PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 20-1408

MICHAEL ZITO; CATHERINE ZITO,

Plaintiffs – Appellants,

v.

NORTH CAROLINA COASTAL RESOURCES COMMISSION,

Defendant – Appellee.

NORTH CAROLINA COASTAL FEDERATION,

Amicus Supporting Appellee.

Appeal from the United States District Court for the Eastern District of North Carolina, at Elizabeth City. James C. Dever III, District Judge. (2:19-cv-00011-D)

Argued: May 4, 2021 Decided: August 9, 2021

Before GREGORY, Chief Judge, MOTZ, and THACKER, Circuit Judges.

Affirmed by published opinion. Chief Judge Gregory wrote the opinion, in which Judge Motz and Judge Thacker joined.

ARGUED: J. David Breemer, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. Ryan Y. Park, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellees. **ON BRIEF:** Glenn E. Roper, North Highlands, Colorado, Erin E. Wilcox, PACIFIC LEGAL FOUNDATION, Sacramento, California, for Appellants. Joshua H. Stein, Attorney General, Sarah G. Boyce, Deputy Solicitor General, Mary Lucasse, Special Deputy Attorney General, Marc Bernstein, Special Deputy Attorney General, NORTH CAROLINA DEPARTMENT OF JUSTICE, Raleigh, North Carolina, for Appellee. Ramona H. McGee, Sierra B. Weaver, Elizabeth R. Rasheed, SOUTHERN ENVIRONMENTAL LAW CENTER, Chapel Hill, North Carolina, for Amicus North Curiae.

GREGORY, Chief Judge:

This case asks whether a Fifth Amendment takings claim against the North Carolina Coastal Resources Commission (the "Commission") is barred by State sovereign immunity. When the Commission denied Plaintiffs Michael and Catherine Zito (the "Zitos") permission to rebuild their vacation home due to environmental regulations, the Zitos brought suit in federal court, claiming that the State deprived them of the value of their property and committed a

taking under the Fifth Amendment. The district court granted the State's motion to dismiss for lack of subject matter jurisdiction due to the State's immunity from suit in federal court. We affirm the district court's dismissal.

I.

In 2008, the Zitos purchased a beachfront house and lot (the "Property") in South Nags Head, North Carolina. The Property is located on one of the State's barrier islands, a system of narrow islands that run along the State's coast. Between 2008 and 2016, the Zitos used the house as a vacation home and rental property. But on October 10, 2016, the house caught fire and burned to the ground. Following the fire, the Zitos sought to rebuild the house on the same lot.

Given its location, the Zitos' Property is governed by North Carolina's Coastal Area Management Act ("CAMA"). Enacted in 1974, CAMA created the Commission to implement rules regulating land-use planning, development permits, and beach management and restoration along North Carolina's coasts. N.C. Gen. Stat. §§ 113A-103(2), -107, -110, -120, -134.11. One of CAMA's goals is "[t]o [e]nsure that the development or preservation of the . . . coastal area proceeds in a manner consistent with the capability of the land and water for development, use, or preservation based on ecological considerations." *Id.* § 113A-102(b)(2).

To do so, CAMA requires coastal property development to be set back a certain distance from the vegetation line—the first line of natural vegetation which marks the boundary between the beach and

more stable land. 15A N.C. Admin. Code 07H .0305(a)(5), .0306(a)(1). These set-back requirements protect property owners from coastal storms and encroaching waters while also preventing disturbance to the beaches and dunes that act as buffers for the property and environment further inland. *See id.* at .0306(a); Br. of N.C. Coastal Fed'n, as *Amicus Curiae* in Support of Appellee at 11–12. Under CAMA, buildings with less than 5,000 square feet must be set back a distance at least 60 feet or 30 times the local rate of erosion, whichever is farther. 15A N.C. Admin. Code 7H.0306(a)(5)(A). But buildings of less than 2,000 square feet built before June 1, 1979 fall under a grandfather provision, requiring the property to be set back only 60 feet from the line of vegetation. 15A N.C. Admin. Code 7H.0309(b).

Though the Zitos' Property qualifies for the grandfather provision, it fails to satisfy the 60 feet set-back limit. Based on an October 2017 survey, the Property is currently set back only 12 feet from the vegetation line. In 2018, the coastline by the Property eroded at an average rate of six feet per year. The next year, the average rate of erosion climbed to seven feet per year. According to *amicus curiae*, coastal erosion and rising sea levels could cause the Property to be underwater by 2024. Br. of N.C. Coastal Fed'n, as *Amicus Curiae* in Support of Appellee at 7.[1]

[1] The effects of annual erosion are offset, to some extent, by the State's beach renourishment projects. North Carolina has carried out beach renourishment projects in 2010 and 2019. The 2019 renourishment project appears to have still been in progress in June 2020, but the record does not indicate whether the 2019 project is now complete or whether it has affected the setback lines. *See* J.A. 55.

To enforce its set-back regulations, CAMA requires a permit for property development that will affect "any area of environmental concern," such as the barrier islands where the Property is located. N.C. Gen. Stat. § 113A-118(a). To acquire a minor permit—for the construction of a small residential building, such as a house[2]—individuals must apply to the local city or county; if the initial application is denied, applicants may seek administrative review or a variance from the Commission. *Id.* §§ 113A-118(b), -120.1, -121(b), -121.1; 15A N.C. Admin. Code 07J.0201.

The Zitos applied for a permit from the Town of Nags Head. The Town's local permit officer denied the application because the Property did not meet CAMA's set-back requirements. The Zitos then filed a petition for a variance with the Commission. After considering the petition at a public hearing, the Commission issued its Final Agency Decision denying the variance on December 27, 2018. When notifying the Zitos of the denial, the Commission also informed them of their right to appeal the decision in state superior court.

The Zitos filed suit in federal court, arguing that CAMA's restrictions amounted to an unconstitutional taking. The Commission filed a motion to dismiss for lack of subject matter jurisdiction, claiming that the

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[2] Though the Zitos wished only to replace the house that had previously been built on the lot, the Commission's regulations consider the "[r]eplacement of structures damaged or destroyed by natural elements, fire or normal deterioration" to be "development [that] requires CAMA permits." 15A N.C. Admin. Code 7J .0210.

suit was barred by State sovereign immunity. The district court agreed with the Commission. First, it found that the Commission qualifies as an arm of the State subject to the protections of sovereign immunity. *Zito v. N.C. Coastal Res. Comm'n*, 449 F. Supp. 3d 567, 577–79 (E.D.N.C. 2020). It then relied upon this Court's decision in *Hutto*, where we 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." *Id.* at 576 (quoting *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014)). Determining that North Carolina's Constitution permits individuals to bring takings claims in state court, the district court concluded that Plaintiffs' claims against the State were barred by sovereign immunity in federal court. *Id.* at 580–83. The Zitos appealed.

II.

A.

State sovereign immunity presents a question of law that we review de novo. *See Hutto*, 773 F.3d at 542. Because sovereign immunity is waivable, this Court treats it "akin to an affirmative defense," meaning that the defendant bears the burden of demonstrating that sovereign immunity applies. *Id.* at 543.

The Zitos do not dispute that the Commission is an arm of the State, such that sovereign immunity may apply. But they argue that the Fifth Amendment's Takings Clause overcomes State sovereign immunity.

The Eleventh Amendment states that "[t]he 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." U.S. Const. amend. XI. While courts—including this one—frequently refer to States' immunity from suit as "Eleventh Amendment immunity," *see, e.g.*, *Hutto*, 773 F.3d at 542, the phrase is "something of a misnomer, for the sovereign immunity of the States neither derives from, nor is limited by, the terms of the Eleventh Amendment." *Alden v. Maine*, 527 U.S. 706, 713 (1999). Rather, "States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today . . . except as altered by the plan of the [Constitutional] Convention or certain constitutional amendments." *Id.*

The Fifth Amendment provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Zitos contend that because the Fifth Amendment's Takings Clause is self-executing—guaranteeing a remedy of just compensation—it reflects a Constitutional structure that exempts takings claims from the limitations of sovereign immunity.[3] While the

[3] Plaintiffs briefly draw a comparison to the Bankruptcy Clause, which the Supreme Court held to create a constitutional exception to sovereign immunity. *See Cent. Va. Cmty. Coll. v. Katz*, 546 U.S. 356, 373–78 (2006). But the Supreme Court has since declared that this exception is "limited to the Bankruptcy Clause" due to the "singular nature" of bankruptcy jurisdiction. *Allen v. Cooper*, 140 S. Ct. 994, 1002 (2020). The Supreme Court "view[s] bankruptcy as on a different plane, governed by

Takings Clause originally applied only to the federal government, Plaintiffs argue that its incorporation to the States in the Fourteenth Amendment abrogated the sovereign immunity of States as well.

