

No. 10-218

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**In the Supreme Court of the United States**

PPL MONTANA, LLC,

*PETITIONER,*

v.

STATE OF MONTANA,

*RESPONDENT.*

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*On Petition for a Writ of Certiorari to the  
Supreme Court of the State of Montana*

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**BRIEF FOR THE MONTANA FARM BUREAU  
FEDERATION AND THE CATO INSTITUTE  
AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## QUESTIONS PRESENTED

1. Does the constitutional test for determining whether a section of a river is navigable for title purposes require a trial court to determine, based on evidence, whether the relevant stretch of the river was navigable at the time the State joined the Union as directed by *United States v. Utah*, 283 U.S. 64 (1931), or may the court simply deem the river as a whole generally navigable based on evidence of present-day recreational use, with the question “very liberally construed” in the State’s favor?

2. When a hydropower project is licensed under the Federal Power Act, a process that includes an economic analysis of the project and solicits state input, and the hydropower producer has obtained easements from private parties and paid substantial rents to the federal government on the understanding that the riverbeds under the hydropower facilities are owned by those private parties or the federal government, is a State’s attempt retroactively to claim title and impose tens of millions of back and future rent obligations for use of the riverbeds preempted?

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**INTEREST OF AMICUS CURIAE<sup>1</sup>**

The Montana Farm Bureau Foundation (Farm Bureau) represents the interests of over 16,000 member families operating farms, ranches, and other agricultural concerns in every county across the State of Montana. Agriculture and related industries have been a critical part of Montana's economy since its founding. Since 1919, the Farm Bureau has provided its members with a forum representing their interests at every level of government. The Farm Bureau unites the individual voices of its members in speaking out on government policy regarding property rights, water quality, water rights, taxes, government regulations, use of public lands, and the environment.

The Farm Bureau believes that it can best fulfill its mission through its support of the free enterprise system and policies that protect individual freedom and opportunity. In support of those goals, and its desire to contribute positively to the community-at-large, the Farm Bureau promotes, protects, and represents all business, economic, social, and educational interests of members and their communities.

The Farm Bureau's interests are particularly intertwined with the property rights, land use, and

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<sup>1</sup> In accordance with Rule 37.6, *amici* state that no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amici* and its counsel has made a monetary contribution to the preparation or submission of this brief. In accordance with Rule 37.2(a), *amici* state that 10-day notice was given and all parties consented to the filing of this brief.

water issues germane to this case. The ruling below will have a profound impact on the farming and ranching operations undertaken by the Farm Bureau's members. The Farm Bureau thus brings a unique and important perspective to the issues presented by Petitioner.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies works to restore the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences and forums, publishes the annual *Cato Supreme Court Review*, and files amicus briefs.

*Amici* seek to ensure that the Montana Supreme Court's attempt to alter long-held property rights is reviewed, and as appropriate, reversed.

### SUMMARY OF ARGUMENT

This dispute over the navigability of certain Montana rivers threatens to redefine property rights held—without controversy—by Montanans for over a century. The Montana Supreme Court’s decision below effectively converts title in hundreds of miles of riverbeds to the State, having profound effect not only on the Petitioner, but on all who own land neighboring the affected rivers and who depend on their existing water rights for their livelihood. *Amici* thus respectfully urge the Court to grant Petitioner’s writ—and overturn the Montana Supreme Court’s ruling—for the following three reasons:

1. The Montana Supreme Court’s ruling contravenes this Court’s settled law defining when a river is navigable. To claim title to land under the “equal footing” doctrine, a State must necessarily challenge rights of the existing owners. This Court had previously crafted a rigorous test for use in this context, balancing existing property rights against state claims. But in its enthusiasm to uphold the State’s claim, the Montana Supreme Court failed to follow this Court’s evenhanded standard, introducing and applying a different and formless standard designed to render navigability a *fait accompli*. This Court must grant Petitioner’s writ to correct the Montana Supreme Court’s error, and reestablish its own, proper, standard.

2. When the majority of the Montana Supreme Court granted the state of Montana original title to the riverbeds by using its new and different “navigability” standard, it triggered a judicial taking. Had the Montana Supreme Court followed this Court’s settled precedents, there would have been no

taking and no violation of the Petitioner's property rights and right of due process. This is further reason why this Court should grant *certiorari* and reaffirm both its established standard for determining navigability and the broader point that a state, whether by judicial fiat or otherwise, cannot redefine settled property rights without violating the Fifth Amendment.

