No. 18-457

In The
Supreme Court of the United States

NORTH CAROLINA DEPARTMENT OF REVENUE,

Petitioner,

v.

THE KIMBERLEY RICE KAESTNER
1992 FAMILY TRUST,

Respondent.

**On Writ of Certiorari to the
Supreme Court of North Carolina**

**BRIEF OF *AMICUS CURIAE* LAW PROFESSORS
IN SUPPORT OF PETITIONER**

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STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

Amici are law professors who have studied the history, purpose, and taxation of trusts. *Amici* teach courses on the laws governing trusts and estates, taxation, and property, and have published extensive scholarship on the law of trusts. *Amici* submit this brief to show that a beneficiary is and always has been the central constituent of a trust. As a result, a beneficiary's residency in a taxing state necessarily creates a significant relationship between the taxing state and the trust income that is the object of the tax. *Amici* urge the Court to weigh these points in reaching its decision in this case—a decision likely to have long-term consequences for the law on trusts.

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1 In accordance with Supreme Court Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have filed letters granting blanket consent to the filing of *amicus* briefs.

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SUMMARY OF ARGUMENT

The question presented in this appeal is whether the Due Process Clause prohibits a state from taxing the income of a trust based on a trust beneficiary's in-state residency. The Supreme Court of North Carolina concluded that the Due Process Clause imposes this prohibition. That conclusion, however, clashes with the history, purpose, and established legal treatment of trusts.

A beneficiary's in-state residency is a uniquely relevant factor in establishing taxing jurisdiction. A trust's three basic constituents—settlor, trustee, and beneficiary—may make contact with different states. Among those constituents, however, only a trust's beneficiary is entitled to trust income. It follows that contacts with a state made by a trust's beneficiary bear the closest relationship to the object of income taxation: income from the trust corpus.

This brief begins with a discussion of the history that led to the modern-day trust, focusing on the beneficiary's essential role in the trust relationship. It then examines four key attributes of modern-day trusts that confirm a beneficiary's central and unique role in a trust. The brief applies the history and key attributes to the decision below, concluding that a beneficiary's contacts with a state must be a cardinal consideration in establishing taxing jurisdiction.

ARGUMENT

I. The history of trusts shows that the trust was developed to preserve property for a beneficiary.

The Supreme Court of North Carolina concluded that the residency of a trust beneficiary is insufficient to determine whether a taxing state's contacts with the trust satisfy the Due Process Clause. This conclusion, however, overlooks the purpose of a trust. A trust is created to benefit a trust beneficiary.

A look at the history of the law on trusts shows that the arrangement has always existed for this purpose. *Amici* urge the Court to consider this history in assessing the role of a beneficiary's residency in the Court's due-process analysis.

A. The predecessor to the modern trust—called a "use"—facilitated property transfers in the face of feudal restrictions.

Trust law traces its roots to the Middle Ages, when feudal lords controlled English lands. John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 Yale L.J. 625, 632 (1995). In exchange for vows of allegiance and military service to protect the land, the lords granted partial rights of use and exploitation to tenants. Francesco Parisi, *Entropy in Property*, 50 Am. J. Comp. L. 595, 599 (2002).

Tenants, however, could not pass these rights from one generation to the next. Langbein, *supra*, at 632–33. This is because the feudal lords restricted who could own the land. *Id.* at 632; Parisi, *supra*, at 599. These restrictions meant that tenants could not devise their land rights by will. Kent D. Schenkel, *Trust Law and the Title-Split: A Beneficial Perspective*, 78 UMKC L. Rev. 182, 185 (2009) [hereinafter Schenkel, *Trust Law and the Title-Split*]; *see also* Langbein, *supra*, at 632–33.

