NORTH CAROLINA

WAKE COUNTY

GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20-CVS-12925

COASTAL CONSERVATION ASSOCIATION, et al.,

Plaintiffs,

v.

STATE OF NORTH CAROLINA,

Defendant.

PLAINTIFFS' BRIEF IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

This case is about the State of North Carolina's failure to satisfy its obligations under the public trust doctrine—a legal doctrine that the people of North Carolina have ratified in their Constitution. The public trust doctrine imposes a duty on the State to hold and manage in trust, for the benefit of its current and future citizens, all of North Carolina's public trust resources. Those public trust resources include the natural resources of North Carolina's coast: our navigable coastal waters, as well as the fish and shellfish within those waters.

As the overwhelming evidence confirms, however, the State has allowed our coastal fisheries resources to be depleted, and to a staggering degree. Abundant, objective, and undeniable data confirm that North Carolina's coastal fisheries are now paying the price for the State's longstanding and fundamentally flawed management approach—an approach that includes favoring unsustainable resource exploitation over responsible resource conservation, disregarding the rights of the average citizen to harvest and possess coastal fisheries resources, and allowing

exceptionally wasteful harvest practices that all other Southeastern states banned or severely curtailed long ago. As the last bastion of these resource depleting practices, North Carolina is now widely regarded as an outlier in coastal fisheries management.

With our coastal fisheries resources in serious jeopardy and in continuous overall decline, the Plaintiffs have brought this action to hold the State accountable. The Plaintiffs are the Coastal Conservation Association of North Carolina and 86 citizens from across the state, including five former members of the Marine Fisheries Commission. Their complaint contains over 100 pages of detailed factual allegations backed by objective data, all of which support a single cause of action: a claim against the State for failing to meet its obligations under the public trust doctrine as incorporated by the North Carolina Constitution. *See* Compl. at 108.

The State has now moved to dismiss the complaint. The State's motion presents several arguments, but those arguments essentially fall into two categories.

First, the State seeks dismissal on the grounds of sovereign immunity and, furthermore, asserts that the Plaintiffs did not allege the absence of sovereign immunity. The State is wrong on both counts. The State never has sovereign immunity from constitutional claims like the one here, and, regardless, the complaint explicitly alleged the absence of sovereign immunity.

Second, the State asks the Court to adopt several limitations on the public trust doctrine that have never been accepted before—limitations that, if adopted, would effectively eliminate the doctrine. The State's motion asks this Court to hold that: (1) the State has no obligation to protect or preserve North Carolina's public

trust resources at all; (2) the State's public trust obligations can only be enforced by itself, even in cases where it is sued for failing to meet those obligations; and (3) there are separation-of-powers problems because at the remedial stage of the case, this Court will inevitably fail in its routine task of adjudicating constitutional claims. No court in the nation—much less any court in North Carolina—has ever adopted such a view of the public trust doctrine. Instead, the State's position is belied by two centuries of public trust law, the plain language of the North Carolina Constitution, and multiple decisions of North Carolina's appellate courts.

For these reasons, the State's motion to dismiss should be denied.

FACTUAL BACKGROUND

For brevity, the Plaintiffs incorporate by reference the allegations of their complaint, but the following is a short summary of those allegations:

Under the public trust doctrine as incorporated by the North Carolina Constitution, the State has a legal duty to hold and manage in trust, for the benefit of its current and future citizens, all of North Carolina's public trust resources, including our coastal fisheries resources. *See* Compl. ¶¶ 1–7. As described more fully below, this means that the State must manage and regulate the harvest of coastal fisheries resources in a way that protects the rights of current and future generations of the public to fish in public waters. Compl. ¶ 303. To that end, the State may not allow activities that threaten the rights of current and future generations to fish in public waters, such as harvest equipment or methods that generate undue waste or impair the sustainability of coastal fisheries. Compl. ¶¶ 302–03.

The complaint sets forth evidence backed by extensive data—data that comes from the State itself, and which must be deemed true and admitted on this Rule 12 motion[1]—demonstrating that the State has failed to meet those obligations. As the complaint describes, the State has facilitated the excessive exploitation of fisheries, permitted wasteful fishing practices, and yielded to commercial interests to the impairment of public trust rights and resources. The complaint highlights three examples of these failures:

- First, unlike every other state in the southeast, the State of North Carolina has for decades allowed the excessive use of two destructive commercial fishing practices—unattended gillnets and trawling in estuarine waters—that cause critical habitat destruction and result in substantial wastage of coastal fish stocks and their prey species. North Carolina's waters are now the last bastion for the extensive use of these wasteful practices, and our fisheries have paid the ultimate price, with precipitous declines in multiple public trust fish stocks. *See* Compl. ¶¶ 13–15, 85–183.

- Second, the State has refused to curb chronic, long-term overfishing of multiple public trust fish stocks. *See id.* ¶¶ 16–17, 184–282. As just one example, the State historically permitted commercial harvesting of River Herring to exceed twenty million pounds a year, and continued to allow excessive harvest until the stock collapsed altogether. *See id.* ¶ 16.

- Third, the State has tolerated a lack of harvest reporting by a majority of commercial fishing license holders for more than a decade. By disregarding these "latent" commercial fishing licenses, the State has obscured the full degree of chronic overfishing and the true impacts of overharvest on North Carolina's coastal fish stocks. *See id.* ¶¶ 283–98.

Plaintiffs further describe how the State's decades-long bias toward commercial fishing interests has driven the State's mismanagement of the public's

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[1] A Rule 12 motion requires treating the complaint's allegations as true and admitted, *Sutton v. Duke*, 277 N.C. 94, 98, 176 S.E.2d 161, 163 (1970), with any inferences in the complaint treated in the light most favorable to the plaintiffs. *Ford v. Peaches Ent. Corp.*, 83 N.C. App. 155, 156, 349 S.E.2d 82, 83 (1986).

fisheries resources. *See id.* ¶¶ 8–11. The State has allowed the excessive exploitation of coastal fisheries by those licensed to harvest resources for profit, even though those commercial licensees represent less than 0.1% of the North Carolina citizens for whom the State holds those resources in trust. *See id.* ¶ 10.

The complaint also describes in extensive detail how North Carolina's coastal fisheries are paying the price for the State's longstanding and fundamentally flawed management approach. The complaint catalogues the many statistical indicators of this sad reality, including the following:

- commercial and public harvest data reflecting that multiple fish species have declined dramatically—in some cases by as much as 98%—since the last comprehensive fisheries legislation was enacted in the 1990s (Compl. ¶¶ 127–32);
- the uninterrupted decline in commercial fish landings since the 1980s (*id.*);
- the millions of pounds of wasted bycatch produced by unsustainable (yet permitted) harvest methods (*id.* ¶¶ 111–18);
- documented yet tolerated overfishing of multiple fish species over decades (*id.* ¶¶ 200–82);
- multiple, unhealthy fish stocks, with declining numbers of the sexually mature fish needed for the stock to be sustainable (*id.*);
- a long-term trend in reductions of the number of fish that the public may keep necessitated by declining fish stocks (*id.* ¶¶ 78–84); and
- annual State stock assessments showing that most managed fish stocks are not "viable" within the meaning of statutory requirements (*id.* ¶¶ 64–73).

In sum, the complaint describes how the State's mismanagement of North Carolina's coastal fisheries resources has eliminated—or, at a minimum, severely curtailed—the public's right to fish for many species, and how it has threatened the very existence of that right for future generations of North Carolinians.

