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; NEW MEXICO WILDLIFE FEDERATION; NEW MEXICO CHAPTER OF BACKCOUNTRY HUNTERS & ANGLERS,

Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of the State of New Mexico

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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CORPORATE DISCLOSURE STATEMENT

Respondent Adobe Whitewater Club of New Mexico is a New Mexico nonprofit corporation, has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent New Mexico Wildlife Federation is a New Mexico nonprofit corporation, has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent New Mexico Chapter of Backcountry Hunters & Anglers is the New Mexico chapter of the Oregon nonprofit Backcountry Hunters & Anglers, and no publicly held company owns 10% or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES (continued)

Page(s)

Constitutional Provisions

Statutes

TABLE OF AUTHORITIES
(continued)

Page(s)

Other Authorities

INTRODUCTION

In this case, respondents, a group of nonprofit organizations, sought a writ of mandamus to invalidate regulations adopted by the New Mexico Game Commission. Respondents argued the regulations: (1) violated the New Mexico Constitution because they allowed landowners with non-navigable rivers on their property to post signs that the rivers were "closed" to public access, and (2) were beyond the scope of the agency's statutory authority. The New Mexico Supreme Court agreed on both points, holding that the regulations were inconsistent with the New Mexico's public trust doctrine as embodied in the New Mexico Constitution and affirmed in the New Mexico Supreme Court's 1945 decision in *State ex rel. State Game Commission v. Red River Valley Co.* ("*Red River*"), 182 P.2d 421 (N.M. 1945), and, in any event, not statutorily authorized.

Petitioners, private owners of land adjacent to and underneath stretches of certain New Mexico rivers, intervened below and claimed that ruling in respondents' favor would constitute a taking of their property. The New Mexico Supreme Court rejected that claim.

There is no reason for the Court to review that holding. As a threshold matter, this Court lacks jurisdiction over this case because the New Mexico Supreme Court's judgment rests on an adequate and independent state-law ground. Even looking beyond this threshold defect, neither version of the takings claim that purportedly turns on the question petitioners ask this Court to address has legs. Petitioners failed to raise the "legislative" takings version of the claim in the New Mexico Supreme

Court, and the "judicial" takings version is premature and roundly deficient on this mandamus action's scant record.

Nor is the federal question petitioners attempt to wrest out of the decision below important enough to warrant this Court's attention. Petitioners assert that "[t]he New Mexico Supreme Court rested its [rejection of their takings claim] on the ground that, before statehood, the United States' title in the beds and banks of non-navigable waters" throughout the country "was burdened by a 'broad' easement permitting such intrusions by any member of the public." Pet. 14. But the New Mexico Supreme Court made no such sweeping ruling. Instead, the court's analysis was limited to specifics of New Mexico law, history, and custom that do not carry over to other states.

It is no surprise, therefore, that petitioners' assertion of a split over the question presented among state courts falls flat. Petitioners identify a spectrum of approaches that state courts have taken to their own public trust law. But these state-law differences are of no moment to this Court. Petitioners do not identify a single court that has done what it asked the New Mexico court to do here—namely, hold that the state's public trust doctrine effects (or would effect) a taking of private land because of an incursion on possessory interests traced back to federal land patents.

Finally, the New Mexico Supreme Court was correct to hold that no taking has occurred here. The court held that New Mexico's public trust doctrine encompasses "the right to recreate and fish in public waters and that this right includes the privilege to do

such acts as are reasonably necessary to effect the enjoyment of such right." Pet. App. 17a. As the court recognized in *Red River* and reaffirmed here, the resulting public right to touch the riverbeds at issue is simply an aspect of "prior existing [New Mexico] law recognized by the United States government" and predating statehood, a right which reflected "prior existing law, always the rule and practice under Spanish and Mexican dominion." Pet. App. 26a. Indeed, even petitioners concede that some measure of "incidental" contact with their private streambeds and banks has always been permissible. Pet. 19; *see also* Pet. App. 34a.

The Court should deny certiorari.

STATEMENT

I. Legal Background

Under "accepted principles of federalism, the States retain residual power" to establish rules regarding the ownership and use of non-navigable waters within their borders. *PPL Mont., LLC v. Montana* ("*PPL Montana*"), 565 U.S. 576, 604 (2012); *see also Ickes v. Fox*, 300 U.S. 82, 95 (1937). One feature of this power is the public trust doctrine. Under this doctrine, states claim ownership over certain waters within their borders in trust for the public, which has the right to use the water for navigation, fishing, and other recreational purposes. *See, e.g.*, *PPL Montana*, 565 U.S. at 603. Each state may determine for itself "the scope of the public trust over waters within their borders," including whether and where the doctrine applies. *Id.* at 603-04

The public trust doctrine has a lengthy and venerable history, dating back to at least Roman civil law. *PPL Montana*, 565 U.S. at 603. In New Mexico, the right of the public to use all the waters of the state dates back to Spanish and Mexican rule and practice, and has been codified in the New Mexico Constitution. *Red River*, 182 P.2d at 427-30, 431-33. In other states, the doctrine's principles can be traced to "English common law on public navigation and fishing rights over tidal lands." *PPL Montana*, 565 U.S. at 603. Multiple states today recognize and apply the public trust doctrine, and the United States Supreme Court first followed it in *Illinois Central Railroad Co. v. Illinois*, 146 U.S. 387, 435 (1892).

