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No. 10-218

In the Supreme Court of the United States

PPL MONTANA, LLC,

PETITIONER,

v.

STATE OF MONTANA,

RESPONDENT.

*On Writ of Certiorari to the
Supreme Court of the State of Montana*

BRIEF OF THE MONTANA FARM BUREAU FEDERATION, AMERICAN FARM BUREAU FEDERATION, CATO INSTITUTE, AND THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, AS *AMICI CURIAE* SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Montana Farm Bureau Federation represents more than 17,500 member families operating farms, ranches, and other agricultural concerns in almost every county in Montana. Agriculture and related industries have been a critical part of Montana's economy since its founding, and agriculture is the largest industry in the state. Since 1919, MFBF has provided its members with a forum representing their interests at every level of government. MFBF unites the individual voices of its members to address government policy that affects property rights, water quality, water rights, taxes, government regulations, use of public lands, and the environment.

MFBF believes its member families are best served by supporting our free enterprise system and defending those policies that protect individual freedom and opportunity.

MFBF is a member of the American Farm Bureau Federation (Farm Bureau). The Farm Bureau is organized as a federation of fifty independent state Farm Bureaus and the Puerto Rico Farm Bureau, whose members include family farmers. Established in 1919, the Farm Bureau is a general farm organization that protects, promotes, and represents the business, economic, social, and

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[1] In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.3(a), *amici* state that all parties consented to the filing of this brief.

educational interests of American farmers and ranchers before the Executive Branch, Congress, and federal courts. The Farm Bureau represents family farmer members who produce and raise every type of agricultural crop and commodity in the nation.

The Cato Institute is a nonpartisan national public policy research foundation dedicated to advancing principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Among its other endeavors in support of these goals, Cato files *amicus* briefs.

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.

SUMMARY OF THE ARGUMENT

The Montana Supreme Court's sweeping decision markedly diverges from fundamental principles protecting the property rights of private citizens.[2] It erred in its analysis of navigability in the context of title and ownership of submerged riverbeds by failing to follow this Court's title navigability standard.[3] This Court should overturn the decision below and reaffirm the federal test for title navigability found in *United States v. Utah*, 283 U.S. 64 (1931).

In Part I, *amici* explain the rights at stake not only for Montanans, but for property owners nationwide. In Part II, *amici* demonstrate why the Montana Supreme Court's affirmance of the trial court's premature summary judgment ruling was wrong. Part III explains why the decision below is a judicial taking and a due process violation, as understood by a majority of this Court in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 130 S. Ct. 2592 (2010). For each of these reasons, this Court should reverse the Montana Supreme Court's erroneous decision.

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[2] At their simplest, property rights in a physical thing are the rights "to possess, use and dispose of it." *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 435 (1982). When the government permanently occupies another's property, it "does not simply take a single 'strand' from the 'bundle' of property rights: it chops through the bundle, taking a slice of every strand." *Id.*

[3] This brief addresses "navigability" as it applies to determinations of title, and not navigability determinations in any other context (such as regulatory authority).

ARGUMENT

I. The Montana Supreme Court's Novel Title Navigability Standard Imperils Established Property Rights

A. For Decades, Montana Farmers And Ranchers Have Owned The Riverbeds At Issue

Montana's farmers and ranchers have been encouraged for many years, by the State of Montana, to use the streambeds at issue here. No one ever believed that Montana owned these streambeds. Property owners have never been charged for their use, and their ownership has never—prior to this case—been challenged. Until the ruling below, it was rightfully understood that the disputed river segments were "non-navigable."

That changed only because the lower courts ignored a "mountain" of evidence, while concurrently employing an amorphous legal standard inconsistent with federal navigability law. *See PPL Mont., LLC v. Montana*, 229 P.3d 421, 467 (Mont. 2010) (Rice, J., dissenting). The lower court's redefinition of title navigability paves the way for Montana to begin claiming title to dozens of submerged riverbeds long believed to be non-navigable, disturbing (and ultimately, usurping) the established property rights of its citizens. *See* JA 196. The Montana Supreme Court's analysis cannot stand.

B. Montana And Its Courts Are Hostile To These Established Interests

Amici are further concerned by Montana's open hostility to these settled property rights. Montana, for example, claims that PPL has no title to the riverbeds abutting its property because title does not appear in its deed. *See* Pet. Cert. Opp. at p. 24. This position flatly contradicts Montana law, providing that where rivers are non-navigable, title reverts to the United States, or, if applicable, to private owners. *See* MONT. CODE ANN. § 70-16-201; *Missoula v. Bakke*, 198 P.2d 769, 772 (Mont. 1948). Indeed, when land "borders upon a navigable . . . stream," the owner "takes to the edge of the . . . stream at the low-water mark," but when land abuts any other type of stream, "the owner takes to the middle of the . . . stream." *Id.* This is true for PPL, and it is true for all similarly-situated Montanans.[4]

MFBF's members use the streams flowing through their lands for irrigation and related purposes. *See* MONT. CONST. art. IX, § 3 (existing water rights exercised "for any useful or beneficial purpose" are "recognized and confirmed"). In many cases, these farmers have built small dams, diversions, or head gates on the riverbeds that are

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[4] This is a longstanding principle of law dating to Blackstone. *See Holyoke Co. v. Lyman*, 82 U.S. 500, 506-07 (1872) ("Where such a proprietor owns the land on one side only of the stream, his right to the land and to the use of the water, whether used as power to operate mills and machinery or merely as a fishery, extends only to the middle thread of the stream, as at common law, and is subject to the same conditions and regulations as when the ownership includes the whole soil over which the water of the stream flows.").

crucial for ensuring effective irrigation. Pursuant to settled Montana law, farmers' rights to build these structures on rivers long considered non-navigable have never previously been challenged by the State.

