No. COA21-654 TENTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS
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COASTAL CONSERVATION ASSOCIATION et al.,

Plaintiffs-Appellees,

v.

STATE OF NORTH CAROLINA,

Defendant-Appellant.

From Wake County
No. 20-CVS-12925

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AMICUS CURIAE BRIEF OF NORTH CAROLINA WILDLIFE FEDERATION AND SOUND RIVERS IN SUPPORT OF PLAINTIFFS-APPELLEES

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STATEMENT OF THE CASE

Coastal Conservation Association and numerous individuals (Plaintiffs) brought this case in part under the public trust doctrine to remedy and hold the State accountable for its mismanagement of coastal fishery resources—particularly its continued authorization of estuarine shrimp trawling, unattended gill nets, and chronic overfishing. Compl. ¶¶ 10-14. Plaintiffs contend these practices have resulted in the collapse of many commercially and ecologically important fish species. *Id.* ¶¶ 16-17, 131. They allege that in the twenty-five years since the Fisheries Reform Act was enacted to restore North Carolina's already depleted fish populations, the long-term decline across multiple species has only accelerated. *Id.* ¶¶ 47, 74-77.

Plaintiffs assert that the public trust doctrine must overlay *some* minimum standard onto the State's management of common-pool natural resources, including coastal fisheries. *Id.* ¶ 11. They further contend that a dramatic, decades-long decline in the populations of most coastal fish species demonstrates the State's violation of the minimum duties it owes to the public. *Id.* ¶¶ 10-13.

The State does not assert that it has acted within the bounds of the public trust doctrine; instead, it contends sovereign immunity precludes Plaintiffs' case at the outset. This appeal does not present questions of the outer limits of the public trust doctrine, or of appropriate relief: it raises the basic issue whether North Carolina citizens can *ever* bring a public trust doctrine claim against their government. Plaintiffs should be entitled to have their case heard, because their allegations establish a prima facie case that the State is violating its public trust duties.

Dismissing this case based on the State's sweeping claim of sovereign immunity would eviscerate the public trust doctrine in North Carolina.[1] In the State's conception, the State (and only the State) can *enforce* the public trust doctrine, but it can never *violate* the public trust doctrine, or be held accountable to its citizens for violating the doctrine. If the State were correct, then it would have *no* duty to the public under the doctrine. Thus, *no* amount of mismanagement of trust resources could lead to judicial intervention. No North Carolina case has ever adopted the State's argument.

This Court should affirm the Superior Court's denial of the State's motion to dismiss, for two reasons. First, the *public* must be able to enforce the *public* trust doctrine for the doctrine to have any meaning; the courts and legislature have firmly embraced the doctrine over many decades, implying that a right to sue is inherent in the doctrine itself. Second, contrary to the State's assertions, the North Carolina Constitution incorporates the public trust doctrine, meaning sovereign immunity does not apply in any event.

INTEREST OF AMICI

As explained in the motion that accompanies this brief, Amici North Carolina Wildlife Federation and Sound Rivers are North Carolina-based nonprofit organizations dedicated to protecting the state's public trust resources for future generations. Amici seek to demonstrate for the Court that the legal issues this appeal presents will extend far beyond the present case. The State's sovereign immunity defense would greatly reduce the applicability of the public trust doctrine in North Carolina, imperiling the lands and wildlife Amici have long sought to protect.

[1] In the Superior Court, the State advanced other arguments to support dismissal. It asserts only sovereign immunity on appeal. Br. 3.

