No. 16-1305

In The
Supreme Court of the United States

GREGORY NIES, et ux.,

Petitioners,

v.

TOWN OF EMERALD ISLE, NORTH CAROLINA,

Respondent.

On Petition For A Writ Of Certiorari To The North Carolina Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioners are former owners of oceanfront property in the Town of Emerald Isle, North Carolina. The precise property boundary is unknown, but the property likely included some dry sand beach. In the proceedings below, Petitioners challenged two municipal ordinances that regulated public use of the dry sand beach, by limiting beach driving and by restricting the public's placement of beach equipment to allow emergency vehicle access. The question presented is:

Whether the North Carolina Court of Appeals correctly ruled that principles of North Carolina common law in force long before Petitioners purchased their property permitted public use of the full breadth of North Carolina's ocean beaches, making the challenged ordinances not a taking.

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OPINIONS BELOW

The Petition for Certiorari omitted a ruling below: On April 13, 2016, the North Carolina Supreme Court granted the Town's motion for dismissal of the Nies' appeal of right for "lack of substantial constitutional question," while allowing a petition for discretionary review to proceed. That unpublished order is provided in the Appendix to this brief at 1a-2a.

JURISDICTION

Jurisdiction lies under 28 U.S.C. § 1257(a).[1]

INTRODUCTION

Petitioners point to no error in the North Carolina Court of Appeal's understanding or application of federal law. And the Nies acknowledged below that the statute they now challenge simply codifies the common law. Their claim that North Carolina's legislature redefined property rights boils down to an assertion that the intermediate state court misinterpreted North Carolina's common law.

But the North Carolina Supreme Court is the proper body to correct errors of North Carolina common law, and declined to review this case, for many good reasons. Among them: the absence of a substantial constitutional question, multiple affirmative grounds for affirmance, and Petitioners' profitable property sale while the case was pending. To reach any federal question, this Court would first have to impose new limits on the public trust doctrine in North Carolina and then resolve questions about the scope of that State's custom doctrine, all without the benefit of a definitive ruling from the State's highest court on these issues.

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[1] Petitioners do not cite § 1257. *See* Pet. 1.

The poor vehicle presented to North Carolina's highest court is thus an even worse vehicle before this Court.

Even if the Court were willing to wade through these obstacles and address threshold state law questions that Petitioners stated were unsettled below, it would be for naught. There has been no statutory redefinition of property rights here. The Town has allowed beach driving since its incorporation 60 years ago, Pet. A5, and has done so under North Carolina's long-standing common law doctrines of public trust and custom.

While other States may have different beachfront property laws, there is no one-size-fits-all public trust doctrine that exists apart from each State's common law, and Petitioners' claimed conflict proves only that. As our federalist system promotes, every State shapes its own beach property law given its own unique history and circumstances.

Petitioners do not ask this Court to resolve federal law, only to "confirm" it (Pet. 29, 32), and seek reversal only of claimed errors in the intermediate appellate court's interpretation of North Carolina common law. This plea for error correction—and error correction of state law, to boot—falls far short of the Court's criteria for certiorari review, even more so because the decision below was correct.

STATEMENT

1. Respondent Town of Emerald Isle is a small municipality lying between the Atlantic Ocean and Bogue Sound on the island of Bogue Banks in Carteret County, North Carolina. The Town was incorporated in 1957. Consistent with the pre-existing custom of public beach use, the Town has allowed and regulated beach driving since its incorporation about 60 years ago.[2] "Beach driving" refers to the traditional practice of using the State's beach strand for transportation. Historically, before the advent of paved roads, the strand served as a common highway for coastal residents. *See Wise v. Hollowell*, 171 S.E. 82 (N.C. 1933) (describing automobile driving on beach strand travelling from Nags Head to Ocean View, Virginia in 1932). Driving on the beach continues in some locales, mainly for recreational purposes, such as sport fishing.

Emerald Isle's population swells from about 4,000 residents in the winter months to over 40,000 people in the summer months. These visitors and residents often enjoy recreational activities on the ocean beaches within the Town. *See Emerald Isle v. State*, 360 S.E.2d 756 (N.C. 1987). The public uses both the "dry sand" portion of the beach strand, which lies between the toe of the frontal dunes and the high water mark, as well

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[2] Record on Appeal before the North Carolina Court of Appeals (R), p. 518, ¶ 3. *See also* 1965 N.C. Sess. Law 798, § 1 (regulating driving "south of the dune line"—*i.e.*, on the entire width of the dry sand beach—in an area encompassing the Town of Emerald Isle).

as the "wet sand" beach between the high and low water marks.

Like other coastal communities in the State facing a large influx of summer tourists, Emerald Isle has developed municipal ordinances to help provide for the public safety and welfare of people using the beaches. Among those ordinances are measures to control driving and to regulate the placement of recreational equipment on the beach. *See* Emerald Isle, North Carolina Code of Ordinances, ch. 5, §§ 18-19 and §§ 60-65.[3] The relevant provisions of the 2010 version of these ordinances which were in effect when the Nies' complaint was filed, as well as the 1981 predecessor, are provided in the Appendix (3a-9a).

The Beach Equipment Ordinance requires all unattended beach equipment to be removed from the beach by a certain time. This measure addresses safety concerns arising from items being left on the beach overnight. Oceanfront property owners are eligible for exemptions. (R. 403). Placement of beach equipment within 20 feet seaward of the base of the frontal dune is prohibited, to allow unimpeded travel for Town vehicles providing emergency rescue, trash removal and other essential services on the beach strand. *See* App. 3a-5a.

The Beach Driving Ordinance regulates driving on the wet and dry sand portions of the beach, and bans driving on the dunes. It prohibits the public from

[3] *See* https://library.municode.com/nc/emerald_isle/codes/ code_of_ordinances?nodeId=PTIICOOR_CH5BESHRE.

driving during the peak summer season. When driving is allowed, the ordinance requires a permit from the Town and limits driving to a designated area from ten feet seaward of the frontal dune to the ocean. *See* App. 5a-7a. Similar beach driving ordinances have been in effect since at least 1981. Pet. A5; App. 7a-9a.[4]

After vacationing at Emerald Isle for two decades, Petitioners purchased an oceanfront lot and house there in 2001. Like many oceanfront properties in the State, Petitioners' seaward boundary was the mean high water mark, which is in a constant state of flux, including landward migration due to erosion or storms.[5]

To combat erosion, from 2003 to 2005 the Town engaged in a publicly funded "beach renourishment" project. That project enlarged the beach strand, including in front of Petitioners' property, by depositing additional sand on the beach. (R. 520, ¶ 13). This moved the mean high water mark seaward and widened the dry sand beach. Under North Carolina law, Petitioners' property line did not move seaward, but remained at the pre-project mean high water

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[4] The Petition incorrectly states that the 2013 beach driving ordinance eliminated the ten-foot no-driving buffer at the toe of the frontal dune, and now allows driving on the entire beach. Pet. 11. The 2013 ordinance retained the ten-foot prohibition in new Section 5-64(d). *See* https://library.municode.com/nc/emerald_isle/codes/code_of_ordinances?nodeId=PTIICOOR_CH5BESHRE.