However, this Court adopted a different reading of the Takings Clause and sovereign immunity in *Hutto*, 773 F.3d at 540. In *Hutto*, South Carolina public employees challenged a state law amending pension benefits and contributions for public employees who returned to work after retirement. *Id.* They argued that changes to the law amounted to a taking because the changes ended benefits and required the employees to make additional contributions. Addressing sovereign immunity, the plaintiffs in *Hutto* made the same claim the Zitos make here—that "sovereign immunity *never* bars a constitutional takings claim" due to the Takings Clause's guarantee of just compensation. *Id.* at 551.

This Court disagreed. We observed that the Supreme Court has recognized the surrender of State sovereign immunity in six contexts:

> (1) when a State consents to suit; (2) when a case is brought by the United States or another State; (3) when Congress abrogates sovereign immunity pursuant to Section 5 of the Fourteenth Amendment or pursuant to the Bankruptcy Clause; (4) when a suit is brought against an entity that is not an arm of the State; (5) when a private party sues a

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principles all its own." *Id.* at 1003. Its treatment of the Bankruptcy Clause and sovereign immunity is therefore "a good-for-one-clause-only holding." *Id.*

> state official in his official capacity to prevent an ongoing violation of federal law; and (6) when an individual sues a state official in his individual capacity for ultra vires conduct.

Id. (citing *S.C. State Ports Auth. v. Fed. Mar. Comm'n*, 243 F.3d 165, 176–77 (4th Cir. 2001)). We declined to create an additional, blanket exception for the Takings Clause. Although "there is arguably some tension" between the Fifth Amendment guarantee of just compensation and the bar of sovereign immunity, "that tension is not irreconcilable." *Id.*

To resolve that tension, this Court compared the Takings Clause to the Due Process Clause's right to a remedy for taxes collected in violation of federal law. *Id.* at 551–52. "In a long line of cases," the Supreme Court "has established that due process requires a 'clear and certain' remedy for taxes collected in violation of federal law." *Reich v. Collins*, 513 U.S. 106, 108–09 (1994) (citing *McKesson Corp. v. Div. of Alcoholic Beverages and Tobacco, Fla. Dep't of Bus. Regulation*, 496 U.S. 18 (1990) and "the long line of cases upon which *McKesson* depends"). "[D]espite the constitutional requirement that there be a remedy, the Supreme Court expressly noted in *Reich* . . . that the sovereign immunity that States enjoy in federal court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum." *Hutto*, 773 F.3d at 110 (cleaned up). Nevertheless, *Reich* held that *state courts* must allow suits to recover taxes unlawfully collected, the "sovereign immunity [that] States traditionally enjoy in their own courts notwithstanding." *Reich*, 513 U.S. at 110. "Reasoning analogously," this Court concluded

that "the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims." *Hutto*, 773 F.3d at 551.[4]

B.

The Zitos argue that the Supreme Court's ruling in *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019) undermined *Hutto*'s reasoning. Because *Knick* held that plaintiffs can bring a takings claim in federal court, regardless of state remedies available, the Zitos believe *Knick* abrogated *Hutto*'s rule applying sovereign immunity in federal court if state courts are open to such claims.

Knick addressed the substantive requirements of a takings claim: It decided when the plaintiff has "suffered a violation of his Fifth Amendment rights" and is "able to bring a 'ripe' federal takings claim in federal court." *Knick*, 139 S. Ct. at 2168. Before *Knick*, the Supreme Court held in *Williamson County* that "if a State provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Just Compensation Clause until it has used the procedure and been denied just compensation." *Williamson Cnty. Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 195 (1985). In other words, the *Williamson County* Court believed a person to be denied just

[4] This Court "[did] not decide the question whether a State can close its doors to a takings claim or the question whether the Eleventh Amendment would ban a takings claim in federal court if the State courts were to refuse to hear such a claim." *Hutto*, 773 F.3d at 551.

compensation at the moment a person's claim for compensation was denied in state court. But *Williamson County* inadvertently laid a "trap" for potential litigants. Because the full faith and credit statute, 28 U.S.C. § 1738, requires federal courts to give preclusive effect to a state court decision, *Williamson County*'s substantive definition of a takings claim effectively prevented federal courts from reviewing federal takings claims. *Knick*, 139 S. Ct. at 2169. Reversing *Williamson County*, the Supreme Court held in *Knick* that a property owner is denied just compensation and has an actionable claim in federal court "as soon as a government takes his property for public use without paying for it." *Id.* at 2170.

Knick did not address sovereign immunity, as it involved a suit against a town. *See Jinks v. Richland Cnty.*, 538 U.S. 456, 466 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."). Thus, every circuit to address *Knick*'s effect on sovereign immunity has concluded that *Knick* did not abrogate State sovereign immunity in federal court. *See Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) ("But *Knick* did not involve Eleventh Amendment immunity, which is the basis of our holding in this case."); *Bay Point Props., Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456–57 (5th Cir. 2019) ("Nor does anything in *Knick* even suggest, let alone require, reconsideration of longstanding sovereign immunity principles protecting states from suit in federal court."), *cert. denied*, 140 S. Ct. 2566 (2020); *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020) ("[T]he

Court's opinion in *Knick* says nothing about sovereign immunity."), *cert. denied*, 141 S. Ct. 1390 (2021).

To sidestep this fact, the Zitos suggest that *Knick* indirectly altered the sovereign immunity framework by recognizing the self-executing nature of the Takings Clause in federal court. But the Supreme Court recognized the self-executing nature of the Takings Clause in federal court well before *Knick*. *See Jacobs v. United States*, 290 U.S. 13, 16 (1933) ("[S]uits [ ] based on the right to recover just compensation for property taken by the United States . . . . rested upon the Fifth Amendment. Statutory recognition was not necessary."). *Knick* itself makes this point when quoting *Jacobs* to explain that the form of a state remedy does not qualify the substantive takings claim because the claim "rest[s] upon the Fifth Amendment." *Knick*, 139 S. Ct. at 2170 (quoting *Jacobs*, 290 U.S. at 16). So *Knick* did nothing new with respect to the self-executing nature of the Takings Clause in federal court.[5]

Additionally, *Knick*'s discussion of the Takings Clause does not imply any link between the self-execution of the Takings Clause and the elimination of sovereign immunity. To the contrary, the Supreme Court's analysis compares the Takings Clause to other

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[5] This Court likewise recognized the self-executing nature of the Takings Clause in *Hutto*. *See* 773 F.3d at 551–52 ("Just as the Constitution guarantees the payment of just compensation for a taking, so too does the Due Process Clause provide the right to a remedy for taxes collected in violation of federal law."); *id.*at 553 (quoting other circuits stating that the "self-executing" nature of a takings claim does not override sovereign immunity in federal court).

constitutional rights that may be subject to sovereign immunity. The Court wrote,

> Although *Jacobs* concerned a taking by the Federal Government, the same reasoning applies to takings by the States. 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—just as the existence of a state action for battery does not bar a Fourth Amendment claim of excessive force.

Knick, 139 S. Ct. at 2171. By drawing a comparison to Fourth Amendment claims of excessive force, the Supreme Court indicated that its analysis did not deal with sovereign immunity, which otherwise limits Fourth Amendment suits seeking damages against States. Ultimately, the *Knick* Court expressed its belief that *Williamson County* made the Takings Clause an inferior right "among the provisions of the Bill of Rights"; by reversing *Williamson County*, the Court meant to "restor[e] takings claims" to equal and "full-fledged status . . . among the other protections in the Bill of Rights." *Id.* at 2169–70; *see also id.* at 2177 ("Takings claims against local governments should be handled the same as other claims under the Bill of Rights."). By treating the Takings Clause the same as other constitutional rights, the Supreme Court suggests that it remains subject to the same limitations on those other rights—including sovereign immunity. *See Will v. Mich. Dep't of State Police*, 491 U.S. 58, 66 (1989).