The Montana Supreme Court's divergent navigability standard may also bar affected Montana farmers from exercising their existing water rights. *See Hage v. United States*, 35 Fed. Cl. 147, 159 (1996) ("Likewise, plaintiffs can have a property interest in water, and even defendant concedes that a water right is a type of property right."). Indeed, Montana's high court has previously explained that "[w]hen the [water] right was fully perfected, that is, when there was a diversion of the water and its application to a beneficial use, it thereupon became a property right of which the owner could only be divested in some legal manner." *Osnes Livestock Co. v. Warren*, 62 P.2d 206, 210 (Mont. 1936). Consequently, that right cannot be appropriated by the government without compensation. *See Harrer v. N. Pac. Ry. Co.*, 410 P.2d 713, 175 (Mont. 1966) ("One who has appropriated water in Montana acquires a distinct property right"); *Smith v. Denniff*, 60 P. 398, 400 (Mont. 1900) (holding that a water right is a "positive, certain, and vested property right"); *see also People ex rel. Deneen v. Econ. Light & Power Co.*, 89 N.E. 760, 768 (Ill. 1909) (holding that "[t]he property rights of riparian owners in the bed of an unnavigable stream are as sacred as any other property right"). Had the Montana legislature passed a law in the same manner, it would have been a compensable taking. *See Hage*, 35 Fed. Cl. at 159; *see also Dugan v. Rank*, 372 U.S. 609, 625 (1963).

These are not hypothetical concerns for Montana farmers. The loss of water for irrigation and related purposes will have serious economic consequences. Montana previously released a list of at least three dozen rivers—or portions thereof—that it believes are navigable. JA 196. Already, MFBF members report disputes with emboldened state officials regarding the navigability of streams bisecting their lands. And in reliance upon the Montana Supreme Court's novel title navigability standard, Montana is preparing to levy unprecedented assessments on property owners.

C. The Decision Below Was Not Grounded In Law Or Fact

The decision below unduly assaulted Montanans' property rights in two crucial ways. First, in confirming the trial court's rush to judgment on Montana's behalf, the Montana Supreme Court ignored unmistakable evidence that significant portions of the upper Missouri, Clark Fork, and Madison rivers were not, in fact, navigable. The evidence was at least sufficient to raise a question of fact that should have been resolved at trial.

Second, the Montana Supreme Court came to the wayward conclusion that non-navigable stretches of the disputed rivers were, legally, too "short" to support a non-navigability finding. Relying on its own truncated analysis, the Montana Supreme Court held that even if certain stretches of river were non-navigable, those stretches were "too short to matter." *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) ("Disturbing to me is that the Court is declaring, as a matter of law, that the reaches claimed by PPL to be

non-navigable are simply too 'short' to matter."). The Montana Supreme Court did this despite *Utah*'s unmistakable teaching that length is ***just one*** of the factual considerations that must be considered in a "precise" title navigability analysis. *See Utah*, 283 U.S. at 82-84.

The Montana Supreme Court was not applying an established navigability standard to a unique situation. Rather, it created a new navigability standard with the consequence of unduly divesting and destroying property interests previously established under *Utah*. This Court should affirm the federal *Utah* standard and reverse the Montana Supreme Court, reestablishing the settled property rights that Montanans have long enjoyed.

II. This Court Should Protect Settled Property Interests By Affirming The *Utah* Navigability Test

Montana seeks to benefit from redefining the property rights of its citizens out of existence.[5] It was for that very purpose that the lower courts disregarded the *Utah* title navigability standard, and instead adopted a "concept of navigability for title

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[5] The lower court's ruling below led to an award of over $40 million against PPL. *See PPL Mont.*, 229 P.3d at 457. Given this precedent, the States' incentives to wrest federal law for their benefit could not be more apparent. *See, e.g.*, Outlook Declines As Budget Cut Proposals Come In, BILLINGS GAZETTE, Jan. 30, 2010, at A1; Charles S. Johnson, *State Sees Another Fall In Revenue Outlook*, BILLINGS GAZETTE, Mar. 14, 2009, at B1; *see also* Michael Powell, *Illinois Stops Paying Its Bills, But Can't Stop Digging Hole*, N.Y. TIMES, July 3, 2010, at A1; Mary Williams Walsh and Amy Schoenfeld, *Padded Pensions Add To New York's Fiscal Woes*, N.Y. TIMES, May 21, 2010, at A1.

purposes" charitably characterized as "***very liberally construed*** by the United States Supreme Court." *PPL Mont.*, 229 P.3d at 446. The Montana Supreme Court thus denoted its intent to favor the State's ambitions from the outset.

A. The Montana Supreme Court Gave Undue Deference To The State Of Montana's Evidence

But the lower courts' "liberal" reading of *Utah* violated fundamental principles of property title jurisprudence. They failed to adequately protect settled property interests by engaging in a selective review of the facts designed to favor Montana. *See State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997) (holding that *stare decisis* concerns are "at their acme" in cases involving property and contract rights) (citing *Payne v. Tennessee*, 501 U.S. 808, 828 (1991)). Indeed, there is no better evidence to determine a river's "susceptibility to commerce" than available historical evidence of non-navigability, but this is precisely the evidence the lower courts ignored. *See Utah*, 283 U.S. at 82. This was error.

The property rights at issue here are the most fundamental in the property "bundle," and thus, a thorough factual review consistent with the rules of federal title navigability is vital. *See Leo Sheep Co. v. United States*, 440 U.S. 668, 687 (1979) ("This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned . . ."); *Palazzolo v. Rhode Island*, 533 U.S. 606, 626-627 (2001) (rejecting the argument that inherent uncertainty in legislative action forecloses a taking, because "[t]he State may not put so potent a

Hobbesian stick into the Lockean bundle"). Here, the draconian nature of the relief Montana sought—reversion of title—must be tempered by the federal requirement that Montana meet its burden to prove navigability prior to embarking on a *de facto* taking.

Instead, the Montana Supreme Court conflated what it characterized as a "liberal" legal standard with a jurisprudential monster of its own creation—an indefensible evidentiary standard tilting the evidence in favor of the State, against PPL, and, by extension, against all other property holders holding title to riverbeds that Montana now belatedly disputes. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (criticizing majority for "disregarding the considerable evidence PPL [] presented").