[5] *See Borax Consol., Ltd. v. Los Angeles*, 296 U.S. 10, 23 (1935); Donna R. Christie, *Of Beaches, Boundaries and SOBS*, 25 J. LAND USE & ENVTL. LAW 19, 34 (2010).

mark. The State now owns the newly raised portion of the dry sand beach lying between Petitioners' property line and the new mean high water mark. N.C. Gen. Stat. § 146-6(f) (2013); Pet. A4. *Contra* Pet. 8. The record does not establish where the current property line is.

2. In 2011, Petitioners, together with four other property owners, commenced this inverse condemnation action, alleging that the Town's adoption of the ordinances regulating beach driving and beach equipment on the dry sand beach violated the Takings Clause. The Carteret County Superior Court granted the Town's motion for summary judgment on all claims, and dismissed Petitioners' complaint. Pet. App. C.[6]

Petitioners appealed, arguing that the ordinances constituted a physical taking of their privately-titled dry sand beach. Pet. A9.

The North Carolina Court of Appeals first noted that at least some of the dry sand beach adjacent to Petitioners' property belonged to the State, not Petitioners. Specifically, the court found that, due to the Town's beach renourishment work, "the State now owns dry sand beach—which it holds for the public trust—between Plaintiffs' property line and the

[6] The Nies' case was separated from that of the other plaintiffs, whose cases remain pending in state court.

current mean high water mark—which no longer represents Plaintiffs' property line." Pet. A4.[7]

The court had no occasion to resolve the precise extent to which renourishment had shifted ownership of the dry sand beach to the State, because it determined that Petitioners never possessed the right to exclude the public from any privately-owned dry sand beach. Pet. A20. The court reached this conclusion on two grounds.

First, the court examined the common law public trust doctrine. Pet. A9-A17. The court distinguished between public trust lands and public trust rights, noting that "[p]ublic trust rights are associated with public trust lands, but are not inextricably tied to ownership of these lands." Pet. A12.

To determine the scope of public trust use rights under North Carolina's common law, the court examined executive branch opinions; North Carolina cases; the history of beach driving in Emerald Isle, noting that Petitioners' own description of past ordinances acknowledged that "'historically,' the public has been driving on private property dry sand beach," Pet. A6; and statutes, including but not limited to the statute (now) challenged by Petitioners, N.C.G.S. § 77-20(d)-(e). Pet. A5-A7; A9-A17. The "ordinances 'allowing' driving on the designated driving areas," the

[7] For this reason, the Town does not concede that the twenty-foot travel lane traverses private property previously owned by the Nies, contrary to Petitioners' assertion that it is "undisputed." Pet. 12.

court pointed out, "were in fact restrictive, not permissive, in that they restricted previously allowed behavior and did not create any new rights[.]" Pet. A6. From those sources, the Court of Appeals concluded that the public enjoyed the right to access the full ocean beach under the public trust doctrine. Pet. A19.

Second, the North Carolina Court of Appeals applied the common law doctrine of custom. Pet. A17-A18. Although acknowledging that the precise contours of the custom doctrine were uncertain, and that the issue was not "extensively argued on appeal," Pet. A17 n.2, the court reached the doctrine on the merits and concluded that "no such restrictions [limiting the public to the wet sand beach] have traditionally been practiced in North Carolina." Pet. A18. The court recognized that "the public right of access to dry sand beaches in North Carolina is so firmly rooted in the custom and history of North Carolina that it has become part of the public consciousness." *Id*.

After examining these two doctrines, the North Carolina Court of Appeals concluded that, under background principles of state property law, "[t]he right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of rights' purchased by Plaintiffs in 2001"; therefore, there was no physical taking. Pet. A21. The intermediate appellate court went on to reject Petitioners' argument that the Town's ordinances regulating the public's access otherwise impaired their property rights. Applying settled federal law, Pet.

A21-A22, the court found the ordinances to be legitimate exercises of the Town's police power, Pet. A23-A32.

3. Before the North Carolina Supreme Court, Petitioners filed a notice of appeal requesting an appeal of right on constitutional question grounds, N.C.G.S. § 7A-30(1), and a petition for discretionary review, N.C.G.S. § 7A-31. In seeking review from the North Carolina Supreme Court, Petitioners argued that whether beachfront property owners held the right to exclude the public from use of any privately-held dry sand beach was "one of the great, unsettled issues of North Carolina law." Nies' Response to Motion to Dismiss Appeal on Substantial Const'l Question at 9.

The North Carolina Supreme Court dismissed the Nies' constitutional appeal of right, allowing the Town's motion for dismissal based on a "lack of substantial constitutional question," App. 1a-2a, while allowing their petition for discretionary review to proceed. *Id*.

Briefing before the North Carolina Supreme Court ensued. Every coastal town and city in the State, then-Attorney General Roy Cooper, various state executive agencies, the State's independent coastal resources rule-making commission, Professor Joseph Kalo, and public interest organizations spanning the spectrum from dune-buggy enthusiasts to sea-turtle savers all filed briefs documenting the widespread consensus that the public has always had the right to use and

access the State's dry sand beaches.[8] In addition to addressing these issues on the merits, the parties' briefing grappled with various vehicle issues, including a statute of limitations defense.

After briefing, but before argument, the Nies filed a letter informing the North Carolina Supreme Court that they had sold their Emerald Isle property. Pet. 18. The property was sold at a profit.[9] The Nies' letter asserted that the sale did not moot any physical takings claim, while admitting that a profitable property sale could moot a regulatory takings claim under North Carolina law. *See Messer v. Town of Chapel Hill*, 485 S.E.2d 269, 270 (N.C. 1997).

Shortly after receiving notice of the property sale, the North Carolina Supreme Court dismissed the Nies' case *ex mero motu*, without explanation. Pet. App. B.

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[8] The North Carolina Supreme Court's docket for this case is available at https://appellate.nccourts.org/dockets.php?court=1 & docket=1-2015-0409-001&pdf=1&a=0&dev=1. Many of the amicus briefs filed in support of the Town are available here: http://www.emeraldisle-nc.org/legal-briefs-%E2%80%93-nies-v-emerald-isle-.

[9] Information available in the public domain from the Carteret County North Carolina Register of deeds, available at http://deeds.carteretcounty.com, provides the real estate excise tax paid for property sales. The tax rate has remained a constant $1.00 per $500 of the "consideration or value of the interest conveyed," since 1991, N.C.G.S. § 105-228.30(a); 1991 N.C. Sess. Law 689, § 338. The Nies purchased their property on June 15, 2001 (Instrument #911512) and sold it on Septmeber 21, 2016 (Instrument #1555310). Given the constant tax rate, the $500 increase in excise tax paid at the time of sale signifies a net profit of $250,000.