GOVERNING STANDARDS

The issue on a Rule 12 motion "is not whether [the] plaintiff will ultimately prevail, but whether the plaintiff is entitled to offer evidence to support the claim." *Howe v. Links Club Condo. Ass'n, Inc.*, 263 N.C. App. 130, 137, 823 S.E.2d 439, 447 (2018). Thus, the "essential question" is "whether the complaint, when liberally construed, states a claim upon which relief can be granted on any theory." *Wells Fargo Ins. Servs. USA, Inc. v. Link*, 372 N.C. 260, 266, 827 S.E.2d 458, 465 (2019).

For these reasons, a Rule 12 motion should not be granted unless "it appears certain that [the plaintiff] could prove no set of facts which would entitle [it] to relief under some legal theory." *Fussell v. N.C. Farm Bureau Mut. Ins. Co.*, 364 N.C. 222, 225, 695 S.E.2d 437, 440 (2010); *see also, e.g.*, *Energy Invs. Fund, L.P. v. Metric Constructors, Inc.*, 351 N.C. 331, 337, 525 S.E.2d 441, 445 (2000) ("Rule 12(b)(6) generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery.").

These rules apply with even greater force when courts are called upon to interpret a provision in Article I of the North Carolina Constitution, like the State's motion asks the Court to do here. The North Carolina Supreme Court has repeatedly cautioned that trial courts must "give our Constitution a liberal interpretation in favor of its citizens with respect to those provisions [in Article I of the North Carolina Constitution]," because these provisions "were designed to safeguard the liberty and security of the citizens in regard to both person and property." *Tully v. City of Wilmington*, 370 N.C. 527, 533, 810 S.E.2d 208, 214 (2018) (quoting *Corum v. Univ. of North Carolina*, 330 N.C. 761, 783, 413 S.E.2d 276, 290 (1992)).

Against the weight of these overlapping, unfavorable standards of review, the State's motion fails for the reasons that follow.

ARGUMENT

I. The State's sovereign immunity arguments lack merit.

A. The State has no sovereign immunity from the Plaintiffs' claim.

The State's first and primary argument for dismissal is that it enjoys sovereign immunity. That argument clashes with every major sovereign immunity decision decided by the North Carolina Supreme Court over the past 40 years.

The Supreme Court has repeatedly admonished that the State *never* has sovereign immunity from constitutional claims. *See Corum*, 330 N.C. at 786, 413 S.E.2d at 291; *Craig v. New Hanover County Bd. of Educ.*, 363 N.C. 334, 338, 678 S.E.2d 351, 354 (2009); *Tully*, 370 N.C. at 533–34, 810 S.E.2d at 213–14. Indeed, the Court's prior decisions "could hardly have been clearer" that sovereign immunity does not apply in a constitutional challenge. *Craig*, 363 N.C. at 338, 678 S.E.2d at 354.

This is a constitutional challenge. The complaint pleads a single cause of action under the public trust doctrine as incorporated by the North Carolina Constitution, and it specifically and repeatedly cites to Article I, Section 38 and Article XIV, Section 5 of the North Carolina Constitution. *See* Compl. at 108. The complaint also makes abundantly clear that Plaintiffs' claim is brought "directly under" the North Carolina Constitution. *Id.* ¶ 26. Thus, sovereign immunity is

inapplicable.[2] *See Corum*, 330 N.C. at 786, 413 S.E.2d at 291; *Craig*, 363 N.C. at 338, 678 S.E.2d at 354; *Tully*, 370 N.C. at 533–34, 810 S.E.2d at 213–14.

For this reason alone, the State's assertion of sovereign immunity has no merit.

B. Plaintiffs properly alleged the absence of sovereign immunity.

The State also argues that the Plaintiffs did not sufficiently allege the *absence* of sovereign immunity. State's Br. at 5. Here, too, the State's argument is contrary to controlling precedent in at least two respects.

First, the Court of Appeals held in *Bolick v. County of Caldwell* that when the State has no sovereign immunity to waive (for example, in a constitutional challenge, like this one), a "plaintiff is under no requirement to plead a waiver of sovereign immunity" because a "defendant could not waive an immunity that it did not possess." 182 N.C. App. 95, 98, 641 S.E.2d 386, 389 (2007). Thus, the State's argument—which does not mention *Bolick*—has been squarely rejected.

Second, even if a plaintiff had to plead the *absence* of sovereign immunity, as the State mistakenly assumes, it would not improve the State's arguments for a separate reason: The Plaintiffs here *did* allege the absence of sovereign immunity.

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[2] To the extent that the State attempts to recast Plaintiffs' claim as divorced from the North Carolina Constitution, this tactic is unavailing for two reasons. First, even a cursory review of the complaint confirms that the claim arises under the North Carolina Constitution. Compl. ¶¶ 26, 108. Second, in the only instance where a state has attempted to defend a public trust claim on sovereign immunity grounds, that argument was rejected. *See Kanuk v. Alaska*, 335 P.3d 1088, 1096 (Alaska 2014). That result only makes sense, because if states had sovereign immunity from public trust claims, then public trust rights would be unenforceable altogether.

In an abundance of caution, the complaint alleged the following: "Plaintiffs seek declaratory and injunctive relief directly under the public trust doctrine and the North Carolina Constitution, and no other adequate remedy at law is available or appropriate. Therefore, sovereign immunity is inapplicable." Compl. ¶ 26. As the Court of Appeals recently held in *T & A Amusements, LLC v. McCrory*, such an allegation is more than sufficient. 251 N.C. App. 904, 911, 796 S.E.2d 376, 381 (2017) (holding that even if an express allegation were required, the plaintiffs "met that burden . . . by alleging that 'Defendants are not entitled to sovereign immunity"). Thus, the State's pleading-deficiency argument—which does not mention *T & A Amusements*—has also been squarely rejected.

What is more, it appears that the State recognized that the Plaintiffs went above and beyond what the law required by alleging the absence of sovereign immunity. Each time the State's brief advances its pleading-deficiency argument and quotes the relevant allegation of the complaint, it conspicuously *deletes* the key words in that allegation—the words that make abundantly clear that the Plaintiffs are proceeding directly under the North Carolina Constitution. *See* State's Br. at 1, 5–6 (omitting the words "and the North Carolina Constitution" when quoting from the complaint (emphasis added)). Here is one such example:

> First, the plaintiffs have not alleged and cannot show that the State waived its sovereign immunity from suit. They allege only that "sovereign immunity is inapplicable" "because Plaintiffs seek declaratory and injunctive relief directly under the public-trust doctrine . . . and no other adequate remedy at law is available or appropriate." Compl. 11 ¶ 26. There is no law to

In sum, the State's first and foremost argument for dismissal consists of:

- asserting sovereign immunity where the North Carolina Supreme Court "could hardly have been clearer" in holding that it does not exist;
- contending that the Plaintiffs were required to allege the absence of sovereign immunity even though the Court of Appeals has held that no such requirement exists; and
- attempting a pleading-deficiency argument by offering the Court a rewritten version of the complaint with the key words deleted.

These tactics are unjustified, and the Court should reject them accordingly.

II. The State's proposed limitations on the public trust doctrine have no merit.

The crux of this case is that the State's failure to properly manage commercial harvesting abdicates its public trust duty to preserve North Carolina's coastal fisheries resources for current and future public use. In response, the State proposes a never-before-adopted view of the public trust doctrine. If accepted by the Court, the State's view would effectively eliminate the doctrine altogether, along with the current and future public rights it is meant to guarantee.

