No. ____

IN THE

Supreme Court of the United States

FREDERICK L. ALLEN and NAUTILUS PRODUCTIONS, LLC,

Petitioners,

v.

JOSHUA STEIN, Governor of North Carolina,
in his official capacity, et al.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Congress and this Court's precedents have tightly circumscribed appellate courts' authority to review non-final, interlocutory issues. In *Swint v. Chambers County Commission*, 514 U.S. 35 (1995), this Court left open whether federal courts hearing an interlocutory appeal can assert pendent appellate jurisdiction to review otherwise unappealable issues that are (i)"inextricably intertwined with" or (ii) "necessary to ensure meaningful review of" the independently appealable order, *id.* at 51. Since *Swint*, the circuits have split 8-3-2 over whether pendent jurisdiction is available beyond those two circumstances. Eight circuits hold that *Swint* is the limit; three, including the Fourth Circuit below, have crafted their own broader tests; and two are internally divided.

In this interlocutory sovereign immunity appeal, the Fourth Circuit never addressed sovereign immunity. Instead, the court—*sua sponte* and over respondents' express waiver—departed from *Swint* and asserted pendent appellate jurisdiction to review an unrelated procedural order.

The questions presented are:

1. Whether, on an interlocutory appeal, a federal court of appeals may exercise pendent appellate jurisdiction to review issues neither inextricably intertwined with nor necessary to ensure meaningful review of the independently appealable order.

2. Whether summary reversal is warranted because the Fourth Circuit transgressed the party-presentation principle by *sua sponte* exercising jurisdiction on a basis appellants waived.

PARTIES TO THE PROCEEDING

Petitioners Frederick L. Allen and Nautilus Productions, LLC were the plaintiffs-appellees in the court of appeals.

Respondents were the defendants-appellants in the court of appeals. Respondents are Joshua H. Stein, in his official capacity as Governor of North Carolina; Susan Wear Kluttz, in her official capacity as former Secretary of the North Carolina Department of Natural and Cultural Resources; Margrette Kathryn Thompson, in her official capacity as Chief Deputy Secretary of the North Carolina Department of Natural and Cultural Resources; Darin J. Waters, in his official capacity as Deputy Secretary of the North Carolina Department of Natural and Cultural Resources; Catherine Ann Swain, in her official capacity as Director of Marketing of the North Carolina Department of Natural and Cultural Resources; James Christopher Southerly, in his official capacity as State Archaeologist; Stephen Atkinson, in his official capacity as Deputy State Archaeologist – Underwater and Director of the Underwater Archaeology Branch of the North Carolina Department of Natural and Cultural Resources; the North Carolina Department of Natural and Cultural Resources; the State of North Carolina; Jeffrey Neale Jackson, in his official capacity as Attorney General of North Carolina; Pamela Brewington Cashwell in her official capacity as Secretary of the North Carolina Department of Natural and Cultural Resources; Sarah Koonts, in her official capacity; Maria E. Vann, in her official capacity as Director of Regional History Museums of the North Carolina Department of

Natural and Cultural Resources; Mike Carraway, in his official capacity; and William Schorr Johnson, in his official capacity as Director of Communications of the North Carolina Department of Natural and Cultural Resources.

Friends of Queen Anne's Revenge, a non-profit corporation, was also a defendant in the district court but was not a party in the court of appeals.

CORPORATE DISCLOSURE STATEMENT

Nautilus Productions, LLC has no parent corporation, and no publicly held company owns 10% or more of its stock. Its shares are not publicly traded, and it has no stock ticker symbol.

RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Allen v. Stein*, No. 24-1954 (4th Cir.) (judgment entered January 23, 2026; rehearing denied February 20, 2026)
- *Allen v. Stein*, No. 5:15-cv-00627-BO (E.D.N.C.) (order on appeal entered August 30, 2024; judgment entered April 7, 2026)

The following proceedings are directly related because they arose from the same district court case:

- *Allen v. Cooper*, No. 18-877 (U.S.) (decided March 23, 2020; judgment issued April 24, 2020)
- *Allen v. Cooper*, Nos. 17-1522 & 17-1602 (4th Cir.) (judgment entered July 10, 2018; rehearing denied August 9, 2018)
- *Allen v. Cooper*, No. 21-2040 (4th Cir.) (judgment entered October 14, 2022)
- *Allen v. Stein*, No. 26-1576 (4th Cir.) (held in abeyance on May 29, 2026, pending disposition of this petition)

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Frederick Allen and Nautilus Productions, LLC (together, "Allen") 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 Fourth Circuit's decision (App.1-40) is reported at 165 F.4th 272. The Fourth Circuit's order denying rehearing en banc (App.133-35) is unpublished. The district court's decision denying in part respondents' motion to dismiss on sovereign immunity grounds (App.41-98) is unreported but available at 2024 WL 4009870.

The district court's earlier decision allowing Allen to amend his complaint (App.102-32) is reported at 555 F.Supp.3d 226. The Fourth Circuit's order dismissing respondents' appeal from that decision for lack of jurisdiction (App.99-101) is unreported but available at 2022 WL 19226124.

JURISDICTION

The Fourth Circuit issued its decision on January 23, 2026, App.1, and denied petitioners' timely petition for rehearing en banc on February 20, 2026, App.133-35. On May 18, 2026, the Court extended the time to file a petition for a writ of certiorari to July 20, 2026, No. 25A1253. This Court has jurisdiction under 28 U.S.C. §1254(1).

STATUTORY PROVISIONS AND FEDERAL RULES INVOLVED

28 U.S.C. §1291 provides in pertinent part:

> The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court. * * *

28 U.S.C. §1292 provides in pertinent part:

(a) * * * [T]he courts of appeals shall have jurisdiction of appeals from:

> (1) Interlocutory orders of the district courts of the United States, * * * or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees of such district courts or the judges thereof determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which

> there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.
>
> * * *
>
> (e) The Supreme Court may prescribe rules, in accordance with section 2072 of this title, to provide for an appeal of an interlocutory decision to the courts of appeals that is not otherwise provided for under subsection (a), (b), (c), or (d).

Rules 15(a)(2), 54(b), and 60(b) of the Federal Rules of Civil Procedure are reproduced at App.136-37.

INTRODUCTION

This case was about pirates and sunken treasure. Until it wasn't. What began as a copyright dispute over Blackbeard's shipwreck first reached this Court on a sovereign immunity issue. Now, a decade in, the litigation has run aground thanks to an entrenched circuit split on an important and recurring question of pendent appellate jurisdiction. This Court should take up the case again to answer that question.

On an interlocutory appeal from the denial of sovereign immunity, the Fourth Circuit—*sua sponte* and over respondents' express waiver—invoked pendent appellate jurisdiction to reach an unrelated procedural issue while avoiding the only issue properly on appeal. That maneuver squarely implicates a longstanding circuit conflict.

The conflict stems from this Court's decision in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). That case rejected a claim of pendent jurisdiction but left open the possibility that the doctrine could be used to reach unappealable issues that are "inextricably intertwined with" or "necessary to ensure meaningful review of" an order properly on interlocutory appeal.

In the decades since *Swint*, this Court has said little about pendent jurisdiction. Amid that silence, the circuits have split over whether pendent jurisdiction is limited to the two *Swint* conditions. Eight circuits stick to *Swint*; three, including the Fourth Circuit below, apply their own broader tests; and two cannot decide.

This question is important. Over the years, the Fourth Circuit and its companions in the minority have expanded the scope of pendent jurisdiction far beyond the guardrails this Court suggested. In the process, they have lost sight of *Swint*'s admonishment that pendent jurisdiction must be construed narrowly to avoid transforming collateral-order appeals "into multi-issue interlocutory appeal tickets." 514 U.S. at 49-50.

That not only has negative practical consequences for litigants but also interferes with Congress's authority to restrict piecemeal appeals—a policy choice it has stood by since the Founding. As this case shows, the minority approach undermines Congress's policy twice over: It lets courts reach issues Congress said must wait, while avoiding issues Congress designated for immediate review. This case provides an excellent vehicle to resolve the split and rein in pendent jurisdiction.

Plenary review is therefore warranted. But at the very least, the decision below cries out for summary reversal on party-presentation grounds. This Court is by now familiar with the Fourth Circuit's adversarial relationship with the party-presentation principle. That relationship is once again on display here. Dissatisfied with respondents' theory of jurisdiction, the court threw it overboard and took the helm, crafting its own but-for theory of pendent appellate jurisdiction.

This Court corrected the Fourth Circuit's disregard for the party-presentation principle three times last Term—including a summary reversal the Fourth Circuit had in hand two months before its decision here. Summary reversal is warranted once again.

This Court should grant certiorari to resolve the split over *Swint* or summarily reverse.

STATEMENT

A. Legal background

"[F]rom the very beginning," Congress has limited federal appellate jurisdiction to final decisions. *Cobbledick v. United States*, 309 U.S. 323, 325 (1940). "Originating in the First Judiciary Act of 1789, the finality requirement is now codified in 28 U.S.C.

§1291." *GEO Grp. v. Menocal*, 146 S.Ct. 774, 781 (2026). That provision confers jurisdiction over appeals from "final decisions of the district courts." 28 U.S.C. §1291. In general, a decision is "'final' under §1291 only when it resolves the entire case." *GEO*, 146 S.Ct. at 781 (cleaned up). "That final-judgment rule, by preventing piecemeal appeals, promotes the efficient administration of justice and preserves the proper balance between trial and appellate courts." *Id.* (cleaned up).

1. The final-judgment rule comes with a few narrow exceptions. Congress codified a handful in 28 U.S.C. §1292. Section 1292(a) allows immediate appeals from three categories of interlocutory orders. Section 1292(b) gives "district courts circumscribed authority to certify for immediate appeal interlocutory orders" they find "pivotal and debatable." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 46 (1995). And §1292(e) authorizes this Court to "prescribe rules" allowing interlocutory appeals "not otherwise provided for." 28 U.S.C. §1292(e); *Swint*, 514 U.S. at 48.

Beyond the statutory exceptions, this Court has read §1291 to allow immediate appeals of "collateral orders"—a "small class" of decisions "treat[ed] as final" despite not ending a case. *GEO*, 146 S.Ct. at 781. But that doctrine is "narrow" and "stringent." *Id.* (attribution omitted) (collecting cases). It imposes "three non-negotiable conditions" for immediate review: The order must "(1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment." *Id.* (attribution omitted).

2. Once one of these exceptions opens the door to interlocutory review, one more exception comes into play: pendent appellate jurisdiction. No statute or rule provides for this exception; it is a judge-made doctrine. The idea is that once an interlocutory order is properly on appeal, pendent jurisdiction allows review of other, nonappealable issues with a close enough relationship to the appealable order. *Swint*, 514 U.S. at 43-44 & n.2.

Three decades ago, this Court considered whether to recognize pendent appellate jurisdiction in *Swint v. Chambers County Commission*, 514 U.S. 35 (1995). The Court stopped short of doing so. In *Swint*, the Eleventh Circuit "unquestionably had jurisdiction to review" an order denying summary judgment on a qualified immunity defense. *Id.* at 38. But it also reviewed a denial of summary judgment on the merits as to another defendant—a garden-variety interlocutory order. *Id.* at 41-43. The Eleventh Circuit reasoned that "judicial economy" justified review because reaching the unappealable order could "put an end to the entire case." *Id.* at 43-44 (attribution omitted).

This Court unanimously disagreed. 514 U.S. at 45-51. The Court acknowledged that the courts of appeals widely embraced pendent jurisdiction, albeit with "varying views about when such jurisdiction is properly exercised." *Id.* at 44 n.2. But the Court cast doubt on the practice, noting the tension with "the statutory instructions Congress has given to control the timing of appellate proceedings." *Id.* at 45.

As explained, §1292 authorizes certain exceptions to the final-judgment rule, including through §1292(b)'s certification process. Giving courts of appeals discretion to exercise pendent jurisdiction over still more rulings would "severely undermine[]" §1292(b). *Swint*, 514 U.S. at 47. After all, Congress chose a "two-tiered arrangement" in which district courts, not appellate courts, have "first line discretion to allow interlocutory appeals." *Id.*

The Court saw a similar clash with §1292(e). "The procedure Congress ordered for" court-driven expansions of interlocutory appeals is "rulemaking under §2072," "not expansion by court decision." *Swint*, 514 U.S. at 48.

Finally, *Swint* cautioned that "a rule loosely allowing pendent appellate jurisdiction would encourage parties to parlay *Cohen*-type collateral orders into multi-issue interlocutory appeal tickets." 514 U.S. at 49-50.

But *Swint* declined to "definitively or preemptively settle" whether pendent appellate jurisdiction is ever proper and, if so, when. 514 U.S. at 50-51. The Court suggested two circumstances that might have made a difference, noting that the parties did not argue that the pendent ruling "was [i] inextricably intertwined with [the] decision" properly on appeal "or [ii] that review of the former decision was necessary to ensure meaningful review of the latter." *Id.* at 51.

3. Over the next thirty years, this Court has rarely revisited pendent appellate jurisdiction. Two years after *Swint*, the Court approved pendent jurisdiction over an issue that was both "inextricably intertwined" with and "necessary to ensure meaningful review of the" primary issue, *Clinton v. Jones*, 520 U.S. 681, 707 n.41 (1997) (quoting *Swint*, 514 U.S. at 51).

Three years later, in a sovereign immunity appeal, the Court reviewed a pendent question without discussing its authority to do so. *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 770 n.2 (2000) (recognizing that the court below "exercised pendent appellate jurisdiction"). But in explaining its decision to "begin" with the pendent issue, the Court relied on a "combination of logical priority" and the pendent issue's "virtual coincidence of scope" with the immunity question—considerations reminiscent of *Swint*. *See id.* at 779-80.

It would be another twenty-one years before this Court's third—and most recent—brush with pendent appellate jurisdiction. In *Whole Woman's Health v. Jackson*, 142 S.Ct. 522 (2021), the Court stated that "[a]s with any interlocutory appeal, our review is limited to the particular orders under review and any other ruling 'inextricably intertwined with' or 'necessary to ensure meaningful review of' them," *id.* at 531 (quoting *Swint*, 514 U.S. at 51). And that was that; the Court did not expressly apply the test.

B. Factual background

This case started with a treasure trove of copyrighted footage. Petitioner Rick Allen is one of the world's leading videographers. For the better part of two decades, Allen risked life and limb to document the underwater excavation of *Queen Anne's Revenge*—Blackbeard's flagship, which sunk off the coast of North Carolina in 1718.

Allen invested countless hours and most of his life savings into the endeavor. His efforts produced the world's only high-quality footage and the best record of Blackbeard's last voyage. Allen duly registered the copyrights.

Recognizing the value of Allen's work, respondents sought to use it for their own benefit. But instead of paying, respondents resorted to "a modern form of piracy." *Allen v. Cooper*, 140 S.Ct. 994, 999 (2020). They embarked on a state-sanctioned copyright infringement campaign, posting Allen's work online, publishing it in magazines, selling it in their gift shop, and displaying it to museum visitors—all without permission or compensation.

Respondents persisted despite Allen's repeated notice, takedown attempts, and efforts to negotiate a license. And respondents fought back by enacting Blackbeard's Law, a state statute targeting Allen that purported to place his work in the public domain. *See* C.A.App.86, 103-04.

C. Procedural background

That straightforward dispute kicked off a decade of litigation, including three interlocutory appeals and a previous trip to this Court.

1. In 2015, Allen sued North Carolina, a state agency, various state officials, and a non-state entity, Friends of Queen Anne's Revenge ("Friends"). Allen asserted claims for copyright infringement, violations of the Fourteenth Amendment's Due Process Clause, and unconstitutional takings. C.A.App.29-52.

All defendants except Friends moved to dismiss on sovereign immunity grounds. D.Ct.Dkt.50 at 6-12. In response, Allen pointed to the Copyright Remedy Clarification Act, 17 U.S.C. §511(a) ("CRCA"), which abrogated sovereign immunity for copyright infringement. D.Ct.Dkt.57 at 7. The district court agreed that CRCA validly abrogated sovereign immunity and allowed Allen's copyright claim to proceed. D.Ct.Dkt.69 at 6-9.

The court acknowledged that *United States v. Georgia*, 546 U.S. 151 (2006), provides another path to abrogation for actual constitutional violations. But it opted not to reach that issue. D.Ct.Dkt.69 at 7-8; App.128-29.

Respondents took an interlocutory appeal to the Fourth Circuit, which held that CRCA's wholesale abrogation of sovereign immunity exceeded Congress's constitutional power. *Allen v. Cooper*, 895 F.3d 337, 353 (4th Cir. 2018).

2. This Court granted certiorari. 587 U.S. 1039. One of the concerns this Court explored was whether respondents' position would let states willfully infringe copyrights with impunity.

Respondents repeatedly assured the Court that even without CRCA's wholesale abrogation, plaintiffs like Allen would have a remedy for willful infringement. For example, they said:

> [W]henever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court's *Georgia* decision, they can bring a direct constitutional claim. We don't dispute that.

App.141. When asked whether CRCA's abrogation was "valid insofar as [a state] deliberately takes property from people," respondents answered "Yes." App.141-42; *see also* Brief for Respondents at 55-56, *Allen*, 140 S.Ct.994 (No. 18-877) (similar).

This Court affirmed and held that CRCA's wholesale abrogation was unconstitutional. 140 S.Ct. at 1007.

3. On remand, the district court dismissed Allen's claims against respondents without prejudice. D.Ct.Dkt.92. That left one defendant, Friends.

Allen informed the court that he was finalizing a settlement with Friends, but he requested thirty days to seek reconsideration as to respondents. C.A.App.54. The court agreed and set a briefing schedule. C.A.App.18; D.Ct.Dkt.103.

With that plan in place, Allen filed a stipulated dismissal as to Friends. C.A.App.56.

Allen then moved for reconsideration as scheduled. He both asked the court to revisit its earlier takings ruling in light of the intervening decision in *Knick v. Township of Scott*, 139 S.Ct. 2162 (2019), and sought leave to amend to account for this Court's decision in this case, respondents' concessions about *Georgia*, and additional infringement. D.Ct.Dkt.106.

The district court granted the motion in August 2021. App.102-32. Because the case was not final and no judgment had been entered, the court applied the standards for reconsidering interlocutory orders under Rule 54(b) and for leave to amend under Rule 15(a)(2). App.106-09, 130-31. But because the parties had debated the motion under Rule 60(b), the court also considered that rule's more restrictive standard and found that it, too, was satisfied. App.109.

4. Respondents appealed again. The Fourth Circuit dismissed for lack of jurisdiction because the order granting leave to amend was not immediately appealable. App.100-01.

5. Back in district court, Allen amended his complaint. As relevant here, he added more detailed allegations showing that respondents' intentional infringement amounted to an actual constitutional violation under *Georgia*.

Respondents again moved to dismiss on sovereign immunity grounds. Despite their concession to this Court, respondents contended that *Georgia* does not apply to copyright claims. C.A.App.190-91, 197-98.

The district court denied the motion in relevant part, concluding that the complaint "checks all of *Georgia*'s boxes" for a valid as-applied abrogation. App.97-98. The court explained that Allen "plausibly alleged that the State's direct copyright infringements in violation of the Copyright Act also constitute a procedural due process violation." App.98.

6. Respondents took a third interlocutory appeal. The notice of appeal identified only "those parts of the district court's order [D.E.168] entered on August 30, 2024, that denied defendants' motions to dismiss." C.A.App.316 (brackets in original).

Respondents' brief nonetheless challenged not only the 2024 order denying sovereign immunity, but also the 2021 order allowing Allen to amend—the same one the Fourth Circuit previously held was not immediately appealable. Resp.C.A.Br.26-38.

Respondents invoked the Fourth Circuit's jurisdiction only "under 28 U.S.C. §1291 and the collateral-order doctrine." Resp.C.A.Br.1. When Allen challenged jurisdiction as to the 2021 order, respondents retreated to "the merger rule"—and the merger rule alone. Resp.C.A.Reply.5-10. According to respondents, the interlocutory, unappealable 2021 order merged into the interlocutory-but-appealable 2024 order. *Id.* But respondents failed to identify any case applying merger to interlocutory appeals.

Nowhere did respondents invoke pendent appellate jurisdiction. To the contrary, respondents waived that theory at oral argument, stating, "I don't think this is a pendent appellate jurisdiction kind of a situation." C.A.Arg.2:29-3:12.

7. The Fourth Circuit never addressed the appealable 2024 order denying sovereign immunity. It instead reached back to the unappealable 2021 order, reversed it, and vacated "as moot" all later rulings, including the 2024 order. App.39-40.

The court declined to reach respondents' sole argument for exercising jurisdiction over the 2021 order: the merger doctrine. App.20-21. Noting that it had "apparently never applied" merger in this context, the court was "content to leave" respondents' theory "for another day." App.21.

After jettisoning the parties' arguments, the court charted its own course and invoked pendent appellate jurisdiction. App.21-25. The court held that pendent jurisdiction was appropriate because the 2021 order was a but-for cause of the immunity decision. App.23-25. Had the district court denied leave to amend in 2021, it would not have denied sovereign immunity on the amended claims in 2024—and so, the Fourth Circuit held, it had discretion to review the earlier decision. *Id.* ("made the 2024 Ruling possible"; "sole and only seed thereof").

Turning to the 2021 order's merits, the court held that Rule 60(b), not Rule 54(b), governed. App.25-31. The court reasoned that the stipulation dismissing Friends "resulted in a final judgment"—never mind that the district court had not entered judgment and had already authorized the reconsideration motion and set a briefing schedule for it. App.27-31. Applying Rule 60(b), the Fourth Circuit held that allowing Allen to revive his copyright claims was an abuse of discretion. App.31-37.[1]

As a result, the Fourth Circuit declined to reach sovereign immunity. App.38-39. Instead, it vacated "as moot" the 2024 decision denying immunity and directed the dismissal of all claims with prejudice. App.39-40.

The Fourth Circuit denied Allen's timely petition for rehearing en banc. App.133-35.

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[1] Respondents did not challenge, and the court declined to reach, the part of the order granting reconsideration on Allen's takings claim in light of *Knick*—even though that provided an independent basis for what, in the Fourth Circuit's view, was "reopening" the case. App.37 n.10. The court reasoned that "no party contests the district court's dismissal of that claim" in 2024. *Id.* To be clear, Allen contests that dismissal—but it was not immediately appealable.

REASONS FOR GRANTING THE WRIT

I. This Court should resolve whether pendent appellate jurisdiction is available to decide issues neither inextricably intertwined with nor necessary to ensure meaningful review of a properly appealable issue.

A. The decision below deepens an intractable divide among the circuits.

In the three decades since *Swint*, the federal courts of appeals have splintered over pendent appellate jurisdiction.

1. This case squarely implicates one such conflict—a lopsided split over whether pendent appellate jurisdiction is limited to the two circumstances *Swint* identified: issues "inextricably intertwined with" or "necessary to ensure meaningful review of" a properly appealable issue. 514 U.S. at 51; *accord Whole Woman's Health*, 142 S.Ct. at 531. Every circuit has weighed in. Eight say yes; three say no; and the other two are internally conflicted.

a. Eight circuits—the First, Second, Third, Sixth, Seventh, Eighth, Ninth, and Tenth—hold that *Swint* is the limit. *See, e.g.*, *Limone v. Condon*, 372 F.3d 39, 50-52 (1st Cir. 2004) ("[W]e will not exercise appellate jurisdiction over the pendent issue unless one of the *Swint* criteria is satisfied."); *Myers v. Hertz Corp.*, 624 F.3d 537, 552-56 (2d Cir. 2010) ("two-part standard"), *cert. denied*, 566 U.S. 930 (2011); *OI Eur. Grp. v. Bolivarian Republic of Venezuela*, 73 F.4th 157, 176 (3d Cir. 2023) ("only two narrow circumstances"), *cert. denied*, 144 S.Ct. 549 (2024); *Archie v. Lanier*, 95 F.3d 438, 443 (6th Cir. 1996) ("To read *Swint* otherwise is effectively to undercut the rule it established … .”); *Allman v. Smith*, 790 F.3d 762, 763 (7th Cir. 2015) (pendent jurisdiction “barely survived its scathing treatment in *Swint*”); *Langford v. Norris*, 614 F.3d 445, 457-58 (8th Cir. 2010); *Puente Ariz. v. Arpaio*, 821 F.3d 1098, 1109 (9th Cir. 2016); *Brock v. Flowers Foods, Inc.*, 121 F.4th 753, 771 (10th Cir. 2024), *aff'd*, 146 S.Ct. 1358 (2026).

Take, for example, the Tenth Circuit. Before *Swint*, that court applied a three-factor test considering the adequacy of the record, how “closely related” the issues were, and “judicial economy.” *Moore v. City of Wynnewood*, 57 F.3d 924, 929 (10th Cir. 1995). That test did not survive *Swint*, which the Tenth Circuit read to leave open only two “narrow exceptions.” *Id.* at 930. The Eighth Circuit likewise “re-examine[d]” its broader view and held that *Swint*'s two circumstances mark pendent jurisdiction's outer bounds. *Kincade v. City of Blue Springs*, 64 F.3d 389, 394 (8th Cir. 1995), *cert. denied*, 517 U.S. 1166 (1996).

Moreover, the Eighth Circuit has roundly rejected the view the Fourth Circuit took below, holding that resolving the properly appealable issue “must necessarily resolve the pendent” issue, “not the other way around.” *Langford*, 614 F.3d at 458; *accord Lockridge v. Bd. of Trs. of the Univ. of Ark.*, 315 F.3d 1005, 1012 (8th Cir. 2003) (en banc). Or as the Third Circuit puts it, “if we can adjudicate the appealable order without venturing into otherwise nonreviewable matters, we have no need—and therefore no power—to examine those matters.” *O'Hanlon v. Uber Techs., Inc.*, 990 F.3d 757, 765 (3d Cir. 2021) (cleaned up).

At least three circuits have expressly rejected the view that "judicial economy alone" can "justify exercising pendent appellate jurisdiction." *Schnatter v. 247 Grp.*, 155 F.4th 543, 554 (6th Cir. 2025); *McCarter v. Ret. Plan for Dist. Managers of the Am. Fam. Ins. Grp.*, 540 F.3d 649, 653-54 (7th Cir. 2008) (overruling contrary cases); *Meredith v. Oregon*, 321 F.3d 807, 815 (9th Cir. 2003), *amended in other part*, 326 F.3d 1030 (9th Cir. 2003).

The disagreement among the circuits has not been lost on those in the majority. For instance, the Second Circuit recognized soon after *Swint* that "[m]ost of [its] sister circuits" had confined the doctrine along *Swint*'s lines, while the D.C. Circuit had "given *Swint* a more permissive reading." *Rein v. Socialist People's Libyan Arab Jamahiriya*, 162 F.3d 748, 757-58 (2d Cir. 1998), *cert. denied*, 527 U.S. 1003 (1999).

b. Three circuits reject the majority view. The Fourth Circuit's decision below joins the Fifth and D.C. Circuits in straying beyond *Swint*.

i. The Fourth Circuit exercised pendent jurisdiction here not because the 2021 procedural and 2024 sovereign immunity issues were inextricably intertwined, nor because it needed to reach the procedural issues to meaningfully review immunity, but because the 2021 decision was a but-for cause of the 2024 decision. App.23-25. That approach extends pendent jurisdiction far beyond *Swint*, allowing review of any decision that could have disposed of a case (or even a claim or issue) before the properly appealable order was entered.

To be sure, the decision below purported to follow earlier cases interpreting *Swint* as a two-prong test, App.21-23, asserting without explanation that jurisdiction was available "under either prong" here, App.23. But saying so doesn't make it so. In reality, the analysis bears no resemblance to either prong.

First, as the Fourth Circuit has repeatedly explained, "rulings are inextricably intertwined if the same specific question will underlie both the appealable and the nonappealable order, such that resolution of the question will necessarily resolve the appeals from both orders at once." *Indus. Servs. Grp. v. Dobson*, 68 F.4th 155, 167 (4th Cir. 2023) (cleaned up).

But the decision below nowhere suggests that the two orders present the same question—or even questions that have anything to do with each other. And for good reason: As the decision's own analysis indicates, reviewing the 2021 order meant asking whether the district court's decision was interlocutory or final and then deciding whether the court appropriately exercised its discretion under the applicable procedural rule. App.25-37. By contrast, reviewing the 2024 ruling would have meant asking whether the court correctly denied sovereign immunity. App.16-18. Answering either question would not shed any light on, much less "necessarily resolve," the other, *Indus. Servs.*, 68 F.4th at 167.

Nor can reviewing the 2021 order have been necessary to ensure meaningful review of the 2024 order. After all, the Fourth Circuit never reviewed the 2024 order at all. App.38-39. It could easily have done so without reaching the earlier procedural issues. If the district court was right to deny immunity, its decision to allow the amended complaint is a routine procedural decision reviewable only after final judgment.

And if the court was wrong about immunity, there would be no need to look back to 2021.

