No. 20-1408

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

MICHAEL ZITO; CATHERINE ZITO,

Plaintiffs – Appellants,

v.

NORTH CAROLINA COASTAL RESOURCES COMMISSION,

Defendant – Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Honorable James C. Dever III, District Judge

APPELLANTS' OPENING BRIEF

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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No. 20-1408 Caption: Zito v. North Carolina Coastal Resources Commission

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Michael Zito and Catherine Zito
(name of party/amicus)

who is Appellants, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: s/ J. David Breemer Date: 6/2/2020

Counsel for: Appellants Michael Zito, et al.

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JURISDICTIONAL STATEMENT

This case involves federal constitutional issues. The district court had jurisdiction under 28 U.S.C. § 1331. The court issued a final judgment disposing of all claims on March 27, 2020. Joint Appendix (JA) at 102. The case was timely appealed on April 8, 2020. JA at 103. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF ISSUES

1. Whether enactment of the Fourteenth Amendment, and its incorporation of a Just Compensation Clause remedy for takings, abrogated North Carolina's immunity from a federal suit seeking compensation for a taking of property?

2. Alternatively, whether North Carolina's procedure for takings claims against the North Carolina Coastal Commission fails to provide just compensation, thereby permitting the claim in federal court under *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 552 (4th Cir. 2014)?

INTRODUCTION

This case arises from Appellee North Carolina Coastal Resources Commission's (Commission) refusal to grant Michael and Catherine Zito

(Zitos) a permit to rebuild a small beachfront home after a fire destroyed it. JA at 008-009, ¶¶ 2-3. Because the permit denial stripped the Zitos' residential lot of all use and value, they filed suit, alleging that the Commission unconstitutionally took their property without just compensation, in violation of the United States Constitution.

The district court held that sovereign immunity principles emanating from the Eleventh Amendment requires dismissal of the suit. JA at 083-101. This was a mistake. While the Eleventh Amendment generally bars damages claims against the states, the Just Compensation Clause of the Fifth Amendment, incorporated against the states through the Fourteenth Amendment, is an exception to sovereign immunity. This is because the Just Compensation Clause requires and supplies a "self-executing" damages remedy in federal court for a taking. When the Fourteenth Amendment bound the states to the Just Compensation Clause remedy, it created an exception to immunity for takings suits. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 316 n.9 (1987); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999).

Even if circuit precedent precludes the court from reaching the foregoing conclusion, sovereign immunity does not bar the Zitos' claim because North Carolina does not provide an open and adequate procedure for recovering compensation for a taking by the Commission. *Hutto*, 773 F.3d at 552. The "exclusive" procedure for litigating takings claims against the Commission—N.C. Gen. Stat. § 113A-123—does not allow for monetary compensation when a taking is found. That statutory restriction is incompatible with Fifth Amendment precedent holding that damages must be paid whenever a court finds a taking, for the full period of a taking, regardless of state consent. The absence of a state procedure guaranteeing prompt and full compensation for Commission takings precludes sovereign immunity.

STATEMENT OF THE CASE

The Loss of the Zitos' Home

Since 2008, the Zitos have owned a beachfront lot, located at 10224 East Seagull Drive in South Nags Head, Dare County, North Carolina. The lot was platted in 1977 and developed in 1982 with an approximately 1,700-square-foot home. JA at 011, ¶¶ 11-13.

The parcel is part of an established and dense coastal subdivision. *Id.* ¶¶ 14-15. There are more than a dozen homes on either side (to the northwest and south) of the Zitos' lot, as well as many homes lying landward (to the southwest) of the property. *Id.* These neighboring homes are not set farther back from the ocean than the Zitos' former or proposed home. *Id.* ¶ 16.

The Zitos purchased the developed property in 2008 for approximately $438,500. *Id.* ¶¶ 12-13. Between 2008 and 2016, the Zitos used their home for family vacations and as a rental property. *Id.* ¶ 17. Sadly, on October 10, 2016, the Zitos' home caught fire and burned to the ground. *Id.* ¶ 18. Only the septic system remained intact and unharmed. *Id.*

The Zitos soon sought to rebuild the home. JA at 011 ¶ 19, 013 ¶ 27. To do so, they had to comply with the North Carolina Coastal Area Management Act (CAMA) and rules establishing minimum setback areas from the first line of vegetation. N.C. Gen. Stat. § 113A-100, *et seq.*; JA at 012 ¶ 20.