While state law governs the extent and contours of the public trust doctrine, federal law determines whether the public holds title to riverbeds under the equal footing doctrine. And where the beds and banks are privately owned, state law balances the public's ownership and right to use the water with the interests of private landowners. Indeed, as numerous courts have acknowledged, public and private rights "must be reconciled to the extent possible." *Galt v. State ex rel. Dep't of Fish, Wildlife & Parks*, 731 P.2d 912, 916 (Mont. 1987); *see also Day v. Armstrong*, 362 P.2d 137, 145 (Wyo. 1961). The rights of the public and landowners "are not absolute, irrelative, and uncontrolled, but are so limited, each by the other, [so] that there may be a due and reasonable enjoyment of both." *Conatser v. Johnson*, 194 P.3d 897, 902 (Utah 2008) (quotation marks omitted). Such balancing of rights is a common property-law principle. And some state courts describe public trust over riverbeds as functioning

akin to easements. *See, e.g.*, *Day*, 362 P.2d at 145 ("The title to waters within this State being in the State, in concomitance, it follows that there must be an easement in behalf of the State for a right of way through their natural channels.").

Different states strike the balance between public and private rights somewhat differently. But several have established state public trust doctrines allowing members of the public to touch private streambeds and banks to fish and otherwise recreate. *See* Pet. App. 17a; *Day*, 362 P.2d at 146 (Wyoming); *Mont. Coal. for Stream Access, Inc. v. Hildreth*, 684 P.2d 1088, 1091 (Mont. 1984); *Galt*, 731 P.2d at 915-16; *Conatser*, 194 P.3d at 902 (Utah).[1] In 1945, the New Mexico Supreme Court issued a decision along these lines, holding that the New Mexico Constitution establishes a public trust right to use the water in non-navigable streams for "fishing and recreation." Pet. App. 13a (discussing *Red River*, 182 P.2d 421). Indeed, petitioners here concede that the public's right to use New Mexico waters under the public trust has always carried with it at least some "incidental" right to touch privately owned beds and banks to effectuate the trust right regardless of title origin. Pet. 19; *see also* Pet. App. 34a.

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[1] As the New Mexico Supreme Court noted, the Utah Legislature subsequently limited this holding, but did not prohibit all incidental contact with beds and banks. Utah Code Ann. § 73-29-102 (2010); *see Utah Stream Access Coal. v. Orange St. Dev.*, 416 P.3d 553, 555 (Utah 2017).

II. Procedural Background

1. In 2018, the New Mexico State Game Commission issued new regulations limiting the public's access to non-navigable waters in New Mexico, referred to herein as the "Regulations." Purporting to implement a 2015 state statute, the Regulations allowed landowners to apply to the Commission for certificates determining that particular stretches of waterways on their property were non-navigable. Pet. App. 44a-53a (N.M. Admin. Code § 19.31.22). The certificates would "formally recognize[]" that the waterways were "non-navigable public waters and therefore trespass on private property through non-navigable public water or via accessing public water via private property is not lawful," absent written permission from the landowner. N.M. Admin. Code § 19.31.22.13(B).

As to nearly every stretch of every river in New Mexico, application of the Regulations would have had the practical effect of barring any public use. *See* Pet. App. 16a. In fact, the Regulations served the express purpose of making the "riverbed or streambed" under "non-navigable public water . . . closed to access." N.M. Admin. Code § 19.31.22.6. They accordingly permitted landowners who received certificates to post signs on their property warning that no one should "walk or wade onto private property through non-navigable public waters." *Id.* § 19.31.22.13(D). The signs in turn would constitute "prima facie evidence that the property subject to the sign is private property." *Id.* § 19.31.22.13(F).

2. Under the Regulations, the Commission issued certificates for five stream segments: three to petitioner Z&T Cattle Company, one to petitioner

Chama Troutstalkers, LLC, and one to another entity that is not a petitioner here. *See* State's Resp. to N.M.S.C. Pet. at 12, Att. A.

Respondents then brought a petition for writ of mandamus in the New Mexico Supreme Court, seeking to invalidate the Regulations as contrary to the New Mexico Constitution and beyond the scope of the 2015 statute. *See* Pet. App. 7a; N.M.S.C. Pet. at 7. Respondents sought to "make explicit" that New Mexico's public trust doctrine, as enunciated in *Red River*, "necessarily includes the incidental right to make reasonable use of riverbeds and banks." N.M.S.C. Pet'rs Br. at 2. The State conceded the Regulations were unlawful and unenforceable. But petitioners and other parties intervened to oppose the petition. Pet. App. 9a.

Petitioners' motion to intervene alleged no specific trespass, and no party provided evidence of any. *See* Pet. App. 7a, 31a-35a. Petitioners also sought no relief on a takings theory or otherwise; they simply requested that respondents' petition be denied on several grounds, including arguing that a decision granting the petition would effect a judicial taking. *See, e.g.*, Pet. App. 9a, 32a.