According to the State, the public trust doctrine imposes *no restrictions* on the State's management of North Carolina's fisheries; therefore, the State has *no obligation* to preserve North Carolinians' public trust rights in those resources. Moreover, the State posits, even if it did have such an obligation, only the State itself could enforce it—the ultimate example of "the fox guarding the henhouse." And finally, the State suggests that asking a trial court to adjudicate constitutional claims—a task that trial courts perform every day across North Carolina—somehow creates a separation-of-powers problem.

As described below, the State's attempt to disavow its public trust obligations is fundamentally inconsistent with two centuries of public trust law and the clear mandates of the North Carolina Constitution.

A. The State's first proposed limitation—that there are no restraints on the State's management of public trust resources at all—is untenable.

The State rejects the bedrock concept that "[t]he public trust doctrine imposes on the State a legal duty to . . . manage . . . public trust resources" as the complaint describes. State's Br. at 10. This attempt by the State to disavow its obligations reveals its fundamental misunderstanding of the public trust doctrine.

As discussed below, the public trust doctrine in American law has two distinct features: (1) the people's delegation of authority to the State to manage their public resources, including navigable waters and the fisheries in those waters; and (2) the State's duty to preserve the public's rights in those natural resources. *See generally* Mary Christina Wood, *Nature's Trust; Environmental Law for a New Ecological Age* 128 (2014) (explaining that the public trust doctrine "[w]eav[es] together two civil strands of power and obligation"); *see also Parker v. New Hanover County*, 173 N.C. App. 644, 654, 619 S.E.2d 868, 875–76 (2005).

The State recognizes the first of these two features: its delegated authority from the people to manage their public trust resources. But the State expressly disavows the second feature: its duty to preserve the public's rights in those resources. State's Br. at 8–10. According to the State, "no law" supports the notion that it has any legal obligation to protect or preserve public trust resources. *Id.* Instead, the State contends that it has unfettered and unreviewable prerogative to

"manage" our coastal fisheries resources in any fashion it chooses, including by allowing these resources to be depleted to the point that they are unavailable to the citizens for whom they are held in trust.

Fortunately, the State's aggressive position has never been the law. Instead, the State seeks to countermand: (1) two centuries of public trust law recognizing the State's obligations; (2) North Carolina authorities acknowledging those obligations; and (3) the provisions of the North Carolina Constitution ratifying those obligations.

1. Two centuries of public trust law confirm the State's obligations under the public trust doctrine.

As the U.S. Supreme Court recognized in 1879, the term "public trust," at its core, refers to the fundamental principle that the government may not abdicate its duty to the public. *See, e.g.*, *Stone v. Mississippi*, 101 U.S. 814, 820 (1879) ("[T]he power of governing is a trust committed by the people to the government, no part of which can be granted away."). This includes a state's obligation to preserve the public's right to natural resources, such as fisheries and watercourses. *See Geer v. Connecticut*, 161 U.S. 519, 534 (1896) ("[I]t is the duty of the legislature to enact such laws as will best preserve the subject of the trust [wildlife], and secure its beneficial use in the future to the people of the state.").

As the U.S. Supreme Court has explained, public resources must be "held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties." *Ill. Cent. R.R. Co. v. Illinois*, 146 U.S. 387, 452 (1892); *see also Shepard's Point Land Co. v. Atlantic Hotel*, 44 S.E. 39, 42

(N.C. 1903) (same).[3] A state "can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them . . . than it can abdicate its police powers in the administration of government." *Ill. Cent. R.R. Co.*, 146 U.S. at 453. In other words, the State's public trust obligations are a core duty of government that cannot be cast aside.

These basic concepts are older than the State of North Carolina itself.[4] Under English law, title and dominion in lands and tidal waters were held by the Crown for the benefit of the nation. *See Phillips Petrol. v. Mississippi*, 484 U.S. 469, 473 (1988). After the American Revolution, these rights and obligations conveyed to the original states within their respective borders. *See id.* at 473–74. As states joined the Union, they received ownership of all lands under waters subject to the ebb and flow of the tide. *Id.* at 476; *see also, e.g.*, *Arnold v. Mundy*, 6 N.J.L. 1, 71 (N.J. 1821) (public trust resources include "the air, the running water, the sea, the fish, and the wild beasts").

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[3] This concept reflects a fundamental distinction between *citizens* of a Republic and *serfs* under a Crown. *See, e.g.*, Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. Rev. 471, 484 (1970) (noting that the public trust doctrine is the difference between a society of "citizens rather than serfs"). Unlike the serf, the citizen is a beneficiary holding a clear public property interest in natural resources that the citizen entrusts to their government to protect. *See id.*

[4] The public trust doctrine's application to natural resources can be traced back to Roman law (the Institutes of Justinian, part of the Corpus Juris Civilis), the "foundation for modern civil law systems." *Juliana v. United States*, 217 F. Supp. 3d 1224, 1253 (D. Or. 2016) (citing Timothy G. Kearley, *Justice Fred Blume and the Translation of Justinian's Code*, 99 Law Libr. J. 525, ¶ 1 (2007)), *rev'd on other grounds*, 947 F.3d 1159 (9th Cir. 2020). Roman law declared that "the following things are by natural law common to all—the air, running water, the sea, and consequently the seashore." *Id.* (citing J. Inst. 2.1.1 (J.B. Moyle trans.)).

The states' management of these resources, however, was limited by the states' obligations as trustees: The states could use or dispose of such resources only to the extent that doing so would not cause "substantial impairment of the interest of the public in the waters." *Ill. Cent. R.R. Co.*, 146 U.S. at 435; *see also, e.g.*, *Brickell v. Trammel*, 82 So. 221, 226 (Fla. 1919) ("For the purpose of enhancing the rights and interests of the whole people, the States may by appropriate means grant to individuals limited privileges in the lands under navigable waters, but not so as to divert them or the waters thereon from their proper uses for the public welfare[.]").

As a consequence, the State's tolerance of excessive exploitation of coastal fisheries resources by private, commercial interests must yield to the public's right to harvest fish for their personal use. *See Ill. Cent. R.R. Co.*, 146 U.S. at 435. For that reason, the public trust doctrine requires courts to "look with considerable skepticism upon any governmental conduct which is calculated . . . to subject public uses to the self-interest of private parties." Sax, *supra* n.3, at 490.

The Plaintiffs' claim here faithfully tracks these time-honored, basic legal principles. The complaint makes no attempt to force the State to regulate commercial fishing in any particular manner—the straw man that the State attempts to set up. *See* State's Br. at 16–17. Rather, the complaint challenges—and describes in great detail in extensive allegations that must be treated as true and admitted—how the State has *failed* to properly manage coastal fisheries resources, most notably by permitting commercial-fishing exploitation and waste to such a degree that the State has alienated the resource to the detriment of the Plaintiffs' public trust rights.

The State's duty under the public trust doctrine—as expressly affirmed by two provisions of the North Carolina Constitution discussed below—is to *preserve* the public's right to fish in coastal waters by protecting it from any activity that impairs that right, including excessive exploitation from commercial fishing. The State remains free to choose the manner in which it regulates commercial fishing, so long as that manner sufficiently protects the public trust rights of current and future North Carolinians. But by failing to properly manage coastal fisheries resources, the State has violated its public trust obligations and permitted the "substantial impairment of the interest in the public" in North Carolina's fisheries.[5] *Ill. Cent. R.R. Co.*, 146 U.S. at 435.