The CAMA Permitting Framework

Under CAMA rules, coastal property within a designated Area of Environmental Concern (AEC) is subject to a building set-back line. The line is calculated based on estimated annual erosion rates and the location of the first line of stable, natural vegetation. 15A NCAC 07H.0304; JA at 012 ¶ 22. Buildings of less than 5,000 square feet must be set back from the first stable line of vegetation at a distance of at least 30 times the annual erosion rate. 15A NCAC 07H.0306; JA at 012 ¶ 23. However, lots created prior to June 1, 1979, are subject to a reduced set-back line in instances when the standard set-back line would prohibit placement of a structure. 15A NCAC 07H.0309; JA at 012 ¶ 24. For these grandfathered lots, development of less than 2,000 square feet must only be set back 60 feet from the line of vegetation. *Id.*

Anyone wanting to build in a coastal AEC must apply for a CAMA permit. JA at 012 ¶ 25. Local coastal governments, like the Town of Nags Head, make the initial CAMA permit decision. If the locality denies a permit, the applicant may seek a variance from the CAMA denial by filing a petition with the Commission. *Id.*

The Zitos' Application

On or about July 31, 2017, the Zitos submitted an initial CAMA Minor Permit Application to the Town of Nags Head's CAMA Local Permit Officer (LPO). JA at 013 ¶ 26. The application sought permission to build a home on the existing 32' x 28' footprint, with a resulting maximum total floor area of 1,792 square feet. *Id.* ¶ 27. The Zitos also proposed building a driveway of clay, packed sand, or gravel to minimize potential flooding concerns. *Id.* The Town LPO deemed the Zitos' CAMA application complete after Dare County inspected and approved the existing septic system for use with the proposed rebuilt home. *Id.* ¶ 28.

The entire subdivision, including the Zitos' lot, is in a coastal AEC, where the official erosion rate is said to average six feet per year. *Id.* ¶ 29. Under CAMA regulations, this zone requires a set-back line of 180 feet (6' x 30') inland from the line of vegetation for new development. *Id.* The line of vegetation in the area containing the Zitos' lot is established by a static line of vegetation created when the Town carried out a 2011 beach renourishment project in the area. *Id.*; 15A NCAC 07H.0305(a)(6) and 07H.0306(a)(11).

All of the Zitos' proposed development is located landward of the static vegetation line, on private land that is not, and never has been, subject to public use. However, like other surrounding developed lots, the Zitos' parcel is not set back 180 feet from the static vegetation line. JA at 013 ¶ 30. Therefore, if strictly applied, the CAMA set-back rule would completely prohibit development on the Zitos' property. *Id.* Although the Zitos' lot is a pre-1979 lot, it also does not meet the lesser 60-foot (grandfather) set-back line. *Id.* ¶ 31.

On April 26, 2018, the Town denied the Zitos' CAMA Minor Permit Application because it did not meet the applicable CAMA set-back rules. JA at 014 ¶ 32. After the Town issued the denial, the Zitos filed a petition for a variance with the Commission to construct the 1,792-square-foot residence as proposed in their CAMA application. *Id.* ¶ 34. The Zitos argued in part that a variance was warranted because denial would render their property undevelopable. *Id.*

After stipulating to facts related to the nature of the property and development, the Commission considered the Zitos' variance petition at a public hearing on November 27, 2018, and issued a "Final Agency Decision" denying the variance on December 27, 2018. *Id.* ¶¶ 35-36; ECF

No. 1-5, JA at 032-045. In the decision, the Commission determined that the Zitos had not established the hardship necessary to warrant a variance from the CAMA set-back rules. JA at 014 ¶ 37. In so doing, the Commission suggested that the Zitos could use their lot for campsites or uses traditionally accessory to a residence, like a stand-alone deck or pool. JA at 015 ¶ 40. Without the variance, the Zitos cannot develop their property for a home or any other economically viable, developmental use. *Id.* ¶ 39, severely damaging its value. Meanwhile, homes surrounding the Zitos' now unusable lot continue to exist, inconsistent with the same set-back rules that prevent the Zitos from rebuilding. *Id.* ¶ 41.

Federal Procedure

On March 6, 2019, the Zitos filed this lawsuit, alleging the taking of private property without just compensation in violation of the U.S. Constitution, the North Carolina Constitution, and North Carolina law. JA at 008-020. The complaint contains two counts. First, it alleges that the Commission's variance denial causes an "inverse condemnation" taking of their property, without just compensation, in violation of the North Carolina Constitution and North Carolina Law. JA at 016 ¶¶ 49-52. The Zitos have voluntarily dismissed this state law claim.

The second, and now sole, count in the complaint asserts that the Commission's decision caused a taking without compensation under the Fifth Amendment to the United States Constitution. *Id.* at 018-019 ¶¶ 63-78. The claim seeks a declaratory judgment that the Commission's action is an unconstitutional taking and $700,000 in damages. *Id.* at 020.