3. The Montana Supreme Court's actions below raise grave federalism concerns and, in particular, erode existing checks and balances between federal and state interests. By purporting to use federal law to take property rights from private parties and the federal government, the Montana Supreme Court is in the tenuous position of turning federal law against its maker. Without this Court's intervention, state courts across the country will be free to employ similar *pro forma* navigability analyses to support similar property grabs. This would delegitimize federal law, converting it into a sword used by the States against existing property owners, including the United States Government, without regard for the settled rights now being upended. This Court need not—and should not—allow the States to take such liberties.

### ARGUMENT

Dissenting from the majority's opinion below, Justice Rice found that the majority ignored this Court's established approach to assessing navigability for title purposes. (Pet. App. 98.) The majority's fundamental departure from this Court's teachings led directly to its "categorical pronouncements" that the entirety of the Missouri, Clark Fork, and Madison rivers were navigable at

the time of Montana's statehood. (Pet. App. 98.) Its broad holding eradicates settled property rights Montanans have enjoyed for over a century. In contrast to the majority's approach, this Court's particularized approach is the appropriate method for determining navigability because significant property rights are at stake. (See Pet. App. 98.) As *amici* will demonstrate below, law and policy confirm that the Montana Supreme Court's application of this Court's precedent was in error, and should be reversed with directions to follow this Court's established standard.

**I. The Decision Below Contravenes This Court's Carefully-Drawn Analytical Framework For Assessing Navigability**

In *United States v. Utah*, 283 U.S. 64 (1933), this Court set forth the proper method for determining the navigability of rivers. As Justice Rice noted below, this Court did not endorse the approach, taken by the majority below, that entire rivers were navigable simply because certain reaches of the river were navigable. (Pet. App. 96.) Instead, this Court adopted an approach meticulously analyzing the evidence of navigability of the river at issue section-by-section. *Utah*, 283 U.S. at 77 ("Even where the navigability of a river, speaking generally, is a matter of common knowledge, and hence one of which judicial notice may be taken, it may yet be a question, to be determined upon evidence, how far navigability extends."). Navigable sections of the river should be considered navigable for title purposes and, conversely, nonnavigable sections should be considered nonnavigable.

In *Utah*, the State of Utah challenged a special master’s conclusion that a four-mile stretch of the Colorado River was non-navigable. The Court upheld the State’s challenge, explaining that while it was not concerned with the non-navigability of a “short interruption” or “negligible part” of a stream, it would separately consider “long reaches with particular characteristics of navigability or nonnavigability.” *Id.* at 77. On that basis, this Court concluded that the disputed four-mile stretch had particular characteristics of navigability, and overruled the special master. *See id.* at 90.

In finding that the entirety of the Madison, Clark Fork, and Missouri rivers was navigable, the Montana Supreme Court ignored clear evidence that various stretches of each river were non-navigable, on the legal basis that the sections in question were “relatively short.” (Pet. App. 60-61.) While this was not true even in fact, since Petitioner put at issue three stretches of river each over 100 miles long, (see Pet. App. 101, 104, 109-10, 114)<sup>2</sup>, it is clear that when the Montana Supreme Court issued its decision granting Montana title to thousands of acres of riverbeds, it ignored not only this Court’s teachings, but the policies—intended to protect rights—underlying those teachings.

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<sup>2</sup> The majority misstates the nature of Petitioner’s claims. Petitioner put long stretches of each river at issue below, including 125 miles of the Missouri River, the entire 133-mile-long Madison River, and over 200 miles of the Clark Fork River. (See Pet. App. 101, 104, 109-10, 114.)

**A. Navigability Determines Ownership of Private Property Rights and Thus a Limited Section-By-Section Inquiry Is Appropriate.**

Under the “equal footing” doctrine, title to submerged lands under Montana rivers was vested in the State if the rivers were “navigable” at the time of Statehood. *See Utah*, 283 U.S. at 77. And because many sections of the Madison, Clark Fork, and Missouri Rivers have been considered nonnavigable since statehood, the State of Montana has not held title to these submerged lands. As a result, for over a century Petitioner and thousands of private parties have held and enjoyed their real property rights in riverbed lands, deriving title from their ownership of the riparian lands abutting the rivers. This Court has long protected such settled property interests. *See Leo Sheep Co. v. U.S.*, 440 U.S. 668, 687-88 (1979) (“This Court has traditionally recognized the special need for certainty and predictability where land titles are concerned, and we are unwilling to upset settled expectations to accommodate some ill-defined power to construct public thoroughfares without compensation.”).

