No. 22-410

In The Supreme Court of the United States

CHAMA TROUTSTALKERS, LLC; Z&T CATTLE CO., LLC,
PETITIONERS

v.

ADOBE WHITEWATER CLUB OF NEW MEXICO,
A NON-PROFIT CORPORATION; NEW MEXICO WILDLIFE
FEDERATION, A NON-PROFIT CORPORATION;
NEW MEXICO CHAPTER OF BACKCOUNTRY HUNTERS &
ANGLERS, A NON-PROFIT CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEW MEXICO

REPLY BRIEF FOR THE PETITIONERS

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INTRODUCTION

The New Mexico Supreme Court held that the United States' pre-statehood title to non-navigable waters in New Mexico was encumbered by a "broad" easement allowing any person to walk or wade onto those lands to the extent "reasonably necessary to effect the enjoyment" of "general outside recreation, sports, and fishing"—and so the same broad easement encumbers all riparian lands in modern-day New Mexico. Pet. App. 20a, 25a, 26a–28a (internal quotation marks omitted). Neither the New Mexico Supreme Court nor respondents have marshalled any contemporaneous legal authority supporting that sweeping holding, which conflicts with the precedential decisions of other state supreme courts and implicates the vast *current* holdings of the United

States and federally recognized tribes, as well as those of petitioners and many other private landholders. Respondents' assortment of reasons to deny review of this important question are by turns mistaken and irrelevant. This Court should grant the petition.

I. There Are No Barriers To This Court's Review

Respondents posit a number of purported jurisdictional or prudential barriers to this Court's review. Brief in Opposition ("BIO") 11–17. Their contentions lack merit.

1. Respondents are incorrect that the decision below rested on an adequate and independent state-law ground. BIO 11–12. Respondents point to the New Mexico Supreme Court's construction of the Trespass Statute not to authorize the Trespass Rule. Pet. App. 24a–26a. But that holding was not independent of the court's federal-law holding.

In the decision below, the New Mexico Supreme Court first held that the Trespass Rule violated the state constitutional right of the public to walk and wade onto private land when enjoying water sports. Pet. App. 17a–24a. Petitioners had argued that recognizing such a right would violate the Takings Clause of the U.S. Constitution. The New Mexico Supreme Court considered and rejected that argument on the ground that the United States' pre-statehood title was subject to the same broad recreational easement. *Id.* at 26a–28a. But had it agreed with petitioners, the court would have been required to either construe the state constitution not to encompass the putative right or hold that the state right is preempted by the federal constitution. In either

event, it would have held that the asserted state right does not exist.

The New Mexico Supreme Court further held that, purely as a matter of *state constitutional avoidance*, it would construe the Trespass Statute not to authorize the Trespass Rule. Pet. App. 24a–26a; see Pet. 13 n.1. The court viewed its holding as "the only constitutional reading" of the statute. *Id.* at 24a; *see id.* at 25a (holding that construing the statute to authorize the Trespass Rule would be "unconstitutional").

The statutory holding therefore was not independent of the resolution of the federal-law question. Were this Court to reverse the New Mexico Supreme Court's federal-law holding, the court would be required to determine whether its interpretation of the state constitution could be sustained in light of the federal Takings Clause. If not, then the court would necessarily reconsider its construction of the Trespass Statute, which rested exclusively on its interpretation of the state constitutional right.

This Court has consistently held that a state-law ruling is not an independent and adequate state ground when it "implicates an underlying question of federal law." *Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 388 (1986) (citing cases). For example, in *St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772 (1981), the Court held that it has jurisdiction to review a state-court judgment that "literally * * * concerns the construction of a state statute" where the state court's "analysis depended entirely on its understanding of the meaning of [a federal statute] and the First Amendment." *Id.* at 780 n.9 (citing similar precedents). So too here.

2. Respondents puzzlingly claim that petitioners "effectively concede" that the Trespass Rule is invalid because they have acknowledged that incidental touching of riverbanks during boating would not amount to a trespass. BIO 12–13; see Pet. 9. The contention makes no sense. The Trespass Rule prohibits only "trespass" on private land, and the signs issued under the rule refer to "walk[ing] and wad[ing]." N.M. Admin. Code § 19.31.22.13(B), (D)(3), Pet. App. 52a–53a. Petitioners merely explained that incidental contact with riverbanks by a boat would not amount to a trespass at all—and so would not violate the Trespass Rule or landowners' constitutional rights.