The Commission filed a Motion to Dismiss on May 9, 2019, arguing that the Zitos' federal takings claim was unripe. On June 26, 2019, the Court denied that motion. On August 20, 2019, the Commission filed a second motion to dismiss. This motion argued that sovereign immunity prevented the district court from exercising jurisdiction over the Zitos' suit. On March 27, 2020, the court granted the motion and dismissed the Zitos' claim. JA at 083-101.

SUMMARY OF ARGUMENT

The Commission contends, and the district court held, that sovereign immunity protections flowing from the Eleventh Amendment deprive the federal courts of jurisdiction over the Zitos' claim for monetary compensation for a taking of their residential lot. That argument is mistaken.

The Eleventh Amendment generally forbids private suits seeking damages from a state entity in federal court. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). This rule is not absolute, however. Pertinent here, immunity is not a barrier "where there has been a surrender of [ ] immunity in the plan of the [constitutional] convention." *Hutto v. S.C. Retirement Sys.*, 773 F.3d 536, 551 (4th Cir. 2014) (quotation marks and citation omitted). The Just Compensation Clause operates as such a planned "surrender." The Clause provides an automatic damages remedy whenever the government takes private property for public use, *Jacobs v. United States*, 290 U.S. 13, 16 (1933), and ratification of the Fourteenth Amendment bound states to this requirement. The states' standard immunity from damages claims is subservient to the states' Fourteenth Amendment duty to pay when taking property for the benefit of the public.

The Commission will doubtless contend that this Court cannot address the foregoing principles because the Commission believes that *Hutto* has already rejected federal jurisdiction over takings suits against states. But that argument imbues *Hutto* with far too much force. *Hutto* held only that sovereign immunity bars a takings claim against a state

entity in federal court if state courts are available to hear the claim,773 F.3d at 552. Moreover, the Supreme Court's recent decision in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), has undercut *Hutto* by holding that state court takings remedies are irrelevant to federal court jurisdiction over compensation-seeking takings claims. *Id.* at 2170-71. Since *Hutto*'s "state court remedies" rationale for applying sovereign immunity in federal court is no longer valid, this Court must resolve this case by reference to background constitutional principles. If the Just Compensation Clause gives a person the right to damages for a taking (it does), and this right is actionable in federal court (it is), and states are bound by these principles through the Fourteenth Amendment (they are), then sovereign immunity is inapplicable to claims under the Just Compensation Clause.

Even if *Hutto*'s rationale remains in force, sovereign immunity does not apply in this case because North Carolina courts are not open to a suit, like the Zitos', that seeks compensation for a taking by the Commission. The exclusive procedure for challenging a Commission action as a taking, found in N.C. Gen. Stat. § 113A-123, merely permits invalidation of the offending action. Compensation is possible only if the

State, at its discretion, decides to institute a separate eminent domain action after a taking is found under N.C. Gen. Stat. § 113A-123(b) & (c). This is a constitutionally inadequate process. Moreover, contrary to the district court's view, a person in the Zitos' position cannot secure compensation by filing a second takings suit under the North Carolina Constitution after first litigating under N.C. Gen. Stat. § 113A-123(b) & (c). Even if possible, such a two-suit process is an inadequate procedure for vindicating the self-executing right to compensation for a taking. The bottom line is that the available state procedures for seeking compensation from the Commission do not satisfy *Hutto*'s "open state courts" requirement for applying sovereign immunity.

ARGUMENT

I.

THE FEDERALLY ACTIONABLE AND SELF-EXECUTING JUST COMPENSATION REMEDY OVERRIDES THE COMMISSION'S IMMUNITY FROM DAMAGES SUITS

A. Since States Are Bound by the Just Compensation Clause Remedy, They Cannot Invoke Immunity in Takings Cases

This Court reviews the district court's dismissal for lack of jurisdiction de novo, *Davani v. Virginia Dep't of Transp.*, 434 F.3d 712, 715 (4th Cir. 2006). The Commission has the general burden to prove that

sovereign immunity principles bar jurisdiction, *Hutto*, 773 F.3d at 543, but it cannot do so.

The Eleventh Amendment states: "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." There is no doubt that immunity concepts operate as a robust barrier to private suits that seek to compel a state to pay damages. *Edelman*, 415 U.S. at 666-67; *Ford Motor Co. v. Dep't of Treasury of Ind.*, 323 U.S. 459, 464 (1945); *Hess v. Port Auth. Trans–Hudson Corp.*, 513 U.S. 30, 48 (1994); *Cory v. White*, 457 U.S. 85, 90 (1982). But it is equally true that the Just Compensation Clause is a unique provision in that it provides its own damages remedy when government violates the Fifth Amendment's proscription against uncompensated takings. *See Knick*, 139 S. Ct. at 2171. Indeed, unlike other constitutional plaintiffs, those claiming a Just Compensation Clause violation can often *only* seek monetary compensation, as equitable relief is generally unavailable. *Id.* at 2176-77.

