No. 16-1305

In The
Supreme Court of the United States

GREGORY NIES, *et ux.*,

Petitioners,

v.

TOWN OF EMERALD ISLE, NORTH CAROLINA,

Respondent.

On Petition for Writ of Certiorari to the North Carolina Court of Appeals

MOTION FOR LEAVE TO FILE AND BRIEF OF *AMICI CURIAE* OWNERS' COUNSEL OF AMERICA, NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, CATO INSTITUTE, AND PROFESSOR DAVID L. CALLIES IN SUPPORT OF PETITIONER

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MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE*

Owners' Counsel of America, the National Federation of Independent Business Small Business Legal Center, Cato Institute, and Prof. David L. Callies hereby move, pursuant to Supreme Court Rule 37.2, for leave to file a brief *amici curiae* in support of the petition for writ of certiorari. *Amici* file this motion because Respondent Town of Emerald Isle declined to consent to *amici*'s filing of their brief. Petitioners have consented. The proposed brief is attached.

As more fully explained in the proposed brief, *amici* are organizations that frequently participate in cases raising significant constitutional and property rights issues, and a legal academic whose scholarship focuses on the public trust. *Amici* have a vital interest in this case because it affords the Court the opportunity to clarify that although state legislatures may redefine property law, they cannot avoid the self-executing command of the Fifth Amendment that they pay just compensation when long-recognized property interests are taken as a consequence. If the decision below stands, state legislatures will continue to employ statutory redefinition as an end run around the Just Compensation Clause.

Accordingly, *amici* respectfully request the Court grant leave to file the attached brief as *amici curiae*.

Respectfully submitted.

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MAY 2017

QUESTION PRESENTED

Whether the Takings Clause permits a state to statutorily redefine an entire coastline of privately owned dry beach parcels as a "public trust" area open for public use, without just compensation.

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INTEREST OF *AMICI CURIAE*

Owners' Counsel of America. Owners' Counsel of America (OCA) is an invitation-only national network of the most experienced eminent domain and property rights attorneys.[1] They have joined together to advance, preserve and defend the rights of private property owners, and thereby further the cause of liberty, because the right to own and use property is "the guardian of every other right," and the basis of a free society. *See* James W. Ely, *The Guardian of Every Other Right: A Constitutional History of Property Rights* (3d ed. 2008). OCA is a non-profit 501(c)(6) organization sustained solely by its members. Only one member lawyer is admitted from each state. OCA members and their firms have been counsel for a party or amicus in many of the property cases this Court has considered in the past forty years, and OCA members have also authored and edited treatises, books, and law review articles on property law and property rights.

NFIB Legal Center. The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. The National Federation

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1. In accordance with this Court's Rule 37, *amici* state that counsel of record for all parties received notice of *amici*'s intention to file this brief at least 10 days prior to the due date. Petitioners consented to the filing of this brief, but Respondent withheld consent. *Amici* also affirm that no person other than *amici*, their members, or their counsel made a monetary contribution to its preparation or submission.

of Independent Business (NFIB) is the nation's leading small business association, representing members in Washington, D.C., and all 50 state capitols. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses.

NFIB represents 325,000 member businesses nationwide, and its membership spans the spectrum of business operations, ranging from sole proprietor enterprises to firms with hundreds of employees. While there is no standard definition of a "small business," the typical NFIB member employs 10 people and reports gross sales of about $500,000 a year. The NFIB membership is a reflection of American small business.

Cato Institute. The Cato Institute is a nonpartisan public-policy research foundation established in 1977 and dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*.

Professor David L. Callies. David L. Callies is the Benjamin A. Kudo Professor of Law at the University of Hawaii's William S. Richardson School of Law, where he teaches land use, state and local government, and real property. Callies is one of the nation's recognized authorities on the law of public trust and regulatory takings, especially how they related to beaches and littoral property. Among the many books he has written, co-authored, or edited are *Property*

