No.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. North Carolina, like the other original States, gained sovereign title to its submerged lands in 1776, when it declared independence from the British Crown. Since that time, North Carolina's sovereign property rights have been decided by state law.

Did the Court of Appeals err by holding that sovereign title to submerged lands in the original thirteen States depends on federal law instead?

II. North Carolina filed this lawsuit in state court, raising a single state-law claim to quiet title to part of the riverbed under the Yadkin River. Alcoa removed the case to federal court, claiming that a federal question was embedded in North Carolina's state-law claim.

Did the Court of Appeals err by exercising removal jurisdiction over North Carolina's state-law claim without considering the disruption to the federal-state balance, as required by *Gunn v. Minton*, 568 U.S. 251 (2013)?

PARTIES

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

Alcoa Power Generating, Inc., was the defendant below and is a respondent here.

Alcoa moved in the Court of Appeals to add Cube Yadkin Generation, LLC, as an additional appellee. Alcoa stated that it had sold its rights to the property at issue in this case to Cube. The Court of Appeals granted Alcoa's motion. Cube is therefore a respondent here.

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The Fourth Circuit's order denying rehearing en banc, by an 8-7 vote, is reproduced in the appendix at 111a.

The opinion of the United States District Court for the Eastern District of North Carolina that denied the State's remand motion is reported at 989 F. Supp. 2d 479 (2013) and is reproduced in the appendix at 104a. The district court's findings of fact and conclusions of law, entered after a one-issue bench trial, are available at 2015 WL 2131089 and are reproduced in the appendix at 91a. The district court's later order, granting Alcoa's motion for summary judgment on other issues, is reported at 135 F. Supp. 3d 385 (2015) and is reproduced in the appendix at 72a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1).

The Fourth Circuit issued its opinion and entered judgment on April 3, 2017. The Fourth Circuit denied rehearing en banc on June 9, 2017.

On August 28, 2017, Chief Justice Roberts extended the time to file this petition until November 6, 2017. *North Carolina v. Alcoa Power Generating, Inc.*, No. 17A195 (U.S. Aug. 28, 2017).

CONSTITUTIONAL PROVISIONS

Relevant constitutional provisions are reproduced in the appendix to this petition. App. 113a-14a.

INTRODUCTION

This petition seeks to restore the principle that state law decides the sovereign property rights of the original thirteen States.

"When the revolution took place, the people of each state became themselves sovereign; and in that character, held the absolute right to all their navigable waters, and the soil under them . . . subject only to the rights since surrendered by the constitution to the general government." *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, 410 (1842).

Under these principles, North Carolina took sovereign title to its submerged lands in 1776, when it declared independence from the British Crown. From that time until the Fourth Circuit's decision here, the common law of North Carolina has governed the State's sovereign ownership of its submerged lands.

In this case, North Carolina seeks a declaratory judgment that it has sovereign title to a forty-five mile stretch of land under the Yadkin River. North Carolina began the lawsuit by filing a state-law quiet-title claim in state court. Alcoa removed the lawsuit to the United States District Court for the Eastern District of North Carolina. The district court denied North Carolina's motion to remand.

On appeal, a divided panel of the Fourth Circuit held that North Carolina's title to the Yadkin riverbed was a federal question. In reaching that decision—a decision on which the court denied rehearing en banc by an 8-7 vote—the Fourth Circuit erred in deciding two important issues of federal law.

First, the Fourth Circuit incorrectly held that federal law governs the sovereign ownership of submerged lands that the original States acquired before the Constitution was ratified—that is, before federal law even existed.

That choice-of-law ruling overlooks the structure and history of the Constitution. The Fourth Circuit's decision assumes that the ratification of the Constitution made the original States' ownership of their sovereign lands a subject of federal law. That assumption is incorrect. No provision in the Constitution grants the federal government an interest in the sovereign lands of the original States. Indeed, the Constitution "never would have been ratified if the States and their courts were to be stripped of their sovereign authority except as expressly provided by the Constitution itself." *Alden v. Maine*, 527 U.S. 706, 727 (1999) (quoting *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 239 n.2 (1985)).

The Fourth Circuit's decision on choice of law is not only wrong, but inconsistent with the laws of at least ten original States. The courts of those States define navigability under state-law rules that vary from federal common law.

Second, the Fourth Circuit erred by exercising subject-matter jurisdiction over North Carolina's state-law claim without considering the disruption to the federal-state balance.

Before exercising jurisdiction over an exclusively state-law lawsuit—even one that involves an embedded federal question—this Court's precedents require that federal courts consider whether doing so

would "disturb the balance of federal and state judicial responsibilities." *See Gunn v. Minton*, 568 U.S. 251, 255 (2013).

