No. _____

In The
Supreme Court of the United States

MICHAEL ZITO AND CATHERINE ZITO,
Petitioners,

v.

NORTH CAROLINA
COASTAL RESOURCES COMMISSION,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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

Counsel for Petitioners

QUESTION PRESENTED

Whether the Fourteenth Amendment's incorporation of the "self-executing" Just Compensation Clause abrogates state sovereign immunity from federal takings claims?

LIST OF ALL PARTIES

The parties to the judgment from which review is sought are Michael and Catherine Zito. They were parties in all proceedings below.

Respondent is the North Carolina Coastal Resources Commission.

RULE 14.1(b)(iii) STATEMENT

The proceedings in the Eastern District of North Carolina and Fourth Circuit identified below are directly related to the above-captioned case in this Court.

Zito v. North Carolina Coastal Resources Commission, 8 F.4th 281 (4th Cir. Aug. 9, 2021)

Zito v. North Carolina Coastal Resources Commission, 449 F. Supp. 3d 567 (E.D.N.C. Mar. 27, 2020)

TABLE OF CONTENTS

APPENDIX

TABLE OF AUTHORITIES

Cases

U.S. Constitution

Statutes

Other Authorities

PETITION FOR WRIT OF CERTIORARI

Michael and Catherine Zito respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 8 F.4th 281 and reprinted at App. A. The order of the district court granting Respondent's motion to dismiss is reported at 449 F. Supp. 3d 567 and reprinted at App. B.

JURISDICTION

The district court had jurisdiction over this case under 28 U.S.C. § 1331 and the Fifth Amendment to the United States Constitution. The judgment of the court of appeals was entered on August 9, 2021. App. A. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fifth Amendment to the Constitution provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

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."

INTRODUCTION

This case presents an important and persistent question as to whether sovereign immunity overrides the "self-executing" constitutional right to just compensation for a taking when a state takes property. The Just Compensation Clause provides property owners with a monetary remedy whenever the government takes property, *Knick v. Township of Scott*, 139 S. Ct. 2162, 2171-72 (2019), and the Fourteenth Amendment subjects states to this compensation mandate. *Dolan v. City of Tigard*, 512 U.S. 374, 384 n.5 (1994). At the same time, sovereign immunity bars suits against states for damages. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). There is thus "obvious tension" between these two constitutional principles. *Community Housing Improvement Program v. City of New York (CHIP)*, 492 F. Supp. 3d 33, 40 (E.D.N.Y. 2020).

In the decision below, the Fourth Circuit held that sovereign immunity precludes an unconstitutional takings claim against a state in federal court when a remedy exists in state court. App. A-13-14, 19. In so holding, the court relied primarily on this Court's decision in *Reich v. Collins*, 513 U.S. 106 (1994). *Reich* recognizes that the Due Process Clause supplies a refund remedy for unconstitutionally appropriated taxes in state court, but that sovereign immunity would bar a refund claim in federal court. *Id.* at 110. The court below held that *Reich* applies in the takings context, and that the application of immunity to bar a takings claim in federal court properly "reconcile[s]" the "tension" between the Just Compensation Clause and sovereign immunity.

The Fourth Circuit's approach is not consistent with this Court's precedent. First, that precedent establishes that the Just Compensation Clause supplies a "self-executing," monetary remedy for every taking. *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*, 482 U.S. 304, 315-16 (1987). Second, the Court has held that the just compensation remedy is immediately actionable in federal court when a taking occurs. *Knick*, 139 S. Ct. at 2171-73. Finally, it has held that enactment of the Fourteenth Amendment's Due Process Clause incorporated the Just Compensation Clause and thus bound states to the federal just compensation requirement for a taking of property. *Dolan*, 512 U.S. at 384 n.5.

This Court has previously signaled that the foregoing line of precedent leaves no room for the argument that states enjoy sovereign immunity from suits under the Takings Clause. *First English*, 482 U.S. at 315-16 & n.9 (rejecting Solicitor General's argument that the Just Compensation Clause cannot be construed as remedial provision because that would conflict with state immunity); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 714 (1999) (questioning whether immunity "retains its vitality" in the takings context). Nevertheless, the Court has "surprisingly" never directly resolved the conflict between sovereign immunity and the Just Compensation Clause. Richard H. Seamon, *The Asymmetry of State Sovereign Immunity*, 76 Wash. L. Rev. 1067, 1067-68 (2001); Eric Berger*, The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 496 (2006) (the Court has "avoided the issue"); *CHIP*, 492 F. Supp. 3d

at 40 (noting the Court has not "decisively resolved the conflict").

The time has come to address the issue. The question presented has percolated through the federal appellate courts, and most have employed the same *Reich*-based reasoning, and come to the same incorrect conclusion as the court below—that sovereign immunity trumps the Just Compensation Clause in federal court. *CHIP*, 492 F. Supp. 3d at 40 (The "weight of authority among the circuits" is that "sovereign immunity trumps the Takings Clause—at least where . . . the state provides a remedy of its own for an alleged violation."); *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 955 (9th Cir. 2008) (federal appellate courts have "expressly or implicitly applied the *Reich* rationale and held that the Eleventh Amendment bars Fifth Amendment reverse condemnation claims").