As the court recognized, App.23, it laid the groundwork for its but-for causation test in *Hinson v. Norwest Financial South Carolina, Inc.*, 239 F.3d 611 (4th Cir. 2001). *Hinson* asserted pendent jurisdiction over an earlier order allowing joinder of additional plaintiffs because the joinder decision was "inextricably linked to the outcome of the remand issue" properly on appeal. 239 F.3d at 615. By that, the court meant only that had joinder been denied, there would have been nothing left to remand because the original plaintiffs had settled; joinder was a but-for cause of the remand. *See id.* at 618.

True, the Fourth Circuit has also said that "[p]endent appellate jurisdiction is exclusively available" in *Swint*'s two circumstances. *Indus. Servs.*, 68 F.4th at 166-67. But whatever the state of the law before, binding circuit precedent now allows the exercise of pendent jurisdiction whenever an earlier order was a but-for cause of the properly appealable order. And because the decision below purports to apply *Swint*, future panels will have no reason to disregard it.

ii. The Fifth Circuit sometimes claims to confine itself to *Swint*'s two circumstances, but in fact, it has crafted its own set of situations allowing pendent jurisdiction: when (i) deciding the properly appealable issue will "necessarily dispose[] of the pendent claim"; (ii) "addressing the pendent claim will further the purpose of officer-immunities [*sic*] by helping the officer avoid trial"; (iii) "the pendent claim would be otherwise unreviewable"; or (iv) "the claims involve precisely the same facts and elements." *Escobar v.*

Montee, 895 F.3d 387, 392-93 (5th Cir. 2018); *accord Heidi Grp. v. Tex. Health & Hum. Servs. Comm'n*, 138 F.4th 920, 929 (5th Cir. 2025) (asserting without explanation that *Escobar*'s "four situations" satisfy *Swint*'s two circumstances).

Although *Escobar*'s first and fourth options arguably apply *Swint*'s "inextricably intertwined" prong, the second and third have nothing to do with *Swint*. The third ("otherwise unreviewable") permits jurisdiction over orders that satisfy only one of the collateral-order doctrine's "three non-negotiable conditions," *GEO*, 146 S.Ct. at 781.

And the second ("helping the officer avoid trial") is pure policymaking, used to reach beyond properly appealable immunity issues—but only for defendants' benefit. This route around *Swint* comes from *Morin v. Caire*, 77 F.3d 116 (5th Cir. 1996), a qualified immunity appeal in which the court ignored *Swint* and relied on earlier cases to assert pendent jurisdiction over state-law tort claims "[i]n the interest of judicial economy," *id.* at 119-20. According to the Fifth Circuit, refusing jurisdiction over the state claims "would defeat the principal purpose of allowing an appeal of immunity issues before a government employee is forced to go to trial"—even though the defendants did not claim immunity from trial on those claims. *Id.*

Morin is alive and well. *See, e.g.*, *Carter v. Dupuy*, 173 F.4th 561, 566 (5th Cir. 2026) (applying *Morin* to reach state-law claims alongside a qualified immunity appeal "in the interest of judicial economy"); *Waller v. Hanlon*, 922 F.3d 590, 598 (5th Cir. 2019) (invoking *Escobar* to assert jurisdiction over state-law claims because "subject[ing] [officers] to trial" on claims from which they were undisputedly not immune "would undermine the purpose of qualified immunity").

iii. The D.C. Circuit has expressly refused to limit pendent jurisdiction to *Swint*'s two circumstances. *Gilda Marx, Inc. v. Wildwood Exercise, Inc.*, 85 F.3d 675, 679 n.4 (D.C. Cir. 1996) (per curiam).

Instead, the D.C. Circuit exercises pendent jurisdiction when it thinks "substantial considerations of fairness or efficiency demand it." *E.g.*, *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019) (attribution omitted). For example, it will decide "a threshold issue" when "pendent review will likely terminate the entire case, sparing both [itself] and the district court from further proceedings and giving the parties a speedy resolution." *Id.* (attribution omitted). Like the but-for causation test, that opens the door to reviewing any earlier decision that could have been dispositive. *See also Rendall-Speranza v. Nassim*, 107 F.3d 913, 917 (D.C. Cir. 1997) (setting out a multifactor test whose considerations include fairness, efficiency, adequacy of the record, whether the issue might be mooted as the case continues, and the number and complexity of the issues); *Gilda Marx*, 85 F.3d at 678-79 (more factors).

The D.C. Circuit admits that "other circuits have taken a different path." *Kilburn v. Socialist People's Libyan Arab Jamahiriya*, 376 F.3d 1123, 1134 (D.C. Cir. 2004) (collecting cases). To defend its chosen approach, the D.C. Circuit has contended that jurisdiction over an interlocutory appeal "is in large measure jurisdiction to deal with all aspects of the case that have been sufficiently illuminated to enable decision by the court of appeals without further trial court development"—at least when doing so is efficient. *Jungquist v. Sheikh Sultan Bin Khalifa Al Nahyan*, 115 F.3d 1020, 1027 (D.C. Cir. 1997) (attribution omitted). That includes the "efficiency" of resolving an unappealable but "easy" issue to avoid the "difficult and complicated task" of deciding the appealable issue. *KiSKA Constr. Corp.-U.S.A. v. Wash. Metro. Area Transit Auth.*, 167 F.3d 608, 611 (D.C. Cir. 1999).[2]

c. That leaves two circuits straddling the divide.

i. On the one hand, the Eleventh Circuit recognizes that "pendent appellate jurisdiction should be present only under [the] rare circumstances" *Swint* described. *King v. Cessna Aircraft Co.*, 562 F.3d 1374, 1379 (11th Cir. 2009) (per curiam), *cert. denied*, 558 U.S. 881 (2009); *accord Summit Med. Assocs. v. Pryor*, 180 F.3d 1326, 1335 (11th Cir. 1999), *cert. denied*, 529 U.S. 1012 (2000). And it ordinarily insists that if the primary issue can be resolved "without reaching the merits" of the pendent issue, then the pendent issue is not reviewable. *Carbone v. Cable News Network, Inc.*, 910 F.3d 1345, 1357 (11th Cir. 2018) (attribution omitted); *accord Freyre v. Chronister*, 910 F.3d 1371, 1379 (11th Cir. 2018) ("The question is not whether deciding the pendent issue would moot the properly appealed issue, but whether review of the former decision is necessary to ensure meaningful review of the latter." (cleaned up)), *cert. denied*, 140 S.Ct. 114 (2019). Had it followed the same rule, the Fourth

[2] A few D.C. Circuit cases treat *Swint*'s conditions as limits when declining to exercise jurisdiction. *See, e.g.*, *In re England*, 375 F.3d 1169, 1182 (D.C. Cir. 2004) (Roberts, J.) (pendent jurisdiction "may be appropriate only when" one of *Swint*'s two circumstances is satisfied), *cert. denied*, 543 U.S. 1152 (2005).

Circuit could not have exercised jurisdiction here; it could not have mooted the appealable issue by deciding a nonappealable issue instead.

On the other hand, the Eleventh Circuit has held that it can and should exercise jurisdiction in "the interests of judicial economy" when resolving a nonappealable issue "in favor of the defendants will necessarily dispense of any need to pass on the [appealable] issues." *Bryant v. Jones*, 575 F.3d 1281, 1301-02 (11th Cir. 2009), *cert. denied*, 559 U.S. 940 (2010).

ii. The Federal Circuit has likewise fractured. One line of cases recognized that *Swint* allows pendent jurisdiction in "only the most extraordinary circumstances"—those *Swint* identified. *E.g.*, *Falana v. Kent State Univ.*, 669 F.3d 1349, 1360-61 (Fed. Cir. 2012). But another line disregarded *Swint* and continued to apply looser tests. For example, relying on a pre-*Swint* case, *Procter & Gamble Co. v. Kraft Foods Global, Inc.*, 549 F.3d 842 (Fed. Cir. 2008), held that pendent jurisdiction is discretionary and that the "major factor in determining whether to exercise [it] is the extent that review of the appealable order will involve consideration of factors relevant to the otherwise nonappealable order," *id.* at 846 (attribution omitted).

Those lines of cases collided in *Orenshteyn v. Citrix Sys., Inc.*, 691 F.3d 1356 (Fed. Cir. 2012), where a split panel held that the court lacks pendent jurisdiction "unless at least one of the *Swint* tests is met," *id.* at 1358-59. Despite acknowledging contrary precedential decisions, the majority did not attempt to overrule them. *See id.* at 1359 (citing *Procter & Gamble* as a "*But see*"). Judge Newman dissented, arguing that

Swint's circumstances are not the limit and that "considerations of judicial efficiency and economy" supported jurisdiction. *Id.* at 1367, 1370-72.

Yet the conflict continues. Since *Orenshteyn*, the Federal Circuit sometimes limits itself to *Swint*, *see Elbit Sys. Land & C4I Ltd. v. Hughes Network Sys., LLC*, 927 F.3d 1292, 1305-06 (Fed. Cir. 2019), and sometimes reverts to pre-*Swint* habits, *see Micron Tech., Inc. v. Longhorn IP LLC*, 161 F.4th 1374, 1382 (Fed. Cir. 2025).

2. The confusion does not stop there. Courts and commentators acknowledge that "the courts of appeals have not developed a single, consistent analysis for when pendent jurisdiction applies." Sarah Erickson André, Federal Appeals Jurisdiction and Practice §7:63 (Jan. 2025 update); *accord* Bryan Lammon, *Is Pendent Appellate Jurisdiction Necessary?*, Final Decisions (Aug. 2, 2022), https://finaldecisions.org/is-pendent-appellate-jurisdiction-necessary.

Recognizing that other "courts of appeals have set their own standards," the Sixth Circuit has said that "other circuits' decisions are less persuasive" on pendent jurisdiction "than they are in other contexts." *Watkins v. Healy*, 986 F.3d 648, 659-60 & n.20 (6th Cir. 2021), *cert. denied*, 142 S.Ct. 348 (2021).

One prominent area of confusion is what "inextricably intertwined" means. *See, e.g.*, Bryan Lammon, *Municipal Piggybacking in Qualified-Immunity Appeals*, 126 Penn. St. L. Rev. 123, 143 (2021) (the "meaning is not settled").

Some approaches are permissive. For example, the Second Circuit sometimes asks whether "there is sufficient overlap in the factors relevant to the appealable and nonappealable issues" to justify review, *Kaluczky v. City of White Plains*, 57 F.3d 202, 207 (2d Cir. 1995) (cleaned up), and has found that "substantial factual overlap" suffices, *Freeman v. Complex Computing Co.*, 119 F.3d 1044, 1050 (2d Cir. 1997). The Third Circuit misquoted that test to say "facts" instead of "factors" in 1988 and has run with "sufficient overlap in the facts" ever since. *United States v. Spears*, 859 F.2d 284, 287 (3d Cir. 1988) (misquoting *San Filippo v. U.S. Tr. Co. of N.Y.*, 737 F.2d 246, 255 (2d Cir. 1984), *cert. denied*, 470 U.S. 1035 (1985)); *see, e.g.*, *Reinig v. RBS Citizens, N.A.*, 912 F.3d 115, 130 (3d Cir. 2018) (repeating it with a chain of attribution leading to *Spears*). Applying that mutation, the Third Circuit has found issues inextricably intertwined where they "arise from a single" contract or "the same set of facts." *Palcko v. Airborne Express, Inc.*, 372 F.3d 588, 594-95 (3d Cir. 2004), *cert. denied*, 543 U.S. 1049 (2005). And the Eleventh Circuit has been satisfied with legal issues that "overlap[] in significant part," *McMahon v. Presidential Airways, Inc.*, 502 F.3d 1331, 1357 (11th Cir. 2007), only to later criticize the Third Circuit's "sufficient overlap" test, *Hamrick v. Partsfleet, LLC*, 1 F.4th 1337, 1353 (11th Cir. 2021).

Other definitions, including in the same circuits, are more restrictive. For instance, the Third Circuit often pairs "sufficient overlap" with additional requirements, such as that "the appealable issue cannot be resolved without reference to the otherwise unappealable issue." *Reinig*, 912 F.3d at 130 (cleaned up).

The Second Circuit, for its part, has required that "the same specific question … underlie both the appealable order and the non-appealable order, such that [its] resolution of the question will necessarily resolve the appeals from both orders at once." *Myers*, 624 F.3d at 553 (cleaned up). That "the two issues are factually, and even legally, similar" is not enough. *Id.* at 554; *cf. Abelesz v. OTP Bank*, 692 F.3d 638, 647 (7th Cir. 2012) ("even closely related" is insufficient). The en banc Eighth Circuit adds that it is the appealable issue that must "necessarily resolve[] the pendent" issue. *Lockridge*, 314 F.3d at 1012 (attribution omitted). So does the Tenth, which requires the primary appeal to "resolve[] *all of the remaining issues* presented by the pendent appeal" without needing to consider "distinct" "legal or factual matters." *Brock*, 121 F.4th at 771 (attribution omitted).

Another popular formulation asks whether the pendent issue "is coterminous with, or subsumed in, the appealable issue." *E.g.*, *Cotton v. Hughes*, 176 F.4th 886, 896 (6th Cir. 2026) (cleaned up); *Langford*, 614 F.3d at 458 (8th Cir.); *Horton ex rel. Horton v. City of Santa Maria*, 915 F.3d 592, 603 (9th Cir. 2019); *Zen Magnets, LLC v. Consumer Prod. Safety Comm'n*, 968 F.3d 1156, 1167 (10th Cir. 2020).

3. As this case demonstrates, disagreements about the scope of pendent appellate jurisdiction make a real difference. Because *Queen Anne's Revenge* happened to sink off the coast of North Carolina, respondents were able to use a sovereign immunity argument, no matter its (still-unresolved) merits, to secure interlocutory review of an otherwise unappealable procedural decision. Had Blackbeard's ship instead met its fate anywhere north of Virginia (or near Puerto Rico or the U.S. Virgin Islands)—in what are now the First,

Second, and Third Circuits' waters—that decision would not have been subject to interlocutory review. So too for the five other circuits that stick to *Swint* (difficult though it may have been for Blackbeard to sail there).

Compare this case with *Walker v. City of Pine Bluff*, 414 F.3d 989 (8th Cir. 2005). There, as here, a defendant invoked pendent jurisdiction to seek early review of an order granting leave to amend, arguing that if the plaintiff had not been allowed to add a new claim, the appealable order denying qualified immunity on that claim would not have been entered. 414 F.3d at 993 ("Grace argues the issues are inextricably intertwined because qualified immunity … only became an issue when leave to amend the complaint was granted."). But unlike the Fourth Circuit here, the Eighth Circuit found that but-for causation theory "without merit." *Id.* There is no reason to think the other seven circuits that stick to *Swint* would reach a different result.

And this is not the only case. Unsurprisingly, different standards yield different outcomes. *See, e.g.*, *Watkins*, 986 F.3d at 659 & n.20 (cataloging disparate outcomes on statute-of-limitations issues); *contrast Jungquist*, 115 F.3d at 1027 (D.C. Cir.) (exercising pendent jurisdiction "[b]ecause review of the district court's rulings on personal jurisdiction may dispose of the instant case"), *with, e.g.*, *E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.*, 269 F.3d 187, 204 (3d Cir. 2001) ("The fact that personal jurisdiction is or can be case-dispositive does not alter the analysis"); *contrast Azima*, 926 F.3d at 874 (D.C. Cir.) (finding pendent jurisdiction to review "threshold" *forum non conveniens* decision), *with King*, 562 F.3d at 1378-81 (11th Cir.) (no jurisdiction over same issue); *contrast Morin*, 77 F.3d at 119-20 (5th Cir.) (exercising pendent jurisdiction over state claims "in the interest of judicial economy" and to further immunity interests), *with Penate v. Hanchett*, 944 F.3d 358, 369-70 (1st Cir. 2019) (applying *Swint* and finding no pendent jurisdiction in similar circumstances).

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The decision below deepens an intractable divide among the federal courts of appeals over the boundaries of pendent appellate jurisdiction. This Court should grant certiorari to resolve the conflict over *Swint* and bring clarity to this frequently contested area of appellate jurisdiction.

B. The decision below is wrong.

This case illustrates why it is a mistake to expand pendent appellate jurisdiction beyond *Swint*'s two circumstances. The Fourth Circuit misused pendent jurisdiction to do exactly what *Swint* warned against: upend Congress's carefully crafted statutory scheme by turning a collateral order into a "multi-issue interlocutory appeal ticket[]." *See* 514 U.S. at 49-50.

1. Although *Swint* did not "definitively or preemptively settle" the scope of pendent appellate jurisdiction, 514 U.S. at 50, it illuminated a critical distinction: Pendent jurisdiction can be used to facilitate, but not expand, congressionally authorized interlocutory review.

Swint's central concern was that freewheeling pendent jurisdiction would flout Congress's "statutory instructions" governing "the timing of appellate proceedings" and the allocation of power between district and appellate courts. 514 U.S. at 45-47. Congress confined interlocutory review to a few narrow exceptions, and it prescribed rulemaking as the mechanism for expanding jurisdiction. *Id.* at 48. That decision "warrants the Judiciary's full respect." *Id.* at 48-50. Any "changes are to come from rulemaking" or Congress, "not judicial decisions in particular controversies or inventive litigation ploys." *Microsoft Corp. v. Baker*, 582 U.S. 23, 39-40 (2017).

It was thus no accident that the circumstances *Swint* identified—"inextricably intertwined" or "necessary to ensure meaningful review"—both speak to courts' ability to effectively adjudicate issues over which they already have interlocutory jurisdiction. *See* 514 U.S. at 51; *see also* Stephen I. Vladeck, *Pendent Appellate Bootstrapping*, 16 Green Bag 2d 199, 212 (2013) (pendent jurisdiction should apply "only where the appellate court cannot" adjudicate the collateral order without deciding "a necessarily antecedent legal question").

What this Court was not ready to say in *Swint*, it has said since. *Clinton* upheld the exercise of jurisdiction because *Swint*'s circumstances were present. *Clinton*, 520 U.S. at 707 n.41. And *Whole Woman's Health* recited those circumstances as the test. 142 S.Ct. at 531.

Rightly so. Thirty years of experience show that the *Swint* test—as recognized by most circuits—is workable and facilitates review of immediately appealable orders without opening the floodgates to piecemeal appeals. The same cannot be said of the Fourth, Fifth, and D.C. Circuits' broader tests. Far from facilitating the exercise of congressionally conferred jurisdiction, those tests expand interlocutory review beyond its statutory limits—and are often, as here, used to avoid reviewing properly appealable issues. *See supra* pp.14-15; *Rendall-Speranza*, 107 F.3d at 917 (avoiding "difficult" and "delicate" immunity issues); *KiSKA*, 167 F.3d at 611 (prioritizing "easy" pendent issue to avoid "difficult and complicated" issue properly on appeal).

What's more, this Court has emphasized that "[u]ncertainty regarding the question of jurisdiction is particularly undesirable." *Grupo Dataflux v. Atlas Glob. Grp.*, 541 U.S. 567, 582 (2004). The importance of predictability favors keeping jurisdictional rules "as simple as possible." *Hertz Corp. v. Friend*, 559 U.S. 77, 80 (2010). The *Swint* test is predictable; it is an objective test that turns on the logical relationship between the issues.

The minority view, by contrast, reduces to judicial whim. For example, under the Fourth Circuit's but-for test, any order that preceded and led to the appealable decision is fair game. Whether a court will ultimately exercise jurisdiction turns on the panel's sensibilities in any given case. The same is true in the Fifth and D.C. Circuits, which likewise claim sweeping jurisdiction limited only by subjective policy preferences and views on judicial economy.

This Court has repeatedly rejected case-by-case approaches to appellate jurisdiction. Collateral orders are identified "by category, not case-specific circumstances." *GEO*, 146 S.Ct. at 781. "Appeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957). The same concerns cut against the minority view here, which risks letting a narrow gloss meant to facilitate review "swallow the general rule" against piecemeal appeals. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994).

2. This case illustrates the problems with exceeding *Swint*'s limits.

Swint squarely foreclosed jurisdiction here. The pendent Rule 60(b) question has nothing to do with sovereign immunity, and so it was neither inextricably intertwined with nor necessary for review of the appealable immunity issue. *See supra* pp.18-20.

By nonetheless exercising jurisdiction, the panel contradicted *Swint*'s principles. Instead of using pendent jurisdiction to ensure meaningful review of the appealable issue, the panel deployed it to avoid the appealable issue altogether, in favor of reaching a decision ineligible for interlocutory review.

This case also exemplifies *Swint*'s concern that freely available pendent jurisdiction would encourage parties to pursue meritless or even frivolous interlocutory appeals as a vehicle for early review of other issues. *Swint*, 514 U.S. at 49-50. That's what happened here. Respondents pursued a sovereign immunity appeal on a theory that flatly contradicted their own concessions before this Court, *supra* pp.11-13, only to "parlay" that appeal into a "ticket[]" for the same interlocutory appeal that had already been dismissed for lack of jurisdiction. *Swint*, 514 U.S. at 49-50. The gambit worked. Respondents secured a yearslong delay and ultimately a with-prejudice dismissal. This is exactly the situation *Swint* sought to avoid.

C. The question presented is important and frequently recurring.

1. The question presented is important in both principle and practice, and it is up to this Court to resolve it.

It is Congress's prerogative to set the bounds of federal appellate jurisdiction and courts' duty to heed them. *Carroll*, 354 U.S. at 399 ("[T]he existence of appellate jurisdiction … is dependent upon authority expressly conferred by statute."); *accord Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994) (federal courts "possess only that power authorized by Constitution and statute"); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 115 (2009) (Thomas, J., concurring) ("The scope of federal appellate jurisdiction is a matter the Constitution expressly commits to Congress … ."). Congress has consistently chosen to prohibit piecemeal review, subject to narrow exceptions. *Supra* pp.5-6.

Beyond exceeding courts' authority, the minority rule creates practical problems for courts and litigants. It sows confusion around which issues are actually on appeal that is rarely resolved until the case is decided. *See* Lammon, *Municipal Piggybacking*, at 142-45. And broad, discretionary availability of pendent jurisdiction comes with the temptation to pursue interlocutory review of more issues, more often.

When appellate courts deviate from congressionally prescribed rules, it is up to this Court to restore Congress's choice. *Microsoft*, 582 U.S. at 37 ("Repeatedly we have resisted efforts to stretch §1291 to permit appeals of right that would erode the finality principle and disserve its objectives."). This Court has repeatedly granted certiorari to rein in appellate jurisdiction and should do so again here. *See, e.g.*, *id.*; *Will v. Hallock*, 546 U.S. 345, 349 (2006) (vacating judgment for lack of appellate jurisdiction); *Swint*, 514 U.S. at 45-51.

This split in particular is one only this Court can mend. After all, the split arises from this Court's own decision in *Swint*, which left the question open. Congress has done its part by identifying the orders eligible for interlocutory review. And the courts of appeals have spent decades grappling with the issue, to no avail. It has been thirty-one years since the Court provided meaningful guidance. It is time to put the issue to rest.

2. This issue recurs frequently. Disputes over pendent appellate jurisdiction have the potential to arise in every interlocutory appeal, whether from a collateral order or under §1292. That is why every circuit has repeatedly confronted the question presented. More than 1,000 federal appellate cases (including more than 600 precedential decisions) have at least mentioned the doctrine since *Swint*, and the overwhelming majority of precedential mentions are in cases considering whether to apply it.[3] With rules like the Fourth Circuit's but-for causation test in place, invitations to exercise pendent appellate jurisdiction will become only more frequent.

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[3] This Westlaw search for federal court of appeals cases decided after March 1, 1995 currently returns 1,036 cases, including 669 precedential cases:

> TE("pend*nt appellate jurisdiction" ((pend*nt /3 jurisdiction) /25 (interlocutory immediate!))).

D. This case is an ideal vehicle for resolving the question presented.

This petition provides an excellent vehicle for addressing this important issue. The decision below squarely presents the question. The Fourth Circuit invoked pendent appellate jurisdiction as the sole source of its authority to review the 2021 order. There is no dispute that the 2021 order was not independently appealable; the Fourth Circuit so held when respondents tried. App.100-01. And there is no serious argument that jurisdiction would have been available under *Swint*. *Supra* pp.18-20; *Walker*, 414 F.3d at 993 (no jurisdiction on an indistinguishable theory). That is presumably why respondents not only made no such argument, but also waived pendent appellate jurisdiction. *Supra* pp.13-14.

The question presented is outcome determinative. The Fourth Circuit's exercise of pendent jurisdiction beyond *Swint*'s limits led it to order Allen's claims dismissed with prejudice, ending the case. *Supra* p.15. Had the court instead resolved the sovereign immunity issue—the only properly appealable issue—Allen's claims likely would have survived or at the very least been dismissed without prejudice for lack of jurisdiction. *See Lancaster v. Sec'y of the Navy*, 109 F.4th 283, 295 (4th Cir. 2024).

Plus, this case comes without the complications that often accompany pendent jurisdiction cases. The decision below expressly exercised pendent jurisdiction, provided a reasoned explanation that directly implicates the divide over *Swint*, and lays bare the practical effect on the litigation. By contrast, cases that go beyond *Swint* often provide little to no analysis. And because this issue by definition arises in an interlocutory context, appeals presenting it are not necessarily case dispositive. Finally, cases rejecting pendent jurisdiction are often backstopped by a discretionary decision to decline jurisdiction anyway, complicating this Court's review.

In short, this is the time and the case to resolve an entrenched disagreement about federal courts' power to expand the scope of interlocutory appeals. This Court should grant certiorari and reverse.

II. The Fourth Circuit's defiance of the party-presentation principle warrants summary reversal.

As discussed, this case implicates a circuit split that warrants plenary review. But the Fourth Circuit should never have reached that issue to begin with, because respondents waived it. *Supra* pp.13-14. Skeptical of respondents' theory of jurisdiction, the Fourth Circuit overrode respondents' waiver and injected its own theory. This Court corrected the Fourth Circuit's disregard for the party-presentation principle three times last Term. It should do so again here.

1. "Federal courts adhere to the principle of party presentation"—"the rule that points not argued will not be considered." *Margolin v. Nat'l Ass'n of Immigr. Judges*, 146 S.Ct. 1285, 1288 (2026) (per curiam) (cleaned up). As this Court recently reminded the Fourth Circuit, "courts call balls and strikes; they don't get a turn at bat." *Clark v. Sweeney*, 146 S.Ct. 410, 412 (2025) (per curiam) (cleaned up). Undeterred, the same court was back in the batter's box two months later for this case.

No party even suggested that pendent appellate jurisdiction applied. Respondents started with the collateral-order doctrine. Resp.C.A.Br.1. Allen explained why neither that doctrine nor pendent jurisdiction applied. Pet.C.A.Br.24-25. Respondents pivoted to merger. Resp.C.A.Reply.5-10. And when the panel floated pendent jurisdiction, respondents shot it down. C.A.Arg.2:29-3:12.[4]

The court was rightly skeptical of respondents' merger theory. *See* App.20-21. But "[i]nstead of ruling on that [theory], the Fourth Circuit devised a new one." *Clark*, 146 S.Ct. at 412. Declaring itself "content to leave" respondents' argument "for another day," App.21, the court exercised pendent jurisdiction on its own but-for causation theory. App.21-25. "And the court did so without giving either side a chance to address its theory." *Margolin*, 146 S.Ct. at 1288. "That drastic departure from the principle of party presentation constituted an abuse of discretion." *Id.* (cleaned up).

Perhaps the court saw a "wrong[] to right" in the 2021 decision. *Margolin*, 146 S.Ct. at 1288 (attribution omitted); *see* App.37 (criticizing the order as allowing a "do-over"). Even so, its job was not to "sally forth" to correct a perceived error, but to "decide only the questions presented." *Margolin*, 146 S.Ct. at 1288 (cleaned up).

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[4] Respondents' statement at oral argument elevated the forfeiture in their briefs to waiver. But whether seen as forfeiture or waiver, the result is the same: Respondents did not present the argument the Fourth Circuit relied on.

2. The Fourth Circuit's latest transgression warrants this Court's intervention. Last Term, the Fourth Circuit's party-presentation misadventures led this Court to summarily reverse two decisions and then to grant, vacate, and remand a third. *Clark*, 146 S.Ct. at 412-13 (summary reversal); *Margolin*, 146 S.Ct. at 1288-89 (same); *Walters v. Coleman*, No. 25-867, 2026 WL 1640908 (June 8, 2026) (GVR in light of *Clark*).

But the message has not sunk in. This case came two months after *Clark*, but that did not stop the panel. And both *Margolin* and *Walters* were decided over dissents on party-presentation grounds. *Margolin*, 146 S.Ct. at 1287-88 (noting dissent from denial of rehearing); *Coleman v. Dotson*, 160 F.4th 472, 528 (4th Cir. 2025) (Rushing, J., dissenting).

Intervention is particularly appropriate here. The party-presentation principle is rooted in the idea that the adversarial process is the best way to reach the correct result. *United States v. Sineneng-Smith*, 140 S.Ct. 1575, 1579 (2020). By disregarding that principle to forge its own trail, the panel wandered into just the sort of errors party presentation helps prevent.