The Fourth Circuit failed even to consider this prerequisite to federal jurisdiction. That failure is inconsistent with the rulings of several other Courts of Appeals. Those courts have declined to exercise federal jurisdiction under *Gunn* where, as here, Congress has never enacted a federal statute on point.

Moreover, the decision below conflicts with the Ninth Circuit's holding (as well as an earlier Fourth Circuit decision) that when a State is the party opposing removal in an embedded-federal-question case, federal courts may exercise jurisdiction only if "removal 'serves an overriding federal interest.'" *Nevada v. Bank of Am. Corp.*, 672 F.3d 661, 676 (9th Cir. 2012) (quoting *W. Va. ex rel. McGraw v. CVS Pharm., Inc.*, 646 F.3d 169, 178 (4th Cir. 2011)).

To restore "the proper balance of responsibility between state and federal courts" that the Fourth Circuit's decision has disrupted, North Carolina respectfully requests that the Court grant this petition. *Gunn*, 568 U.S. at 256.

STATEMENT

I. The History of State Ownership of Navigable Waters

A. North Carolina Adopts a Navigability Test

"States, in their capacity as sovereigns, hold title to the beds under navigable waters . . . ." *PPL Mont., LLC v. Montana*, 565 U.S. 576, 589 (2012). This rule originates from English common law, which defined navigable waters as those "where the tide ebbs and flows." *Shively v. Bowlby*, 152 U.S. 1, 11, 14 (1894). In England, with its "dominant coastal geography," *PPL Montana*, 565 U.S. at 590, inland rivers were "presumed nonnavigable." *Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 379 (1977).

In 1776, when North Carolina declared independence, it gained title over its lands directly from the British Crown. *See Waddell's Lessee*, 41 U.S. (16 Pet.) at 416.

In defining the scope of its sovereign property rights, North Carolina chose to depart from the English tide-based rules. As the Supreme Court of North Carolina observed almost two centuries ago, those rules are "entirely inapplicable" to North Carolina because of "the great length of [the State's] rivers," which "extend[ ] far into the interior." *Wilson v. Forbes*, 13 N.C. (2 Dev.) 30, 34-35 (1828).

Like many of the original States, North Carolina adopted a navigability-in-fact test to govern its ownership of submerged lands. *See id.* at 35. The State therefore took title to all lands under waters that were capable of being navigated in their natural

condition by watercraft. *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). Under North Carolina law, moreover, rivers do not "lose . . . their navigability" merely because they are "intercepted by falls." *Broadnax v. Baker*, 94 N.C. 675, 681 (1886). Instead, a river is navigable if it can be traversed for pleasure, even if it cannot be put to commercial use. *State v. Twiford*, 136 N.C. 603, 608-09, 48 S.E. 586, 588 (1904).

Since independence, North Carolina has held title to these navigable waters in trust for its citizens. The State's 1776 constitution made waters within the State's boundaries the "property of the people of this State, to be held by them in sovereignty." N.C. Const. of 1776, decl. of rights, § XXV.

The current North Carolina Constitution maintains "the policy of this State to conserve and protect its lands and waters for the benefit of all its citizenry." N.C. Const. art. XIV, § 5. Applying that policy, the Supreme Court of North Carolina has confirmed that lands under navigable water "are held in trust by the State for the benefit of the public." *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527, 369 S.E.2d 825, 828 (1988).

In practice, this public trust puts strict limits on any argument (like Alcoa's argument here) that a riverbed of a navigable river is no longer state property. The Supreme Court of North Carolina has held that any transfer of a sovereign-owned riverbed requires specific legislative approval. *Gwathmey*, 342 N.C. at 304, 464 S.E.2d at 684.

B. Constitutional Ratification and Its Effects

In 1789, North Carolina ratified the U.S. Constitution and, together with the other original States, formed the United States. Upon ratification of the Constitution, North Carolina retained all rights previously vested in the State as sovereign. The only exception involved powers "surrendered to the national government by the constitution of the United States." *Shively*, 152 U.S. at 15. For example, North Carolina surrendered the right to regulate its commerce with foreign nations. U.S. Const. art. I, § 8.

No provision of the Constitution surrendered North Carolina's title to the lands under its navigable waters. As this Court has explained, "the original States did not grant these properties to the United States but reserved them to themselves." *United States v. Texas*, 339 U.S. 707, 716 (1950); *accord Pollard v. Hagan*, 44 U.S. (3 How.) 212, 230 (1845).