and the Public Interest (3d ed. 2007); *Eminent Domain: A Handbook of Condemnation Law* (2011); *Preserving Paradise: Why Regulation Won't Work* (1994); *Regulating Paradise: Land Use Controls In Hawaii* (1984); *Cases and Materials on Land Use* (5th ed. 2008); and *The Role of Customary Law in Sustainable Development* (2006). His research focuses on the public trust, and among his scholarship are articles on *Background Principles, Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations*, 46 Val. U. L. Rev. 339 (2002) (with J. David Breemer); *The Categorical (*Lucas*) Rule: "Background Principles," Per Se Regulatory Takings, and the State of Exceptions*, 30 Touro L. Rev. 371 (2014) (with David A. Robyak); *Custom and Public Trust: Background Principles of State Property Law?*, 30 Envtl. L. Rep. 10003 (2000); *Regulatory Takings and the Supreme Court: How Perspectives on Property Rights Have Changed from* Penn Central *to* Dolan*, and What State and Federal Courts Are Doing About It*, 28 Stetson L. Rev. 523 (1999); and *Through a Glass Clearly: Predicting the Future in Land Use Takings Law*, 54 Washburn L. Rev. 43 (2014). Professor Callies believes his scholarly perspective and extensive study of the doctrines which are at issue in this case will aid the Court.

SUMMARY OF ARGUMENT

The North Carolina Court of Appeals permitted the Town of Emerald Isle (Town) to impress into public service the portion of the Nies family's property above the mean high water mark as a road and park. North Carolina law has never subjected this dry sand to public ownership, through the public trust doctrine or otherwise. The court below, however, ignored this distinction, holding that the Town's permitting the public to use to the Nies' dry sand was not a taking because the Nies never owned the right to exclude the public from "public trust" areas of the beach. But under North Carolina law—and the law of the vast majority of other jurisdictions—the public trust is limited to land below the mean high water mark, and cannot be extended by the legislature or by a court, and at the same time avoid the constitutional obligation to pay just compensation. Simply put, the public trust doctrine isn't a means to transform without compensation what has always been private property under North Carolina law, into a public resource.

This brief makes three points. *First*, the just compensation requirement is self-executing, and even if a state may alter its property law by statute, it cannot avoid its constitutional obligation to pay for the change. *Second*, since its inception, the scope of North Carolina's public trust doctrine has been strictly limited to state-owned beaches seaward of the mean high water mark; until it was extended to include the dry sand beach up to the vegetation line, the North Carolina public trust was consistent with the law of a vast majority of other jurisdictions. *Third*, expansion of the "public trust" beyond its traditional scope cannot completely swallow up the Just Compensation Clause.

ARGUMENT

I. JUST COMPENSATION IS SELF-EXECUTING

The state legislature cannot avoid the self-executing right to just compensation. *Jacobs v. United States*, 290 U.S. 13, 17 (1933) (the "right to just compensation could not be taken away by statute or be qualified"). That is because the Fifth Amendment has a "self-executing character . . . with respect to compensation." *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315 (1987). In other words, the right to recover just compensation for property taken for public use cannot be burdened by state law limitations, particularly a legislature's or a municipality's declaring that what has always been private property is, with the stroke of a pen, public land.[2]

We begin from this foundational principle because the Fifth Amendment right to be secure in property is undermined—or, as in the present case, forfeited entirely—when title to land is not governed by established rules of property and principles of common law. It is essential that courts faithfully and

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2. The Court has affirmed this "essential principle: Individual freedom finds tangible expression in property rights." *United States v. James Daniel Good Real Property*, 510 U.S. 43, 61 (1993). The Framers recognized that the right to own and use property is "the guardian of every other right" and the basis of a free society, and the Constitution embraces the Lockean view that "preservation of property [is] the end of government, and that for which men enter into society." See James W. Ely, The Guardian of Every Other Right: A Constitutional History of Property Rights (3d ed. 2008) (noting John Adams' proclamation that "property must be secured or liberty cannot exist"). John Locke, Second Treatise on Civil Government, XI § 138.

consistently apply settled principles of property to secure an owner's fundamental rights. The court below undermined that bedrock principle when it concluded that a statute could alter the private nature of the dry sand beach without paying compensation, and transform it into public land, and shift to the Nies and their neighbors the entire economic burden of that public good. Settled expectations lie at the core of the protection of civil rights, and the Court has recognized that the means to protect this foundation is a system which fosters "certainty and predictability" in land titles. *Leo Sheep Co. v. United States*, 440 U.S. 668, 687-88 (1979) (There is a "special need for certainty and predictability where land titles are concerned [and this Court is] unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.").