Accordingly, the State's contention that "no law" restrains its management of North Carolina's fisheries is belied by two centuries of American public trust law, as well as the centuries of public trust law that came before it.

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[5] The State criticizes the complaint's explanation of the public trust doctrine through the familiar lens of private trust law. State's Br. at 7. But Plaintiffs have never suggested that private trust principles control here. Rather, as courts have recognized, the private trust relationship is simply a metaphor that illustrates the obligations of and restraints upon the State in the *public* trust context. *See State v. Dickerson*, 345 P.3d 447, 455 (Or. 2015) ("Although the trust metaphor is an imperfect one (for example, there is no trust instrument that delineates the terms of the trust), the state's powers and duties with respect to wildlife have many of the traditional attributes of a trustee's duties."). Thus, courts often turn to private trust principles in public trust cases. *See, e.g.*, *Juliana*, 217 F. Supp. 3d at 1254 (citing private trust treatise and the Restatement (Second) of Trusts for guidance on public trust claims). In fact, the courts' use of the trust metaphor in discussing fisheries resources is nearly two centuries old. *See Martin v. Waddell*, 41 U.S. 367, 412–14 (1842).

2. North Carolina's courts have long recognized the State's obligations under the public trust doctrine.

North Carolina has recognized the State's obligations under the public trust doctrine for more than 200 years. *See, e.g.*, *Shepard's Point Land Co.*, 44 S.E. at 42; *State v. Forehand*, 67 N.C. App. 148, 150–51, 312 S.E.2d 247, 249 (1984) (observing that North Carolina's courts have "long accepted the public trust doctrine"). Both our Supreme Court and Court of Appeals have adopted the holding of the U.S. Supreme Court in *Ill. Cent. R.R. Co.* (discussed *supra* at 14), which declared that the State's management of public trust resources must not result in "substantial impairment of the interest of the public in the waters." *State ex rel. Rohrer v. Credle*, 322 N.C. 522, 526, 369 S.E.2d 825, 827 (1988) (quoting *Ill. Cent. R.R. Co.*, 146 U.S. at 435); *Forehand*, 67 N.C. App. at 151, 312 S.E.2d at 249 ("Under the doctrine [set forth in *Ill. Cent. R.R. Co.*], the State holds title to the submerged lands under navigable waters, 'but it is a title . . . held in trust for the people of the state so that they may navigate, fish, and carry on commerce in the waters involved.'").

It is also beyond dispute that North Carolina's public trust resources include its coastal fisheries, and that the public has a right to navigate those waters and fish for their personal use. *See, e.g.*, *State v. West*, 31 N.C. App. 431, 441, 229 S.E.2d 826, 831–32 (1976) (recognizing the State's obligation to hold and manage in trust coastal oysters for the people), *aff'd*, 293 N.C. 18, 235 S.E.2d 150 (1977); *Town of Nags Head v. Richardson*, 260 N.C. App. 325, 334, 817 S.E.2d 874, 882 (2018) (recognizing "those rights held in trust by the State for the use and benefit of the people of the State in common"). The State essentially concedes as much. *See* State's Br. at 8 ("The public

trust rights that the public has traditionally enjoyed in public trust lands and waters include the rights to navigate, swim, hunt, fish, and recreate.").

In sum, North Carolina has long recognized the fundamental restraints that the public trust doctrine imposes on the State's management of our fisheries.

Against the weight of this well-settled body of law, the State relies almost exclusively on the 1995 decision in *Gwathmey v. State ex rel. Department of Environmental, Health, & Natural Resources*, 342 N.C. 287, 464 S.E.2d 674 (1995). *See* State's Br. at 8–9, 19. In *Gwathmey*, the State conveyed marshlands to private parties by a special legislative grant and then, years later, attempted to renege on that conveyance—a questionable action that would have impaired the landowners' property rights and likely raised constitutional concerns. *Id.* at 301–02; 464 S.E.2d at 682–83. Under those unique circumstances, the Court took a dim view toward the State's attempt to renege on its prior action, and the Court applied an exception to the public trust doctrine for public land conveyed by special legislative grant. *See id.* at 303; 464 S.E.2d at 683. Even then, the Court was careful to reaffirm that the State must hold the land beneath navigable waters in trust for the people. *Id.*

To be sure, the complaint here does not involve the public trust exception for conveyance of public land to private parties, much less any special legislative grant of land or an attempt by the State to renege on an act that would form strong reliance interests in private parties. For this reason alone, the decision in *Gwathmey*—a doctrinal exception that was no doubt driven by its egregious facts—is inapposite.

More fundamentally, though, the State's reliance on *Gwathmey* is misplaced for another reason: It does not stand for the sweeping proposition—one that the State now invites the Court to adopt for the first time—that the State has unfettered, unreviewable discretion to allow the excessive exploitation of public trust resources. Recent cases decided after *Gwathmey* confirm the State's longstanding obligation. *See, e.g.*, *Richardson*, 260 N.C. App. at 334, 817 S.E.2d at 883; *Parker*, 173 N.C. App. at 654, 619 S.E.2d at 875–76; *Fish House, Inc. v. Clarke*, 204 N.C. App. 130, 132–33, 693 S.E.2d 208, 210 (2010). Those decisions demonstrate that *Gwathmey* was not intended to relieve the State of its public trust obligations, and, furthermore, that the State's longstanding public trust obligations remain.[6]

For example, in the last word from our appellate courts on the public trust doctrine, the Court of Appeals in *Richardson* not only confirmed that "[t]he State is tasked with protecting [public trust] rights," but also recognized that this obligation arises "pursuant to the North Carolina Constitution." *Richardson*, 260 N.C. App. at

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[6] The State succeeded to ownership of public trust resources when the Union was formed, but with the "concomitant restraints" imposed by public trust *rights*. *Rohrer*, 322 N.C. at 525, 369 S.E.2d at 827. Thus, the State has always been limited to "*reasonable* legislative regulation, *for navigation, fishing and commerce*." *Id.* at 527, 369 S.E.2d at 828 (emphasis added). Our appellate courts have long articulated this restraint. *See, e.g.*, *Jones v. Turlington*, 243 N.C. 681, 683, 92 S.E.2d 75, 77 (1956) (cautioning that an easement in public trust land is subject to legislation "for the protection of the public rights in rivers and navigable waters"); *State v. Stewart*, 40 N.C. App. 693, 695, 253 S.E.2d 638, 640 (1979) (recognizing that "the State's wildlife population is a natural resource of the State held by it in trust for its citizens," and the legislature may therefore enact "laws reasonably related to the protection of such wildlife"); *see also West*, 31 N.C. App. at 441, 229 S.E.2d at 831–32 ("[P]roperty owned by the government is held in trust for the people and . . . the intentional or negligent acts of the agents of the government should not serve to deny the people of the benefits and enjoyment of 'their' property.").

334, 817 S.E.2d at 883. As these decisions make clear, nothing in *Gwathmey* was intended to reverse course on two centuries of public trust law.

In addition, the State's almost exclusive reliance on *Gwathmey* has a timing problem: *Gwathmey* was decided over two decades before the North Carolina Constitution was amended to include the express, state constitutional ratification of the public trust doctrine on which the Plaintiffs' cause of action here is premised—an amendment that imposes on the State an obligation to "forever preserve[ ]" North Carolinians' public trust rights to fish for personal use. *See infra* at 23–26 (discussing Article I, Section 38). Naturally, because this constitutional amendment came after *Gwathmey*, the decision contains no discussion of it.