3. Equally puzzling is respondents' extensive discussion of the purported "defects" in the Takings Clause issue that petitioners raised below. BIO 13–17. Petitioners have not presented a Takings Clause issue in the petition. *See* Pet. i. As the petition explains, the New Mexico Supreme Court rejected petitioners' Takings Clause argument based on an antecedent interpretation of federal law: that, before statehood, the United States' title in the beds and banks of non-navigable waters was burdened by a "broad" recreational easement to facilitate water sports and other activities. Pet. 14. This Court clearly has jurisdiction over that express holding.

To the extent that the legislative and judicial takings arguments that petitioners advanced below "raise[] complex issues," BIO 14, the New Mexico Supreme Court can address those issues on remand after this Court corrects its misunderstanding of the scope of the United States' title before statehood. And the lack of "factfinding" about petitioners' chain of title or the "public use of waters flowing across their lands,"

BIO 16, has no bearing on the question whether a broad recreational easement burdened U.S. title to riparian lands before statehood.

II. Respondents Offer Virtually No Substantive Defense Of The Decision Below

Respondents offer virtually no substantive defense of the actual holding of the New Mexico Supreme Court. *See* BIO 23–29. Indeed, respondents' merits discussion conspicuously refuses to use the words "easement," "walk," or "wade" at all—instead defending an imaginary holding limited to the "'incidental' touching" of riverbanks. BIO 26. That even respondents cannot bring themselves to defend the actual basis for the decision below militates strongly in favor of review.

1. Respondents' principal arguments are unresponsive to the question presented. Respondents argue that when the United States conveyed title to private parties, those grants were subject to the public-trust doctrine governing the use of any nonnavigable waters running across that land. BIO 25–27. But that is undisputed. *See* Pet. 4. What petitioners challenge is the New Mexico Supreme Court's holding that the land was subject to a broad recreational easement allowing anyone to walk and wade on the property at issue. As to that question, respondents have failed to cite a single contemporaneous judicial decision, government publication, legal treatise, or other source ever recognizing such an easement.

Respondents claim that a 1945 New Mexico Supreme Court decision "explain[ed] that longstanding local customs and laws necessarily permitted 'incidental' touching of beds and banks to fish and recreate

on public waters." BIO 26 (citing *State ex rel. State Game Comm'n v. Red River Valley Co.*, 182 P.2d 421 (N.M. 1945) ("*Red River*")). That is both incorrect and irrelevant. It is incorrect because *Red River* addressed only the use of the waters, not intrusions onto the land. *See* Pet. 5–6. And it is irrelevant because the question here is not whether "incidental touching" is permitted, but whether the land is subject to a "broad" easement allowing *walking* and *wading* on private property whenever necessary for water sports and the like. Pet. App. 20a. *Red River*'s historical discussion said nothing at all about that. It is telling that, although respondents repeatedly invoke *Red River*'s supposedly thorough historical analysis, BIO 3, 4, 10, 25, 26, 27, they are unable to point to even a single historical source that supports the decision below.

In much the same vein, respondents argue that those landowners who acquired property through Mexican land grants rather than U.S. patents were subject to Mexican property law. BIO 24–25. But respondents have cited no Mexican legal sources supporting the purported easement either. And in any event, the holding below encompassed all land in New Mexico, not only land traceable to Mexican land grants.[1]

2. Respondents' other contentions lie even further afield. Respondents note, for example, that Mexican

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[1] Respondents invoke the documents specifying the particulars for petitioners' properties, which were submitted at the rehearing stage below, *see* BIO 24–27, but nothing

law did not limit water use to riparian landowners. BIO 27–28. That has nothing to do with whether riparian lands were burdened by a broad recreational easement. Respondents also note that New Mexico has not embraced common-law rules governing the use of the water, citing *Red River*. BIO 28. The petition explains as much. Pet. 18. But the question here is whether the United States' title was subject to ordinary common-law principles of *land* ownership, such as the right to exclude intruders.