In contrast with the majority’s erroneous analysis below, this Court previously achieved a delicate balance between the property rights of private owners and those of the states by adopting a thorough navigability analysis. While this Court disclaimed its interest in nautical quirks of navigability—essentially an extension of the judicial maxim *de minimis non curiat lex*<sup>3</sup>—it held that

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<sup>3</sup> “The law does not concern itself with trifles.”

stretches of river that are navigable should be considered as such for title purposes, and that nonnavigable stretches of river should be likewise considered. *Utah*, 283 U.S. at 81 (“The question thus comes to the use, and the susceptibility to use, for commerce of the sections of these rivers which the master has found to be navigable.”). This approach ensures minimal disruption to existing rights, while protecting states with legitimate claim to submerged lands under truly navigable waters.

The inherent protections afforded to existing property holders do not end there. To that end, courts have developed a navigability test requiring a State seeking title to submergible lands to demonstrate that a river was “(1) [] used or [] susceptible of being used, (2) as a highway of useful commerce, (3) in its natural and ordinary condition, and (4) by the customary modes of trade and travel at the time of statehood.” *North Dakota v. U.S.*, 972 F.2d 235, 237-38 (8th Cir. 1992). States—not current property holders—have the burden of demonstrating that waters were navigable at the time of their statehood, and not the other way around.

These rules did not develop randomly. Instead, they were designed to protect current property holders from States, like Montana, with incentive to abuse the navigability standard for their own gain. *Brewer-Elliott Oil & Gas Co. v. U.S.*, 260 U.S. 77, 89 (1922) (“Some states have sought to retain title to the beds of streams by recognizing them as navigable when they are not actually so. It seems to be a convenient method of preserving their control.”).

Putting the burden of proof on the states, requiring them to meet a rigorous multi-element test,

and performing the comprehensive navigability analysis set forth in *Utah* ensures that courts do not override settled property rights without exacting analysis and appropriate safeguards. *See Utah*, 283 U.S. at 77 (“In the present instance, the controversy relates only to the ***sections of the rivers*** which are described in the complaint, and the master has limited his findings and conclusions as to navigability accordingly.”) (emphasis added).<sup>4</sup> These safeguards are even more important here because, as Petitioner notes, the majority’s navigability ruling gives the State original title to the submerged lands under them—potentially forestalling any takings claim under the Fifth Amendment if Montana takes title to the land. (Pet. 36.) In other words, Montana wants to avoid its Fifth Amendment obligation to pay compensation for taking the Petitioner’s property by applying this new “navigability” standard to redefine ownership of the riverbeds. Doing so violates this Court’s precedent and merits this Court’s review and reversal.

**B. The Montana Supreme Court’s “Relatively Short” Test Was Judicial Error, Subjecting Private Property Owners to an Unlawful, Arbitrary Standard of Navigability**

Despite the understanding of property owners based upon more than a century of settled law, the Montana Supreme Court turned existing property law upside down by (a) shifting the burden of proof

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<sup>4</sup> *See also Muckleshoot Indian Tribe v. FERC*, 993 F.2d 1428, 1432-33 (9th Cir. 1993); *City of Centralia, Wash. v. FERC*, 851 F.2d 278, 280 (9th Cir. 1988); *Loving v. Alexander*, 745 F.2d 861, 867 (4th Cir. 1984).

from Montana to the Petitioner and, (b) more significantly, redefining navigability using a broad, “blanket” approach instead of the specific, evidence-based approach required by this Court. Nowhere was the majority’s decision more egregious than in its misapplication of this Court’s *Utah* precedent.

This Court has previously held that lower courts should analyze navigability in sections, giving particular concern to “long reaches with particular characteristics of navigability or nonnavigability.” *Utah*, 283 U.S. at 77. Taking a simplified view of that test, the majority below focused only on length, concluding that nonnavigable portions of the river were “relatively short interruptions” that could be safely ignored in finding every portion of every river at issue navigable. (Pet. App. 61.) But this finding was in error because whether a nonnavigable stretch of river is “relatively short”—whatever that means—is contrary to the fact-based analysis the *Utah* standard requires. Lower courts must analyze all the relevant facts to determine whether sections of the river have “particular characteristics of navigability or nonnavigability.” *Utah*, 283 U.S. at 77. The length of each section is simply one “characteristic of navigability” among many that must be considered.