Accordingly, *Knick* did not undermine *Hutto*, where this Court held sovereign immunity to bar a takings claim against a State in federal court if state courts remain open to adjudicating the claim.

III.

We next consider whether North Carolina courts remain open to adjudicating the Zitos' takings claim. The parties agree that state courts satisfy this requirement if they provide a "reasonable, certain, and adequate" means for challenging an action as a taking and obtaining compensation if the challenge is successful. *See* Oral Argument at 29:03–29:19; *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 213 (4th Cir. 2019) (quoting *Cherokee Nation v. S. Kan. Ry. Co.*, 135 U.S. 641, 659 (1890)).

Though North Carolina's Constitution generally provides a cause of action for plaintiffs to bring takings claims, *see Corum v. Univ. of N.C.*, 413 S.E.2d 276, 289 (N.C. 1992), the Zitos contend that takings claims against the Commission are governed by North Carolina General Statutes § 113A-123(b)–(c), which provides an "exclusive" procedure where invalidation of the state action is the sole remedy. Because invalidation does not compensate the plaintiff for any temporary taking, the Zitos insist that North Carolina courts do not provide an adequate avenue for just compensation.

Section 113A-123(b) states that any person with a recorded interest in land affected by a final order of the Commission may "petition the superior court to determine whether the petitioner is the owner of the land in question" and "determine whether . . . the

order constitutes the equivalent of taking without compensation." N.C. Gen. Stat. § 113A-123(b). "Either party shall be entitled to a jury trial on all issues of fact, and the court shall enter a judgment . . . as to whether the Commission order shall apply to the land of the petitioner." *Id.* "The method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be exclusive and such issue shall not be determined in any other proceeding." *Id.* If the court has determined the action to be a taking, and the State still intends to regulate the property, then the State must initiate eminent-domain proceedings "under the provisions of Chapter 146 of the General Statutes," *id.* § 113A-123(c), which would result in compensation. *See* N.C. Gen. Stat. §§ 136-103, -104, -109, -112.

The Zitos, however, emphasize the outcome if the state court rules the Commission's action to be a taking and the State does not pursue eminent-domain proceedings (i.e., if the State agrees to cease the regulatory restriction). To the Zitos, § 113A-123(b) would invalidate the restriction but offer no compensation for the temporary taking. In this situation, the Commission asserts that the plaintiff may bring a subsequent suit under the North Carolina Constitution to obtain compensation for the temporary taking.[6]

[6] At oral argument, the State represented that a plaintiff could file a claim for compensation for the temporary taking the same day that the state court found the Commission's action to be a taking. *See* Oral Argument at 39:12–40:08.

We agree with the Commission. Section 113A-123(b) states that its procedure "shall be exclusive" only "for the determination of *the issue* of whether such order constitutes a taking without compensation." N.C. Gen. Stat. § 113A-123(b) (emphasis added). It does not state that this shall be the exclusive procedure for determining all available remedies. Because the North Carolina Constitution provides an independent cause of action for plaintiffs to seek damages for a takings claim, *Corum*, 413 S.E.2d at 289, it permits the Zitos to pursue damages after establishing through § 113A-123(b) that the regulation amounted to a taking.

Even if we assume that N.C. Gen. Stat. § 113A-123(b) provides the exclusive remedy for a takings claim brought against the Commission, North Carolina's constitutional guarantees would override that limitation to the extent it prevented the redress for a temporary taking. *See Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 163 S.E.2d 363, 371 (N.C. 1968) ("It is familiar learning that a citizen may sue the State . . . for taking his private property for a public purpose under the Constitution where no statute affords an adequate remedy."); *Corum*, 413 S.E.2d at 289 ("[I]n the absence of an adequate state remedy, one whose state constitutional rights have been abridged has a direct claim against the State under our Constitution."); *Taylor v. Wake Cnty.*, 811 S.E.2d 648, 652 (N.C. Ct. App. 2018) ("A *Corum* claim allows a plaintiff to recover compensation for a violation of a state constitutional right for which there is either no common law or statutory remedy, or when

the common law or statutory remedy that would be available is inaccessible to the plaintiff.").[7]

For instance, in *Midgett*, a landowner sued the State Highway Commission for a taking because its construction of a nearby highway caused his property to become flooded. *Midgett v. N.C. State Highway Comm'n*, 132 S.E.2d 599, 602 (N.C. 1963), *rev'd on other grounds by Lea Co. v. N.C. Bd. of Transp.*, 304 S.E.2d 164 (N.C. 1983). Though North Carolina provided an "ordinarily exclusive" statutory remedy for the taking, the applicable condemnation statute contained a statute of limitations that "would make a recovery by the plaintiff in the instant case impossible." *Id.* at 608. Nevertheless, the North Carolina Supreme Court held that the plaintiff's taking claim could be maintained under the State Constitution. *Id.* The Court explained that the State Constitution's promise of just compensation for a taking is not "susceptible of impairment by legislation," and where "no statute affords an adequate remedy under a particular fact situation, the common law will furnish the appropriate action for adequate redress of such grievance." *Id.*; *see also Craig*

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[7] Though this right of action arises from a state constitutional right, North Carolina uses the same standard for determining whether a taking has occurred under both the U.S. and North Carolina Constitutions. *See Finch v. City of Durham*, 384 S.E.2d 8, 19 (N.C. 1989) (holding that a rezoning did not constitute a taking under the North Carolina Constitution and that the rezoning therefore did not constitute a taking under the U.S. Constitution "for the same reasons"); *Guilford Cnty. Dep't of Emergency Servs. v. Seaboard Chem. Corp.*, 441 S.E.2d 177, 183 (N.C. Ct. App. 1994) ("We find that these tests are consistent and therefore analyze Seaboard's state and federal constitutional [takings] claims together.").

ex rel. Craig v. New Hanover Cnty. Bd. of Educ., 678 S.E.2d 351, 356–57 (N.C. 2009) (reaffirming *Midgett* and North Carolina's "long-standing emphasis on ensuring redress for every constitutional injury").

In reply, the Zitos contend that even if they can bring a takings claim for damages after § 113A-123(b) proceedings, the statutory proceedings effectively create an exhaustion requirement forbidden by the Supreme Court in *Knick*. But again, the Zitos misstate the holding of *Knick*. *Knick* prohibited the use of *state* procedures as an exhaustion requirement for a takings claim in *federal* court. *See Knick*, 139 S. Ct. at 2167. But *Knick* did not prohibit States from establishing procedural requirements in their own courts. Indeed, *Knick* reaffirmed *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 n.21 (1984), where the Supreme Court upheld a federal statute that "required the plaintiff to attempt to vindicate its [takings] claim [ ] through arbitration before proceeding [with their takings claim] under the Tucker Act." *Knick*, 139 S. Ct. at 2173. This requirement was permissible because Congress "is free to require plaintiffs to exhaust administrative remedies before bringing constitutional claims" in federal court. *Id.*; *see also Ladd*, 971 F.3d at 579 ("In reaffirming [*Ruckelshaus*], the Court notes that Congress can, as a condition of its waiver of sovereign immunity in the Tucker Act, require takings plaintiffs to exhaust administrative remedies before proceeding to federal court."). If Congress can condition its waiver of federal sovereign immunity in federal court by requiring plaintiffs to satisfy certain exhaustion requirements, it follows that States may condition their waiver of State sovereign immunity the same

way in their courts as well. *See Felder v. Casey*, 487 U.S. 131, 138 (1988) ("No one disputes the general and unassailable proposition . . . that States may establish the rules of procedure governing litigation in their own courts.").

Of course, there are limits on the procedural constraints that the States may impose. The Supreme Court has warned that state procedures violate the Supremacy Clause if the procedures effectively deprive plaintiffs of their federal rights. *See id.* ("[W]here state courts entertain a federally created cause of action, the 'federal right cannot be defeated by the forms of local practice.'"). For example, a State may not adopt procedures that discriminate between state and federal claims. *See Haywood v. Drown*, 556 U.S. 729, 738 (2009); *Felder*, 487 U.S. at 141. But the Zitos' arguments revolve around *Knick*, and they otherwise offer no argument for why North Carolina's procedures might impede their federal rights in violation of the Supremacy Clause. As explained above, North Carolina's procedures are consistent with *Knick*; North Carolina's procedures guarantee the ability to challenge the Commission's action as a taking in state court; and if North Carolina's statutes do not provide an adequate constitutional remedy, the North Carolina Constitution guarantees the Zitos the ability to seek that remedy in state court.