While the damages remedy for a taking is relatively narrow, it is mandatory. *First English*, 482 U.S. at 315-16. Indeed, the Just

Compensation Clause is a "self-executing" damages remedy for those who have suffered an unconstitutional taking. *Id.* at 315 (quotation omitted). "Claims for just compensation are grounded in the Constitution itself," *id.*, so no legislative action is needed before one may seek compensation for a taking. *Jacobs*, 290 U.S. at 16 (claims "based on the right to recover just compensation for property taken" do not require "[s]tatutory recognition"). In short, the Just Compensation Clause gives property owners a right to seek and recover damages whenever government takes property without compensation, *Knick*, 139 S. Ct. at 2171-72, and this right adheres in federal court, just as in state court. *Id.* at 2170-72.

Of course, the Just Compensation Clause did not bind the States initially; it applied only to the federal government. But this changed with ratification of the Fourteenth Amendment. That Amendment "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution" and "'fundamentally altered the balance of state and federal power.'" *Alden v. Maine*, 527 U.S. 706, 756 (1999) (quoting *Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 59 (1996)). The Fourteenth Amendment's provisions "were intended to be, what they really are, limitations of the power of the States," *Ex parte*

Virginia, 100 U.S. (10 Otto) 339, 345 (1879). "[A] State cannot disregard the limitations which the Federal Constitution has applied to her power. Her rights do not reach to that extent." *Id.* at 346.

Central to Fourteenth Amendment's dilution of state power is its command that states refrain from "depriv[ing] any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1. The Due Process Clause incorporated the dictates of the Just Compensation Clause, including its mandatory damages remedy for a taking, *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239-41 (1897). Thus, ratification of Fourteenth Amendment subjected states to the Just Compensation Clause's requirement of payment for takings. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002) (the Just Compensation Clause "applies to the States as well as the Federal Government.").

The subjection of states to the just compensation requirement through the Due Process Clause necessarily constrains their right to claim immunity when a property owner seeks just compensation for a taking. After all, under Section 5 of the Amendment, Congress may enforce constitutional provisions against states by legislating a damages

remedy for a constitutional violation notwithstanding sovereign immunity. *Fitzpatrick v. Bitzer*, 427 U.S. 445, 448-49, 456 (1976). If legislation providing damages for a violation of the Fourteenth Amendment waives immunity, *id.*, then certainly a just compensation provision in that Amendment that already provides a self-executing damages remedy to enforce a constitutional right has the same effect. *See, e.g.*, *Cent. Va. Cmty. College v. Katz*, 546 U.S. 356, 373-78 (2006) (holding that the Bankruptcy Clause provides a constitutionally grounded exception to sovereign immunity); *see also Allen v. Cooper*, 140 S. Ct. 994, 1003 (2020) (noting that in *Katz*, "the Court found that the Bankruptcy Clause itself did the abrogating" because "the States had already 'agreed in the plan of the Convention not to assert any sovereign immunity defense' in bankruptcy proceedings") (quoting *Katz*, 546 U.S. at 377).

Bringing it all together, when the states were subjected to the Fourteenth Amendment and the "self-executing" Just Compensation remedy it incorporated, property owners harmed by a state taking acquired a right to file a claim for compensation, notwithstanding immunity. *First English*, 482 U.S. at 316 n.9; *see also Esposito v. S.C.*

Coastal Council, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting); Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. Chi. L. Rev. 429, 485 (2002) (noting that *First English* "suggested that state sovereign immunity must yield in suits asserting takings claims"); Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 573-74 (2003) ("[T]he Fifth Amendment's Just Compensation Clause also appears to furnish an exception to the prohibition on damages relief."); Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 519 (2006) ("[T]he straight textual argument seems to require the government to provide money damages [for a taking], notwithstanding otherwise applicable sovereign immunity bars.").

