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' REPLY BRIEF

GLENN E. ROPER
Pacific Legal Foundation
1745 Shea Center Drive, Suite 400
North Highlands, Colorado 80129
Telephone: (916) 419-7111
Email: GERoper@pacificlegal.org

J. DAVID BREEMER
ERIN E. WILCOX
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Email: JBreemer@pacificlegal.org
Email: EWilcox@pacificlegal.org

Attorneys for Plaintiffs – Appellants Michael Zito, et al.

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 3

I. THE COMMISSION FAILS TO SHOW HOW *HUTTO*'S REASONING AND ANALOGY TO *REICH* SURVIVES *KNICK* 3

A. The Tax Damages Remedy Supplied by the Due Process Clause Exists Only in State Court; This Explains *Reich*'s Asymmetrical Immunity Regime in Due Process Cases 5

B. After *Knick*, the Just Compensation Clause Supplies a Self-Executing Damages Remedy in Federal Court; This Negates Use of *Reich*'s Due Process-Based Immunity Analysis in Takings Cases 7

C. The Commission's Position Would Establish an Unsupportable Scheme in Which Just Compensation Clause and Sovereign Immunity Rules Vary Depending on Forum 10

II. THE COMMISSION FAILS TO SHOW THAT NORTH CAROLINA COURTS ARE OPEN TO A JUST COMPENSATION CLAIM AGAINST THE COMMISSION 14

CONCLUSION 18

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT 19

TABLE OF AUTHORITIES

Cases

Alden v. Maine,
527 U.S. 706 (1999) 6-7, 11, 13

Cobb v. South Carolina Dep't of Transp.,
618 S.E.2d 299 (S.C. 2005) 16

DLX, Inc. v. Kentucky,
381 F.3d 511 (6th Cir. 2004) 10

Fair Assessment in Real Estate Ass'n, Inc. v. McNary,
454 U.S. 100 (1981) 6

First English Evangelical Lutheran Church of Glendale v. Los Angeles County, 482 U.S. 304 (1987) 11, 16, 18

Franchise Tax Bd. of Cal. v. Hyatt,
139 S. Ct. 1485 (2019) 11

Guilford Realty & Ins. Co. v. Blythe Bros. Co.,
131 S.E.2d 900 (N.C. 1963) 12

Harbert Int'l, Inc. v. James,
157 F.3d 1271 (11th Cir. 1998) 10

Hendler v. United States,
952 F.2d 1364 (Fed. Cir. 1991) 13

Holliday Amusement Co. of Charleston, Inc. v. South Carolina, 493 F.3d 404 (4th Cir. 2007) 7-8

Hutto v. S.C. Ret. Sys.
773 F.3d 536 (4th Cir. 2014) 1, 3, 18

Kerns v. United States,
585 F.3d 187 (4th Cir. 2009) 3

Knick v. Township of Scott,
139 S. Ct. 2162 (2019) 2, 4, 7-9, 11, 14-15

Millison v. Wilzack,
551 A.2d 899 (Md. Ct. Spec. App. 1989) 16-17

Mora v. City of Gaithersburg,
519 F.3d 216 (4th Cir. 2008) 6

Regional Rail Reorganization Act Cases,
419 U.S. 102 (1974) 15

Reich v. Collins,
513 U.S. 106 (1994) 1, 4-5, 7

San Remo Hotel, L.P. v. City & County of San Francisco,
545 U.S. 323 (2005) 7-8

Seven Up Pete Venture v. Schweitzer,
523 F.3d 948 (9th Cir 2008) 10

Williamson County Reg'l Planning Comm'n v.
Hamilton Bank of Johnson City, 473 U.S. 172 (1985) 2, 8, 17

Rule

Fed. R. Civ. P. 12(b)(1) 3

Other Authorities

Fallon, Jr., Richard H., *The "Conservative" Paths of the*
Rehnquist Court's Federalism Decisions,
69 U. Chi. L. Rev. 429 (2002) 13-14