Whatever the merits of the panel's but-for causation theory as a matter of law, it was contrary to the facts. With the benefit of briefing, the panel might have realized that the portion of the 2021 order it reversed was not, in fact, a but-for cause of the later immunity ruling. The 2021 order granted reconsideration and leave to amend for two independent reasons: a change in takings law and the *Georgia* issue. App.109-32; *supra* p.13; *supra* note 1. Even if the court needed to "reopen" the case under Rule 60(b), neither respondents nor the Fourth Circuit disputed that the takings claim independently justified doing so. *See* App.37 n.10. There was no need to separately justify Rule 60(b) relief on *Georgia*—the only question the Fourth Circuit reviewed. Party presentation would have exposed this flaw.[5]

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The Fourth Circuit has once again "lost sight of" its role. *Margolin*, 146 S.Ct. at 1289. If the Court does not grant plenary review, it should summarily reverse and remand so the Fourth Circuit can decide the sovereign immunity issue the parties presented.

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[5] The panel also erred by dismissing with prejudice. App.39-40. Respondents never asked for that, and for good reason: In the Fourth Circuit, sovereign immunity dismissals are, as respondents acknowledged, "always without prejudice," Resp.C.A.Reply.18 (citing *Lancaster*, 109 F.4th at 295).

CONCLUSION

This Court should grant certiorari and exercise plenary review on the first question or summarily reverse on the second.

Respectfully submitted,

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July 20, 2026

APPENDIX

TABLE OF APPENDICES

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED JANUARY 23, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1954

FREDERICK L. ALLEN; NAUTILUS PRODUCTIONS, LLC,

Plaintiffs-Appellees,

v.

JOSHUA H. STEIN, GOVERNOR OF NORTH CAROLINA; SUSAN WEAR KLUTTZ, FORMER SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; MARGRETTE KATHRYN THOMPSON, CHIEF DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; DARIN J. WATERS, DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY; CATHERINE ANN SWAIN, DIRECTOR OF MARKETING OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; JAMES CHRISTOPHER SOUTHERLY, STATE ARCHAEOLOGIST, IN HIS OFFICIAL CAPACITY; STEPHEN ATKINSON, DEPUTY

STATE ARCHAEOLOGIST-UNDERWATER AND DIRECTOR OF THE UNDERWATER ARCHAEOLOGY BRANCH OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA; JEFFREY NEALE JACKSON, ATTORNEY GENERAL OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; PAMELA BREWINGTON CASHWELL, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; SARAH KOONTS, IN HER OFFICIAL CAPACITY; MARIA E. VANN, DIRECTOR OF REGIONAL HISTORY MUSEUMS OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; MIKE CARRAWAY, IN HIS OFFICIAL CAPACITY; WILLIAM SCHORR JOHNSON, DIRECTOR OF COMMUNICATIONS OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY,

Defendants-Appellants,

and

FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION,

Defendant.

Argued October 22, 2025
Decided January 23, 2026

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Terrence W. Boyle, District Judge. (5:15-cv-00627-BO)

Before NIEMEYER, KING, and HARRIS, Circuit Judges.

Reversed in part, vacated in part, and remanded with directions by published opinion. Judge King wrote the opinion, in which Judge Niemeyer and Judge Harris joined.

KING, Circuit Judge:

In this appeal from the Eastern District of North Carolina, we address another chapter in the decade-long quest by plaintiffs Frederick Allen and his video production company, Nautilus Productions, LLC (collectively, "Allen"), to secure a federal court judgment against a host of defendants — including the State of North Carolina, its Governor and Attorney General, its Department of Natural and Cultural Resources, and various other state officials (collectively, the "North Carolina defendants") — for copyright infringement. Allen's claims arise from photographs and videos he made during an excavation of the sunken remains of the pirate ship called the *Queen Anne's Revenge*, which was commanded by the infamous Blackbeard in waters near the Old North State in the early 1700s.

Over a decade ago, in 2015, Allen initiated this lawsuit against the North Carolina defendants. In 2018, on appeal from a 2017 district court order that denied immunity claims interposed by the North Carolina defendants, this Court reversed. Our decision ruled, inter alia, that those defendants were entitled to sovereign immunity, qualified immunity, and legislative immunity on the various claims. *See Allen v. Cooper*, 895 F.3d 337 (4th Cir. 2018) (the "2018 Decision"). Allen thereupon sought relief from our Court's sovereign immunity rulings in the Supreme Court. The Court granted certiorari and, in its 2020 decision, affirmed our sovereign immunity rulings across the board. *See Allen v. Cooper*, 589 U.S. 248, 140 S. Ct. 994, 206 L. Ed. 2d 291 (2020) (the "2020 Supreme Court Decision").

Notwithstanding those decisions by our Court and the Supreme Court, the district court in 2021 authorized Allen to reopen his lawsuit against the North Carolina defendants. *See Allen v. Cooper*, 555 F. Supp. 3d 226 (E.D.N.C. 2021), ECF No. 118 (the "2021 Decision"). That is, Allen was authorized by the 2021 Decision to amend his failed complaint and pursue an entirely new constitutional theory of liability for copyright infringement against the North Carolina defendants — by alleging "as-applied" or "case-by-case" abrogation of state sovereign immunity — premised on a 2006 Supreme Court decision called *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006) (the "*Georgia* theory").

The North Carolina defendants, in a familiar fashion, moved, inter alia, to dismiss the claims alleged in Allen's newly amended complaint on Eleventh Amendment sovereign immunity grounds. In 2024, the district court denied sovereign immunity on one of the new claims and authorized Allen's *Georgia* theory to proceed to discovery.

See Allen v. Cooper, No. 5:15-cv-00627 (E.D.N.C. Aug. 30, 2024), ECF No. 168 (the "2024 Ruling"). The North Carolina defendants have again appealed, seeking to challenge both the 2021 Decision and the 2024 Ruling. As explained herein, we are constrained to reverse the 2021 Decision, vacate and hold for naught the 2024 Ruling, and remand with directions.

I.

A.

Just as this appeal involves a storied history, the same is true for the facts underlying Allen's copyright claims. For approximately seven months in about 1717 and 1718, a notorious pirate named Edward Teach — colloquially referred to as the "pirate Blackbeard" — commandeered control of a French vessel then known as *La Concorde*. Upon capturing the French vessel, Blackbeard renamed her the *Queen Anne's Revenge* (the "*Revenge*"), and he equipped the *Revenge* for piracy activity on the high seas. Approximately six months later, however, Blackbeard ran the *Revenge* aground near Beaufort Inlet on the North Carolina coast. The wreckage of the *Revenge* was beneath the waves until 1996, when Intersal, Inc., a private exploration company, discovered the sunken remains of the plundered vessel.

Due to its location, the *Revenge* and its artifacts were and are the property of the State of North Carolina, and thus subject to the Old North State's "exclusive dominion and control." *See* N.C. Gen. Stat. § 121-22; *see also* 43

U.S.C. § 2105(c). In 1998, Intersal and the Department of Natural and Cultural Resources of North Carolina entered into a 15-year salvage agreement. Following execution of the salvage agreement, Intersal hired Allen to be the exclusive videographer for the *Revenge* recovery project.

It was at this point, according to Allen, that the North Carolina defendants began to emulate Blackbeard himself — that is, they initiated a "concerted campaign of intentional piracy to steal Allen's property." *See* Br. of Appellee 3 (citation modified). During a multi-year recovery effort regarding the *Revenge*, Allen captured video footage of the shipwreck and registered 13 copyrights with the United States Copyright Office. Each of Allen's copyrights covered a specific year's worth of videos.

Allen asserts that he first discovered acts of copyright infringement by the North Carolina defendants in 2013, when his protected work was uploaded to a state-operated YouTube channel and onto other social media platforms. Allen then approached the North Carolina defendants with his concerns, and the parties settled their differences. That resolution soon soured, however, and Allen alleges that the North Carolina defendants continued to improperly use his video footage online, as well as in a newsletter about the State's Maritime Museum. Allen also asserts that the North Carolina defendants devised and executed a plan to infringe on his copyrights shortly thereafter, and did so specifically by enacting legislation in 2015. That legislation was passed by the North Carolina General Assembly and signed into law by the Governor. It was then codified as N.C. Gen. Stat. § 121-25(b) (2015).[1] Allen has characterized § 121-25(b) as specifically targeting his work and authorizing the North Carolina defendants to infringe on his copyrights, without limitation.

B.

1.

As recited earlier, Allen initiated this lawsuit in the Eastern District of North Carolina in 2015. By amended complaint filed in March 2016, Allen alleged three claims that are relevant here. *See Allen v. McCrory*, No. 5:15-cv-00627 (E.D.N.C. Mar. 7, 2016), ECF No. 12 (the "2016 Complaint").[2] In Count I, Allen sought a declaratory

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1. Allen refers to N.C. Gen. Stat. § 121-25(b) in these proceedings as "Blackbeard's Law." At the time of its enactment, § 121-25(b) provided as follows:

> All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recordings, or other documentary material, and any such provision in any agreement, permit, or license shall be void and unenforceable as a matter of public policy.

See N.C. Gen. Stat. § 121-25(b) (2015).

2. The 2016 Complaint alleged two other counts, for unfair and deceptive trade practices, and for civil conspiracy. Those claims were dismissed by the district court in 2017 on sovereign immunity grounds. Neither are at issue in this appeal.

judgment that § 121-25(b), the so-called "Blackbeard's Law" enacted in North Carolina, was preempted by a federal statute — that is, the Copyright Act, 17 U.S.C. § 101 *et seq.* In Count II, Allen sought damages and injunctive relief for the alleged copyright infringement.

In Count III, Allen alleged a civil rights claim under 42 U.S.C. § 1983, specifying two constitutional violations. Allen first alleged that the 2015 enactment of N.C. Gen. Stat. § 121-25(b) constituted an unconstitutional taking of Allen's property, in contravention of the Takings Clause of the Fifth Amendment. Second, Count III specified that such conduct also violated Allen's rights under the Due Process Clause of the Fourteenth Amendment. In addition to the North Carolina defendants, Allen sued a nonprofit non-governmental entity called the Friends of Queen Anne's Revenge (the "Friends of QAR"), alleging that it had participated in the infringement activities of the North Carolina defendants.

2.

In May 2016, the North Carolina defendants moved to dismiss the 2016 Complaint, claiming Eleventh Amendment sovereign immunity on behalf of the North Carolina entities and officials sued in their official capacities, and claiming both qualified and legislative immunity as to each and every North Carolina official sued in an individual capacity. A basis for the North Carolina defendants' sovereign immunity claim was that § 511 of the Copyright Remedy Clarification Act of 1990 (the "CRCA") — which specified a legislative intent to abrogate state sovereign immunity for copyright claims — was not a valid exercise of congressional power, rendering § 511's purported immunity abrogation unconstitutional. *See* 17 U.S.C. § 511(a) (declaring abrogation of state sovereign immunity from copyright claims).

3.

By Order of March 23, 2017, the district court granted the North Carolina defendants' motion to dismiss in part. Specifically, the Order dismissed nearly all of Allen's claims alleged in the 2016 Complaint, excepting Counts I and II. In so ruling, the court determined that Congress, in enacting the CRCA, had validly exercised its authority to abrogate state sovereign immunity. As a result, the court denied the North Carolina defendants' immunity claims on Counts I and II. *See Allen v. Cooper*, 244 F. Supp. 3d 525 (E.D.N.C. 2017), ECF No. 69 (the "2017 Ruling"). In dismissing Count III, however, the court decided that it was constrained, by Fourth Circuit precedent, to conclude that Allen's "takings claims brought under § 1983 are barred by the Eleventh Amendment when North Carolina courts are available for such a claim to be brought." *Id.* at 18 (citing *Hutto v. S.C. Ret. Sys.*, 773 F.3d 536, 552 (4th Cir. 2014)).

4.

As mentioned earlier, the North Carolina defendants pursued a collateral order appeal of the district court's 2017 Ruling on Counts I and II to our Court. Allen cross-appealed, challenging the court's rulings regarding the dismissal of the Count III takings claim, to the extent that claim alleged violations of Fourteenth Amendment due process.

In our comprehensive 2018 Decision — authored by our colleague Judge Niemeyer — we ruled that Congress had not validly abrogated State sovereign immunity when it adopted the CRCA. *See Allen v. Cooper*, 895 F.3d 337, 353 (4th Cir. 2018) ("[W]e conclude that the [CRCA's] wholesale abrogation of sovereign immunity for claims of copyright infringement is grossly disproportionate to the relevant injury under the Fourteenth Amendment . . . ."). Our 2018 Decision also ruled that the claims of qualified and legislative immunity by the North Carolina defendants collectively barred all claims against those sued in their individual capacities. *Id.* at 356-58.

The 2018 Decision thus reversed the 2017 Ruling and remanded to the district court for a dismissal of each of the North Carolina defendants from Allen's lawsuit. As a result, the Friends of QAR was the only defendant remaining in the litigation. Allen filed a petition for certiorari in January 2019, requesting the Supreme Court to determine whether Congress had validly abrogated state sovereign immunity from copyright infringement claims when the CRCA was enacted.

5.

In June 2019, the Supreme Court granted Allen's petition for certiorari and heard and considered the merits of our 2018 Decision concerning sovereign immunity.

Writing for the Court, Justice Kagan explained and ruled that state sovereign immunity had not been validly abrogated by the CRCA.[3] *See Allen v. Cooper*, 589 U.S. 248, 266-67, 140 S. Ct. 994, 206 L. Ed. 2d 291 (2020) (recognizing that CRCA was designed to provide uniform remedy for statutory infringement "rather than to redress or prevent unconstitutional conduct"). Accordingly, Judge Niemeyer's 2018 Decision was affirmed. *Id.* at 267 (declaring that "we affirm the judgment below").

After the Supreme Court's 2020 decision affirming our 2018 Decision, Allen settled his dispute with the sole remaining defendant in the litigation — the Friends of QAR. As a result, Allen voluntarily dismissed his claims against that defendant with prejudice on August 17, 2020. By all accounts, Allen's lawsuit concerning this entire matter was closed.

C.

1.

But Allen was not ready to give up. On September 4, 2020, Allen filed in the district court for the Eastern District of North Carolina what he called a "motion for reconsideration," relying on Rule 60(b)(6) of the Federal Rules of Civil Procedure. He requested reconsideration of the district court's 2017 Ruling that had dismissed the

3. In his petition for certiorari, Allen did not seek review of any of the qualified or legislative immunity rulings that were made in our 2018 Decision.

§ 1983 Fifth Amendment takings claim alleged in Count III of the 2016 Complaint. Allen therein also moved to amend his dismissed complaint to "even more clearly set out the facts supporting his cause of action," and to authorize a new theory for abrogation of sovereign immunity. *See* J.A. 58.[4] That new theory concerning sovereign immunity was predicated on *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006), a Supreme Court decision that — 14 years before Allen's motion for reconsideration — had adopted the proposition that Congress has "authority to abrogate sovereign immunity for claims arising from state conduct that amounts to an *actual violation* of the Fourteenth Amendment's substantive guarantees." *See Allen*, 895 F.3d at 349 (citing *Georgia*, 546 U.S. at 158 (2006)).

2.

In August 2021, the district court granted Allen's reconsideration motion. Prior to analyzing the merits of the motion, the 2021 Decision recognized that Allen filed his motion "pursuant to Rule 60 of the Federal Rules of Civil Procedure." *See* 2021 Decision 4. But it then declared that Rule 60 was "not applicable," because the 2017 Ruling "dismissed only some of the defendants and some of the claims." *Id.* at 5-6 (reciting that "[r]ather than deny the motion because it cites to Rule 60(b), the Court will construe [Allen's] Rule 60(b) motion as a Rule 54(b) motion to reconsider").

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4. Citations herein to "J.A. __" refer to the contents of the Joint Appendix filed by the parties in this appeal.

When considering whether Allen's reconsideration motion was timely, however, the 2021 Decision relied on Rule 60(b). Although the motion had been filed more than three years after the 2017 Ruling, the district court noted that due to the time lapse caused by the Fourth Circuit and Supreme Court appeals, there was only an 82-day delay between the 2020 Supreme Court Decision and Allen's motion, which was deemed, in the view of the court, "reasonably timely." *See* 2021 Decision 7-8 (citing Fed. R. Civ. P. 60(b)).

The 2021 Decision next addressed the merits of Allen's Rule 60(b) motion and ruled that a 2019 Supreme Court decision, *Knick v. Township of Scott, Pennsylvania*, 588 U.S. 180, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), had implicitly overruled the Fourth Circuit precedent that the district court had relied on in its 2017 Ruling. In that regard, the 2021 Decision declared that the district court's 2017 dismissal of the § 1983 Fifth Amendment takings claim in Count III of the 2016 Complaint was flawed. The 2021 Decision thus ruled that reconsideration was proper "under either Rule 54(b) or Rule 60(b)" due to a "change in decisional law," and that Count III was "no longer dismissed" from the then-concluded litigation. *See* 2021 Decision 21.

Having thereby revived the Count III Fifth Amendment takings claim, the 2021 Decision turned to Allen's request for permission to allege a new theory of abrogation of sovereign immunity, predicated on the Supreme Court's 2006 *Georgia* decision. That "new" theory would purportedly allow Allen to pursue his copyright infringement claims and the resulting constitutional violations that had been dismissed by our Court's 2018 Decision and the 2020 Supreme Court Decision. But instead of analyzing the *Georgia*- based request under Rule 60(b)(6) — again, the Rule that Allen had invoked in his reconsideration motion — the district court again turned to Rule 54(b) and stated that "reconsideration of its previous order of dismissal is appropriate in this case under the Rule 54(b) standard." *See* 2021 Decision 22.

The 2021 Decision then concluded that the district court's "reconsideration" of Allen's copyright infringement and Fourteenth Amendment claims against the North Carolina defendants was proper because the district court had previously ruled that the CRCA was a valid prophylactic abrogation of state sovereign immunity, and the court had "never considered whether [Allen has] a valid claim for abrogation under *Georgia*." *See* 2021 Decision 22. And it proclaimed that the district court had "never expressly closed the door to a valid claim of case-by-case abrogation under *Georgia*," and that the Fourth Circuit and the Supreme Court also "passed on the *Georgia* issue." *Id.*

Finally, in response to the North Carolina defendants' contentions that Allen's *Georgia* theory failed on its merits in any event, the 2021 Decision relied on Rule 15(a)(2) of the Federal Rules of Civil Procedure and recognized that leave to amend a complaint may be "freely given when justice requires." *See* 2021 Decision 24. The district court thus granted Allen leave to amend because "*Georgia* serves as a valid basis for [Allen] to bring [his] constitutional claims," and it determined that such leave was proper in order to give Allen an opportunity to "buttress [his] allegations of 'a modern form of piracy'" by the North Carolina defendants. *Id.* (quoting *Allen*, 589 U.S. at 252).

3.

In September 2021, the North Carolina defendants noticed an appeal to our Court, seeking therein a review of the 2021 Decision that had reinstated Allen's lawsuit and granted Allen leave to amend his 2016 Complaint to allege his *Georgia* theory. Allen responded with a motion to dismiss the appeal for lack of jurisdiction. In October 2022, we granted Allen's motion to dismiss by ruling that the 2021 Decision was neither an appealable final decision, nor an appealable interlocutory order. *See Allen v. Cooper*, No. 21-2040, 2022 U.S. App. LEXIS 28738, 2022 WL 19226124 (4th Cir. Oct. 14, 2022), ECF No. 27.

D.

1.

In February 2023, Allen filed a second amended complaint in the district court, alleging therein a garden variety of claims. *See Allen v. Cooper*, No. 5:15-cv-00627 (E.D.N.C. Feb. 8, 2023), ECF No. 134 (the "2023 Amended Complaint"). In April 2023, the North Carolina defendants moved to strike a major portion of the 2023 Amended Complaint under Rule 12(f) of the Federal Rules of Civil Procedure, maintaining that most of the

Amended Complaint substantially exceeded the bounds authorized by the 2021 Decision. By that same motion, the North Carolina defendants again moved to dismiss all non-stricken allegations of the 2023 Amended Complaint on their sovereign immunity claims, pursuant to Rule 12 (b)(1) of the Federal Rules of Civil Procedure.

2.

Stemming inherently from the district court's 2021 Decision authorizing Allen to reopen this litigation and amend his complaint, the court in 2024 entered an order that is relevant here: the 2024 Ruling analyzing the North Carolina defendants' motion to dismiss. In its 2024 Ruling, the district court recognized that "much of the Second Amended Complaint [went] far beyond the Court's instructions" in the 2021 Decision. *See* 2024 Ruling 2 (citation modified). The 2024 Ruling explained that the 2021 Decision was clear, in that it only authorized "Allen's direct takings claim [alleged in Count III of the 2016 Complaint] and his *Georgia* claims" to proceed. *Id.* at 13. The 2024 Ruling therefore struck all claims that exceeded that mandate without further discussion. *Id.* at 13-14.[5]

The district court's 2024 Ruling then characterized two counts of the 2023 Amended Complaint — that is, Counts III and IV — to be takings claims that arose under the Takings Clause of the Fifth Amendment. The

5. Allen did not cross-appeal in connection with the 2024 Ruling, to the extent it afforded the North Carolina defendants relief under Rule 12(f). Accordingly, we need not address that aspect of the 2024 Ruling in further detail.

2024 Ruling also dismissed those claims, however, as barred by Eleventh Amendment sovereign immunity. *See* 2024 Ruling 21-22 (discussing *Zito v. N.C. Coastal Res. Comm'n*, 8 F.4th 281, 286-88 (4th Cir. 2021), which declared that "*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").[6]

The 2024 Ruling then turned to Allen's *Georgia* theory and stated that *Georgia* was "linked inextricably" to Count I of the 2023 Amended Complaint — the only surviving claim remaining before the district court — which had alleged copyright infringement, in contravention of 17 U.S.C. § 501 *et seq.*, against the North Carolina defendants in their official capacities. *See* 2024 Ruling 13-14. The 2024 Ruling addressed, therefore, whether the North Carolina defendants' copyright infringement activities constituted a denial of Fourteenth Amendment procedural due process. That is, it assessed whether sovereign immunity had been abrogated under a case-by-case theory of abrogation, predicated on the Supreme Court's 2006 decision in *United States v. Georgia*, 546 U.S. 151, 158, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006) (ruling that Congress has plenary authority to abrogate sovereign immunity on an as-applied basis for claim arising from state conduct that "*actually*" violates the Fourteenth Amendment). To that end, the 2024 Ruling recited that the district court had to consider "whether Allen states claims for copyright

6. The 2024 Ruling also ruled that Allen failed to allege a *Georgia*-based Fourteenth Amendment due process violation on a takings theory. *See* 2024 Ruling 37.

infringement and [whether] that same conduct also violates the Fourteenth Amendment." *See* 2024 Ruling 28.

Rejecting the North Carolina defendants' copyright defenses, the 2024 Ruling determined that Allen had properly alleged — under the *Georgia* theory — willful or intentional copyright infringement, as well as a Fourteenth Amendment violation. The court recited that the North Carolina defendants were "in the position to foresee a deprivation and [they] acted pursuant to an established state procedure — § 121-25(b) — whose purpose was to deprive Allen of his protected interest in his copyrights." *See* 2024 Ruling 41. That is, the 2024 Ruling concluded that "under *Georgia*, [§ 511 of the CRCA] validly abrogates the State's sovereign immunity as-applied." *Id.* at 43. As a result, Count I of the 2023 Amended Complaint — alleging copyright infringement and a related denial of Fourteenth Amendment due process pursuant to Allen's *Georgia* theory — was Allen's sole surviving claim (the "*Georgia* copyright infringement due process claim").

* * *

On September 30, 2024, the North Carolina defendants noticed the appeal that is now pending before our Court. The defendants therein stated that they appealed "from those parts of the district court's [2024 Ruling] that denied defendants' motions to dismiss the second amended complaint." *See* J.A. 316.

II.

Having ascertained and summarized the factual and procedural background of this appeal, we turn to the issues which are raised in these circumstances and the competing contentions of the parties. Three issues are presented for consideration.

First, we must examine the extent and bases of our jurisdiction in this appeal, which was initiated by the North Carolina defendants following the 2024 Ruling. Second, we assess whether and to what extent we must consider and resolve the contention of the North Carolina defendants that the 2021 Decision was fatally flawed. And third, we will decide whether the challenge of the North Carolina defendants to the 2024 Ruling of the district court should be sustained.

III.

Having provided the foregoing overview of the issues we are obliged to resolve, we turn to them in that order. Specifically, we will assess our jurisdiction, consider the 2021 Decision, and then discuss our disposition of the 2024 Ruling.

A.

1.

In assessing the jurisdictional morass presented here, we will first summarize the respective positions of the parties. We indisputably possess jurisdiction over the 2024 Ruling, pursuant to the collateral order doctrine, because that Ruling denied the North Carolina defendants sovereign immunity from Allen's *Georgia* copyright infringement due process claim. *See Jackson Creek Marine, LLC v. Maryland*, 153 F.4th 423, 428 (4th Cir. 2025) ("[T]he denial of a state's assertion of sovereign immunity may be immediately appealed under the collateral order doctrine.").

But the North Carolina defendants contend that, in resolving this appeal, we are also entitled to review the 2021 Decision of the district court, pursuant to Rule 3(c)(4) of the Federal Rules of Appellate Procedure. Specifically, they maintain that the 2021 Decision was an earlier-in-time ruling that "led up to" and merged into the appealable 2024 Ruling. *See* Reply Br. of Appellant 6-7. The North Carolina defendants argue, in other words, that a denial of sovereign immunity is a final decision under 28 U.S.C. § 1291, and therefore that it is an "appealable order" with which the 2021 Decision must merge. *Id.* at 14 (relying on *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 141, 113 S. Ct. 684, 121 L. Ed. 2d 605 (1993)); *see also Lee-Thomas v. Prince George's Cnty. Pub. Schs.*, 666 F.3d 244, 247 (4th Cir. 2012) ("We possess jurisdiction under the collateral order doctrine to review a denial of Eleventh Amendment immunity, in that such a ruling is deemed a final decision under 28 U.S.C. § 1291.").

Allen, on the other hand, contends that our jurisdiction in this appeal is limited to the 2024 Ruling only. Allen asserts that the authorities relied upon by the North

Carolina defendants for their merger argument involve appeals that arise from traditional final judgment rulings, such as summary judgments, rather than collateral orders that are appealable because they are final decisions within the meaning of § 1291, such as an order — like the 2024 Ruling — denying sovereign immunity. *See Jenkins v. Woodard*, 109 F.4th 242, 246-47 (4th Cir. 2024) (merging order granting summary judgment with earlier orders denying requests for appointment of counsel and additional time for discovery).

To be sure, Rule 3(c)(4) of the Appellate Rules provides that a "notice of appeal encompasses all orders that, for purposes of appeal, merge into the designated judgment or appealable order." *See* Fed. R. App. P. 3(c)(4). But our Court has apparently never applied Rule 3(c)(4) to merge and confer appellate jurisdiction over an earlier interlocutory order, such as the 2021 Decision, with an appealable collateral order denying a claim of sovereign immunity, or any other type of immunity.

In these circumstances, we are content to leave for another day the North Carolina defendants' Rule 3 merger contention. And that is because we are satisfied that we possess what is called pendent appellate jurisdiction over the 2021 Decision.

2.

Pendent appellate jurisdiction is a "judicially-created, discretionary exception to the final judgment requirement." *See Rux v. Republic of Sudan*, 461 F.3d

461, 475 (4th Cir. 2006). When an issue is already properly before a court of appeals, "[p]endent appellate jurisdiction permits appellate courts to 'retain the discretion to review issues that are not otherwise subject to immediate appeal when such issues are so interconnected with immediately appealable issues that they warrant concurrent review.'" *See Nero v. Mosby*, 890 F.3d 106, 123 (4th Cir. 2018) (citing *Rux*, 461 F.3d at 475). Though pendent appellate jurisdiction should only be exercised sparingly, we have recognized that it may be utilized "(1) when an issue is inextricably intertwined with a question that is the proper subject of an immediate appeal; or (2) when review of a jurisdictionally insufficient issue is necessary to ensure meaningful review of an immediately appealable issue." *See Scott v. Fam. Dollar Stores, Inc.*, 733 F.3d 105, 111 (4th Cir. 2013) (citation modified); *see also Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 49-50, 115 S. Ct. 1203, 131 L. Ed. 2d 60 (1995) (cautioning against "a rule loosely allowing pendent appellate jurisdiction").

As to the first situation, separate issues are "inextricably intertwined" when "the same specific question will underlie both the appealable and the non-appealable order, such that resolution of the question will necessarily resolve the appeals from both orders at once." *See Indus. Servs. Grp., Inc. v. Dobson*, 68 F.4th 155, 167 (4th Cir. 2023) (citation modified); *see also Altman v. City of High Point, N.C.*, 330 F.3d 194, 207 n.10 (4th Cir. 2003) (determining that resolution of issue of whether officers were entitled to qualified immunity was "inextricably intertwined" with issue of whether municipality could be held liable because the immunity issue "fully resolve[d]" the municipality's liability). We have thus exercised pendent appellate jurisdiction when an earlier, non-immediately appealable order "is inextricably linked to the outcome of the" appealable issue. *See Hinson v. Norwest Fin. S.C., Inc.*, 239 F.3d 611, 615 (4th Cir. 2001).