B. The Supreme Court's *Knick* Decision Undercuts *Hutto*'s Rationale and Requires This Court To Revisit the Issue of Whether the Just Compensation Clause Overrides the Eleventh Amendment

As the foregoing shows, the following principles should control the issue: (1) the Just Compensation Clause provides a damages remedy for every taking, *First English*, 482 U.S. at 316; (2) that remedy is self-enforcing, allowing a property owner to immediately sue in federal court for money damages when a taking occurs, *id.* at 315; *Knick*, 139 S. Ct. at 2171-72; *Kirby Forest Indus., Inc. v. United States*, 467 U.S. 1, 5 n.6 (1984); (3) the Fourteenth Amendment bound the states by this just compensation regime, *Dolan v. City of Tigard*, 512 U.S. 374, 383-84, 391 n.8 (1994); therefore (4) claims seeking compensation for a state taking are not subject to the Eleventh Amendment. *Esposito*, 939 F.2d at 173 n.3 (Hall, J., dissenting) ("Inasmuch as the Supreme Court has now held that the Just Compensation Clause always requires compensation for any taking, . . . the Eleventh Amendment's general bar of damages against states must yield.") (citation omitted).

Nevertheless, the Commission will argue that this Court cannot adopt the foregoing logic because (in its view) *Hutto* has already resolved the issue in favor of applying immunity to takings claims. It invests too

much in the *Hutto* decision. *Hutto* did not directly reject the view that ratification of the Fourteenth Amendment—and imposition of the just compensation remedy on states—allows private claims for compensation against state takings. *Hutto* more narrowly concluded that "the Eleventh Amendment bars Fifth Amendment takings claims against States in federal court when the State's courts remain open to adjudicate such claims." 773 F.3d at 552. Whether or not this was correct when decided, the *Knick* decision obviates *Hutto*'s carefully cabined rationale.[1] *See* JA at 099.

To understand *Knick*'s effect on *Hutto*, it must be recalled that, at the time of *Hutto*, it was clear only that the Just Compensation Clause was self-executing and actionable in *state* courts. *Seven Up Pete Venture*

[1] Two circuit courts have concluded that *Knick* does not directly abrogate sovereign immunity in the takings context. *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1212 (10th Cir. 2019); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 457 (5th Cir. 2019). That conclusion is not relevant to the Zitos' arguments, however, because the Zitos are not contending that *Knick* directly and broadly resolves the issue of whether takings claims are subject to sovereign immunity. The Zitos more narrowly assert that *Knick*'s repudiation of state takings remedies and affirmation of the Just Compensation Clause's self-executing nature in federal court undercuts the rationale for *Hutto*. The few other circuit decisions referring to *Knick* do not address this limited and circuit-specific argument.

v. Schweitzer, 523 F.3d 948, 954 (9th Cir. 2008) ("*First English* expounds the self-executing character of the Takings Clause and the resulting obligation by the states to provide a specific remedy for takings *in their own courts* . . . .") (emphasis added); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 533 (6th Cir. 2004) (Baldock, J., concurring) ("[T]he Fifth Amendment is a self-executing remedy in *state courts* . . . .") (emphasis added); Thomas E. Roberts, *Ripeness and Forum Selection in Fifth Amendment Takings Litigation*, 11 J. Land Use & Envtl. L. 37, 56-57 (1995) ("[A]fter *First English*, no *state court* is free to reject a compensation award where a taking is found.") (emphasis added).

The role of the clause in federal court was far murkier. Indeed, at the time of *Hutto*, a takings claim for compensation could not be brought in federal court until state courts considered the claim. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-96 (1985). *Williamson County* held that the right to seek just compensation in federal court was contingent on whether or not a state court ordered compensation. In theory, a litigant who was denied compensation in state court could then pursue his claim in federal court. *Id.* But in practice, this state court exhaustion requirement totally barred

Just Compensation Clause claims in federal courts because the required state court process triggered res judicata over the subsequent federal suit. *Rockstead v. City of Crystal Lake*, 486 F.3d 963 (7th Cir. 2007); *Lumbard v. City of Ann Arbor*, 913 F.3d 585, 590-92 (6th Cir. 2019) (Kethledge, J., concurring).

Either way—as *Williamson County* was intended to operate or as it did in practice—the Just Compensation Clause was not "self-executing" in federal court when *Hutto* was decided. *Knick*, 139 S. Ct. at 2171. Under the pre-*Knick* regime in place when the court decided *Hutto*, "[i]n the absence of a state remedy, the Fifth Amendment right to compensation would attach immediately. But, under *Williamson County*, the presence of a state remedy qualifies the right, preventing it from vesting until exhaustion of the state procedure." *Id.* In short, at the time of *Hutto*, the Just Compensation Clause allowed a property owner to claim damages for a taking in state court, but not in federal court.