REASONS FOR DENYING THE PETITION

Petitioners raise no federal question meriting this Court's review and multiple procedural obstacles impede clean resolution of the state law questions that are presented. The North Carolina Supreme Court rightly deemed this case unworthy of its attention and the vehicle concerns below weigh double here.

The predicate of Petitioners' claimed constitutional wrong—that the ruling below somehow destroyed their pre-existing right to exclude the public from an unknown portion of the dry sand beach on property they once owned—assumes that such a right to exclude was well-established under North Carolina law. But the opposite is true. No source of North Carolina law establishes such a pre-existing right, and all authority points in the opposite direction.

Under North Carolina's own unique and long-established doctrines of public trust and custom, Petitioners never possessed a right to exclude the North Carolina public from the dry sand beach. That asserted right underpins their federal claim, and Petitioners concede that their federal takings claim rises or falls with that state law predicate. That leaves this Court with no federal question to answer, only assertions of state law errors to correct. But there is no need to take the extraordinary step of ruling on complex questions of state property law when the State's highest court has declined to do so.

What's more, no conflict begs this Court's review. All Petitioners' "conflict" argument confirms is that

property law is state law, which each State is free in our federal system to arrange as it sees fit—and the States have done so.

Ultimately, if the decision below reflected the dramatic break with established North Carolina property rights that Petitioners insist it does, better-postured cases will arise. If and when it ever becomes necessary to state the obvious—that the public has always had the right to use and access the dry sand beaches of North Carolina—cleaner vehicles will permit the North Carolina Supreme Court to do so.

I. This Case Is An Exceptionally Poor Vehicle To Review A Federal Takings Question That Is Not Even Presented.

1. When requesting review from North Carolina's highest court, Petitioners insisted that the extent of public trust rights over the dry sand beach was one of the "great, unsettled issues" of North Carolina common law, *see supra*, 10. In declining review not once, but twice, the North Carolina Supreme Court either disagreed, or decided this case was not the right one to resolve that question. Each explanation counsels against review here—doubly so, because if North Carolina law is indeed "unsettled," the North Carolina Supreme Court should be the court to settle it in the first instance.

The North Carolina Supreme Court's first dismissal for "lack of [a] substantial constitutional question," App. 1a, confirms that significant questions

of federal constitutional law are not at issue here, only state law issues. *See also infra* Section II.A.

As for the subsequent *ex mero motu* dismissal, a multitude of plausible and reinforcing reasons warranted dismissal below. After reviewing the case file, the North Carolina Supreme Court could rightly have concluded that the North Carolina Court of Appeals reached the correct result, and no further action was needed. And there were plenty of other reasons for the North Carolina Supreme Court to stay its hand.

Ex mero motu dismissals by the North Carolina Supreme Court, akin to this Court's dismissal of a writ of certiorari as improvidently granted, arise in a variety of situations, including when the complaint states a defect on its face, *Caldlaw, Inc. v. Caldwell*, 102 S.E.2d 829, 831 (N.C. 1958); when an appeal is not ripe for review, *e.g.*, *Bailey v. Gooding*, 270 S.E.2d 431, 433 (N.C. 1980); *Rogers v. Brantley*, 94 S.E.2d 896, 896 (N.C. 1956) (per curiam); when a party fails to preserve an appealable issue, *Harris v. Harris*, 300 S.E.2d 369, 373 (N.C. 1983); or when the case is moot, *State ex rel. Rhodes v. Gaskill*, 383 S.E.2d 923, 925 (N.C. 1989).[10]

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[10] Because the North Carolina Supreme Court's unexplained dismissal means that the judgment could stand on an adequate and independent state law ground, *i.e.*, the "existence of an adequate state ground is debatable," *Sternbridge v. Georgia*, 343 U.S. 541, 547-548 (1952), this Court could decline to exercise jurisdiction. *See also Bailey v. Anderson*, 326 U.S. 203, 206-207 (1945).

Thus, beyond Petitioners' politicized suggestion that changes in the composition of the highest court caused the dismissal of their case, Pet. 19, the refusal to hear the case could have resulted from a host of case-specific vehicle problems, any one of which could justify the dismissal, and all of which counsel with added force against review by this Court.

Such vehicle problems include:

- Petitioners' property sale, at a profit, arguably mooted any regulatory takings claim, as Petitioners themselves recognized in their letter advising the North Carolina Supreme Court of the sale. *See Messer*, 485 S.E.2d at 270; *supra* 10 & n.9;
- Petitioners made concessions and left evidence unrebutted regarding the history of beach driving in Emerald Isle, yet sought to premise their appeal on different facts—as they continue to do in this Court, improperly asking this Court to decide the case on different facts than the court below. *See* Pet. A6; Pet. 9 n.5;[11]
- The Court of Appeals' opinion noted but did not resolve questions about the exact property boundary, given the beach

[11] Petitioners refer this Court to an affidavit, but the North Carolina Court of Appeals relied on Petitioners' acknowledgment and characterization of earlier town ordinances to find this concession, not an affidavit. Pet. A6.

renourishment work undertaken by the Town. Pet. A4;

- Petitioners purchased their property years after the statute they challenge was enacted, decades after adoption of Town ordinances regulating the long-standing tradition of beach driving, and many years after other statutes reinforcing public beach access were on the books. *See* Pet. A14. Although a takings claim does "not evaporate just because a purchaser took title after the law was enacted," "a reasonable restriction that predates a landowner's acquisition . . . can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property." *Murr v. Wisconsin*, 137 S. Ct. 1933, 1945 (2017); and

- The judgment could be affirmed without reaching the merits based on the unresolved statute of limitations defense that the Town preserved.[12] Petitioners alleged below that the beach driving ordinance (effective in 1981) constitutes a physical taking, and contend here that the statute (enacted in 1998) constitutes a physical taking. So the two-year statute of limitations, N.C.G.S. § 40A-51, ran by 2000 (long before this suit), and the

[12] *See* Town's Answer (R. 117); its brief on appeal (p. 20, n.8), and its brief to the North Carolina Supreme Court (Def-Resp's New Brief at 16, n.10 & 40-41).

claim does not transfer to subsequent purchasers like Petitioners, *Palazzolo v. Rhode Island*, 533 U.S. 606, 628 (2001).

2. In this Court, those vehicle problems persist and are only exacerbated given Petitioners' request that this Court decide questions of state property law. Because the North Carolina Supreme Court ultimately declined to rule on a question that Petitioners insisted was unsettled, this Court would have to itself divine the definitive state law rule against which Petitioners' federal claims must be judged, instead of simply consulting a decision of the State's highest court. Although the North Carolina Court of Appeals' answer was right, *see infra* Section II, that does not mean the state law issues are simple. *See Gwathmey v. North Carolina*, 464 S.E.2d 674, 688 (N.C. 1995) (describing public trust doctrine as "unnecessarily complex and at times conflicting").