Nor did *Gwathmey* involve a discussion of Article XIV, Section 5, the other constitutional provision on which the Plaintiffs are proceeding here. Again, the Court in *Gwathmey* was simply applying a doctrinal exception for special legislative conveyances of public land where the State had reneged on a conveyance, so there would have been no need to reach any issue under Article XIV, Section 5. That constitutional provision, however, recognizes that the "proper function" of the State is to "preserve" our natural resources for the benefit of our citizenry—further constitutional grounds on which the State's "no obligation" theory of the public trust doctrine is foreclosed. *See infra* at 20–22 (discussing Article XIV, Section 5).

These points confirm that the State's almost exclusive reliance on *Gwathmey* is misplaced. Nothing in *Gwathmey* (or any other decision for that matter) suggests that the State has unfettered, unreviewable discretion to allow public trust resources

to be excessively exploited.[7] Instead, that stunning proposition is one that the State is asking this Court to adopt for the first time in North Carolina's history.

3. The North Carolina Constitution defeats the State's argument.

As described above, the preservation of public trust rights has always been a core government obligation in American law. In North Carolina, however, the people took the extra step of raising the constitutional floor: They ratified constitutional amendments mandating that the State uphold its public trust obligations.

In its current form, North Carolina's constitution contains two provisions that defeat the State's argument that it lacks any public trust obligations.

First, the people of North Carolina in 1972 ratified a constitutional amendment that became Article XIV, Section 5. The legislation proposing the amendment was entitled, "An Act to Amend the Constitution to Provide for the Protection of Natural Resources," N.C. Sess. Laws 1971-630, and it was "popularly identified as the 'environmental bill of rights.'" John L. Sanders, Proposed Amendments, Popular Gov't, Sept. 1971, at 14. As that name reflects, "the drafters of [this provision] . . . intended to adopt the [public trust doctrine] as a constitutional directive." Kacy Manahan, *The Constitutional Pub. Tr. Doctrine*, 49 Envtl. L. 263, 296 (2019).

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[7] The State also points to commentary from Professor John Orth about Article XIV, Section 5, in which he opines that the principal effect of Article XIV, Section 5 was to create the State Nature and Historic Preserve. State's Br. at 18–19. But this observation is entirely consistent with the Plaintiffs' claim here. Far from introducing extraordinary new concepts, the provision reaffirms rights that North Carolinians have possessed for centuries.

To that end, the text of Article XIV, Section 5 dictates that the State's "proper function" is to "preserve" its natural resources for the benefit of the people:

> It shall be the policy of this State *to conserve and protect* its lands and waters *for the benefit of all its citizenry*, and to this end it *shall be* a proper function of the State of North Carolina and its political subdivisions *to* . . . *preserve* as a part of the common heritage of this State its . . . estuaries [and] beaches.

N.C. Const. art. XIV, § 5 (emphasis added).

Since the ratification of Article XIV, Section 5, our appellate courts have interpreted that provision to effectuate the intent of the drafters to "adopt the [public trust doctrine] as a constitutional directive." Manahan, *supra*, at 296. In 1988, the North Carolina Supreme Court interpreted this provision and held that it "*mandates* the conservation and protection of public lands and waters for the benefit of the public." *Rohrer*, 322 N.C. at 532, 369 S.E.2d at 831 (emphasis added). The Court of Appeals in 2005 reached a similar conclusion, holding that this provision "recognize[s] the key role of the State and its political subdivisions . . . in ensuring the navigability and quality of waters." *Parker*, 173 N.C. App. at 654, 619 S.E.2d at 875–76. Most recently, in 2018, the Court of Appeals held that, under this provision, "[t]he State is tasked with protecting these [public trust] rights pursuant to the North Carolina Constitution." *Richardson*, 260 N.C. App. at 334, 817 S.E.2d at 883.

Nevertheless, the State in its brief disavows these obligations, claiming that "[t]his constitutional amendment does not create a right of the public or any obligation of the State relevant to the plaintiffs' grievances." State's Br. at 18. As described above, however, the North Carolina Supreme Court has held that Article XIV, Section 5 "*mandates* the conservation and protection of public lands and waters

for the benefit of the public." *Rohrer*, 322 N.C. at 532, 369 S.E.2d at 831 (emphasis added). The State cannot argue away that constitutional "mandate." *Id.*[8]

The State also disclaims any responsibility for how "third parties" might contribute to the problem. State's Br. at 16. But the State is charged with *regulating* those parties, and the complaint alleges that commercial overfishing and wasteful harvest methods only occur *because the State allows them*—a factual allegation that must be accepted as true at this early stage, and regardless, is confirmed by the data. *See, e.g.*, Compl. ¶¶ 5, 11–13.

The State's apparent desire to turn a blind eye to these issues only underscores the underlying problem of regulatory capture. As Plaintiffs allege in great detail, the State's management practices reflect a clear bias in favor of the commercial fishing sector—the key industry the State is charged with regulating to preserve the Plaintiffs' rights. *See, e.g.*, *id.* ¶¶ 40–46. The State's blame-shifting argument ultimately amounts to an improper attempt to pierce these extensive factual allegations on a motion to dismiss—a tactic that Rule 12 does not allow.

In short, the text of Article XIV, Section 5 and the decisions interpreting this constitutional mandate defeat the State's argument that it lacks any obligations here.

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[8] By legislative definition as well, North Carolina's coastal fish stocks are deemed "marine and estuarine resources" for management purposes. N.C. Gen. Stat. § 113-129(11). Thus, those resources must be deserving of preservation as a part of the State's common heritage as contemplated by Article XIV, Section 5.

The same is true for a second constitutional amendment that the people of North Carolina ratified more recently: a 2018 amendment that ratified North Carolinians' public trust rights to fish for personal use. *See* N.C. Const. art. I, § 38.

The legislation proposing what is now Article I, Section 38 to the voters was entitled, "An Act to Amend the North Carolina Constitution to Protect the Right to Hunt, Fish, and Harvest Wildlife." N.C. Sess. Law 2018-96. The question on the ballot to the voters asked them to vote "for" or "against" a "constitutional amendment protecting the right of the people to hunt, fish, and harvest wildlife." *Id.* That amendment was ratified in November 2018 by nearly 3/5 of the voters.[9]

The amendment is now contained in Article I of the North Carolina Constitution, the "Declaration of Rights," where North Carolina's most sacred constitutional rights are kept. As the Supreme Court has explained, "[t]he very purpose of the Declaration of Rights is to ensure that the violation of these rights is never permitted by anyone who might be invested under the Constitution with the powers of the State." *Corum*, 330 N.C. at 783, 413 S.E.2d at 290. That prime placement in Article I was fitting, because it is "[t]hrough the Declaration of Rights [that] the people of North Carolina [have] secured these rights against state officials and shifting political majorities." *Id.* at 787, 413 S.E.2d at 292.

North Carolina's Declaration of Rights begins with the following preamble:

> That the great, general, and essential principles of liberty and free government may be recognized and established, and that the relations of this State to the Union and government of the United States and those

[9] *See* N.C. State Bd. of Elections, 11/06/2018 Official General Election Results, *available at* https://www.ncsbe.gov/results-data/election-results.