One example of how the majority’s “relatively short” standard skewed its analysis is in its treatment of the 17-mile-long Great Falls Reach. This is an impassable stretch of the Missouri River, mainly due to large waterfalls. (Hence the name, “Great Falls.”) But to the majority this was “merely a short interruption in the use of the Missouri as a channel for useful commerce.” (Pet. App. 60-61.) Without further explanation, the majority characterized this section of the Missouri River as

“relatively short,” ignoring evidence that “there has never been any navigation on the Missouri River in the Great Falls reach because the physical characteristics of the falls prevent it” and overlooking “fifteen different rapids and nine waterfalls” in the area—including the 87-foot descent of the Great Falls themselves. (Pet. App. 198.) The Great Falls Reach is not a “negligible part” of the river. *See Utah*, 283 U.S. at 77. Instead, the 17-mile Great Falls Reach marks a profound transition in the character of the Missouri River. (See Pet. App. 228 (explaining that the Great Falls Reach effectively makes the stretch of river above it “a different river” than the stretch of river below it).) These are precisely the “particular characteristics” of nonnavigability that should be determinative—or at least considered—under *Utah*. 283 U.S. at 77. The standard used by the majority below—and the resulting holding—is thus capricious. It never explains why a 17-mile stretch of river including an almost 100-foot waterfall could not be a “long reach[] with particular characteristics of . . . nonnavigability”—even though the majority concedes that the section in question is, in fact, nonnavigable. *Id.*

In *Utah*, this Court deemphasized length as a critical factor, finding that a mere four-mile stretch had the requisite characteristics of navigability and thus overruled the special master’s opposite conclusion. *Utah*, 283 U.S. at 80. It is thus clear that navigability cannot be reduced to a mere question of length, as the majority below attempted to do here, but requires a total review of all the relevant “characteristics” of navigability. *See id.* at 77. Indeed, it is this thorough review of all the facts that further limits the possibility of arbitrary

decision-making and the abusive confiscation of long-existing rights.

Even the State of Montana itself has taken a less extreme position than the Montana Supreme Court did. When, in 1986, Montana's Department of State Lands published a list of 37 rivers it claimed were navigable, it claimed only the middle portion of the Madison River from the "confluence of its west fork to Varney, Montana." (Pet. App. 104-05.) That study was hopelessly flawed, but even then, it was only the majority's adoption of an extreme navigability standard that granted the State of Montana title to more of the Madison River than even the State itself once claimed to own.

The majority's approach is wholly unworkable as a standard for adjudicating navigability. Its reductionist approach begs the obvious question: if a stretch of river is too "relatively short" to be, in and of itself, declared nonnavigable, when does it become long enough? Courts—and litigants—can only guess. The touchstone of the *Utah* standard is not length—this Court's adjudication of a mere four-mile stretch of river demonstrates that alone. And Montana's adoption of its own shapeless standard is, quite plainly, an invitation to abuse.

Further, the majority below did not even consistently apply its own misguided standard. For example, the majority ruled that the entire Madison River was navigable based, in large part, on a "log float on its middle portion," (Pet. App. 26, 56), but did not analyze the length of the outer portions of the Madison River at all—even under its "relatively

short” test.<sup>5</sup> It simply concluded that the entire river was navigable based on (disputed) evidence that the middle portion was navigable. Are the portions of the Madison River on either side of the middle portion “relatively short” under the Montana Supreme Court’s standard, and thus unable to obtain nonnavigable status in their own right? One has no idea from the majority opinion. The same is true of the “merely short interruptions” on the Clark Fork and Madison Rivers where Petitioner operates its dams. (Pet. App. 60-61.) These are not factual findings; they are bald conclusions. Indeed, one reason why the majority below may have been hesitant to reveal the secret formula behind its “relatively short” navigability standard is that it appears to expand and contract based on the result it seeks to achieve.