Amicus North Carolina Wildlife Federation has attempted to reduce bycatch and waste and protect essential habitat areas through advocacy to the Marine Fisheries Commission, thus giving it particular familiarity with the history behind Plaintiffs' public trust doctrine claim. In 2016, the Federation filed a petition with the Commission to address bycatch by modifying the definition of "Secondary Nursery Areas" to include ocean waters, and designating all inshore and near-shore coastal fishing waters as Special Secondary Nursery Areas.[2] Although the Commission approved the petition, the Division of Marine Fisheries blocked the rulemaking process. In 2019, the Federation filed a second petition asking the Commission to designate new Shrimp Trawl Management Areas in the Pamlico Sound and other critical spawning waters, and to take other actions, such as requiring shrimp to reach a certain size before opening shrimping season, reducing tow times, and limiting trawler headrope size to 110 feet.[3] These proposals prioritize small, local shrimp harvesters over larger, out-of-state fleets.[4] The second petition was denied. The Division opposed both petitions as "unnecessary." Compl. ¶ 123.

BACKGROUND

The public trust doctrine, a set of principles derived from Roman and English law, holds that the public has property rights in rivers, the sea, and the seashore, because its interests in "navigation and fishing" compel a special governmental duty toward "property used for those purposes." Joseph Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 474 (1970). In its first modern application, the doctrine prevented the Illinois legislature from granting extensive submerged lands—all the land

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[2] N.C. Wildlife Fed'n, Petition for Rulemaking (Nov. 2, 2016), https://ncwf.org/wp-content/uploads/2016-11-02-NCWF-Petition-for-Rulemaking-w_Exhibits-A-F.pdf.
[3] N.C. Wildlife Fed'n, Petition for Rulemaking (May 20, 2019), https://ncwf.org/wp-content/uploads/2019-05-20-Petition-for-RM-amended-updated.pdf.
[4] *Id.*

underlying Lake Michigan for one mile out from the shoreline and extending one mile in length along Chicago's central business district—to a railroad company. *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 437 (1892). The U.S. Supreme Court held that the state could not divest itself of authority to govern an area in which it has responsibility to exercise its police power; granting a major city's entire waterfront to a private company was effectively an abdication of legislative authority over navigation. *Id.* at 452-53.

In North Carolina, "the lands under navigable waters are held in trust by the State for the benefit of the public and the benefit and enjoyment of North Carolina's submerged lands is available to all its citizens, subject to reasonable legislative regulation, for navigation, fishing and commerce." *Parker v. New Hanover Cnty.*, 173 N.C. App. 644, 653 (2005) (quoting *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 527 (1988) (internal quotations omitted)); *see also* N.C. Gen. Stat. § 1-45.1 (codifying public trust doctrine and extending its protections to "the right to navigate, swim, hunt, fish, and enjoy all recreational activities in the watercourses of the State"); *id.* § 113A-134.1(b) (noting citizens have traditionally enjoyed "public access to…coastal waters"); *Friends of Hatteras Island Nat. Historic Land Trust v. Coastal Res. Comm'n*, 117 N.C. App. 556, 574 (1995).

The public trust doctrine underpins Plaintiffs' contention that—although the State is vested with the power and instrumentalities to regulate the harvest of fish—*some* level of regulatory failure falls below the "reasonable" minimum standard the State owes to its citizens. *See Parker*, 173 N.C. App. at 653. As Plaintiffs' complaint alleges, the State's regulation of commercial fishing, and even its efforts at reform beginning in 1997, have failed to stem unsustainable exploitation of fish populations and the estuaries that support them. Plaintiffs contend North Carolina is the only southeastern state that continues to allow estuarine trawling

and unattended gillnets, which have decimated multiple fish stocks. Compl. ¶¶ 13-15, 85-282. Since 1997, when dramatic declines in several fishery stocks prompted the Fisheries Reform Act, total commercial landings for six important fish species have declined a *further* 79%.[5] One of the principal causes is bycatch from trawling: for every pound of shrimp caught in North Carolina waters, nearly four pounds of finfish and other marine life are caught, killed, and shoveled overboard. Hundreds of millions of young fish die in this manner each year.[6]

The State's contention that Plaintiffs' case cannot even reach the merits, because of sovereign immunity, is troubling especially in light of its opposition to the Federation's past petitions. Whatever the merits of the current case, the State's jurisdictional argument would leave the public with virtually no ability to assert claims on behalf of public trust resources. The State, in effect, asks this Court to deem its management categorically lawful, regardless of the claim actually presented. But the State is not a monarchy. It governs not by absolute right, but subject to certain limitations on its power. The public trust doctrine is one such limitation, providing an independent standard for management of resources held in trust for the public. *See* Sax, 68 Mich. L. Rev. at 484.