Not only is that conclusion incompatible with the character, scope, and importance of the right to just compensation, it ultimately returns the Takings Clause to second-class constitutional status by stripping it of federal judicial protection when states take property. *See Knick*, 129 S. Ct. at 2169-70. Other constitutional rights are protected from state intrusion in federal court through suits for injunctive relief under *Ex parte Young*, 209 U.S. 123, 159 (1908). But equitable relief is not available in most takings cases. *Knick*, 139 S. Ct. at 2176. If sovereign immunity bars federal actions for just compensation, as the decision below holds, federal courts cannot protect the Takings Clause from state violations—even as those courts vindicate other constitutional rights under *Ex parte Young*. This is inconsistent with the status of the

Takings Clause and leaves property owners dependent on a maze of byzantine state court procedures for vindication of their federal right to just compensation.

The Court should grant the Petition to confirm what enactment of the Fourteenth Amendment and this Court's decisions plainly suggest: takings claims invoking the Just Compensation Clause against states are a constitutionally grounded exception to sovereign immunity. This will resolve confusion and conflict in this area, put the Takings Clause on par with other constitutional rights with respect to federal protection, and ensure that the restraints on state power promised by the Fourteenth Amendment do not ring hollow. *Bay Point Props., Inc. v. Mississippi Transp. Comm'n*, 937 F.3d 454, 456 n.1 (5th Cir. 2019) (acknowledging that "'the tension' between state sovereign immunity and the right to just compensation . . . is [an issue] for the Supreme Court").

STATEMENT OF THE CASE

This case arises from the North Carolina Coastal Resources Commission's (Commission) refusal to permit Michael and Catherine Zito (Zitos) to rebuild a small beachfront home after a fire destroyed it in 2016. App. A-5. Because the Commission's permit denial stripped the Zitos' lot of all economically beneficial use, they Zitos sued in federal court, alleging that the Commission's action caused an unconstitutional taking of their property. App. A-2. The district court granted a motion to dismiss, concluding that sovereign immunity shielded the Commission from the Zitos' takings claim in federal

court. App. B-2. The Fourth Circuit affirmed. App. A-20.

I.

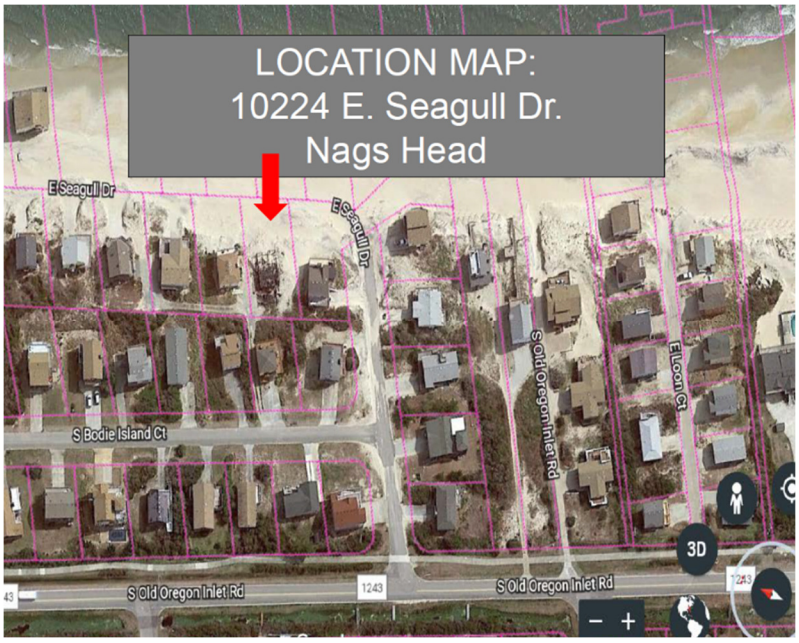
FACTUAL BACKGROUND

The Town of Nags Head is a small community on North Carolina's fabled Outer Banks. Resting along the state's eastern edge, these barrier islands draw tourists and locals alike to their warm sand and waters.

In 2008, the Zitos purchased a 1,700-square-foot beach house at 10224 E. Seagull Drive, Nags Head to use as a family vacation home and rental property. App. A-3. Platted in 1977 and developed in 1982, the Zitos' home stood in an established residential subdivision. Joint Appendix on Appeal (JA) at 23.

More than a dozen homes exist on either side of the Zitos' lot, and many others are located both seaward and landward of the property. *Id.*

For eight years, between 2008 and 2016, the Zitos spent family time at their beach house and rented it out for income at other times. App. A-3. Sadly, on the night of October 10, 2016, a fire burned the home to the ground while it was unoccupied. *Id.* It was a total loss; only the underground septic system remained intact and unharmed. A photo showing the location of the property after the fire is reproduced below.



JA at 24.

The Zitos soon decided to rebuild. Because their property is near the shore, development on the lot must comply with the North Carolina Coastal Area Management Act (CAMA), N.C. Gen. Stat. § 113A-100, *et seq.*, and related regulations. App. at B-3.