> of the people of this State to the rest of the American people may be defined and affirmed, we do declare . . . .

Id. After that preamble follows our most venerated constitutional rights—for example, "that all persons are created equal; that they are endowed by their Creator with certain inalienable rights; that among these are life, liberty, the enjoyment of the fruits of their own labor, and the pursuit of happiness." N.C. Const. art. I, § 1.

Among these most sacred rights, the people of North Carolina saw fit to include their newly ratified, constitutional, public trust rights to fish for their personal use. The text of Article I, Section 38 provides:

> The right of the people to hunt, fish, and harvest wildlife is a valued part of the State's heritage and *shall be forever preserved* for the public good. The people have a right, including the right to use traditional methods, to hunt, fish, and harvest wildlife, subject only to laws enacted by the General Assembly and rules adopted pursuant to authority granted by the General Assembly to (i) promote wildlife conservation and management and (ii) preserve the future of hunting and fishing.

N.C. Const. art. I, § 38 (emphasis added).

Naturally, given the recency of this constitutional provision, the courts have yet to interpret it. Like other written instruments, however, the words used in constitutional provisions are interpreted according to their plain meaning. *See Town of Boone v. State*, 369 N.C. 126, 132, 794 S.E.2d 710, 715 (2016). Thus, interpreting the plain meaning of Article I, Section 38's mandate—"shall be forever preserved"—is a straightforward task. "Shall" means "has a *duty* to," representing "the *mandatory* sense" conveyed by drafters. Definition of "Shall", Black's Law Dictionary (11th ed. 2019) (emphasis added). "Forever" means "for a limitless time." Merriam-Webster Dictionary. "Preserve" means "to keep safe from injury, harm, or destruction." *Id.*

Thus, the plain meaning of "shall forever preserve" imposes a duty to keep safe from injury, harm, or destruction for a limitless time. And because the "fundamental purpose" of our Constitution is "to provide citizens with protection from the State's encroachment upon [constitutional] rights," *Corum*, 330 N.C. at 782, 413 S.E.2d at 276, it follows that this permanent "duty" to keep our public trust resources "safe from injury, harm, or destruction" must fall on the State. After all, who would be responsible for preserving North Carolina's public trust resources if not the State?

The State has no answer for that question. Instead, it asserts that Article I, Section 38 merely *restricts* the State's regulation. In the State's view, this constitutional provision does not place any affirmative duties upon the State. State's Br. at 16. But much like the State's sovereign immunity argument, which is grounded in deleting words that the State finds unhelpful to its theory, the State's assertion here disregards the plain text of Article I, Section 38 (underlined here) that it finds unhelpful: "The right of the people to hunt, fish, and harvest wildlife . . . <u>shall be forever preserved for the public good</u>." N.C. Const. art. I, sec. 38 (emphasis added); *see also Town of Boone*, 369 N.C. at 132, 794 S.E.2d at 715 (reaffirming that constitutional interpretation begins with the plain meaning of the text).

Particularly given that this provision must be given a "liberal interpretation" in favor of the Plaintiffs, *Tully*, 370 N.C. at 533, 810 S.E.2d at 214 (quoting *Corum*, 330 N.C. at 783, 413 S.E.2d at 290), the State's attempt to disavow that preservation requirement is puzzling. The State concedes that it has an obligation to *regulate* those natural resources, yet it denies any obligation to *preserve* those same resources,

even to the point of depletion—the current, sad case for many North Carolina public trust fish stocks. The State's brief sheds no light on this disconnect, much less identifies who else—if not the State—could possibly be responsible for "forever preserv[ing]" those resources "for the public good." N.C. Const. art. I, § 38.[10]

This aspect of the State's brief also clashes with representations that the State made to the Court earlier in this case at a hearing on a commercial fishing trade association's motion to intervene. At that hearing, the State argued that it "actually represent[s] the interests of the resource itself." March 15, 2021 Hrg. Tr. (Exhibit A) at 39:16–17. If that is so, then surely, at a bare minimum, the State has a duty to *protect* "the resource itself." *Compare id. with* State's Br. at 10.

As these points show, the State has a constitutional obligation to protect and preserve North Carolinians' public trust rights, including and especially their public trust rights to fish for their personal use. The State's position that "no law" supports such an obligation cannot be reconciled with the North Carolina Constitution.[11]

In sum, the State is asking this Court to countermand two centuries of American public trust law, countless North Carolina decisions on the public trust

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[10] Notably, the State's brief never attempts to address the "shall be forever preserved" mandate in Article I, Section 38. *See* State's Br. at 15–17.

[11] The State also spends several pages of its brief "to the extent" that the Plaintiffs have asserted two independent claims under the Constitution. State's Br. at 15. That notion is easily dispelled by a plain reading of the complaint, which asserts only a single cause of action. *See* Compl. at 108. Thus, the State's "abundance of caution" argument is really just a hypothetical that has no bearing on the issues here. Regardless, the State's arguments about Article XIV, Section 5 and Article I, Section 38 fail for the same reasons discussed above. *See supra* at 20–26.

doctrine, and two provisions of the North Carolina Constitution—including a provision in North Carolina's Declaration of Rights. No North Carolina court has ever accepted the extreme position that the State now advances, and this Court should reject the invitation to become the first.

B. The State's second proposed limitation—that the State's public trust obligations can only be enforced by the State itself, even in cases where it is sued for failing to meet those obligations—is untenable.

The State's next proposal invites the Court to hold that the only one who can enforce the State's public trust obligations is the State, including when the State itself is sued for failing to meet those obligations—the ultimate "fox guarding the henhouse" rule. *See* State's Br. at 10–12. This proposal is unsupported by law and, furthermore, would eviscerate the public trust doctrine and the state constitutional provisions that incorporate it.

As a threshold matter, the cases that the State relies on for its proposal—*Neuse River Foundation, Inc. v. Smithfield Foods, Inc.*, 155 N.C. App. 110, 574 S.E.2d 48 (2002), and *Town of Nags Head v. Cherry, Inc.,* 219 N.C. App. 66, 723 S.E.2d 156 (2012)—do not endorse that proposal. Indeed, the State was not even sued in those cases; rather, the plaintiffs in those cases attempted to sue *private parties*.

In *Neuse River Foundation*, the plaintiff sued private hog farming companies for allegedly polluting public waters with hog waste. 155 N.C. App. at 112, 574 S.E.2d at 50–51. Likewise, in *Cherry*, a town sued a private landowner in part because the landowner's structure restricted vehicle access to public beach areas. 219 N.C. App. at 67–68, 723 S.E.2d at 156. In other words, the plaintiffs in both cases were

attempting to cloak themselves with the State's power and exercise that power against private parties—something the Court of Appeals rightly rejected as foreign to the public trust doctrine. *Neuse River Foundation*, 155 N.C. App. at 119, 574 S.E.2d at 54; *Cherry, Inc.*, 219 N.C. App. at 75, 723 S.E.2d at 161. Neither of these cases involved claims against the State to hold it accountable for its own failings.[12]

For this reason alone, the State's attempt to expand the holdings of these cases to a constitutional claim against the State is misguided.