As to the second scenario, an issue is "necessary to ensure meaningful review if resolution of the appealable issue necessarily resolves the non-appealable issue or where review of the non-appealable issue is necessary to ensure meaningful review of the appealable one." *See Scott*, 733 F.3d at 111 (citation modified). Our Court has utilized this alternative when orders at issue have been "so interconnected" that they had to be reviewed concurrently. *See Elegant Massage, LLC v. State Farm Mut. Auto. Inc. Co.*, 95 F.4th 181, 188-89 (4th Cir. 2024) (exercising pendent appellate jurisdiction over non-appealable order because "threshold merits question" addressed therein was "integral" to ruling in appealable order).

3.

The circumstances of this collateral order appeal from the 2024 Ruling warrant the exercise of our discretion to review the 2021 Decision under either prong of the pendent jurisdiction analysis. *See Ealy v. Pinkerton Gov't Servs., Inc.*, 514 Fed. App'x 299, 309 (4th Cir. 2013) ("But the two potential pendent jurisdiction scenarios set forth in *Swint* are not always so easily distinguished."). Put succinctly, it would be unworkable for us to rule that we possess jurisdiction with respect to the 2024 Ruling — which denied the North Carolina defendants sovereign immunity — but that we lack jurisdiction concerning the 2021 Decision that made the 2024 Ruling possible.

To be sure, this is not a situation where the 2021 Decision is merely related to, or helpful to, an analysis of the 2024 Ruling. The 2021 Decision is the sole and only seed thereof. Put differently, the 2021 Decision is the necessary foundational prerequisite for the appealable 2024 Ruling, and it is therefore linked inextricably to our disposition of this appeal. The plain terms of the 2024 Ruling make that clear, as they reference the scope of the authorized "reconsideration" fixed by the 2021 Decision in analyzing the North Carolina defendants' sovereign immunity-based motion to dismiss. *See* 2024 Ruling 2 ("Much of the Second Amended Complaint goes far beyond the Court's instructions[.]"). The 2021 Decision also made explicit rulings concerning Allen's *Georgia* theory, which is an issue in the North Carolina defendants' appeal of the 2024 Ruling. *See* 2021 Decision 23-24 (determining that alleged conduct of North Carolina defendants amounted to both statutory and constitutional violations, and "[t]herefore, [Allen] can still use the CRCA as a basis for [his] *Georgia* claim").

On a similar score, the 2021 Decision was the sole basis for the district court's purported authority relative to the 2024 Ruling. *See Hendricks v. Bank of America*, 408 F.3d 1127, 1134-35 (9th Cir. 2005) (explaining that pendent appellate jurisdiction may exist "over those questions that implicate the very power the district court used to issue the rulings then under consideration"). In this situation, if the court erred in 2021 in reopening this litigation to "reconsider" contentions that it never addressed, it would unequivocally have no authority to analyze and resolve the North Carolina defendants' Eleventh Amendment sovereign immunity claims before us today.

The foregoing concerns are especially ripe here, because our Court and the Supreme Court have each determined at least six years ago that the North Carolina defendants are entitled to sovereign immunity on Allen's claims. And in these circumstances, the 2021 Decision is "so interconnected" with the 2024 Ruling "as to require concurrent review." *See Elegant Massage, LLC*, 95 F.4th at 188. As a result, we will exercise our discretion to apply the pendent appellate jurisdiction doctrine and also assess the 2021 Decision in this collateral order appeal from the 2024 Ruling.

B.

1.

Satisfied with the jurisdictional question, we proceed to assess whether the district court erred in reopening Allen's litigation in 2021.[7] As explained above, on September

7. As a threshold matter, we reject Allen's contention that the North Carolina defendants waived their objections to the 2021 Decision by failing to raise them when they appealed the 2021 Decision in September 2021. Allen moved to dismiss immediately after the North Carolina defendants noticed their 2021 appeal. And we granted Allen's motion and dismissed for lack of jurisdiction. *See Allen v. Cooper*, No. 21-2040, 2022 U.S. App. LEXIS 28738, 2022 WL 19226124 (4th Cir. Oct. 14, 2022), ECF No. 27.

4, 2020, Allen moved for reconsideration in the district court, relying on Rule 60(b)(6) of the Federal Rules of Civil Procedure, which applies to relief from final judgments, orders, or proceedings in certain circumstances. The court, however, proceeded to a "reconsideration" of Allen's copyright and constitutional claims under Rule 54(b) — a less onerous Rule for modification of non-final decisions.

Of importance here, a district court's application of each of those Rules is reviewed on appeal for abuse of discretion. *See, e.g., Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (reviewing 54(b) ruling for abuse of discretion); *Aikens v. Ingram*, 652 F.3d 496, 501 (4th Cir. 2011) (en banc) (reviewing 60(b) ruling for abuse of discretion). We have recognized that "a district court abuses its discretion when it acts in an arbitrary manner, when it fails to consider judicially-recognized factors limiting its discretion, or when it relies on erroneous factual or legal premises." *See Wall v. Rasnick*, 42 F.4th 214, 220 (4th Cir. 2022) (citation modified). Notably, our Court has made clear that "an error of law is by definition an abuse of discretion, and such an error is alone grounds for reversal." *See Wudi Industrial (Shanghai) Co., Ltd. v. Wong*, 70 F.4th 183, 190 (2023) (citation modified); *Pendleton v. Jividen*, 96 F.4th 652, 656 (4th Cir. 2024) ("A ruling that rests on an error of law is necessarily an abuse of discretion.").

2.

In this light, we will first evaluate whether the district court abused its discretion in deciding to apply Rule 54(b)

— rather than Rule 60(b) — to its consideration of Allen's 2021 motion to revive his *Georgia*-based copyright and constitutional claims. And we are satisfied that the court erred in that regard. Put simply, Rule 60(b) was the only conceivable — yet nevertheless inadequate — means to reopen this litigation.

a.

Before explaining that reconsideration of this litigation was erroneous under Rule 60(b), we will first discuss why it was not permissible under Rule 54(b) and describe why the 2021 Decision amounts to an "error of law" that is "alone grounds for reversal." *See Wudi*, 70 F.4th at 190 (citation modified). And that is because Rule 54(b) applies to interlocutory, pre-judgment orders, whereas Rule 60(b) governs final judgments. Rule 54(b) provides, in relevant part, that

> any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and *may be revised at any time before the entry of a judgment adjudicating all the claims* and all the parties' rights and liabilities.

See Fed. R. Civ. P. 54(b) (emphasis added). By contrast, and entirely on the other hand, Rule 60(b) is titled "Grounds for Relief from a *Final* Judgment, Order, or Proceeding." *See* Fed. R. Civ. P. 60(b) (emphasis added).

In addressing Allen's request in 2021 for "reinstatement of [his] lawsuit and an opportunity to amend [his] complaint" with respect to his then-dismissed claims that the North Carolina defendants had violated the CRCA and the Fourteenth Amendment, the district court ruled that "reconsideration of its [2017 Ruling] of dismissal is appropriate in this case under the Rule 54(b) standard." *See* 2021 Decision 21-22. The court determined that its 2017 Ruling had not been a final order, because only some of Allen's claims against the North Carolina defendants were dismissed, and a non-governmental defendant, the Friends of QAR, remained in the suit. But that analysis failed to assess the relevant appellate procedural history. Taking that history into account, there is no doubt that the 2017 Ruling was not an interlocutory order within the purview of Rule 54(b).

A brief restatement of the procedural timeline is helpful. The district court ruled in 2017 that the North Carolina defendants' sovereign immunity contentions on Allen's copyright-based claims had not been abrogated. We reversed that decision — ruling in 2018 that the North Carolina defendants were immune from Allen's claims. And the district court then dismissed Allen's claims against the North Carolina defendants — pursuant to our Court's mandate — on August 24, 2018.

Following the Supreme Court's affirmance of our Court's 2018 Decision in 2020, Allen dismissed his lawsuit against the only then-remaining defendant, the Friends of QAR, on August 17, 2020. With all parties having been dismissed from the litigation, as of August 2020, the lawsuit was no longer in existence, in that all rights and liabilities between and among the various parties had been adjudicated within the meaning of Rule 54(b).

In other words, the district court's implementation of our Court's 2018 mandate and Allen's dismissal of the Friends of QAR in 2020 necessarily had resulted in a final judgment. There was thus no interlocutory order for the district court to seek to "revise" in 2021. *See* Fed. R. Civ. P. 54(b); *Waetzig v. Halliburton Energy Servs., Inc.*, 604 U.S. 305, 312, 145 S. Ct. 690, 221 L. Ed. 2d 143 (2025) (holding that even a "voluntary dismissal without prejudice is 'final' under Rule 60(b)" and that such a "dismissal is the conclusive and last filing on the docket, and it completes the particular lawsuit at issue" (citation modified)). This litigation — which began in 2015 — was concluded in 2020, and there was nothing for the district court to do with respect to Allen's lawsuit. *See Calderon v. GEICO Gen. Ins. Co.*, 754 F.3d 201, 204 (4th Cir. 2014) ("In the ordinary course a 'final decision' is one that ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." (citation modified)).

The purpose of Rule 54(b) is to allow an appeal before "the determination of all issues as to all parties" and "before a final judgment can be had." *See Dickinson v. Petroleum Conversion Corp.*, 338 U.S. 507, 511, 70 S. Ct. 322, 94 L. Ed. 299 (1950). Although the district court's 2021 actions might have been proper in 2017, they were not proper in 2021. The 2021 Decision of the district court was thus an abuse of its discretion.

Resisting that straightforward conclusion, however, Allen maintains that he had obtained leave to file his motion for reconsideration before he voluntarily dismissed the Friends of QAR, and that there was not a final judgment for Rule 60(b) purposes. But this proposition is without merit. Despite Allen's creative characterizations, Allen's Rule 60(b)(6) motion was undeniably filed on September 4, 2020, after he had voluntarily dismissed the Friends of QAR on August 17, 2020. Put simply, the briefing schedule established by the district court is not the relevant measurement — the motion itself, which Allen filed to seek leave to amend his complaint to again pursue his claims against the North Carolina defendants, is what controls. *See* Fed. R. Civ. P. 41(a)(1)(A)(ii) (establishing that voluntary stipulation of dismissal does not require court order to become effective); *see also* 9 Charles A. Wright & Arthur Miller, Federal Practice and Procedure § 2363, at 270-271 (2d ed. 1995) (explaining that "voluntary dismissal by stipulation is effective immediately upon filing and does not require judicial approval").

The result of the foregoing analysis is inevitable: On September 4, 2020, when Allen filed his motion for reconsideration — seeking leave to amend his failed and dismissed complaint — there were no live claims then pending against any defendant, and this lawsuit had terminated. And Allen apparently recognized that Rule 60(b) was the only possible avenue for obtaining reconsideration, as he invoked that Rule himself. *See* J.A. 58 (declaring that Allen "move[s] pursuant to Rule 60(b)(6) for [the district court] to reconsider its Order . . . dismissing Count III of Allen's amended complaint"); *see also* J.A. 54 (status report filed by Allen on July 15, 2020 in the district court describing Allen's settlement with Friends of Queen Anne's Revenge as "the only live issue in the case").

b.

We accordingly turn to whether the district court abused its discretion on August 18, 2021, by filing its 2021 Decision that purported to reopen this litigation under Rule 60(b). *See Humphrey v. Humphrey*, 434 F.3d 243, 248 (4th Cir. 2006) ("When a trial court applies the wrong legal test an appellate court may resolve the case without remanding if the evidence would inevitably produce the same outcome under the correct standard." (citation modified)). We are satisfied that an abuse of discretion occurred with respect to the 2021 Decision.

i.

Rule 60(b) of the Federal Rules of Civil Procedure authorizes a federal court to "relieve a party from a final judgment, order, or proceeding" in certain specific circumstances, including mistake or excusable neglect, newly discovered evidence, or fraud. *See* Fed. R. Civ. P. 60(b)(1)-(5) (citation modified).[8] Rule 60(b) also contains

8. Specifically, Rule 60(b)'s multiple enumerated reasons for relief, absent its "catchall" provision, include the following:

> (1) mistake, inadvertence, surprise, or excusable neglect;
>
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

a "catchall" provision — in Rule 60(b)(6) — that a court may apply for "any other reason that justifies relief." *Id.* at 60(b)(6). The catchall provision of Rule 60(b)(6) is only to be applied, however, when "the movant demonstrates extraordinary circumstances." *See Wells Fargo Bank, N.Z. v. AMH Roman Two NC, LLC*, 859 F.3d 295, 299 (4th Cir. 2017) (citation modified); *Ackermann v. United States*, 340 U.S. 193, 199-202, 71 S. Ct. 209, 95 L. Ed. 207 (1950) (explaining that "extraordinary circumstances" are required for Rule 60(b)(6) relief).

Moreover, "to obtain relief from a judgment under Rule 60(b), a moving party must first show (1) that the motion is timely, (2) that he has a meritorious claim or defense, and (3) that the opposing party will not suffer unfair prejudice if the judgment is set aside." *See United States v. Welsh*, 879 F.3d 530, 533 (4th Cir. 2018). Of especial relevance here, "if the reason asserted for the Rule 60(b)(6) motion could have been addressed on appeal from the judgment, we have denied the motion as merely an inappropriate substitute for an appeal." *See Aikens*, 652 F.3d at 501; *Dowell v. State Farm Fire & Cas. Auto.*

> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
>
> (4) the judgment is void; [and]
>
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable[.]

See Fed. R. Civ. P. 60(b)(1)-(5).

Ins. Co., 993 F.2d 46, 48 (4th Cir. 1993) (explaining that "voluntary, deliberate, free, untrammeled choice" not to appeal judgment or order will not provide basis for Rule 60(b)(6) relief (citing *Ackermann*, 340 U.S. at 200)).

ii.

In the present situation, Allen moved for reconsideration under Rule 60(b)(6) and has made no assertion that his request for reconsideration fits into any of the five other enumerated scenarios in Rule 60(b)(1) through (5). Nor could he. The *Georgia* decision had been established Supreme Court precedent since 2006, that is, for approximately 14 years at the time Allen filed his Rule 60(b) motion. We must therefore decide whether Allen has shown that there were "extraordinary circumstances" — which must exist in order to invoke the "catchall" provision of Rule 60(b)(6) — sufficient to allow him to reopen this litigation in 2021 and amend his complaint to reallege previously-dismissed claims under an afterthought theory. The answer to that question is strikingly simple: no such circumstances existed here, and the district court's ruling is thus an erroneous abuse of discretion.

In that regard, the crux of the district court's reasoning in its 2021 Decision for reopening this litigation and authorizing Allen to pursue his 2006 *Georgia* theory of liability is that, because the district court had previously determined that the CRCA was valid prophylactic abrogation, "it never considered whether [Allen has] a valid claim for abrogation under *Georgia*." *See* 2021 Decision 22. The court explained that it

> never expressly closed the door to a valid claim of case-by-case abrogation under *Georgia*. Because this Court, the Fourth Circuit, and the Supreme Court all passed on the *Georgia* issue, it is appropriate to consider this claim for case-by-case abrogation following the Supreme Court's decision rejecting the CRCA as a valid prophylactic statute.

Id.[9]

The district court's explanation in the 2021 Decision is fatally flawed for multiple reasons. First, and perhaps most critically, the *Georgia* decision had been "on the books" since 2006-10 years before Allen had even filed his 2016 Complaint. *See United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006). Allen had never alleged a *Georgia* theory, and he had neither raised nor pursued a *Georgia*-based contention before this Court in the 2018 appeal. Critically, Allen did not argue a *Georgia* theory in the Supreme Court after our Court disposed of his prophylactic abrogation theory. And that fact is important, because the *Georgia* Court itself had granted a remand for the lower courts to assess whether as-applied abrogation could be a viable alternative for the claims.

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9. We observe that the 2021 Decision's assertion that the Fourth Circuit "passed" on the *Georgia* issue is belied by our 2018 Decision. *See Allen v. Cooper*, 895 F.3d 337, 349 (4th Cir. 2018) (citing to *Georgia* and declaring that "Congress has plenary authority to abrogate sovereign immunity for claims arising from state conduct that amounts to an *actual violation* of the Fourteenth Amendment's substantive guarantees").

Second, neither Allen nor the district court has presented any explanation of how Allen's failure to pursue an established legal theory — such as that created by *Georgia* — could ever meet the exceptional circumstances requirement of Rule 60(b)(6). *See Omni Outdoor Advert., Inc. v. Columbia Outdoor Advert., Inc.*, 974 F.2d 502, 506 (4th Cir. 1992) ("[N]othing in the federal rules encourages a plaintiff to delay bringing causes of action until the plaintiff's 'better' claim is resolved."). And, in this situation, Allen would need to justify hauling the North Carolina defendants back into court concerning claims that were dismissed years earlier on Eleventh Amendment sovereign immunity grounds. Put simply, we agree with the North Carolina defendants that the prejudice to them from Allen's delay in pursuing his *Georgia* theory is "manifest." *See* Br. of Appellant 35.

Third, the 2021 Decision was fatally flawed for yet another reason. That is, the district court bypassed the second and third prongs of the Rule 60(b) analysis — i.e., that the movant must establish that he has a meritorious claim or defense and that the opposing party will not suffer unfair prejudice — in a handful of sentences from its 2021 Decision, which perplexingly collapsed Allen's Rule 60 (b)(6) and Rule 15(a) burdens:

> *Defendant argues that [Allen's] Georgia argument fails on the merits. However, [Allen] seek[s] an opportunity to amend to allege more facts to buttress the allegations* of taking without due process, intentional infringements, and those responsible. Rule 15 of the Federal Rules of Civil Procedure provides that a party

> may amend his pleadings with leave of the court. Fed. R. Civ. P. 15(a)(2). Further, Rule 15 directs that leave to amend be freely given when justice requires. *Id.* "This liberal rule gives effect to the federal policy in favor of resolving cases on their merits *instead of disposing of them on technicalities*." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (citing *Conley v. Gibson*, 355 U.S. 41, 48, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)).

See 2021 Decision 24 (emphasis added).

Notwithstanding the district court's faulty analysis, the Supreme Court has recently confirmed that a movant must satisfy Rule 60(b)(6)'s standard before a district court can consider the issue of whether to grant leave to amend a complaint:

> The Rule 60(b)(6) standard does not change when a party seeks to reopen his case to amend his complaint. In that circumstance, satisfaction of Rule 60(b)(6) necessarily precedes any application of Rule 15(a).

See BLOM Bank SAL v. Honickman, 605 U.S. 204, 213, 145 S. Ct. 1612, 221 L. Ed. 2d 850 (2025); *see also Daulatzai v. Maryland*, 97 F.4th 166, 178 (4th Cir. 2024) (recognizing that "if a plaintiff seeks to reopen a case under Rule 60(b) in order to file an amended complaint, she must satisfy one of the Rule 60(b) grounds *before* a court may consider her motion to amend"). The 2021 Decision authorized Allen to reopen his litigation then and there, and to demonstrate its merits later, notwithstanding the North Carolina defendants' objections. *See BLOM Bank SAL*, 605 U.S. at 214 ("What a district court may not do is what the Second Circuit demanded here: dilute Rule 60 (b)(6)'s stringent standard by balancing it with Rule 15(a)'s liberal pleading principles." (citation modified)).

Fourth, we cannot accept the 2021 Decision's explanation that the belated nature of Allen's request to amend and pursue the *Georgia* theory prevents an unwarranted disposal of a lawsuit on a "technicality." *See* 2021 Decision 24 (citation modified). On the contrary, it is difficult to imagine how the restart of this litigation is anything other than a "do-over." Our Court has been clear that "although Rule 15(a) indicates that leave to amend should be freely given when justice so requires, the rule does not afford plaintiffs a tool to engage in the litigation of cases one theory at a time." *See Omni Outdoor*, 974 F.2d at 506 (citation modified). As our Judge Wilkinson cogently explained therein, "trying cases one claim at a time is both unfair to the opposing party and inefficient for the judicial system." *Id.* In these circumstances, Allen had a full and fair opportunity to raise and litigate his *Georgia* contentions when he initiated this lawsuit in 2015. But he failed to do so then, in 2018 before our Court, and again in the Supreme Court in 2020.

Put simply, the district court abused its discretion in rendering its 2021 Decision. We are constrained to reverse each of the rulings made therein with respect to the *Georgia* copyright infringement due process claim.[10]

10. As we have heretofore explained, *see supra* Part I.C.2, the 2021 Decision also authorized reconsideration of the 2016 Complaint's

C.

In light of our conclusion that the 2021 Decision was an abuse of the district court's discretion, we turn to an assessment of the 2024 Ruling. On that score, we are satisfied to vacate as moot the 2024 Ruling, pursuant to our Court's precedent in *Norfolk Southern Railway Co. v. City of Alexandria*, 608 F.3d 150 (4th Cir. 2010). As we recognized in 2010 in our *Norfolk Southern* decision, "[w]e are always obliged to assure ourselves that a live dispute exists between the parties at all stages of litigation." *Id.* at 161. To that end, "[a] dispute is moot when the parties lack a legally cognizable interest in the outcome." *Id.* (citation modified). And "the parties lack such an interest when . . . our resolution of an issue could not possibly have any practical effect on the outcome of the matter." *Id.*; *see also Holloway v. City of Va. Beach*, 42 F.4th 266, 275 (4th Cir. 2022) ("Under these well-established mootness principles, federal courts may not opine on the merits of a case when doing so would have no practical effect on the outcome of the matter." (citation modified)).

With those well-established principles in mind, "[t]he customary practice when a case is rendered moot on appeal is to vacate the moot aspects of the lower court's judgment," if the mootness "occurred through happenstance, rather

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Count III Fifth Amendment takings claim that was dismissed by the district court in its 2017 Ruling. Because reconsideration of that claim was predicated on a perceived change in decisional law — rather than on Allen's *Georgia* theory — and because no party contests the district court's dismissal of that claim in its 2024 Ruling, we do not review that ruling.

than through the voluntary action of the losing party." *See Norfolk S.*, 608 F.3d at 161-62 (citation modified); *Goldman v. Brink*, 41 F.4th 366, 369 (4th Cir. 2022) (applying *Norfolk Southern* precedent to, inter alia, vacate "unreviewed" constitutional ruling on Eleventh Amendment sovereign immunity); *Palmer v. Liberty Univ., Inc.*, 72 F.4th 52, 69 (4th Cir. 2023).

In these circumstances, we are of opinion that a decision on the underlying merits of the 2024 Ruling "could not possibly have any practical effect on the outcome of the matter," given our disposition today on the 2021 Decision. *See Norfolk S.*, 608 F.3d at 161. That is, the resolution of the Eleventh Amendment sovereign immunity issues presented — yet again — in this matter, vis-à-vis the 2024 Ruling, would necessarily "result in an advisory opinion being rendered" on moot constitutional issues. *Id.* at 162; *Goldman*, 41 F.4th at 369. And although a party "may desire that we render an opinion to satisfy [a] demand for vindication or curiosity about who's in the right and who's in the wrong" relative to the *Georgia* copyright infringement due process claim, "we may only decide cases that matter in the real world." *See Norfolk S.*, 608 F.3d at 161 (citation modified).

IV.

Pursuant to the foregoing, we are constrained to reverse the 2021 Decision and vacate as moot — and hold for naught — the 2024 Ruling, as well as all rulings of the district court subsequent to the 2021 Decision. Consistent therewith, we remand with directions to close this litigation by dismissing the North Carolina defendants and all claims lodged and pending against them herein, with prejudice.

REVERSED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION, FILED AUGUST 30, 2024

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NORTH
CAROLINA, WESTERN DIVISION

No. 5:15-CV-00627-BO

FREDERICK L. ALLEN AND NAUTILUS
PRODUCTIONS, LLC,

Plaintiffs,

v.

ROY A. COOPER, GOVERNOR
OF NORTH CAROLINA, *et al.*,

Defendants.

August 29, 2024, Decided;
August 30, 2024, Filed

ORDER

Before the Court is the second attempt of Frederick Allen and his company, Nautilus Productions, LLC, (collectively "Allen") to abrogate North Carolina's sovereign immunity. Allen's first attempt to sue the North Carolina, its Department of Natural and Cultural Resources, and various state officials (collectively, "North

Carolina" or "the State") foundered when the Supreme Court held the Copyright Remedy Clarification Act of 1990 ("CRCA"), 17 U.S.C. § 501, *et seq.*, was an invalid prophylactic abrogation of state sovereign immunity under § 5 of the Fourteenth Amendment. Allen now asserts that two other theories of abrogation—as-applied abrogation under § 5 of the Fourteenth Amendment and the "self-executing" Fifth Amendment—allow this Court to hear his claims.

North Carolina disagrees. The State moves to strike much of Allen's Second Amended Complaint for exceeding this Court's order granting reconsideration and giving leave to amend. For the remaining claims, the State moves to dismiss, arguing that sovereign immunity precludes jurisdiction here because Allen cannot show a valid abrogation under either theory.

This Court agrees with the State on some issues and Allen on others. Much of the Second Amended Complaint goes far beyond the Court's instructions; and much of what remains is outside this Court's subject-matter jurisdiction, but not everything. The Court, therefore, grants in part and denies in part North Carolina's motions.

BACKGROUND

By this stage in the proceedings, the story of this case has been told and retold.[1] Another extensive retelling is

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1. For a more detailed account of the factual background *see* *Allen v. Cooper*, 244 F. Supp. 3d 525, 530-31 (E.D.N.C. 2017); *Allen*

unnecessary; a primer on the key facts will suffice. Still, a thorough recounting of the procedural history—which is admittedly dense—is necessary to understand the dispute as it currently stands.

I. The Origins of Allen's Copyrights

In 1996, Intersal, a marine salvager, discovered Blackbeard's flagship the *Queen Anne's Revenge* ("the *QAR")* in North Carolina's coastal waters near the Beaufort Inlet. Under North Carolina law, the *QAR* and its artifacts are state property. N.C. Gen. Stat. § 122-22. Intersal and the North Carolina Department of Natural and Cultural Resources ("DNCR" or "the Department") entered into a fifteen-year salvage agreement. That agreement gave Intersal, among other things, the exclusive right to make and market all commercial media of the salvage efforts. The agreement, however, contained exceptions for public records and non-commercial and educational uses. Intersal then retained Allen and his company, Nautilus Productions, LLC, to document the salvage efforts. Allen registered 13 copyrights with the U.S. Copyright Office, each copyright covering a year's worth of video and still images of the *QAR's* preservation.

The relationship between Allen and the Department soured around 2013. At that time, Allen learned that the Department had uploaded copyrighted still images and video-footage to the internet without his consent. Allen,

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v. Cooper, 895 F.3d 337,342-45 (4th Cir. 2018); *Allen v. Cooper*, 589 U.S. 248,251-54, 140 S. Ct. 994, 206 L. Ed. 2d 291 (2020); *Allen v. Cooper*, 555 F. Supp. 3d 226,230-32 (E.D.N.C. 2021).

Intersal, and the Department reached a written settlement agreement resolving that dispute. Without admitting to any wrongdoing, the State and the Department compensated Allen for the alleged infringement. The agreement also clarified the parties' rights to the videos and photographs.[2]

Not long after the settlement agreement, Allen alleges the Department resumed its copyright infringement by publishing, performing, and displaying copyrighted videos and still images on the internet. To make matters worse for Allen, in 2015 the North Carolina General Assembly passed Session Law 2015-218. 2015 N.C. Sess. Laws 218, § 4(a). That law, codified as N.C. Gen. Stat. § 121-25(b)[3], amended a provision of North Carolina public records law, by adding the following language:

2. Intersal and the State are in protracted litigation over the Settlement Agreement in the North Carolina Business Court. *See Intersal, Inc. v. Wilson*, 2024 NCBC LEXIS 51, at *1, 2024 NCBC Order 28 (N.C. Super. Ct. Mar. 15, 2024).

3. On 1 July 2016, the General Assembly amended § 121-25(b) to remove the last sentence detailing the absence of limitations on the use of the documentary materials. The amended version read as follows:

> All photographs, video recordings, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historical materials, in the custody of any agency of North Carolina government or its subdivisions shall be a public record pursuant to Chapter 132 of the General Statutes.

2016 N.C. Sess. Laws 94, § 16.2.

> (b) All photographs, video records, or other documentary materials of a derelict vessel or shipwreck or its contents, relics, artifacts, or historic materials in the custody of any agency of North Carolina government or its subdivisions shall be public records pursuant to G.S. 132-1. There shall be no limitation on the use of or no requirement to alter any such photograph, video recording, or other documentary material, and any such provision in any agreement, permit or license shall be void and unenforceable as a matter of public policy.

2015 N.C. Sess. Laws 218, § 4.(a).

II. Allen's First Attempt to Sue the State

On 1 December 2015, Allen commenced this action. He alleged the State, the Department, and various state officials, violated federal law—namely, the Takings Clause of the Fifth Amendment, Due Process Clause of the Fourteenth Amendment, the Copyright Act, and 42 U.S.C. § 1983—through direct copyright infringement and the passage of § 121-25(b). Allen sought declaratory relief that § 121-25(b) was void and unenforceable not only as preempted by the Copyright Act but also under the Fifth and Fourteenth Amendments. For the ongoing constitutional violations, Allen sought injunctive relief under *Ex Parte Young*, 209 U.S. 123, 28 S. Ct. 441, 52 L. Ed. 714 (1908). In addition to these federal claims, Allen asserted claims under North Carolina law.