Under the CAMA framework, coastal property that lies within a designated Area of Environmental Concern (AEC) is subject to a set-back rule that requires development to occur a certain distance from the shore.[1] App. B-3. The set-back line is calculated based on estimated annual beach erosion rates and the location of the first line of stable, natural vegetation. App. A-3-4. The rules require construction to generally be set back from the line of vegetation at a distance of at least 30 times the annual erosion rate. App. A-4. However, a "grandfather" clause allows development of less than 2,000 square feet on parcels existing before June 1, 1979, to be set back only 60 feet from the line of vegetation. *Id.*

The Zitos' lot is in a coastal AEC that has an official erosion rate of six feet per year. App. B-4. This results in a 180-foot set-back requirement (30 times the annual erosion rate of six feet). *Id.* Like adjacent lots, the Zitos' parcel is not 180 feet from the vegetation line.[2] App A-4. And while the lot is a "grandfathered" one because it existed prior to 1979, it also does not meet the lesser 60-foot set-back line for such property. *See id.* Strict application of CAMA's set-back rules would accordingly bar development on the Zitos' property.

Nevertheless, in July, 2017, the Zitos submitted an application to the Town of Nags Head to rebuild a

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[1] The Commission considers the "[r]eplacement of structures damaged or destroyed by . . . fire" to be "development [that] requires CAMA permits." 15A NCAC 7J.0210.

[2] The line of vegetation in the Town of Nags Head was established as a "stable" line of vegetation in 2011 when the Town carried out a beach renourishment project. *See* 15A NCAC 7H.0305(a)(6) & 7H.0306(a)(11).

home on their lot.[3] The proposed home was to be roughly the same size as the prior one, and within the same footprint. Their proposal also included a new driveway of clay, packed sand, or gravel to minimize potential flooding concerns. Still, the Town denied the Zitos' application because the proposed development was not compliant with the CAMA set-back rules. App. A-5.

The Zitos subsequently filed a petition for a variance from the preclusive CAMA rules with the Commission. *Id.* They asserted, in part, that their property would be rendered undevelopable without a variance. In December 2018, the Commission considered the Zitos' petition at a public hearing. Afterward, it issued a Final Agency Decision denying the requested variance. *Id.* In so doing, the Commission found that the Zitos could use their lot as a campsite or for a stand-alone swimming pool.[4]

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[3] Under CAMA, local governments have initial permitting jurisdiction over CAMA permits. *See* N.C. Gen. Stat. § 113A-121(b); 15A NCAC 7J.0201. If the locality denies a permit, the applicant may seek a variance from the Commission. N.C. Gen. Stat. § 113A-121.1.

[4] The Commission made that finding despite an affidavit from the Deputy Planning Director and Zoning Administrator for the Town of Nags Head stating that if the Zitos were not allowed to rebuild a home, the local zoning code would not allow the property to be used as a public campsite, or for a stand-alone deck, storage shed, or swimming pool.

II.

PROCEDURE

A. The District Court Decision

The Zitos sued the Commission in the U.S. District Court for the Eastern District of North Carolina. They asserted that the agency's refusal to grant a variance allowing reconstruction of their home resulted in a taking of their property under the Fifth Amendment to the United States Constitution.[5] App. A-5.

The Commission soon moved to dismiss the case as unripe based on the existence of alleged state compensation procedures. App. B-5. Relying on *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019), the district court denied the motion. The Commission subsequently filed a second motion to dismiss. This time, it asserted that Eleventh Amendment sovereign immunity principles barred the Zitos' Fifth Amendment claim for just compensation. App. B-6. The district court granted this motion, concluding that it was bound to follow a prior Fourth Circuit decision, *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536 (4th Cir. 2014), which held that "the Eleventh Amendment bars Fifth Amendment taking claims against States *in federal court* where the *State's courts* remain open to adjudicate such claims." App. B-11 (quoting *Hutto*, 773 F.3d at 552).

The district court's ruling notes, however, that the Fourth Circuit's sovereign immunity analysis in *Hutto* is in "tension with the Supreme Court's reasoning in

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[5] Although the Zitos initially also raised a state law claim, they later voluntarily dismissed that claim. App. B-5.

Knick." It observed that, while "*Knick* removed the state litigation requirement that had forced litigants to file their takings claims under state law in state court," *Hutto*'s sovereign immunity barrier "forces litigants who wish to pursue a takings claim under the Fifth Amendment into state courts." App. B-24. Although the district court recognized that it had to follow *Hutto*, it acknowledged "the significant constitutional issues that the Zitos raise, and [ ] that 'the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court.'" App. B-25. (quoting *Knick*, 139 S. Ct. at 2167). The district court concluded that "*Knick* foreshadows the day when the [Supreme] Court will have to address the interplay between the Fifth Amendment's Just Compensation Clause and the Eleventh Amendment." App. B-24.

B. The Fourth Circuit Opinion

On appeal, the Fourth Circuit affirmed the district court. App. A-3. Relying on *Hutto*, the Fourth Circuit re-confirmed that sovereign immunity precludes takings claims seeking just compensation in federal court when state courts are open to such claims. App. A-14, 20. In so holding, the court below reiterated its belief that *Reich*, 513 U.S. at 110, justifies a sovereign immunity barrier to takings claims.

The Fourth Circuit also rejected the argument that *Knick* undermines the conclusion that sovereign immunity applies to federal court takings cases due to the availability of state remedies. App. A-10-12. It further rejected the contention that *Knick* renders reliance on *Reich* improper because *Knick* distinguishes Takings Clause and Due Process Clause

remedies. App A-12. The court below concluded that, "[b]y treating the Takings Clause the same as other constitutional rights, the Supreme Court [in *Knick*] suggests that it remains subject to the same limitations on those other rights—including sovereign immunity." App. A-13.