3. The New Mexico Supreme Court issued the writ of mandamus, ordering the Commission to withdraw the Regulations. *See* Pet. App. 1a-3a.

4. Petitioners then sought rehearing. Among other things, they argued for the first time that the New Mexico Constitution's incorporation of a public-trust right to step on beds and banks of non-navigable streams crossing their property incidental to use of public waters effected a legislative taking. They also for the first time submitted a limited

number of exhibits, including chain-of-title documents and news articles, *see generally* Pet. App. 39a, and reiterated their judicial takings argument.

5. While the petition for rehearing was pending, the Commission repealed the Regulations. Pet. App. 55a.

6. The following month, the New Mexico Supreme Court denied rehearing and released an opinion providing its reasoning for issuing the writ of mandamus.

a. In its opinion, the New Mexico Supreme Court first concluded that the Regulations violated the New Mexico Constitution. Specifically, the court explained that the New Mexico public's "right to recreate and fish in public waters"—located in article XVI, section 2 of the New Mexico Constitution—includes an incidental right to touch the privately owned beds below the public waters insofar as "reasonably necessary to effect the enjoyment" of that right. Pet. App. 7a, 17a. This conclusion, the court explained, necessarily followed from its 1945 decision in *Red River*, which held that the public trust doctrine enshrined in article XVI, section 2 protects fishing and recreation. "To prohibit those acts reasonably necessary to enjoy the right to recreation and fishing" on non-navigable streams would effectively eliminate the New Mexico public trust doctrine itself. Pet. App. 21a.

The New Mexico Supreme Court recognized the rights of private landowners in the riverbeds at issue. The court thus took care to "emphasize that the scope of the public's easement includes only such use as is reasonably necessary to the utilization of the water itself and any use of the beds and banks must be of

minimal impact." Pet. App. 23a. The court also "stress[ed] that the public may neither trespass on privately owned land to access public water, nor trespass on privately owned land from public water," something the court had also noted in *Red River*. Pet. App. 17a. Because the court had no evidence of any claimed trespass before it, its holding was necessarily general and included no judicial finding regarding the status of the waterways crossing petitioners' properties or any specific incursion on petitioners' claimed property rights.

b. In the alternative, the New Mexico Supreme Court also held that the Commission lacked the statutory authority to promulgate the Regulations. Specifically, the court interpreted section 17-4-6(C) of the New Mexico Fish and Game and Outdoor Recreation code—providing that no person "shall walk or wade onto private property through non-navigable public water or access public water via private property" absent written consent—to exclude the beds and banks of public waters, and therefore to deny the Commission the authority promulgate inconsistent regulations. Pet. App. 25a.

c. The court also rejected petitioners' argument that granting the writ amounted to a judicial taking—that is, a judicial announcement of a new rule of law that deprived them of established property rights. Pet. App. 26a. As the court explained, its decision was nothing more than a more formal recognition of what it had already held decades before in *Red River*. *See ibid.*

Red River involved a private landowner who was a successor in interest to a Mexican land grant confirmed by Congress in 1869 (before New Mexico

statehood). The landowner contended that its ownership of the beds and banks of the impounded waters of the non-navigable Canadian and Conchas rivers included a right to exclusive fishing access within a new reservoir. 182 P.2d at 426. The court in *Red River* acknowledged that the New Mexico Constitution could not "deprive [the landowner] of any right which may have vested prior" to the constitution's adoption in 1911. *Id.* at 427. But the court held that article XVI, section 2 did not do so. That provision's codification of the public trust merely reflected existing law dating to "time immemorial," including Las Siete Partidas, a collection of Spanish laws circa the early 1500s. *Id.* at 427-29. The court further noted that the United States government had "always recognized the validity of local customs and decisions in respect to the appropriation of public waters," including the public's right to use water under the public trust. *Id.* at 428. By patenting land to private parties, the United States did not "intend[] that it should, nor did the patent purport to, destroy, or in any manner limit, the right of the general public to enjoy the uses of public waters." *Id.* at 432.

Drawing from *Red River*'s historical analysis, the court explained that it was "immaterial" whether petitioners could "trace their title to the[ir] riverbeds back to the United States." Pet. App. 27a. The United States government held title to these lands "subject to" pre-existing "local customs and decisions." *Ibid.* (internal quotation marks and citations omitted). And New Mexico Constitution's public trust doctrine was merely "declaratory of existing law, always the rule and practice under

Spanish and Mexican dominion." Pet. App. 26a. In short, the instant decision merely "ma[de] explicit what was already implicit in *Red River*," and followed from legal principles long predating New Mexico statehood and "recognized by the United States government" when it held title to the riverbeds at issue. Pet. App. 26a-28a.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Properly Present Any Federal Question

1. This Court lacks jurisdiction to address the question presented because the New Mexico Supreme Court's judgment rests on an adequate and independent state-law ground.