In addition, ratification did not alter the power of the original States to *define the scope* of their sovereign property rights. Instead, "the law of real property is, under our Constitution, left to the individual States to develop and administer." *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 484 (1988); *accord Corvallis*, 429 U.S. at 378 ("Under our federal system, property ownership is not governed by a general federal law, but rather by the laws of the several States.").

North Carolina's ratification of the Constitution therefore left intact the State's ownership of submerged lands, as well as the State's power to define the scope of that ownership. *See* U.S. Const. amend. X ("The powers not delegated to the United

States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.").

C. Newly Admitted States and the Equal-Footing Doctrine

Unlike the original thirteen States, newly admitted States generally did not own their submerged lands before they joined the United States. Instead, those lands were held by the federal government "in trust for the future States." *Shively*, 152 U.S. at 49; *accord Idaho v. Coeur d'Alene Tribe*, 521 U.S. 261, 283 (1997).

To provide new States with "similar rights" to those of the original States, this Court developed the equal-footing doctrine. *United States v. Louisiana*, 363 U.S. 1, 16 (1960) (citing *Pollard*, 44 U.S. (3 How.) 212). That federal doctrine holds that when new States are admitted to the Union, they take title to the land under their navigable waters as "the result of federal action." *United States v. Oregon*, 295 U.S. 1, 14 (1935).[1]

Because new States obtained their land titles by federal transfer, "any ensuing questions of navigability for determining state riverbed title are governed by federal law." *PPL Montana*, 565 U.S. at 591.

Under the federal common law of navigability, new States take title to land under rivers that "at the time of statehood" were "used, or [we]re susceptible of

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[1] Lands under non-navigable (and not tidally influenced) water, however, remain owned by the federal government. *PPL Montana*, 565 U.S. at 591.

being used, . . . as highways for commerce, over which trade and travel [were] conducted in the customary modes of trade and travel on water." *Id.* at 592 (quoting *The Daniel Ball*, 77 U.S. (10 Wall.) 557, 563 (1871)).[2]

II. North Carolina's Quiet-Title Lawsuit

In the early 20th century, North Carolina allowed the predecessors of Alcoa Power Generating, Inc., to construct four hydroelectric dams across the Yadkin River to generate power for an aluminum smelting plant. App. 4a-5a. After Alcoa closed the smelting plant in 2010, North Carolina filed this lawsuit to ensure that the Yadkin riverbed is used for the benefit of the people of North Carolina. *See* N.C. Const. art. XIV, § 5.

Specifically, North Carolina filed this quiet-title action in state court, seeking a declaration under state law that a forty-five mile stretch of land under the Yadkin River belongs to North Carolina, not to Alcoa. The complaint did not assert any claims under federal law. App. 4a, 31a-32a.

North Carolina's lawsuit turns on the following question: Was the relevant stretch of the Yadkin navigable in 1776? On the theory that this question arose directly "under the U.S. Constitution," Alcoa

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[2] The equal-footing doctrine also grants new States the land under waters that are "tidally influenced." *PPL Montana*, 565 U.S. at 591. For these coastal waters, federal common law mirrors the English rule: New States gained title to submerged land up to the "mean high tide line." *Phillips*, 484 U.S. at 490; *see also Knight v. U.S. Land Ass'n*, 142 U.S. 161, 183 (1891).

removed the case to the Eastern District of North Carolina. App. 8a.

North Carolina moved to remand. It pointed out that in the original thirteen States, state law, not federal law, decides navigability. App. 8a. The district court rejected that argument and denied the motion to remand. The court held that the equal-footing doctrine—a doctrine that applies to later-admitted States—also governs the navigability of rivers in original States like North Carolina. App. 8a.

This holding had two key effects. Jurisdictionally, it led the district court to conclude that North Carolina's state-law claim involved an embedded federal question. App. 11a. Substantively, the court's holding caused the court to apply federal law instead of North Carolina law on the navigability of waters in the State. App. 16a-17a.

On the merits, the district court held, after a bench trial, that the contested part of the Yadkin River was not navigable under federal navigability standards. App. 5a. In the end, the court granted summary judgment for Alcoa, holding that Alcoa owned the riverbed. App. 72a.

On North Carolina's appeal, a divided panel of the Fourth Circuit affirmed. App. 2a.

Unlike the district court, the panel majority did not base its analysis of navigability on the equal-footing doctrine. App. 10a-18a. Instead, the majority reasoned that under *Martin v. Waddell's Lessee*, 41 U.S. (16 Pet.) 367, lawsuits over title to riverbeds in the thirteen original States always present questions of federal law. App. 12a-13a.