These limitations carried on even after the feudal system dissolved. Land ownership transferred only by descent and, until the enactment of the Statute of Wills in 1540, 32 Hen. 8 c. 1, could not be devised by will to others. *See* Langbein, *supra*, at 632–33; David T. Smith, *The Statute of Uses: A Look at Its Historical Evolution and Demise*, 18 Case W. Res. L. Rev. 40, 60 (1966); *cf.* W. D. Rollinson, *Principles of the Law of Succession to Intestate Property*, 11 Notre Dame L. Rev. 14, 15 (1935) (discussing the transmission of land by "descent" and by "devise"). Resentful of these laws, property owners looked for a way to facilitate the transfer of their land to their wives and children. Schenkel, *Trust Law and the Title-Split*, *supra*, at 189; *see also* Langbein, *supra*, at 632–33.

These dynamics gave rise to what was known as a "use." Langbein, *supra*, at 632–33. In a use, a landowner transferred the land's legal title to a person known as a "feoffee," who held the title for the use of the landowner and his family.[2] Schenkel, *Trust Law and the Title-Split*, *supra*, at 186. The feoffee held the land's legal title, but the living landowner and his family retained the land's economic and personal benefits. *Id.* A use therefore defeated the feudal-era restrictions of property ownership: when the landowner died, his family retained the land's benefits, effectuating the functionality of a will. *Id.* In this way, uses were created to benefit the landowner's family.

B. The trust developed from the "use" and had the same core function of preserving property for a beneficiary.

The evolution and purpose of the use set the stage for the creation of the modern trust—the relationship at the heart of this case.

Because English common law did not recognize the use, disputes about uses were heard in English courts of equity. Howard L. Oleck, *Historical Nature of Equity Jurisprudence*, 20 Fordham L. Rev. 23, 37 (1951). Disputes arose based on the separation between legal title (which belonged to the feoffee) and the benefits of that title (which belonged to the landowner and his family). *See* Langbein, *supra*, at 634; Schenkel, *Trust Law and the Title-Split*, *supra*, at 186–87.

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2 A "feoffee to uses" is "[a] person to whom land is conveyed for the use of a third party." *Feoffee to uses*, *Black's Law Dictionary* (10th ed. 2014).

In resolving these disputes, courts of equity bypassed common-law precedent and provided redress, such as specific performance, for injuries in circumstances where the common-law courts were not authorized to act. Schenkel, *Trust Law and the Title-Split*, *supra*, at 187; Oleck, *supra*, at 37–38; *see also* Langbein, *supra*, at 634. In particular, the courts of equity required the feoffee to follow the landowner's instructions to benefit his family after his death. Schenkel, *Trust Law and the Title-Split*, *supra*, at 187. English law reasoned that "after the trust creator died, the property belonged to the living beneficiaries of the dead creator's largesse once they came of age." Kent D. Schenkel, *Exposing the Hocus Pocus of Trusts*, 45 Akron L. Rev. 63, 71 n.31 (2012) (quoting Ronald Chester, *From Here to Eternity? Property and the Dead Hand* 47 (2007)).

On this theory—and through the exercise of their powers—courts of equity strengthened the beneficiary's interest by treating the "use" as an incorporeal thing that could be divided. Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 Stan. L. Rev. 1189, 1197 (1985). Thus, the beneficiary did not hold an estate in land but instead held an estate in "use." *Id.*

The law on trusts originated from this theory and these equitable powers. Although modern-day trusts include complex portfolios with various assets, the principles that control the trust relationship find their roots in the history described above. Those principles empower a trustee to transact with the trust property, *see* Langbein, *supra*, at 637–42, but they do not change the essential character of a trust: an abstract device designed to hold, manage, preserve, and distribute wealth, all for the benefit of the beneficiary.

II. Key attributes of modern trusts confirm that a beneficiary is the central figure in the trust relationship.

Having evolved from English courts of equity, modern trusts possess several key features that bear on the due-process analysis in this case: (1) the law does not recognize a trust relationship in the absence of a beneficiary; (2) a beneficiary holds a property interest in the trust corpus; (3) a trustee's conduct must advance the beneficiary's interest; and (4) a trust is not a legal entity.