Thus, North Carolina's courts remain open for takings claims. Under *Hutto*, this means that sovereign immunity bars the Zitos' claims against the State in federal court. 773 F.3d at 552.

IV.

We recognize there must be sorrow in the Zitos' loss of their home, and even more so in light of the steadily rising swells of our oceans' waters. But State sovereign immunity bars their takings claims against the Commission in federal court when North Carolina's courts remain open to adjudicating those claims. For the foregoing reasons, we affirm the district court's judgment.

AFFIRMED

Appendix B-1

Filed March 27, 2020

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH CAROLINA
NORTHERN DIVISION
No. 2:19-CV-11-D

MICHAEL ZITO, and CATHERINE ZITO,	)	
Plaintiffs,	)	**ORDER**
v.	)	
NORTH CAROLINA COASTAL RESOURCES COMMISSION,	)	
Defendant.	)	

On March 6, 2019, Michael and Catherine Zito ("the Zitos," or "plaintiffs") filed a complaint against the North Carolina Coastal Resources Commission ("the Commission") alleging a taking of private property without just compensation in violation of the Fifth Amendment of the United States Constitution. *See* Compl. [D.E. 1] ¶¶ 63-78.[1] The Zitos seek declaratory relief, damages, just compensation, reasonable attorney fees and costs, and all other appropriate relief. *See id.* at 13. On August 9, 2019, the North Carolina Coastal Federation ("the

[1] On June 5, 2016, the Zitos waived count one of their complaint, which alleged an "inverse condemnation" takings claim under the North Carolina Constitution. *See* [D.E. 16] 1 n.1; *cf.* Compl. ¶¶ 48-62.

Federation") moved to intervene as a matter of right under Federal Rule of Civil Procedure 24(a)(2), or alternatively, by permission under Federal Rule of Civil Procedure 24(b) [D.E. 24]. On August 20, 2019, the Commission moved to dismiss the complaint for lack of subject-matter jurisdiction under Federal Rule of Civil Procedure 12(b)(1) [D.E. 36]. On that same date, the Commission amended its initial answer to the complaint [D.E. 39]. On August 27, 2019, the Zitos opposed the Federation's motion to intervene [D.E. 40]. On September 5, 2019, the Federation replied [D.E. 41]. On September 6, 2019, the Zitos responded to the Commission's motion to dismiss [D.E. 42]. On September 20, 2019, the Commission replied [D.E. 44]. On September 25, 2019, the Zitos moved to clarify the status of the stipulated administrative facts [D.E. 45]. On October 16, 2019, the Commission responded [D.E. 49]. On October 24, 2019, the Zitos replied [D.E. 50].

As explained below, *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 542-43 (4th Cir. 2014), requires this court to hold that the Eleventh Amendment bars the Zitos' Fifth Amendment takings claim. If the Zitos are to obtain relief on this claim, they first must get such relief from the United States Court of Appeals for the Fourth Circuit sitting en banc or from the United States Supreme Court. Thus, the court grants the Commission's motion to dismiss [D.E. 36] and dismisses the complaint without prejudice for lack of subject-matter jurisdiction. The court denies as moot the Federation's motion to intervene [D.E. 24] and the Zitos' motion to clarify the status of the stipulated administrative facts [D.E. 46].

I.

The Zitos are residents of Timonium, Maryland and own a beachfront lot at 10224 East Seagull Drive in South Nags Head, North Carolina ("the property"). *See id.* at ¶¶ 11-12. The Zitos bought the beachfront lot in 2008 for $438,500 and the lot contained a 1,700 square foot home built in 1982. *See id.* at ¶¶ 12-13. On October 10, 2016, a fire destroyed the Zitos' home on the property. *See id.* at ¶ 18. On July 31, 2017, the Zitos sought to rebuild their home, with a total floor area of 1,792 on a 32' x 28' footprint, and submitted a North Carolina Coastal Area Management Act ("CAMA") Minor Permit application to the Town of Nags Head's CAMA Local Permit Officer ("LPO") *See id.* at ¶¶ 20, 26-27.

CAMA governs development of North Carolina's ocean areas and establishes various rules and regulations. *See id.* at ¶¶ 20-22. These rules and regulations include set-back requirements for ocean-front development on property within the Ocean Erodible Area of Environmental Concern ("AEC") that are based on a combination of annual erosion rates, the location of the first stable, natural vegetation line, and the size of the building. *See id.* at ¶¶ 20-24; 15A N.C. Admin. Code 7H.0304. Buildings of less than 5,000 square feet have a set-back line from the first stable line of vegetation of at least 30 times the annual erosion rate. *See* Compl. at ¶ 23; 15A N.C. Admin. Code 7H.0306(5)(a). Buildings of less than 2,000 square feet built before June 1, 1979, fall under a grandfather provision that establishes a reduced set-back line of 60 feet from the line of vegetation, if the standard set-back line would otherwise prevent

building. *See* Compl. at ¶ 24; 15A N.C. Admin. Code 7H.0309(b). For CAMA permits, the local coastal governments are the initial decisionmakers, and applicants can seek a variance from the Commission if their initial permit is denied. *See* Compl. at ¶ 25.

The Zitos' property falls within the AEC. *See id.* at 29. The AEC official erosion rate is 6 feet per year, which, when multiplied by 30 as required by CAMA, results in a standard setback line of 180 feet from the first line of stable vegetation. *See id.*; 15A N.C. Admin. Code 7H.0306(5)(a). On April 26, 2018, the Town of Nags Head LPO denied the Zitos' CAMA Minor Permit. *See* Compl. ¶ 32; Ex. C [D.E. 1-4]. The LPO did so because the "[the Zitos'] home is setback approximately 12 ft. landward of the static vegetation line," and thus did not meet CAMA's requirements. *See* Compl. ¶ 32; Ex. C [D.E. 1-4] 3.

After the denial, the Zitos filed a variance petition with the Commission. *See* Compl. ¶¶ 25, 34. On November 27, 2018, the Commission considered the variance petition at a public hearing. *See id.* at ¶ 35. On December 27, 2018, the Commission denied the variance and issued a "Final Agency Decision." *See id.* at ¶ 36; Ex. D [D.E. 1-5]. In its "Final Agency Decision," the Commission concluded that the Zitos failed to demonstrate the requisite hardship to qualify for a variance. *See* Compl. ¶ 37; Ex. D [D.E. 1-5] 11-16. On March 6, 2019, the Zitos filed this action and sought declaratory relief, just compensation, reasonable attorney fees and costs, and all other appropriate relief.

On May 9, 2019, the Commission moved to dismiss; the complaint, asserting three grounds for

dismissal: (1) under Rule 12(b)(1) of the Federal Rules of Civil Procedure for lack of subject-matter jurisdiction; (2) under the Eleventh Amendment's grant of sovereign immunity; and (3) under Rule 12(b)(6) of the Federal Rules of Civil Procedure for failure to state a claim [D.E 13, 14]. On June 5, 2019, the Zitos responded in opposition, and waived the state law inverse condemnation takings claim in count one of their complaint [D.E. 16]. On June 19, 2019, the Commission replied [D.E. 17].

On June 21, 2019, the Supreme Court decided *Knick v. Township of Scott*, 139 S. Ct. 2162 (2019). In *Knick*, the Court overruled *Wi11iamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), a case that had formed a core part of the Commission's motion to dismiss. *See Knick*, 139 S. Ct. at 2167-68; [D.E. 14] 9-17. In *Knick*, the Court removed *Williamson County*'s state-litigation requirement and held that a "property owner has suffered a violation of his Fifth Amendment rights when the government takes his property without just compensation, and therefore may bring his claim in federal court under [section] 1983 at that time." *Knick*, 139 S. Ct. at 2168. On June 26, 2019, this court denied the Commission's motion to dismiss and motion for leave to file a supplemental memorandum in light of *Knick* [D.E. 19]. *See* [D.E. 20, 21]. On July 10, 2019, the Commission answered the complaint [D.E. 22], and on August 20, 2019, amended its answer [D.E. 39].