The Montana Supreme Court’s formulaic decision—even if it refuses to divulge that formula—defeats this Court’s clear direction that navigability is to be determined by analysis based upon all relevant facts. In *Utah*, this Court considered “a comprehensive statement of the facts adduced with

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<sup>5</sup> One reason for the majority’s inexactitude below—and the resulting adoption of its all-encompassing navigability standard—is likely the paucity of evidence that actually supported the State’s position. One expert for Petitioner below reviewed the State’s evidence of navigability and stated that “[h]ad the State been a student of mine at the University of Montana, presenting its brief as a paper . . . it would have received a failing grade for not following the most fundamental tenets of historical analysis.” (See Pet. App. 203-04.) That same expert explained why the historical record demonstrates, for example, the Madison River’s nonnavigability, even if the majority below—willfully or not—chose to ignore that evidence. (See Pet. App. 292-95.)

respect to the topography of the rivers, their history, impediments to navigation, and the use, and susceptibility to use, of the rivers as highways of commerce.” 283 U.S. at 73-74. In doing so, it divided the rivers at issue into navigable and nonnavigable sections, based on its review of all the features at issue—not just relative length. *See id.* at 77; *see also United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). Nothing in *Utah*—or anywhere else in this Court’s jurisprudence—supports the majority’s “relatively short” navigability standard. The property interests at stake demand that navigability be determined using this Court’s fact-based and particularized analysis required in *Utah*. The majority below failed to do so and this Court should grant certiorari to correct this error.

**C. The Majority Improperly Shifted the Burden of Proof Away From the State of Montana and to the Petitioner.**

Not only did the majority below use the wrong standard to analyze navigability, it shifted the burden of proof away from the State of Montana and on to the Petitioner. For example, the Court rejected Petitioner’s expert report concluding that the Madison River was nonnavigable because it “fail[ed] to demonstrate” that the Madison was not “susceptible for use as a channel of commerce.” (Pet. App. 58.) But as demonstrated above, the Court offered no analysis of the navigability of the outer sections of the Madison River. That, in turn, is because the State offered no evidence of those sections’ navigability, except for a single log float on the Madison River’s “middle” section. (Pet. App. 101-

108.) The majority did not even analyze the length of the bookending stretches of the river under its “relatively short” standard. (Pet. App. 101-108.)

When a state wishes to change title to property by claiming it is “navigable,” the state bears the burden of establishing its claim. In this case the majority erred when it shifted the burden of proof away from the State, instead requiring the property owner to prove its ownership to retain title.

## **II. The Majority’s Arbitrary Decision Violated Property Rights And Is Nothing More Than A Thinly-Disguised Judicial Taking.**

When the majority refused to follow this Court’s settled standard for determining navigability and redefined ownership of property by using a new test for navigability it engaged in a judicial taking.

This Court has long held property rights are defined by “existing rules or understandings that stem from an independent source such as state law.” *Preseault v. I.C.C.*, 494 U.S. 1, 20-22 (1990) (O’Connor, J., concurring) (citing *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984), quoting *Webb’s Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980); see also *Maritrans, Inc. v. U.S.*, 342 F.3d 1344, 1352 (Fed. Cir. 2003) (property rights derive from “existing rules and understandings”). Consistent with existing property rules, the State of Montana recognized and upheld the real property interests of riparian landowners in the riverbeds of the Clark Fork, Missouri, and Madison rivers for over a century before challenging those rights through this lawsuit instead. See, e.g., Mont. Code Ann. § 70-

16-201 (enacted in 1895, and providing that “[e]xcept where the grant under which the land is held indicates a different intent, the owner of the land, when it borders upon a navigable lake or stream, takes to the edge of the lake or stream at low-water mark; when it borders upon any other water, the owner takes to the middle of the lake or stream”). Montana even upheld those property rights after it promulgated its list of 37 purportedly-navigable rivers in 1986.

The majority, however, converted those existing property rights over to the State by applying a new, flawed test to define navigability. The fact that Montana’s judicial branch redefined existing property rights does not render this any less a taking of property in violation of the Fifth Amendment. See *Webb’s*, 449 U.S. at 164 (holding that a State “by *ipse dixit* may not transform private property into public property without compensation . . .”); *Monongahela Nav. Co. v. U.S.*, 148 U.S. 312, 326 (1893) (holding that “no private property shall be appropriated to public uses unless a full and exact equivalent for it be returned to the owner”). In short, the majority’s arbitrary subversion of existing property rights is a judicial taking. See *Kaiser Aetna v. U.S.*, 444 U.S. 164, 178 (1979) (holding that when Government makes a “naked assertion” to a public right, that “assertion collides with not merely an ‘economic advantage’ but an ‘economic advantage’ that has the law back of it to such an extent that courts may ‘compel others to forbear from interfering with [it] or to compensate for [its] invasion’”) (quoting *United States v. Willow River Co.*, 324 U.S. 499, 502 (1945)).