The lower courts' biased approach finds no succor in cases holding that States presumptively hold title to submerged riverbeds under navigable waters. *See Idaho v. Coeur d'Alene Tribe of Idaho*, 521 U.S. 261, 284-85 (1997); *United States v. Alaska*, 521 U.S. 1, 34 (1997); *United States v. Oregon*, 295 U.S. 1, 14 (1935). None of these cases supports the presumption that a river is navigable in the first instance. The presumption of title applies only ***after*** the *Utah* navigability test is satisfied. The lower courts below failed to apply the federal standard for proving title navigability, and thus erred to the extent that they invoked a presumption appropriate only for navigable waters.

There is no support in *Utah*—or in any of this Court's other navigability decisions—for the deference exhibited by the courts below. *See Hughes v. Washington*, 389 U.S. 290, 296 (1967) (Stewart, J., concurring) ("But to the extent that it constitutes a

sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate."). Quite the opposite—the State must demonstrate navigability and ownership. And, at the summary-judgment stage, Montana's burden of proof was extremely high.

B. Montana Did Not Meet Its Burden Of Proof On Summary Judgment

The lower courts' extraordinary deference to the State was plainly at odds with the requirement that Montana prove title navigability. *See North Dakota ex rel. Bd. of Univ. and School Lands v. United States*, 770 F. Supp. 506, 509 (D. N.D. 1991) (holding that North Dakota "bears the burden of proving that the Little Missouri River was navigable at the time of statehood"); *In re River Queen*, 275 F. Supp. 403, 408 (W. D. Ark. 1967) ("The burden of proof rests upon the petitioners to establish the navigability of the portion of White River that is involved in this proceeding"); *Iowa-Wisconsin Bridge Co. v. United States*, 84 F. Supp. 852, 867 (Ct. Cl. 1949) (criticizing defendant for making "no effort" to prove navigability in fact). That deference was all the more indefensible at the summary-judgment stage of the proceedings. Indeed, the majority opinion below reflects the extent to which Montana's evidence was favored over PPL's. *See PPL Mont.*, 229 P.3d at 470 (Rice, J., dissenting) ("The Court's decision to the contrary makes one wonder just what evidence the Court would have considered sufficient for PPL to defeat summary judgment in this case.").

For instance, the majority held that the Great Falls reach was navigable because it had been

"portaged by the Lewis and Clark expedition, and many others, early in the 19th century, allowing the Missouri to provide a useful channel of commerce." *Id.* at 447. But that conclusion was dispelled by PPL's expert. *Id.* at 465 (Rice, J., dissenting); JA 375-377 (describing the extreme impracticality of Lewis and Clark's "portage," presenting evidence that their passage took several weeks, and concluding that their route held no commercial value). Indeed, there was little evidence that Lewis and Clark's route was used as a regular—much less useful—channel of commerce, however storied its early explorers may have been.[6] JA 789 (noting that 1866 Bancroft report, if taken at face value, "would have left those poor passengers in the middle of the Falls, and dead by drowning").[7] Montana's scant

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[6] Clark wrote, "[T]he men has to haul with all their Strength wate & art, maney times every man all catching the grass & knobes & Stones with their hands to give them more force in drawing on the Canoes & Loads, and notwithstanding the Coolness of the air in high presperation and every halt, [those in the company] are asleep in a moment, maney limping from the Soreness of their feet. Some become fant for a few moments, but no man Complains all go Chearfully on—to State the fatigues of this party would take up more of the journal than other notes which I find Scercely time to Set down." THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, June 23, 1805, *available at* http://lewisandclarkjournals.unl.edu; *see also* STEPHEN E. AMBROSE, UNDAUNTED COURAGE: MERIWETHER LEWIS, THOMAS JEFFERSON, AND THE OPENING OF THE AMERICAN WEST 230-250 (1996).

[7] *Cf. Lykes Bros. v. U.S. Army Corps of Eng'rs*, 64 F.3d 630, 635 (11th Cir. 1995) (affirming district court's holding of non-navigability despite a historical account describing one exploring party's ability to traverse the river "with great difficulty, pushing the canoes through the weeds, and hauling the canoes over two troublesome places"); *Miami Valley Conservancy Dist. v. Alexander*, 692 F.2d 447, 451 (6th Cir.

evidence was directly contradicted by PPL, creating a material issue of fact. *Id.* at 465-69 (Rice, J., dissenting).

The majority below also held that the upper Madison River was navigable at the time of statehood based on evidence of "present-day recreational use."[8] *Id.* at 448. But Montana offered no evidence that the rivers remain in the same condition today as they were in the late 19th Century. *See United States v. Crow, Pope & Land Enters., Inc.* 340 F. Supp. 25, 36 (N.D. Ga. 1972) ("[T]he court is unable to determine whether the natural and ordinary condition of the river, *i. e.*, volume of water, gradient, and regularity of flow, is capable of supporting navigation since that information . . . has not been presented."). Instead, the lower court shifted the burden to PPL to show that the river had changed—a burden PPL met. *See* JA 570; *PPL Mont.*, 229 P.3d at 465 (Rice, J., dissenting) ("For purposes of summary judgment, PPL demonstrated that the Madison River today is not the same as it was at the time of statehood, and that, at that time, it was not navigable."). This burden-shifting alone was contrary to elementary procedure, undermining the lower courts' holdings further.

1982) (rejecting navigability of 36-mile portion of river where evidence offered was of "early military expeditions").

[8] The rule that States must demonstrate evidence of navigability at the time of statehood itself plays a protective role in guarding private property rights, since any changes that convert "an un-navigable stream to one that is navigable" would simply "destroy or damage" existing rights. *See Econ. Light & Power*, 89 N.E. at 769.