The Just Compensation Clause embodies that principle, because as a self-executing right, compensation flows as the natural consequence of a taking, and cannot be limited or restricted. It is designed "to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). The Town cannot invite the public to use the Nies' land and not pay, while at the same time avoiding the requirements of the Constitution simply because the it decreed that what had been private land was thereafter open to the public.[3] A state's ability to

3. The ruling of the court below conflicts with other lower courts which conclude that the requirement to pay just compensation is self-executing and cannot be limited or impaired "by legislation or ordinance." *People* ex rel. *Wanless v. Chicago*, 38 N.E.2d 743, 746 (Ill. 1941); *Tucson Airport Auth. v. Freilich*, 665 P.2d 1007, 1011 (Ariz. App. 1982) ("The determination of the proper rate of interest, being a part of just compensation, is

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define (and redefine) its property law—while it may inform the compensation calculus—is not dispositive. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74, 93-94 (1980) (Marshall, J., concurring) ("Quite serious constitutional questions might be raised if a legislature attempted to abolish certain categories of common-law rights in some general way."); *Lucas v. S. Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992) ("Any limitation so severe cannot be newly legislated or decreed (without compensation), but must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership."); *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Protection*, 560 U.S. 702, 713 (2010) (noting "[s]tates effect a taking if they recharacterize as public property what was previously private property"). That principle is best illustrated by *Preseault v. Interstate Commerce Comm'n*, 494 U.S. 1, 8 (1990),

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necessarily a judicial function which the legislature may not usurp."); *Redevelopment Agency of City of Burbank v. Gilmore*, 198 Cal. Rptr. 304 (Cal. App. 1984) (same); *Gov't of Guam v. 162.40 Square Meters of Land*, No. CVA14-011 (Guam Mar. 17, 2016) (same); *Ill. State Toll Highway Auth. v. Am. Nat'l Bank & Trust Co.*, 642 N.E.2d 1249, 1253 (Ill. 1994) (same); *State* ex rel. *Humphrey v. Baillon Co.*, 480 N.W.2d 673, 676 (Minn. App. 1992) (same); *Manning v. Mining & Minerals Div. of the Energy, Minerals & Nat. Res. Dep't*, 144 P.3d 87, 91-92 (N.M. 2006) (rejecting agency's claim it was not liable for regulatory taking because the agency lacked eminent domain power, the court noted, "legislation cannot insulate the state from providing just compensation for takings . . . When a taking occurs, just compensation is required by the Constitution, regardless of state statute"); *Red Springs City Bd. of Educ. v. McMillan*, 108 S.E.2d 895, 900 (N.C. 1959) (Parker, J., concurring) ("[T]he constitutional prohibition against taking private property for public use without the payment of just compensation is self-executing, and neither requires any law for its enforcement, nor is susceptible of impairment by legislation.").

where the Court held that converting abandoned railway easements to recreational trails

> gives rise to a takings question in the typical rails-to-trails case because many railroads do not own their rights-of-way outright but rather hold them under easements or similar property interests. While the terms of these easements and applicable state law vary, frequently the easements provide that the property reverts to the abutting landowner upon abandonment of rail operations.

Id. Three Justices of this Court concurred, emphasizing that "[a] sovereign, 'by *ipse dixit*, may not transform private property into public property without compensation. . . . This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent.'" *Id*. at 23 (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980)).

The Nies are not challenging the North Carolina legislature's power to alter the common law rules regarding which portions of the state's beaches are public, and which are private. They merely seek the remedy which the Just Compensation Clause imposes as the constitutional consequence flowing from the physical invasion of their previously private property by the public, under the authority of section 77-20, and the Town's invitation to the public to "come on in, the water's fine." *See* Laurence Tribe, Constitutional Choices 176 (1986) ("Did the government effect a taking [in *Kaiser Aetna v. United States*, 444 U.S. 164 (1979)] by saying to the general public, 'Come on it, the water's fine?'"). The Nies' lawsuit does not seek to stop the invasion, but rather to secure compensation for the taking of what the North Carolina legislature apparently has determined is a public good: opening up private beaches to public use. While

North Carolina may unquestionably eliminate the Nies' right to exclude, it cannot—by *ipse dixit*—declare that its enactment effects no taking. As Justice Holmes reminded us for posterity, the public cannot avoid "paying for the change." *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) ("[A] strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change"). The court below validated the Town's having its cake and eating it too: the public has secured wider public beaches, at the cost of only a few lines of text in a statute book.

II. UNTIL NOW, THE NORTH CAROLINA PUBLIC TRUST STOPPED AT THE MEAN HIGH WATER MARK

We turn to a foundational issue in this case: did the public trust, as applied by the North Carolina courts (and a majority of other state courts), encompass the dry sand between the mean high water mark and the vegetation line? The short answer is no.