These features confirm that the trust beneficiary is a focal point of the trust relationship, enjoying unique rights and interests in the trust's corpus. Only the trust beneficiary is entitled to income derived from the trust corpus. For that reason, the contacts that a trust's beneficiary makes with a taxing state must be leading considerations in determining whether the state's taxation of trust income comports with the Due Process Clause.

A. A trust cannot exist without a beneficiary.

As discussed above, the use was created to aid a landowner's family; without the use, the family would lose the benefit of the land after the landowner's passing. *See* Langbein, *supra*, at 633. Put another way, the landowner had no independent reason to convey legal title to a feoffee other than to ensure that his family would receive the land's benefits after his passing. *See id.* And the "use" served no benefit to the feoffee, who was fundamentally a caretaker of the legal title. Schenkel, *Trust Law and the Title-Split*, *supra*, at 186 (describing the feoffee's role as merely to "follow the landowner's instructions with respect to [the land's] use and disposition").

The same is true today. Trusts owe their entire existence to their beneficiaries, and the law does not even recognize a trust relationship unless the trust's terms provide a beneficiary. Unif. Trust Code § 402 (Unif. Law Comm'n 2000) (amended 2010) ("A trust is created only if . . . the trust has a definite beneficiary . . . ."); Restatement (Third) of Trusts § 44 (Am. Law Inst. 2003); 90 C.J.S. *Trusts* § 4 (2010) ("The existence of a beneficiary is an indispensable element of an express trust, and in the absence of a beneficiary, the effort to create such trust aborts.").

The absence of a trustee, in contrast, does not jeopardize the law's recognition of a trust. Restatement (Third) of Trusts § 31; Alan R. Bromberg & E. B. Fortson, *Selection of a Trustee; Tax and Other Considerations*, 19 Sw. L.J. 523, 524 (1965) ("It is hornbook law that a trust will not be permitted to fail for want of a trustee; the courts will supply one if the grantor does not."); *see also* Unif. Trust Code § 704 (providing procedure for filling a vacancy in trusteeship). Nor does the absence of a settlor endanger the law's recognition of a trust relationship. *See* 76 Am. Jur. 2d *Trusts* § 3 (2016); Henry Hansmann & Ugo Mattei, *Trust Law in the United States. A Basic Study of Its Special Contribution*, 46 Am. J. Comp. L. Supp. 133, 134 (1998).

In sum, the existence of a trust is entirely "incidental to and derivative of the purpose of benefiting the trust beneficiary." Schenkel, *Trust Law and the Title-Split*, *supra*, at 183. A trust without a beneficiary is therefore a legal nullity.

B. Only the trust beneficiary holds a beneficial property interest in the trust corpus.

Because a trust is established to hold property for a beneficiary, it follows that a beneficiary has a cognizable property interest in the trust corpus.[3] *See Blair v. Comm'r*, 300 U.S. 5, 14 (1937) (recognizing that the beneficiary of an inter vivos trust has a vested interest in the trust—an "estate in and to property" of the trust); *see also Pennsylvania v. Stewart*, 12 A.2d 444, 446–47 (Pa. 1940) (noting that "the beneficiary also has rights in rem, an actual property interest in the subject-matter of the trust"), *aff'd*, 312 U.S. 649 (1941); 3 Helene S. Shapo et al., *The Law of Trusts and Trustees*

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[3] *Amici* acknowledge that some trust-law scholars believe that a beneficiary's interest is promissory, not proprietary. *See, e.g.*, Langbein, *supra*, at 644 (discussing this debate among trust-law academics). That view, however, is defeated by the equitable origins of the trust described above. *See id.* at 644–47.

§ 183, at 512 (3d ed. 2012) (noting that the beneficiary's interest in modern-day trusts has "become increasingly a right in rem and is now substantially equivalent to equitable ownership of the trust res").