Petitioners' insistence that the state courts could not reject their takings claim on the basis of custom, Pet. 22 n.13, introduces yet more state law messiness. The Court of Appeals had inherent authority to rule on this basis regardless of any preservation issues, *Dogwood Dev. Mgmt. Co. v. White Oak Transp. Co.*, 657 S.E.2d 361, 364 (N.C. 2008), and this Court may, of course, reach any issue passed on below. And beyond these procedural questions, any doubt about the scope of the custom doctrine under North Carolina law poses one more obstacle to a clean resolution of Petitioners' claim.

A comparison with last Term's decision in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017) is illustrative. There, the Court resolved a federal regulatory takings question about the proper methodology for determining the parcel as a whole without miring itself in disputed threshold questions of state property law. And it did so with the benefit of a record where property boundaries were undisputed. Although the decision below was rendered by a lower state court, that intermediate appellate court had applied settled precedent from the Wisconsin Supreme Court. *Id*. at 1941.

In contrast, Petitioners here seek review of an intermediate state court decision turning only on state and local law questions, in a case containing multiple alternative grounds for affirmance. The North Carolina Supreme Court wisely declined review. This Court should do the same.

3. Further counseling against review is the problem that the federal question framed by Petitioners is not actually presented. The ruling below cannot reasonably be read to endorse a theory that the General Assembly broke with centuries of North Carolina property law to create public trust rights out of thin air. *See also infra* Section II. As Petitioners recognized in their briefing below, N.C.G.S. § 77-20 "just codifies the common law." Nies' North Carolina Court of Appeal Reply Br. at 2.

Also, Petitioners cannot even pin down their federal takings claim, and are unable to take a

consistent position on which state action constitutes a taking. As presented, Petitioners' question asserts a legislative taking. Pet. i. But elsewhere, Petitioners invoke judicial takings. Pet. 30-31. And in their original complaint, as well as before the North Carolina Court of Appeals, Petitioners challenged the Town's ordinances, not the statute. *E.g.*, R. 20; R. 27; Pet. A9. Perhaps given this apparent confusion, Petitioners fail to specify any federal misstep in the lower court's analysis, asking only for this Court to "confirm" settled federal rules, and remand the case to the state court to determine whether some unspecified form of taking occurred. Pet. 32 & n.22.

This Court need not expend its scarce resources overcoming multiple vehicle problems to reach a state law issue that the North Carolina Supreme Court wisely declined to decide, just to "confirm" federal law. For those reasons alone, certiorari is not warranted.

II. The North Carolina Court of Appeals Correctly Interpreted North Carolina Law.

Worse still, the state law ruling Petitioners ask this Court to correct is one that the state intermediate appellate court got *right*. That alone justifies denying the petition, as a state court decision about state law must be wrong beyond all doubt to raise constitutional concerns. *Cf. Stop the Beach Renourishment v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 726 n.9 (2010) (plurality) ("A property right is not established if there is doubt about its existence; and when there is doubt

we do not make our own assessment but accept the determination of the state court.").

A. Petitioners' Assertions of Error Are Based in State Law, Not Federal Law.

The federal law "conflicts" that Petitioners assert are illusory. In passing on Petitioners' takings claim, the intermediate appellate court cast no doubt on either of the principles that Petitioners claim are at risk (Pet. 27-32): that newly opening dry sand beaches to public access would be a physical taking, or that States "effect a taking if they recharacterize as public property what was previously private property." *Stop the Beach Renourishment*, 560 U.S. at 713 (plurality). The North Carolina Court of Appeals had no need to address either question, because it held that Petitioners *never* had the right to exclude the public from the dry sand beach, Pet. A21, and there was thus no recharacterization of property rights, only application of long-standing law, Pet. A17.

1. As for the purported conflict with this Court's physical-takings jurisprudence, the intermediate appellate court effectively assumed—or did not dispute, because there was no reason to reach the question—that allowing public use of the dry sand beaches where it was previously forbidden would be a "per se" taking (Pet. 27-29). That is why the open factual question about the property's boundary, Pet. A4, never factored into the court's analysis.

In other words, the court rejected Petitioners' physical-taking claim because it rejected Petitioners'

state law premise, holding that Petitioners "have never, since they purchased the Property in 2001, had the right to exclude public traffic, whether pedestrian or vehicular, from the public trust dry sand beach portions of the Property." Pet. A23; *see also id*. (rejecting physical takings claim because it "is predicated on [Petitioners' rejected] contention that the dry sand portion of the Property is not encumbered by public trust rights"). That is manifestly a state law holding that by definition cannot conflict with this Court's precedent.

2. Likewise, the North Carolina Court of Appeals did not cast aside the federal rule that "a State, by *ipse dixit*, may not transform private property into public property without compensation." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980); *see* Pet. 30-32. Rather, the court concluded that § 77-20(d)-(e) codified the common-law understanding, which Petitioners acknowledge (Pet. 31) the legislature may do. *See* § 77-20(d) (describing the "right of the people to the customary free use and enjoyment of the ocean beaches" as "*reserved to the people of this State under the common law*" and "*established in the common law* as interpreted and applied by the courts of this State") (emphasis added).

Petitioners argue otherwise based upon a holding that the Court of Appeals never made, *i.e.*, the contention (Pet. 15-16) that the Court of Appeals held the Legislature in 1998 *changed* the common law to newly impose public trust rights on privately-owned dry sand beaches. The ruling below cannot be so

simplistically recast. Rather, the Court of Appeals drew on multiple sources—including cases, North Carolina administrative opinions, and the evidence of long-standing public use (much of it uncontested)—to reach its conclusion that the "public right of access to dry sand beaches in North Carolina is . . . firmly rooted in the custom and history of North Carolina," Pet. A18, and part of the State's common law, as "*codified* by [the] General Assembly." Pet. A11 (emphasis added); *see, e.g.*, Pet. A9 (describing the "public trust doctrine" as "a creation of common law"); A15 (citing 1996 opinion by the North Carolina Attorney General interpreting North Carolina common law); A17 (citing *Concerned Citizens v. Holden Beach Enterprises*, 404 S.E.2d 677, 688 (N.C. 1991)); A5-A6 (describing history of public driving on dry sand beaches).

That holding was right as a matter of state law. *See infra* Section II.B. And more importantly, it did not depend upon a legislative re-definition of property rights. Petitioners' argument otherwise (Pet. 15-16) relies on three isolated statements. First, the court described § 77-20 as "stat[ing] the position of the General Assembly" as to the location of public trust rights. But the first statement, in context, refers to the General Assembly's position that the *common law* provided for public trust use rights regarding dry sand beaches, as expressly stated by the legislature in language emphasized by the Court of Appeals. Pet. A14.

The court's statement that the legislature has the power to modify the common law (Pet. 16) likewise

does not help Petitioners. It is true, as far as it goes—the state legislature *does* have the power to modify common law—but the Court of Appeals recognized that power was subject to constitutional limitations, Pet. A11, and did not hold that the legislature had, in fact, modified the common law.