Amici agree with Petitioner that evidence of modern-day recreational use does not establish navigability. Pet. Br. 49-52. But even assuming its relevance, Montana at least needed to lay the foundation for it by demonstrating that river conditions had not changed over time. *See PPL Mont.*, 229 P.3d at 466 (Rice, J., dissenting) (criticism of Montana's use of present-day evidence was rooted in "clear legal support"). The State offered ***no*** such evidence. *See North Dakota*, 972 F.2d at 240 (holding that modern day canoe use and modern day "boatability" data were not "reliable indicators" of navigability at statehood, particularly where conflicting evidence was offered "at trial"). PPL, on the other hand, demonstrated that they had changed. JA 570. At best, conditions at the time of statehood were disputed and summary judgment premature. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (criticizing majority for disregarding expert opinion "that the current condition of the Madison River is completely different than at the time of statehood").

The trial court also wrongly relied on the present navigability of Hebgen Lake, near the Missouri River. *See id.* at 466-67 (Rice, J., dissenting). Hebgen Lake did not exist at the time of Montana's admission to the Union. *Id.*; JA 258. Its navigability is irrelevant to the factual question of whether the upper Missouri River was navigable when Montana became a state—the only relevant question in determining title navigability. *See id.* at 466-67 (Rice, J., dissenting) (citing *Oregon v. Riverfront Prot. Ass'n.*, 672 F.2d 792, 794 n.1 (9th Cir. 1982)).

Additional evidence ignored by the courts below was substantial, including:

- Evidence that the disputed rivers had been studied and considered non-navigable by federal agencies, including the Army Corps of Engineers. *See id.* at 464-65 (Rice, J., dissenting) ("Addressing the same stretches of the Madison River which are at issue here, the Army Corps of Engineers concluded that "[a]s far as is known there has never been any navigation on these streams, *and commercial navigation on them is entirely out of the question*"); *id.* at 465 (Rice, J., dissenting) (noting a 1891 Army Corps of Engineers report concluding that the Clark Fork was "a mountain torrential stream, full of rocks, rapids and falls, and *is utterly un-navigable, and incapable of being made navigable except at an enormous cost*"); *id.* at 467 (Rice, J., dissenting) (referencing the Corps' 1931 finding that "commercial navigation" on challenged portions of the Clark Fork river was "entirely out of the question"); *id.* at 465 (Rice, J., dissenting) (noting War Department's finding that the Great Falls were non-navigable); JA 472, 475, 535, 564, 919.[9]

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[9] A host of cases demonstrate that this evidence was, at the very least, probative of navigability. *See Oregon*, 295 U.S. at 23 ("It is not without significance that the disputed area has been treated as nonnavigable both by the Secretary of the Interior and the Oregon courts."); *Wash. Water Power Co. v. F.E.R.C.*, 775 F.2d 305, 329 n.20 (D.C. Cir. 1985) (noting evidence that War Department and Army Corps of Engineers had determined the Spokane River to be non-navigable); *George v. Beavark, Inc.*, 402 F.2d 977, 981 (8th Cir. 1968) (holding that Army Corps of Engineers' opinion that stream was non-navigable was "not

- Historical evidence that disputed areas were not susceptible to commercial use at the time of statehood.[10] *See id.* at 464 (Rice, J., dissenting) ("PPL submitted a 'mountain'-over 500 pages-of affidavits and exhibits demonstrating that the portions of the Missouri, Madison, and Clark Fork Rivers at issue were non-navigable at the time of statehood."); JA 367, 656, 729, 922.
- Evidence and testimony challenging Montana's evidence. *See id.* at 466 (Rice, J., dissenting) (noting flaws in 1986 study

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without significance"); *United States v. Brewer-Elliot Oil & Gas Co.*, 249 F. 609, 619 (W.D. Okla. 1918) ("Valuable evidence is found in the reports of engineers in the War Department . . . sufficient reference to them may be made to show their weight in the case."); *In re Strahle*, 250 F. Supp. 2d 997, 1001 (N.D. Ind. 2003) ("Arguably the Court's decision cannot rest solely on the conclusion of the United States Army Corps of Engineers, however it can be a significant factor in rendering its decision."). The Montana Supreme Court's dismissal of this evidence as "conclusory statements . . . insufficient as a matter of law to raise genuine issues of material fact" is, ironically enough, conclusory in its own right—and highly inappropriate at the summary judgment stage. *See PPL Mont.*, 229 P.3d at 448; *id.* at 469 (Rice, J., dissenting) ("[T]he District Court, and now this Court, has taken upon itself the role of factfinder, weighing PPL's evidence and concluding that it lacks credibility, rendering it mere 'conclusory statements.'").

[10] Historical evidence is admissible—if not the most reliable—evidence, and presents a question of weight for a trier of fact. In *Utah*, the United States put forth "limited historical facts" in support of its case, evidence that the Court weighed in its determination. 283 U.S. at 81-82 ("Much of this evidence as to actual navigation relates to the period after 1896, but the evidence was properly received and is reviewed by the master as being relevant. . . .").

Montana relied on to demonstrate navigability); *id.* at 470 (Rice, J., dissenting) (noting State's problematic reliance on "two of the least trustworthy historical sources" in establishing navigability).

- Evidence that Montana had not claimed the rivers in question before joining the lawsuit. *See id.* at 466 (Rice, J., dissenting) (noting evidence that Montana had previously identified only one section of the Madison River as navigable).[11]

The existence of a material factual dispute defeats summary judgment. *See Porter v. Galarneau*, 911 P.2d 1143, 1146-47 (Mont. 1996) (holding that the standard of review from summary judgment is *de novo* and that the party seeking summary judgment "has the burden of establishing a ***complete absence*** of any genuine factual issues") (emphasis added).

[11] *See also Brewer-Elliot*, 260 U.S. at 89 ("Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control."); *see also Phillips Petroleum Co. v. Mississippi,* 484 U.S. 469, 492 (1988) (O'Connor, J., dissenting) (noting that facts demonstrated that "Mississippi showed no interest in the disputed land from the time it became a State until the 1970's"); *Mintzer v. N. Am. Dredging Co.*, 242 F. 553, 560-61 (N.D. Cal. 1916) (holding that river "has never been in fact navigated in any true sense; and has not been treated or considered, either by the public or by the state, as capable of navigation. While this lack of recognition by the state is not conclusive, ***it is nevertheless not without potency as a fact in its bearing on the question***, since it is not to be lightly presumed that the state will part with its title to property of known or recognized value for public use") (emphasis added).