The majority went on to conclude that the perceived role of federal law in this case triggers federal-question jurisdiction. App. 10a-12a. The majority, however, did not apply the tests that limit embedded-federal-question jurisdiction. *See* App. 10a-18a; *Gunn*, 133 S. Ct. at 1063.

Judge Robert B. King dissented in a thirty-seven-page opinion. He emphasized that North Carolina became sovereign in 1776, before the federal government existed. He also pointed out that the original States did not, by ratifying the Constitution, cede any land titles to the federal government. For these reasons, Judge King concluded, federal law does not govern the navigability of rivers in North Carolina or the other original States. App. 31a-46a; *see* App. 34a ("the Constitution has nothing to do with the land holdings of the Original States").

Judge King also concluded that even if federal law did play a role here, this case would still fail the tests for embedded-federal-question jurisdiction. App. 47a-48a.

North Carolina timely petitioned for rehearing en banc. The Court of Appeals voted to deny rehearing by an 8-to-7 vote. App. 112a.

REASONS FOR GRANTING THE PETITION

I. The Choice of Law on Sovereign Ownership of Submerged Lands in the Thirteen Original States Is a Question of Exceptional Importance.

This petition raises a fundamental, unresolved question of federalism: By ratifying the Constitution, did the original States give the federal government the authority to decide who owns the States' sovereign lands?

The Fourth Circuit answered yes. That is, the court held that sovereign title to submerged lands is, in all fifty States, an issue of federal common law. Through this holding, the Fourth Circuit altered sovereign property rights held by North Carolina (and other original States) since before the United States was even formed.

As a matter of constitutional structure, that result would be possible only if the Constitution itself made title to riverbeds in the thirteen original States a federal question. After all, until the Constitution was ratified, the original thirteen States held title to sovereign lands as defined by their own laws. *Waddell's Lessee*, 41 U.S. (16 Pet.) at 410. Those rights were diminished later only to the extent that the Constitution itself stated expressly. *PPL Montana*, 565 U.S. at 590.

This Court has long recognized the exceptional nature of cases that concern the States' sovereign ownership of submerged lands. For example, in 1845, when it first articulated the equal-footing doctrine, the Court observed that it approached the decision "with a just sense of its great importance to all the

states of the union." *Pollard*, 44 U.S. (3 How.) at 220. In dissent, Justice Catron went further, calling a dispute over sovereign ownership of submerged lands "the most important controversy ever brought before this court." *Id.* at 235.

Despite its importance, the question presented here—whether state or federal law governs sovereign ownership of submerged lands in the original thirteen States—has never been decided by this Court. Although this Court has applied federal common law in navigability-for-title cases that involve the later-admitted States, it has never decided whether that test applies to the original thirteen States.

Here, that question is squarely presented and outcome-determinative.

If the federal navigability test does not apply to the original thirteen States, the Fourth Circuit's exercise of federal-question jurisdiction here was erroneous.

The choice of law on navigability affects the merits of this lawsuit as well. That is so because North Carolina law on navigability differs from federal common law in multiple ways. App. 50a-51a; *see infra* pp. 15-16. For example, for a particular river to be navigable for title purposes, federal law requires that the river be navigable for commercial use. *PPL Montana*, 565 U.S. at 592. North Carolina law does not. *Twiford*, 136 N.C. at 608-09, 48 S.E. at 588. The outcome of this case—ownership of the Yadkin—therefore flows directly from the choice of law that this petition addresses.

In sum, this case raises an exceptionally important, and unresolved, question of constitutional

law: whether the original States, by ratifying the Constitution, gave the federal government the authority to decide the States' title to existing sovereign lands. This case also presents an ideal vehicle for resolving that question.

II. The Fourth Circuit's Decision Is Inconsistent with the Laws of Other Jurisdictions.

This Court's review is also warranted to resolve inconsistent case law. The Fourth Circuit's reasoning that federal law decides navigability for title clashes with decisions in at least ten original States that apply state law to decide title to submerged lands. In many of these States, state navigability law differs markedly from federal law. Applying federal law in these States could unsettle longstanding property rights.

North Carolina offers a stark example of how the Fourth Circuit's decision to apply federal law disrupts long-settled state title to submerged lands. North Carolina's navigability test differs from the federal test in at least two important ways.

First, under federal law, for a given segment of a river to be considered navigable, the entire segment must be navigable without interruption. A need to travel by land to avoid falls or rapids (i.e., portaging) defeats navigability under federal law. *See PPL Montana*, 565 U.S. at 597-98. In contrast, under North Carolina law, "waters lose not their navigability" simply "because [they are] intercepted by falls." *Broadnax*, 94 N.C. at 681.