The Fourth Circuit then determined that North Carolina offers an adequate two-suit process for the Zitos to seek compensation for the taking of their property by the Commission. It concluded that the Zitos must first file a state court action to invalidate the Commission action as a taking of property. If they succeed, the Zitos may then file a second suit for monetary compensation using a different state court procedure. App. A-14-19. Finding this to be an adequate state compensation remedy, the Fourth Circuit held that "State sovereign immunity bars their takings claims against the Commission in federal court." App. A-20.

Petitioners now timely file this Petition for Writ of Certiorari.

REASONS FOR GRANTING THE PETITION

The Eleventh Amendment and the Fifth Amendment's Just Compensation Clause express two of the most venerable constitutional principles in existence: sovereign immunity for states and just compensation for citizens whose property is taken for public use. These principles function independently and adequately in most cases. However, when a state takes property without compensation, sovereign immunity and the Just Compensation Clause—applicable to states through the Fourteenth Amendment—come into conflict. While the former

bars a damages award, the latter positively requires it.

The Fourth Circuit's holding that sovereign immunity is superior to the right of compensation for a taking conflicts with this Court's jurisprudence, diminishes the Just Compensation Clause, and conflicts with the decisions of other courts, all of which justifies review.

I.

THE DECISION BELOW CONFLICTS WITH THIS COURT'S JUST COMPENSATION CLAUSE PRECEDENT

A. The Principles at Issue

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." This Court has held that the Amendment generally bars all suits against a state entity absent the state's consent to the suit. *Hans v. Louisiana*, 134 U.S. 1, 21 (1890). Indeed, the Court has explained that the text of the Eleventh Amendment is not a full expression of the concept of sovereign immunity. Thus, the state sovereign immunity principles that animate the Eleventh Amendment apply in state court, as well as in federal court. *Alden v. Maine*, 527 U.S. 706, 712, 733, 749 (1999).[6]

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[6] Prior to *Alden*, the Court's precedent suggested that sovereign immunity principles may not apply in state courts. *Hilton v. South Carolina Public Railways Comm'n*, 502 U.S. 197, 204-05

There are exceptions. In particular, sovereign immunity is inapplicable where "[t]he States have consented" to suit "pursuant to the plan of the [Constitutional] Convention or to subsequent constitutional Amendments." *Id.* at 755. Section 5 of the Fourteenth Amendment allows Congress to enforce Fourteenth Amendment rights against states without respect to their immunity. *Id.* at 755-57. And, in *Ex parte Young*, this Court recognized an exception from sovereign immunity when a person sues state officials for prospective relief from an ongoing violation of federal law, 209 U.S. 123; *see also*, *Milliken v. Bradley*, 433 U.S. 267, 289-90 (1977).

Under this framework, states and their officials enjoy robust immunity from suits requiring a payment of damages. *Edelman*, 415 U.S. at 666-67 (*Ex parte Young* does not allow a suit seeking an injunction that would result in retroactive monetary relief); *Ford Motor Co. v. Dep't of Treasury of Indiana*, 323 U.S. 459, 464 (1945) (Eleventh Amendment bars a damages action against a State in federal court); *Hess v. Port Authority Trans–Hudson Corp.*, 513 U.S. 30, 48 (1994).

At the same time, it is now settled that the Just Compensation Clause provides property owners with a right to recover monetary compensation whenever the government takes property. *Knick*, 139 S. Ct. at 2171-73. In fact, in most takings cases, property owners can only seek compensation for a taking; equitable relief is unavailable. *Id.* at 2176-77. While the Just Compensation Clause remedy may be

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(1991). But *Alden* clarified that "the States retain an analogous constitutional immunity from private suits in their own courts," 527 U.S. at 748.

relatively narrow, it is mandatory and "self-executing." *First English*, 482 U.S. at 315-16. No legislative action is necessary for the right to just compensation to be effective; the Constitution itself confers the right. *Jacobs v. United States*, 290 U.S. 13, 16 (1933) (claims "based on the right to recover just compensation for property taken" do not require "[s]tatutory recognition" but are "founded upon the Constitution").

Thus, while the Just Compensation Clause allows a property owner to immediately seek compensation for a taking of property in federal court, sovereign immunity indicates that federal courts cannot apply this rule if the state is a defendant. As a result, "[t]he principles of sovereign immunity and just compensation are on a collision course." Seamon, 76 Wash. L. Rev. at 1067-68; Berger, 63 Wash. & Lee L. Rev. at 494.

B. The Decision Below Conflicts With This Court's Precedent

The Fourth Circuit's conclusion that sovereign immunity prevails in the clash with the Just Compensation Clause conflicts with this Court's jurisprudence.

1. The decision conflicts with this Court's understanding of the Just Compensation Clause

On several occasions, this Court has recognized that the Just Compensation Clause is not just a condition on the exercise of the government's power to take property; it supplies a damages remedy in the event that government appropriates property without payment. Indeed, in a series of opinions culminating

in *Knick*, the Court has emphasized that the monetary remedy inherent in the Just Compensation Clause is "self-executing." That means the Constitution itself gives a property owner a "claim for just compensation at the time of the taking." *Knick*, 139 S. Ct. at 2171 (quoting *First English*, 482 U.S. at 315). Indeed, the *Knick* Court confirmed that the right to receive payment for a taking is actionable in federal court, as well as in state courts, as soon as a taking occurs. *Id.* at 2171-73.