Grant, Eric, *A Revolutionary View of the Seventh Amendment*
and the Just Compensation Clause,
91 Nw. U. L. Rev. 144 (1996) 13

Struve, Catherine T., *Turf Struggles: Land, Sovereignty,*
and Sovereign Immunity,
37 New Eng. L. Rev. 571 (2003) 14

INTRODUCTION

In its Response Brief, Appellee North Carolina Coastal Resources Commission (Commission) fails to prove, as it must, that sovereign immunity principles shield it from Michael and Catherine Zitos' (Zitos) claim for just compensation for the taking of their property. The Commission relies heavily on this Court's decision in *Hutto v. S.C. Ret. Sys.* 773 F.3d 536, 552 (4th Cir. 2014). Yet, it concedes that (unlike here) the *Hutto* plaintiffs "did not raise" the argument that the self-executing nature of the Just Compensation Clause waives sovereign immunity in takings cases, and that "*Hutto* itself" fails to address that argument. Response Brief at 32. Nevertheless, the Commission largely avoids the issue, failing to refute the straightforward contention that the Just Compensation Clause obligates them to pay for takings and therefore defeats sovereign immunity.

Instead, the Commission relies on *Hutto*'s conclusion that sovereign immunity applies to takings claims in federal court, if state court remedies exist, and it points to due process precedent to buttress that conclusion. *Reich v. Collins*, 513 U.S. 106, 110 (1994). But the Commission fails to adequately explain how *Hutto* and *Reich* survive

Knick's conclusion that, unlike the Due Process Clause, the Just Compensation Clause provides a self-executing damages remedy in federal court, which opens those courts to takings claims against states.

Finally, the Commission does not rebut the Zitos' contention that North Carolina courts are not "open" to their just compensation claim, justifying federal review. The Commission admits that the Zitos must utilize an "invalidation" takings procedure that will not provide them with just compensation, and it fails to show that a proposed second suit option for securing compensation is constitutionally inadequate. *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). The Zitos have a constitutional right to immediately sue for compensation for the taking of their lot, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2172 (2019), but that right is not protected under North Carolina's procedures.

ARGUMENT

I.

THE COMMISSION FAILS TO SHOW HOW *HUTTO*'S REASONING AND ANALOGY TO *REICH* SURVIVES *KNICK*

After a recitation of the "facts," one which improperly strays from the allegations in the complaint,[1] the Commission turns to the legal issue at hand, arguing that *Hutto* compels application of sovereign immunity to the Zitos' claim. As this Court is aware, *Hutto* held that sovereign immunity bars a takings claim in federal court as long as state courts are open to the claim. 773 F.3d at 552.

In their Opening Brief, the Zitos argued that *Hutto*'s conclusion is no longer tenable after *Knick*, because *Knick* (1) repudiated the use of state remedies in takings jurisdictional decisions and (2) extended the just compensation clause damages remedy to federal court, rendering analogies to due process precedent like *Reich* inapposite in the takings

[1] This case arises from a motion to dismiss for lack of jurisdiction under Fed. R. Civ. P. 12(b)(1). The Commission asserts a "facial" challenge to jurisdiction, alleging that sovereign immunity renders the allegations in the complaint insufficient to establish jurisdiction. *See Kerns v. United States*, 585 F.3d 187, 192 (4th Cir. 2009) (citation omitted). In a facial challenge, "the facts alleged in the complaint are taken as true, and the motion must be denied if the complaint alleges sufficient facts to invoke subject matter jurisdiction." *Id.*

context. The Commission largely ignores the initial, state remedies, point. It does not deny, however, that *Knick* removed state remedial considerations from federal takings jurisdictional analysis. *Knick*, 139 S. Ct. at 2170 ("The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."); *see also id.* at 2172-73. This aspect of *Knick* undercuts *Hutto*'s reliance on available state court remedies as a factor in determining federal jurisdiction over a takings claim against a state.