Last, Petitioners cite a statement that § 77-20 "establishes" that some portion of the dry sand beach is subject to public trust rights, Pet. A18. In context, however, the stray use of the word "establishes" is better read to state that § 77-20 confirms or shows what the common law established.

Respondent quite agrees with Petitioners that "[w]hen N.C.G.S. § 77-20[(d)-(e)] was enacted in 1998, no one understood it to *change* the common law or to *create* public rights on dry beaches." Pet. 23 (emphasis added). Rather, as the Court of Appeals' judgment reflects, and the scholar on which Petitioners rely explained, the North Carolina legislature enacted § 77-20(d)-(e) because otherwise section 77-20(a)—codifying the common-law ownership boundary as the mean high water mark—"might be misread as a legislative . . . rejection of the doctrine of custom or the expanded public trust doctrine" that historically guaranteed public use of dry sand beaches. Joseph J. Kalo, *The Changing Face of the Shoreline: Public and Private Rights to the Natural and Nourished Dry Sand Beaches of North Carolina*, 78 N.C. L. REV. 1869, 1895 (2000). Thus, the legislature enacted § 77-20(d)-(e) not to *alter* the common law, but to ensure that its earlier enactments were not misread as destroying the

customary common-law right of the people of North Carolina to use dry sand beaches.[13]

The conflicts, and the taking(s), alleged by Petitioners thus boil down to their insistence that the North Carolina Court of Appeals got North Carolina law wrong. But it is not ordinarily the role of this Court to grant review only to correct an intermediate state court's interpretation of state law—and this would be the wrong case to do so.

B. Based on Its Sound Interpretation of State Law, the Court Below Correctly Rejected Petitioners' Takings Claim.

Under the common law of North Carolina, oceanfront property owners have never had the right to exclude the public from the dry sand beach, whether that right is analyzed through the lens of public trust rights or custom. Neither the few cases Petitioners cite, nor the many others they don't, prove otherwise.

1. To win their takings claim, Petitioners had to "prove the elimination of an established property right." *Stop the Beach Renourishment*, 560 U.S. at 726 (plurality); *see id.* at 730 ("There is no taking unless

[13] The General Assembly's intent to codify existing law is further confirmed by the bill's title: "An Act . . . To *Recognize the Common Law Right* Of The Public To The Customary Free Use And Enjoyment Of The Ocean Beaches." 1998 N.C. Sess. Laws 225, § 5.1. (emphasis added). "[W]hen the meaning of an act is at all doubtful, all the authorities now concur that the title should be considered." *State ex rel. Cobey v. Simpson*, 423 S.E.2d 759, 764 (N.C. 1992).

Petitioner can show that, before the [relevant] decision, littoral-property owners had" the claimed property right) (op. for the Court). Because the property right to exclude the public from dry sand beaches has not been recognized in prior opinions, Petitioners cannot meet their burden. "What counts is not whether there is precedent for the allegedly confiscatory decision, but whether the property right allegedly taken was established." *Id.* at 728 (plurality). State law alone can answer this question. "Property interests, of course, are not created by the Constitution," (or this Court), but rather their "dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1977).

No North Carolina precedent establishes the right to exclude claimed by Petitioners. But ample North Carolina authority shows that under North Carolina common law, public trust use rights extend beyond the boundary of the public trust title to the adjacent dry sand beach—although the North Carolina Supreme Court has yet seen fit to definitively address the question.

To understand beach property law, the distinction between public trust title and public trust use rights is key, although elided by Petitioners and their *amici*. This Court has recognized that "even where States have given dominion over tidelands to private property owners, some States have retained for the general public the right to fish, hunt, or bathe on these lands."

Phillips Petroleum Co. v. Mississippi, 484 U.S. 469, 483-484 (1988). North Carolina is one such State, which distinguishes between public trust title and public trust use rights. *See* N.C.G.S. § 113-131(e) ("'[P]ublic trust resources' means land and water areas, *both public and private*, subject to public trust rights.") (emphasis added).

Long before 1998 (when N.C.G.S. § 77-20 was amended to add the paragraphs codifying the common law on public access to dry sand beaches), all three branches of state government understood North Carolina common law to recognize public trust use rights in the dry sand beaches.

The legislature has for decades regulated driving on the dry sand beach, presupposing a public right, originating in the common law, to access the dry sand beach. For example, in 1965 the legislature prohibited certain driving on the "beach strand" in a region that includes Emerald Isle. 1965 N.C. Sess. Laws 798, § 1. The beach strand was defined as the area between the line of sand dunes and the low water mark, thereby including the dry sand beach. Fishing, construction, and government vehicles were all permitted to drive on the strand. *Id*. And in 1973, the legislature authorized towns and cities to regulate driving on the "foreshore, beach strand and the barrier dune system" of beaches. N.C.G.S. § 160A-308.

In 1985, the legislature codified common law public trust use rights as including "the right to freely use and enjoy the State's ocean and estuarine beaches

and public access to the beaches." N.C.G.S. § 1-45.1. And § 77-20(d) itself reflects the "common law" as the source of the public's "customary free use and enjoyment of the ocean beaches," from "time immemorial," including the dry sand beach.

North Carolina's courts, too, have recognized the long-standing history of public rights to use and enjoy the dry sand beaches, implicitly and explicitly. For example, in 1987, the North Carolina Supreme Court held that a statute limiting beach driving in some areas did not create a special privilege for those owners that were newly free of beach driving (including driving on the "beach dunes area," beyond the wet sand beach). *Emerald Isle v. State*, 360 S.E.2d 756, 765 (N.C. 1987). The unchallenged premise of the emolument claim was that beach driving was normally permissible.

That case is not the only one consistent with the Court of Appeals' conclusion. In *Concerned Citizens of Brunswick Cty. Taxpayers Ass'n v. State*, 404 S.E.2d 677, 688 (N.C. 1991), the North Carolina Supreme Court rejected dicta from the Court of Appeals to "the effect that the public trust doctrine will not secure public access to a public beach across the land of a private property owner," because it was not clear that the statement "reflects the law of this state." While not a definitive resolution, it strongly suggests that the Court of Appeals here correctly concluded that public trust use rights apply on privately-owned dry sand beach.