Of course, originally, the Just Compensation Clause, and the remedy it provides, did not bind the States; it applied only to the federal government. *Barron v. City of Baltimore*, 32 U.S. (7 Pet.) 243, 247-51 (1833). But this changed with enactment of the Fourteenth Amendment, which shifted the balance of federal and state power and "required the States to surrender a portion of the sovereignty that had been preserved to them by the original Constitution." *Alden*, 527 U.S. at 756. In part, the Fourteenth Amendment prohibited states from "depriv[ing] any person of . . . property, without due process of law." U.S. Const. amend. XIV, § 1. This Court soon held that the Fourteenth Amendment's due process requirement incorporated the Fifth Amendment's Just Compensation Clause. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 239-41 (1897). By incorporation, the just compensation requirement "applies to the States as well as the Federal Government." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 306 n.1 (2002).

The Fourth Circuit's conclusion that property owners cannot sue a state agency for just compensation in federal court when a state takes property rights is irreconcilable with the precedent outlined above. If, under the Court's precedent, (1) the Just Compensation Clause mandates damages for every taking (it does); and (2) that right is actionable in federal court, (it is) and (3) states are bound by this requirement through the Fourteenth Amendment (they are), there is little room for the proposition, adopted by the decision below, that states are exempt from federal suits alleging a violation of the Takings Clause. Berger, 63 Wash. & Lee L. Rev. at 519 ("[T]he straight textual argument seems to require the government to provide money damages [for a taking], notwithstanding otherwise applicable sovereign immunity bars.").

Indeed, while this Court has not squarely addressed the conflict between sovereign immunity and the just compensation requirement, it has indicated that the right to compensation is superior to immunity. For instance, in *First English*, this Court considered whether the Fifth Amendment provided a damages remedy when a land use regulation causes a taking, As amicus curiae, the United States argued that "principles of sovereign immunity" prevented the Court from interpreting the Fifth Amendment as "a remedial provision." 482 U.S. at 316 n.9; Brief for the United States as Amicus Curiae Supporting Appellee, No. 85-1199, 1986 WL 727420, at *26-30 (U.S. Nov. 4, 1986).

The *First English* Court rejected this position. 482 U.S. at 316 n.9 ("[T]he cases cited in the text . . . refute the argument of the United States that 'the

Constitution does not, of its own force, furnish a basis for a court to award money damages against the government.'" (quoting United States' Amicus Brief)). This conclusion "strongly suggests" the Just Compensation Clause is an exception to sovereign immunity. Vicki C. Jackson, *The Supreme Court, the Eleventh Amendment, and State Sovereign Immunity*, 98 Yale L.J. 1, 115 n.454 (1988); *see also* Catherine T. Struve, *Turf Struggles: Land, Sovereignty, and Sovereign Immunity*, 37 New Eng. L. Rev. 571, 574 (2003); 1 Laurence H. Tribe, *American Constitutional Law* § 6–38, at 1272 (3d ed. 2000) (observing, based on *First English*, that the Takings Clause "trumps state (as well as federal) sovereign immunity").

Approximately a decade later, in *Del Monte Dunes*, a plurality of the Court questioned whether sovereign immunity "retains its vitality" in the context of compensation-seeking takings claims. *Del Monte Dunes*, 526 U.S. at 714. Further, this Court has decided many takings cases against states without concern that sovereign immunity might preclude jurisdiction. *See Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Tahoe-Sierra*, 535 U.S. at 302. Indeed, in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), amici directly raised sovereign immunity, but the Court did not address it. *See* Amicus Brief of the Board of County Commissioners of the County of La Plata, et al., in Support of Respondents, No. 99-2047, 2001 WL 15620, at *20-21 (U.S. Jan. 3, 2001).

None of these takings cases directly rejected sovereign immunity. But, since sovereign immunity is a quasi-jurisdictional concern that can be raised at any stage, *Edelman*, 415 U.S. at 678; *Ford Motor Co.*, 323 U.S. at 467, the fact that this Court's takings

decisions routinely overlook the issue confirms what other decisions suggest: sovereign immunity is not a jurisdictional bar when faced with a takings claim seeking a remedy under the Just Compensation Clause. *Manning v. N.M. Energy, Minerals & Natural Res. Dep't.*, 144 P.3d 87, 90 (N.M. 2006) (noting this Court "has consistently applied the Takings Clause to the states, and in so doing recognized, at least tacitly, the right of a citizen to sue the state under the Takings Clause")

The Fourth Circuit's conclusion thus conflicts with this Court's Just Compensation Clause precedent. But even more, it ultimately fails to align with Congress' intent to limit state power over individual rights through enactment of the Fourteenth Amendment. *Mitchum v. Foster*, 407 U.S. 225, 238-39 (1972) (recognizing the role of the Amendment in elevating "the Federal Government as a guarantor of basic federal rights against state power"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 287 (1913) (adopting as the "theory of the Amendment" that "the Federal judicial power is competent to afford redress for [a] wrong" that violates the Fourteenth Amendment); Akhil Reed Amar, *The Bill of Rights: Creation and Reconstruction* 268 (1998) (noting that a leading proponent of the Amendment stated it was adopted in part to protect "citizens of the United States, whose property, by State legislation, has been wrested from them"). If Congress can act to enforce a Fourteenth Amendment right without violating state immunity, *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456 (1976). then certainly enactment of the Amendment itself overrides that immunity when it includes a "self-executing" remedy like the right to compensation. 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[.]").