Respondents spill much ink insisting that this Court's holding in *Summa Corp. v. California ex rel. State Lands Comm'n*, 466 U.S. 198 (1984), was limited to the California-specific statute at issue in the case. BIO 17–18, 28–29. But they ultimately do not dispute that if the United States' title was not burdened by a public easement at the time that a parcel was conveyed to a private party, and no such easement was reserved in the instrument of conveyance, then the property was taken free and clear of any such easement. That is the only proposition for which the petition cites *Summa Corp*. Pet. 16.

3. Resorting to hyperbole, respondents assert that the Trespass Rule bars "any public use" of New Mexico waters. BIO 6. That is incorrect. For one, respondents ignore riparian land owned by the state.

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in the decision below turned on those particulars, as distinct from general property rights throughout New Mexico. Nor could a patent's statement that property is subject to "'vested and accrued water rights,'" BIO 26 (quoting petitioner Z&T Cattle's patent), ever properly yield a broader recreational easement over the *land*.

And even as to privately owned land, the decision below acknowledged that numerous water activities do not require walking or wading onto privately held land—including ordinary boating and fishing from boats. Pet. App. 19a.

4. Finally, grasping for an alternative justification for the result below, respondents suggest that even if the United States' title was *not* encumbered by the easement recognized by the New Mexico Supreme Court, the easement could have been imposed on private landowners as a form of "subsequent state regulation." BIO 27. That argument is clearly wrong. While landowners are subject to state land regulation, such as rules governing "adverse possession," *ibid.*, a compulsory *easement* would be a taking requiring just compensation. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021).

III. The Question Presented Warrants This Court's Review

Respondents contend that the decision below is not sufficiently "important" to warrant this Court's review—despite their previous insistence that the case presented "an issue of great public interest and importance." Resp. N.M.S.C. Opening Br. 27. Their arguments are misplaced.

1. Respondents are wrong that there is no conflict of authority among state supreme courts. BIO 19–23.

As an initial matter, respondents incorrectly claim that the petition asserts a conflict "over 'the existence and extent' of the *public trust doctrine*," which is a state-law principle governing the use of the waters. BIO 19 (quoting Pet. 20) (emphasis added). What the

petition actually describes is a conflict over "the existence and extent of * * * an *easement*" over the United States' pre-statehood title to riparian lands. Pet. 20 (emphasis added).

As to that question, the supreme courts of four states—Colorado, Alabama, Kansas, and Wyoming—have rejected the view adopted below. Pet. 20–25. Respondents argue that those decisions depended exclusively on state law. BIO 20–23. But the decisions construed state law in light of the courts' conclusions about U.S. title to riparian lands before statehood.

For example, respondents' treatment of the Colorado Supreme Court's decision in *Hartman v. Tresise*, 84 P. 685 (1905), ignores the opinion's express holding that because "the United States owned the lands which, after [statehood], it conveyed to the plaintiff," and the "patent [did not] contain, any reservation of any public right of fishery, or of any *easement over his lands to enable the public to enjoy such right*[,]," the state lacked the "power" to impose a public-trust easement. *Id.* at 687 (emphasis added); *see* Pet. 20–22. The conflict with the decision below is especially sharp because much of Colorado was acquired from Mexico through the Treaty of Guadalupe Hidalgo and therefore was subject to the same background principles of Mexican and Spanish law as New Mexico. *See* National Archives, *Treaty of Guadalupe Hidalgo*.[2]

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[2] https://www.archives.gov/milestone-documents/treaty-of-guadalupe-hidalgo#:~:text=This%20treaty%2C%20signed%20on%20February,Oklahoma%2C%20Kansas%2C%20and%20Wyoming.