ARGUMENT

1. SOVEREIGN IMMUNITY DOES NOT PRECLUDE THIS CASE BECAUSE ENFORCEABILITY AGAINST THE STATE IS INHERENT IN THE PUBLIC TRUST DOCTRINE.

a. THIS CASE PRESENTS AN ISSUE OF FIRST IMPRESSION.

The State contends that because Plaintiffs have not identified "any judicial decision" holding the State has waived sovereign immunity for public trust doctrine claims, sovereign

[5] N.C. Wildlife Fed'n, "Marine Fisheries," https://ncwf.org/wildlife/marine-fisheries/.
[6] *Id.*

immunity must apply. Br. 18. But the State, for its part, fails to cite any case supporting its argument that sovereign immunity *does* apply to claims brought under the public trust doctrine. The reason is simple: this is an issue of first impression. Although the North Carolina courts have repeatedly recognized the existence of the public trust doctrine, they have never directly addressed its interplay with sovereign immunity. As explained below, there are strong reasons this Court should hold that sovereign immunity does not apply to public trust doctrine claims, because a right to sue must inhere in the doctrine for it to have any meaning.

b. SOVEREIGN IMMUNITY IN NORTH CAROLINA IS SUBJECT TO EXCEPTIONS.

In North Carolina, sovereign immunity is a judge-made doctrine first adopted by the Supreme Court in *Moffitt v. City of Asheville*, 103 N.C. 237 (1889). The doctrine "originated with the feudal concept that the king could do no wrong." *Corum v. UNC*, 330 N.C. 761, 785 (1992). Several modern cases have held that even when the State *asserts* sovereign immunity in litigation, its *conduct* can show implicit waiver. For instance, in *Smith v. State*, 289 N.C. 303, 320 (1976), a wrongful termination claim by a state employee, the N.C. Supreme Court rejected the State's defense of sovereign immunity and instead held that the State implicitly consents to be sued for damages on a contract in the event of a breach. The Court favorably cited other states' case law recognizing sovereign immunity as a "monarchistic doctrine" of "unsound" logic. *Id.* at 311-12. Among other considerations, the Court held that allowing the State to arbitrarily avoid a contract obligation, after inducing the other party to perform, "would be judicial sanction of the highest type of governmental tyranny," and that the "courts are a proper forum in which claims against the state may be presented and decided upon known principles." *Id.* at 320.

Other cases have found implicit waiver when the State enters a lease agreement, *Can Am South, LLC v. State*, 234 N.C. App. 119, 127 (2014), and when the State acquires land by eminent domain, *Ferrell v. NCDOT*, 334 N.C. 650, 655 (1993). *See also Guthrie v. N.C. State Ports Auth.*, 307 N.C. 522, 535 (1983) (holding, over State's objection, that waiver in Tort Claims Act applied to personal injury claims).

Here, although the State concedes that it "has waived its sovereign immunity to some common law claims," it does not acknowledge the courts' role in negating sovereign immunity. Br. 18. The courts have held that immunity does not apply in some cases *despite* the State's assertions, not consistent with them.[7] Here, although the State has not taken a discrete action showing it has waived sovereign immunity through its conduct, this Court should nonetheless hold that sovereign immunity does not apply—or is implicitly waived—as to claims brought under the public trust doctrine.

c. THE NATURE OF THE PUBLIC TRUST DOCTRINE NECESSITATES THE POSSIBILITY OF JUDICIAL ENFORCEABILITY.