Second, under federal law, only *commercial* navigation of a river can establish navigability. Recreational navigation is irrelevant, except as indirect evidence of commercial navigation. *PPL Montana*, 565 U.S. at 600. Under North Carolina law, in contrast, water is navigable if it can be traversed by any "useful vessel[ ]," including "small craft used for pleasure." *Gwathmey*, 342 N.C. at 300, 464 S.E.2d at 682.

Because of these differences between federal and North Carolina law, the Fourth Circuit's decision to apply federal law narrows the range of riverbeds that North Carolina holds in trust for its citizens. *See* App. 31a, 57a (King, J., dissenting).

Similarly, under South Carolina law, 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. *State v. Head*, 330 S.C. 79, 91-92, 498 S.E.2d 389, 395 (1997). The stricter federal navigability standard, which requires uninterrupted navigability and focuses on commercial use alone, therefore threatens South Carolina's longstanding ownership of its sovereign lands as well.

Like the Carolinas, New Hampshire and New York recognize navigability based on recreational use. *Hartford v. Gilmanton*, 101 N.H. 424, 425-26, 146 A.2d 851, 853 (1958); *Adirondack League Club, Inc. v. Sierra Club*, 92 N.Y.2d 591, 603-04, 706 N.E.2d 1192, 1195-96 (1998). Further, in New York (as in North Carolina), small interruptions in a vessel's ability to traverse a waterway do not defeat a finding of navigability. *Danes v. State*, 219 N.Y. 67, 70-71, 113 N.E. 786, 787 (1916).

By contrast, in other original States, applying federal law would enlarge state ownership of submerged lands, at the expense of private landowners.

Five original States continue to follow the English rule, which limits sovereign ownership to tidal waters: Connecticut, Maryland, Massachusetts, New Jersey, and Rhode Island.[3] In these States, inland rivers are therefore presumed to be non-navigable. By replacing these States' strict, tide-based navigability rules with the broader federal standard, the Fourth Circuit's decision would transfer riverbeds from private landowners to the States.

In Virginia, the Fourth Circuit's decision could enlarge the State's ownership over submerged lands in a different way. Although Virginia's navigability rules for inland rivers mirror the federal common law, *see Norfolk City v. Cooke*, 68 Va. (27 Gratt.) 430, 434 (1876), Virginia courts apply a different test for tidal waters. Unlike federal common law, which recognizes state ownership up to the "mean high tide line," *Phillips*, 484 U.S. at 490, Virginia law limits sovereign title to the "mean *low*-water mark." *Scott v. Burwell's Bay Improvement Ass'n*, 281 Va. 704, 709, 708 S.E.2d 858, 861 (2011) (emphasis added). This rule of Virginia law has existed since 1679, long before ratification of the Constitution. *Taylor v.*

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[3] *See Clickner v. Magothy River Ass'n*, 424 Md. 253, 267 & n.6, 35 A.3d 464, 473 & n.6 (2012); *Champlin's Realty Assocs., L.P. v. Tillson*, 823 A.2d 1162, 1165 (R.I. 2003); *City of Newark v. Nat. Res. Council in Dep't of Envtl. Prot.*, 82 N.J. 530, 542-44, 414 A.2d 1304, 1310-11 (1980); *McGibney v. Waucoma Yacht Club, Inc.*, 149 Conn. 560, 563, 182 A.2d 622, 623 (1962); *Brosnan v. Gage*, 240 Mass. 113, 116-17, 133 N.E. 622, 624 (1921).

Commonwealth, 102 Va. 759, 770-71, 47 S.E. 875, 880 (1904). By displacing Virginia's state-law rule, the Fourth Circuit's decision risks unsettling private ownership of coastal lands between the high and low tidelines.[4]

In sum, the Fourth Circuit's decision warrants this Court's review because it creates widespread discord between federal and state courts on a legal issue with important implications for federalism and property rights.

III. State Law Decides Sovereign Ownership of Submerged Lands in the Original Thirteen States.

This Court's review is warranted for another reason as well: The Fourth Circuit decided the important question here in an incorrect way.

Specifically, the court erred by affirming a decision that expanded the equal-footing doctrine beyond its limits. That doctrine applies only to the later-admitted States. The equal-footing doctrine has never before been applied to the original States, which entered the union as preexisting sovereigns.