The public trust is limited to the area below the mean high water mark. Any extension of this demarcation onto private dry sand—by either legislature or court—is a taking of private property that requires condemnation and the payment of just compensation. The question here is where the public beach ends and private property begins; it goes nearly without saying that the long-standing demarcation between them cannot be altered without compensating littoral property owners. Neither the legislature, nor a court can simply declare what was always private property to be a public beach.

In American law, the public trust is a common law doctrine that each state as sovereign holds title to

submerged land in trust for the public. The doctrine has its roots in the notion that certain resources are not capable of private ownership, but are common to all. *See Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469 (1988) (state's use of land subject to public trust under state law is not a taking). The purpose of the trust is to ensure that the public has the ability to "navigate, swim, hunt, fish and enjoy all recreational activities in the watercourses of the state." N.C. Gen. Stat. § 1-45.1. This includes the right to access the state's beaches. *Id*. While the list of activities which the public trust guarantees has grown over the years, the location of the boundary between the public's beaches and private property has not: it has always been the mean high water mark, not the vegetation line.

This Court recognized that the public trust under English law applied to lands subject to tidal ebbs and flows. *See Illinois Central R.R. v. Illinois*, 146 U.S. 387 (1892). Adapted to the geography of the New World, the doctrine has been applied in a nearly uniform manner by the states—including this court, as set forth in *West v. Slick*, 326 S.E.2d 601, 617 (N.C. 1985) and other cases—to hold with few exceptions that the boundary between the state's public trust beach and private property is the mean high tide line or the mean high water mark. For example:

Alabama: *State v. Gill*, 66 So.2d 141 (Ala. 1953) (mean high water mark).

Alaska: *City of St. Paul v. Alaska*, 137 P.3d 261 (Alaska 2006) (mean high water mark).

California: *Marks v. Whitney*, 491 P.2d 374 (Cal. 1971) (mean high water mark).

Connecticut: *State v. Knowles-Lombard Co.*, 188 A. 275 (Conn. 1936) (mean high water mark).

Florida: *Daytona Beach v. Tona-Rama, Inc.* 295 So.2d 73 (Fla. 1974) (mean high water mark).

Maryland: *Dep't of Nat. Res. v. Mayor of Ocean City*, 332 A.2d 630 (Md. 1975) (mean high water mark).

Mississippi: *Cinque Bambini P'ship v. State*, 491 So. 2d 508 (Miss. 1986) (mean high water mark).

New York: *People v. Steeplechase Park Co.*, 113 N.E. 521 (N.Y. 1916) (mean high water mark).

North Carolina: *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 117 S.E.2d 513 (N.C. 1970) (mean high water mark).

Rhode Island: R.I. Const. art. I, § 17 (mean high water mark).

Other states fix the border at the low water mark. *See*, *e.g.*, *Hilton Head Plantation Property Owners Ass'n v. Donald*, 651 S.E.2d 614 (S.C. App. 2007). *See also* Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the relevant lines for defining the limits of private title and public access are the mean high water and mean low water marks, which are the averages of high and low tides over 18.6 years.") (citing *Borax Consol. Ltd. v. Los Angeles*, 296 U.S. 10, 26-27 (1935)).

Only three jurisdictions fix the public line elsewhere. Oregon and Hawaii do not rely on the public trust to do so, but on hyperlocal customary practices. *See*, e.g., S*tate* ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969); *Cnty. of Hawaii v. Sotomura*, 517 P.2d 57

(Haw. 1973).[4] That doctrine requires proof of a particular custom on particular properties form

4. Applying "custom," in *State* ex rel. *Thornton v. Hay*, 462 P.2d 671 (Or. 1969), the Oregon Supreme Court held that littoral property owners had no rights to the dry sand area of beaches because:

> [F]rom the time of the earliest settlement to the present day, the general public has assumed that the dry-sand area was a part of the public beach, and the public has used the dry-sand area for picnics, gathering wood, building warming fires, and generally as a headquarters from which to supervise children or to range out over the foreshore as the tides advance and recede.

Id. at 673. After this Court's decision in *Lucas*, which held that background principles did not include law "newly legislated or decreed," the Oregon Supreme Court considered whether application of the Thornton rule was a taking. In *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994), the court held Thornton was not newly legislated or decreed and was not a sudden change in Oregon's property law. Thornton, the court held, "did not create a new rule of law," but "merely enunciated one of Oregon's 'background principles of . . . the law of property.'" *Id*. at 456 (quoting *Lucas*, 505 U.S. at 1029).