The Montana Supreme Court did not comply with this elementary rule. *See id.* at 470 (Rice, J., dissenting) ("Consistent with the legal standards, this Court has steadfastly guarded against depriving a party of the right to trial by the improper entry of summary judgment. Today, I believe we step back from the protection of that right."); *see also* U.S. Amicus Brief, pp. 16-17 (noting lower court's "deficient application of the relevant legal principles to the facts of this case"). That was plain error.

The lower courts' rush to summary judgment is all the more disconcerting when Montana and the United States both previously insisted that title navigability was fact-intensive and, thus, concluded that this Court should not review this case. Pet. Cert. Opp. at 17-20; U.S. Amicus Brief at 16. Navigability is irreducibly fact-intensive, and often hotly disputed. *See Brewer-Elliot*, 249 F. at 615 ("The issue of navigability is one of fact. The purely 'legal test' cannot be accepted. A river is not navigable, unless so in fact."). This is necessarily so, given the crucial rights at stake—and because Montana, and other states, have a vested interest in tipping the scales in their own favor. *See Brewer-Elliot*, 260 U.S. at 89. Yet, in deciding the issues below on summary judgment, the lower courts set aside the very factual record they were charged with reviewing. *See PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting). That was insupportable as a matter of both law and common sense. *See Arenas v. United States*, 322 U.S. 419, 434 (1944) (in determining property rights on Indian reservation, setting aside grant of summary judgment for government because "we think the duty of the Court . . . can be discharged in a case of this complexity only by trial, findings and

judgment in regular course"); *PPL Mont.*, 229 P.3d at 467 (Rice, J., dissenting) (explaining that "evidentiary issues" raised by PPL "should be tested at trial-including cross-examination, rebuttal, and by application of the proper burden of proof-and resolved there by the factfinder"). Only a sufficient factual review under federal standards of title navigability ensures that fundamental property rights are protected.

The lower courts' disregard for accepted summary judgment standards deeply concerns *amici*'s affected members, many of whom are small farmers and ranchers without the resources to marshal the "mountain" of evidence that PPL presented below. *See* Pet. Br. 56. And the Montana Supreme Court's "very liberal" legal standard, which allows the State of Montana to establish title while ignoring contradictory facts, sets a dangerous precedent for divesting established property rights not only across Montana, but throughout the nation.

Because the Montana Supreme Court's decision is inconsistent with *Utah* and violates fundamental principles of jurisprudence applicable to property title, this Court should reverse.

C. The Lower Courts Misapplied *Utah*, Thus Disregarding Material Facts Demonstrating Non-navigability

The lower courts' inexplicable disregard for the facts below demonstrates that they were unlikely to give property owners a fair shake under any legal standard. Forging onward, however, they compounded their errant analysis by adopting a legal standard inordinately favorable to Montana. Rather

than "precisely" determining where navigability starts and stops as required under federal law, the Montana Supreme Court instead held that certain non-navigable parts of the river, typified by—but not limited to—the Great Falls, were too "short" to support a non-navigability finding. *Id.* at 464 (Rice, J. dissenting). This conclusory legal standard was highly inappropriate, particularly with fundamental property rights at stake.

1. *Utah* Establishes Federal Standards For Determining Title Navigability.

A review of *Utah* demonstrates the errors inherent in the lower courts' contrary approach. The United States brought suit to quiet title to certain submerged riverbeds claimed by the State of Utah.[12] *See Utah*, 283 U.S. at 71. To assist in its determination, the Court referred the case to a special master to "take the evidence and to report it with his findings of fact, conclusions of law, and recommendations for decree." *Id.* at 72. "Voluminous evidence" was offered, and the special master's report gave a "comprehensive statement of the facts adduced with respect to the topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce." *Id.* at 72-73. The special

[12] Federal law indisputably governs title navigability. *See United States v. Holt State Bank*, 270 U.S. 49, 55-56 (1926) ("Navigability, when asserted as the basis of a right arising under the Constitution of the United States, is necessarily a question of federal law to be determined according to the general rule recognized and applied in the federal courts.").

master preliminarily found that various stretches of the Colorado, Green, and Grand Rivers were navigable, and others were non-navigable. *Id.* at 73-74. Utah did not challenge any of the special master's findings except for four miles of the Colorado River deemed as non-navigable. *Id.* at 74-75.

The Court determined that the four-mile stretch at issue in *Utah* was navigable based on the unique facts presented in that case. *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) (explaining that the "nuances of the test for title navigability underscore the critical nature of the facts and circumstances of each case"). What must be considered here, however, is that the navigability of a stretch of river merely four miles long was carefully considered and adjudicated by this Court. *See Utah*, 283 U.S. at 89-90. Indeed, it directed that "the exact point at which navigability may be deemed to end . . . should be calculated ***precisely***."[13] *See id.* at 90 (emphasis added).

Consistent with this Court's direction, courts must "precisely" calculate where title navigability begins and ends. *Id.* Whether labeled a "section-by-section" approach or not, the result is the same—title rests in the state only at points where the river was navigable at the time of statehood. Otherwise, it belongs elsewhere. To determine the difference, this Court must undertake a precise review—one the lower courts failed to perform. *See id.*; *Brewer-Elliot*, 260 U.S. at 88; *see also Niemotko v. Maryland*, 340 U.S. 268, 271 (1951) ("In cases in which there is a

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[13] *Amici*'s brief seeking certiorari also discusses the *Utah* standard, and that discussion is incorporated herein.

claim of denial of rights under the Federal Constitution, this Court is not bound by the conclusions of lower courts, but will re-examine the evidentiary basis on which those conclusions are founded.").