That conclusion is reinforced, moreover, by the long history of beach driving on the dry sand beach. *See, e.g.*, *Concerned Citizens*, 404 S.E.2d at 681 (recounting testimony establishing vehicular travel on the beach strand as early as the 1920s); Pet. A5 (describing unrebutted evidence that beach driving had been allowed in Emerald Isle since the Town's incorporation in 1957). Petitioners "acknowledge[d]" in this very case that "'historically,' the public has been driving on private property dry sand beach," given an ordinance that permitted driving on the "foreshore and area . . . consisting primarily of hardpacked sand" up to a point "ten (10) feet seaward from the foot or toe of the dune." Pet. A5-A6.[14]

Finally, the North Carolina Attorney General has also recognized—before the enactment of N.C.G.S. § 77-20(d)-(e)—that the common law preserves the right of the public to access the dry sand beaches. *See Opinion of Attorney General Re: Advisory Opinion Ocean Beach Renourishment Projects*, *N.C.G.S.*

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[14] That Petitioners seek to dodge this concession now, and ask this Court to reevaluate the facts underlying the ruling below, Pet. 9 n.5, only confesses the importance of this uncontested history, and is one of the many vehicle problems in this case. *See supra*, Section I. And Petitioners' assertion that at the time of their 2001 purchase, there was no driving on the dry sand beach, only on "the hard packed wet beach bounded on the landward side by the mean high water mark" (Pet. 8) is both inconsistent with the historical record and the reality of beach driving, and impossible as a practical matter. People prefer to drive on the hard-packed sand, because it is easier. But when the tide is in, they have no choice but to drive on the dry sand closer to the dunes, whether hard packed or soft.

§ 146-6(f), 1996 WL 925134, *2 (Oct. 15, 1996) (opining that the "dry sand beach" is "an area of private property which the State maintains is impressed with public rights of use under the public trust doctrine and the doctrine of custom or prescription").

Against this tri-branch authority, Petitioners predominantly rely on selected tidbits of purportedly contrary court opinions. But their reliance confuses public trust ownership with public trust use rights. The oft-quoted statement from *Gwathmey*, 464 S.E.2d at 678, that "the public trust doctrine is not an issue . . . where the land involved is above water" (Pet. 4, 6, 21, 31) comes from a case about privately-owned marshlands, and addressed no issues related to dry sand beaches. *Id.* at 676-86. Petitioners' other authority referencing the mean high water mark addressed the property boundary, not public trust use rights. *See, e.g.*, *Carolina Beach Fishing Pier, Inc. v. Carolina Beach*, 177 S.E.2d 513, 516 (N.C. 1970) (question presented was "[w]here is the dividing line between the property of the State and that of the littoral private owner?"); *Cooper v. United States*, 779 F. Supp. 833, 835 (E.D.N.C. 1991) (addressing question of "[p]rivate ownership in the dry sand").

In contrast to Petitioners' cases addressing the simple question of private ownership *vel non*, no case establishes that private ownership in North Carolina ever included the right to exclude the public from the dry sand beaches. Absent this established right to exclude, there can be no taking, because a right that was never established cannot be destroyed by

government action, whether legislative or judicial. *See Stop the Beach Renourishment*, 560 U.S. at 726, 730. Petitioners failed to meet their burden to produce such authority. And the authority that does touch on the question of public *use* rather than public *ownership* overwhelmingly supports the North Carolina Court of Appeals' conclusion.

2. Petitioners' attempt to establish a taking by mischaracterizing state law fails for a second reason. As an alternative basis for its holding that Petitioners' bundle of rights never included the right to exclude the public from the dry sand beach, the North Carolina Court of Appeals correctly held that public use of dry sand beaches has been established by custom. Pet. A17-A18. This separate holding can sustain the judgment below, and Petitioners barely contest it on the merits. *See Bennett v. Spear*, 520 U.S. 154, 166 (1997) ("A respondent is entitled . . . to defend the judgment on any ground supported by the record.").

Under North Carolina law, to be recognized as customary law, a custom "must be uniform, long established, generally acquiesced in, reasonable [rather than contrary to public policy] and so well known as to induce the belief that the parties contracted with reference to it." *Penland v. Ingle*, 50 S.E. 850, 851 (N.C. 1905). Public use of dry sand beaches meets that standard.

Petitioners do not contest that the public has made uniform use of the full extent of both the dry and wet sand beaches of the State, and that this use has

been "frequent, uninterrupted, and unobstructed," N.C.G.S. § 77-20(d), Pet. A17 n.2. This use is long-established, dating from time immemorial. *See, e.g.*, *Etheridge v. Jones*, 30 N.C. 100 (1847) (documenting auction sales of salvaged items on the beach); Gregory Seaworthy (George Higby Troop), *Antebellum Nags Head*, from NAGS HEAD, OR, TWO MONTHS AMONG "THE BANKERS" 22-26, 37-39, 79-80, 159-161 (1850), *excerpted in* AN OUTER BANKS READER, 12, 16 (David Stick ed., 1998) (describing beach as route of travel and place of recreation, including in horse-drawn carriages); Kalo, *Changing Face of the Shoreline*, 78 N.C. L. REV. at 1877 ("[T]he custom of the dry sand beaches being open to public trust uses has a long history in North Carolina."). This long-standing public use furthers the public policy of North Carolina. N.C.G.S. § 113A-134.1(b) ("The beaches . . . make[] a significant contribution to the economic well-being of the State" and "have been customarily freely used and enjoyed by people throughout the State."). And it is so well-known that it has become a part of the public consciousness. *See id.*; N.C.G.S. § 77-20(d); Pet. A18.[15]

[15] Petitioners and their *amici* stress the harms that will befall beachfront property owners if the ruling below is left undisturbed, while unable to identify a single source of North Carolina law establishing the right to exclude the public from the dry sand beach. But if their desired sudden and unprecedented privatization of North Carolina's beaches were to occur, countless non-oceanfront property owners and businesses would be harmed, because their property values and long-held entitlement to freely use North Carolina's ocean beaches would be undermined.

Petitioners' only response to this uncontested history (Pet. 22 n.13) is to assert that custom was not sufficiently briefed or that it has been eliminated from North Carolina law. Petitioners' assertion that custom was not properly briefed is beside the point; the North Carolina Court of Appeal plainly passed upon it, making it properly before the Court. *Va. Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) ("It suffices for our purposes that the court below passed on the issue. . . ."). And Petitioners' assertion that the custom doctrine has been eliminated from North Carolina common law is meritless. *See, e.g.*, *Penland*, 50 S.E. at 851.

Winder v. Blake, 49 N.C. 332 (1857), on which Petitioners rely, cannot be read to categorically reject use of custom. *See, e.g.*, *Peterson v. South & W. R. R.*, 55 S.E. 618, 620 (N.C. 1906) (citing *Winder* as support for holding that a custom had not been proven, but not rejecting the applicability of the doctrine). And any doubt on that score ultimately presents yet another question of state law that the North Carolina Supreme Court has declined to resolve in this case, once again counseling against this Court's premature review.

3. In short, Petitioners make no argument for a taking that stands independently from their wrongheaded claims about North Carolina law. And the Court of Appeals' correct state law holding leads inexorably to the conclusion that Petitioners suffered no taking.