"This Court from the time of its foundation has adhered to the principle that it will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945); *see also Coleman v. Thompson*, 501 U.S. 722, 729 (1991). Nearly 90 years ago, this Court described that rule as "settled," explaining that "our jurisdiction fails if the nonfederal ground is independent of the federal ground and adequate to support the judgment." *Fox Film Corp. v. Muller,* 296 U.S. 207, 210 (1935) (dismissing writ for want of jurisdiction). The inquiry is whether "the adequacy and independence of any possible state law ground is . . . clear from the face of the opinion." *Michigan v. Long*, 463 U.S. 1032, 1040-41 (1983).

This case is a quintessential example of the adequate and independent state law rule. The only claim for relief in the state court was a petition for a

writ of mandamus to invalidate the Regulations issued in 2018 by the New Mexico State Game Commission. The New Mexico Supreme Court granted that petition on two alternative grounds: (i) the Regulations were inconsistent with the New Mexico Constitution's articulation of public trust rights, and (ii) the Commission's actions were ultra vires; the promulgation of the Regulations exceeded its statutory authority under section 17-4-6(C) of the State's Game and Fish and Outdoor Recreation code. *See* Pet. App. 16a-26a. The second ground involves only state law and is sufficient to support the court's holding. The court cited only New Mexico precedents, statutes and state constitutional provisions in that portion of the opinion, never suggesting that federal law dictated—much less had any bearing on—its interpretation of section 17-4-6(C).

Were this Court to "review the state court's decision and hold that it had misinterpreted [a question of federal law], on remand the court would still" adhere to its judgment that the Regulations are invalid "on state statutory grounds. This is precisely the result the doctrine of adequate and independent state grounds seeks to avoid." *California v. Freeman*, 488 U.S. 1311, 1314 (1989); *see also Herb*, 324 U.S. at 126 (state-law ground is adequate and independent where "the same judgment would be rendered by the state court" regardless of this Court's view on a federal question).

2. Even if this jurisdictional hurdle could somehow be surmounted, this case's odd procedural posture would still militate against this Court's review of petitioners' question presented. Petitioners seek this Court's review of the New Mexico Supreme

Court's judgment invalidating the Regulations. At the same time, petitioners effectively concede that the Regulations are, in fact, invalid. The Regulations allowed landowners to obtain a determination that, where a stream segment is certified as non-navigable, privately owned beds and banks are "closed to access without written permission from the landowner." Pet. App. 8a. But petitioners concede that the public may use streams on their property and, while doing so, "'touch[ing of] the bed or bank' would not constitute a trespass," at least in some circumstances. Pet. 9; Pet. App. 34a. And they nowhere dispute that "navigability"—the core criterion of the Regulations—is irrelevant to the public trust under New Mexico law. *See* Pet. App. 23a.

Given these concessions, the Regulations as written were not legal regardless of this Court's answer to the question presented, so nothing this Court could do would change the New Mexico Supreme Court's judgment. Indeed, any decision from this Court would constitute an advisory opinion.

3. Underneath these problems, defects in the petitioners' core argument—that there has somehow been a taking here—also weigh heavily against this Court's review. Petitioners' question presented regarding the nature of title previously held by the United States is based on their broader assertion that that the New Mexico Supreme Court's decision effects a taking of their property. *See* Pet. 15-17. They then expand this takings claim, proffering two theories: "[E]ither" the taking occurred (a) "in 1912," when New Mexico adopted the "public-waters provision" of the state constitution, or (b) by virtue of the decision below, when the New Mexico Supreme Court

described the scope of the public trust. Pet. 17. Both theories are procedurally flawed.

a. This Court lacks jurisdiction over petitioners' argument that the New Mexico Constitution effected a taking of their property when adopted. Petitioners first asserted that theory as an aside in their brief seeking rehearing. *See* Pet. App. 40a-41a. The New Mexico Supreme Court never addressed the issue. And this Court lacks jurisdiction to review the validity of state laws where "the state courts have had no opportunity to pass" on the question. *Monks v. New Jersey*, 398 U.S. 71, 71 (1970) (dismissing such a petition as improvidently granted). That includes where a petitioner "attempt[s] to raise a federal question after judgment, upon a petition for rehearing . . . unless the [state] court actually entertains the question and decides it." *Herndon v. Georgia*, 295 U.S. 441, 443, 446 (1935).

At any rate, petitioners' suggestion that this Court should assume the possibility that the New Mexico Constitution effected a taking of property owned by their predecessors in interest in 1912 is dubious. Such a takings claim raises complex issues, such as whether petitioners are entitled to press a takings claim that allegedly ripened a century before they acquired their property. *See, e.g.*, *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001) ("[A]ny award [for a physical taking] goes to the owner at the time of the taking, and [] the right to compensation is not passed to a subsequent purchaser."); Pet. 9, 16 (asserting a physical taking). Petitioners also ask this Court to determine the scope of title held by the United States at some undefined point in the past, but ignore—as just one example—the effect of

Congress's acceptance of the New Mexico Constitution in the statehood process, and, in turn, New Mexico's constitutional "guarantee[]"at article II, section 5, that the "rights, privileges and immunities [conferred by] the Treaty of Guadalupe Hidalgo shall be preserved inviolate." *See* J. Res. 8, 62d Cong, 37 Stat. 39 (1911); Pet. 5.

b. Petitioners' theory that the decision below may have effectuated a judicial taking is similarly problematic.