2. The Fourth Circuit decision is incompatible with *Knick*

Of course, in the decision below, the Fourth Circuit did not simply hold that sovereign immunity bars takings claims in federal court. It held that sovereign immunity is a barrier "if state courts remain open to adjudicating the claim." App at A-20. This conclusion is also irreconcilable with the Court's precedent.

As the district court observed, the Fourth Circuit's "state-court remedy requirement is in tension with the Supreme Court's reasoning in *Knick*." App. at B-24. In *Knick*, this Court overruled the rule, articulated in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 194-96 (1985), that a federal takings claim cannot be raised in federal court if compensation procedures are available in state court. In rejecting this state remedies/exhaustion rule, the *Knick* Court stated: "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." 139 S. Ct. at 2070. It further explained that "the availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's federal constitutional claim," and this "allows the owner to proceed directly to federal court." *Id.* at

2171. In sum, because an uncompensated taking violates "the self-executing Fifth Amendment at the time of the taking, the property owner can bring a federal suit at that time." *Id.* at 2172.

While *Knick* "removed the state-litigation requirement that had forced litigants to file their takings claims under state law in state court," the Fourth Circuit's decision in this case "still forces litigants who wish to pursue a takings claim under the Fifth Amendment into state courts" if their claim is against a state. App. B-24. It is true, of course, that *Knick* did not consider a takings claim against a state. But nothing in *Knick* or related precedent supports the idea that state remedies affect federal review depending on the nature of the defendant; i.e., whether it is a state, rather than local entity. *Knick*, 139 S. Ct. at 2171 ("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[.]").

Federal judicial power to enforce the Takings Clause does not hinge on what state courts are doing, but on what the Fourteenth Amendment already did: extended the just compensation requirement to the states. This Court should grant the Petition to confirm that state court remedies are as irrelevant to the federal courts' power to hear a takings claim against a state as they are to its power over a claim against a local government.

3. The decision below conflicts with precedent distinguishing takings and due process concepts

Surprisingly, the court below looked primarily to this Court's Due Process Clause-based analysis in *Reich*, rather than to takings precedent, in deciding that sovereign immunity bars the Zitos' takings claim. This approach is inconsistent with precedent from this Court distinguishing takings and due process principles.

Reich held that the Due Process Clause requires a state to provide a refund remedy in its own courts for unconstitutionally collected taxes. 513 U.S. at 108-09; *see also McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 32 (1990) (noting the "State's obligation to provide retrospective relief as part of [a] postdeprivation procedure" in its own courts). In so holding, *Reich* found that sovereign immunity was not a barrier: "'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 *Reich* 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) (emphasis added).

The Fourth Circuit in this case, and other courts, have concluded that *Reich* provides a compromise, "third-way," approach to the clash between sovereign immunity and the Just Compensation Clause, one

that requires application of sovereign immunity in federal court, but not in state court. App. at A-9; *DLX, Inc. v. Kentucky*, 381 F.3d 511, 527 (6th Cir. 2004) (citing *Reich*, 513 U.S. at 110). Indeed, it is not an exaggeration to say that *Reich* is the single most influential precedent on the issue of whether sovereign immunity bars a takings claim in federal court. *Seven Up Pete Venture*, 523 F.3d at 954-55 (noting the federal courts' reliance on *Reich* in this area of law); *see also, DLX*, 381 F.3d at 527. This Court's precedent does not justify such a role.

On numerous occasions, this Court has rejected that contention that takings questions can be resolved by due process answers. *Knick*, 139 S. Ct at 2174. ("[T]he analogy from the due process context to the takings context is strained . . . ."); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 541-42 (2005) (divorcing takings and due process principles). This doctrinal separation holds true with respect to the scope of potential monetary remedies under the Just Compensation Clause and the Due Process Clause. While the Court has clarified that the just compensation remedy is self-executing and actionable in *federal* court, *Knick*, 139 S. Ct. at 2170-72, it has limited the due process tax refund remedy to *state* court. *Reich*, 513 U.S. at 109-10; *see also Fair Assessment in Real Estate Ass'n, Inc. v. McNary*, 454 U.S. 100 (1981) (holding tax claims non-justiciable in federal court). This distinction is incompatible with the idea, adopted below, that *Reich*'s due process-based, state court remedial analysis controls the issue of whether the just compensation remedy applies in federal court.

Reich simply does not address the issue in this and other state takings cases: whether a damages remedy that is self-executing in *federal court* overrides sovereign immunity in *federal court*. Yet, with the issue filtered through the circuit courts, most have "expressly or implicitly applied the *Reich* rationale and held that the Eleventh Amendment bars Fifth Amendment reverse condemnation claims brought in federal district court." *Seven Up Pete Venture*, 523 F.3d at 955. At this point, only intervention from this Court can correct the misapplication of *Reich* to the Just Compensation Clause context.