The practice of precisely determining navigability is regularly followed. Below, PPL even offered evidence of the Army Corps of Engineers' conclusion that "[f]or the purpose of administering the laws for the preservation and improvement of navigable waters of the United States, this Department considers Clark Fork navigable from its mouth in Pend O'Reille [sic] Lake to the Northern Pacific Railroad Bridge, ***a distance of only about four miles***."[14] *See id.* at 467 (Rice, J., dissenting) (emphasis added); JA 568. This is notable, of course, because four miles is the same length of river that this Court considered when making its own "precise" determination of navigability in *Utah*. 283 U.S. at 89-90. The question is simply whether a stretch of river, however long, provided a useful channel of commerce at statehood.[15] If it did, it is navigable for

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[14] Meriwether Lewis appears to have agreed. *See* THE JOURNALS OF THE LEWIS AND CLARK EXPEDITION, July 4, 1806, *supra* note 5 (describing east fork of Clark Fork river as not navigable "in consequence of the rapids and shoals" obstructing its currents).

[15] Hypothetically, one can imagine a four-mile stretch of navigable river that is difficult to access and surrounded by non-navigable stretches, such as in a canyon. A "short" stretch such as this may remain non-navigable because this short stretch could serve no regular, useful commercial purpose. On the other hand, one can imagine the same four-mile stretch of river providing a potential (or actual) commercial link between towns—or from railroad to highway. In these cases, a navigability finding may be appropriate. Whatever the case, to

title. If it did not, it is not. With this in mind, title navigability must be precisely determined from point to point, using the correct legal standard and considering all the facts. *See PPL Mont.*, 229 P.3d at 464 (Rice, J., dissenting) (citing *Utah*).

2. Other Courts Have Correctly Applied *Utah* When Analyzing Title Navigability.

Lower courts following *Utah* are precise in adjudicating title navigability. The Federal Court of Claims, for example, demonstrated appropriate discretion in *Mundy v. United States*, 22 Cl. Ct. 33 (1990). In *Mundy*, plaintiffs sued the United States alleging that actions taken by the Army Corps of Engineers had diminished the value of their property on the Jackson River. The United States argued that the portion of the Jackson River neighboring plaintiffs' property was navigable, and thus the disputed riverbed belonged to the State.

Both sides argued that previous court rulings had established the navigability, or lack thereof, of the Jackson River. Plaintiffs cited two previous rulings by the Supreme Court of Virginia holding that sections of the Jackson were non-navigable. *See id.* at 35-36 (citing *Hot Springs Lumber & Mfg. Co. v. Revercomb*, 65 S.E. 557 (Va. 1909) and *Boerner v. McCallister*, 89 S.E. 2d 23 (Va. 1955)). The United States, on the other hand, cited a Fourth Circuit case

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simply say that certain stretches of river are too "short" to be non-navigable is to substitute subjective whim for a measurable legal standard.

allegedly establishing the Jackson River's navigability between two points in its middle. *See id.* (citing *Loving v. Alexander*, 745 F.2d 861 (4th Cir. 1984)).

The *Mundy* court reviewed the cases and distinguished them, principally because none addressed navigability ***at the point on the Jackson River at issue***. *See Mundy*, 22 Cl. Ct. at 36. Concluding that "[a] river can be navigable in some parts and non-navigable in others," it explained that its task was to "determine whether the Jackson River at RM-5—***where plaintiff claims to have an easement***—is a navigable river." *See id.* (citing *United States v. Appalachian Elec. Power Co.*, 311 U.S. 377 (1940)) (emphasis added).[16] Evidence

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[16] *See also Brewer-Elliot Oil & Gas Co. v. United States*, 260 U.S. 77, 87 (1922) (affirming lower courts' holding that Arkansas River "along the Osage Reservation" was not navigable, and that point of navigability began miles below the reservation); *Crow,* 340 F. Supp. at 31 (limiting holding to a "segment of the Chattahoochee River approximately 47 miles in length without regard to the navigability of the river at any other point"); *Loving v. Alexander*, 548 F. Supp. 1079, 1086 n.6 (W.D. Va. 1984) (in determining navigability for purposes of Commerce Clause jurisdiction, holding that "[t]he navigability of only a portion of a river may be determined irrespective of the navigability of the river at any other point"); *Oregon ex rel. State Land Board v. Corvallis Sand & Gravel Co.*, 582 P.2d 1352, 1356 (Or. 1978) (holding that under Equal Footing Rule, Oregon acquired title to "the bed of the navigable portions of the Willamette River"). In *Loving*, the Fourth Circuit upheld the district court's finding that a twenty-mile portion of the Jackson River was "navigable" for purposes of determining federal Commerce Clause jurisdiction. *See Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984). It declined, however, to extend its ruling beyond the disputed portions of the river. *Id.* Dozens of plaintiffs were joined as parties in the *Loving* case. *Id.*

regarding the navigability of other river sections was not helpful.

Because the parties had not offered "sufficient evidence" on which to determine the Jackson River's navigability at the disputed point, summary judgment was denied and the parties ordered to complete factual discovery. *Id.* This is the correct approach.[17] When title is at stake, "precise" factual determinations are required. *See* Pet. Br. 35.

Montana's courts simply cannot ignore tangible evidence of non-navigability, particularly at the summary judgment stage. *See Utah*, 283 U.S. at 77 ("Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question to be determined upon evidence, how far navigability extends.") (citing *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 698 (1899)).[18] And the length of a

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[17] *See Crow*, 340 F. Supp. at 29 (holding that it is "an evidentiary question as to where along the course of the river between its mouth and its source navigability ceases"); *United States v. 531.10 Acres in Anderson Cnty., S.C.*, 243 F. Supp. 981, 986-87 (D. S.C. 1965) (reviewing evidence put forward by historical experts "predicated generally upon the same information, with each arriving at varying determinations as to the question of navigability"); *see also PPL Mont.*, 229 P.3d at 462 (Rice, J., dissenting) ("[C]ourts look to relevant portions of a river and, based on the facts, determine whether particular reaches at issue are navigable or non-navigable.").