This Court has long recognized that the equal-footing doctrine applies only to the "new States admitted into the Union since the adoption of the Constitution." *Shivley*, 152 U.S. at 26; *see* U.S. Const. art. IV, § 3, cl. 1 (allowing the admission of new

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[4] Like Virginia, Massachusetts has followed the low-water-mark test for coastal waters. *Rauseo v. Commonwealth*, 65 Mass. App. Ct. 219, 222, 838 N.E.2d 585, 588-89 (2005); *Storer v. Freeman*, 6 Mass. (6 Tyng) 435, 437-39 (1810).

States). The equal-footing doctrine governs the sovereign rights of newly admitted States because these States had no preexisting sovereignty. Instead, they received their sovereignty as a "result of federal action in admitting a state to the Union." *Oregon*, 295 U.S. at 14.

That point explains why this Court has applied federal law to decide navigability in the newly admitted States: Sovereign land titles in those States were conferred "by the [U.S.] Constitution itself," so issues that decide the scope of those land titles, such as navigability, likewise have a federal character. *PPL Montana*, 565 U.S. at 591 (quoting *Corvallis*, 429 U.S. at 374).

Sovereign lands in the original thirteen States, in contrast, lack a federal origin. Thus, there is no basis for applying federal law to decide the navigability of rivers—or any other aspect of sovereign land titles—in those States. Instead, land titles in the original thirteen States have a state-law origin, so state law decides the scope of those titles.

This point is illustrated indirectly by *Corvallis*, in which this Court held that state law must decide ownership of state lands that were not transferred directly from the federal government. 429 U.S. at 372. *Corvallis* involved a dispute between the State of Oregon and an Oregon business over the ownership of land that, after Oregon's statehood, became part of a riverbed because of later changes in the river's course. The Oregon Supreme Court applied federal common law to settle title to the riverbed. This Court, however, reversed that choice of law. Because the land at issue had not been transferred directly from the United States to Oregon at statehood, its ownership had to

"be decided solely as a matter of Oregon law." *Id.* at 372.

To guide future cases, the Court announced the following choice-of-law rule: Federal law applies when "the question in any Court, state or federal, is, whether a title *to land which had once been the property of the United States* has passed." *Id.* at 377 (emphasis added) (quoting *Wilcox v. Jackson*, 38 U.S. (13 Pet.) 498, 517 (1839)).[5]

Here, the Fourth Circuit overlooked the scope limitation in this rule. The court held that federal law governs the ownership of even those lands that have never "been the property of the United States." *Id.*

That reasoning clashes with the history and structure of the Constitution. Although sovereign ownership of submerged lands passed to the later-admitted States from the federal government, that was not the case for the original thirteen States. Instead, the original States gained title to their submerged lands "when the Revolution took place." *Waddell's Lessee*, 41 U.S. (16 Pet.) at 410. Ratification of the Constitution left those pre-ratification titles intact. *Shively*, 152 U.S. at 15; *Pollard*, 44 U.S. (3

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[5] *See also Borax Consol. v. City of Los Angeles*, 296 U.S. 10, 22 (1935) ("The question as to the extent of this federal grant, that is, as to the limit of the land conveyed, or the boundary between the upland and the tideland, is necessarily a federal question."); *Oregon*, 295 U.S. at 14 ("Since the effect upon the title to such lands is the result of federal action in admitting a state to the Union, the question, whether the waters within the State under which the lands lie are navigable or nonnavigable, is a federal, not a local one."); *Brewer-Elliott Oil & Gas Co. v. United States*, 260 U.S. 77, 88 (1922) ("[T]he validity and effect of an act done by the United States is necessarily a federal question.").

How.) at 230. For these reasons, federal navigability law applies only when the lands at issue have a federal origin. *See, e.g.*, *Corvallis*, 429 U.S. at 377.

This understanding of the interaction between constitutional history and choice of law is confirmed in a treatise that this Court has previously cited on these issues: "Because the Federal government never had original jurisdiction over the trust lands and waters of the Thirteen Original States, it never conveyed these lands to any of them. Thus, no Federal question arises as to what lands were held in trust by any of the original States." David Slade, *Putting the Public Trust Doctrine to Work* 18 (1990), *cited in PPL Montana*, 565 U.S. at 603.

To support the contrary choice of law that the Fourth Circuit applied here, the court relied mainly on cases that apply the equal-footing doctrine to later-admitted States. *See* App. 10a-18a.[6] As shown above, that reliance was mistaken.