First, a judicial takings claim would require petitioners to "prove the elimination of an established property right" by the New Mexico Supreme Court's decision here. *Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envt'l Prot.*, 560 U.S. 702, 726 (2010) (plurality). This standard "contains . . . a considerable degree of deference to state courts," as "[a] property right is not established if there is doubt about its existence." *Id.* at 726 n.9.

Yet, the New Mexico Supreme Court held long ago in *Red River* that the New Mexico Constitution gives the public a right to fish and recreate on non-navigable streams flowing through private property. 182 P.2d at 427, 431; Pet. App. 20a. The New Mexico Attorney General also agreed years before this case that "[t]he public's right to use public waters for fishing includes activities that are incidental and necessary for the effective use of the waters," including "walking, wading and standing in a stream in order to fish." N.M. Att'y Gen. Op. 14-04 at 7 (Apr. 1, 2014). Indeed, petitioners themselves concede that some public contact with privately owned beds and banks incidental to recreation activities is permissible. Pet. 19. The absence of an "established

property right" to exclusive private use of streambeds makes it implausible—at least as things stand now—that petitioners could somehow succeed in this lawsuit on any judicial takings claim.

Furthermore, the case's posture as a mandamus action involving only the legality of the Regulations means that the Court has no factfinding or even a competent factual record regarding title to individual lands, the public's actual use of public waters flowing through petitioners' property, or the effects of that use. Although petitioners submitted on rehearing a limited number of title documents and news articles, none of that evidence was properly before or considered by the New Mexico Supreme Court, much of it constitutes plainly inadmissible hearsay, and other parties had no opportunity to test petitioners' belated factual claims.[2] In sum, petitioners have presented no actual conflict or dispute about public use of waters flowing across their land.

At the very least, it would be inappropriate to assume without additional factual development that the general standard articulated by the New Mexico Supreme Court could be a judicial taking. This Court has emphasized that takings cases "require[] a careful inquiry informed by the specifics of the case." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). Consequently, only after the New Mexico courts apply the New Mexico Supreme Court's ruling in the context of a concrete factual dispute would it be

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[2] Accordingly, respondents in no way concede the validity of petitioners' title claims and waive no rights, either in this proceeding or in any future proceeding, regarding those claims.

appropriate to determine whether petitioners have actually been deprived of any interest in their land.

II. The Question Presented Is Not Important Enough To Warrant This Court's Attention

Petitioners ask this Court to review a limited and factually intensive issue regarding the scope of title potentially held by the United States in New Mexico lands at some point in the undefined past. Pet. i. Not only is that question not properly presented by way of petitioners' underlying takings claim, but the question is of little to no effect outside New Mexico. It is heavily dependent on New Mexico law, history, and custom, and law specific to New Mexico land claims.

1. The New Mexico Supreme Court based its decision here on a historical analysis of Spanish and Mexican law pre-dating statehood, the New Mexico Constitution, historical customs and practices in New Mexico, and the development of New Mexico law governing public waters. *See* Pet. App. 11a-18a, 20a-23a, 26a-28a. Together, these analytical touchpoints are unique to New Mexico.

Attempting to brush over that obvious reality, petitioners cite *Summa Corp. v. California ex rel. State Lands Commission*, 466 U.S. 198 (1984), for the broad contention that any state-specific public-trust rights must have been "confirmed at the time that title was transferred" from the United States. Pet. 4. But the statute at issue in *Summa Corp.*—the Act of March 3, 1851—applies to land claims arising only in California. That is, the Act "set[] up a comprehensive claims settlement procedure" for "'each and every person claiming lands *in California* by virtue of any

right or title derived from the Spanish or Mexican government.'" 466 U.S. at 203 (emphasis added) (quoting Act of Mar. 3, 1851, § 8, ch. 41, 9 Stat. 632). The Act simply does not apply to land claims in New Mexico.

Congress did not address land-grant claims in New Mexico until 1854. The 1854 Act, 10 Stat. 308, contained a very different set of procedures from the 1851 Act. The 1854 Act set up no comparable commission and provided no court jurisdiction. Instead, it provided only that the Surveyor-General would "make a full report" on property claims arising under Spanish or Mexican law and refer those reports to Congress for confirmation. Act of July 22, 1854, § 8, 10 Stat. 308. The 1854 Act imposed no preservation requirement. It also made clear that all New Mexico land was taken "under the laws, usages, and customs of the country before its cession into the United States." *Ibid.* Accordingly, the question petitioners ask this Court to resolve depends on New-Mexico-specific considerations that would not carry over to other states.

2. Leaving other states aside, petitioners also contend that the federal question they ask this Court to resolve is highly consequential for their own property rights in New Mexico. *See* Pet. 31. Even if such a New-Mexico-specific issue were worthy of this Court's attention, petitioners' contention would be both highly questionable and premature.

To begin, petitioners have conceded that the public's right to use non-navigable waters has always included at least some "incidental" contact with privately owned beds and banks. Pet. 19; *see also* Pet. App. 34a. As a consequence—and especially

without further factual development—it is uncertain whether any meaningful daylight exists between such "incidental" touching and the contact allowed here by the New Mexico Supreme Court: contact "reasonably necessary" to allow recreation with "minimal impact." Pet. App. 23a.