This Court should grant the Petition in part to limit *Reich* to the due process context, allowing the issue to be resolved under Just Compensation Clause precedent and the Fourteenth Amendment's incorporation doctrine.

II.

THE DECISION BELOW RAISES AN IMPORTANT QUESTION AS TO WHETHER IMMUNITY ALLOWS STATES TO EVADE THE DUTY TO PAY FOR TAKINGS IN FEDERAL COURT

A. The Decision Below Renders the Takings Clause Inferior to Other Constitutional Rights

The Fourth Circuit's conclusion that sovereign immunity defeats the right to just compensation in federal court is not only doctrinally untenable, it also severely diminishes the scope and strength of the constitutional right to just compensation. This result flows from the monetary nature of the just compensation remedy, which operates as a potential

barrier to the filing of takings claims in federal court under *Ex parte Young*.

Most constitutional violations can, of course, be redressed by injunctive relief, and this feature allows citizens to invoke federal protection of their constitutional rights against state interference under *Ex parte Young*. But the Takings Clause is different due to the just compensation provision; the usual remedy for violations of that Clause is monetary, not injunctive in nature. *Knick*, 139 S. Ct. at 2176. If sovereign immunity bars federal takings claims in federal court, as the decision below holds, the Takings Clause is stripped of federal protection from state intrusion. *See, e.g.*, *Jevons v. Inslee*, No. 1:20-CV-3182-SAB, 2021 WL 4443084, at *11 (E.D. Wash. Sept. 21, 2021); (refusing to hear a takings claim against a state official under *Ex parte Young* because "[t]he relief sought by Plaintiffs is foreclosed by the Supreme Court's decision in *Knick*. The remedy for a taking under the Fifth Amendment is damages, not equitable relief."); *Pharmaceutical Research & Mfrs. of America v. Williams*, No. 20-1497, 2021 WL 963760 (D. Minn. Mar. 15, 2021) (dismissing an injunction-seeking takings claim against state officials based on unavailability of equitable relief); *Local 860 Laborers' Int'l Union of N. America v. Neff*, No. 1:20-CV-02714, 2021 WL 2477021, at *6 (N.D. Ohio June 17, 2021) (same). This result converts the right to compensation into a second class right relative to other constitutional rights when it comes to federal judicial protection.

In the end, the loss of federal protection for Takings Clause claims against states leaves people like the Zitos dependent on state procedures for the

vindication of their federal right to compensation. While local compensation processes are available in many states, in some, including Arkansas and Tennessee, there is no process at all because sovereign immunity bars takings claims in both state court *and* federal courts. *Compare Austin v. Arkansas State Highway Comm'n*, 895 S.W.2d 941 (Ark. 1995) (sovereign immunity barred a damages-seeking takings claim against a state), *with Long v. Area Manager, Bureau of Reclamation*, 236 F.3d 910, 916-17 (8th Cir. 2001) (Eleventh Amendment bars takings claims against states in the Eighth Circuit), *and compare Hise v. Tennessee*, 968 S.W.2d 852, 853-55 (Tenn. Ct. App. 1997) (holding that immunity precluded an inverse condemnation claim against the State), *with DLX*, 381 F.3d at 527 (states are immune from takings claims in the Sixth Circuit). This transforms the Just Compensation Clause "into an empty admonition." *See Esposito v. South Carolina Coastal Council*, 939 F.2d 165, 173 n.3 (4th Cir. 1991) (Hall, J., dissenting) (If state immunity applies to takings cases, "a recalcitrant state could nullify the Just Compensation Clause by simply refusing to furnish a procedure to assess and award compensation. The Clause could be converted from a fundamental constitutional right into an empty admonition.").

B. State Court Procedures for Seeking Compensation for a State Taking Are Often More Burdensome Than a Suit Under the Federal Takings Clause

In other states, available state court compensation procedures are usually more burdensome, complicated, and uncertain than a

straightforward Takings Clause suit in federal court. Brief of the Ohio Farm Bureau Federation as Amicus Curiae in Support of Petitioner, *Knick v. Township of Scott*, No. 17-647, 2018 WL 2733954 (U.S. June 4, 2018). Some states, including California and Florida, require property owners to exhaust non-compensatory litigation procedures as a prerequisite to filing a claim for damages for a taking by a state. *See, e.g.*, *California Coastal Comm'n v. Superior Court*, 210 Cal. App. 3d 1488, 1496 (1989) (property owner could not seeking damages for a taking in inverse condemnation because he had failed to first file an action to invalidate the taking); *Florida Dep't of Agric. & Consumer Services v. Dolliver*, 283 So. 3d 953, 955-57 (Fla. Dist. Ct. App. 2019) (summarizing a complicated process in which the legislature must make a special allocation of funds to pay for a takings judgment and the takings victims can petition for that allocation). This multi-layered process confuses, delays, and sometimes prevents the vindication of the Just Compensation Clause. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347-48 (1816) (Story, J.) ("The Constitution has presumed . . . that State attachments, State prejudices, State jealousies, and State interests, might sometimes obstruct, or control, or be supposed to obstruct or control, the regular administration of justice.").