The Fourth Circuit relied on only one case that involved an original State like North Carolina: *Waddell's Lessee*. As Judge King recognized in his dissent, however, *Waddell's Lessee* does not hold that federal law governs navigability in the original States. *See* App. 32a-35a. Navigability was not the issue in *Waddell's Lessee*. Instead, the case involved an issue of New Jersey law: the effect of the American

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[6] *See PPL Montana*, 565 U.S. 576 (Montana); *Corvallis*, 429 U.S. 363 (Oregon); *United States v. Utah*, 283 U.S. 64 (1931) (Utah); *Shively*, 152 U.S. 1 (Oregon); *Knight*, 142 U.S. 161 (California); *Pollard*, 44 U.S. (3 How.) 212 (Alabama); *see also Phillips*, 484 U.S. 469 (Mississippi).

Revolution on land titles in New Jersey. 41 U.S. (16 Pet.) at 408, 414, 416-17.

More broadly, *Waddell's Lessee*, a diversity case, does not even mention federal-question jurisdiction. Nor could it have: The case was decided thirty-three years before the federal courts obtained general federal-question jurisdiction. *See* Jurisdiction and Removal Act of 1875, ch. 137, § 1, 18 Stat. 470, 470.

Finally, even if the Court had applied federal law in *Waddell's Lessee*, that choice of law would be invalid today. *Waddell's Lessee* was decided almost a century before *Erie Railroad v. Tomkins*, which generally requires federal courts sitting in diversity to apply state law. 304 U.S. 64, 80 (1938).

In sum, the Fourth Circuit overlooked principles of federalism that required the court to apply state law, not federal law, to decide navigability in this case. That oversight calls for the Court to reinforce—and, if necessary, clarify—the federalism principles that protect the original thirteen States.

IV. The Fourth Circuit Erred by Exercising Federal Removal Jurisdiction over North Carolina's State-Law Claim.

Certiorari is warranted for another reason as well: The Fourth Circuit overlooked the strict limits on federal-question jurisdiction over state-law claims. *See Gunn*, 568 U.S. at 258.

North Carolina's complaint in this case asserts a single claim: a request under state law for a declaratory judgment on title to real property. App. 4a.

Alcoa recharacterized North Carolina's state-law claim as one arising under federal substantive law and, on that basis, removed the case to federal court. This kind of removal is possible in only a "slim category" of cases: where a state-law claim includes a federal issue that is "(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; *accord Grable & Sons Metal Prods., Inc. v. Darue Eng'g & Mfg.*, 545 U.S. 308, 314 (2005). When, as here, a plaintiff invokes state law alone, all four of the *Gunn* factors must be satisfied, or federal subject-matter jurisdiction is absent. *Gunn*, 568 U.S. at 258.

Here, the Fourth Circuit overlooked most of the *Gunn* test. The court began—and ended—its discussion by concluding that federal law governs navigability here. App. 13a-15a. As shown above, that conclusion was mistaken. *See supra* pp. 18-22. Thus, this case fails the first two parts of the *Gunn* test.

But even if the Fourth Circuit's conclusion on choice of law had been correct, the court still would have been required to test the perceived federal question under the remaining *Gunn* factors. As Judge King noted in dissent, App. 47a-48a, the panel majority skipped these required steps.

That omission was pivotal, because this case fails the third and fourth parts of the *Gunn* test.

Under the third factor in *Gunn*, the substantiality test, the "crucial factor" is whether the federal issue is a "'nearly pure issue of law'" that would be "'controlling in numerous other cases,'" as opposed to

a "'fact-bound and situation-specific' issue." *Adventure Outdoors, Inc. v. Bloomberg*, 552 F.3d 1290, 1299-1301 (11th Cir. 2008) (quoting *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677, 700-01 (2006)); *accord Great Lakes Gas Transmission, LP v. Essar Steel Minn. LLC*, 843 F.3d 325, 331 (8th Cir. 2016); *Kalick v. Nw. Airlines Corp.*, 372 F. App'x 317, 320 (3d Cir. 2010).

Here, the issue presented by North Carolina's lawsuit—whether a forty-five mile stretch of the Yadkin River was navigable in 1776—is highly fact-specific. Because the allegedly federal issue raised here is not a "pure issue of law," it is not substantial under *Gunn*. *Empire HealthChoice*, 547 U.S. at 700.

Nor does this case satisfy the fourth factor in *Gunn*, the federalism test. When courts apply this test, they balance (a) the relevant State's interest in having its courts resolve the type of issues in question and (b) any congressional articulation of a federal interest in having the federal courts decide issues of that kind. *See Gunn*, 568 U.S. at 264; *Grable*, 545 U.S. at 315.