On August 20, 2019, the Commission moved, for a second time, to dismiss for lack of jurisdiction [D.E. 36] and filed a supporting memorandum with three

arguments [D.E. 38]. First, the Eleventh Amendment bars the Zitos from asserting their federal takings claim in federal court since they could have brought a takings claim in state court. *See* [D.E. 38] 7-10; *Hutto*, 773 F.3d at 552. Second, and relatedly, the Eleventh Amendment provides the Commission Eleventh Amendment immunity in federal court because it is an "arm of the state." *See* [D.E. 38] at 10-20. Third, Congress has not abrogated the Commission's Eleventh Amendment immunity, and the Commission has not waived it. *See id.* at 21-24.

On September 6, 2019, the Zitos responded in opposition [D.E. 42]. They argued that the Fifth Amendment's Just Compensation Clause is self-executing, that it is binding on the states through the Fourteenth Amendment, and that the Eleventh Amendment does not bar claims against states under the Just Compensation Clause in federal court. *See id.* at 7-10. The Zitos also argued that, even if the Just Compensation Clause is not self-executing, they cannot bring a takings claim in North Carolina state court and thus the Eleventh Amendment should not apply. *See id.* at 12-16. On September 20, 2019, the Commission replied and argued that *Hutto* remains binding precedent, that North Carolina state courts remain open for the Zitos to assert their takings claim, and that the court should not accept wholesale the Zitos' statement of facts concerning the administrative and statutory scheme. *See* [D.E. 44].

II.

A.

The Fifth Amendment Takings Clause applies to the States through the Fourteenth Amendment *See, e.g.*, *Murr v. Wisconsin*, 137 S. Ct. 1933, 1942 (2017); *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536 (2005). It provides that private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. This prohibition "was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). It applies to temporary government actions as well as permanent ones. *See Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 322 (2002); *First English Evangelical Lutheran Church v. Cty. of Los Angeles*, 482 U.S. 304, 318-19 (1987); *Front Royal & Warren Cty. Indus. Park Corp. v. Town of Front Royal*, 135 F.3d 275, 285 (4th Cir. 1998).

"The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property." *Lingle*, 544 U.S. at 537. For example, when the government uses its eminent domain power to condemn a person's land for some public purpose (such as to build a road or a military base), the government has "taken" that land and must pay just compensation for it. *See, e.g.*, *Ark. Game & Fish Comm'n v. United States*, 568 U.S. 23, 31-32 (2012); *Stop the Beach Renourishment Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 713-15 (2010); *Lingle*, 544 U.S. at 537; *Tahoe-Sierra*, 535 U.S. at 321-22.

A taking also occurs when instead of appropriating or invading private property, the government undertakes "regulatory actions that are functionally equivalent to the classic taking." *Lingle*, 544 U.S. at 539; *see Murr*, 137 S. Ct. at 1942-43; *Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2427 (2015). "[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking." *Ark. Game & Fish Comm'n*, 568 U.S. at 31; *see Stop the Beach Renourishment Inc.*, 560 U.S. at 713. Nonetheless, the Supreme Court has identified two situations in which a regulation will, per se, constitute a taking. First, a regulation is a taking if it authorizes a "permanent physical occupation" of property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982); *see, e.g.*, *Ark. Game & Fish Comm'n*, 568 U.S. at 32. Second, a regulation is a taking if it requires a property owner to sacrifice all economically beneficial use of the property, unless the regulation does no more than enforce limits that "inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1029 (1992).[2]

Regulations that fit neither per se rule are evaluated using the multi-factor balancing test in *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104 (1978). *See Horne*, 135 S. Ct at 2427; *Ark. Game & Fish Comm'n*, 568 U.S. at 31-32; *Lingle*, 544 U.S. at 538-39. The so-called "'Penn Central factors" include

[2] This principle also applies under the North Carolina Constitution. *See, e.g.*, *Helms v. City of Charlotte*, 255 N.C. 647, 655-57, 122 S.E.2d 817, 824-25 (1961).

(1) the regulation's economic impact on the claimant, (2) the extent to which the regulation interferes with the claimant's reasonable, investment-backed expectations, and (3) the character of the government's action. *See Murr*, 137 S. Ct at 1943; *Lingle*, 544 U.S. at 538-39; *Penn Cent.*, 438 U.S. at 124. A regulatory taking (just like a "classic taking") can be either permanent or temporary. *See Tahoe-Sierra*, 535 U.S. at 322-23; *Lucas*, 505 U.S. at 1030 & n.17; *First English*, 482 U.S. at 318-19; *Sansotta v. Town of Nags Head*, 97 F. Supp. 3d 713, 729-30 (E.D.N.C. 2014).

B.

The Eleventh Amendment states, in full: "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." U.S. Const. amend. XI. The Eleventh Amendment provides states with "immuni[ity] from suits brought in federal courts by her own citizens as well as by citizens of another state," a concept known as sovereign immunity. *Edelman v. Jordan*, 415 U.S. 651, 663 (1974). Historically, the "Fourth Circuit has 'been unclear on whether a dismissal on Eleventh Amendment immunity grounds is a dismissal for failure to state a claim under Rule 12(b)(6) or a dismissal for lack of subject-matter jurisdiction under Rule 12(b)(1).'" *Kariuki v. Dep't of Ins.*, No. 5:18-CV-341-D, 2019 WL 2559807, at *3 (E.D.N.C. June 20, 2019) (unpublished) (quoting *Andrews v. Daw*, 201 F.3d 521, 524 n.2 (4th Cir. 2000)), *appeal dismissed*, 2020 WL 1062217 (4th

Cir. Mar. 5, 2020) (per curiam) (unpublished). But the Fourth Circuit recently held that "sovereign immunity deprives federal courts of jurisdiction to hear claims, and a court finding that a party is entitled to sovereign immunity must dismiss the action for lack of subject-matter jurisdiction." *Cunningham v. Gen. Dynamics Info. Tech., Inc.*, 888 F.3d 640, 649 (4th Cir. 2018) (quotation omitted); *see Ackerson v. Bean Dredging LLC*, 589 F.3d 196, 207 (5th Cir. 2009); *Hill v. CBAC Gaming LLC*, No. DKC 19-0695, 2019 WL 6729392, at *4 (D. Md. Dec. 11, 2019) (unpublished). Accordingly, the court analyzes the Commission's assertion of Eleventh Amendment sovereign immunity under Rule 12(b)(1).

A Rule 12(b)(1) motion to dismiss for sovereign immunity under the Eleventh Amendment tests subject-matter jurisdiction, which is the court's "statutory or constitutional power to adjudicate the case." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 89 (1998) (emphasis omitted). A federal court "must determine that it has subject-matter jurisdiction over [a claim] before it can pass on the merits of that [claim]." *Constantine v. Rectors & Visitors of George Mason Univ.*, 411 F.3d 474, 479-80 (4th Cir. 2005). In considering a motion to dismiss for lack of subject-matter jurisdiction, the court may consider evidence outside the pleadings without converting the motion into one for summary judgment. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). Although plaintiffs bear the burden of establishing that this court has subject-matter jurisdiction over their claims, *see, e.g.*, *Steel Co.*, 523 U.S. at 104; *Evans*, 166 F.3d at 647; *Richmond, Fredericksburg & Potomac R.R. v. United*

States, 945 F.2d 765, 768 (4th Cir. 1991), the party asserting sovereign immunity bears the burden of demonstrating that immunity. *See Hutto*, 773 F.3d at 543 (collecting cases).

In *Hutto*, the Fourth Circuit 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." *Hutto*, 773 F.3d at 552 (emphasis omitted). Thus, to dismiss a Fifth Amendment takings claim, *Hutto* requires: (1) an entity to enjoy sovereign immunity under the Eleventh Amendment and (2) the state to provide an open forum to adjudicate such a takings claim. *See id.* at 551-52.