In the recent case of *Stop the Beach Renourishment v. Florida Dept. of Environmental*

*Protection*, 560 U.S. ---, 130 S. Ct. 2592, 2601 (2010), a plurality of this Court held that there is no “textual justification” for limiting takings claims deriving from executive or legislative action. Justice Scalia concluded that “it would be absurd to allow a State to do by judicial decree what the Takings Clause forbids it to do by legislative fiat,” thus recognizing the doctrine of judicial takings. *Id.* And though refusing to reach the question of whether to recognize judicial takings, Justice Kennedy suggested that “[t]he Court would be on strong footing in ruling that a judicial decision that eliminates or substantively changes established property rights, which are a legitimate expectation of the owner, is ‘arbitrary or irrational’ under the Due Process Clause.” *Id.* at 2615. The result, in Justice Kennedy’s view, is the same—state judges cannot do by decree what state legislators cannot do by fiat. *See id.*

The majority’s holding below—adjudicating the rights of thousands of riparian owners based on a new navigability standard inconsistent with this Court’s *Utah* decision and other settled law—does just that. Montana’s legislature could not have taken property in this fashion—neither should its courts be able to do so.

This Court’s intervention is the only hope for the thousands who will lose their property rights as a result of the majority’s decision. In ruling that the entire Missouri, Clark Fork, and Madison rivers were navigable at statehood, the majority set in motion a trap that will ultimately ensnare thousands of citizens now relying on their existing rights and interests, inevitably including members of the Farm Bureau.

The ruling below, for example, is now legal precedent which the State of Montana can use to acquire title to what are currently understood to be privately-owned submerged lands and riverbeds. The state merely needs to apply this new navigability standard and rivers understood to be nonnavigable under this Court's *Utah* standard will now, by *ipse dixit*, become "navigable" and state-owned. This is so, even though a federal court has already found certain stretches of the rivers in question nonnavigable, at a time far more contemporaneous to Montana's statehood than now. *See Steele v. Donlan*, In Equity No. 950 (D. Mont. July 14, 1910). Upsetting these established property rights and expectations is clear error.

Likewise, the effects of the majority's errors are not limited to the three rivers on which it purportedly passed judgment. The State's 1986 river study funded by its Department of State Lands and cited above, on which the majority in large part relied, purported to find that an additional 34 Montana rivers were navigable-for-title at the time of statehood.<sup>6</sup> Emboldened by the legal precedent set

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<sup>6</sup> As Petitioner's certiorari petition points out, the State's novel navigability standard converts federally-owned riverbed lands as well, in a state where the Bureau of Land Management manages approximately eight million acres of federal lands. (Pet. 36.) Among the federal lands already converted by the ruling below are those parts of the Madison River flowing through Yellowstone National Park. (Pet. 5.) For its part, the United States has taken the position that only "portions" of the Missouri, Yellowstone, and Big Horn rivers are navigable for purposes of determining title under the "equal footing" doctrine—a limited position generally consistent with this Court's *Utah* standard. (U.S. Dep't of Interior, Letter to Montana Dep't of State Lands (dated Aug. 26, 1988).) It was

below, there is nothing to stop the State of Montana from using federal law to further its own ends, unless this Court intervenes. The *pro forma* standard adopted below is not only arbitrary and unfair—its application in the future means that the State of Montana will win every time. The navigability analysis, if anything, should be more than a judicial rubber-stamp for the states’ unreasonable ambitions, much less ill-considered attempts to increase state coffers.

Moreover, when altering the existing principles by which property rights are defined, procedural due process requires notice to the affected property holders. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965) (explaining that a fundamental requirement of due process is ‘the opportunity to be heard’ . . . at a meaningful time and in a meaningful manner”) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); *see also Great N. Ry. Sunburst Oil & Ref. Co.*, 287 U.S. 358, 364-66 (1932); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 (1930). No such notice has ever been given to the affected property holders on any of the rivers in question here, much less any of the three dozen rivers to which the State of Montana now belatedly claims ownership.