The State moved to dismiss Allen's amended complaint, arguing, among other things, that the CRCA was an invalid abrogation of state sovereign immunity under § 5 of the Fourteenth Amendment. On 23 March 2017, this Court denied in part and granted in part Defendants' motion to dismiss. *Allen*, 244 F. Supp. 3d at 546. Because this Court concluded that the CRCA abrogated North Carolina's sovereign immunity, it allowed plaintiffs' claims for copyright infringement and injunctive and declaratory relief to proceed. *Id.* at 535, 544.

Not all of Allen's claims survived. The Court granted the State's motion to dismiss Allen's § 1983 claims for unconstitutional takings and violations of due process as well as Allen's state-law claims because of the State's sovereign immunity. *Id.* at 540. The Court dismissed Allen's § 1983 claims on sovereign immunity grounds per the Fourth Circuit's decision in *Hutto v. South Carolina Retirement System*, 773 F.3d 536 (4th Cir. 2014), which held that state sovereign immunity bars taking claims in federal court when those claims can be brought in state court. *Allen*, 244 F. Supp. 3d at 540.

Because this Court did not dismiss all of Allen's claims on immunity grounds, North Carolina filed an interlocutory appeal. Regarding the CRCA's abrogation of sovereign immunity under § 5 of the Fourteenth Amendment, the Fourth Circuit concluded that the CRCA satisfied neither element required for a valid abrogation. *Allen*, 895 F.3d at 348-54. The Circuit then took up (for the first time) Allen's claims for declaratory and injunctive relief for ongoing constitutional violations under *Ex Parte Young*. 895 F.3d at 354-55. It rejected that request on the grounds that Allen had failed to plausibly allege ongoing constitutional violations, citing the concession made by Allen's counsel at oral argument that ongoing infringements had stopped. *Id.* at 354. The Fourth Circuit also rejected prospective relief under *Ex Parte Young* against § 121-25(b) because of the lack of a meaningful relationship between that statute and the state officials Allen sought to enjoin. *Id.* at 355. Finally, the Fourth Circuit held that the state officials sued in their individual capacities were entitled to qualified and legislative immunity. *Id.* at 356-58.

Although the Fourth Circuit entered judgment on 10 July 2018, that judgment did not take effect until 17 August 2019 because the mandate was stayed under Federal Rule of Appellate Procedure 41(a)(1) pending a ruling on the petition for rehearing en banc, which was ultimately denied. [DE 88, 89, 91]. On remand, this Court lifted its stay and dismissed Allen's claims against the State, the Department, and the public officials in their official capacity without prejudice; the remaining claims against the public officials in their individual capacities were dismissed with prejudice. [DE 92].

Because the Fourth Circuit held provisions of the CRCA invalid, the Supreme Court granted certiorari. *Allen*, 598 U.S. at 254. On the contested issue—whether in enacting the CRCA Congress had validly exercised its constitutional authority to abrogate state sovereign immunity—the Court first rejected Allen's arguments that constitutional authorization could be found in

Congress's power under Article I, Section 8, Clause 8. *Id.* at 256-260. The Court then concluded the CRCA was an invalid prophylactic abrogation under § 5 of the Fourteenth Amendment. *Id.* at 260-66.

III. Intervening Developments Prompt Allen's Motion for Reconsideration.

While this case worked its way through the higher courts, the Supreme Court decided *Knick v. Township of Scott*, 588 U.S. 180, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), a decision with considerable implications for the substantive requirements of Fifth Amendment takings claims in federal court. *Knick's* most pronounced impact is that overruled *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985). *Williamson County* held that "if a state provides an adequate procedure for seeking just compensation, the property owner cannot claim a violation of the Takings Clause until it has used the procedure and been denied just compensation." *Id.* at 195. "*Williamson County's* state-litigation rule . . . created some real anomalies," Chief Justice Rehnquist noted later, because it, combined with preclusion doctrines, effectively "ensur[ed] that litigants who [went] to state court to seek compensation [were] likely . . . unable later to assert their federal takings claims in federal court." *San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323,351, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (Rehnquist, C.J., concurring in the judgment). Ultimately, the Court jettisoned *Williamson County* in *Knick* because the "state-litigation requirement relegate[d] the Takings clause to the status of a poor relation among the provisions of the Bill of Rights." *Knick*, 588 U.S. at 189 (quotation marks omitted). The Court explained that "a property owner has a claim for a violation of the Takings Clause as soon as a government takes his property for public use without paying for it." *Id.* Thus, the moment a government takes without payment, the government violates the Fifth Amendment, which—because it is "self-executing" as to compensation—gives the plaintiff the ability to bring a federal suit without exhausting state remedies. *Id.* at 194.

Seizing on *Knick*, Allen filed a motion for reconsideration. [DE 105]. Allen asked this Court to reconsider its dismissal of Count III of his Amended Complaint, which claimed Defendants acted "under color of state law to pass N.C. Gen. Stat. § 121-25(b) and to threaten Plaintiffs . . . with enforcement thereof." [DE 12 ¶ 76]. Count III elaborated that § 121-25(b) was not only an unconstitutional taking in violation of the Fifth Amendment itself, but also Defendants enforced it in disregard to Plaintiff's rights to notice and an opportunity to be heard under the Due Process Clause. *Id.* Additionally, Allen asked the Court to allow his Copyright Act and constitutional claims to proceed under the case-by-case abrogation framework set forth in *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006).

On 18 August 2021, the Court granted Allen's motion for reconsideration. While the Court was aware that sovereign immunity was not at issue in *Knick, Knick's* discussion of the Fifth Amendment's substantive requirements persuaded this Court that *Hutto's* holding was fatally undermined. *Allen*, 555 F. Supp. 3d at 239-40. Specifically, the Court was persuaded that *Hutto* had been implicitly overturned by three aspects of *Knick*. First, *Knick's* recognition that the Fifth Amendment right to just compensation arises at the time of the taking and is not susceptible to qualification by state remedies; second, its dismantling of *Williamson County's* preclusion trap signaled that the similar trap created by *Hutto* was likewise constitutionally improper; and third, Hutto's delegation of responsibility to state courts for federal takings litigation was contrary to the fundamental promise of the Fourteenth Amendment. *Id.* at 235-37.

On Allen's second ground for reconsideration, the Court concluded that Allen could proceed on his copyright infringement and constitutional claims under *Georgia's* as-applied framework. *Id.* at 242-43. Allen's first attempt to sue the State focused on the CRCA as prophylactic abrogation. This Court, the Fourth Circuit, and the Supreme Court viewed Allen's claims only through that lens. What's more, counsel for the State acknowledged the theoretical viability of a *Georgia* claim during oral argument before the Supreme Court. Additionally, the CRCA remains available to abrogate state sovereign immunity provided a plaintiff can show a constitutional violation as well as a violation of the Copyright Act.

Finally, the Court granted Allen leave to file an amended complaint to allege additional facts, buttressing their allegation of intentional infringements, unconstitutional takings, and that those taking were without due process of law. *Id.* at 243.

Allen's second amended complaint did not manifest for some time because of motions and appeals. On 03 September 2021, the State moved this Court to reconsider its order granting Allen's motion for reconsideration, arguing that the Fourth Circuit's *post-Knick* decision in *Zito v. N. Carolina Coastal Res. Comm'n*, 8 F.4th 281 (4th Cir. 2021), reaffirmed *Hutto's* holding that sovereign immunity bars a direct taking claim in federal court when a state's courts remain open to such claims. [DE 119, 120]. Before this Court could rule on that motion, however, the State filed an interlocutory appeal of the Court's 18 August Order on reconsideration. [DE 122]. The Court then granted a consent motion to stay proceedings pending a final determination of the State's interlocutory appeal. [DE 126]. On 14 October 2022, the Fourth Circuit granted Allen's motion to dismiss the interlocutory appeal for lack of jurisdiction with the mandate effecting the judgment on 7 November 2022. *See* [DE 128, 129, 130].

In January 2023, this Court issued an order following a conference that accomplished three case-management goals. [DE 133]. First, the Court lifted the stay; second, the Court ordered Allen to file their amended complaint within 21 days "[i]n accordance with the Court's August 18, 2021, order"; and third, the Court denied the State's motion to reconsider, [DE 119], without prejudice as premature, allowing the State to renew its arguments in a response to the second amended complaint.

IV. Allen's Second Amended Complaint

On 8 February 2023, Allen filed his Second Amended Complaint, naming as defendants North Carolina, the

Department, the Governor, the Attorney General, and seven Department officials. [DE 134]. Of the individual defendants, Allen sued only the Governor and Attorney General in their official capacity; the rest Allen sued in both their official and individual capacities. The Second Amended Complaint contains ten counts alleging violations under a wide range of federal statutes and constitutional provisions:

- **Count I**. North Carolina, the DNCR, and the individual defendants, in their official capacities, willfully infringed on Allen's copyrights by using his works without permission in violation of 17 U.S.C. §§ 106 and 501. [DE 134 ¶¶ 140-150].

- **Count II**. North Carolina, the DNCR and the individual defendant, in their official capacities, altered or removed copyright management information, violating 17 U.S.C. § 1202. [DE 134 ¶¶ 151-158].

- **Count III**. North Carolina and the DNCR violated the Fifth and Fourteenth Amendments, directly and through the Copyright Act, when they infringed on Allen's copyrights and took possession of physical media, effecting a takings. Allen claims those takings, occurred without notice or an opportunity to be heard, violating due process. [DE 134 ¶¶ 159-173].

- **Count IV**. North Carolina and the DNCR violated the Fifth and Fourteenth Amendments, directly and through the Copyright Act, by enacting § 121-25(b), which effected a taking by eliminating Allen's right to exclude others from using his work by placing that work in the public domain without due process. [DE 134 ¶¶174-188].

- **Count V**. North Carolina and the DNCR violated the Bill of Attainder Clause of Article I, Section 10, Clause 1 of the Constitution through the passage of § 121-25(b). [DE 134 ¶¶ 189-201].

- **Count VI**. North Carolina and the DNCR violated the Ex Post Facto Clause of Article I, Section 10, Clause 1 of the Constitution through the passage of § 121-25(b). [DE 134 ¶¶ 202-208].

- **Count VII**. North Carolina and the DNCR violated the Contracts Clause of Art. **I**, Section 10, Clause 1 of the Constitution by passing 121-25(b), which unlawfully impairs the obligations set forth in the 2013 settlement agreement. [DE 134 ¶¶ 209-213].

- **Count VIII**. Seven Department Officials violated 42 U.S.C. § 1983 by unconstitutionally effecting a taking his copyrights through the passage of § 121-25(b) and promoting, implementing, and administering the DNCR's policy to infringe on his copyright works and disregard the 2013 settlement agreement. [DE 134 ¶¶ 214-219].

- **Count IX**. Allen requests injunctive relief against ongoing constitutional violations under *Ex Parte Young*. [DE 134 ¶¶ 220-224].

- **Count X**. Allen requests declaratory relief under the Declaratory Judgment Act, 28 U.S.C. §2201. [DE 134 ¶¶ 225-227].

The State challenges the Second Amended Complaint through several Rule 12 motions. It moves to strike the Second Amended Complaint, contending that almost all of the counts in the Second Amended Complaint exceed the scope of the Court's order on reconsideration. [DE 144]. Next the State moves to dismiss what remains of the Second Amended Complaint under Rule 12(b)(1) for the lack of subject-matter jurisdiction and under Rule 12(b)(6) for failure to state a claim for relief. [DE 146]. As to the Motion to Strike, Allen responds the Court imposed no limitations on his ability amend the complaint. [DE 153]. As to the Motion to Dismiss, Allen responds that he has adequately alleged claims that abrogate North Carolina's sovereign immunity. [DE 153].

While the parties briefed these motions, the North Carolina General Assembly enacted Session Law 2023-70. That law amended § 121-25 by removing subsection

(b) entirely, erasing all reference to documentary photographs, recordings, or other materials in the custody of the State or its subdivisions. 2023 N.C. Sess. Law. 70, § 11. Deleting § 121-25(b) reverberated immediately in these proceedings. Two days after Session Law 2023-70 was enacted, the State filed its reply brief, raising new arguments. [DE 155]. Allen moved for leave to file a surreply. [DE 157]. The Court held a hearing on the State's motions on 25 August 2023. [DE 164]. At the hearing, the State stated that it does not oppose Allen's surreply.[4]

While the State's Rule 12 motions were under consideration, the Court, on its own motion, stayed the case in anticipation of a decision of the Supreme Court in *DeVillier v. Texas*, 601 U.S. 285, 144 S. Ct. 938, 218 L. Ed. 2d 268 (2024). [DE 165]. The question presented in *Devillier* was whether a "property owner may sue for just compensation directly under the Takings Clause," which in turn is a question of "the procedural vehicle by which a property owner may seek to vindicate [his irrevocable] right" to just compensation. *Id.* at 289. The Court, however, left those questions for another case because "a state-law inverse-condemnation cause of action provides a vehicle" for the property owner's takings claims. *Id.* at 292, 294. Considering the range of potential outcomes for Allen's claims, *DeVillier* provided more of a restatement on the current state of the Takings Clause than a paradigm shift. Accordingly, the Court lifted the stay in a separate order filed contemporaneous with this order. All matters have been fully briefed and are ripe for decision.

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4. With no objection from the Defendants, the Court will grant the Motion.

DISCUSSION

Throughout this case, the State's efforts to dismiss this case on sovereign immunity grounds has attracted the most attention. So too here. Before taking up sovereign immunity, however, the Court must address and resolve several preliminary matters: first, the State's Motion to Strike Allen's Second Amended Complaint for non-compliance with the Federal Rules of Civil Procedure, the Local Civil Rules, and this Court's order on the Motion for Reconsideration; second, Allen's argument in response that the second-filed Motion to Dismiss should be denied as procedurally improper for the State's failure to consolidate with its Motion to Strike.

I. Motion to Strike

Under Federal Rule of Civil Procedure 12(f), the Court—under its own motion or on motion made by a party—may strike "from a pleading . . . any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P 12(f). Beyond the limits of Rule 12 are the district court's "inherent powers, not conferred by rule or statute, to manage their own affairs so as to achieve the orderly and expeditious disposition of case." *See Goodyear Tire & Rubber Co. v. Haeger*, 581 U.S. 101, 107, 137 S. Ct. 1178, 197 L. Ed. 2d 585 (2017); *Iota Xi Chapter of Sigma Chi Fraternity v. Patterson*, 566 F.3d 138, 150 (4th Cir. 2009) (concluding "district court acted well within its discretion" when it struck filing for noncompliance with local rule). Although Rule 12(f) motions to strike are generally disfavored, *Waste Mgmt. Holdings v. Gilmore*, 252 F.3d

316, 347 (4th Cir. 2001), the decision to strike is committed to the discretion of the district court. *See United States v. Ancient Coin Collectors Guild*, 899 F.3d 295, 324 (4th Cir. 2018).

Courts routinely strike parts of amended complaints—including claims, parties, and legal theories—when the offending parts exceed the scope of the court's order granting leave to amend. *See, e.g., Gerritsen v. Warner Bros. Entm't*, 116 F. Supp. 3d 1104, 1125 (C.D. Cal. 2015); *Patterson v. HG Ohio Emp. Holding Corp.*, 2024 U.S. Dist. LEXIS 82557, 2024 WL 2022088, at *2-4 (N.D. Ohio May 7, 2024); *Harris v. Louisiana*, 2024 U.S. Dist. LEXIS 76858, 2024 WL 1834370, at *2-3 (M.D. La. Apr. 26, 2024); *Nolen v. Fairshare Vacation Owners Ass 'n*, 2021 U.S. Dist. LEXIS 138031, 2021 WL 3036371, at *3 (M.D. Fla. Apr. 9, 2021), *aff'd*, 2023 U.S. App. LEXIS 23181, 2023 WL 5622595 (11th Cir. Aug. 31, 2023); *Clements v. Austin*, 2022 U.S. Dist. LEXIS 152239, 2022 WL 3593621, at *1 (D.S.C. Aug. 19, 2022); *Whitehead v. Mgmt. & Training Corp.*, 2020 U.S. Dist. LEXIS 39297, 2020 WL 1078739, at *3 (D.N.M. Mar. 6, 2020); *Desouza v. Office of Children & Family Servs.*, 2019 U.S. Dist. LEXIS 99009, 2019 WL 2477796, at *5-6 (E.D.N.Y June 12, 2019).

When granting Allen's Motion for Reconsideration, the Court was clear in its instructions. Only certain claims were no longer dismissed. And the Court permitted Allen to file an amended complaint to allow him to allege additional facts in support of those claims. Plaintiffs are under the impression that "the Court did not impose any limitations when it granted [their] request to amend the complaint." [DE 153 at 7]. Not so. Allen is limited not only by the Court's order granting reconsideration but also the contours of his motion to reconsider. Allen moved to reconsider only Count III, which alleged a § 1983 claim a taking in violation of the Fifth Amendment and a related denial of procedural due process. Regarding the direct takings claim, the Court reconsidered its dismissal because it was persuaded that the Supreme Court's decision in *Knick* amounted to an intervening change in law. As to Allen's *Georgia* claim, the Court viewed it appropriate to consider case-by-case abrogation under the CRCA "[b]ecause this Court, the Fourth Circuit, and the Supreme Court all passed on the *Georgia* issue." 555 F. Supp. 3d at 242. Allen's direct takings claim and his *Georgia* claims are the only claims properly before this Court. And in the 18 January 2023 order lifting the stay, the Court reiterated that the amendment should be filed in accordance with its order granting reconsideration. [DE 133].

Allen maintains that striking certain claims would be improper because those claims are inextricably linked to the claims he is allowed to bring. The Court finds this concern warranted with respect to Allen's claim for copyright infringement in Count I of the Second Amended Complaint. To state a *Georgia* claim, a plaintiff must show that the same conduct that violates a federal statute that provides for damages against a State also works a constitutional violation. *Georgia*, 546 U.S. at 158-59. Allen claims that the Department's infringement on his copyrights resulted in a taking of his intellectual property and those infringement were deprivations without due process of law. The claims are linked inextricably. Striking Count I would frustrate Allen's ability to proceed on the claims this Court has expressly permitted. Accordingly, the Court strikes Counts II, VI, and VIII—X from the Second Amended Complaint.[5] Allen may proceed on Counts I, III, and IV.

In addition to striking claims for exceeding this Court's orders, the State argues the Court should also strike allegations in the Second Amended Complaint the State deems immaterial, impertinent, scandalous, or otherwise irrelevant.[6] Having reviewed those allegations and the parties' submissions, the Court concludes that allegations do not rise to the level of "redundant, immaterial, impertinent, or scandalous" that clear Rule 12(f)'s high threshold for motions to strike.

Relatedly, Allen contends this Court should deny Defendants' Motion to Dismiss as an improper successive motion under the consolidation requirement set forth in Federal Rule of Civil Procedure 12(g).

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5. Defendants point to Allen's failure to follow Local Civil Rule 15.1 as an additional justification for striking the second amended complaint. That Rule, like all Local Civil Rules, is subject to the discretion of the presiding judge. *See* Local Civil Rule 1.1. The order granting the motion for reconsideration gave Plaintiffs leave to amend their complaint to add additional allegations, permitting them to deviate from the requirements of Rule 15.1.

6. Specifically, Defendants move the Court to strike paragraphs 1, 4, 14, 47-52, 81, 83, 96, 100, 102, 114, and 175 in their entirety and paragraphs 10, 53, 82, 90, 117, 193, and 217 in part. [DE 145 at 14].

Rule 12(g)(2) precludes a party from raising some defenses or objections in a subsequent motion if those defenses were available but not included in an earlier Rule 12 motion. That Rule, however, exempts the defenses of failure to state a claim for relief and lack of subject-matter jurisdiction. The former may be asserted in a subsequent responsive pleading, a motion for judgment on the pleadings, or at trial. Fed. R. Civ. P. 12(h)(2). The latter may be raised at any time. Fed. R. Civ. P. 12(h)(3).

To be sure, Defendants should have followed Rule 12 to the letter and filed one motion that joined all available defenses. But the second-filed motion is not as bad as Allen claims. For starters, the core of the State's motion challenges Court's subject-matter jurisdiction because of state sovereign immunity. As such, that challenge may be brought at any time. So the offending portions are essentially those sections where Defendants move to dismiss under Rule 12(b)(6) for failure to state a claim. But as with the subject-matter jurisdiction, the defense of failure to state a claim is not easily brushed aside. Rule 12(h)(2), for example, allows that defense to be raised on a motion for judgment on the pleadings, which would use the same standard. *See Occupy Columbia v. Haley*, 738 F.3d 107, 115 (4th Cir. 2013).

Stepping back provides valuable perspective. Allen seeks to dismiss as improperly, successively filed a Rule 12 motion containing one defense that can be brought at any time and another that could be brought in a subsequent motion that would be evaluated under the same standard. Acceding to Allen's request would merely delay the inevitable. The Rules of Civil Procedure facilitate the "just, speedy, and inexpensive determination of every action and proceeding[]" and are to be construed accordingly. Fed. R. Civ. P. 1. To deny the second-filed motion would invert procedure from its subordinate role and frustrate these goals. The Court, therefore, rejects Allen's procedural opposition to the State's Motion to Dismiss.

II. Motion to Dismiss

Now on to the central issue: Does this Court lack subject-matter jurisdiction? Or, to put it differently, Has Allen shown that North Carolina' sovereign immunity has been abrogated? In this section, the Court answers both. To that end, Court will first discuss background principles of sovereign immunity relevant to Allen's theories of abrogation. The Court will then turn to Allen's theories that (1) the takings clause is self-executing and abrogates sovereign immunity by its own force and (2) that as-applied abrogation under *Georgia* is permissible here.

A. Legal Standards

1. Rule 12(b)(1)

A Rule 12(b)(1) motion challenges the Court's subject-matter jurisdiction. "A defendant may challenge subject-matter jurisdiction in one of two ways: facially or factually" *Beck v. McDonald*, 848 F.3d 262, 270 (4th Cir. 2017). A facial challenge occurs when a defendant argues that the complaint fails to allege facts sufficient to establish subject-matter jurisdiction. *Id.* A factual challenge occurs when a defendant argues that the allegations of jurisdiction in the complaint are not true. *Id.* A plaintiffs procedural protections vary depending on the type of jurisdictional challenge. With a facial challenge, the plaintiff is given the same protections as a Rule 12(b)(6) motion. *Id.* On the other hand, a factual challenge goes beyond the allegations in the complaint. As a result, the district court may decide disputed issues of fact relating to subject-matter jurisdiction. *Mayor & City Council of Balt. v. Trump*, 416 F. Supp. 3d 452, 479 (D. Md. 2019). To that end, "the court may regard the pleadings as mere evidence on the issue and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* (quoting *Velasco v. Gov't of Indonesia*, 370 F.3d 392, 398 (4th Cir. 2004)).

Under Rule 12(b)(1), the Plaintiff typically has the burden of establishing, by a preponderance of evidence, subject-matter jurisdiction. *Demetres v. East West Constr., Inc.*, 776 F.3d 271, 272 (4th Cir. 2015); *Evans v. B.F. Perkins Co.*, 166 F.3d 642, (4th Cir. 1999) Because state sovereign immunity—unlike other limits on Article III jurisdiction—may be waived, the burden of establishing sovereign immunity is placed on the party asserting it. *Hutto*, 773 F.3d at 543; *Zito*, 8 F.4th at 284. Once a defendant has shown its entitled to sovereign immunity, the burden of proving abrogation or waiver falls to the plaintiff. *See Williams v. Big Picture Loans, LLC*, 929 F.3d 170, 176 (4th Cir. 2019); *Allen*, 895 F.3d at 355 (discussing burden to show *Ex parte Young* exception); *Welch v. United States*, 409 F.3d 646, 651 (4th Cir. 2005) (noting "[p]laintiff's burden to show that an unequivocal waiver of sovereign immunity exists"); *Cf. Blanco Ayala v. United States*, 982 F.3d 209, 214 (4th Cir. 2020) (noting plaintiff's burden to establish that exception to FTCA's immunity waiver does not apply).

2. Rule 12(b)(6)

Federal Rule of Civil Procedure 12(b)(6) provides that a complaint may be dismissed for failure to state a claim upon which relief may be granted. This tests the complaint's legal and factual sufficiency. The focus is on the pleading requirements under the Federal Rules not the proof needed to succeed on a claim. "Federal Rules of Civil Procedure 8(a)(2) requires only a short and plain statement of the claim showing that the pleader is entitled to relief, in order to give the defendant fair notice of what the . . . claim is and grounds upon which it rests." *Bell Atl Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). This standard does not require detailed factual allegations. *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211 (4th Cir. 2019). But it "demands more than unadorned, the-defendant-unlawfully-harmed-me accusation." *Nadendla v. WakeMed*, 24 F.4th 299, 305 (4th Cir. 2022).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, 'to state claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Twombly*, 550 U.S. at 570). For a claim to be plausible, its factual content must allow the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* Although the court accepts the factual allegations as true, the court does not accept the complaint's legal conclusions, so "simply reciting the cause of actions' elements and supporting them by conclusory statements does not meet the required standard." *ACA Fin. Guar. Corp.*, 917 F.3d at 212.

B. State sovereign immunity principles

State immunity from suit is a structural component of our constitutional design. Before ratification, immunity from suit was a core aspect of the States' status as sovereign entities. *Alden v. Maine*, 527 U.S. 706, 713, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999). Ratifying the Constitution created our federal system—"a system of dual sovereignty between the state and federal government," *Gregory v. Ashcroft*, 501 U.S. 452, 457, 111 S. Ct. 2395, 115 L. Ed. 2d 410 (1991). The States entered that system with their sovereignty, and their sovereign immunity, largely intact. *See Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779, 111 S. Ct. 2578, 115 L. Ed. 2d 686 (1991); *see also Torres v. Texas Dep't of Pub. Safety*, 597 U.S. 580, 597, 142 S. Ct. 2455, 213 L. Ed. 2d 808 ("The Constitution forged a Union, but it also protected the sovereign prerogatives of States within our government.").

The Courts of the United States must respect the fundamental aspects of the States' sovereignty. "The principle of sovereign immunity is a constitutional limitation on the federal judicial power established in Art. III." *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 98, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984); *see also*

Sossamon v. Texas, 563 U.S. 277, 284, 131 S. Ct. 1651, 179 L. Ed. 2d 700 (2011) ("sovereign immunity principles enforce an important constitutional limitation on the power of the federal courts."). For a short moment in the Early Republic, it was thought that such limitations didn't apply to suits against the states by citizens of another state. *See Chisholm v. Georgia*, 2 U.S. 419, 1 L. Ed. 440, 2 Dall. 419 (1793). It is generally understood that the Eleventh Amendment—which "stands not so much for what it says but the presupposition of our constitutional structure which it confirms," *Blatchford*, 501 U.S. at 779—corrected this misunderstanding.[7] *See also Va. Off. for Prot. & Advoc. v. Stewart*, 563 U.S. 247, 253, 131 S. Ct. 1632, 179 L. Ed. 2d 675 (2011) (commenting that the Supreme Court "[has] understood the Eleventh Amendment to confirm the structural understanding that States entered the Union with their sovereign immunity intact, unlimited by Article

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7. The text of the Eleventh Amendment "appear[s] to restrict only the Article III diversity jurisdiction of the federal courts, *Seminole Tribe v. Florida*, 517 U.S. 44, 54, 116 S. Ct. 1114, 134 L. Ed. 2d 252 (1996). But "[the Supreme Court's] decision in *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), clarified that States retain their immunity from suit regardless of the citizenship of the plaintiff." *PennEast Pipeline Co., LLC v. New Jersey*, 594 U.S. 482, 499, 141 S. Ct. 2244, 210 L. Ed. 2d 624 (2021). The undersigned has discussed at-length both the text of the Eleventh Amendment and why *Hans* was poorly reasoned and wrongly decided. *See Allen*, 244 F. Supp. 3d at 535-40 ; *Allen*, 555 F. Supp. 3d at 238; *see also Richard Anderson Photography v Brown*, 852 F.2d 114, 124-25 (4th Cir. 1988) (Boyle, D.J., concurring in part and dissenting in part). In the words of Justice Breyer, who shared the view that the sovereign-immunity precedents were amiss, the undersigned "recogniz[es] that my longstanding view has not carried the day." *Allen*, 589 U.S. at 248 (Breyer, J., concurring).

III's jurisdictional grant"). Now, state sovereign immunity generally prevents suits against nonconsenting states in federal and state forums.