The beneficiary's property interest is equitable in nature. *Stone v. White*, 301 U.S. 532, 537 (1937); *see* 76 Am. Jur. 2d *Trusts* § 1; 17 Alan Newman et al., *The Law of Trusts and Trustees* § 962, at 19 (3d ed. 2010). It is also more than a mere right; it is a form of title. *See Blair*, 300 U.S. at 13–14 (describing a beneficiary's interest as a "right, title, and estate in and to property"); 90 C.J.S. *Trusts* § 265; Schenkel, *Trust Law and the Title-Split*, *supra*, at 181 n.2.

Beneficiaries can exercise equitable title in important ways. For example, beneficiaries may enforce the trust, sue to enjoin a trust breach, and obtain damages from a breach. *Blair*, 300 U.S. at 13. A beneficiary's trust interest—in the absence of a spendthrift clause or other express restraint—is also freely alienable; beneficiaries can freely "transfer a part of [their] interest as well as the whole."[4] *Id.* In addition, absent a spendthrift clause, beneficiaries can use their trust interest as security for credit, either (1) by expressly pledging their interest in the trust corpus to creditors

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[4] A spendthrift clause contains language that protects the beneficiary's income and principal interests from the claims of the beneficiary's creditors. Restatement (Third) of Trusts § 58 cmt. d(2). Aimed at protecting beneficiaries who spend in excess of income, a spendthrift clause bars the beneficiary from pledging undistributed trust assets as security for a loan or other debts during the term of the trust.

or (2) by leveraging the interest as a security for credit by relying on their overall wealth, inclusive of their interest in the trust property, to induce creditors to extend unsecured credit. Hansmann & Mattei, *supra*, at 138.

A trustee does not have these rights. This is so even though the trustee holds the legal title of the trust corpus. The trustee's legal title does not permit the trustee to benefit from the trust corpus. A trustee therefore cannot use trust assets to satisfy obligations to the trustee's creditors. 76 Am. Jur. 2d *Trusts* § 256 (explaining that "a trustee's interest in trust property is not subject to liability for his or her private, as distinguished from his or her official, debts and obligations"); 90 C.J.S. *Trusts* § 260 ("A fundamental tenet of trust law is the protection of the trust estate from a trustee's personal creditors."). A settlor also does not have these rights. Unless expressly allowed by statute in the jurisdiction, a settlor's creditors—like a trustee's creditors—cannot reach trust property (as long as the settlor is not also a beneficiary). Hansmann & Mattei, *supra*, at 139.

Only the beneficiary holds equitable title to the trust corpus—title that affords the beneficiary benefits unavailable to the settlor and the trustee. This fact further reinforces the unique relationship between a trust and its beneficiary.

C. A trustee's obligation is to advance the beneficiary's interests.

A beneficiary's central role in a trust relationship is also highlighted by the nature of the trustee's obligations.

As discussed above, English courts of equity fashioned remedies that recognized a beneficiary's cognizable interest in trust property. Schenkel, *Trust Law and the Title-Split*, *supra*, at 186–87. The feoffee's duty was to hold and manage legal title to that property consistent with the settlor's instructions. *See id.* To protect the beneficiary's interest, courts of equity stepped in if a feoffee breached that duty. *Id.* at 187.

A trustee's power to manage a modern trust's assets is no different: it is bound by a fiduciary duty to the trust beneficiaries. Langbein, *supra*, at 640–42. In other words, the laws that once restricted a feoffee's conduct evolved into the modern "law of fiduciary administration." *Id.* at 640. A trustee's core duty is to display "complete loyalty to the interests of the beneficiary" and to exclude "all selfish interest and all consideration of the interests of third persons." 11 George Gleason Bogert & George Taylor Bogert, *The Law of Trusts and Trustees* § 543, at 217 (2d rev. ed. 1993); *see also* Unif. Trust Code § 802 ("A trustee shall administer the trust solely in the interests of the beneficiaries."). This Court itself has described a trustee as "a fiduciary owing undivided loyalty to the interest of the beneficiaries in administering the trust," *NLRB v. Amax Coal Co.*, 453 U.S. 322, 327–28 (1981), and has emphasized that the rule of undivided loyalty "must be enforced with 'uncompromising rigidity,'" *id.* at 330 (quoting *Meinhard v. Salmon*, 164 N.E. 545, 546 (N.Y. 1928)).[5]