In this context, where federal jurisdiction over Just Compensation Clause claims was contingent on state court procedures, it was conceivable for the *Hutto* court to similarly hold that immunity hinders federal takings jurisdiction if states will adjudicate takings claims. *See*

773 F.3d at 552. But that context is now very different, thanks to *Knick*'s conclusion that the availability or nature of state court remedies is irrelevant to federal court jurisdiction over claims under the Just Compensation Clause, 139 S. Ct. at 2168-70; *id.* at 2172 ("The fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right."); *see also id.* at 2170 ("[N]o matter what sort of procedures the government puts in place to remedy a taking, a property owner has a Fifth Amendment entitlement to compensation as soon as the government takes his property without paying for it."). As a result, *Hutto*'s reasoning is no longer viable and does not control the fate of the Zitos' claim.

C. *Reich*'s Due Process Analysis Is Not Pertinent to This Just Compensation Clause Case

In an attempt to retain *Hutto*'s dichotomous federal/state court immunity framework, the Commission is likely to point to *Reich v. Collins*, 513 U.S. 106 (1994), on which *Hutto* relied. This is also unavailing.

1. The *Reich* decision and its role in *Hutto*

In *Reich*, the Supreme Court reviewed a state's attempt to deny a post-deprivation remedy for unconstitutionally collected taxes after it had previously ensured such a remedy was available in state court. Building on prior precedent holding that the Fourteenth Amendment's Due Process Clause requires a refund remedy for unconstitutional taxes, *Reich* confirmed the "State's obligation to provide retrospective relief as part of [a] postdeprivation procedure." *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco*, 496 U.S. 18, 32 (1990); *see Reich*, 513 U.S. at 109. In so doing, the Court held that a state's sovereign immunity does not bar a post-deprivation suit for a monetary refund in state court: "a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment, the sovereign immunity States traditionally enjoy in their own courts notwithstanding." 513 U.S. at 109-10 (citation omitted). The Court then noted, in dicta, "that the sovereign immunity States enjoy in *federal* court, under the Eleventh

Amendment, does generally bar tax refund claims from being brought in that forum." *Id.* at 110 (citing *Ford Motor Co.*, 323 U.S. at 459).

Hutto relied on the foregoing statements in *Reich* to support its conclusion that sovereign immunity bars a Just Compensation Clause claim in federal court as long as state courts provide a post-taking compensation remedy. 773 F.3d at 552. It did so because it found the Due Process Clause at issue in *Reich* analogous to the Just Compensation Clause, in that both appeared to provide a similar, constitutionally based damages remedy. *Id.* But, due to *Knick*, the comparison can no longer be sustained.

2. *Knick* separates takings and due process law and renders *Reich* inapposite

Reich's approval of an asymmetrical Eleventh Amendment scheme for due process tax claims—in which immunity applies in federal court, but not in state court—was possible because the tax refund remedy required by the Due Process Clause *is itself asymmetrical*: it *must* exist in state courts, but is not mandated in federal courts.[2] *Carpenter v. Shaw*,

[2] This dichotomous situation is itself justified by two principles: (1) state tax disputes are considered the province of the state courts, and not issues for federal courts for reasons of state/federal "comity," *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981), and

280 U.S. 363, 369 (1930) ("[A] denial by *a state court* of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment.") (emphasis added); *McKesson Corp.*, 496 U.S. at 31 ("[T]he Due Process Clause of the Fourteenth Amendment obligates *the State* to provide meaningful backward-looking relief to rectify any unconstitutional deprivation.") (emphasis added) (footnote omitted); *Reich*, 513 U.S. at 111 ("Due process . . . allows *the State* to maintain an exclusively postdeprivation regime [to address tax claims].") (emphasis added). Because the Due Process Clause tax refund "obligation arises from the Constitution itself" in state court, *Alden*, 527 U.S. at 740, but not in federal court, abrogation of immunity is necessary only *in state court*. *Reich*, 513 U.S. at 110.

When the court decided *Hutto*, the Constitution also only required a compensation remedy for a taking in *state court*. *Seven Up Pete Venture*, 523 F.3d at 954. The Just Compensation Clause remedy was accordingly

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(2) due process does not require adequate pre-deprivation process in tax disputes (a requirement that could be gauged in federal court); it requires, at a minimum, post-deprivation state remedies. *McKesson Corp.*, 496 U.S. at 37-39.

in the same position as Due Process Clause tax refund remedies, like that in *Reich,* when *Hutto* was decided, paving the way for *Hutto*'s reliance on *Reich*. But, as we have seen, *Knick* changed the way the Just Compensation Clause is interpreted. Unlike the Due Process Clause, it now requires a compensation remedy *in federal court* as soon as a Just Compensation violation occurs. *Knick*, 139 S. Ct at 2170. Therefore, *Reich*'s due process, tax refund immunity analysis is no longer viable in takings cases, *Knick*, 139 S. Ct. at 2164 ("[T]he analogy from the due process context to the takings context is strained . . . ."), which affirms that *Reich* no longer supports *Hutto*.