Another case that the State cites, *Clarke*, 204 N.C. App. 130, 693 S.E.2d 208, actually undermines its position. The Court there *allowed* a private litigant "to preserve the public's rights to [navigable waters] under the public trust doctrine" by raising the doctrine as a defense to a private trespass claim. *Id.* at 136, 693 S.E.2d at 213. In doing so, the Court recognized the distinction between private litigants: (a) improperly exercising the State's police powers; and (b) rightfully protecting individual public trust rights. *See id.* at 137, 693 S.E.2d at 213 ("Defendant invokes the public trust doctrine, not to litigate the rights of the state, but to ensure that Plaintiff does not prevent her from enjoying those rights.").

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[12] The State also suggests that the absence of North Carolina precedent involving an identical claim to the one here calls for dismissal. State's Br. at 12 (citing nothing). The fact that this case presents issues of first impression should come as no surprise. After all, Plaintiffs' claim arises in part under Article I, Section 38—a provision in our Bill of Rights that North Carolinians adopted only a few years ago. Moreover, constitutional questions of first impression are never a basis for dismissal. To the contrary, resolving first-impression questions of constitutional law is a fundamental role of our judiciary—a function that our courts carry out every day. *Infra* at 30–35.

Perhaps more important than the circumstances on which these cases turned, however, is the real reason that those cases cannot bear the weight that the State attempts to put on them. The reason is that no North Carolina court has ever adopted the rule that the State now proposes: that the people of North Carolina and their judiciary alike are powerless to enforce their state constitutional public trust rights, because the only one who can police the State is the State itself—in other words, that the State can giveth and taketh away a remedy whenever it so pleases.

That proposed rule would be an affront to the basic legal principle that every "injury" must have a "remedy"—a principle enshrined in North Carolina's "remedy clause." N.C. Const. art. I, § 18. As the North Carolina Supreme Court recently explained, the remedy clause "prohibits the use of government power to withhold a remedy to an injured party." *Comm. to Elect Dan Forest v. EMPAC*, 2021-NCSC-6, ¶ 18 (N.C. 2021) (quoting N.C. Const. art. I, § 18); *see also, e.g.*, *Ill. Cent. R.R. Co.*, 146 U.S. at 453 (holding that, like other core government functions, the State cannot "abdicate its trust over property in which the whole [of its] people are interested"). If the law were otherwise, then as the Supreme Court put it, it "would indeed be a fanciful gesture" to hold that the people of North Carolina have rights that cannot be enforced. *Corum*, 330 N.C. at 786, 413 S.E.2d at 291.

It should come as no surprise, therefore, that the State's brief could not unearth a single example of a state that has attempted—much less prevailed on—the "fox guarding the henhouse" defense to a public trust claim that the State proposes

here. To the best of the undersigned's knowledge, no such example exists, and there is no precedent for any state even making this argument.

For all of these reasons, the State's second proposed limitation—that the State's public trust obligations can only be enforced by the State itself, even in cases where it is sued for failing to meet those obligations—is untenable.

C. The State's third proposed limitation—that judicial enforcement of public trust rights violates the separation of powers—has no legal basis.

The State's next attempted defense is to raise the specter of a separation-of-powers issue. Like the State's other arguments, this argument rings hollow as well.

As our Supreme Court recently observed, more than two centuries of North Carolina jurisprudence has made it "the duty of the judicial branch to interpret the law, including the North Carolina Constitution[,]" and "to construe the limits on the powers of the branches of government created by our Constitution." *EMPAC*, 2021-NCSC-6, ¶ 14. As a consequence, our judiciary "has the responsibility to protect the state constitutional rights of the citizens"—a sacred duty "as old as the State" itself. *Corum*, 330 N.C. at 783, 413 S.E.2d at 290.

To that end, our trial courts are tasked routinely—literally every day, in courthouses across the state—with deciding whether the North Carolina Constitution has been violated and, if so, exercising the trial court's "inherent constitutional power to fashion a common law remedy for a violation of a particular constitutional right." *Corum*, 330 N.C. at 784, 413 S.E.2d at 291; *see also id.* at 784, 413 S.E.2d at 290

(explaining that if the trial court finds a constitutional violation, then "[i]t will be a matter for the trial judge to craft the necessary relief").[13]

The complaint here simply asks the Court to fulfill this longstanding duty. It asks for common, unexceptional relief for a constitutional claim: a declaration that the State has violated the Plaintiffs' constitutional rights and an injunction to enjoin future violations. *See* Compl. at 112 (Prayer for Relief). This is hardly extraordinary. This is routine relief in a constitutional challenge, as countless authorities reflect.[14]

Despite this, the State suggests that this ordinary, unexceptional request for relief should get different and exceptional treatment here, and that nothing short of the separation-of-powers doctrine makes that so. State's Br. at 12–14. As support for this defense, the State once again re-casts the complaint to fit the State's

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[13] This responsibility is especially important in the context of public trust rights. Courts are frequently called on to protect the rights of minorities, but in public trust cases, courts are called upon the protect the rights of the majority. *See* Gerald Torres & Nathan Bellinger, *The Pub. Tr.: The Law's DNA*, 4 Wake Forest J.L & Pol'y 281, 312 (2014). As scholars have observed, in the context of fisheries, a failure in the political process has allowed a minority (the commercial fishing industry) to exercise undue influence over the state to the detriment of the majority (the general public)—a result that is patently undemocratic. *Id.*; *see also* Sax, 68 Mich. L. Rev. at 560 ("[S]elf-interested and powerful minorities often have an undue influence," causing the state to "ignore broadly based public interests."). Thus, the public trust doctrine "relies on courts" for enforcement. Wood, *supra*, at 132; *see also, e.g.*, *Gwathmey*, 342 N.C. at 293, 464 S.E.2d at 677 (recognizing that the public trust doctrine is an important "tool for judicial review of state action" that impacts public resources).

[14] *See, e.g.*, *N.C. Ass'n of Educators, Inc. v. State*, 368 N.C. 777, 792, 786 S.E.2d 255, 266 (2016) (affirming trial court decision finding that the State violated constitutional rights and enjoining future violations); *Rockford-Cohen Grp., LLC v. N.C. Dep't of Ins.*, 230 N.C. App. 317, 320, 749 S.E.2d 469, 472 (2013) (same); *Heritage Vill. Church & Missionary Fellowship, Inc. v. State*, 40 N.C. App. 429, 454, 253 S.E.2d 473, 488 (1979) (same), *aff'd,* 299 N.C. 399, 263 S.E.2d 726 (1980).

narrative. According to the State, the Plaintiffs have asked this Court "to step in and regulate virtually the entirety of the commercial fishing industry." State's Br. at 12 (citing nothing). The State cites nothing for this assertion because it is incorrect. Nowhere in the complaint do the Plaintiffs seek that relief, nor would the Plaintiffs ever desire that relief at all.

The reality, as the complaint confirms, is that this is a constitutional challenge that presents a single claim under the public trust doctrine as incorporated by the North Carolina Constitution. *See* Compl. at 108. Like all constitutional challenges, especially those under Article I, this case calls upon the Court to fulfill its judicial role by following a straightforward, two-step process:

First, the Court must "interpret the law" to determine whether the State has violated the North Carolina Constitution. *EMPAC*, 2021-NCSC-6, ¶ 14; *Corum*, 330 N.C. at 783, 413 S.E.2d at 290; *Tully*, 370 N.C. at 533–34, 810 S.E.2d at 213–14.