Yet state sovereign immunity is not absolute. The first limits are those the States impose on themselves. "[A] State's sovereign immunity is a personal privilege which it may waive at pleasure." *Coll. Say. Bank v. Fla. Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 675, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (quotation omitted). "A state may of course consent to suit, although such consent must be unequivocally expressed." *PennEast*, 594 U.S. at 500 (quotations omitted). There are also "certain waivers of sovereign immunity to which all states implicitly consented at the founding." *PennEast*, 594 U.S. at 500. These "plan of the Convention waivers" spring from the structure of the Constitution. "Actions do not offend state sovereignty if the States consented to them at the founding." *Torres*, 597 U.S. at 587 (cleaned up) (quotations omitted). But plan of the Convention waivers are few and far between.[8]

8. In *Allen*, the Supreme Court described the plan of the Convention waiver of sovereign immunity under the Bankruptcy Clause recognized in *Central Va. Community College v. Katz*, 546 U.S. 356, 359, 126 S. Ct. 990, 163 L. Ed. 2d 945 (2006), as "a good-for-one-clause-only holding." 589 U.S. at 259. Yet not long after, the Court recognized additional plan of the convention waivers in two cases. *PennEast*, 594 U.S. at 500-02 (concluding that a private party's action under federal eminent domain power "falls comfortably within the class of suits to which State consented under the plan of the Convention); *Torres*, 587 U.S. at 594 (holding that under "the plan of the Convention, the States waived their immunity under Congress' Article I power 'to raise and support armies' and 'provide and maintain a Navy.'" (cleaned up)).

The next limits come from Congress's power to abrogate the States' sovereign immunity through § 5 of the Fourteenth Amendment. [T]he Fourteenth Amendment, by expanding federal power, at the expense of state autonomy, . . . fundamentally altered the balance of state and federal power struck by the Constitution." *Seminole Tribe*, 517 U.S. at 59. Section 5 of the Fourteenth Amendment thus authorizes Congress to "provide for suits against state or state officials that are Constitutionally impermissible in other contexts." *Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976). Section 5, however, does not provide an unlimited power to abrogate.

When exercising its § 5 power to abrogate the States' sovereign immunity, Congress can take two paths. The first path is prophylactic abrogation, which occurs when Congress legislates broadly to deter or remedy constitutional violations even if in the process its remedial statute prohibits constitutional conduct. *Allen*, 589 U.S. at 260. Still, prophylactic abrogation is limited. The abrogation "must sufficiently connect[] to conduct courts have held Section 1 to proscribe." *Id.* This comes down to "a means-end test." *Id.* at 261. "There must be a congruence and proportionality between the injury to prevented or remedied and the means adopted to that end." *Fla. Prepaid*, 527 U.S. at 672 (quoting *City of Boerne v. Flores*, 521 U.S. 507, 520, 117 S. Ct. 2157, 138 L. Ed. 2d 624 (1997)). In other words, the abrogation must strike the proper balance between constitutional wrong and statutory remedy. Where the scope of the remedial or preventative statute exceeds the constitutional authorization, Congress goes beyond its authority under § 5 of the Fourteenth Amendment, and the statute is an invalid for that purpose.

The second path, seldom traveled, is case-by-case (or as-applied) abrogation. Case-by-case abrogation arises from the unassailable statement that "§ 5 [of the Fourteenth Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the states for *actual* violations of those provisions." *Georgia*, 546 U.S. at 158. When Congress provides "a private cause of action for damages against the State for conduct that actually violates the Fourteenth Amendment," *Id.* at 159, the court "consider[s] only whether [a] claim alleges conduct that, if it occurred and wasn't justified by a valid defense, would have violated the Fourteenth Amendment," *Alaska v. EEOC*, 564 F.3d 1062, 1068 (9th Cir. 2009)

Compared to its more aggressive and well-known sibling, as-applied abrogation ducks the risk of Congress regulating beyond its underlying constitutional authorization. A claim that meets *Georgia's* test will always be within the bounds of Section 5 of the Fourteenth Amendment because of the symmetry between the statutory remedy and constitutional harm. Put differently, a private cause of action for damages against the State for conduct that actually violates the Fourteenth Amendment will be, by itself, perfectly congruent and perfectly proportional. *See* Ernest A. Young, *State Sovereign Immunity After the Revolution*, 102 Tex. L. Rev. 697, 759 (2024). *Cf Alaska v. EEOC*, 564 F.3d at 1068 (stating that "congruence and proportionality requirement applies only to prophylactic legislation; it doesn't apply to a direct remedy for unconstitutional conduct").

C. Allen's first theory: abrogation under the "self-executing" Fifth Amendment

Allen's alleges that this Court may hear his Fifth Amendment takings claims against the state because the "self-executing nature" of the Fifth Amendment directly abrogates state sovereign immunity. As discussed, Allen's argument rests on the theory that the Supreme Court's decision in *Knick* altered the sovereign-immunity framework.

But In *Zito v. North Carolina Coastal Resources Commission*, the Fourth Circuit held that *Knick's* discussion of the self-executing nature of the Fifth Amendment did not alter the sovereign immunity framework. 8 F.3d at 286-88. *Pre-Knick* decisions such as *Hutto*—which held that "the Eleventh Amendment bars the Fifth Amendment takings claims against States in federal courts where the States Court remain open to adjudicating such claims," *Hutto*, 773 F.3d at 552—are undisturbed. The Fourth Circuit said it succinctly: "*Knick* did not undermine *Hutto.*" *Zito*, 8 F.3d at 288. Actions under the Takings Clause are subject to the same limits as other constitutional rights—including state sovereign immunity. *Id.*

Allen contends that *Zito* was wrongly decided and maintains that *Knick* fatally undermined *Hutto*. This

Court "cannot for even a moment entertain" Allen's argument. *United States v. Pate*, 754 F.3d 550, 554 (8th Cir. 2014). Fourth Circuit precedent binds this Court and the parties alike. *See Carrera v. E.M.D. Sales Inc.*, 75 F.4th 345, 352 (4th Cir. 2023). *Hutto* and *Zito* are circuit precedent. Neither are susceptible to being second-guessed much less overruled here. *See Allen*, 244 F. Supp. 3d at 540 ("[T]his Court is constrained[] [by] the absolute hierarchical system of courts in the federal judiciary."). That task is for the Fourth Circuit sitting en banc or for the Supreme Court. *Taylor v. Grubbs*, 930 F.3d 611, 619 (4th Cir. 2019); *Warfaa v. Ali*, 811 F.3d 653, 661 (4th Cir. 2016); *United States v. Collins*, 415 F.3d 304, 311 (4th Cir. 2005). Thus, the Court will perform its duty and apply the rules set forth in *Hutto* and *Zito* to the extent they are applicable here.

Changing tacks and working within the confines of those decisions, Allen argues *Hutto* and *Zito* do not apply because the reasoning underlying those decisions is inapposite when federally created property interests are involved. *Hutto's* holding, he contends, is premised on the assumption "that states have a sovereign interest in resolving disputes over state-based property rights." [DE 153 at 12].

The Court does not share that reading of *Hutto*. To be sure, *Hutto* involved property interests created by state law. *See Hutto*, 773 F.3d at 540-41 (describing Fifth Amendment claims arising from state pension benefits). But the underlying law creating the property interest did not play a meaningful much less decisive role in the outcome. Instead, *Hutto's* reasoning is premised on the nature of constitutional remedies. The *Hutto* court analogized from *Reich v. Collins*, 513 U.S. 106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1995), which involved state sovereign immunity and the remedies under the Due Process clause. Just as in *Reich*, where the Supreme Court noted that the Due Process Clause did not abrogate state sovereign immunity in federal court when state courts remain open for those claims, so too did *Hutto* conclude that state sovereign immunity bars "Fifth Amendment takings claims against States *in federal court* when the *State's courts* remain open to adjudicate such claims," *Hutto*, 773 F.3d at 552; *Reich*, 513 U.S. at 109.

Worse, Allen's property-rights argument does not square with key sovereign-immunity principles. Put any theory of abrogation under the Fifth or Fourteenth Amendment to the side and consider copyrights only as property. The Constitution doesn't create property interests. *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 161, 101 S. Ct. 446, 66 L. Ed. 2d 358 (1980). Instead, property interests "are created and their dimensions are defined by existing rules or understandings that stem from an independent source." *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972). A copyright is a property interest created by Congress exercising its authority under Article I, Section 8, Clause 8 of the Constitution. *See Ladd v. Law & Tech. Press*, 762 F.2d 809, 812 (9th Cir. 1985). Authority incapable of abrogating state sovereign immunity. *Allen*, 589 U.S. at 248 ("[T]he power 'to secur[e] an intellectual property owner's exclusive [r] ight[s]' under Article I stops when it runs into sovereign immunity." (quoting Art. I, § 8, cl.8)); *Fla. Prepaid*, 527 U.S. at 669. What's more, whatever limitations the Due Process and Just Compensation Clauses impose on state sovereign immunity, those limitations "arise from the Constitution itself" which means they do not "speak to the power of Congress to subject States to suits in [federal] courts." *See Alden*, 527 U.S. at 740 (discussing *Reich's* limits). Accordingly, were this Court to accept Allen's theory—i.e., let the provenance of the property interests drive the analysis—it would let rejected theories of abrogation in through the backdoor.

Because *Hutto* remains valid, binding precedent, North Carolina's sovereign immunity bars this Court from hearing Allen's direct Fifth Amendment claims unless Allen can show that North Carolina courts do not offer a " 'reasonable, certain, and adequate' means for challenging an action as a taking and obtaining compensation if the challenge is successful." *Zito*, 8 F.4th at 288 (quoting *Mountain Valley Pipeline, LLC v. 6.56 Acres of Land*, 915 F.3d 197, 213 (4th Cir. 2019)). At bottom, this ask if there a recognized cause of action available in state court. *See, e.g., Gerlach v. Rokita*, 95 F.4th 493, 499 (7th Cir. 2024); *74 Pinehurst LLC v. New York*, 59 F.4th 557, 570 n.7 (2d Cir. 2023); *EEE Minerals, LLC v. North Dakota*, 81 F.4th 809, 816; *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 734-35 (6th Cir. 2022); *Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1213-14 (10th Cir. 2019).

North Carolina law provides Allen a cause of action to pursue a claim for just compensation in state court.

Although the North Carolina Constitution does not have a lockstep provision for the Fifth Amendment, Article I, Section 19 of the North Carolina Constitution protects against takings of private property without compensation. *Kirby v. N.C. Dep't of Transp.*, 368 N.C. 847, 853, 786 S.E.2d 919, 924 (2016) (quoting *Long v. City of Charlotte*, 306 N.C. 187, 195-96, 293 S.Ed.2d 101, 107-08 (1982)). The North Carolina Supreme Court has held that "one whose constitutional rights have been abridged has a direct claim against the State under [the North Carolina] Constitution." *Corum v. Univ. of N.C.*, 330 N.C. 761, 782, 413 S.E.2d 276, 289 (1992) This direct cause of action, moreover, is not limited by North Carolina's sovereign immunity. *See Id.* at 786, 413 S.E.2d. at 291.

Allen argues that no state remedy is adequate, including a direct implied cause of action under *Corum*, because North Carolina's courts lack jurisdiction to hear those claims. Such claims, Allen contends, would either be preempted under the Copyright Act or must proceed in federal court because of the exclusive jurisdiction of the federal courts for "any Act of Congress relating to . . . copyrights" under 28 U.S.C. § 1338.

This line of argument presents a question that goes beyond *Zito* and *Hutto*. How courts outside the Fourth Circuit have resolved copyright infringement actions with associated constitutional claims casts doubt on Allen's argument. For example, the Fifth Circuit recently dismissed a suit for copyright infringement with corresponding Fifth and Fourteenth Amendment claims on sovereign immunity grounds because the plaintiff could proceed in state court under the state constitution. *Can. Hockey L.L.C. v. Tex. A&M Univ. Athletic Dep't*, 2022 U.S. App. LEXIS 3976, 2022 WL 445172 (5th Cir. Feb. 14, 2022), *cert. denied*, 143 S.Ct. 118, 214 L. Ed. 2d 31 (2022); *see also Jim Olive Photography v. Univ. of Hous. Sys.*, 624 S.W.3d 764 (Tex. 2021) (deciding copyright infringement takings claims under Fifth Amendment and Texas Constitution). Assuming, however, that either the Copyright Act or § 1338 precluded North Carolina's courts from hearing Allen's takings claim, the Court is not persuaded that state sovereign immunity under *Hutto* is susceptible to artful pleading. Again, the animating sovereign-immunity principle *Hutto* acknowledged is that whatever remedy the Constitution requires—be it under the Due Process clause as in *Reich*, or the Just Compensation Clause as in *Hutto*—a suit for that remedy in *federal court* must come after *the State* has closed its own courts. 773 F.3d at 552.

Allen flips of this principle on its head. Despite North Carolina's openness to takings claims in its courts, he argues that he is entitled to proceed directly in federal court because two federal statutes- 17 U.S.C. § 301 and 28 U.S.C. § 1338—combine to preclude his claims from being heard in state court. Put differently, because Congress has decided to shut the doors of North Carolina's courts to the claims Allen wishes to bring, he argues the Fifth Amendment abrogates the State's sovereign immunity in federal court.

Allen's preemption argument runs into the same problem as his federal-property interest argument. At its root, abrogation of sovereign immunity through federal legislation is not concerned with *if* Congress can do so but *how* Congress may do so. Congress cannot use its Article I powers to abrogate the States' sovereign immunity: "The Eleventh Amendment restricts the judicial power under Article III, and Article I cannot be used to circumvent the constitutional limitations placed upon federal jurisdiction." *Seminole Tribe*, 517 U.S. at 72-73. It follows that it is equally impermissible for Congress to indirectly do the same via its Article I power to control the jurisdiction of the federal courts. *See Patchak v. Zinke*, 583 U.S. 244, 253, 138 S. Ct. 897, 200 L. Ed. 2d 92 ("So long as Congress does not violate other constitutional provisions, its 'control over the jurisdiction of the federal courts' is plenary." (quoting *Trainmen v. Toledo, P.& W.R. Co.*, 321 U.S. 50, 63-64, 64 S. Ct. 413, 88 L. Ed. 534 (1944)); *Cf Bowles v. Russell*, 551 U.S. 205, 212, 127 S. Ct. 2360, 168 L. Ed. 2d 96 (2007) ("Within constitutional bounds, Congress decides what cases the federal courts have jurisdiction to consider.").

Finally, the Court draws attention to and rejects an implied premise of Allen's argument—that he could not bring a Fifth Amendment takings claim in state court. While *Hutto* makes clear that state sovereign immunity prevents Allen from proceeding on his takings claims in this Court, nothing in that decision forecloses Allen from raising the same in state court. *See Hutto*, 773 F.3d at 552; *Zito v. N.C. Coastal Resources Comm'n*, 449 F. Supp. 3d 567, 582 (E.D.N.C. 2020); *Cf. Jim Olive Photography*, 624 S.W.3d 764 (considering copyright infringement claims under Texas and United States Constitution). State courts have the jurisdiction and the obligation to hear federal constitutional claims. *Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 823, 110 S. Ct. 1566, 108 L. Ed. 2d 834 (1990) *Claflin v. Houseman*, 93 U.S. 130, 136, 23 L. Ed. 833 (1876); *Cf. Burt v. Titlow*, 571 U.S. 12, 19, 134 S. Ct. 10, 187 L. Ed. 2d 348 (2013) ("State courts are adequate forums for the vindication of federal rights."). And this Court is "unwilling to assume the State[] will refuse to honor the Constitution or obey the binding laws of the United States." *Alden*, 527 U.S. at 755; *see DeVillier*, 601 U.S. at 292 (same).

Whether North Carolina could invoke its sovereign immunity in state court for a Fifth Amendment takings claim is not before this Court. *Corum*, of course, waives the State's immunity for takings claims under the State Constitution only. 330 N.C. at 785-86, 413 S.E.2d at 291. But precedent suggests the North Carolina's waiver of its sovereign immunity for takings claims under the North Carolina Constitution bodes well for takings claims under the Constitution. *See Howlett v. Rose*, 496 U.S. 356, 375-76, 110 S. Ct. 2430, 110 L. Ed. 2d 332 (1990) (holding that the state court cannot "refus[e] to entertain" federal-law actions on jurisdictional grounds because of state sovereign immunity "when [those] courts entertain[] similar state-law actions against state defendants."). A definitive answer will have to be supplied by a North Carolina court.

Because North Carolina's Courts remain open for Allen to assert takings claims directly in state court, this Court returns to its original conclusion—Allen's takings claims against the State and the Department are barred from federal court under *Hutto. See Allen*, 244 F. Supp. 3d at 540.[9] Allen has failed to show the "self-executing' Fifth Amendment provides an exception to sovereign immunity. The Court therefore will dismiss Allen's Fifth Amendment Takings claims without prejudice unless he can show an abrogation of state sovereign immunity on other grounds.

9. Independent of sovereign immunity, Allen's direct Fifth Amendment Takings Claim against the State and the Department raise additional thorny questions. Because "[c]onstitutional rights do not typically come with a built-in-cause of action to allow for private enforcement in courts," *DeVillier*, 601 U.S. at 291, to proceed directly under the Takings Clause without a procedural vehicle requires a plaintiff to show that "the Fifth Amendment Takings Clause creates an implied direct cause of action by its text alone," *Gerlach v. Rokita*, 95 F.4th 493, 498 (7th Cir. 2024). In 2017, this Court dismissed Allen and Nautilus's Takings Claims brought under § 1983 as barred by sovereign immunity under *Hutto. Allen*, 244 F. Supp. 3d at 540. In Allen's Second Amended Complaint, however, he does not return to this theory. Section 1983 provides an independent cause of action and thereby acts as a procedural vehicle. Of course, neither States nor "arms of the State" are "persons" under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 70-71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989). Still, the absence of a procedural vehicle is potentially fatal, especially as nothing before this Court indicates that Allen attempts to state the Fifth Amendment provides an implied cause of action. Not to mention that such an attempt would face considerable challenges. In *DeVillier*, for example, the Supreme Court took up that question, acknowledged its "precedents do not cleanly answer" it, and declined to provide an answer. 601 U.S. at 292. Because North Carolina's sovereign immunity bars this Court from hearing Allen's claims as they are currently formulated, there is no need to discuss this issue further.

D. Allen's second theory: case-by-case abrogation under *Georgia*

Because Allen's "self-executing" Fifth Amendment theory of abrogation does not pass muster, North Carolina's sovereign immunity will bar this Court from hearing Allen's claims absent a valid abrogation. To that end, Allen argues that claim-by-claim abrogation under *Georgia* allows his copyright infringement, takings, and procedural due process claims to proceed in federal court notwithstanding North Carolina's sovereign immunity.

Georgia sets out a three-part test instructing lowers courts to determine, "on a claim-by-claim basis, (1) which aspects of the State's alleged conduct violated [a federal statute]; (2) to what extent such misconduct also violated the Fourteenth Amendment; and (3) insofar as such misconduct violated [the federal statute] but did not violate the Fourteenth Amendment, whether Congress's purported abrogation of sovereign immunity as to that class of conduct is nevertheless valid." 546 U.S. at 159. The Supreme Court has already determined that the CRCA's prophylactic abrogation of sovereign immunity for copyright infringement is invalid. *Allen*, 589 U.S. at 265-66. So this Court need only consider whether Allen states claims for copyright infringement and that same conduct also violates the Fourteenth Amendment. *See Alaska v. EEOC*, 564 F.3d at 1068.

Case-by-case abrogation under *Georgia* intertwines the jurisdictional issue with the underlying merits of the statutory and constitutional violations. In order to have a valid abrogation, a plaintiff must show that both violations have occurred, which means that if either claim fails on the merits then there is no subject-matter jurisdiction. "[W]hen subject matter jurisdiction is dependent on the same statute that forms the basis of the underlying claim, the jurisdictional question is tied up with the merits of the case," as such "a decision of the jurisdictional issue requires a ruling on the underlying substantive merits of the case." 5B Charles A. Wright et al., *Federal Practice and Procedure* § 1350 (4th ed. 2024). In such circumstances, the jurisdictional issue "should not be decided on a motion to dismiss but may be appropriate for summary judgment." *Id.*

With that in mind, the Court must consider whether Allen states a claim by accepting his well-pleaded allegations as true and considering them in the light most favorable to him. *See, e.g., Pickett v. Texas Tech Univ. Health Sciences Center*, 37 F.4th 1013, 1031 (5th Cir. 2022) (analyzing *Georgia* claim under 12(b)(6) standard because "the jurisdictional and merits questions . . . are inextricable). To that end, the Court will not consider evidence submitted by the State that is not integral to the complaint. *See Secretary of State for Defence v. Trimble Navigation Limited*, 484 F.3d 700, 705 (explaining the court, on a motion to dismiss, may "consider documents attached to the motion to dismiss, so long as they are integral to the complaint and authentic.").

Appendix B

1. DNCR's alleged violation of the Copyright Act

The Court begins with the first requirement under the *Georgia* framework: Whether Allen has plausibly alleged the DNCR violated the Copyright Act through its infringements. Satisfying this first prong is critical. *See, e.g., Buchanan v. Maine*, 469 F.3d 158 (for the *Georgia* analysis, "if the State's conduct does not violate [the federal state], the court does not proceed to the next step in the analysis").

The Copyright act grants the owner of copyright "the 'exclusive rights' to 'reproduce,' 'distribute,' 'perform,' 'display,' or 'prepare derivative works based upon' their copyrighted works." *Entm't v. Cox Communs., Inc.*, 93 F.4th 222, 227 (4th Cir. 2024) (quoting 17 U.S.C. § 106). "Anyone who violates any of the[se] exclusive rights . . . is an infringer," 17 U.S.C. § 501(a), and the copyright owner may "institute an action" against an infringer, *Id.* § 501(b). A direct infringement claim requires proof that (1) plaintiff had a valid copyright and (2) defendant infringed upon that copyright by violating one of the exclusive rights under § 106. *Smith v. Barnesandnoble.com*, 839 F.3d 163, 166 (2d Cir. 2016).

Taking the facts in the light most favorable to Allen, the Court concludes Allen has plausibly stated a claim that the DNCR infringed on his copyrights. It is undisputed that Allen holds valid copyrights in the materials he alleges the DNCR infringed. In the Second Amended Complaint, Allen provides detailed accounts of his copyrights and the DNCR's alleged infringements of specific copyrights by copying, displaying, distributing, and performing his works without permission online and in a state museum.

The State argues that the alleged infringements fall under the use exceptions under 17 U.S.C. §§ 108 and 109. Section 108 provides exemptions for infringements related to archival use but carves out pictorial works, with some exceptions. *See Id.* § 108(i). Section 109 codifies the first sales doctrine, which "provides that a 'rights holder's control over the distribution of any particular copy or phonorecord that was lawfully made effectively terminate when that copy or phonorecord is distributed to its first recipient." *Hachette Book Group, Inc. v. Internet Archive*, 664 F. Supp. 3d 370, 384-85 (S.D.N.Y. 2023) (quoting *Capitol Records, LLC v. ReDigi Inc.*, 910 F.3d 649, 655 (2d Cir. 2018)). Like exemptions for fair use, the exemptions under § 108 and § 109 are affirmative defenses to copyright infringement. *See Adobe Systems Inc. v. Christenson*, 809 F.3d 1071, 1078-79 (9th Cir. 2015) (first sale); *Hachette Book Group*, 664 F. Supp. 3d, at 381 (fair use). Affirmative defense to copyright infringement provide "a permissible basis for dismissal only where the facts necessary to establish the defense are evident of the face of the complaint." *Spinelli v. National Football League*, 903 F.3d 185, 199 (2d Cir. 2018) (quotations omitted); *see also Santos v. Kimmel*, F. Supp. 3d , 2024 U.S. Dist. LEXIS 148806, 2024 WL 3862149, at *3 (S.D.N.Y 2024) (explaining that affirmative defenses to copyright infringement are "most frequently resolved at summary judgment"). Here, all the facts necessary to the resolution of the State's affirmative defenses do not clearly appear on the face of the Second

Amended Complaint. The State's arguments, replete with citations to various exhibits, consist almost entirely of evidence beyond the face of the amended complaint. The State's arguments involve mixed questions of law and fact better suited to summary judgment. The Court, therefore, concludes that resolving these defenses is premature in this posture.

Allen has also plausibly alleged that the DNCR's infringements were willful or intentional. The Copyright Act does not define willful infringement. *Lyons P'ship v. Morris Costumes, Inc.*, 243 F.3d 789, 799 (4th Cir. 2001). Courts have held that willful infringement occurs, at minimum, when the defendant recklessly disregards the copyright holder's rights. *BMG Right Mgmt. (US) LLC v. Cox Communications, Inc.*, 881 F.3d 293, 312 (4th Cir. 2018); *see Market Research Grp., Inc. v. Berge*, 953 F.3d 907, 920 (6th Cir. 2020) ("[A] defendant willfully commits copyright infringement when he knowingly or recklessly copies another's work."). The State was clearly on notice of Allen's copyrights given his proactive approach to policing potential infringements, his assertion of his exclusive rights after the fact, and his watermarks and other identifiers on works. What's more, the patter and timing of the infringements permit a reasonable inference that the DNCR knew of, or disregarded, the risk that posting would violate Allen's exclusive rights. At least six of the infringements, for example, were online posts that had previously been removed in 2013, which was the time a dispute over licenses between Allen, Intersal, and the State arose. After § 121-25(b) was enacted, those posts returned online. Accordingly, Allen has adequately stated a claim for willful copyright infringement.

2. Actual Constitutional Violations

Allen asserts that the State's copyright infringement and physical appropriation of his media during, after, and through § 121-25(b) constitute takings and a denial of procedural due process in violation of the Fifth and Fourteenth Amendments. As to his Fifth Amendment claims, Allen alleges the State took his property in three distinct ways: (1) "by engaging in wide-scale, willful, and indiscriminate infringement of [his] copyrights"; (2) "by physical[ly] taking [] Allen's property by withholding and refusing to return Allen's physical media containing copies of his works"; and (3) by "plac[ing] the vast majority of Allen's portfolio into the public domain[]" through § 121-25(b). *(See* [DE 134 ¶¶ 162, 163, 177].)

Allen's Fourteenth Amendment due process claim piggyback of these allegations. Allen asserts he was not given "due process in connection with [the State's] takings . . . [because,] Allen did not have an opportunity to be heard and had not means to challenge the infringements." Likewise, because "[N.C. Gen. Stat. § 121-25(b)] is self-enforcing[,]" Allen claims he did not have "any opportunity to oppose the entry of his work into the public domain, or to seek reclassification once the work was added to the public domain." (See [DE 134 ¶¶ 169, 183].)

The State, not conceding that *Georgia* extends here, responds that Allen's allegations fail regardless because he has failed to allege actual constitutional violations within § 1 of the Fourteenth Amendment. The Court will address each violation in turn.

(a) Allen's Fifth Amendment claims

"The Fifth Amendment's Takings Clause provides: 'nor shall private property be taken for public use, without just compensation.'" *Blackburn v. Dare County*, 58 F.4th 807, 810 (4th Cir. 2023) (quoting U.S. Const. Amend V). The Takings Clause applies to the States by incorporation through the Fourteenth Amendment. *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 147, 141 S. Ct. 2063, 210 L. Ed. 2d 369 (2021); *Chi. B & Q R. Co. v. City of Chicago*, 166 U.S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897). And the Takings Clause's protections extends to intellectual property. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1003-04, 104 S. Ct. 2862, 81 L. Ed. 2d 815, (1984) (trade secrets); *James v. Campbell*, 104 U.S. 356, 357-58, 26 L. Ed. 786, 1882 Dec. Comm'r Pat. 67 (1882) (patents). Because the parties agree that the copyrights are property protected by the Fifth Amendment, the Court will proceed under the assumption that the Fifth Amendment's guarantee extends to copyrights.[10]

Government takings fall into one of two categories: physical appropriations or use restrictions. *Blackburn*. 58 F.4th at 810 n.3 (adopting "physical-appropriation versus use-restriction dichotomy). Direct government appropriation or physical invasion of private property is the paradigmatic taking. *Lingle v. Chevron U.S.A Inc.*,

10. In *Allen*, the Supreme Court stated that "[c]opyrights are a form of property." 589 U.S. at 261. That statement addressed whether are copyrights are property in the context of the Fourteenth Amendment Due Process Clause not the Fifth Amendment Takings Clause.

544 U.S. 528, 537, 125 S. Ct. 2074, 161 L. Ed. 2d 876 (2005); *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Plan. Agency*, 535 U.S. 302, 324, 122 S. Ct. 1465, 152 L. Ed. 2d 517 (2002). Moreover, a "physical appropriation is a taking whether it is permanent or temporary." *Cedar Point Nursery*, 594 U.S. at 153.

Takings also occur when government regulations go too far in restricting the use of a property. *Penn. Coal Co. v. Mahon*, 260 U.S. 393, 415-16, 43 S. Ct. 158, 67 L. Ed. 322 (1922). Use restrictions amounting to takings come in two varieties. Occasionally, a use restriction will deny the owner all economically beneficial use of the property, resulting in a per se taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 112 S. Ct. 2886, 120 L. Ed. 2d 798 (1992). More common, however, are use restrictions which fall short of that mark. *See Tahoe-Sierra Preservation*, 535 U.S. at 322 (describing *Lucas* per se taking as rule for an "extraordinary case."). Those restrictions are evaluated under the "ad hoc, factual inquiry" set out in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 98 S. Ct. 2646, 57 L. Ed. 2d 631 (1978), which tells courts "to examine (1) the economic impact of the use restriction, (2) how much the restriction interferes with investment-backed expectations, and (3) the character of the governmental action." *Blackburn*, 58 F.4th at 810-11 (quotation marks omitted).