Since *Knick* undercuts both *Hutto*'s "state court remedies" reasoning and the authority on which it rests, the court must consider and resolve the case based on the self-executing, remedial character of the Just Compensation Clause. The Court should hold that ratification of the Fourteenth Amendment carved out an exception from the earlier-enacted Eleventh Amendment by requiring states to pay compensation for a taking. While this would conflict with a few pre-*Knick* decisions from other circuits, the conclusion that takings claims are exempt from the Eleventh Amendment is the necessary result of the Fourteenth

Amendment's incorporation of the self-executing and remedial Just Compensation Clause.

II.

ALTERNATIVELY, THE ZITOS' CLAIM IS NOT BARRED BY SOVEREIGN IMMUNITY BECAUSE NORTH CAROLINA'S STATE COURT PROCEDURE DOES NOT PROVIDE COMPENSATION FOR A COMMISSION TAKING

Even if *Hutto* remains intact after *Knick*, the Zitos' claim is not subject to sovereign immunity in federal court because the state court procedure controlling takings litigation against the Commission, N.C. Gen. Stat. § 113A-123(b) & (c), is not open to the Zitos' claim for just compensation. 773 F.3d at 551-52.

A. N.C. Gen. Stat. § 113A-123—The "Exclusive" Procedure for Suing the Commission for a Taking—Is Not Open to the Zitos' Compensation Claim

N.C. Gen. Stat. § 113A-123(b) & (c) sets out the "exclusive" state court procedure for litigating a claim that the Commission has caused an unconstitutional regulatory taking by depriving a property owner of the use and value of private property. That procedure authorizes a state court to decide whether the Commission's actions rise to the level of a regulatory taking. If so, the statute further authorizes the state court to

invalidate the offending Commission action with respect to the subject land. N.C. Gen. Stat. § 113A-123(b).

The problem for present purposes is that N.C. Gen. Stat. § 113A-123 does not authorize a state court to order compensation after finding a taking. Instead, the statute makes clear that damages are obtainable after a state court finds a Commission taking only if the State subsequently institutes a separate eminent domain proceeding for the subject land "under the provisions of Chapter 146 of the General Statutes." *Id.* § 113A-123(c). Such a proceeding results in the condemnation of land and requires the provision of just compensation. N.C. Gen. Stat. § 136-103(d).

If an eminent domain proceeding was *guaranteed* to the Zitos after a court found they had suffered a taking at the hands of the Commission, then N.C. Gen. Stat. § 113A-123(b) and (c) might function as an adequate and open procedure for litigating their federal takings claims, satisfying *Hutto*. But the exercise of eminent domain under the statute can only occur if both the Commission and the Governor a*gree to it*. The institution of eminent domain proceedings (and associated award of compensation) after a state court finds a taking under N.C. Gen. Stat. § 113A-123(b)

requires (1) "the request of the Commission," and (2) "[a] finding that sufficient funds are available therefor," and (3) "the consent of the Governor and Council of State." N.C. Gen. Stat. § 113A-123(c).

Thus, the only possible route for property owners to obtain compensation for a regulatory taking by the Commission—the initiation of compensated condemnation proceedings by the State under Chapter 146—is discretionary with the state. This is irreconcilable with federal takings law. Under modern precedent, the Just Compensation Clause of the Fifth Amendment requires damages for every taking. *First English*, 482 U.S. at 315-16. "Where the government's activities have already worked a taking of all use of property, no subsequent action by the government can relieve it of the duty to provide compensation for the period during which the taking was effective." *Id.* at 321. Under this modern understanding, "invalidation" of a taking is not a permissible alternative remedy. *Id.* [3]

[3] The use of "invalidation" as a takings remedy derives from an older, "police power"-related theory of takings liability that considered rescission of a government action to be an adequate constitutional remedy. *See Responsible Citizens in Opposition to Flood Plain Ordinance v. City of Asheville*, 302 S.E.2d 204, 208 (N.C. 1983) (considering whether an ordinance was "invalid" because it caused a taking); *Helms v. City of Charlotte*, 122 S.E.2d 817, 822 (N.C. 1961); *Finch v. City of Durham*,

N.C. Gen. Stat. § 113A-123 is simply not open to a takings claim, like the Zitos', seeking a compensatory remedy against the Commission because it does not guarantee compensation when a court finds a taking. Compensation under this statute is impermissibly "at the whim of the sovereign," *Fla. Dep't of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 697 (1982), in that it depends on the state's willingness to institute separate eminent domain proceedings after a court finds a Commission taking. As a result, even if *Hutto*'s rationale controls here, the Eleventh Amendment does not bar the Zitos' suit. 773 F.3d at 551-52.