By the very nature of the public trust doctrine, rights vested in the public connote obligations on behalf of the State. *See Credle*, 322 N.C. at 525. These rights and obligations have meaning only if they can be enforced against mismanagement of commonly held resources; rendering them categorically unenforceable would render them virtually meaningless. *See* Sax, 48 Mich. L. Rev. at 474 (noting "to provide a satisfactory tool," the doctrine "must be enforceable against the government"). Holding that the State can never be sued under the public trust doctrine would extend far beyond this case to the many natural resources Amici work to protect.

[7] *Smith*, *Guthrie*, and *Can Am* began with the same posture as this case: the Superior Court denied the State's assertion of sovereign immunity. In all three, the Court of Appeals affirmed.

Public trust claims, in particular, should stand or fall on their merits. The public trust doctrine views the government as a guardian of rights *on behalf of* its citizens. This makes it a particularly unsuitable context to contend—as the State does here—that the "king can do no wrong." *See Corum*, 330 N.C. at 785. Such a "monarchistic" conception of governmental immunity may still apply in other circumstances, but it cannot be the proper reading of the public trust doctrine, which by its nature and history reflects our society as "one of citizens rather than of serfs." *See Smith*, 289 N.C. at 311; Sax, 68 Mich. L. Rev. at 484 (citing *Martin v. Waddell*, 41 U.S. 367, 414 (1842)). Holding otherwise would allow the State to act unfettered by any judicial process. In the fisheries management context, as well as in contract law, this would constitute "the highest type of governmental tyranny." *See Smith*, 289 N.C. at 320. Under the N.C. Constitution, the people are sovereign. N.C. Const. Art. 1 § 2; *see also Kanuk v. State*, 335 P.3d 1088, 1096 (Alaska 2014) (declining to dismiss public trust doctrine claims based on sovereign immunity).

d. THE STATE'S LONGSTANDING RECOGNITION OF THE PUBLIC TRUST DOCTRINE SUPPORTS IMPLIED WAIVER OF SOVEREIGN IMMUNITY.

Our state courts have long recognized the public trust doctrine. *See, e.g.*, *Nies v. Town of Emerald Isle*, 244 N.C. App. 81, 87 (2015). While sovereign immunity emerged from the concept that the king could do no wrong, the public trust doctrine derives from recognition that certain lands and resources were not entirely owned but only held by the king for the benefit of all his subjects. As the N.C. Supreme Court held in *Credle*, the public trust doctrine signifies that the State owns "tidal lands and waters for the benefit of the public," subject to "concomitant restraints." 322 N.C. at 525. This ownership *on behalf of* the public led the N.C. Supreme Court to reject an oysterman's attempt to quiet title to a 640-acre tract of submerged oystering grounds, because "the benefit and enjoyment of North Carolina's submerged lands is available to all its

citizens, subject to *reasonable* legislative regulation, for navigation, fishing and commerce." *Id.* at 526, 534 (emphasis added).

In addition to the courts, the legislature has repeatedly reaffirmed the public trust doctrine's validity in North Carolina, and the existence of "public trust rights." *See, e.g.*, N.C. Gen. Stat. §§ 113-206(f), 77-20(d), 1-45.1. This legislative recognition evinces the General Assembly's codification of rights granted from the State to the public.

Plaintiffs contend the State has not managed North Carolina's estuarine fisheries *reasonably*, but instead has condoned and permitted waste. It would violate the courts' and legislature's recognition of the doctrine and its "concomitant restraints" on State ownership to hold, across the board, that no one asserting the doctrine can *ever* sue the State to vindicate "public trust rights." *See Credle*, 322 N.C. at 525, 534. No case has ever so held.[8] While no single, discrete action evinces the State's implied waiver, as in *Smith* (entering a contract) or *Ferrell* (exercising eminent domain), there is instead a longstanding recognition by the courts and General Assembly of rights in estuarine resources, held by the public. This Court should not allow the State to nullify longstanding judicial and legislative recognition of the public trust doctrine; it should consider sovereign immunity implicitly waived.