The duty of loyalty is not the only duty that a trustee owes to a beneficiary. A trustee also owes each beneficiary a duty to exercise "reasonable care, skill, and caution" in administering the trust "as a prudent person would, in light of the purposes, terms and other circumstances of the trust." Restatement (Third) of Trusts § 77(1)–(2). The beneficiary can sue to enforce the trustee's obligation to perform those duties. *See* Hansmann & Mattei, *supra*, at 134.

A trustee can even be removed from the trust relationship under certain circumstances, including by a beneficiary. *See* Restatement (Third) of Trusts § 37 cmt. b (noting that the terms of the trust may authorize a beneficiary to remove the trustee). A court has discretion to remove a trustee for proper cause. *Id.* cmt. d ("A court may remove a trustee whose continuation

[5] These duties are the same even where the terms of a trust provide the trustee with "absolute" or "sole" discretion over the trust. Because trusts are solely for the benefit of beneficiaries, terms describing a trustee's discretion are not interpreted literally under the law of trusts. Unif. Trust Code § 814(a) (noting that the breadth of discretion granted to the trustee in the terms of the trust do not alter a trustee's duty to act for the interests of the beneficiaries); Restatement (Third) of Trusts § 50 cmt. c (explaining that "words such as 'absolute' or 'unlimited' or 'sole and uncontrolled' are not interpreted literally"); *see also* Unif. Trust Code § 105(b)(3) (noting that the terms of a trust cannot evade "the requirement that a trust and its terms be for the benefit of its beneficiaries").

in that role would be detrimental to the interests of the beneficiaries."). A beneficiary, on the other hand, cannot be removed because to do so would defeat the purpose of the trust. *See supra* pp. 7–8.

The takeaway from these points is this: a trustee holds legal title to trust property, but does so subject to the possibility of being removed and exclusively "to facilitate the *beneficiaries'* enjoyment." Langbein, *supra*, at 655 (emphasis added).

D. A trust is not a separate legal entity, but a relationship created for a beneficiary.

The principles laid out above—that a trust fails for want of a beneficiary, that the beneficiary has a cognizable interest in the trust corpus, and that the trustee's obligations run to the beneficiary—provide the framework for a final and significant tenet of trust law: a trust is not an entity at all, but a relationship to safeguard property for a beneficiary. *Americold Realty Tr. v. ConAgra Foods, Inc.*, 136 S. Ct. 1012, 1016 (2016) ("Traditionally, a trust was not considered a distinct legal entity . . . ."); *Anderson v. Wilson*, 289 U.S. 20, 27 (1933) ("[T]he trust is an abstraction . . . the law has seen fit to deal with this abstraction for income tax purposes as a separate existence . . . ."); 76 Am. Jur. 2d *Trusts* § 2 ("A trust is not a legal entity."); *see also* Unif. Trust Code § 202 (providing for jurisdiction only over the trustee and beneficiary).

The abstract nature of a trust has notable consequences. For example, a trust cannot be sued.

Americold Realty Tr., 136 S. Ct. at 1016; 76 Am. Jur. 2d *Trusts* § 2. Instead, a lawsuit involving a trust is filed against the trustee in a representative capacity. *See Americold Realty Tr.*, 136 S. Ct. at 1016; Restatement (Third) of Trusts § 105.