Similarly, in *Public Access Shoreline Hawaii v. County of Hawaii Planning Comm'n*, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996), the Hawaii Supreme Court redefined the nature of fee simple absolute ownership, and abandoned the "Western concept of exclusivity" to impose a blanket easement retroactively over all Hawaii property. The case arose as a dispute over the standing of native Hawaiians to intervene in an agency hearing regarding a coastal permit sought by a property owner. *Id*. at 1250. The agency denied standing, concluding that native Hawaiians did not have interests different from the general public. The Hawaii Supreme Court determined that native Hawaiians did possess unique rights, because custom dictated that Hawaii property owners never possessed the right to fully exclude native Hawaiians who wished to exercise "customary and traditional

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"time immemorial." David J. Bederman, *The Curious Resurrection of Custom: Beach Access and Judicial Takings*, 96 Colum. L. Rev. 1375, 1384-88, 1448 (1996). This doctrine is not applicable in North Carolina:

> We did not import from the mother country any of the "special customs," which, in particular localities, are allowed to supersede the common law. All legislative power is vested in our General Assembly. We can recognise no other law-making power, and there is no intimation to be met with in any of our decisions, that special customs can grow up among us, whereby rights may be affected, or the common law be in anywise changed. By the common law an imaginary line is thrown around the land of every one, which may not be entered without subjecting the wrong-doer to an action. No custom or usage can change this law.

Winder v. Blake, 49 N.C. 332 (1857). The "custom" doctrine is thus inapplicable here, and the Town did not raise custom as a defense below.

New Jersey remains the sole outlier in interpreting the public trust to prohibit private ownership of the dry sand beach. *See Matthews v. Bay Head Improvement Ass'n*, 471 A.2d 355 (N.J. 1984). There, the court concluded the public has the right to access privately-owned dry sand because it is reasonably

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practices" on private property. *Id.* at 1268. The court found its decision did not work a judicial taking or a regulatory taking because the custom was a "background principle" of Hawaii property law, even if it eliminated the right to exclude.

necessary to the public's use of adjacent public beaches. *Id*. at 365-66. Over time, this right has been further expanded by the New Jersey court to include access from the nearest public road. *See Raleigh Avenue Beach Ass'n v. Atlantis Beach Club, Inc*., 879 A.2d 112, 120-21 (N.J. 2005). The New Jersey court's rationale in these cases should be viewed for what it is, an exercise in judicial fiat, untethered from the fundamental principles outlined in the first part of this brief; policymaking in the guise of law. Moreover, the New Jersey court avoided the consequences of these rulings, because the main issue present here (whether extending the public's ability to use property to private land is a taking), was not presented in those cases.

Unfortunately, the court below joined New Jersey and took the same fundamentally wrong approach when it concluded that the public trust beach now includes the Nies' dry sand without compensation. The court ignored the common law foundation of the public trust and its limitation to the wet sand below the mean high water mark, instead concluding that a statute—N.C. Gen. Stat. § 77-20(d)—legislatively extended the reach of the public trust to the privately-owned dry sand beach. *See Nies v. Town of Emerald Isle*, No. COA15-169, slip op. at 14 (N.C. App. Nov. 17, 2015) ("[T]he General Assembly has the power to make this determination through legislation, and thereby modify any prior common law understanding of the geographic limits of these public trust rights."). The court sought to distinguish between what it called "public trust rights" (the "portion of privately-owed dry sand beaches [which] are subject to public trust rights" (public access)), and actual public trust property (as detailed above,

property below the mean high water mark *owned* by the state). *Id.* The court concluded that the statute only extended "public trust rights" even though it didn't impact actual ownership of the dry sand. In other words, the legislature invited the public to use the Nies' dry sand, where prior to the statute, the Nies had the right to exclude the public.