The more important effect of *Knick* is its creation of a critical distinction between takings and due process concepts, for this removes *Reich* as a basis for *Hutto*'s rationale. *Reich* held that a due process claim seeking a tax refund is proper in state court, notwithstanding sovereign immunity, but that sovereign immunity bars the claim in federal court. *Reich*, 513 U.S. at 110. The Commission believes this asymmetrical due process/sovereign immunity scheme can still be transferred to the takings context. It is wrong.

A. The Tax Damages Remedy Supplied by the Due Process Clause Exists Only in State Court; This Explains *Reich*'s Asymmetrical Immunity Regime in Due Process Cases

The Commission's (mis)understanding of *Reich* apparently arises from its belief that the Due Process Clause damages remedy in tax refund cases is the same as the Just Compensation Clause's remedy for a taking. Response Brief at 37. It seems to think that this justifies continued application of *Reich*'s immunity analysis in takings cases. The problem is that the two clauses are *not* the same after *Knick*.

The Due Process Clause provides its own damages remedy in tax refund cases in *state court* only, while the Takings Clause now confers a self-executing damages remedy in federal courts and state courts. This difference in remedial reach explains (1) why sovereign immunity gives way in state court, but not federal court, in due process tax cases, and (2) why the *Reich*/due process sovereign immunity analysis is improper in the takings context. In short, because the Due Process Clause does not supply a damages remedy in federal court, sovereign immunity applies in that forum in due process cases. *Reich*, 513 U.S. at 110. And because the post-*Knick* Takings Clause does supply a self-executing damages

remedy in federal court, *Reich*'s analysis is no longer relevant to takings cases.

Notably, the Commission concedes that the Due Process Clause supplies a damages remedy only in *state* court tax cases. Response Brief at 37 ("[T]he [*Reich*] Court made clear that the plaintiffs' due process remedy was available only in *state* court.") (emphasis added); *see also Alden v. Maine*, 527 U.S. 706, 740 (1999) (noting, in discussing *Reich*, that "due process requires *the State* to provide the remedy it has promised") (emphasis added; citation omitted). This principle—that the Due Process Clause supplies a state court a damages remedy in tax cases, but not a federal remedy—is consistent with the understanding that due process is satisfied by post-deprivation *state* remedies, *Mora v. City of Gaithersburg*, 519 F.3d 216, 230-31 (4th Cir. 2008), and that federal courts cannot award damages in tax cases under "comity" principles. *Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100, 107 (1981) ("[T]he principle of comity bars federal courts from granting damages relief in" state tax cases.); *id.* at 116 ("[T]axpayers must seek protection of their federal rights by state remedies, provided of course that those remedies are plain, adequate, and complete . . . .").

As previously noted, the state court limitation on the Due Process Clause remedy explains *Reich*'s forum-dependent view of sovereign immunity in due process cases. Since the Due Process Clause supplies a self-executing damages remedy in state court, *id.* sovereign immunity must yield there in tax cases, *Alden*, 527 U.S. at 740 (explaining that sovereign immunity did not apply in *Reich* because "the obligation" to pay damages in state court "arises from the Constitution itself"). But because the Due Process Clause does not of its own force supply a damages remedy in federal court, sovereign immunity applies in federal court. *Reich*, 513 U.S. at 109-10.

B. After *Knick*, the Just Compensation Clause Supplies a Self-Executing Damages Remedy in Federal Court; This Negates Use of *Reich*'s Due Process-Based Immunity Analysis in Takings Cases

At the time of *Hutto*, the Just Compensation Clause operated similarly to the Due Process Clause in tax cases, with respect to the provision of a damages remedy. Prior to *Knick*, a property owner could claim compensation for a taking in state court, but not in federal court. *See Knick*, 139 S. Ct. at 2170; *San Remo Hotel, L.P. v. City & County of San Francisco*, 545 U.S. 323, 346-47 (2005); *see also Holliday Amusement*

Co. of Charleston, Inc. v. South Carolina, 493 F.3d 404, 409 (4th Cir. 2007).