Similarly, a trust cannot own property. *See* 76 Am. Jur. 2d *Trusts* § 2. Although a trust holds property, it does not own the property. *See* Restatement (Third) of Trusts § 40. The trustee holds legal title to the property in a fiduciary capacity. *See* Robert T. Danforth, *Rethinking the Law of Creditors' Rights in Trusts*, 53 Hastings L.J. 287, 290 (2002) ("[A]lthough the trustee is strictly speaking the 'owner' of the trust assets, the trustee owns those assets not for the trustee's own benefit, but for the benefit of the beneficiaries, for whom the trustee is a fiduciary."); Samuel Williston, *The Right to Follow Trust Property When Confused with Other Property*, 2 Harv. L. Rev. 28, 28 (1888) (noting that term "trustee" indicates "any one holding money or property in a fiduciary capacity"). The beneficiary, on the other hand, holds equitable title in the property. *Supra* pp. 10–11.

A trust also cannot enter into contracts. 76 Am. Jur. 2d *Trusts* § 2. Unlike a corporation, a trust cannot bind itself because it is not a legal entity. *See id.* Instead, the trustee, acting in a representative capacity, can enter into contracts in the course of administering the trust. *See* Restatement (Third) of Trusts § 105 cmt. c.

In sum, the law does not treat a trust as a legal entity, and a trust does not have any powers that legal entities traditionally have. A trust is something different: an arrangement among constituents that is marked by a fiduciary relationship between the trustee and the trust beneficiaries. *Americold Realty Tr.*, 136 S. Ct. at 1016; 76 Am. Jur. 2d *Trusts* § 2.

III. The contacts that a trust's beneficiary makes with a state cannot be disregarded in determining jurisdiction to tax income on a trust corpus.

In view of the historical purpose and legal treatment of trusts, a beneficiary enjoys unique rights to income on a trust's corpus. Because of those unique rights, a beneficiary's contacts with a state are important, if not dispositive, for purposes of determining jurisdiction to tax income on a trust's corpus. The Supreme Court of North Carolina erred in concluding otherwise.

This section first examines the parts of the holding below that overlook the significance of a beneficiary's contacts in the taxing-jurisdiction analysis. It then discusses the potential contacts with one or more states that the constituents of a trust may have. Finally, it explains why a beneficiary's contacts—more so than the other constituents of the trust—are of the nature and quality that matter for taxing jurisdiction.

A. The holding below misapplies this Court's instruction in *Quill* and overlooks important characteristics of trusts.

The holding below depends on this Court's instruction that due process requires "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax." *Quill Corp. v. North Dakota*, 504 U.S. 298, 306 (1992) (quoting *Miller Bros. v. Maryland*, 347 U.S. 340, 344–45 (1954)).

The Supreme Court of North Carolina misapplied this instruction. It held that the beneficiaries' contacts with North Carolina, which stem from residency in North Carolina, were insufficient under the analysis. *Kimberley Rice Kaestner 1992 Family Tr. v. N.C. Dep't of Revenue*, 814 S.E.2d 43, 51 (N.C. 2018). In its reasoning, however, the court below never examined the nature or quality of those contacts—an examination that *Quill* demands. *Quill*, 504 U.S. at 312 ("[A]t the most general level, the due process nexus analysis requires that we ask whether an individual's connections with a State are substantial enough to legitimate the State's exercise of power over him.").

Instead, the decision below opined that trusts and their beneficiaries "have legally separate, taxable existences." *Kaestner*, 814 S.E.2d at 51. The court then reasoned that the trust's "link[s]" or "minimum connection[s]" to the state for taxing jurisdiction were also separate from those of the beneficiaries. *Id.* at 49 (quoting *Quill*, 504 at 306). The majority relied on this

Court's holding in *Walden v. Fiore*, 571 U.S. 277 (2014), which concluded that "unilateral activity of another party or a third person is not an appropriate consideration when determining whether a defendant has sufficient contacts with a forum State." *Kaestner*, 814 S.E.2d at 49 (quoting *Walden*, 571 U.S. at 284).

This reasoning reveals a misunderstanding of the nature of trusts, sidestepping at least three important features of the trust relationship.