However, the court's erroneous distinction fell apart just four pages later, because it conflated the two concepts—public use of private property, versus public ownership—which it had just sought to separate. The court concluded, "[t]he right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of rights' purchased by the Plaintiffs in 2001." *Id.*, slip op. at 19. Thus, in the court's view, the legislature's extension of the public trust to encompass the Nies' dry sand was not a taking because the Nies never actually owned the right to keep the public out of the dry sand. *Id.*, slip op. at 20. This highlights the fundamental flaw in the Court of Appeals' reasoning: after acknowledging that the legislature's extension of "public trust rights" to allow public use of the private dry sand beach was a derogation of the common law but did not impact ownership, the court concluded the Nies never owned the right to keep the public off that property at all. *See id.*, slip op. at 22 ("Plaintiffs have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property . . . [t]he contested beach driving portions of the Ordinances do not create a right of the public relative to the Property; they regulated a right that the public already enjoyed."). More critical than the Court of Appeals'

internal inconsistencies, of course, was its departure from North Carolina precedent such as *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 117 S.E.2d 513 (N.C. 1970), which hold that the demarcation line between private property and public beaches is the mean high water mark. *See id.* at 516 ("[W]e hold that the seaward boundary of plaintiff's lots is fixed at the high-water mark. The high-water mark is generally computed as a mean or average high-tide, and not as the extreme height of the water.").

If the legislature or the Town determined that the public would be better served by moving the public/private border shorewards and expanding the publicly-owned or publicly-used beach to the dry sand, they almost certainly have the power to do so, provided they exercise the eminent domain power and provide the compensation which our constitutions require. *Mahon*, 260 U.S. at 416.

III. THE COURT BELOW EXPANDED THE SCOPE OF THE PUBLIC TRUST, WITHOUT COMPENSATION

The very concept of private property would be meaningless if states could ignore the command to pay just compensation when redefining property. For example, in *Matthews v. Bay Head Imp. Ass'n*, 471 A.2d 355 (N.J.), *cert. denied*, 469 U.S. 821 (1984), the New Jersey Supreme Court held the privately owned dry sand beach area of littoral property to be subject to the public trust. The court expanded the geographic scope of the trust from tidelands and navigable waters to the dry beach because the public *needed* access in order to exercise its public trust rights:

> Exercise of the public's right to swim and bathe below the mean high water mark may depend upon a right to pass across the upland beach. Without some means of access the public right to use the foreshore would be meaningless. To say that the public trust doctrine entitles the public to swim in the ocean and to use the foreshore in connection therewith without assuring the public of a feasible access route would seriously impinge on, if not effectively eliminate, the rights of the public trust doctrine.

Id. at 364. The court held the public trust doctrine should "be molded and extended to meet changing conditions and needs of the public it was created to benefit." *Id.* at 365 (quoting *Borough of Neptune City v. Borough of Avon-by-the-Sea*, 294 A.2d 47, 55 (N.J. 1972)). *See also National Audubon Soc. v. Superior Court*, 658 P.2d 709 (Cal.), *cert. denied*, 464 U.S. 977 (1983) (property owners who purchase property subject to public trust do not state takings claims).

This is not an isolated example, limited to tidelands. The public trust doctrine, which traditionally has been applied only to tidelands and navigable waters, recently has been judicially extended to cover other natural resources deemed worthy by courts of public ownership. *See*, *e.g.*, *Center for Biological Diversity, Inc. v. FPL Group, Inc.*, 83 Cal. Rptr. 3d 588, 595-96 (Cal. Ct. App. 2008) (public trust doctrine covers wildlife and is not limited to navigable waters and tidelands); Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 467

(1970) ("certain interests are so particularly the gifts of nature's bounty that they ought to be reserved for the whole of the populace."). For example, relying on the public trust doctrine, in *State of Hawaii v. Zimring*, 566 P.2d 725 (Haw. 1977), the Hawaii Supreme Court ignored its prior precedent regarding construction of property descriptions on the shoreline and publicized extensions of land occurring after a lava flow. In 1955, the active volcano on the island of Hawaii created 7.9 acres of new land when lava flowed into the ocean. *Id.* at 727. The state assessed the littoral landowner property taxes on the new land, but thirteen years later sought to quiet title, asserting public ownership of the new fast land. *Id.* at 738. The littoral owner's boundary description extended ownership to the "high water mark." The Hawaii Supreme Court, however, disregarded the accepted meaning of this term, holding instead the description was merely a "natural monument" and not an "azimuth and distances" description. *Id.* at 745 (Vitousek, J., dissenting). Consequently, the court vested title to the new land in the state because to adhere to the deed's language would, in the court's view, result in an inequitable "windfall" that should not "enrich" of any one landowner, but rather should inure to the collective public. *Id.* at 734-35. The North Carolina Court of Appeals' ruling in this case adds to this growing list, and this Court should grant certiorari to review this important issue.

CONCLUSION

This Court should grant the petition and review the judgment of the North Carolina Court of Appeals.

Respectfully submitted.

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MAY 2017