B. No Secondary State Procedure Allows the Zitos To Recover Compensation and a Two-Suit Procedure Would Be Constitutionally Inadequate

The district court rejected the foregoing conclusion because it concluded that the Zitos could file a claim for compensation in state court under the North Carolina Constitution *after* they successfully used the N.C. Gen. Stat. § 113A-123 process to hold the Commission liable for a

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384 S.E.2d 8, 22 n.1 (N.C. 1989) (Exum, C.J., dissenting) ("The remedy for a zoning ordinance which amounts to an unconstitutional taking is to declare the ordinance void insofar as it applies to the property taken.") (citing *Helms*, 122 S.E.2d at 822); *see also Agins v. City of Tiburon*, 598 P.2d 25, 29-31 (Cal. 1979), *aff'd*, 447 U.S. 255 (1980) (holding that the remedy for a taking arising from a denial of all use of land is not damages but invalidation and citing supportive authority of the time).

taking. JA at 98. In other words, the district court concluded that the Zitos could potentially get compensation for the denial of all use of their land by going through the following two-suit procedure: (1) exhaust N.C. Gen. Stat. § 113A-123 and secure a final state court judgment invalidating a Commission action as a taking, and (2) file a second state court suit under the North Carolina Constitution for compensation for the period in which the Commission taking was in effect. *Id.* at 97-98. Based on this alleged possibility, the district court believed the state process was "open" to the Zitos' claim.

The court was wrong. At the outset, no North Carolina authority holds that a property owner can sue the Commission for a taking—or for compensation for a taking—outside the procedure in N.C. Gen. Stat. § 113A-123. Indeed, every state court case involving a takings claim against the Commission has arisen under that particular statutory procedure. *See, e.g.*, *King ex rel. Warren v. State*, 481 S.E.2d 330, 332 (N.C. Ct. App. 1997); *Midgett v. N.C. Coastal Res. Comm'n*, 713 S.E.2d 791, *4-5 (N.C. Ct. App. 2011). This is not surprising since N.C. Gen. Stat. § 113A-123 is expressly deemed to be the "exclusive" means to litigate a takings claim against the Commission and the Commission adamantly

defends that characterization. The notion that a property owner can pursue a takings claim against the Commission outside of the N.C. Gen. Stat. § 113A-123 is, with respect, speculative, and a speculative compensation procedure is not an available or adequate one. *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land, Owned by Sandra Townes Powell*, 915 F.3d 197, 212 (4th Cir. 2019) (property owners are entitled to a "reasonable, certain, and adequate provision" for obtaining just compensation).

But even if the lower court's two-suit theory for compensation was valid, the scheme would not be constitutionally adequate because it would impose an exhaustion of remedies requirement on the Zitos' just compensation claim. The Zitos would have to exhaust N.C. Gen. Stat. § 113A-123 before they could claim just compensation for the Commission's actions. This too is irreconcilable with federal takings law. *Knick*, 139 S. Ct. at 2173. Requiring the Zitos to exhaust N.C. Gen. Stat. § 113A-123 before they can claim compensation is not only illegitimate, it is unworkable. Would the Zitos have to wait for the state to decide whether it will invoke eminent domain procedures pursuant to N.C. Gen. Stat. § 113A-123(c) before they sought compensation under the state

constitution in the second suit envisioned by the lower court? Would the issues litigated in their initial, N.C. Gen. Stat. § 113A-123 case have a collateral estoppel effect in the proposed secondary litigation, or would the Zitos have to relitigate the takings issue as a "temporary takings" suit? No one knows because there is simply no state law or precedent allowing a takings suit against the Commission outside of the "exclusive" procedure in N.C. Gen. Stat. § 113A-123.

The reality is that this Court can only look to N.C. Gen. Stat. § 113A-123 in deciding whether state procedures are open to the Zitos' claim for just compensation, since that statute provides the only recognized method for suing the Commission for a taking. And because the procedure permits only an outdated and inadequate "invalidation" remedy for a taking by the Commission, rather than full compensation, the procedure is not "open" to the Zitos' claim. Therefore, under *Hutto*, immunity is not applicable in federal court.

CONCLUSION

The Court should reverse the judgment and remand for further proceedings.

REQUEST FOR ORAL ARGUMENT

As this case involves important constitutional questions, the Zitos respectfully request oral argument.

DATED: June 2, 2020.

Respectfully submitted,

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s/ J. David Breemer
J. DAVID BREEMER
Attorneys for Plaintiffs – Appellants Michael Zito, et al.

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
Effective 12/01/2016

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