The Zitos argue that the Eleventh Amendment offers states, and their related. entities, no protection against a Fifth Amendment takings claim in federal court. *See* [D.E. 42] 7-11. Specifically, the Zitos contend that given "the automatically-effective nature of the damages remedy in the Just Compensation Clause, the imposition of that Clause on the states through the Fourteenth Amendment was the sole congressional action needed to open states to takings claims seeking damages." [D.E. 42] 10-11. In order to distinguish *Hutto* and to support their argument, the Zitos cite footnote 9 in *First English*, 482 U.S. at 316 n.9. The Zitos then contend: (1) "the *Hutto* panel was not presented with the full, Fourteenth Amendment-based argument against sovereign immunity"; and (2) the *Hutto* panel did not "consider the Supreme Court's decision in *First English*." [D.E. 42] 11.

This court cannot ignore binding Fourth Circuit precedent, even if the Zitos offer a persuasive

rationale to consider doing so. Just as a court of appeals cannot overrule the Supreme Court, a district court cannot overrule a court of appeals. *See Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484 (1989) ("If a precedent of [the Supreme] Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to [the Supreme] Court the prerogative of overruling its own decisions."). *Hutto* controls the disposition of this case, and this court must follow it until either the Fourth Circuit sitting en banc or the Supreme Court instructs otherwise. *See Agostini v. Felton*, 521 U.S. 203, 237-38 (1997); *United States v. Sterling*, 724 F.3d 482, 501-02 (4th Cir. 2013); *Waugh Chapel S., LLC v. United Food & Commercial Workers Union Local 27*, 728 F.3d 354, 363 (4th Cir. 2013); *United States v. Logan*, No. 5:08-CR-20-D, 2008 WL 11422532, at *7 (E.D.N.C. Sept. 4, 2008) (unpublished), *aff'd in part, vacated in part*, 395 F. App'x 38 (4th Cir. 2010) (per curiam) (unpublished); *Brown v. N.C. Div. of Motor Vehicles*, 987 F. Supp. 451, 458 (E.D.N.C. 1997), *aff'd*, 166 F.3d 698 (4th Cir. 1999).

Alternatively, the Zitos underrate *Hutto*'s analysis and overrate the strength of footnote nine in *First English*. As for *Hutto*, the Fourth Circuit provided a tight analogy from Supreme Court precedent to support its holding. *See Hutto*, 773 F.3d at 551-52. Just as states can invoke sovereign immunity for *tax disputes* in *federal court* so long as a state forum remains open, so too states can invoke sovereign immunity for *takings claims* in *federal court* so long as a state forum remains open. *See id.*; *Reich*

v. Collins, 513 U.S. 106, 110 (1994) ("[T]he sovereign immunity [that] states enjoy in *federal* court, under the Eleventh Amendment, does generally bar tax refund claims from being brought in that forum," but state courts must hear suits to recover taxes unlawfully extracted in violation of federal law notwithstanding the "sovereign immunity [that] [s]tates traditionally enjoy in their own courts.");[3] *cf. Alden v. Maine*, 527 U.S. 706, 740 (1999) (holding that Congress, under Article I of the Constitution, cannot subject nonconsenting states to private suits for damages in state courts for allegedly violating federal law, but declining to overrule *Reich* because the obligation in *Reich* "arises from the Constitution itself"). Moreover, the Fourth Circuit in *Hutto* discussed two cases that rejected the Zitos' proposed resolution between the self-executing Just Compensation Clause in the Fifth Amendment and sovereign immunity in federal court in the Eleventh Amendment. *See Hutto*, 773 F.3d at 553; *Seven Up Pete Venture v. Schweitzer*, 523 F.3d 948, 954 (9th Cir.

[3] In *Reich*, plaintiff was a retired federal military officer who sued Georgia in Georgia state court seeking a refund of taxes that Georgia imposed on plaintiff's federal retirement benefits. *See Reich*, 513 U.S. at 108. The Georgia tax scheme violated the intergovernmental tax immunity doctrine dating back to *McCulloch v. Maryland*, 4 Wheat. 316 (1819), and generally codified at 4 U.S.C. § 111. *See Reich*, 513 U.S. at 108. The Georgia Supreme Court refused to permit plaintiff to obtain a refund in state court. *See id.* at 109-12. The United States Supreme Court held that "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 Due Process Clause] of the Fourteenth Amendment." *Id.* at 109 (quotation omitted). Thus, plaintiff could seek relief in Georgia state court for taxes that Georgia improperly imposed on his federal retirement benefits in violation of federal law. *See id.* at 108-112.

2008) ("[W]e conclude that the constitutionally grounded self-executing nature of the Takings Clause does not alter the conventional application of the Eleventh Amendment"); *DLX, Inc. v. Kentucky*, 381 F.3d 511, 526 (6th Cir. 2004) ("Treating DLX's claim as a self-executing reverse condemnation claim, . . . we conclude that the Eleventh Amendment's grant of immunity protects Kentucky from that claim . . . .").

As for footnote nine in *First English*, footnote nine cannot bear the weight that the Zitos place on it. *See First English*, 482 U.S. at 316 n.9. First, footnote nine is dicta in that the Court was responding not to a principal argument of the parties, but rather to the United States' amicus brief. *See id.* Second, footnote nine was not essential to deciding *First English*. *See id.* Indeed, *First English* did not concern the Eleventh Amendment or even mention it. Rather, in *First English*, the Supreme Court reversed the California First District Court of Appeal and held that a landowner who claimed that his property has been "taken" in violation of the Fifth and Fourteenth Amendments by a "land-use regulation may [] recover damages for the time before it is finally determined that the regulation constitutes a 'taking' of his property." *Id.* at 306-07. In addition, the *Hutto* panel analyzed *Seven Up* and *DLX* to explain the significance of a state-court remedy to the Eleventh Amendment's self-executing nature and discussed *Reich* and *Alden* to support its holding. *See Hutto*, 773 F.3d at 551-53; *Seven Up*, 523 F.3d 954-956; *DLX*, 381 F.3d at 526-28. Although the *Hutto* panel did not cite *First English*, the *Hutto* panel grappled with the issues that footnote nine in *First English* presented. Accordingly, the court rejects the Zitos' argument.

III.

A.

Because the Commission is asserting sovereign immunity, it bears the burden of proving such immunity. *See Hutto*, 773 F.3d at 542-43. The Eleventh Amendment protects not only states, but also "'state agents and state instrumentalities,' or in other words, arms of the state." *Lane v. Anderson*, 660 F. App'x 185, 195 (4th Cir. 2016) (per curiam) (unpublished) (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 (1997)). "The purpose of the arm-of-state inquiry is to distinguish arms or alter egos of the state from mere political subdivisions of [the] State such as counties or municipalities, which, though created by the state, operate independently and do not share the state's immunity." *U.S. ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 804 F.3d 646, 651 (4th Cir. 2015) (alteration in original) (quotation omitted); *see Kitchen v. Upshaw*, 286 F.3d 179, 184 (4th Cir. 2002). To determine whether a state-created entity is an "arm of the state," the court considers four, non-exclusive factors:

> (1) whether any judgment against the entity as defendant will be paid by the State or whether any recovery by the entity as plaintiff will inure to the benefit of the State;
>
> (2) the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors or officers, who funds the entity, and whether the State retains a veto over the entity's actions;

> (3) whether the entity is involved with state concerns as distinct from non-state concerns, including local concerns; and
>
> (4) how the entity is treated under state law, such as whether the entity's relationship with the State is sufficiently close to make the entity an arm of the State.

S.C. Dep't of Disabilities & Special Needs v. Hoover Universal, Inc., 535 F.3d 300, 303 (4th Cir. 2008) (quotation and alteration omitted); *see Lane*, 660 F. App'x at 195; *Oberg*, 804 F.3d at 650-51; *Ram Ditta v. Md. Nat'l Capital Park & Planning Comm'n*, 822 F.2d 456, 457-58 (4th Cir. 1987). Although each factor is significant, the most important, but not dispositive, factor "is whether the state treasury will be responsible for paying any judgement that might be awarded." *Hutto*, 773 F.3d at 543 (quotation omitted); *see Lane*, 660 F. App'x at 195; *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 137 n.4 (4th Cir. 2014); *Ram Ditta*, 822 F.2d at 457. When factors conflict, the twin reasons for the Eleventh Amendment—protecting state treasuries and respecting state sovereign dignity—must guide the analysis. *See Oberg*, 804 F.3d at 676; *Gray v. Laws*, 51 F.3d 426, 432 (4th Cir. 1995). At bottom, the court must "determine whether the governmental entity is so connected to the State that the legal action against the entity would . . . amount to 'the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties.'" *Cash v. Granville Cty. Bd. of Educ.*, 242 F.3d 219, 224 (4th Cir. 2001) (quoting *Seminole Tribe v. Florida*, 517 U.S. 44, 58 (1996)).