This case provides an apt example. The "exclusive" state court procedure for the Zitos to assert a takings claim against the Commission does not provide compensation if a taking is found. App. B-22. It offers only an "invalidation" remedy. *Id.* at B-20. The Fourth Circuit held that the Zitos must use this procedure to determine if a taking occurred. If a state court finds the Commission caused a taking, the Zitos

must then file a *second* lawsuit, under different state procedures, to obtain compensation for the taking. App. A-15-16. In other words, the Zitos must exhaust a non-compensatory takings procedure to get to a state procedure that might provide compensation for taking of their property by the Commission. *Id.* at A-16. Such a two-suit process has never been tried before in North Carolina and there is no precedent that directly supports or guides it. Moreover, this two-suit state court process for obtaining compensation from the Commission is inconsistent with the law of the Just Compensation Clause, which does not require a plaintiff to exhaust alternative remedies (like invalidation) before suing for compensation. *See Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. at 193 (one asserting a Takings clause violation need not pursue a "declaratory judgment regarding the validity of zoning and planning actions" prior to filing a suit for compensation).

The right to just compensation was never meant to be so complicated or protracted. This Court has made clear that Just Compensation Clause requires the government to pay for every taking, and that payment is due as soon as a taking is found, not years later, after a state court lawsuit. *Knick*, 139 S. Ct. at 2171-73. The states bound themselves to this regime when they enacted the Due Process Clause in the Fourteenth Amendment and subjected themselves to the just compensation remedy incorporated in that Clause. In concluding that sovereign immunity negates these principles, the decision below diminishes both the Fourteenth Amendment and the Takings Clause.

III.

FEDERAL COURTS ARE IN CONFLICT ON THE ISSUE

Many federal courts hold, in agreement with the decision below (and based largely on *Reich*), that sovereign immunity bars takings claims in federal court. But some have rejected this outcome.

In *Allen v. Cooper*, No. 5:15-CV-627-BO, 2021 WL 3682415 (E.D.N.C. Aug. 18, 2021),[7] a federal district court rejected the reasoning of the decision below. *Allen* involved an alleged taking of property arising from North Carolina's unauthorized use of private, copyrighted images of the recovery of Queen Anne's Revenge—the former flagship of the pirate Blackbeard. *Id.* at *1.

Relying primarily on *Knick*, the *Allen* Court rejected the state's sovereign immunity defense. It concluded that *Knick* "decisively endorsed the decision in *First English*, including its statement that the Constitution, '"of its own force, furnish[es] a basis for the court to award money damages against the government,' notwithstanding principles of sovereign immunity." *Id.* at *5. The *Allen* court explained that "the reasoning in *Knick* still applies, even though this case [unlike *Knick*] involves the issue of sovereign immunity." *Knick*, it held, "fatally undermine[s]" the idea "that sovereign immunity applies to cases against States in federal courts when the State's courts remain open to adjudicate such claims." *Id.* The *Allen* court also rejected the conclusion that *Reich* justifies

[7] The *Allen* decision was issued nine days after the Fourth Circuit's decision in this matter, an event of which the *Allen* court was apparently not aware. An appeal has been filed in *Allen*.

applying sovereign immunity to takings claims. *Id.* at *6.

The *Allen* court then looked to the Fourteenth Amendment and concluded it abrogated sovereign immunity:

> The text of the Fifth Amendment supports a finding of automatic abrogation [of immunity]. The Fifth Amendment Takings Clause is one of only two constitutional clauses that dictate a particular remedy, stipulating that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Although the Fifth Amendment only applies to the federal government, the just compensation requirement was extended to the States through the Fourteenth Amendment. Since the Constitution explicitly requires "just compensation," the text of the Fifth Amendment seems to require the government to provide money damages despite any applicable sovereign immunity bars, and there is no Eleventh Amendment language requiring a different outcome.

Id. at *8 (internal citations omitted).

Thus, the *Allen* decision conflicts with the Fourth Circuit's decision in this case. It is not alone in that regard.

In *Devillier v. Texas*, No. 3:20-cv-00223, 2021 WL 3889487 (S.D. Tex. July 30, 2021), another district court rejected the reasoning of the decision below in holding a takings claim against a state proper in federal court, notwithstanding state immunity.

In *Devillier*, property owners asserted that the state caused a compensable taking by knowingly constructing and maintaining an interstate highway in a way that flooded and destroyed their property. *Id.* at *2-3. When the state asserted sovereign immunity, the court rejected it, based in part on the self-executing nature of the Just Compensation Clause. The court explained:

> Drawing support from *Alden*, several state appellate courts have concluded that, even without an express waiver of sovereign immunity, the text of the Fifth Amendment mandates a remedy of just compensation. These courts have held that the purpose of the Fifth Amendment's Takings Clause would be subverted if private takings claims against a state were blocked by sovereign immunity.

Id. at *7.

Concluding that it "agree[s] with and adopt[s] the reasoning provided by these courts," *id.*, the *Devillier* court denied the state's immunity defense, in conflict with the decision below.

Several other federal courts have also concluded, with less analysis, that the Just Compensation Clause overrides sovereign immunity in a takings suit. *See Leistiko v. Sec'y of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government for the damage sustained."); *Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("[S]overeign immunity does not protect the government from a Fifth Amendment

Takings claim because the constitutional mandate is 'self-executing.'").

The Court should grant the Petition to resolve the conflict among the courts on the issue of whether the just compensation requirement incorporated in the Fourteenth Amendment abrogates sovereign immunity when states are charged with taking of property.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

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Respectfully submitted,

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

Counsel for Petitioners