As Petitioners concede (Pet. 31), there is no taking when "common law understandings . . . already limit private property rights." Petitioners' concession is well-taken; this Court has explained that even where a physical invasion is concerned, it "assuredly would permit the government to assert a permanent easement that was a pre-existing limitation upon the land owner's title." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1028-29 (1992). That is what distinguishes *Scranton v. Wheeler*, 179 U.S. 141, 163 (1900) (interests of riparian owner in submerged lands bordering on public navigable water held subject to government's navigational servitude), from *Kaiser Aetna v. United States*, 444 U.S. 164, 178-180 (1979) (imposition of navigational servitude on marina created from pond long-understood to be private property and rendered navigable at private expense held to constitute a taking).

The intermediate North Carolina court, of course, found just such a "pre-existing limitation upon the landowner's title" here, namely the inability to exclude the public from the dry sand beach. Pet. A21. Petitioners fight that premise, but make no argument for a taking if the North Carolina Court of Appeals got state law right. Likewise, they make no argument that Emerald Isle's driving ordinances regulating the long-standing public use of the dry sand beach themselves constitute regulatory takings (or takings of any sort) or are not valid exercises of the police power.

Because Petitioners effectively contest only a state law holding, that state law holding is correct, and the

federal result follows from a rote application of settled federal law, certiorari is not warranted.

III. Historical Differences in The Evolution of Each State's Beachfront Property Law Do Not Create A Federal Conflict.

Lastly, no conflict requires this Court's intervention. The premise of any asserted conflict is Petitioners' apparent belief that this Court should adopt a one-size-fits-all public trust doctrine for the Nation's ocean beaches. But there is no "federal common law of property," *United States v. Craft*, 535 U.S. 274, 294 (2002) (Thomas, J., dissenting), and this Court should reject Petitioners' invitation to create one here.

Petitioners' cases from other States reveal no disagreement about the contours of *federal* law. *See* S. Ct. R. 10(b) (noting a divide in "state court[s] of last resort" over "an important federal question" as a consideration for granting certiorari). On the contrary, the Massachusetts, Maine, and New Hampshire cases uniformly apply the same federal analysis that the North Carolina Court of Appeals used here: asking whether the public use at issue is a pre-existing limitation on the owner's title. *See, e.g.*, Pet. A21 (finding no taking because the "right to prevent the public from enjoying the dry sand portion of the Property was never part of the 'bundle of rights' purchased by Plaintiffs in 2001"); *Bell v. Wells*, 557 A.2d 168, 179 (Me. 1989) (finding a taking because the

"common law has reserved to the public only a limited easement" and a statute "takes a comprehensive easement for 'recreation' ").

The different results in state cases are thus wholly due to different state property laws. *Phillips Petroleum Co*., 484 U.S. at 475 ("[I]t has been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit."). State beachfront property rights differ, as even Petitioners recognize (Pet. 7 n.4) when they acknowledge that New Jersey's common law provides for public access to dry sand beaches.

Massachusetts and Maine, for example, extend private ownership to the low water mark, and further restrict public use to three specific uses: fishing, fowling, and navigation. *Opinion of the Justices*, 313 N.E.2d 561, 565-66 (Mass. 1974); *Bell*, 557 A.2d at 173. This is due to an "extraordinary" colonial-era enactment adopted to encourage littoral owners to build wharves. *Opinion of the Justices*, 313 N.E.2d at 565. It is thus unsurprising that they classified attempts to permit other uses as takings. *Id*. at 567; *Bell*, 557 A.2d at 179. On the other end of the spectrum, property rights in Hawaii generally permit customary gathering and access uses at any traditional location on a parcel because "the western concept of exclusivity is not universally applicable in Hawai'i," and "the issuance of a Hawaiian land patent confirmed a limited property interest as compared with typical land patents governed by western concepts of

property." *Pub. Access Shoreline Haw. v. Haw. Cty. Planning Comm'n*, 903 P.2d 1246, 1268 (Haw. 1995).

Many States fall in between these extremes. In New Hampshire, public use trust rights are coextensive with public trust ownership, and thus end at the mean high water mark. *Purdie v. Attorney General*, 732 A.2d 442, 445 (N.H. 1999). Not so in Oregon, Florida—or North Carolina. *Thornton v. Hay*, 462 P.2d 671, 675, 676-77 (Or. 1969) (holding the owner of the "upland" cannot exclude the public from the dry sand beaches because "this land has been used by the public as public recreational land according to an unbroken custom running back in time as long as the land has been inhabited"); *Daytona Beach v. Tona-Roma, Inc.*, 294 So. 2d 73, 77-78 (Fla. 1974) (recognizing long-standing public recreational customary use in dry sand beach).

These differing results make sense because the coastal area is "sui generis," as "the foreshore is 'owned' by the state, and the upland is 'owned' by the patentee or record-title holder, [but] neither can be said to 'own' the full bundle of rights normally connoted by the term 'estate in fee simple.'" *Thornton*, 462 P.2d at 675. In this unique area, different States have developed, over centuries, different laws to address different local circumstances, history, and customs. Such differences in State policy and custom that shape unique beach property laws are the birthright of our federalist system. They do not create a federal conflict meriting certiorari.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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August 2017

APPENDIX TO THE BRIEF IN OPPOSITION

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Supreme Court of North Carolina

GREGORY P. NIES and DIANE S. NIES

v

TOWN OF EMERALD ISLE,
a North Carolina Municipality

From N.C. Court of Appeals
(15-169)
From Carteret
(11CVS1569)

ORDER

Upon consideration of the notice of appeal from the North Carolina Court of Appeals, filed by the Plaintiffs on the 9th of December 2015 in this matter pursuant to G.S. 7A-30, and the motion to dismiss the appeal for lack of substantial constitutional question filed by the Defendant, the following order was entered and is hereby certified to the North Carolina Court of Appeals: the motion to dismiss the appeal is

"Allowed by order of the Court in conference, this the 13th of April 2016."

s/ Ervin, J.
For the Court

Upon consideration of the petition filed on the 9th of December 2015 by Plaintiffs in this matter for discretionary review of the decision of the North Carolina Court of Appeals pursuant to G.S. 7A-31, the following

order was entered and is hereby certified to the North Carolina Court of Appeals:

"Allowed by order of the Court in conference, this the 13th of April 2016."

s/ Ervin, J.
For the Court

Therefore the case is docketed as of the date of this order's certification. Briefs of the respective parties shall be submitted to this Court within the times allowed and in the manner provided by Appellate Rule 15(g)(2).

WITNESS my hand and official seal of the Supreme Court of North Carolina, this the 14th of April 2016.

Christie Speir Cameron Roeder
Clerk, Supreme Court of North Carolina
M.C. Hackney
M.C. Hackney
Assistant Clerk, Supreme Court Of North Carolina

Town of Emerald Isle Ordinances

For the Court's convenience, the relevant provisions of the Town of Emerald Island's ordinances in effect when Petitioners' complaint was filed in 2011, and the 1981 Beach Driving Ordinance (as amended in 1983 and 1985) that preceded the 2010 version are set forth below. Current versions of the ordinances, based on a recodification and restructuring of the Town's Code, and reflecting some minor amendments, are available on the Town's website.[1]

Beach Equipment Ordinance (2010) (R. 98-99)

Emerald Isle Code of Ordinances
Chapter 5 – Beach and Shore Regulations.

