and does not implicate any federal statutes.

In response, Alcoa claims that North Carolina did not adequately raise these issues below. Opp. 30. In fact, however, the parties have contested embedded-federal-question jurisdiction here at every available stage—from Alcoa's notice of removal in the district

court, to merits briefing in the Fourth Circuit, to North Carolina's petition for rehearing en banc.[5]

In sum, the decision below clashes with the law in at least four other circuits—overseeing twenty-one States—on an important question of federalism. This case therefore offers an excellent vehicle for the Court to clarify *Gunn*'s federalism test.

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[5] *See, e.g.*, C.A. App. J.A. at 50-52 (Notice of Removal); C.A. Br. of Appellant at 7-22; C.A. Pet. for Reh'g En Banc at 13-19.

Alcoa is also wrong that North Carolina did not argue below that *Gunn*'s federalism test applies differently to lawsuits filed by a State. *See* C.A. Pet. for Reh'g En Banc at 16 (noting that federalism concerns are especially pronounced in this case because it involves "a lawsuit filed by a state government"); C.A. Br. of Appellant at 20 (similar).

CONCLUSION

The State of North Carolina respectfully requests that the petition be granted.

Respectfully submitted,

JOSHUA H. STEIN
Attorney General

Matthew W. Sawchak
Solicitor General

Ryan Y. Park
Deputy Solicitor General

Asher P. Spiller
Assistant Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, NC 27602
(919) 716-6400

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