And the majority concedes that the result of its ruling will be to transfer long-held property rights to the State of Montana. In words apparently meant to

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over this evidence—and a “mountain” of additional evidence put forth by Petitioner—that the majority granted summary judgment to the State of Montana despite the intensely factual question that navigability at the time of statehood naturally poses. (*See* Pet. App. 100-101.)

soothe—but having the opposite effect—the majority highlighted the Farm Bureau’s concern by conceding that its ruling will convert existing real property rights, belonging to farmers and ranchers, in riverbeds that accompany riparian land ownership, over to Montana. These long-established rights will now be subject to Legislative control after more than a century of uninterrupted ownership by those who own land neighboring the rivers. (Pet. App. 90.) The best that can be hoped for is that the Montana legislature continues to allow farmers and ranchers to use the property and divert water—subject to a “fair market” (i.e., prohibitive) rate—while the worst-case scenario is that farmers and ranchers are barred from using water when it is leased to other parties—recreational users and wealthy landowners—able to afford “fair market” rates. That such disruptive effects can take place merely on the unverifiable assurances that non-navigable stretches of the rivers at issue are “relatively short” is nothing less than a judicial taking and a fundamental denial of due process.

### **III. This Court Must Intervene To Defend Federal Prerogatives Against State Encroachments**

This case poses a novel, but no less crucial, twist on the federalism concerns this Court usually confronts. States take title to submerged riverbeds not unconditionally, but pursuant to the federal definition of navigability. *Brewer-Elliott*, 260 U.S. at 87-88 (navigability is a question of federal law because “the validity and effect of an act done by the United States is necessarily a federal question”). It

is this Court's definition of navigability that controls, and which the states must follow.

The question of navigability often pits the federal government against the individual States, as it did in *Utah*. By dividing the interests of the United States from those of state governments, property rights are further protected, consistent with federalism. THE FEDERALIST NO. 51 (James Madison) (explaining that federalism creates “a double security [] to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself.”). The majority's evisceration of *Utah* in favor of its own arbitrary standard, however, threatens that balance. Every state is now free to develop its own “relatively short” non-standard by which to justify the expropriation of long swaths of riverbed—indeed, entire rivers—long held by custom and practice by others. Should other states follow the majority below and adopt this new standard of “navigability” that is inconsistent with this Court's specific, fact-based *Utah* standard, property rights across the country are under threat of being redefined by judicial fiat.

While this Court's navigability precedents are many decades old, they were established at a time when large-scale navigability disputes would be most likely—the years after statehood. Now, more than a century later, Montana has—suspiciously to say the least—revived the navigability doctrine to claim hundreds of miles of riverbed land it has never claimed before. But even if the disputed rivers were navigable at the time of Montana's statehood (and, contrary to the majority's opinion below, the evidence demonstrates they were not), this Court's Takings and Due Process doctrines suggest that it was

improper for the Court below to adopt a revised standard unsettling a century of settled property expectations across the State of Montana. *See Leo Sheep*, 440 U.S. at 686-87 (“It is some testament to common sense that the present case is virtually unprecedented, and that in the 117 years since the grants were made, litigation over access questions generally has been rare.”).

The majority below was entirely unconcerned by the devastation it wrought when it redefined navigability using a “very liberally construed” standard inconsistent both with *Utah*, and with 120 years of Montana property owners’ settled rights. (Pet. App. 54.) Even if the States could “very liberally” put their thumbs on the scales of justice in their own favor, as Montana did, to do so in the face of over a century of established property rights undermines those settled interests and is inconsistent with this Court’s precedent. *See Leo Sheep*, 440 U.S. at 681-82 (“[B]oth as matter of common-law doctrine and as a matter of construing congressional intent, we are unwilling to imply rights-of-way, with the substantial impact that such implication would have on property rights granted over 100 years ago, in the absence of a stronger case for their implication than the Government makes here.”). And the threat to settled property rights posed by the precedent set by the Montana Supreme Court multiplies across the nation should other states emulate the majority below.

The emergence of the states as a threat to redefine property rights in this manner is a clear and present danger to rights protected by the Fifth Amendment. Should this Court fail to intervene and restore the *Utah* navigability standard as the settled,

defining rule of law, the State of Montana—and other states—will be able to appropriate title to any submerged lands and riverbeds they desire, free of the Fifth Amendment obligation to pay “just compensation.”

### CONCLUSION

This Court should grant Petitioner’s request for *certiorari*, and ultimately reverse and remand the decision of the Montana Supreme Court, restoring the *Utah* standard established by this Court as the governing rule of law defining the “navigability” of rivers for purposes of establishing ownership of the underlying submerged lands.

Respectfully submitted,

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