As Courts of Appeals other than the Fourth Circuit have recognized, this balancing requires "sensitive judgments about congressional intent, judicial power, and the federal system." *Bank of America*, 672 F.3d at 676 (quoting *Merrell Dow Pharm., Inc. v. Thompson*, 478 U.S. 804, 810 (1986)). When there is no federal statute on point, the "congressionally approved balance disfavor[s] federal involvement." *Great Lakes*, 843 F.3d at 334; *accord Adventure Outdoors*, 552 F.3d at 1302-03. In addition, when "states have traditionally been dominant" in a particular legal sphere, the state interest generally prevails over any

federal one. *Singh v. Duane Morris LLP*, 538 F.3d 334, 340 (5th Cir. 2008).

Based on the above principles, both the Ninth Circuit and an earlier panel of the Fourth Circuit have articulated a special rule that disfavors removals when, as here, a State is the party opposing removal. In that situation, a court should exercise jurisdiction only when "removal 'serves an overriding federal interest.'" *Bank of America*, 672 F.3d at 676 (quoting *McGraw*, 646 F.3d at 178).

The decision on review here clashes with the principle set forth in these cases that States enjoy "sovereign protection" from embedded-federal-question removals like Alcoa's removal here. *Id*.[7]

Indeed, even if one did not give special deference to States that oppose removal of their lawsuits from state courts, the Fourth Circuit's exercise of federal jurisdiction here would still violate *Gunn*'s federalism test.

North Carolina has a powerful sovereign interest in allowing its state courts to decide the ownership of the State's natural resources. Since 1776, North Carolina has held all of the State's waters in trust for "the people of this State." N.C. Const. of 1776, decl. of rights, § XXV. Under the current state constitution, the State remains obligated "to conserve and protect

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[7] The Ninth Circuit's rule applies this Court's teachings correctly. As this Court has recognized, "considerations of comity" require federal courts to be "reluctant to snatch cases which a State has brought from the courts of that State, unless some clear rule demands it." *Franchise Tax Bd. v. Constr. Laborers Vacation Tr. for S. Cal.*, 463 U.S. 1, 21 n.22 (1983). The Ninth Circuit's rule relies on this very reasoning. *Bank of America*, 672 F.3d at 676.

its . . . waters for the benefit of all its citizenry." N.C. Const. art. XIV, § 5.

Since the State's earliest days, the North Carolina state courts have played a central role in defining the public-trust property that the state constitution protects. *See, e.g.*, *Gwathmey*, 342 N.C. at 292-95, 464 S.E.2d at 677-79 (surveying North Carolina decisions of this type since the early 19th century).

The federal government, in contrast, has no interest in having its courts decide a property dispute like this one. For example, this case does not involve:

- Interpretation or enforcement of a federal statute;[8]
- The federal government's power to regulate interstate commerce, App. 34a-36a (King, J., dissenting); or
- "[T]he scope and limitations of a complex federal regulatory framework."[9]

Instead, this case involves a "matter[ ] of peculiarly local concern": ownership of real property. *McCarty v. McCarty*, 453 U.S. 210, 237 (1981). Under these circumstances, "there is no federal interest

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[8] *Cf. Grable*, 545 U.S. at 310 (exercising federal jurisdiction over a quiet-title claim that turned on a provision of the Internal Revenue Code); *United States v. City of Loveland, Ohio*, 621 F.3d 465, 472 (6th Cir. 2010) (exercising federal jurisdiction to enforce a consent decree that was entered to comply with the Clean Water Act).

[9] *Bd. of Comm'rs of the Se. La. Flood Prot. Auth. E. v. Tenn. Gas Pipeline Co.*, 850 F.3d 714, 725 (5th Cir. 2017).

whatever." *Mobil Oil Corp. v. Coastal Petroleum Co.*, 671 F.2d 419, 426 (11th Cir. 1982).[10]

In sum, the Fourth Circuit erred by failing to apply most of the four-factor test that this Court clarified in *Gunn*. Worse, the Fourth Circuit committed that error in a way that raises grave federalism concerns.

Because the Fourth Circuit's approach to embedded-federal-question removals conflicts with the approach taken by other Courts of Appeals, this case calls for review by this Court.

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[10] The Fourth Circuit's decision also differs from the Eleventh Circuit's rejection of jurisdiction in *Mobil*, a pre-*Grable* case in which the defendant similarly claimed that an embedded federal navigability rule controlled the plaintiff's state-law claim. 671 F.2d at 426. The Eleventh Circuit concluded that "[f]ederal law is appropriately indifferent to [the] invocation . . . of a federal test of navigability as a precondition to determining a question of state law." *Id.*

CONCLUSION

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

Respectfully submitted,

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