At the very least, this Court's involvement here based on any concern for petitioners' property rights would be premature. Petitioners have made no showing that their land is now subject to significantly greater encroachment than the public "contact" as to which petitioners concede it has always been subject. Pet. 19.

3. As a last gasp, petitioners gesture toward potential claims related to federal and tribal land interests that could theoretically arise at some point in the future. *See* Pet. 34-35. This conjecture is a red herring. This case does not involve the rights of the United States or any tribe, and the New Mexico Supreme Court never suggested anything to the contrary. Given the widespread acceptance of the public trust throughout the West, including states with significant federal landholdings, *see supra* at 5—none of which have faced any crisis along the lines petitioners purport to fear—petitioners' speculation rings hollow.

III. Petitioners Identify No Conflicting Interpretations Of Federal Law

Petitioners try in two ways to establish a federal law conflict here. Neither works.

1. Petitioners assert that state high courts are divided over "the existence and extent of" the public trust doctrine. Pet. 20. But it is beyond dispute that,

"[u]nder accepted principles of federalism," each state has the power to decide the scope of public trust rights for itself based on its unique history, constitutional provisions, statutes, and common law. *PPL Montana*, 565 U.S. at 603-04. And the cases that petitioners cite all turn on issues of state, not federal law.

Hartman v. Tresise, 84 P. 685 (Colo. 1905), determined that Colorado's state constitution and common law included no public trust right to fish. *State ex rel. Meek v. Hays*, 785 P.2d 1356 (Kan. 1990), determined that a state statute did not address public trust rights. *Mont. Coal. for Stream Access, Inc. v. Curran*, 682 P.2d 163, 170-72 (Mont. 1984), recognized the public trust doctrine under Montana's constitution. And *Conaster*, 194 P.3d at 900, recognized public ownership of state waters pursuant to state statute in Utah.

2. Petitioners insist that the divergent results in these cases all turn on differing views over whether "the United States' title to the beds and banks of non-navigable waters in former U.S. territories [was] subject to an easement permitting all encroachments reasonably necessary for recreation and fishing." Pet. 27. Petitioners are wrong. None of the cases cited by the petitioners hold that lands obtained from the United States beneath non-navigable waters are exempt from state public trust doctrine. Nor do any hold that state law public trust rights in non-navigable waters constitute (or could constitute) a taking because of aspects of title previously held by the United States.

a. Petitioners focus heavily on the Colorado court's 118-year-old decision in *Hartman*. In that

case, the defendant forcibly entered the plaintiff's property to reach a stream. *See* Pet. App. 25a. The defendant claimed he was entitled to do so under the Colorado Constitution and a state statute. *See* 84 P. at 686 (synopsis). The court held that neither the Colorado Constitution nor Colorado's common law recognized a public right to fish, let alone a right to trespass on private property to reach waters to fish. *Id.* at 686-87 (opinion); *see People v. Emmert*, 597 P.2d 1025, 1028 (Colo. 1979) (reiterating this interpretation). The *Hartman* decision, therefore, rested on the court's interpretation of the Colorado Constitution and common law.

Petitioners nevertheless suggest that the Colorado Supreme Court must have interpreted the Treaty of Guadalupe Hidalgo differently than the New Mexico Supreme Court did in this case. *See* Pet. 22. But the *Hartman* decision does not even mention the treaty or any related federal statutes.

Petitioners also quote the Colorado Supreme Court's statement that Colorado could not recognize a right to trespass on the plaintiff's land without "compensation to the owner of lands" at issue. Pet. 21 (quoting *Hartman*, 84 P. at 687). But this analysis depended on the court's conclusion that neither the Colorado Constitution nor its common law embraced a right to fish or right of entry onto the land to reach water. Given that legal context, the court merely held that the Colorado Legislature could not create a new right without providing compensation. *See* 84 P. at 687. The court was not presented with the question of whether recognizing a public trust doctrine under historical and legal circumstances like those in New Mexico—circumstances under which a

public right to fish has been recognized as extending back to time "immemorial"—would trigger any sort of takings claim. *Red River*, 182 P.2d at 427-30, 431-33.

b. There also is no conflict over any federal question between the decision below and the decisions petitioners cite from the Alabama, Kansas, and Wyoming Supreme Courts.

To begin, those territories were never part of Spain's dominion or subject to Spanish law or custom. Nor were they subject to the Treaty of Guadalupe Hidalgo, the 1854 Act, or any of the other historical considerations that the New Mexico Supreme Court relied upon here. As a result, no holding in those cases regarding the nature of title previously held by the United States could conflict with the decision below, which depended on the court's analysis of those factors.