Likewise, respondents do not address the Alabama Supreme Court's express holding in *Hood v. Murphy*, 165 So. 219 (1936), reaffirmed in *Wehby v. Turpin*, 710 So.2d 1243, 1250 (Ala. 1998), that because the land underlying non-navigable streams had been "ceded to the United States" and then conveyed to patentees, the state could not authorize members of the public to intrude on that land without paying just compensation—a holding that rested on this Court's equal-footing doctrine precedent. *Hood*, 165 So. at 220 (citing *United States v. Utah*, 283 U.S. 64 (1931)). Respondents would distinguish *Hood* because the state statute at issue purported to transfer "ownership" of the lands to the state, BIO 22, but that is a distinction without even the slightest difference: A state may no more impose an uncompensated easement on private property than it may outright confiscate title.

As for *State ex rel. Meek v. Hays*, 785 P.2d 1352 (Kan. 1990), and *Day v. Armstrong*, 362 P.2d 137 (Wyo. 1961), both decisions rejected the sort of broad public easement that the decision below recognized. *See* Pet. 23–25. It is logically implicit in those holdings that such an easement did not *already* burden riparian lands when the United States held title before statehood. Respondents also argue that the decisions are distinguishable because Kansas and Wyoming were not subject to the Treaty of Guadalupe Hidalgo. BIO 22. They are mistaken. Parts of both states were acquired through the Treaty of Guadalupe Hidalgo. See National Archives, *Treaty of Guadalupe Hidalgo*, *supra*; Pet. 24.

2. Respondents all but admit that the holding below would apply to title held by the United States and federally recognized tribes. Although they note that

"[t]his case does not involve the rights of the United States or any tribe," BIO 19, they do not identify any basis on which federal or tribal land could be distinguished. If U.S. title was subject to a broad recreational easement before statehood, after all, then it would presumably be subject to the same easement today, as would lands that the federal government conveyed to tribes. Respondents allege federal lands in other western states have not faced a "crisis," *ibid.*, but the majority of those states have rejected the New Mexico Supreme Court's extreme position. *See* Pet. 19–28.

Respondents also suggest that the decision below may not be important to landowners because petitioners acknowledge that a boat's momentary contact with the riverbank is not a trespass. BIO 18–19. That is akin to claiming that if you allow your neighbor to briefly step onto your lawn while mowing her grass, you should also be happy for her to host a barbecue in your front yard.

In truth, the New Mexico Supreme Court established a "broad" easement allowing any member of the public to *walk* or *wade* onto private beds and banks whenever "reasonably necessary" to enjoy water sports and other activities—not merely to touch the banks briefly during boating. Pet. App. 20a. That is clear from its express disagreement with the Wyoming Supreme Court's decision in *Day*, *supra*. Pet. App. 23a. And while the court offered that any "use" of the beds or banks should be "of minimal impact," *ibid.*, no recognized principle of property law requires landowners to allow intruders onto their land so long as they promise to clean up after themselves.

3. Respondents contend that the question presented lacks nationwide importance because it supposedly "heavily depends on New Mexico law, history, and custom, and law specific to New Mexico land claims." BIO 17. But as explained above, respondents have not pointed to any New Mexico-specific legal source that recognizes a broad recreational easement burdening privately held land. While respondents claim that the decision below discusses New Mexico-specific materials, BIO 17, the cited passages of the opinion do not cite any sources recognizing such an easement.

Moreover, even under respondents' own merits arguments, the question presented would be resolved the same way for any of the states acquired from Mexico through the Treaty of Guadalupe Hidalgo. *See* BIO 24. That includes not only New Mexico, but all or parts of Arizona, California, Colorado, Kansas, Nevada, Oklahoma, Utah, and Wyoming—states that are home to over 65 million people. See National Archives, *Treaty of Guadalupe Hidalgo*, *supra*; U.S. Census Bureau, *State Population Totals and Components of Change: 2020–2022*.[3] For example, respondents rely on this Court's statement in *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644 (1876), that property rights "'were not affected by the change of sovereignty and jurisdiction,'" BIO 24, but the Court was referring to *all* territory acquired from Mexico, not only present-day New Mexico. 93 U.S. at 661; *see also* BIO 24 (citing 1854 statute about the New Mexico

[3] https://www.census.gov/data/tables/time-series/demo/popest/2020s-state-total.html#par_textimage_1574439295.

Territory, which covered multiple present-day states). A fundamental property-rights question affecting such a wide swath of the Nation's riparian lands warrants this Court's attention.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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