Here, the alleged taking is one of intellectual property. While Allen claims that the end of the State's action is the same—the taking of his copyrights—he alleges that the State used different means. These means can be placed in two buckets. The first bucket, Allen claims that the State took his copyright through § 121-25(b) when it placed them in public domain, eliminating his right to exclude others from using his copyrights; the second bucket, Allen claims that the state took his copyrights by its direct infringements. As discussed, Allen has not alleged a violation of the Copyright Act relating to the first bucket. Accordingly, the Court need only consider whether Allen has stated a takings claim stemming from the State's direct infringements.

The Supreme Court has addressed an alleged taking of intellectual property only once, in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984), and the intellectual property at issue there was trade secrets not copyrights. The *Ruckelshaus* Court applied the multi-factor *Penn Central* test. 467 U.S. at 1005. When *Ruckelshaus* was decided, the distinction between the two lines of Taking Clause cases (physical takings or use-restrictions) was hazy. *See Philip Morris, Inc. v. Reilly*, 312 F.3d 24, 34, n.6 (1st Cir. 2002) (en banc). But even as takings clause jurisprudence has matured, courts have followed *Ruckelshaus's* lead and analyzed alleged takings of intellectual property under *Penn Central* multi-factor test. *See Philip Morris*, 312 F.3d at 35-36 (trade secrets); *Maine Educ. Ass'n Benefits trust v. Cioppa*, 695 F.3d 145, 153 n.5 (1st Cir. 2012) (declining to analyze taking of trade secret under physical taking *per se* rules because of inadequate development in the district court but noting that circuit precedent "supports the application of the *Penn Central* factors"). So this Court will follow the Supreme Court's lead.

To determine whether governmental action—here, direct copyright infringements—effects a taking, the Court must weigh factors in what is "essentially an 'ad hoc, factual' inquiry," *Ruckelshaus*, 467 U.S. at 1005. "This balancing requires the Court to consider, at least, three factors of 'particular significance': (1) 'the economic impact of the regulation on the claimant'; (2) 'the extent to which the regulation has interfered with distinct investment-backed expectations'; and (3) 'the character of the governmental action." *Blackburn*, 58 F.4th at 812 (quoting *Penn Central*, 438 U.S. at 124); *see also Ruckelshaus*, 467 U.S. at 1005 (applying *Penn Central* factors to intellectual property).

The first *Penn Central* factor—the economic impact of the regulation on the claimant—favors the State. For this factor, the Court must weigh the diminution in value caused by the State's infringements against the value of the uninfringed copyrights. *See Blackburn*, 58 F.4th at 812. A diminution is value by itself is not enough to prevail; instead, a plaintiff must show a *substantial* diminution in the value of the property. *Id.* A substantial diminution is not easily satisfied. *See Clayland Farm Enters., LLC v. Talbot Cnty.*, 987 F.3d 346, (4th Cir. 2020) (40 percent diminution in value was insufficient to show a regulatory taking); *Pulte Home Corp. v. Montgomery Cnty.*, 909 F.3d 685, 696 (4th Cir. 2018) (83 percent diminution in value insufficient to show regulatory takings). What's more, Allen must either plead facts establishing a substantial diminution in value or allege facts allowing the Court to infer a substantial diminution. *Blackburn*, 58 F.4th at 812.

Allen does not meet this standard. He claims that "Defendants' infringements cause the loss of all economically beneficial uses of [his] copyright." [DE 134 ¶ 164]. According to Allen, "the only economically beneficial use of his copyrights was to monetize the rights for license or sale," and the State's infringements prevent that since "there is no reason to license what can be used for free." *Id.* He also claims that the State's infringements caused the loss of "at least 150,000 in potential licensing fees." [DE 134 ¶ 168]. Once the legal conclusions are stripped away, there is nothing that allows the Court to infer a *substantial* diminution in the value of his copyrights. Even in the light most favorable to Allen, an assertion of potential lost licensing revenue does not lead to the plausible inference that the copyrights are so incapable of generating other licensing revenue that the decrease in their value is substantial. And Allen's claims that he has lost all "economically beneficial uses of his copyrights" is a conclusory statement of the elements of a per se taking under *Lucas*. As such, it does not satisfy the pleading standard. *See Blackburn*, 58 F.4th at 812 (rejecting conclusory statement "because it simply alleges there as a taking and then recites the standard for compensation"). In sum, the first factor cuts against Allen.

The second *Penn Central* factor—interference with reasonable distinct investment-backed expectations—slightly favors Allen. Allen alleges that during the course of his involvement on the *QAR* project he made substantial investments of his time and money in obtaining his copyrights. For these investments, Allen expected to a return in the form of licensing fees for commercial media.

Allen's copyrights and the State's entitlement to use them for some purposes are governed by several agreements. When he joined the *QAR* project, Allen obtained the rights to make non-commercial videos and photos of the *QAR* from Intersal; Intersal obtained the rights from the Department. Per the underlying agreements, the Department retained the right to use photographs and videos of the *QAR* and its artifacts for non-commercial purposes, including displaying on the Department's website and curating public records. To be reasonable, Allen's investment-backed expectations must have been consistent with those agreements. *Cf. Clayland Farm*, 987 F.3d at 354 (explaining that a taking is defined by the preexisting property right). Accepting Allen's allegations, the DNCR's infringements frustrated Allen's expectations of licensing his copyrights for commercial use, including the State's use for commercial purposes.

The third and final *Penn Central* factor—the character of the State's action weighs in favor of the State. Conceptually, this factor is mess, as the Fourth Circuit has aptly noted: "combine an ad hoc balancing test with an open-ended factor and you're left with a doctrine that is a veritable mess. " *Id.* at 813 (quotation marks omitted). That said, for the third factor courts "should seek to identify regulatory actions that are functionally equivalent to the classic taking in which the government directly appropriates private property or ousts the owner from his domain." *Id.*

The mere infringement of a copyright by a state actor is not "functionally equivalent" to a government appropriation of the Copyright itself. Allen contends the State's appropriation of his right to exclude is tantamount to appropriation of his copyrights. The right to exclude is one of the exclusive rights conferred under the Copyright Act. *See eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 392, 126 S. Ct. 1837, 164 L. Ed. 2d 641 (2006) (A copyright holder possess 'the right to exclude others from using his property.'" (quoting *Fox Film Corp. v. Doyal*, 286 U.S. 123, 127, 52 S. Ct. 546, 76 L. Ed. 1010 (1932))). The Copyright Act precludes a state, or its agencies, from "seiz[ing], expropriat[ing], transfer[ing], or exercising rights of ownership to the copyright or any exclusive rights under a copyright." 17 U.S.C. § 201(d). As a result, the State's infringements cannot divest him of that right nor can the State actually possess that right for itself. Allen has always retained "the key legal rights that constitute property for purposes of the a [classic takings] analysis, despite government interference." *Jim Olive Photography*, 624 S.W.3d at 775. Accordingly, the State's infringements are not functionally equivalent to a classic taking, and the third *Penn Central* factor—the character of the government action—weighs against him.

Weighing these three factors, the Court concludes Allen has failed to plausibly state a claim for relief under *Penn Central*. As a result, Allen has failed to plausibly state a constitutional violation as required by *Georgia's* second prong. And, absent an actual constitutional violation, he cannot show case-by-case abrogation under § 5 of the Fourteenth Amendment. Accordingly, the Court dismisses without prejudice his claims for copyright infringement insofar as they rely on actual violations of the Fifth Amendment as incorporated by the Fourteenth Amendment.

(b) Allen's Fourteenth Amendment Procedural Due Process Claims

Allen asserts that the DNCR's copyright infringements constituted a denial of due process, abrogating state sovereign immunity under *Georgia's* case-by-case abrogation. The Second Amended Complaint elaborates that due process was denied because § 121-25(b) is (or was, now) self-enforcing, and Allen received no neither notice nor a hearing before his copyrights entered the public domain. There is no need to consider whether any procedural due process violations tied to § 121-25(b) beyond the DNCR's direct infringements under the policy set by that statute. As discussed, the *Georgia* framework looks to the actual constitutional violation only if that conduct also works a statutory violation, and Allen does not state that his copyrights were infringed directly by § 121-25(b). Now, on to Allen's claims for direct copyright infringement tied to actual violations of his right to procedural due process.

The Supreme Court has made it clear that the Due Process Clause cares about only a small subset of state copyright infringements. *Allen*, 589 U.S. at 261-62. Specifically, the Due Process Clause cares only about copyright infringements that satisfy two conditions: (1) "the infringements must be intentional, or at least, reckless"; and (2) the state must "fail to offer an adequate remedy for an infringement, because such a remedy itself satisfies the demand of the due process clause." *Id.*

Defendants argue that Allen has failed to show that either condition is satisfied. The Court, however, has already determined that Allen has plausibly alleged that the DNCR's infringements were willful—that is, intentional or at least reckless. So that leaves only the "failure to offer an adequate remedy." On that front, Defendants argue that the adequate post-deprivation remedies are available to Allen in state court, resulting in Allen's failure to satisfy that condition.

When detailing the extent the Due Process Clause is concerned with copyright infringements, Supreme Court did not conclude that the State would violate the Clause only if it failed to provide adequate post-deprivation remedies. *Allen*, 589 U.S. at 261-62. Instead, the Court stated only that "[a] State cannot violate that Clause unless it fails to offer *an adequate remedy* for an infringement, because such a remedy itself satisfies the demand of "due process." *Id.* at 262 (emphasis added) (citing *Hudson v. Palmer*, 468 U.S. 517, 533, 104 S. Ct. 3194, 82 L. Ed. 2d 393, (1984)). The State elides the nuances of the constitutional violation in its rush to rest on the purported adequacies of North Carolina's post-deprivation remedies. The adequacy of post-deprivation remedies must come after a determination that the demands of due process can be satisfied through a post-deprivation remedies.

Due process generally requires some sort of notice and opportunity to be heard before the deprivation of a protected property interest. 891 F.3d 141, 145-46;

Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 19, 98 S. Ct. 1554, 56 L. Ed. 2d 30 ("Ordinarily, due process of law requires an opportunity for some kind of hearing prior to the deprivation of a significant property interest." (quotations omitted)). A meaningful opportunity to be heard is the core of a due process claim. For "the deprivation by state action of a constitutionally protected interest in 'life, liberty, or property,' is not in itself unconstitutional; what is unconstitutional is the deprivation of such an interest *without due process of law*." *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S. Ct. 975, 108 L. Ed. 2d 100 (1990) (quoting *Parratt v. Taylor*, 451 U.S. 527, 537, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981)).

Still, due process is a "flexible concept that varies with the particular situation." *Id.* at 127; *see also Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886, 895, 81 S. Ct. 1743, 6 L. Ed. 2d 1230 ("[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation."). For that reason, "to determine whether a constitutional violation has occurred, it is necessary to ask what process the state provided, and whether it constitutionally adequate." *Zinermon*, 494 U.S. at 126. What functions as constitutionally adequate process in one situation might be inadequate in others.

It is constitutionally adequate for the State to provide only post-deprivation remedies "where a loss of property is occasioned by a random, unauthorized act by a state employee, rather than by an established state procedure," *Hudson*, 468 U.S. at 532. Likewise, post-deprivation remedies "can satisfy the requirements of procedural due process" where, because of "the necessity of quick action by the State" or "the impracticability of providing any meaningful pre-deprivation process," that is all that can be expected. *Parratt v. Taylor*, 451 U.S. 527, 539, 101 S. Ct. 1908, 68 L. Ed. 2d 420 (1981), *overruled on other ground by, Daniels v. Williams*, 474 U.S. 327, 106 S. Ct. 662, 88 L. Ed. 2d 662 (1986). But post-deprivation remedies are constitutionally inadequate where it is foreseeable that individuals would be deprived of property because of state actors acting pursuant to established state procedure. Thus, "[i]n situations where the State can feasibly provide a pre-deprivation hearing before taking property, it generally must do so regardless of the adequacy of a post-deprivation tort remedy to compensate for the taking." *Zinermon*, 494 U.S. at 132; *see also Zimmerman Brush Co.*, 455 U.S. at 436 (holding post-deprivation hearing as constitutionally inadequate where established state procedure destroyed plaintiff's property interest).

An Eleventh Circuit case, *National Association of Boards of Pharmacy v. Board of Regents of the University System of Georgia*, illustrates a situation where post-deprivation remedies provided constitutionally adequate process for copyright infringement.[11] 633 F.3d 1297 (11th Cir. 2011) (hereafter "*NABP*"). In that case, the copyright owner sued the Board of Regents of a state university for copyright infringement and procedural due process violations after a professor used copyrighted materials

11. To make the case even more on point here, the copyright holder sued under *Georgia* framework.

in his course materials. The Eleventh Circuit held that the copyright holder failed to establish that due process required a pre-deprivation hearing, concluding that "predeprivation process was not feasible under the acts alleged." *Id.* at 1319. Critically, the amended complaint was devoid of allegations that university officials "were acting pursuant to an established state procedure *designed* to deprive individuals of their copyrights." *Id.* at 1318. Because any copyright infringement was the random and unauthorized act of the professor, beyond the control of the state, the deprivation was not foreseeable rendering it impracticable, and unnecessary, to provide pre-deprivation process. *Id.* 1318 - 19.

Unlike in *NABP*, Allen has adequately alleged that the State committed direct infringements while operating under an established state procedure—§ 121-25(b)—designed to facilitate such a deprivation. The State was in the position to foresee a deprivation and the DNCR acted pursuant to an established state procedure—§ 121-25(b)—whose purpose was to deprive Allen of his protected interest in his copyrights. Section 121-25(b) permitted the DNCR to use copyrighted documentary materials in its custody without limitation. What's more, Allen has sufficiently alleged that § 121-25(b) was specifically passed to help the DNCR in its ongoing dispute with Allen and Intersal over the use of documentary materials from the *QAR*. So too does § 121-25(b)'s "in the custody of requirement permit a reasonable inference that it was readily foreseeable to the State that the DNCR would be able, before infringing, to not only identify copyrighted materials but also the identity of the copyright holder. Thus, the DNCR's infringement under § 121-25(b) is a situation where" the state actor knows not only that he is depriving someone of property, but also the identity of the aggrieved party." *NABP*, 633 F.3d at 1319 (emphasis omitted). Allen has alleged that the State committed copyright infringements through an established state procedure rendering post-deprivation remedies inadequate to satisfy due process. Accordingly, the Court concludes that he has shown an actual constitutional violation to satisfy the second prong of the *Georgia* framework.

Because Allen has adequately paired his statutory cause of action under the Copyright Act with a procedural due process claim, the State plays its ace in the hole, arguing that Allen fails to state a *Georgia* claim because his statutory violations are not capable of aligning with his due process claims. That is, the conduct that violates the Copyright Act—copyright infringement—is not identical to the conduct that violates the Due Process Clause—deprivation without due process of law. The State crafts this argument from a footnote in *NABP* that questions whether a procedural due process claim and a copyright infringement claim can succeed under the *Georgia* framework. *NABP*, 633 F.3d at 1316 n.32. The footnote's commentary has guided other district courts to dismiss *Georgia* claims that pair a copyright infringement and due process claims. *See Campinha-Bacote v. Regents of the Univ. of Mich.*, 2016 U.S. Dist. LEXIS 5958, 2016 WL 223408, at *4-5 (S.D. Ohio Jan. 19, 2016); *Am. Shooting Ctr., Inc. v. Secfor Intn'l*, 2016 U.S. Dist. LEXIS 96111, 2016 WL 3952130, at *3-4 (S.D. Cal. Jul. 22, 2016). In the footnote, however, the Eleventh Circuit expressly acknowledged it was unnecessary to reach that conclusion since the plaintiff failed to state a *Georgia* claim. The footnote is pure dicta. *See Karsten v. Kaiser Found. Health Plan of Mid-Atl. States, Inc.*, 36 F.3d 8, 11 (1994) ("If the first reason given is independently sufficient, then all those that follow are surplusage; thus, the strength of the first makes all the rest *dicta*.").

More to the point, the Court does not read *Georgia* so narrowly. Case-by-case abrogation under *Georgia* occurs when a plaintiff can show that the conduct that violates a federal statute, which provides a private cause of action for damages against the States, also works an "independent[] violat[ion] [of] the provisions of § 1 of the Fourteenth Amendment." 546 U.S. at 157. Nothing in *Georgia* indicates that the Supreme Court limited its decision to the statutory violation in that case or required the actual constitutional violation to be anything other than that—an actual constitutional violation.

A violation of the Copyright Act combined with an actual due process violation checks all of *Georgia*'s boxes. The CRCA creates a private cause of action for damages against the States for copyright infringement. 17 U.S.C. § 511(a). The CRCA, of course, went too far in abrogating state sovereign immunity for it be a valid prophylactic abrogation, but it is still available otherwise. What's more, the Supreme Court has held that state copyright infringements constitute Fourteenth Amendment violations when they are (1) intentional, or at least reckless, and (2) the state fails to offer an adequate remedy satisfies the demands of the Due Process Clause. 589 U.S. at 261-62. That means within the broader world of state copyright infringements there is a smaller class of infringements that also work constitutional violations. *Id.* at 262. *Georgia* does not require more for as-applied abrogation. "Thus, insofar as [the CRCA] creates a private cause of action for damages against the state for conduct that *actually* violates the Fourteenth Amendment, [the CRCA] validly abrogates state sovereign immunity." *Georgia*, 546 U.S. at 159.

In sum, the Court concludes that Allen has plausibly alleged that the State's direct copyright infringements in violation of the Copyright Act also constitute a procedural due process violation. Accordingly, under *Georgia*, 17 U.S.C. § 511 validly abrogates the State's sovereign immunity as-applied. The State's motion to dismiss those claims is denied.

CONCLUSION

For these reasons, the Court Orders as follows: Plaintiffs' Motion for Leave to File a Surreply [DE 157] is GRANTED; the Clerk of Court is DIRECTED to file Plaintiff's Surreply [DE 157-1]; Defendants' Motion to Strike [DE 144] is GRANTED IN PART and DENIED IN PART. Defendants' Motion to Dismiss [DE 146] is GRANTED IN PART and DENIED IN PART. Allen may proceed on his claims for direct copyright infringement and procedural due process consistent with this order.

SO ORDERED, this 29 day of August 2024.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED OCTOBER 14, 2022

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 21-2040
(5:15-cv-00627-BO)

FREDERICK L. ALLEN; NAUTILUS PRODUCTIONS, LLC,

Plaintiffs-Appellees,

v.

ROY A. COOPER, III, GOVERNOR OF NORTH CAROLINA; KEVIN CHERRY, DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; KARIN COCHRAN, CHIEF DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; CARY COX, ASSISTANT SECRETARY, MARKETING AND COMMUNICATIONS OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; SUSAN WEAR KLUTTZ, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY; STEPHEN R.

Appendix C

CLAGGETT, A/K/A STEVE CLAGGETT, STATE ARCHAEOLOGIST, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; JOHN W. MORRIS, A/K/A BILLY RAY MORRIS, DEPUTY STATE ARCHAEOLOGIST - UNDERWATER AND DIRECTOR OF UNDERWATER ARCHAEOLOGY BRANCH OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA,

Defendants-Appellants,

and

FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION,

Defendant.

Filed October 14, 2022

ORDER

Appellants seek to appeal the district court's order granting Appellees' motion for reconsideration, which the district court construed as a motion made pursuant to Fed. R. Civ. P. 54(b). Appellees have moved to dismiss the appeal for lack of jurisdiction, contending that the order is neither a final order nor an appealable interlocutory order. This court may exercise jurisdiction only over final orders, 28 U.S.C. § 1291, and certain interlocutory and collateral orders, 28 U.S.C. § 1292; Fed. R. Civ. P. 54(b); *Cohen v.*

Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46, 69 S. Ct. 1221, 93 L. Ed. 1528 (1949). Upon review of the record, we conclude that the order Appellants seek to appeal is neither a final order nor an appealable interlocutory or collateral order. Accordingly, we grant Appellees' motion to dismiss.

Entered at the direction of the panel: Judge Niemeyer, Judge King, and Senior Judge Motz.

For the Court

/s/ Patricia S. Connor, Clerk

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF NORTH CAROLINA, WESTERN DIVISION, FILED AUGUST 18, 2021

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NORTH CAROLINA
WESTERN DIVISION

No. 5:15-CV-627-BO

FREDERICK L. ALLEN and NAUTILUS PRODUCTIONS, LLC,

Plaintiffs,

v.

ROY A. COOPER, *et al.*,

Defendants.

ORDER

This cause comes before the Court on plaintiffs' motion for reconsideration. DE 105. The appropriate responses and replies have been filed, and a hearing was held before the undersigned on February 16, 2021, at Raleigh, North Carolina. For the reasons discussed below, the motion for reconsideration is granted.

BACKGROUND

The shipwreck believed to be *Queen Anne's Revenge*, the former flagship of Edward Teach, more commonly known as the pirate Blackbeard, was discovered in 1996 off the coast of Beaufort, North Carolina. Since 1998, plaintiffs, Frederick Allen and his production company, Nautilus Productions, have been the substantially exclusive underwater photographers of the shipwreck. During this time, plaintiffs have allegedly produced a substantial archive of video and still images showing the underwater shipwreck and the efforts of diving teams and archaeologists to recover various artifacts from the wreck. Allen registered thirteen copyrights in these materials with the U.S. Copyright Office, each copyright covering a year's worth of footage.

In 2013, defendant began arguing that the State of North Carolina and its Department of Natural and Cultural Resources (DNCR) infringed, contributed to infringement, and induced infringement of Allen's registered copyrights by uploading Allen's video-footage to the Internet without Allen's consent. On October 15, 2013, plaintiffs, the State, and the DNCR entered into a written settlement agreement providing for payment to plaintiffs from the DNCR of $15,000 for any copyrights it had infringed prior to that date. The agreement referred to some specific instances of infringement, but none of the parties admitted to any wrongdoing. The agreement also clarified preexisting agreements and divided plaintiffs' video and photographic documentation into two categories to clarify the parties' respective rights. The State and the DNCR paid plaintiffs the $15,000 provided by the settlement on February 3, 2014.

Plaintiffs commenced this action on December 1, 2015, alleging that the State and the DNCR continued to infringe on plaintiffs' copyrights after entry of the 2013 settlement agreement. They further alleged that the State and the DNCR have published, performed, and/or displayed plaintiff's video footage and that, in an effort to convert plaintiffs' copyright assets to state property without payment to plaintiff, defendants collectively wrote and obtained passage of an amendment to an existing North Carolina statute to convert copyrighted works of plaintiffs and others into public record. N.C. Gen. Stat. § 121-25(b).

In their complaint and amended complaint, plaintiffs sought a declaratory judgment that § 121-25(b) is void and unenforceable because it is preempted by the Copyright Remedy Clarification Act (CRCA), 17 U.S.C. §§ 101 *et seq.*, and violates the Takings and Due Process Clauses of the U.S. Constitution. U.S. Const. amends. V and XIV. Plaintiffs further alleged claims of copyright infringement and unconstitutional taking pursuant to 42 U.S.C. § 1983, as well as state law claims for unfair and deceptive trade practices and civil conspiracy. Defendants moved to dismiss plaintiffs' amended complaint, arguing that it is barred by the Eleventh Amendment, that the individual defendants sued in their individual capacities are protected by qualified and legislative immunity, that the complaint fails to state a plausible claim for relief, that plaintiffs lack standing to challenge § 121-25(b) as amended, and that this Court should abstain from issuing an opinion of first impression regarding North Carolina's public record statute. Fed. R. Civ. P. 12(b)(1)-(2), (6).

On March 23, 2017, this Court entered an order denying in part and granting in part defendants' motion to dismiss. The order allowed the claims for a declaratory judgment that § 121-25(b) is void and unenforceable and for copyright infringement to move forward upon finding that North Carolina's Eleventh Amendment immunity for those counts was validly abrogated by the CRCA. The order dismissed the remaining claims for unconstitutional taking pursuant to § 1983, unfair and deceptive trade practices, and civil conspiracy because of sovereign immunity. In dismissing the § 1983 claim, the Court relied on *Hutto v. South Carolina Retirement System*, 244 F. Supp. 3d 536 (4th Cir. 2010), and found, "under Fourth Circuit precedent, that plaintiffs' takings claims brought under § 1983 are barred by the Eleventh Amendment when North Carolina courts are available for such a claim to be brought." *Allen v. Cooper*, 244 F. Supp. 3d 525, 540 (E.D.N.C. Mar. 23, 2017) (citing *Hutto*, 773 F.3d at 552).

Defendants appealed this Court's March 23, 2017 order on April 21, 2017, and plaintiffs cross-appealed on May 5, 2017. This Court granted plaintiffs' motion to stay the case on May 11, 2017, pending a final appellate decision. On July 10, 2018, the Fourth Circuit reversed this Court's decision. To effect the Fourth Circuit's mandate, on August 24, 2018, this Court entered an order dismissing plaintiffs' claims against North Carolina, the DNCR, and the public officials acting in their official capacity without prejudice and dismissing the claims against the public officials in their individual capacities with prejudice. This Court granted plaintiffs' motion to stay on September 27, 2018, until after the U.S. Supreme Court ruled on plaintiffs' petition for certiorari, and the Supreme Court granted the writ of certiorari on June 3, 2019. On April 24, 2020, the Supreme Court affirmed the Fourth Circuit's finding that there was no abrogation of sovereign immunity based on Article I's Intellectual Property Clause or § 5 of the Fourteenth Amendment in this case.[1]

On September 4, 2020, plaintiffs filed the instant motion for reconsideration asking this Court to reconsider its 2017 order dismissing the claim for unconstitutional taking pursuant to § 1983. Plaintiffs claim that, although this Court relied on then-prevailing law at the time it dismissed plaintiffs' takings claim, precedent has been changed by the Supreme Court's decision in *Knick v. Township of Scott*, 139 S. Ct. 2162, 204 L. Ed. 2d 558 (2019), dated June 21, 2019. According to plaintiffs, that change in the law constitutes a valid reason justifying reconsideration of this Court's previous order and reinstitution of the case. Plaintiffs also argue that, now that the Supreme Court has rejected the CRCA as a prophylactic abrogation statute, it is appropriate to consider plaintiffs' claim for case-by-case abrogation based on an actual violation of his constitutional rights under *United States v. Georgia*, 546 U.S. 151, 126 S. Ct. 877, 163 L. Ed. 2d 650 (2006).

DISCUSSION

At the outset, this Court notes that plaintiffs have filed their motion pursuant to Rule 60 of the Federal Rules of Civil Procedure. Defendant has not objected to

1. Following the Supreme Court's decision, the case proceeded against defendant Friends of *Queen Anne's Revenge*. On August 17, 2020, plaintiffs filed a stipulation of voluntary dismissal dismissing the action, with prejudice, against defendant Friends of *Queen Anne's Revenge*, which stipulated to this dismissal. DE 104.

plaintiff moving pursuant to Rule 60. Under that rule, a court may relieve a party from a final order for a limited set of circumstances, including mistake, fraud, and newly-discovered evidence. Fed. R. Civ. P. 60(b). In addition to the specific categories for relief listed, Rule 60(b)(6) allows for a relief for any other reason that justifies relief." *Id.* "To obtain relief from a judgment under Rule 60(b), a moving party must first show (1) that the motion is timely, (2) that he has a meritorious claim or defense, and (3) that the opposing party will not suffer unfair prejudice if the judgment is set aside." *United States v. Welsh*, 879 F.3d 530, 533 (4th Cir. 2018). The movant bears the burden of showing timeliness. *Moses v. Joyner*, 815 F.3d 163, 166 (4th Cir. 2016). Under Rule 60(b)(6), the party must also show the existence of "extraordinary circumstances." *Gonzalez v. Crosby*, 545 U.S. 524, 535, 125 S. Ct. 2641, 162 L. Ed. 2d 480 (2005).

However, Rule 60(b) is applicable only to final orders. *Roberson v. Paul Smith, Inc.*, No. 5:07-CV-284-F, 2011 U.S. Dist. LEXIS 42978, at *5 (E.D.N.C. Apr. 20, 2011) (citing *Fayetteville Inv'rs v. Commercial Builders, Inc.*, 936 F.2d 1462, 1469 (4th Cir. 1991); *McLaurin v. E. Jordan Iron Works, Inc.*, 666 F. Supp. 2d 590, 596 n.2 (E.D.N.C. 2009)). Final judgments adjudicate and resolve all claims as to all parties. *See Benedict v. Hankook Tire Co.*, No. 3:17-cv-109, 2018 U.S. Dist. LEXIS 58616, at *5 (E.D. Va. Apr. 5, 2018); *Moore v. Lightstorm Entm't*, No. RWT-11-3644, 2013 U.S. Dist. LEXIS 112366, at *8 (citing *Millville Quarry Inc. v. Liberty Mut. Fire Ins. Co.*, 217 F.3d 839, [published in full-text format at 2000 U.S. App. LEXIS 17495], at *8 (4th Cir. 2000) (unpublished)).