Second, if the Court finds a violation, the Court must fashion an appropriate remedy. *Corum*, 330 N.C. at 784, 413 S.E.2d at 290 ("It will be a matter for the trial judge to craft the necessary relief."). In fashioning the ultimate remedy, the contours of which "will depend upon the facts of the case developed at trial," the Court is to "minimize encroachment" upon the other branches of government by crafting "the least intrusive remedy available and necessary to right the wrong." *Id.*[15]

[15] This Court's earlier denial of a commercial fishing trade association's motion to intervene without prejudice to the group's right to refile the motion "at the remedial stage of the case" reflects these common phases in constitutional challenges. *See* 3/31/21 Order Denying NC Fisheries Association's Intervention Motion.

Here, the State's separation-of-powers argument bucks this settled judicial approach. After putting words in the Plaintiffs' mouths about the relief they desire (words that are nowhere in the complaint and contradict the straightforward relief sought there), the State invites the Court to leap ahead to the remedial phase, then simply assume that the Court will fail in its duty to "craft the necessary relief"—something that trial courts do every day. In these ways, the State's sky-is-falling argument about the remedy sought here is grossly premature.[16] It also disregards our trial courts' demonstrated ability to do as the Supreme Court has instructed: "craft the necessary relief" while "minimizing encroachment" on the other branches.

Beyond the fact that the State's argument is premature, it also fails on the merits. The separation-of-powers doctrine applies when the judiciary "arrogate[s] a duty reserved by the constitution exclusively to another body." *Richmond County Bd. of Educ. v. Cowell*, 254 N.C. App. 422, 426, 803 S.E.2d 27, 31 (2017) (quoting *In re Alamance County Court Facilities*, 329 N.C. 84, 99, 405 S.E.2d 125, 132 (1991)). In

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[16] *See, e.g.*, *In re United States*, 884 F.3d 830, 836 (9th Cir. 2018) (rejecting as "premature" defendant's argument that "allowing the district court potentially to grant relief would threaten the separation of powers"); *Cobell v. Norton*, 334 F.3d 1128, 1138 (D.C. Cir. 2003) (rejecting argument that injunction "would violate the separation of powers" because "[u]ntil the district court takes such action" the argument is "premature"); *United States v. Cal. Dep't of Transp.*, 693 F. Supp. 2d 1082, 1091 (N.D. Cal. 2009) (rejecting argument that declaratory and injunctive relief would violate separation of powers because "it is premature at this [Rule 12] stage of the litigation for the court to be considering what type of relief, if any, the United States may be entitled to"); *Peters v. Amoco Oil Co.*, 57 F. Supp. 2d 1268, 1289 (M.D. Ala. 1999) (rejecting argument that "the adjudication of this matter would violate the separation of powers" because "it would be absolutely premature to dismiss this case at this stage" given that "precise scope of that relief is not required at this stage, and the lack of a precise scope is not grounds for dismissal").

Cowell, for example, the Court observed it was "well within the judicial branch's power" to determine that the State had violated the constitution by disbursing certain funds, to enjoin any use of those funds, and to order that the funds be returned. *Id.* at 427–28, 803 S.E.2d at 31. The problem only arose when the trial court attempted to opine on how the State should disburse *other* funds not associated with the constitutional violation. *See id.*

That problem does not arise in this case. Nowhere in the complaint is there any suggestion that the Plaintiffs are asking the Court to perform a duty exclusively delegated to another branch. In contrast, the Plaintiffs are simply seeking an order directing the State to do its job—that is, for the State to comply with its public trust and constitutional obligations. This is "well within the judicial branch's power" and, indeed, is a common feature of all cases challenging government inaction under the constitution. *Cowell*, 254 N.C. App. at 427–28, 803 S.E.2d at 31.[17] It is also a common feature of public trust claims in other states, which have not run afoul of the separation-of-powers doctrine.[18]

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[17] The State's extreme position in this case' accentuates the critical role of the judiciary in public trust cases like this one. *See, e.g.*, *Gwathmey*, 342 N.C. at 293, 464 S.E.2d at 677 (recognizing that the public trust doctrine is an important tool for judicial review of state actions that impact public resources).

[18] *See, e.g.*, *Chelan Basin Conservancy v. GBI Holding Co.*, 413 P.3d 549, 558 (Wash. 2018) (recognizing the judiciary's "constitutional responsibility" to determine whether the state violated the public trust doctrine as incorporated by the state constitution); *Kanuk*, 335 P.3d at 1099 (same); *see also, e.g.*, *Pa. Envtl. Def. Found. v. Commonwealth*, 161 A.3d 911, 930, 933 (Pa. 2017) (recognizing that the state "must act affirmatively . . . to protect the environment" under the public trust doctrine as incorporated by the state constitution); *In re Water Use Permit Applications*, 9 P.3d 409, 443, 450 (Haw. 2000) (same).

Thus, the Court need only follow the two-step process above, as the Supreme Court has instructed. *Supra* at 32. If, at the second step, the State wishes to object on separation-of-powers grounds to the relief that the trial court has crafted, the State will surely have that opportunity. But now is not the time for the Court to take up those issues. Those are post-trial issues for the remedial stage, not the Rule 12 stage.

For all of these reasons, the State's separation-of-powers argument is grossly premature, and furthermore, fails on the merits.

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In sum, the State's motion advocates for a stunning, one-of-a-kind version of the public trust doctrine that would eliminate the doctrine entirely: a version where the State has sovereign immunity, no obligation whatsoever to manage public trust resources, a self-serving "fox guarding the henhouse" defense at its disposal, and, long before the case is tried and reaches the remedial phase, an absolute separation-of-powers bar before the trial court even has an opportunity to craft an appropriate remedy. These multiple layers of impenetrable armor that the State seeks would reduce the public trust doctrine and key provisions of the North Carolina Constitution to rubble, resulting in the ultimate "fanciful gesture" of rights without a remedy that our Supreme Court has condemned. *Corum*, 330 N.C. at 786, 413 S.E.2d at 291.

No court in the nation, much less any court in North Carolina, has ever adopted such a view, and for good reason: It is *dangerous*. Two centuries of public trust law and the plain language of the North Carolina Constitution teach us that the State

cannot be allowed to violate its public trust obligations with impunity, then hide behind made-up defenses that no court in the nation has recognized.

This Court should reject the State's invitation to become the first court to endorse that dangerous approach.

CONCLUSION

The State's motion to dismiss should be denied.

Respectfully submitted the 1st day of May, 2021.

POYNER SPRUILL LLP

By: Keith H. Johnson

Keith H. Johnson
N.C. State Bar No. 17885
kjohnson@poynerspruill.com

By: _____

Andrew H. Erteschik
N.C. State Bar No. 35269
aerteschik@poynerspruill.com
John M. Durnovich
N.C. State Bar No. 47715
jdurnovich@poynerspruill.com
Stephanie L. Gumm
N.C. State Bar No. 53485
sgumm@poynerspruill.com
P.O. Box 1801
Raleigh, NC 27602-1801
Telephone: (919) 783-6400
Facsimile: (919) 783-1075

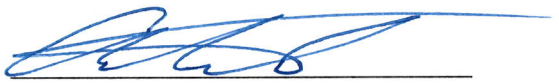
COUNSEL FOR PLAINTIFFS

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing document was served on the following by e-mail in accordance with Rule 5(b)(1):

Scott A. Conklin
sconklin@ncdoj.gov
Mark D. Bernstein
mbernstein@ncdoj.gov
N.C. Department of Justice
P.O. Box 629
Raleigh NC 27602-0629
Counsel for Defendant
State of North Carolina

This the 1st day of May, 2021.



Andrew H. Erteschik