[18] *See also River Queen*, 275 F. Supp. at 408 (citing 56 Am. Jur., Waters, § 193, p. 656); *Phillips Petroleum*, 484 U.S. at 491 (O'Connor, J. dissenting) ("[I]f part of a freshwater river is navigable in fact, it does not follow that all contiguous parts of the river belong to the public trust, no matter how distant they are from the navigable part."); *Oklahoma v. Texas*, 258 U.S.

stretch of impassible river like the Great Falls reach does not provide legal cover for doing so. *See PPL Mont.*, 229 P.3d at 470 (Rice, J., dissenting) ("The Court does not explain why a non-navigable reach running from Fort Benton to Great Falls is too 'short,' and how it can so declare as a matter of law without factfinding"); U.S. Amicus Brief, p. 15 (noting that summary judgment on the basis that PPL only offered evidence of "relatively short interruptions of navigability" was "incorrect, particularly given the length of the segments as to which petitioner submitted evidence of non-navigability"). This Court requires just the opposite approach.

The lower courts' erroneous application of the governing *Utah* standard requires review and reversal, with direction to comply with this Court's previous holdings.

III. The Redefinition Of Established Private Property Rights Violates the Fifth Amendment

The Montana Supreme Court's errant decision is all the more troubling for its disregard of conventional principles governing property law. Courts must give existing property rights paramount consideration. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("That rights in property are basic civil rights has long been recognized.").

574, 591 (1922) ("While the evidence relating to the part of the river in the eastern half of the state is not so conclusive against [n]avigability as that relating to the western section, we think it establishes that trade and travel neither do nor can move over that part of the river . . .").

Property rights are not given or taken at whim, but are instead "defined by existing rules or understandings that stem from an independent source such as state law." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972)); *Maritrans Inc. v. United States*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (quoting *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1030 (1992)). The rules governing title navigability are no different.

Established property rights must be governed by established rules and enforced uniformly. *See Leo Sheep*, 440 U.S. at 687-88; *see also* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1180 (1989) (noting that courts are more likely to defend rights where "they can stand behind the solid shield of a firm, clear principle enunciated in earlier cases").[19] The *ipse dixit* adoption of a novel legal standard below was contrary to these principles.

Navigability, in the context of title, is fundamentally concerned with property ownership. *See Crow*, 340 F. Supp. at 33 ("[T]he court is not unmindful of the difference between suits brought to

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[19] The need for clear principles to govern ***all*** cases is particularly noteworthy given the United States' recommended denial of certiorari merely because PPL is a private utility. *See* U.S. Amicus Brief at 15. Had this Court accepted that position and refused to grant *certiorari*, state tribunals would have been effectively insulated from review on this important federal question—at least until the federal ox was gored. The United States' position here ironically highlighted Hamilton's assertion that the judiciary must "ultimately depend upon the aid of the executive arm even for the efficacy of its judgments." THE FEDERALIST No. 78 (Hamilton).

fix the rights of riparian owners, those concerned with the determination of admiralty jurisdiction, and the scope of Congress' regulatory power over navigable waters under the "commerce clause.'"). Indeed, title is the most fundamental "stick" in the "Lockean bundle." *Palazzolo*, 533 U.S. at 627; *Yee v. City of Escondido*, 503 U.S. 519, 522 (1992) ("Where the government authorizes a physical occupation of property (or actually takes title), the Takings Clause generally requires compensation."). These rights demand adjudication in the most "precise" manner possible. *See Utah*, 283 U.S. at 89-90. This is true whether the property owner is a large utility or a small rancher.[20]

This Court recently revisited these concepts in *Stop the Beach*. Writing for a plurality of the Court, Justice Scalia concluded that "[t]he Takings Clause . . . is not addressed to the action of a specific branch or branches. It is concerned simply with the act, and not with the governmental actor . . . ." *Stop the Beach*, 130 S. Ct. at 2601. Thus, when a court "declares that what was once an established right of private property no longer exists, it has taken that property, no less than if the State had physically appropriated it or destroyed its value by regulation." *Id.* at 2602; *see also Palazzolo*, 533 U.S. at 627 ("Just as a prospective enactment, such as a new zoning ordinance, can limit the value of land without

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[20] Though it opposed *certiorari*, the United States recognized that this Court's review might be warranted upon "an attempt to apply the decision below more broadly" to claim "title from others." U.S. Amicus Brief, p. 15. But it has always been the case that this ruling affects more than just some "private utility"—rather, it substantially undermines title held by a large number of private landowners.

effecting a taking because it can be understood as reasonable by all concerned, other enactments are unreasonable and do not become less so through passage of time or title.").[21]

To hold otherwise would render the constitutional prohibition against takings without meaning. *Stop the Beach*, 130 S. Ct. at 2602 (Scalia, J., plurality opinion) (("It would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat."). Just as courts have adopted rules forbidding the judicial branch from violating non-economic rights, so the judicial branch must be barred from redefining, and in effect nullifying title to, private property rights.

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[21] *See also Penn. Coal Co. v. Mahon*, 260 U.S. 393 (1922) (holding that statute may frustrate investment-backed expectations to such an extent that it amounts to a "taking"); *Phillips Petroleum*, 484 U.S. at 492 (O'Connor, J., dissenting) (criticizing majority's grant of non-navigable tidal areas to Mississippi where that decision "could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interests reasonably believed was lawfully theirs"); *Texaco, Inc. v. Short*, 454 U.S. 516, 542 (1982) (explaining that the "operative restrictions" of the Constitution are triggered where "the State seeks to change the fundamental nature of a property interest already in the hands of its owner") (Brennan, J., dissenting); *Ultimate Sportsbar, Inc. v. United States*, 48 Fed. Cl. 540, 550 (2001) (holding, in dicta, that a judicial taking occurs when "a court's decision does not arguably conform to reasonable expectations") (citing *Hughes*) (internal quotations omitted); *Sotomura*, 460 F. Supp. at 481 (holding that the Supreme Court would "probably vote" with Justice Stewart in ruling that "a taking of private property through a radical and retroactive change in state law, effected by judicial decision, is an unconstitutional taking"); John A. Kupiec, *Returning to Principles of "Fairness and Justice": The Role of Investment-Backed Expectations In Total Regulatory Takings Claims*, 49 B.C. L. REV. 865, 903-07 (2008).