As for the first factor concerning responsibility for judgments, the finances of the Commission and North Carolina are intertwined. The Commission, along with the DCM and larger CAMA programs, "receive[s] funding from the North Carolina General Assembly ("NCGA"), federal grants and appropriations, and permit revenue," which become state funds when deposited in State Treasury accounts. Davis Dec. [D.E. 14-2] ¶ 10; *see* N.C. Gen. Stat. §§ 143C-1-1(d)(25). Ultimately, the Commission's budget is part of the Governor's budget, and not independent of the state. *See* Davis Dec. at ¶ 11; N.C. Gen. Stat. §§ 143C-3-3(a), 3-5(a), and 5-4(b). The Commission does not administer its own accounts. Rather, the state does. *See* N.C. Gen. Stat. § 147-77. Likewise, the Commission does not "own any property or have any resources apart from the state with which to pay a judgment." Davis Dec. at ¶ 12. Moreover, with any judgment serving as an "unbudgeted expense" for the Commission, the state would feel the effect directly through its Treasury because "the State is the Commission's exchequer." [D.E. 38] 12; *see* Davis Dec. at ¶ 13. Although the state is not explicitly liable for the Commission's liability, the state is functionally liable for any judgment. *See Oberg*, 804 F.3d at 658 ("A state may also be functionally liable if the funds available to pay any judgment effectively belong to the state rather than the agency."). Thus, the first factor strongly favors the Commission.

As for the second factor concerning autonomy, the Commission is not autonomous. In analyzing autonomy, the court considers "the degree of autonomy exercised by the entity, including such circumstances as who appoints the entity's directors

or officers, who funds the entity, and whether the State retains a veto over the entity's actions." *Oberg*, 804 F.3d at 668 (quotation omitted). Both the appointment and funding considerations reveal that the Commission lacks autonomy. Either the Governor or the NCGA appoints its directors, *see* N.C. Gen. Stat. §§113A-104(b1) and 104(i), and the NCGA funds the Commission as part of the Governor's budget. *See* N.C. Gen. Stat. §§ 143C-3-3(a), 3-5(a), and 5-4(b). Although the Governor and the NCGA lack an explicit veto over the Commission's actions, the Attorney General of North Carolina serves as the Commission's attorney and approves use of private counsel and any settlement over $75,000. *See* N.C. Gen. Stat. §§ 113A-124(d), 114-2.3, and 114-2.4.

As for the third factor concerning statewide concern, the Commission regulates the coastal areas of North Carolina and thereby affects areas of statewide importance. *See Adams v. N.C. Dep't of Nat. & Econ. Res.*, 295 N.C. 683, 691-93, 249 S.E.2d 402, 407-08 (1978); *Oberg*, 804 F.3d at 674. As for the fourth factor concerning the entity's treatment under state law, North Carolina treats the Commission as if it were part of the state in several ways. For example, the NCGA created the Commission. *See* N.C. Gen. Stat. § 113A-104. Good governance laws such as the State Government Ethics Act apply to the Commission. *See* N.C. Gen. Stat. § 113A-104(c2). North Carolina's Administrative Procedure Act applies to the Commission. *See* N.C. Gen. Stat. §§ 113A-121.1(a), 150B-2(1a). Thus, all four factors weigh in favor of granting the Commission sovereign immunity.

Because the Commission has proven that it is an arm of the state and has sovereign immunity under the Eleventh Amendment, the burden shifts to the Zitos to prove that the Commission has waived its sovereign immunity, or that the Commission's sovereign immunity has been abrogated. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 177 (4th Cir. 2019) ("Once a defendant has [proven that it is an arm of the state], the burden to prove that immunity has been abrogated or waived would then fall to the plaintiff."). As for waiver, the Zitos have alleged no facts to demonstrate that the Commission has clearly and unequivocally waived immunity to a federal takings claims in federal court. *See, e.g.*, *Port Auth. Trans-Hudson Corp. v. Feeney*, 495 U.S. 299, 305-06 (1990); *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 241 (1985), *superseded by statute*, 42 U.S.C. § 2000d-7; *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 99 (1984); *Pense v. Md. Dep't of Pub. Safety & Corr. Servs.*, 926 F.3d 97, 101 (4th Cir. 2019). As for abrogation, the Zitos argue that the self-executing nature of the Fifth Amendment means that Congress need not provide statutory abrogation—the Fourteenth Amendment already did so itself. *See* [D.E. 42] 10-11; *cf. Kimel v. Fla. Bd. of Regents*, 528 U.S. 62, 73 (2000) ("To determine whether a federal statute properly subjects States to suits by individuals, we apply a simple but stringent test: Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute.") (quotation omitted). However, *Hutto* forecloses this argument. *See Hutto*, 773 F.3d at 551-552. Accordingly, the Commission has

not waived its sovereign immunity, and it has not been abrogated.

B.

North Carolina also provides a forum to adjudicate the Zitos' takings claim. Under *Hutto*, a state court must remain available to hear a takings claim in order for a state to enjoy sovereign immunity in federal court. *See Hutto*, 773 F.3d at 551-552. Here, the Zitos can seek relief under both the state statutory scheme and the North Carolina Constitution. As for the state statutory scheme, N.C. Gen. Stat. § 113A-123 grants the ability to challenge Commission actions in state court, setting numerous procedural requirements that include venue, statute of limitations, and a jury-trial right, among others. *See* N.C. Gen. Stat. § 113A-123(b). If a state court finds a taking, the Commission may petition the Department of Administration to begin eminent domain proceedings. *See* N.C. Gen. Stat. § 113A-123(c). Under N.C. Gen. Stat. § 113A-123, the state compensates a property owner only as part of the eminent domain proceedings that can be triggered after a court invalidates a taking. *Cf. id.*; *see* N.C. Gen. Stat. §§ 146-24(c), 136-103(b)(5). That statute also provides that "[t]he method provided in this subsection for the determination of the issue of whether such order constitutes a taking without compensation shall be *exclusive* and such issue shall not be determined in any other proceeding." N.C. Gen. Stat. § 113A-123(b) (emphasis added).

The Zitos construe the eminent domain and exclusivity portions of N.C. Gen. Stat. § 113A-123 to mean that North Carolina is not open to their state

takings claim. *See* [D.E. 42] 12-16. According to the Zitos, N.C. Gen. Stat. § 113A-123 only invalidates regulatory actions by the Commission, making the taking temporary until eminent domain proceedings occur. *Cf. First English*, 482 U.S. at 319 ("Invalidation of the ordinance or its successor ordinance after this period of time, though converting the taking into a 'temporary' one, is not a sufficient remedy to meet the demands of the Just Compensation Clause."). Section 113A-123(c) does provide monetary compensation once such eminent domain proceedings have run their course; however, the Zitos argue that they require monetary compensation in the meantime for the denial of the permit that resulted in a temporary loss of value of their property. *See* [D.E. 42] 14-15. Coupling the temporary-taking gap in the broader statutory scheme with the "exclusive" nature of the N.C. Gen. Stat. § 113A-123(b), the Zitos assert that North Carlina state courts are closed to claims such as the one at issue here.