2. SOVEREIGN IMMUNITY IS NOT APPLICABLE BECAUSE THE N.C. CONSTITUTION INCORPORATES THE PUBLIC TRUST DOCTRINE.

"The doctrine of sovereign immunity cannot stand as a barrier to North Carolina citizens who seek to remedy violations of their rights guaranteed by the Declaration of Rights of our

[8] Although this Court has held that "affirmative actions regarding public trust property must be taken by the State," *Town of Nags Head v. Cherry, Inc.*, 219 N.C. App. 66, 70 (2012), that holding concerned an attempt to enforce the public trust doctrine against *another* private party—not against the State for violating its duties.

Constitution." *Richmond Cnty. Bd. of Educ. v. Cowell*, 225 N.C. App. 583, 587 (2013) (quoting *Corum*, 330 N.C. at 785 (alterations omitted)). Article XIV § 5 of the N.C. Constitution "mandates the conservation and protection of public lands and waters for the benefit of the public." *Credle*, 322 N.C. 522, 532 (1988). As explained below, the N.C. Constitution incorporates the common law public trust doctrine, and accordingly, sovereign immunity does not bar Plaintiffs' claim.

a. CASE LAW AND STATE STATUTES BOTH DEMONSTRATE THAT THE N.C. CONSTITUTION INCORPORATES THE PUBLIC TRUST DOCTRINE.

Given the public trust doctrine's origin in ancient legal traditions, it is unquestionably "a creation of common law." *Nies*, 244 N.C. App. at 87. From this starting point, the State leaps to the conclusion that the doctrine cannot be incorporated into the N.C. Constitution. Br. 5-6. But a claim can be grounded in the common law and *also* incorporated into the N.C. Constitution, which can and does incorporate common law doctrines. *Nies*, 244 N.C. App. at 87. That is the case here: in 1972, North Carolina's voters ratified a "policy" to "conserve and protect [the State's] lands and waters for the benefit of all its citizenry." N.C. Const. Art. XIV § 5.[9] In fact, this Court's most recent pronouncement on the issue, *Town of Nags Head v. Richardson*, 260 N.C. App. 325, 334 (2018), said exactly that: "Public trust rights 'include, but are not limited to, the right to navigate, swim, hunt, fish…. The State is tasked with protecting these rights pursuant to the North Carolina Constitution [quoting N.C. Const. Art. XIV § 5])".

This Court's unambiguous statement in *Richardson* follows logically from the language of § 5. It would take willful blindness to miss the overlap between § 5's "policy" and "public trust rights," which are "held in trust by the State for the use and benefit of the people" and

[9] While the parties discuss another constitutional provision, Article I § 38, Amici focus their brief on Article XIV § 5.

include "the right to navigate, swim, hunt, [and] fish" on "public trust lands, as well as the right to freely use and enjoy the State's ocean and estuarine beaches." *See Richardson*, 260 N.C. App. at 334 (quoting N.C. Gen. Stat. § 1-45.1) (internal quotations omitted).

No case has distinguished or overruled *Richardson*, which State's brief neglects to mention. Instead, the State contends that any possible connection between Article XIV § 5 and the public trust doctrine was eliminated in 1971 when the General Assembly considered, but did not adopt, language stating that North Carolina's natural resources are "held in trust for the people of the State." Br. 23. But removal of the "held in trust" language is not determinative. "Constitutional interpretation begins with the plain language as it appears in the text," *State Bd. of Educ. v. State*, 371 N.C. 149, 159 (2018), and here, the connection between Article XIV § 5 and the public trust doctrine is clear even in the words the General Assembly and the people *did* adopt. This Court recognized as much in *Richardson*, and it should do the same here.[10]