First, a beneficiary is no "third person" or stranger to a trust. *Id.* (quoting *Walden*, 571 U.S. at 284). A beneficiary is a uniquely important constituent of the trust relationship—*a legal requisite* to the trust's existence. *See* Restatement (Third) of Trusts § 44 ("A trust is not created . . . unless the terms of the trust provide a beneficiary . . . .").

Second, given the fiduciary obligations owed to a beneficiary, a trust's relationship with its beneficiary is hardly a product of the beneficiary's "unilateral activity." *Walden*, 571 U.S. at 286, 291.

Third, although a particular trust may have a separate "taxable existence" for some purposes, many do not, and trusts are not distinct legal entities. *See supra* pp. 7–9, 14. The court's focus on the trust's "separate existence" is precisely the sort of overly formalistic analysis that this Court has rejected. *Quill*, 504 U.S. at 307 ("[W]e have abandoned more formalistic tests that focused on a defendant's 'presence' within a State in favor of a more flexible inquiry into whether a defendant's contacts with the forum made it reasonable . . . .");

see also South Dakota v. Wayfair, Inc., 138 S. Ct. 2080, 2093 (2018) (reaffirming "[t]he reasons given in *Quill* for rejecting the physical presence rule for due process purposes"). It also reflects a misunderstanding of the title-split function of trusts, which ultimately are mere relationships among people. *See* Schenkel, *Trust Law and the Title-Split*, *supra*, at 181 n.2; *supra* pp. 7–9, 14–16.

Had the court below examined the nature and quality of the beneficiaries' contacts with North Carolina for jurisdictional purposes, it could not have disregarded those contacts.

B. The constituents of a trust may make "contact" with states.

A trust is not a legal entity. *See supra* pp. 8–11, 14. A trust therefore makes contact with a state through constituents of the trust relationship.

Each of these constituents—settlor, trustee, and beneficiary—may have contact with one or more states. *See* Jeffrey Schoenblum, *Strange Bedfellows: The Federal Constitution, Out-of-State Nongrantor Accumulation Trusts, and the Complete Avoidance of State Income Taxation*, 67 Vand. L. Rev. 1945, 1954 (2014).

In addition, the constituents of the trust relationship have contact with the state under whose law the trust was organized. *See* Unif. Trust Code § 107 cmt. (noting that the Uniform Trust Code "allows a settlor to select the law that will govern the meaning and effect of the terms of the trust," even if the jurisdiction selected has no other connection to the trust).

In these ways, the constituents of a trust may have contacts with more than one state. Schoenblum, *supra*, at 1957. For instance, those constituents may have contacts with the state where the settlor resides, a second state where the trust is administered, and a third state where the beneficiary resides. *See id.* at 1954.

One constituent's contacts, however, touch a state in a particularly significant respect for purposes of establishing taxing jurisdiction.

C. The contacts made by the trust's beneficiary are the most significant for the purpose of establishing taxing jurisdiction.

Quill clarifies that the "link" or "connection" with a state that matters for establishing taxing jurisdiction is a link or connection with "the person, property or transaction [the state] seeks to tax." 504 U.S. at 306; *see also Wayfair*, 138 S. Ct. at 2093 (stating the due-process requirement that there be "some definite link, some minimum connection, between a state and the person, property or transaction it seeks to tax" (quoting *Miller Bros.*, 347 U.S. at 344–45)).

In taxing a trust, a state seeks to tax no "person," but rather "property"—specifically, income on a corpus. Of the potential contacts that the constituents of a trust may make with a state, contacts made by the beneficiary are the most closely tied to income from the corpus—the object of the tax. This close tie to the object of the tax distinguishes the nature and quality of the beneficiary's contacts.

Unlike the other constituents of the trust relationship, only a beneficiary holds a beneficial property interest in the trust corpus. *See Blair*, 300 U.S. at 14. Indeed, "[t]rusts exist because of what they can do for the trust beneficiaries." Schenkel, *Trust Law and the Title-Split*, *supra*, at 183.