The court rejects the Zitos' argument. The Zitos misconstrue the term "exclusive" in N.C. Gen. Stat. § 113A-123(b) and ignore that a plaintiff can recover monetary compensation in state court under the North Carolina Constitution for a temporary taking. As for exclusivity, the "exclusive" in N.C. Gen. Stat. § 113A-123(b) applies to "*whether* such order constitutes a taking without compensation," meaning that the procedure that the statutory scheme describes shall be exclusive. N.C. Gen. Stat. § 113A-123(b) (emphasis added). Moreover, that procedure is the "method provided in this subsection for the determination of the issue," which includes "a jury trial on all issues of fact" and other procedural

provisions. *Id.* Thus, the procedural method outlined in N.C. Gen. Stat. § 113A-123(a) and (b) is exclusive for determining whether a taking occurred. *See Weeks v. N.C. Dep't of Nat. Res. & Cmty. Dev.*, 97 N.C. App. 215, 223, 388 S.E.2d 228, 233 (1990) ("[T]he statute's 'method' contemplates both legal and factual determinations only of whether a 'taking' occurred."). However, N.C. Gen. Stat. § 113A-123(b) does not require that the remedies provided by the statutory scheme, invalidation of a taking and monetary compensation as part of eminent domain proceedings, are exclusive. *See* N.C. Gen. Stat § 113A-123(b).

As for other remedies, although the Zitos correctly note that N.C. Gen. Stat. § 113A-123(b) does not provide a monetary remedy for temporary takings during the eminent domain procedure, the North Carolina Constitution provides such a remedy. Notably, the North Carolina Constitution does not expressly prohibit governments from taking private property for public use without just compensation, but the Supreme Court of North Carolina has found such a prohibition in the Law of the Land Clause. *See, e.g.*, *Finch v. City of Durham*, 325 N.C. 352, 362-63, 384 S.E.2d 8, 14 (1989). The Supreme Court of North Carolina uses the same standard for determining whether a government took property in violation of the North Carolina Constitution as the Supreme Court of the United States uses to assess a Fifth Amendment takings claim. *See, e.g.*, *id.* at 371-72, 384 S.E.2d at 19; *N.C. Dep't of Transp. v. Cromartie*, 214 N.C. App. 307, 314-15, 716 S.E.2d 361, 367 (2011); *Adams Outdoor Advert. v. N.C. Dep't of Transp.*, 112 N.C. App. 120, 122, 434 S.E.2d 666, 667 (1993). Thus, the Zitos can sue under the Law of the Land Clause of

the North Carolina Constitution, which states in relevant part: "No person shall be taken, imprisoned, or disseized of his freehold, liberties, or privileges, or outlawed, or exiled, or in any manner deprived of his life, liberty, or property, but by the law of the land." N.C. Const. art. I, § 19.

The Zitos' takings claim cannot be remedied fully under N.C. Gen. Stat. § 113A-123 because the eminent domain procedures fail to compensate for the temporary loss in value during the duration of the proceedings. The Supreme Court of North Carolina, however, has recognized "inverse condemnation" claims, similar to the regulatory taking at issue here, as allowing for damages. *See Finch*, 325 N.C. at 362-63, 384 S.E.2d. at 14; *Longy v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.E.2d 101, 107-08 (1982), *superseded on other grounds by statute*, Act of July 10, 1981, ch. 919, sec. 28, 1981 N.C. Sess. Laws 1382, 1402; *see also Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 855-56, 786 S.E.2d 919, 925-26 (2016). Moreover, North Carolina courts have allowed "vested rights claims," which are "rooted in the due process of law and *the law of the land* clauses of the federal and state constitutions," to proceed as claims under the North Carolina Constitution in the context of zoning claims. *Godfrey v. Zoning Bd. of Adjustment,* 317 N.C. 51, 62, 344 S.E.2d 272, 279 (1986) (quotation omitted) (emphasis added); *see Swan Beach Corolla, L.L.C. v. Cty. of Currituck*, 244 N.C. App. 545, 781 S.E.2d 350, 2015 WL 8747777, at *3-4 (2015) (unpublished table opinion). Thus, North Carolina provides a forum to adjudicate the Zitos' takings claim.

C.

This case raises two significant issues concerning the effect of *Hutto*. First, *Hutto*'s state court remedy requirement is in tension with the Supreme Court's reasoning in *Knick*. Second, *Hutto* concerned a federal takings claim in *federal court*, but did not mention litigating a federal takings claim in *state court*. As for *Hutto*'s tension with *Knick*, the Court in *Knick* removed the state-litigation requirement that had forced litigants to file their takings claims under state law in state court before pursuing a takings claim in federal court. *See Knick*, 139 S Ct. at 2167-68. *Hutto*, however, still forces litigants who wish to pursue a takings claim under the Fifth Amendment into state courts. *See Hutto*, 773 F.3d at 551-52.

Of course, the Court in *Knick* did not consider sovereign immunity under the Eleventh Amendment because *Knick* involved a suit between a private property owner and a locality that was not entitled to sovereign immunity under the Eleventh Amendment. *Knick*, 139 S. Ct. at 2167-71; *Bay Point Properties, Inc. v. Miss. Transp. Comm'n*, 937 F.3d 454, 456-57 (5th Cir.), *petition for cert. filed*, No. 19-798 (2019); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019). But in reiterating the self-executing nature of the Just Compensation Clause, the Court in *Knick* foreshadows the day when the Court will have to address the interplay between the Fifth Amendment's Just Compensation Clause and the Eleventh Amendment. *Cf. Knick*, 139 S. Ct at 2171; *Lumbard v. City of Ann Arbor*, 913 F.3d 585, 591 (6th Cir.) (Kethledge, J., concurring) ("But the Takings Clause does not say that private property shall not 'be

taken for public use, without just compensation, and without remedy in state court.' Instead the Clause says that private property shall not 'be taken for public use, without just compensation' *period*."), *cert. denied*, 140 S. Ct. 267 (2019). Although *Hutto* binds this court, the court recognizes the force of the Zitos' arguments, notes the significant constitutional issues that the Zitos raise, and acknowledges that "the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court." *Knick*, 139 S. Ct. at 2167.

As for litigating a federal takings claim in state court, *Hutto* does not foreclose a state forum for a federal takings claim. *See Hutto*, 773 F.3d at 552 ("[W]e conclude that the Eleventh Amendment bars Fifth Amendment taking claims against States in federal court when the State's courts remain open to adjudicate such claims." (emphasis omitted)). State courts can hear federal constitutional claims just like federal courts. *See, e.g.*, *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823 (1990); *Tafflin v. Levitt*, 493 U.S. 45S, 458-59 (1990); *Gulf Offshore Co. v. Mobil Oil Corp.*, 453 U.S. 473, 477-78 (1981). Whether the Commission successfully can invoke sovereign immunity for a federal takings claim in state court is a different question for a different court on a different day. *Cf. Howlett v. Rose*, 496 U.S. 356, 367-81 (1990) (holding that a state court cannot use state law sovereign immunity to decline jurisdiction over an action for money damages under 42 U.S.C. § 1983, where state courts entertained similar state-law actions against state defendants); *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 65-66 (1989) (holding that a State is not a "person" against whom a claim for

money damages under 42 U.S.C. § 1983 can be asserted); *Long*, 306 N.C. at 203, 293 S.E.2d at 111-12; *Beroth Oil Co. v. N.C. Dep't of Transp.*, 220 N.C. App. 419, 432-33, 72S S.E.2d 651, 660-61 (2012), *aff'd in part, vacated in part*, 367 N.C. 333, 757 S.E.2d 466 (2014). Nonetheless, this court dismisses the Zitos' complaint without prejudice, and this dismissal does not affect the Zitos' ability to assert a takings claim in state court directly under the Fifth and Fourteenth Amendments[4] or under 42 U.S.C. § 1983.[5]

IV.

In sum, the court GRANTS the Commission's motion to dismiss [D.E. 36] and DISMISSES the complaint WITHOUT PREJUDICE for lack of subject-matter jurisdiction. The court DENIES as moot the Federation's motion to intervene [D.E. 24] and the Zitos' motion to clarify the stipulated administrative facts [D.E. 46].

SO ORDERED. This 27 day of March 2020.

/s/ James C. Dever
JAMES C. DEVER III
United States District Judge

[4] *See First English*, 482 U.S. at 316 n.9; *Lawyer v. Hilton Head Pub. Servs. Dist. No. 1*, 220 F.3d 298, 302 n.4 (4th Cir. 2000); *Mann v. Haigh*, 120 F.3d 34, 37 (4th Cir. 1997); *Sansotta*, 97 F. Supp. 3d at 728 n.4.

[5] *See City of Monterey v. Del. Monte Dunes at Monterey, Ltd.*, 526 U.S. 687, 709-22 (1999); *Sansotta*, 97 F. Supp. 3d at 728 n.4.