These cases are all distinguishable on other grounds as well. In *Hood v. Murphy*, 165 So. 219 (Ala. 1936), the Alabama Supreme Court did not hold, as petitioners claim (Pet. 22-23), that "authoriz[ing] *incursions* onto privately held, non-navigable streams would violate both the Takings Clause and the equal-footing doctrine." (emphasis added). Rather, the Alabama Supreme Court rejected the defendant's argument that a state statute *transferred ownership* of non-navigable beds and banks from private parties to the state. *Hood*, 165 So. at 220; *see also United States v. Oregon*, 295 U.S. 1, 26-27 (1935) (striking down similar statute on equal-footing grounds). That holding does not conflict with the New Mexico Supreme Court's decision here, which involved no attempted transfer of ownership of beds and banks.

The Kansas Supreme Court's decision in *Hays*, 785 P.2d 1356, rested solely on the court's determination of state law, not any question of federal law. The Kansas Supreme Court agreed that the states "are relatively free to regulate the consumptive and nonconsumptive *use* of water within their borders," *id.* at 1360, but held that the state statute at issue was "intended to address problems related to the consumptive use of water, and not nonconsumptive, recreational use," *id.* at 1364. That determination of state legislative intent has no bearing on any federal issue or on the New Mexico Supreme Court's decision here.

Finally, petitioners suggest that the Wyoming Supreme Court's restriction of the public-trust rights in *Day*, 362 P.2d 137, to floatation was "constitutionally compelled" by the Takings Clause. Pet. 25. But the Wyoming Supreme Court held that it was "without power" to extend the scope of the public trust because of the Wyoming Constitution, not because of any dispute over the scope of title once held by the United States. *Day*, 362 P.2d at 151.

IV. The New Mexico Supreme Court's Decision Is Correct

Certiorari is all the more inappropriate in this case because the New Mexico Supreme Court was right to reject the petitioners' argument regarding the nature of title previously held by the United States.

Most private landowners in New Mexico trace their rights to either (1) Mexican or Spanish land grants recognized by the United States under the Treaty of Guadalupe Hidalgo or (2) federal patents

under one or another federal land law, such as the 1862 Homestead Act or the Desert Land Act of 1877. In either circumstance, any title the United States previously held to petitioners' land was subject to the public's right to touch streambeds to fish or recreate on the waters overlying that land.

1. In the Treaty of Guadalupe Hidalgo, the United States recognized preexisting property rights, including legal and customary water rights and uses, arising under Spanish and Mexican law. Congress directed that private land claims arising from Spanish and Mexican land grants be surveyed and confirmed by Congress, but also specified that New Mexico land was taken "under the laws, usages, and customs of the country before its cession into the United States." Act of July 22, 1854, § 8, 10 Stat. 308. As this Court explained in 1876, property rights in New Mexico "were not affected by the change of sovereignty and jurisdiction." *Tameling v. U.S. Freehold & Emigration Co.*, 93 U.S. 644, 661-62 (1876).

Petitioners never explain precisely how their land was originally patented. But it appears from their unverified filings in the New Mexico Supreme Court on rehearing that petitioner Troutstalkers asserts ownership of land within a Mexican land grant, namely the Tierra Amarilla grant. *See* Pet. N.M.S.C. Br. in Supp. of Mot. for Reh'g Ex. A, No. 1 App. Ex. D (pg. 70 of PDF document).

Private parties like petitioner Troutstalkers took ownership of lands in New Mexico under the Treaty of Guadalupe Hidalgo subject to "the laws, usages, and customs of Spain and Mexico," which Congress

expressly preserved. Act of 1854, § 8; *Tameling*, 93 U.S. at 661-62. The applicable Spanish and Mexican law, in turn, provided that a party holding title to the bed of a non-navigable stream held that title subject to a public trust right "to fish and use" public waters for recreation. *Red River*, 182 P.2d at 427, 431; Pet. App. 20a. The State of New Mexico incorporated that right into the state Constitution, N.M. Const. art. XVI, § 2, Pet. App. 42a, which Congress ratified in 1911, *see* J. Res. 8, 62d Cong, 37 Stat. 39 (1911).

Accordingly, the New Mexico Supreme Court concluded in *Red River* that the New Mexico Constitution's acknowledgment of the public trust divested no landowner of any preexisting right and "is only declaratory of prior existing law, always the rule and practice under Spanish and Mexican dominion." 182 P.2d at 427 (quotation marks omitted); *see also* Pet. App. 26a. In other words, the New Mexico Supreme Court merely recognized here that "implicit" in the existing public-trust right enshrined in the New Mexico Constitution is the right to touch riverbeds as reasonably necessary to exercise those recreational and fishing rights. Pet. App. 20a.

2. It appears from their unverified filings in the New Mexico Supreme Court that petitioner Z&T Cattle Co. claims to own land that was at one point patented under the 1862 Homestead Act. *See* Pet. N.M.S.C. Br. in Supp. of Mot. for Reh'g Ex. A, No. 3 App. Ex. D at 19-25 (pgs. 16-22 of PDF document).

This Court has long held that under the nineteenth century land-patent statutes, the United States recognized that land patents granted legal title only to land, and not to waters, which are

controlled by the states. *Cal. Ore. Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 162 (1935). Under those statutes, "all nonnavigable waters were reserved for the use of the public under the laws of the various arid-land states," *Ickes*, 300 U.S. at 95, and Congress intended "to recognize . . . the legislation of a territory as of a state with respect to the regulation of the use of public waters," *Gutierres v. Albuquerque Land & Irrigation Co.*, 188 U.S. 545, 553 (1903).