While it is true that federal court takings barriers were once misleadingly couched as matters of "ripeness," their effect was to *entirely bar* federal courts from adjudicating takings claims. *Knick*, 139 S. Ct. at 2170. That bar specifically arose from the combined effect of *Williamson County*'s "exhaust state court" ripeness rule, 473 U.S. at 194-96, and res judicata rules that prevented takings plaintiffs from going to federal court after they exhausted state court in compliance with *Williamson County*. *See San Remo Hotel*, 545 U.S. at 338.

The pre-*Knick* regime "hand[ed] authority over federal takings claims to state courts," *Knick*, 139 S. Ct. at 2170 (quoting *San Remo*, 545 U.S. at 350) (Rehnquist, C.J., concurring); *see also id.* at 2167, creating a state court remedial scheme akin to the due process tax refund regime observed in *Reich*. But *Knick* changed that, making the Fifth Amendment's just compensation remedy mandatory and available in federal court when a taking occurs. 139 S. Ct. at 2170-71. Since the Just Compensation Clause now supplies a damages remedy in federal court, while the Due Process Clause only provides a remedy in state court, it is

improper to use *Reich*'s due process analysis to resolve the issue of whether the Just Compensation Clause overrides sovereign immunity. *Knick*, 139 S. Ct. at 2174 ("the analogy from the due process context to the takings context is strained"). In short, nothing in *Reich* addresses the takings/immunity issue at hand: whether a damages remedy that is constitutionally obligatory in federal court abrogates sovereign immunity in that court.

Given *Knick*'s effect in undermining the state remedies rationale and due process authority on which *Hutto* rests, this Court should engage in a fresh and more complete assessment of the interaction between sovereign immunity and the Just Compensation Clause. Such an assessment requires consideration of the Just Compensation Clause's mandatory federal damages remedy, and imposition of that remedial requirement on states under the Fourteenth Amendment, on state sovereign immunity. The Commission gives short shrift to this subject, relying primarily on out-of-circuit decisions to counter the Zitos' arguments. But those decisions add nothing to the Commission's position, for they rest on the same *Reich* analogy and "state remedies"

rationale repudiated by *Knick*.[2] *See, e.g.*, *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir 2008) ("[A]s *Reich* states, this constitutionally enforced remedy against the States in state courts can comfortably co-exist with the Eleventh Amendment immunity of the States from similar actions in federal court."); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526-28 (6th Cir. 2004) (pointing to *Reich* in holding that state courts must hear federal takings claims without regard for sovereign immunity, but that federal courts cannot not hear those claims).

C. The Commission's Position Would Establish an Unsupportable Scheme in Which Just Compensation Clause and Sovereign Immunity Rules Vary Depending on Forum

In the end, the Commission urges the Court to "compromise" and hold that sovereign immunity bars Just Compensation Clause claims in federal court, but that such claims should prevail over immunity in state courts. Response Brief at 38 ("suits against a State that seek to secure these constitutional remedies are barred in federal court but may proceed

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[2] Other, earlier out-of-circuit decisions that apply immunity in takings cases in federal court because state remedies are available are unpersuasive not only because they predate *Knick* but also because they predate *Alden*, the 1999 decision establishing that sovereign immunity applies in state courts to the same degree it applies in federal courts. *See, e.g.*, *Harbert Int'l, Inc. v. James*, 157 F.3d 1271, 1279 (11th Cir. 1998).

in the State's own courts"). But the Commission provides no reason grounded in takings or sovereign immunity precedent to support a forum-dependent view of those doctrines. The Commission does not and cannot contend there is one Just Compensation Clause remedy for state courts and a different, weaker one, for federal courts. The Clause now provides the same self-executing damages remedy in federal court and state court. *Knick*, 139 S. Ct. at 2172 ("[B]ecause a taking without compensation violates the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time."); *First English Evangelical Lutheran Church of Glendale v. Los Angeles County*, 482 U.S. 304, 316 (1987) (holding that the Clause provides a self-executing damages remedy in state courts). Nor can the Commission ground its asymmetrical position in sovereign immunity concepts, since the Supreme Court has also made clear that the immunity doctrine protects the state equally in federal and state courts. *See Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1493 (2019); *Alden*, 527 U.S. at 731, 754 ("we hold that the States retain immunity from private suit in their own courts").