Consistent with *Richardson*, the General Assembly has also explicitly stated that N.C. Const. Art. XIV § 5 incorporates the common-law public trust doctrine. *See* N.C. Gen. Stat. § 77-20(d) (observing "public trust rights" in the ocean beaches, which are "recognized by Article XIV, Section 5 of the Constitution of North Carolina"). Even the State's brief apparently admits that public trust rights are "*recognized* by Article XIV, Section 5 of the Constitution." Br. 23 (quoting § 77-20(d)). That should be the end of the matter. The doctrine's origin in the common law does nothing to diminish its constitutional incorporation in North Carolina.

[10] The State's contention that Article XIV § 5 is not "self executing," Br. 26, is immaterial because Plaintiffs contend § 5 can be "executed" via lawsuit.

b. GWATHMEY DOES NOT PRECLUDE CONSTITUTIONAL INCORPORATION OF THE PUBLIC TRUST DOCTRINE.

The State's principal case is *Gwathmey v. State*, 342 N.C. 287, 304 (1995), in which the N.C. Supreme Court held that the legislature was not prohibited from conveying lands underlying navigable waters to a private party, in fee simple, without reserving public trust rights. Although *Gwathmey* stated there is not a "constitutional basis for the public trust doctrine," that statement concerned the plaintiffs' attempt to use the doctrine "to invalidate acts of the legislature which are not proscribed by our Constitution," specifically the decision to convey submerged lands by special grant. *Id.* Accordingly, the Court's statement did *not* apply to whether the State's management of commonly held fishery resources violates trust duties it owes to the public through Article XIV § 5. *See* Compl. ¶ 13. Tellingly, *Gwathmey* did not mention Article XIV § 5 at all, because § 5 was not relevant to the inquiry before the Court: whether the legislature could convey lands in fee simple.

Here, by contrast, Plaintiffs are not attempting to invalidate a conveyance by the legislature. Moreover, Article XIV § 5 is a *critical* component of Plaintiffs' case, because they contend the State has not upheld its duty to preserve North Carolinians' "common heritage," which includes "wetlands" and "estuaries." *See* N.C. Const. Art. XIV § 5. *Richardson*, unlike *Gwathmey*, directly addresses the N.C. Constitution's incorporation of the public trust doctrine through Article XIV § 5. *See* 260 N.C. App. at 334; *see also Parker*, 173 N.C. App. at 653 (citing Article XIV § 5 following a discussion of the public trust doctrine); *Credle*, 322 N.C. at 532 (similar). *Gwathmey*, which did not involve Article XIV § 5, is inapposite to this question.

The doctrine of sovereign immunity is "not a constitutional right; it is a common law theory or defense," and thus "when there is a clash between [] constitutional rights and sovereign immunity, the constitutional rights must prevail." *Corum*, 330 N.C. at 786. Because the N.C.

Constitution incorporates the public trust doctrine, the State's claim of sovereign immunity does not bar Plaintiffs' claims.

CONCLUSION

Upholding the State's sovereign immunity defense would nullify the public trust doctrine in North Carolina, endangering coastal fisheries and other natural resources Amici have fought to protect for many decades. The judgment of the Superior Court should be AFFIRMED.

Respectfully submitted this 10th day of February, 2022.

SOUTHERN ENVIRONMENTAL LAW CENTER

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N.C. R. App. P. 33(b) Certification:
I certify that all of the attorneys listed below have authorized me to list their names on this document as if they had personally signed it.

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type and word-count limitations of Appellate Rules 26(g) and 28(j) because it uses a 12-point proportionally spaced font with serifs and contains fewer than 3,750 words excluding captions, tables, certificates, and the signature block.

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CERTIFICATE OF SERVICE

I certify that on February 10, 2022, a copy of this Amicus Curiae Brief was served upon all counsel of record by email, addressed as follows, in compliance with Appellate Rule 28(i)(4):

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