The New Mexico Supreme Court's decision in *Red River*, in turn, elucidates local law "with respect to the regulation of the use of public waters." *Ibid.* And that decision, along with the one here, explain that longstanding local customs and laws necessarily permitted "incidental" touching of beds and banks to fish and recreate on public waters. Pet. App. 20a. *Red River* also makes clear that the public's right to use waters within New Mexico for public trust uses predates petitioners' patents and was recognized by "local customs" and laws. *See Red River*, 182 P.2d at 427-30, 431-33.

In fact, petitioners' own proffered patents confirm that they are subject to such state public trust rules. Troutstalkers' patent provides that it "shall only be construed as a Quit Claim or relinquishment on the part of the United States and shall not affect the adverse rights of any other person or persons whomsoever." Pet. N.M.S.C. Br. in Supp. of Mot. for Reh'g Ex. A, No. 1 App. Ex. D at 13 (pg. 72 of PDF document). And Z&T Cattle's patents are expressly "subject to any vested and accrued water rights . . . as may be recognized and acknowledged by local customs, laws and decisions of Courts." *E.g.*,

Pet. N.M.S.C. Br. in Supp. Of Mot. for Reh'g Ex. A, No. 3 App. Ex. D at 25 (pg. 22 of PDF document).

Finally, even if title previously held by the United States over any of the riverbeds at issue here was not subject to the public trust rule recognized below, this Court has long held that patents never operated to excuse private patentees from subsequent state regulation affecting those lands. *E.g.*, *Buchser v. Buchser*, 231 U.S. 157, 161 (1913). This includes laws affecting the scope of the patentee's title—for instance, adverse possession or community property. *See id.* at 161-62.

3. Petitioners' counterarguments lack merit. *First*, petitioners claim that the New Mexico Supreme Court failed to support its discussion of the public's trust rights with historical evidence. Pet. 18. That assertion ignores the court's citations to the lengthy analysis in *Red River*, which included a thorough description of the public right of fishing and recreation under Spanish and Mexican law and law and custom within New Mexico from time "immemorial." 182 P.2d at 427-30, 431-33. This discussion included an analysis of Las Siete Partidas, a collection of Spanish law dating to the 1300s and extended to the Spanish colonies in 1530.

Petitioners make no meaningful attempt to discredit *Red River*'s analysis, which is consistent with other courts' descriptions of Spanish and Mexican law. For instance, in 1903, this Court recognized that Mexican law did not limit water use to riparian landowners, as the English common law did, and that under Mexican law, such waters were "subject to be regulated and controlled by the public authorities" for the public's benefit. *Gutierres*, 188

U.S. at 556. The Texas courts reached a similar conclusion in *State v. Grubstake Investment Ass'n*, 297 S.W. 202, 202 (Tex. 1927), holding that "the civil law in force in Mexico [in 1835] made no distinction by reason of the lands granted bordering on a nonnavigable instead of a navigable river," and "the Partidas [provide] a correct statement" of applicable law.

Second, petitioners suggestion that the decision below abrogated some "common law" right they had to exclude the public from their riverbeds is mistaken. *See* Pet. 18, 28. As the New Mexico Supreme Court explained in *Red River*, New Mexico never adopted the English "common law" of riparianism upon which petitioners rely: "[R]iparian ownership, as known to the common law, has never . . . been recognized in New Mexico," including under Spanish or Mexican law. 182 P.2d at 430. Instead, the New Mexico court's decisions in *Red River* and this case are state constitutional holdings. Thus, petitioners have never had any common law right to forbid the public from making incidental contact with beds and banks as reasonably necessary to effectuate New Mexico's constitutional fishing and recreation rights.

Third, citing *Summa Corp.*, petitioners claim that even if historical evidence supports the New Mexico court's analysis, public trust rights to touch the riverbeds at issue were extinguished upon confirmation of land-grant claims because New Mexico did not assert those rights contemporaneously. *See* Pet. 16. As noted above, this argument has a glaring flaw: *Summa Corp.* applies only to California claims confirmed pursuant

to the specific procedures outlined in the 1851 Act. *See* 466 U.S. at 203; *supra* at 17-18. The Act of 1854—which governed New Mexico land claims—imposed no such requirement, and petitioners never even cited that statute to the New Mexico Supreme Court.

In any event, petitioners' argument based on *Summa Corp.* proves too much. Petitioners concede that the public can use non-navigable waters for recreational uses and can, in doing so, have some incidental contact with private lands in furtherance of those rights. Pet. 9. Yet if the rule of *Summa Corp.* had eliminated all public trust rights upon confirmation, that would not be so.

In short, petitioners took title subject to public ownership of, and state authority over, waters running over privately owned beds and banks. As a matter of New Mexico law, dating from time "immemorial," public ownership of these waters conferred rights in the public to fish and recreate. Petitioners have no support for their core contention that their title has carried an established right—at any point—to allow the owner to bar the public from touching the streambeds or banks insofar as reasonably necessary to effectuate its rights in those same waters.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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