Since Just Compensation Clause and sovereign immunity principles are forum-neutral under Supreme Court precedent, there is no basis for a scheme in which the state must answer a claim invoking the Just Compensation Clause in state court, but not in federal court. The present case illustrates the illogical nature of this position. Here, the Commission notes that sovereign immunity must give way to the Just Compensation Clause in North Carolina courts, allowing (most) property owners to prosecute takings claims against the state in the state forum. *See* Response Brief at 49-50; *see generally*, *Guilford Realty & Ins. Co. v. Blythe Bros. Co.*, 131 S.E.2d 900, 907 (N.C. 1963) ("A constitutional prohibition against taking or damaging private property for public use without just compensation is self-executing, and neither requires any law for its enforcement . . . . [T]he owner, in the exercise of his constitutional rights, may maintain an action to obtain just compensation therefor.") (citations omitted). Yet, the agency contends that a contrary result should arise in federal court. The Commission does not explain how the same constitutional rules can yield such a diametrically opposed result in federal and state court. It simply believes it good policy to strike a "balance" that disallows takings claims against the state in federal court

while recognizing their propriety in state court. Takings and sovereign immunity precedent leave no room for this approach.

The Just Compensation Clause supplies a damages remedy for a taking in federal court and state court, and the Fourteenth Amendment binds the Commission (like all state entities) to that remedy. This means that state sovereign immunity must bow to the Just Compensation Clause remedy wherever that constitutional obligation applies, including in a federal forum. *See Alden*, 527 U.S. at 740, 754-55; *Hendler v. United States*, 952 F.2d 1364, 1371 (Fed. Cir. 1991) (noting that, because a federal takings suit is "based upon the constitutional provision protecting property rights, and the provision was considered to be self-executing with respect to compensation, it escaped the problems of sovereign immunity"); Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144, 199 (1996) ("It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is 'repugnant' to sovereign immunity and therefore abrogates the doctrine . . . ."); 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) (citing *First English* for the proposition that "the Fifth Amendment's Just Compensation Clause also appears to furnish an exception to the prohibition on damages relief").[3]

II.

THE COMMISSION FAILS TO SHOW THAT NORTH CAROLINA COURTS ARE OPEN TO A JUST COMPENSATION CLAIM AGAINST THE COMMISSION

If *Hutto* remains unchanged, the Commission asserts that it requires dismissal of the Zitos' claim because it believes North Carolina courts are open to the Zitos' claim. Response Brief at 45. Specifically, the Commission argues that the state provides the Zitos with a two-suit

[3] The Commission complains that "plaintiffs point to no historical evidence that the Fourteenth Amendment was intended to abrogate States' sovereign immunity from takings claims." Response Brief at 44. This misunderstands the Zitos' argument. The Zitos do not argue that Fourteenth Amendment alone abrogates immunity in takings cases, but that it does so in combination with precedent holding that the Just Compensation Clause supplies a self-executing damages remedy for every taking. This compensatory, remedial conception of the Just Compensation Clause became apparent subsequent to the ratification of the Fourteenth Amendment, *Knick*, 139 S. Ct. at 2175-76.

process for vindicating their constitutional right to just compensation. It claims the Zitos must first sue under N.C. Gen. Stat. § 113A-123(b) to invalidate the Commission's decisions as a taking. If they are successful in that procedure, and the state (in its sole discretion) then decides not to institute separate eminent domain proceedings against the property, the Commission claims the Zitos can file a second suit for just compensation under the state or federal constitution. Response Brief at 45-50. The number of contingencies in this process should cause one to suspect it. And indeed, it is inadequate.