In fact, this Court's decision in *Stone v. White* specifically recognized a beneficiary's interests in trust income. *See Stone*, 301 U.S. at 534. *Stone* resolved a dispute among trustees, a beneficiary, and a taxing authority over the appropriate tax on trust income. *See id.* In resolving that dispute, this Court observed that, although the trustee and beneficiary were "distinct tax-paying entities, . . . it was the *beneficiary's* money which paid the tax and it is *her* money" that the trustees sought to have returned. *Id.* at 535 (emphasis added). Stated differently, when a tax is imposed on trust income, "only the equitable owner of the fund [that is, the beneficiary] is ultimately burdened." *Id.* at 538.

Contacts made by a trust's non-beneficiary settlor or trustee, by contrast, have a more attenuated relationship to the object of taxation.

A non-beneficiary settlor leaves the picture once trust assets have been transferred and retains no right or interest in the corpus. *See* Adam Hofri-Winogradow, *The Demand for Fiduciary Services: Evidence from the Market in Private Donative Trusts*, 68 Hastings L.J. 931, 941 (2017) (explaining that once the trust property is held by the trustee, the settlor "steps out of the picture" and "no longer has any powers over either the trustee or the trust property"); *see also* Hansmann & Mattei, *supra*, at 144; *supra* pp. 8–9.

A trustee holds legal title, but serves as a fiduciary to administer the trust to advance the beneficiary's interest. *See* 76 Am. Jur. 2d *Trusts* §§ 334, 352; Bogert & Bogert, *supra*, § 543, at 217–18; *supra* pp. 9–13. As a fiduciary, a trustee cannot claim any equitable property interest in the corpus. *See Navarro Sav. Ass'n v. Lee*, 446 U.S. 458, 463 (1980) (noting that beneficiaries—as opposed to the trustee—have an equitable interest in the trust); Schenkel, *Trust Law and the Title-Split*, *supra*, at 181 n.2 (stating that the beneficiary holds the equitable title to the property while the trustee holds only legal title). Nor can the trustee receive any of the income generated by the trust. *See* Schenkel, *Trust Law and the Title-Split*, *supra*, at 181 n.2.

A trustee's connection to a state, moreover, is merely fortuitous. A particular trustee is impermanent, subject to being removed and replaced by a court or a beneficiary. *See supra* pp. 8, 13–14. Thus, the trustee's contacts to a particular state are impermanent as well, subject to being changed along with the particular trustee. *See supra* pp. 13–14. A beneficiary's connection to the trust, on the other hand, is permanent because the beneficiary cannot be removed from the trust relationship. *See supra* pp. 7–9, 13.

Although the contacts made by a settlor or trustee may be significant for some purposes, they are not the most significant for the purpose that matters here: the object of a state's tax. A trustee's contacts may be significant, for example, in determining who may sue on behalf of the trust. *See* Fed. R. Civ. P. 17(a)(1)(E) (identifying trustee as real party in interest); *Navarro*, 446 U.S. at 462 (holding that "trustees are real parties in interest for procedural purposes"). This rule makes sense in light of the trustee's duty to act as a fiduciary and to transact with assets. *See supra* pp. 12–13. Those contacts, however, bear a comparatively distant relationship to the object of taxation.

Nor does the law of the state where the trust was originally formed have any meaningful relationship to the object of taxation. No individual in the state where a trust is formed enjoys the benefits of the income generated by the trust—unless the beneficiary also lives in that state.

A beneficiary has the closest tie to income on a trust corpus, the object of a state's tax. For that reason, a beneficiary's contacts with a state—most often, that beneficiary's state of residence—are the most meaningful contacts under *Quill*'s due-process analysis. These contacts may be dispositive on the question of taxing jurisdiction. In any case, they cannot be disregarded.

CONCLUSION

For the foregoing reasons, the decision of the Supreme Court of North Carolina should be reversed.

Respectfully submitted,

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