See id. ("In sum, the Takings Clause bars *the State* from taking private property without paying for it, no matter which branch is the instrument of the taking"); *see also Hughes*, 389 U.S. at 298 (Stewart, J., concurring) ("[T]he Constitution measures a taking of property not by what a State says, or by what it intends, but by what it does.").[22]

As an instrument of state power, the Montana Supreme Court's redefinition of established rights based on a novel legal standard is the very definition of a right destroyed by fiat. Despite the Montana Supreme Court's effete attempts at reassurance, small property owners know what is coming next. *See PPL Mont.*, 229 P.3d at 460-61.

And while Justice Kennedy's concurrence suggested that the Due Process Clause is the proper method for setting aside a "judicial decision" that "eliminates an established property right," the same concerns arise under a due process analysis as under a takings analysis. *See Stop the Beach*, 130 S. Ct. at 2614 (Kennedy, J., concurring) ("The Due Process Clause, in both its substantive and procedural aspects, is a central limitation upon the exercise of judicial power. And this Court has long recognized that property regulations can be invalidated under the Due Process Clause."). Both are concerned with protecting and sustaining established rights.

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[22] *See also Chicago, B. & Q. R. Co. v. City of Chicago*, 166 U.S. 226, 233 (1897) ("[T]he prohibitions of the [Fourteenth Amendment] refer to all the instrumentalities of the state—to its legislative, executive, and judicial authorities . . . .") (citing *Ex Parte Virginia*, 100 U.S. 339, 346 (1879)); *Stevens v. Cannon Beach*, 510 U.S. 1207, 1211-12 (1994) (Scalia, J., dissenting from denial of *certiorari*); Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449, 1457 (1990).

At a minimum, due process must accompany the redefinition of settled property rights. *See id.* at 2614 (Kennedy, J., concurring) ("It is thus natural to read the Due Process Clause as limiting the power of courts to eliminate or change established property rights.").[23] But property owners whose rights have been subsumed by the lower courts' broad navigability rulings have not had their day in court—due process was, indeed, sorely lacking.

The rulings below substantially revised the *Utah* standard, extinguishing existing property rights. *See id.* at 2615 (Kennedy, J., concurring) ("The Court would be on strong footing in ruling that a judicial decision that eliminates or substantially changes established property rights, which are a legitimate expectation of the owner, is "arbitrary or irrational" under the Due Process Clause."). Whether the Takings Clause or the Due Process Clause governs, both assume, as do *amici*, that a court's power does not include the ability "to eliminate or change established property rights." *Id.* (Kennedy, J., concurring). This case demonstrates why existing constitutional limitations on judicial action are of great consequence to property owners, and must be maintained accordingly.

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[23] *See also E. Enters. v. Apfel*, 524 U.S. 498, 539-40 (1998) (Kennedy, J., concurring and dissenting) (noting that the Supreme Court has given "careful consideration to due process challenges to legislation with retroactive effects"); *Hughes*, 389 U.S. at 298 (Stewart, J., concurring) ("[T]he Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate . . . ."); *Great N. Ry. v. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66 (1932); *Brinkeroff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 (1930).

Moreover, the lower courts' errors contradicted existing federal precedent. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910).[24] Even if federal court decisions do not formally bind state courts, surely it must take more than a rogue "liberal" legal standard to overcome property rights once they are established. *See Brewer-Elliot*, 260 U.S. at 88 (holding that states cannot adopt a "retroactive rule for determining navigability which would destroy a title already accrued under federal law"). This is particularly true when those rights were swept away without an opportunity to defend them. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that a fundamental requirement of due process is "'the opportunity to be heard' . . . at a meaningful time and in a meaningful manner"). The lower courts' failure to conduct a thorough inquiry under the *Utah* standard violated both the Takings and the Due Process Clauses.

As such, the decision below set a damning precedent for affected Montanans. *See Louisiana v. Garfield*, 211 U.S. 70, 76 (1908); *Iron Silver Min. Co. v. Elgin Min. & Smelting Co.*, 118 U.S. 196, 207-08 (1886); *see also Phillips Petroleum*, 484 U.S. at 494 (O'Connor, J., dissenting) (noting that adoption of broad definition of tidewaters as public trust lands "will increase the amount of land" vulnerable to challenge); *Cannon Beach*, 510 U.S. at 1211 (Scalia, J., dissenting from denial of certiorari). It uniformly

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[24] *See also State Oil*, 522 U.S. at 20 (citing *Payne*, 501 U.S. at 828); *Sotomura v. Hawaii Cnty.*, 460 F. Supp. 473, 482 (D. Hawaii 1978) (holding that when "refusal of a state court to apply *res judicata* results in the direct, actual and irreparable loss of property, that refusal must be said to be so fundamentally unfair as to abridge" due process).

upset title held by similarly-situated property owners, many of whom have enjoyed the benefits of title for decades. It also upset long-settled water rights that have not been disputed at all. The economic harm originating from the lower courts' distortion of these rights—and the concomitant undermining of the reasonable investment-backed expectations accompanying them—will be severe and enduring. Given the far-reaching and potentially intrusive effect of any title navigability analysis, the precise analysis mandated by federal navigability law is not only warranted but mandatory—all the more so where Montana's claim was as blatantly "belated and opportunistic" as here. *See Phillips Petroleum*, 484 U.S. at 492 (O'Connor, J., dissenting); Pet. Br. 54-58.

Whether labeled a Taking or a Due Process violation, the lower courts' actions violated established property rights. Properly understood, the *Utah* test is not just a guideline—much less a rubber stamp for States seeking favorable navigability rulings—but a constitutional requirement for properly adjudicating property rights. *Holt*, 270 U.S. at 55-56. The lower courts' failure to apply it is determinative here.

CONCLUSION

When the most fundamental stick in the property rights bundle is challenged, there is no substitute for the precise analysis required under federal law. The shortcuts taken below were, unfortunately, fatally flawed.

This Court should reverse the Montana Supreme Court with instructions to correctly apply federal—that is to say, precise—navigability

principles in analyzing ownership of title to the Montana riverbeds at issue in this case. Anything less is a violation of deep-rooted federal law backed by established constitutional principles.

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