ARTICLE VIII. – UNATTENDED BEACH EQUIPMENT PROHIBITED

Sec. 5-100. – Definitions.

The following words, terms and phrases, when used in this article, shall have the meaning ascribed to them in this section, except where the context clearly indicates a different meaning:

Beach equipment means any items that are designed or manufactured for use, or actually used, on the beach strand. Examples include chairs, lounges, umbrellas, cabanas, tents, canopies, awnings, volleyball nets, sporting equipment, and other large personal

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[1] https://library.municode.com/nc/emerald_isle/codes/code_of_ordinances?nodeId=PTIICOOR_CH5BESHRE.

items typically used on the beach strand. Beach equipment shall not include municipal trash containers, signage or structures placed by a governmental agency, or items placed by a bona fide conservation agency or organization (such as signs or protection devices for turtle nests).

Beach strand means all land between the low water mark of the Atlantic Ocean and the base of the frontal dunes.

Sec. 5-101. – Unattended beach equipment prohibited.

All beach equipment must be removed from the beach strand by its owner or permitted user on a daily basis. All beach equipment unattended and remaining on the beach strand between 7:00 p.m. and 8:00 a.m. will be classified as abandoned property and will be removed and disposed of by the town.

Sec. 5-102. – Placement of beach equipment.

(a) No beach equipment, attended or unattended, shall be placed within an area twenty (20) feet seaward of the base of the frontal dunes at any time, so as to maintain an unimpeded vehicle travel lane for emergency services personnel and other town personnel providing essential services on the beach strand.

* * *

Sec. 5-103. – Exceptions.

The town manager, or his/her authorized designee, shall have the authority to grant exceptions to the requirements of this article for oceanfront property owners, limited duration special events, or other reasons in the general public interest upon presentation of a written request outlining the reasons for said exception.

* * *

Beach Driving Ordinance (2004, as recodified in 2010) (R. 87-90)

Emerald Isle Code of Ordinances
Chapter 5 – Beach and Shore Regulations:

Art. II – MOTOR VEHICLES ON THE BEACH AND DUNE AREAS

Sec. 5-21. – Definitions.

* * *

Beach and sand dunes area means all land landward of the low water mark of the Atlantic Ocean and the low water mark of Bogue Sound, to include the foreshore beach strand, barrier dune system, single sand dunes, dune ridges, dune systems, and any part thereof, both old and new, including the vegetative cover relating to these dunes. However, public streets and highways are expressly excluded in this definition. Further, the areas of the front, side and rear yards of a residence or business which are not part of a sand dune, dune ridge, or dune system, and which are

covered by vegetative cover, gravel, rock, asphalt, cement or similar material, are excluded from this definition.

* * *

Limited access ways means those areas designated by posted signs whereby legal access to the permitted driving area as hereafter defined may be achieved.

Permitted driving area means the foreshore and area within the town consisting primarily of hard-packed sand and lying between the waters of the Atlantic Ocean and Bogue Sound and a point ten (10) feet seaward from the foot or toe of the dune closest to the waters of the Atlantic Ocean and Bogue Sound.

* * *

Vehicular traffic means the use, other than upon public highways or private ways devoted to the use of the public, of any vehicle, whether motorized or not, and without regard to weight, number of wheels, or other variances among vehicles.

Sec. 5-22. – Driving on beach and sand dunes prohibited; exceptions.

(a) It shall be unlawful for any vehicular traffic to travel upon the beach and sand dunes located within the town except during permitted time periods. The permitted time periods for vehicular travel upon the beach are as follows:

(1) From and including September 15 until and including the Thursday prior to Easter Sunday.

(2) From and including the Monday that occurs 8 days after Easter Sunday until and including April 30.

(b) This prohibition does not apply to commercial fisherman [sic] holding valid state licenses while engaged in commercial fishing activities.

Sec. 5-23. – Driving on designated areas only.

It shall be unlawful for any vehicular traffic holding and displaying a duly authorized permit issued pursuant to this article to travel on any portion of the beach and sand dune areas other than those areas designated herein as permitted driving areas and the limited access ways as defined in section 5-21. It shall also be unlawful for any vehicular traffic to travel on any portion of the beach and sand dune areas without a valid permit, or for any vehicular traffic to travel upon any closed sections of the beach.

* * *

Beach Driving Ordinance (1981, as amended in 1983 and 1985, (R. 526-530)):

Article B

Motor Vehicles on the Beach and Dune Areas

Section 87021. Definitions.

For the purposes of this Article the following definitions shall apply unless the context clearly indicates or requires a different meaning.

Beach and Sand Dunes Area. All land landward of the low water mark of the Atlantic Ocean and the low water mark of Bogue Sound, to include the foreshore beach strand, barrier dune system, single sand dunes, dune ridges, dune systems, and any part thereof, both old and new, including the vegetative cover relating to these dunes. However, public streets and highways are expressly excluded i[n] this definition. Further, the areas of the front, side and rear yards of a residence or business which is [sic] not part of a sand dune, dune ridge, or dune system, and which is [sic] covered by vegetative cover, gravel, rock, asphalt, cement, or similar material, is [sic] excluded from this definition.

* * *

Limited Access Ways. Those areas designated by posted signs whereby legal access to the permitted driving area as hereafter defined may be achieved.

Permitted Driving Area. The foreshore and area within the town consisting of hardpacked sand and lying between the waters of the Atlantic Ocean and Bogue Sound and a point ten (10) feet seaward from

the foot or toe of the dune closest to the waters of the Atlantic Ocean and Bogue Sound.

Vehicular traffic. The use, other than upon public highways or private ways devoted to the use of the public, of any vehicle, whether motorized or not, and without regard to weight, number of wheels, or other variances among vehicles. (Ord. of 12/9/80; as amended by Ord. of 3/8/83)

Section 87022. Driving on Beach and Sand Dunes Prohibited, Exceptions.

It shall be unlawful for any vehicular traffic to travel upon the beach and sand dunes located within the Town between 12:01 a.m. Friday before Memorial Day and 12:00 midnight on the Wednesday following Labor Day in September of each and every year and during the month of May, each weekend from 12:01 a.m. on Saturday until 4:00 a.m. on Monday. This Section shall not apply to vehicles operated by commercial fishermen issued a valid North Carolina fishing license while engaged in commercial fishing activities and while being operated exclusively within the permitted driving area. (Amended December 10, 1985)

Section 87023. Driving on Designated Areas Only.

It shall be unlawful for any vehicular traffic holding and displaying a duly authorized permit issued pursuant to this Article to travel on any portion of the beach and sand dune areas other than those areas designated herein as permitted driving areas and the

limited access ways as defined in Section 87021. (Ord. of 12/9/80; as amended by Ord. of 3/8/83)