The Constitution requires a "reasonable," "certain," and "adequate" procedure for obtaining compensation for a taking. *Regional Rail Reorganization Act Cases*, 419 U.S. 102, 124-25 (1974). Indeed, a property owner has a right to claim compensation in court as soon as an injury to property occurs without contemporaneous compensation. *Knick*, 139 S. Ct. at 2170 ("The Fifth Amendment right to full compensation arises at the time of the taking, regardless of post-taking remedies that may be available to the property owner."). But, by the Commission's own admission, the Zitos do not have a right to immediately claim compensation in state court. They must prosecute an initial

"invalidation" takings suit that cannot give them compensation. The possibility that the state may later initiate a separate eminent domain action, Response Brief at 46, is hardly a "reasonable" or "certain" federal just compensation remedy given its discretionary, unpredictable, and deadline-less nature.

The Commission's claim that the Zitos can file a second, "temporary takings" suit seeking compensation from the Commission, *id.* at 47, does not constitutionalize the process. The Commission still cannot identify a single state court precedent that sanctions its proposed two-step compensation process. There is good reason for this: the Supreme Court rejected invalidation as a sufficient constitutional remedy or compensatory prerequisite decades ago. *See First English*, 482 U.S. at 321-22 ("invalidation of the ordinance without payment of fair value for the use of the property during this period of time would be a constitutionally insufficient remedy"). Since that development, states have (with the apparent exception of North Carolina) adopted or recognized an immediate compensatory remedy—often called an "inverse condemnation" action—when states taking property. *See Cobb v. South Carolina Dep't of Transp.*, 618 S.E.2d 299, 301 (S.C. 2005); *Millison v.*

Wilzack, 551 A.2d 899, 901-03 (Md. Ct. Spec. App. 1989) (describing procedure in a taking case against the taking). The "invalidation"-based compensation process that begins with N.C. Gen. Stat. § 113A-123(b) is a dinosaur that should no longer roam the land. Yet, it does in North Carolina, and its effect is to impede, compensation-seeking takings claims against the Commission.

Indeed, assuming state law allows a second (compensatory) takings suit against the Commission after N.C. Gen. Stat. § 113A-123(b) proceedings, the existence of that second procedure would convert the initial, "invalidation" action into an exhaustion of state remedies requirement. The Commission does not deny this, but it claims that the state may require exhaustion of remedies in its own courts as a predicate to a just compensation claim. Response Brief at 52. It is mistaken because, again, it wrongly focuses on the nature of the forum rather than the nature of the claim. At issue is a Fifth Amendment claim for just compensation, not a state constitutional claim. Federal law governs, and it plainly holds that a landowner need not exhaust an alternative remedy before claiming monetary compensation for a taking. *Williamson County*, 473 U.S. at 193 (holding that a takings plaintiff does not have to bring a

declaratory judgment action in state court to test the "validity" of the government action before seeking compensation); *see also First English*, 482 U.S. at 315-16.

Given the inadequacy of 113A-123(b) as a just compensation remedy and the uncertainty, burden, and improper nature of requiring the Zitos to file two suits to vindicate their federal constitutional right to compensation, the state court system is not "open" to the Zitos' takings claim. The claim is accordingly permissible in federal court under *Hutto*. 773 F.3d at 552.

CONCLUSION

The Court should vacate the district court's judgment and remand for further proceedings.

DATED: August 10, 2020.

Respectfully submitted,

J. DAVID BREEMER
ERIN E. WILCOX
GLENN E. ROPER

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

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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United States Court of Appeals for the Fourth Circuit

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Ramona Heather McGee: rmcgee@selcnc.org, tbenjamin@selcnc.org, jdoucette@selcnc.org
Ryan Y. Park: rpark@ncdoj.gov
Sarah Gardner Boyce: sboyce@ncdoj.gov
Mrs. Erin Elizabeth Wilcox: ewilcox@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Glenn Evans Roper: geroper@pacificlegal.org, incominglit@pacificlegal.org, tdyer@pacificlegal.org
Ms. Mary Louise Lucasse: mlucasse@ncdoj.gov
Elizabeth Rita Rasheed: erasheed@selcnc.org, liz.rasheed.law@gmail.com
Sierra B. Weaver: sweaver@selcnc.org, jdoucette@selcnc.org

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