In this case, the Court's order dismissed only some of the defendants and some of the claims. Since the order did not resolve all claims as to all parties, it was not a final order. *See Quigley v. United States*, 865 F. Supp. 2d 685, 699 (D. Md. 2012) (finding that an order dismissing claims against only one defendant was not a final judgment) (quoting Fed. R. Civ. P. 54). Rule 60(b) is not applicable. Rather than deny the motion because it cites to Rule 60(b), the Court will construe plaintiffs' Rule 60(b) motion as a Rule 54(b) motion to reconsider. *Id.* (citing *Fayetteville Inv'rs*, 936 F.2d at 1469-70).

Rule 54(b) governs "any order or decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties." Pursuant to this rule, "[a]n interlocutory order is subject to reconsideration at any time prior to the entry of a final judgment." *Fayetteville Inv'rs*, 936 F.2d at 1469. "[A] district court retains the power to reconsider and modify its its [sic] interlocutory orders' at any time prior to final judgment, and the exercise of such 'power is committed to the sound discretion of the district court." *Roberson*, 2011 U.S. Dist. LEXIS 42978, at *5-6 (quoting *Am. Canoe Ass'n v. Murphy Farms, Inc.*, 326 F.3d 505, 514-15 (4th Cir. 2003)). A court may revise such an order "under the same circumstances in which it may depart from the law of the case: (1) 'a subsequent trial produc[ing] substantially different evidence'; (2) a change in applicable law; or (3) clear error causing manifest injustice." *Carlson v. Bos. Sci. Corp.*, 856 F.3d 320, 325 (4th Cir. 2017) (noting the similarity of this standard to that applicable to Rule 59(e) motions, except that the law-of-the-case standard allows for new evidence discovered during litigation as opposed to evidence not available at trial to serve as basis for reconsideration motion) (alteration in original) (citing *Am. Canoe*, 326 F.3d at 515). This is a lower standard than that of Rule 60(b). *See Am. Canoe*, 326 F.3d 505, 514-15 (4th Cir. 2003) ("Motions for reconsideration of interlocutory orders are not subject to the strict standards applicable to motions for reconsideration of final judgments.").

I. Plaintiffs' Takings Claim under *Knick*

In determining whether to grant a motion to reconsider pursuant to Rule 54(b), a district court may look to the Rule 60(b) principles, although it is not bound by that rule. *See Fayetteville Inv'rs*, 936 F.2d at 1470 (favorably citing a case that used parts of Rule 60(b) in reaching its conclusion on a motion to reconsider an interlocutory order). Since the parties have argued the motion based on the Rule 60(b) principles and since Rule 60(b) is a more stringent standard than that of Rule 54(b), the Court considers these principles in its analysis. Regardless of whether the Court addresses the issue of reconsideration on the standard of Rule 60(b) or Rule 54(b), plaintiff's request for relief is granted.

Timeliness

Plaintiffs filed this motion for reconsideration three-and-a-half years after this Court entered its order dismissing plaintiffs' takings claim. However, plaintiffs argue that their motion to reconsider is nevertheless timely because plaintiffs gave notice of their intent to seek reconsideration just thirteen months after *Knick* allegedly changed the previously-applicable Fourth Circuit precedent and less than ninety days after the lawsuit returned to this Court from the Supreme Court. Courts must determine, based on the circumstances in the case, whether a delay in filing a Rule 60(b) motion is reasonably timely. *Wells Fargo Bank, N.A. v. AMH Roman Two NC, LLC*, 859 F.3d 295 (4th Cir. 2017); *see also Cox v. Horn*, 757 F.3d 113, 122 (3rd Cir. 2014) (finding that "a district court must consider the full measure of any properly presented facts and circumstances attendant to the movant's request" when determining whether a Rule 60(b)(6) motion is timely); *Days Inns Worldwide, Inc. v. Patel*, 445 F.3d 899, 906 (6th Cir. 2006) ("What constitutes a reasonable time depends on the facts of each case.").

Upon considering the particular circumstances of this case, the Court finds that plaintiffs' delay in filing this motion is reasonably timely. At no point in this case have plaintiffs been dilatory in pursuing the action. Plaintiffs appealed this Court's 2017 order, and they defended against defendants' appeals to both the Fourth Circuit and the Supreme Court. Although plaintiffs filed the instant motion three-and-a-half years after this Court's order of dismissal, based on the facts of this case, this Court determines the starting point for the timeliness inquiry should be the date the Supreme Court affirmed the Fourth Circuit's judgment in this case, or April 24, 2020, rather than the date this Court entered its order of dismissal. *Moses*, 815 F.3d at 165-66 (using the date of a Supreme Court decision creating a change in habeas procedural law as the starting point for the Rule 60(b) timeliness inquiry, rather than the date of the Court's order of dismissal filed nine years prior to the motion for reconsideration at issue); *Werner v. Carbo*, 731 F.2d 204, 207 (4th Cir. 1984) (using the date the Supreme Court denied certiorari to the former decision on appeal as the starting point for the Rule 60(b) timeliness inquiry).

The Court further finds that a delay of eighty-two days between the Supreme Court's order and plaintiff's request to seek reconsideration is reasonably timely. *See id.* at 207 (finding a Rule 60(b) motion timely following a delay of less than eleven weeks); *Wells Fargo Bank*, 859 F.3d at 300 (suggesting a three-and-a-half-month delay in filing a Rule 60(b) motion may be reasonable assuming the moving party was diligent in seeking relief) (citing *Bouret-Echevarria v. Caribbean Aviation Maint. Corp.*, 784 F.3d 37 (1st Cir. 2015)); *Jones v. United States*, No. 5:13-CR-141-FL-1, 2020 U.S. Dist. LEXIS 6206, at *10 (E.D.N.C. Jan. 10, 2020) (finding a Rule 60(b) motion timely when filed approximately four months after the court entered judgment); *Kerr v. United States*, No. 5:08-CR-302-FL-1, 2020 U.S. Dist. LEXIS 1036, at *7 (E.D.N.C. Jan. 3, 2020) (finding a Rule 60(b) motion timely when filed approximately three months after the court entered judgment).

Meritorious Claim or Defense

This Court must also determine whether plaintiffs' claim that the Supreme Court's decision in *Knick* changed Fourth Circuit precedent is meritorious. In its 2017 order, this Court relied on *Hutto* and found, "under Fourth

Circuit precedent, that plaintiffs' takings claims brought under § 1983 are barred by the Eleventh Amendment when North Carolina courts are available for such a claim to be brought." *Allen*, 244 F. Supp. 3d at 540.

In *Knick*, plaintiff sued a municipality, the Township of Scott in Pennsylvania, alleging that an ordinance passed by the municipality violated the Takings Clause of the Fifth Amendment. 139 S. Ct. at 2168. The district court dismissed the takings claim because plaintiff had not pursued an inverse condemnation action in state court, but the Supreme Court granted certiorari to reconsider the issue of whether property owners must seek just compensation under state law in state court before bringing a federal takings claim. *Id.* at 2169. Upon consideration of the issue, the Supreme Court found that "a government violates the Takings Clause when it takes property without compensation, and that a property owner may bring a Fifth Amendment claim under § 1983 at that time." *Id.* at 2177. It also concluded that, "because the violation is complete at the time of the taking, pursuit of a remedy in federal court need not await any subsequent state action." *Id.* Based on this conclusion, the Supreme Court overruled the doctrine of *Williamson County Regional Planning Commission Hamilton Bank of Johnson City*, 473 U.S. 172, 105 S. Ct. 3108, 87 L. Ed. 2d 126 (1985), which held that a plaintiff could not bring a federal takings claim in federal court until a state court had denied his claim for just compensation under state law in a state court. *Id.* at 2169, 2179.

1. Applicability of *Knick*

In *Hutto*, the Fourth Circuit held 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." 773 F.3d at 552. *Krick* involved a suit against a municipality, rather than a State. Since local governments have no claim to sovereign immunity, *Jinks v. Richland Cty.*, 538 U.S. 456, 466, 123 S. Ct. 1667, 155 L. Ed. 2d 631 (2003) ("[M]unicipalities, unlike States, do not enjoy a constitutionally protected immunity from suit."), *Knick* did not address the issue of sovereign immunity.

Defendants argue that since *Knick* did not directly address the issue of sovereign immunity, *Knick* cannot have overturned *Hutto*. However, the Court finds it necessary to consider the reasoning of the Supreme Court in *Knick*. After considering the main points the Supreme Court relied upon in *Knick*, the Court finds that *Knick* would have reached the same conclusion had it involved a taking by a state government rather than a township.

In reaching its conclusion in *Knick*, the Court relied upon three primary points. First, the Court relied on the long-standing principle that "[t]he 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." *Knick*, 139 S. Ct. at 2170. *See also Jacobs v. United States*, 290 U.S. 13, 17, 54 S. Ct. 26, 78 L. Ed. 142 (1933) (holding that a property owner found to have a valid takings claim is entitled to compensation as if it had been "paid contemporaneously with the taking") (citing *Seaboard A. L. R. Co. v. United States*, 261 U.S. 299, 306, 43 S. Ct. 354, 67 L. Ed. 664 (1923)); *First English Lutheran Church of Glendale v. Cty. of Los Angeles*, 482 U.S. 304, 315, 107 S. Ct. 2378, 96 L. Ed. 2d 250 (1987) (finding that a property owner has a constitutional claim for just compensation at the time of the taking because of "the self-executing character" of the Takings Clause with respect to compensation"). Second, the Court found that *Williamson County* created a preclusion trap in which a plaintiff "cannot go to federal court without going to state court first; but if he goes to state court first and loses, his claim will be barred in federal court." *Knick*, 139 S. Ct. at 2167. Finally, the Court relied on the argument that the Fifth Amendment and the federal civil rights statutes "guarantee[] 'a federal forum for claims of unconstitutional treatment at the hands of state officials,' and the settled rule is that 'exhaustion of state remedies is *not* a prerequisite to an action under § 1983.'" *Id.* (quoting *Heck v. Humphrey*, 512 U.S. 477, 480, 114 S. Ct. 2364, 129 L. Ed. 2d 383 (1994)).

After applying each of the Supreme Court's primary points to the case at hand, the Court finds that the reasoning in *Knick* still applies, even though this case involves the issue of sovereign immunity, and that *Hutto's* holding that sovereign immunity applies to cases against States in federal courts when the State's courts remain open to adjudicate such claims is fatally undermined. First, the constitutional violation here, as in *Knick*, arose at the time of the taking without regard to post-taking remedies available to plaintiffs, including any potential state proceedings. *Knick* established that "[t]he fact that the State has provided a property owner with a procedure that may subsequently result in just compensation cannot deprive the owner of his Fifth Amendment right to compensation under the Constitution, leaving only the state law right." *Id.* at 2171. Plaintiffs may bring a federal constitutional claim despite the availability of other compensation remedies, such as an inverse condemnation claim under state law. *Id.* ("The availability of any particular compensation remedy, such as an inverse condemnation claim under state law, cannot infringe or restrict the property owner's constitutional claim."). The Supreme Court, in reaching its decision, relied on *First English*, stating that "in the event of a taking, the compensation remedy is required by the Constitution." *Id.* at 2171 (quoting *First English*, 482 U.S. at 316). In doing so, the court 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 2172 (quoting *First English*, 482 U.S. at 316 n.9).

In reaching its decision, the *Hutto* court relied on a line of tax cases under the Due Process Clause, holding that due process requires a remedy to recover payments pursuant to an unlawful tax, but that States may choose whether to provide a pre-payment or post-payment remedy. *See* 773 F.3d at 551-52 (citing *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco*, 496 U.S. 18, 110 S. Ct. 2238, 110 L. Ed. 2d 17 (1990); *Reich v. Collins*, 513 U.S.

106, 115 S. Ct. 547, 130 L. Ed. 2d 454 (1994)). However, the Supreme Court notes in *Knick* that "the analogy from the due process context to the takings context is strained." 139 S. Ct. at 2174. Unlike in the due process context, "[a] later payment of compensation may remedy the constitutional violation that occurred at the time of the taking, but that does not mean the violation never took place . . . . A bank robber might give the loot back, but he still robbed the bank." *Id.* at 2172.

Therefore, the Takings Clause requires a compensatory remedy without regard to what remedies state law may provide. *Id.* at 2170. Even though *Knick* was not a sovereign immunity case, its conclusion that a compensatory remedy is constitutionally-required was necessary to its decision and is contrary to *Hutto*'s conclusion that state sovereign immunity can bar takings claims brought under the Fourteenth Amendment. *See also Fitzpatrick v. Bitzer*, 427 U.S. 445, 456, 96 S. Ct. 2666, 49 L. Ed. 2d 614 (1976) (noting that the Fourteenth Amendment's "sections by their own terms embody limitations on state authority," including state sovereign immunity).

Second, using *Hutto* to require plaintiffs to exhaust their state takings remedies before turning to federal court creates the same preclusion trap *Knick* objected to. *Knick* noted that requiring a plaintiff to seek just compensation under state law generally precludes any subsequent federal suit, leaving a takings plaintiff "in a Catch-22: He cannot go to federal court without going to state court first; but if he goes to state court and loses, his claim will be barred in federal court." 139 S. Ct. at

2167. Thus, just like *Williamson County*'s ripeness rule, *Hutto*'s holding that a federal plaintiff must sue in state court to avoid sovereign immunity "hand[s] authority over federal takings claims to state courts." *Id.* at 2170 (quoting *San Remo Hotel, L.P. v. City and Cty. of San Francisco*, 545 U.S. 323, 350, 125 S. Ct. 2491, 162 L. Ed. 2d 315 (2005) (Rehnquist, C.J., concurring in judgment) (alteration in original)).

Third, enforcing *Hutto* after *Knick* by allowing States to take responsibility for federal takings litigations flies in the face of both the Fourteenth Amendment and federal rights statutes enforcing the Amendment. The Fourteenth Amendment itself promises access to federal remedies in federal court. *See, e.g., McNeese v. Bd. of Ed. for Cnity. Unit Sch. Dist. 187*, 373 U.S. 668, 674, 83 S. Ct. 1433, 10 L. Ed. 2d 622 (1963) (holding that where plaintiffs assert the "depriv[ation] . . . of rights protected by the Fourteenth Amendment . . . [s]uch claims are entitled to be adjudicated in the federal courts"); *Home Tel. & Tel. Co. v. City of Los Angeles*, 227 U.S. 278, 33 S. Ct. 312, 57 L. Ed. 510 (1913) (rejecting interpretation of the Fourteenth Amendment's state action requirement that would have given state courts the first say as to federal rights claims). Defendants argue that *Knick* specifies when a plaintiff can bring a takings claim, but that only *Hutto* specifies the appropriate forum for such a claim when the defendant is a State. However, *Knick* specifically notes that the Supreme Court has consistently rejected interpretations of federal rights and remedies that would leave those rights at the mercy of state courts. 139 S. Ct. at 2172 ("The 'general rule' is that plaintiffs may bring constitutional claims under § 1983 'without first bringing any sort of state lawsuit, even when state courts actions addressing the underlying behavior are available.'") (quoting David Dana & Thomas Merrill, *Property: Takings* 262 (2002)). *Knick* does, in fact, address the appropriate forum for takings claims, and to hold otherwise would be to do exactly what *Knick* sought to avoid: "relegate[] the Takings Clause to the status of a poor relation' among the provisions of the Bill of Rights." *Id.* at 2170 (quoting *Dolan v. City of Tigard*, 512 U.S. 374, 392, 114 S. Ct. 2309, 129 L. Ed. 2d 304 (1994)).

2. Other Court Decisions Following *Knick*

Defendants argue that every appellate court to consider the issue at hand had concluded that *Knick* does not undermine the rule that sovereign immunity bars takings claims against States in federal court. While it is true that several circuits have considered whether *Knick* changed the states' immunity in takings claims, the analysis has almost exclusively been limited to whether *Knick* directly involved sovereign immunity. The Fifth Circuit and Tenth Circuit merely stated that *Knick* did not address sovereign immunity, and then ended their analysis there. *See Williams v. Utah Dep't of Corr.*, 928 F.3d 1209, 1214 (10th Cir. 2019) ("*Knick* did not involve Eleventh Amendment immunity, which is the basis of our holding in this case."); *Bay Point Props., Inc. v. Miss. Tramp. Comm'n*, 937 F.3d 454, 456 (5th Cir. 2019) ("[T]he Court did not even have occasion to re-consider sovereign immunity law in *Knick*."). As previously discussed, this reliance on the fact that *Knick* involved a taking by a municipality and thus did not consider sovereign immunity is misplaced because *Knick*'s reasoning, which these courts neglect to mention, fatally undermined *Hutto*'s rule.

The Sixth Circuit went slightly further, but not by much. The court noted that "*Knick* says nothing about sovereign immunity," and then notes that *Knick* cited *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 104 S. Ct. 2862, 81 L. Ed. 2d 815 (1984), which involved an administrative exhaustion procedure for federal takings of property. *Ladd v. Marchbanks*, 971 F.3d 574, 579 (6th Cir. 2020). The Sixth Circuit concluded that, if Congress could require administrative exhaustion as a condition of its waiver of sovereign immunity, the Fifth Amendment's Takings Clause did not abrogate sovereign immunity. *Id.* However, *Ruckelshaus* involved a claim for injunctive relief, which is a distinction crucial to *Knick*'s reasoning. *See Knick*, 139 S. Ct. at 2175 (distinguishing respondents' reliance on cases concerning requests for injunctive relief from the case at hand).

Defendants also note that another judge in this district concluded that sovereign immunity continued to apply after *Knick*. *See Zito v. N.C. Coastal Res. Comm'n*, 449 F. Supp. 3d 567 (E.D.N.C. 2020). However, this case is distinct because it involved a taking of real property, a situation in which there is no federal preemption. *Id.* at 571-73. In fact, *Zito* acknowledged "*Hutto*'s tension with *Knick*," stating that plaintiffs raised "significant constitutional issues" under *Knick* and that "the guarantee of a federal forum rings hollow for takings plaintiffs, who are forced to litigate their claims in state court." *Id.* at 582 (quoting *Knick*, 139 S. Ct. at 2167).

After reviewing the other cases considering the interplay between *Hutto* and *Knick*, this Court finds that no other court has attempted to thoroughly consider the relevance of *Knick*'s reasoning to state sovereign immunity in this context. Although the Court recognizes these non-binding cases, there is nothing in these cases that leads the Court to doubt its conclusion that *Knick* would have reached the same result had it involved a State.

3. Longstanding Principles of Sovereign Immunity

Defendants further argue that this Court should continue to follow *Hutto* because its holding is consistent with the foundational principles of sovereign immunity. However, this Court has previously detailed in this case what it believes to be the proper understanding of the Eleventh Amendment: "The Eleventh Amendment was meant to be only what it purports to be by its plain language: a bar of suits against states by citizens of other states or nations brought under the federal courts' diversity jurisdiction." *Allen*, 244 F. Supp. 3d at 535. In support of its reasoning that the line of cases beginning at least as far back as *Hans v. Louisiana*, 134 U.S. 1, 10 S. Ct. 504, 33 L. Ed. 842 (1890), is incorrect and harmful to the country's rule of law, this Court stated that the position that the Eleventh Amendment was intended to constitutionalize a broad principle of sovereign immunity contradicts both the historical evidence and the plain meaning of the Amendment and that the founders wrote a Constitution founded upon the sovereignty of the people, rather than that of the States. *Id.* at 535-540. While the Court does not deem it necessary to repeat its statements regarding the proper interpretation of the Eleventh Amendment in detail, the Court will respond to defendant's assertions that this kind of lawsuit strikes at the heart of North Carolina's sovereign immunity and that there is no historical evidence to show that the Framers intended the Takings Clause to limit sovereign immunity or that the Fourteenth Amendment was intended to abrogate States' sovereign immunity from takings claims.

It is well-established that sovereign immunity is not absolute, and that the Fourteenth Amendment was "enacted after the Eleventh Amendment and specifically designed to alter the federal-state balance." *College Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.*, 527 U.S. 666, 670, 119 S. Ct. 2219, 144 L. Ed. 2d 605 (1999) (citing *Fitzpatrick*, 427 U.S. 445). After considering the text of the Fourteenth Amendment and noting that it "quite clearly contemplate[d] limitations on [States'] authority," the Supreme Court concluded that whatever amount of sovereign immunity the States retained upon ratification of the Constitution was unmistakably reined in by the passage of the Fourteen Amendment. *See Fitzpatrick*, 427 U.S. at 448, 453, 456 ("[T]he Eleventh Amendment, and the principle of state sovereign immunity which it embodies are necessarily limited by the enforcement provisions of § 5 of the Fourteenth Amendment." (citation omitted)). The Fourteenth Amendment's substance is not limited to Congress's action, as "the substantive provisions of the Fourteen Amendment . . . themselves embody significant limitations of state authority." *Id.* at 456. The States "surrender[ed] a portion of the sovereignty that had been preserved to them by the original Constitution" when they enacted the Fourteenth Amendment. *Alden v. Maine*, 527 U.S. 706, 756, 119 S. Ct. 2240, 144 L. Ed. 2d 636 (1999) (citing *Fitzpatrick*, 427 U.S. 445).

Furthermore, the text of the Fifth Amendment supports a finding of automatic abrogation. The Fifth Amendment Takings Clause is one of only two constitutional clauses that dictate a particular remedy, Richard H. Fallon et al., *Hart & Wechsler's Federal Courts and the Federal System* 849 (4th ed. 1996) (noting that the Constitution refers explicitly to remedies only in the Fifth Amendment's Just Compensation Clause and in safeguarding the remedy of habeas corpus against suspension by Congress), 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. *See Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 239, 17 S. Ct. 581, 41 L. Ed. 979 (1897) (finding that Fourteenth Amendment due process requires just compensation when a state government takes private land for public use). 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. Eric Berger, *The Collision of the Takings and State Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493, 519 (2006) (citing *SDDS, Inc. v. South Dakota*, 2002 SD 90, 650 N.W.2d 1, 8-9 (S.D. 2002)).

Structurally, the Takings Clause would be stripped of much of its meaning if the government could simply bar suits for just compensation. State governments could take property whenever they wanted without providing any compensation unless they chose to waive their immunity. *Id.* at 525. Additionally, applying state sovereign immunity to the federal Constitution voids the Constitution's purpose of protecting the enumerated rights regardless of the State's political whims. *Id.* at 528-30 ("There is something deeply contradictory about including a right in the Constitution and then constructing a sovereign immunity barrier to prevent injured parties from enforcing it."). This takes on even more meaning when considered with the fact that the Takings Clause is one of only two constitutional provisions that is remedially-oriented.

In conclusion, this Court finds that the reasoning of *Knick* and the longstanding principles of sovereign immunity support a finding that plaintiffs have met the Rule 60(b) requirement of a meritorious claim or defense, despite the decisions of other courts. *Knick* recognizes that the Fifth Amendment requires just compensation for state takings and allows a plaintiff to immediately bring a § 1983 claim in federal court upon the takings. *Knick* impliedly overrules *Hutto*, upon which this Court initially relied in dismissing plaintiffs' takings claim, to the extent *Hutto* requires state exhaustion or the election of a state remedy before proceeding in federal court. Thus, since plaintiffs are no longer required to bring their takings claim in state court before turning to federal court, this Court finds it unnecessary to consider defendant's argument that plaintiffs have viable state court remedies.

Unfair Prejudice

Defendants argue that plaintiffs fail to make a showing of any of the requisite procedural criteria for Rule 60 (b)(6) relief, but they do not make any specific arguments as to what prejudice defendants would suffer if the instant motion to reconsider is granted. There is no evidence that defendants have relied on the Court's decision in a way that would cause unfair prejudice. *See Wells Fargo Bank*, 859 F.3d at 300-01 (finding unfair prejudice when defendant purchased property in reliance on the court's order). Instead, it appears only that defendants would suffer the prejudice "present when any judgment is vacated: the protraction of proceedings, the time and expense of a new trial, the loss of post-judgment interest." *Werner*, 731 F.2d at 206-07. Such prejudice does not rise to the level of unfair prejudice. *See id.; Liu v. Ma*, 1:15cv1026(JCC/TCB), 2016 U.S. Dist. LEXIS 173062, at *4 (E.D. Va. Dec. 14, 2016). Therefore, plaintiffs have satisfied the requirement of showing that defendants, the non-moving party, will not suffer unfair prejudice if this Court's previous order is set aside.

Extraordinary Circumstances

Plaintiffs argue that the change in law brought about by *Knick* constitutes "extraordinary circumstances." A court may grant relief under Rule 60(b)(6) if "such action is appropriate to accomplish justice." *Dowell y. State Farm Fire & Cas. Auto. Ins. Co.*, 993 F.2d 46, 48 (4th Cir. 1993) (citing *Klapprott v. United States*, 335 U.S. 601, 615, 69 S. Ct. 384, 93 L. Ed. 266 (1949)). The Fourth Circuit has established that "a change in decisional law subsequent to final judgment provides no basis for relief under Rule 60 (b)(6)." *Id.* However, there is a distinction between cases in which a final judgment has been entered and cases where a final judgment has not been entered. *See Holland v. Virginia Lee Co.*, 188 F.R.D. 241, 252-53 (W.D. Va. 1999) ("[I]f the judgment in question has been executed, and thus its effects are no longer prospective, modification of the judgment under Rule 60(b)(6) ordinarily will be unavailable . . . . In contrast, where a change in law effects a consent decree or permanent injunction, a court may indeed find extraordinary circumstances present.") (citing *Hull v. Warden, Md. Penitentiary*, 364 F.2d 495, 496 (4th Cir. 1966); *Ritter v. Smith*, 811 F.2d 1398, 1402 (11th Cir. 1987)). In those cases in which a judgment has not been executed, a "significant change in the law or facts since the submission of the issue to the Court" is a basis for a motion to reconsider. *Henderson v. Clinton & Clinton*, No. 5:13-CV-635-FL, 2014 U.S. Dist. LEXIS 119225, at *18 (E.D.N.C. Aug. 15, 2014) (considering a motion to reconsider under Rule 59 of the Federal Rules of Civil Procedure) (quoting *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983)). This is because extraordinary circumstances are often implicated when prospective effect would be given to a judgment now known to be improper. *Holland*, 188 F.R.D. at 253; *contrast Agostini v. Felton*, 521 U.S. 203, 239, 117 S. Ct. 1997, 138 L. Ed. 2d 391 ("Intervening developments in the law by themselves rarely constitute the extraordinary circumstances required for relief under Rule 60(b)(6), the only remaining avenue for relief on this basis from judgments lacking any prospective component.").

In this case, final judgment was never entered, and this Court was never asked to enter final judgment. Therefore, the Fourth Circuit rule that a change in decisional law is not a basis for relief under Rule 60(b)(6) does not apply. Instead of entering final judgment, this Court awaited the outcome of the appellate proceedings before moving forward and stayed the matter twice pending appeal, showing its retention of jurisdiction. In this posture, the concern that this Court will give effect to a decision now known to be improper, *see Holland* 188 F.R.D. at 253, outweighs the concern for finality, *see Dowell*, 993 F.2d at 48 (stating that "[t]here must be an end to litigation someday") (quoting *Ackermann v. United States*, 340 U.S. 193, 198, 71 S. Ct. 209, 95 L. Ed. 207 (1950)). Here, because final judgment has not been entered and because it would be against the interests of justice to effect a decision now known to be improper, the Court finds that the change in decisional law created by the Supreme Court's decision in *Knick* constitutes an "extraordinary circumstance" for the purposes of Rule 60(b)(6).

Defendants further argue that relief pursuant to Rule 60(b)(6) is inappropriate in this case, as this is merely a substitute appeal. *See Aikens v. Ingram*, 652 F.3d 496, 501 ("[I]f the reason asserted for the Rule 60(b)(6) motion could have been addressed on appeal from the judgment, we have denied the motion as merely an inappropriate substitute for an appeal."). When plaintiffs have made a "'voluntary, deliberate, free, [and] untrammeled choice' not to appeal the decision of the district court," plaintiffs "cannot be relieved of such a choice because hindsight seems to indicate to [them] that [their] decision not to appeal was probably wrong." *Dowell*, 993 F.2d at. (first quoting *Ackermann*, 340 U.S. at 200 (internal citation omitted); and then quoting *id.* at 198).

However, the reason asserted for this motion to reconsider, which is the change in Fourth Circuit precedent resulting from the decision in *Knick*, could not have been addressed on appeal. The Fourth Circuit decision affirming this Court's dismissal of plaintiffs' takings claim based on sovereign immunity was entered on July 10, 2018, and mandate issued on August 17, 2018. The Supreme Court did not decide *Knick* until June 21, 2019, well after the period during which plaintiffs could have appealed the Fourth Circuit opinion on this basis. *Knick*, 139 S. Ct. 2162; Sup. Ct. R. 13(1) ("[A] petition for a writ of certiorari to review a judgment in any case . . . is timely when it is filed with the Clerk of this Court within 90 days after entry of the judgment."). Even if the issue could have been addressed on appeal, this case is distinct from those of *Aikens* and *Dowell*. In both of those cases, plaintiff sought to reopen the action through a Rule 60(b)(6) long after final judgment has been entered. As previously discussed, final judgment was never entered in this case, and this Court retained jurisdiction by staying the case pending appeal twice. Therefore, this motion is not an improper or substitute appeal.

In conclusion, plaintiffs have shown that their motion to reconsider based on a change in decisional law following *Knick* is timely, presents a meritorious claim, would not cause defendant unfair prejudice, and presents extraordinary or compelling results. The Court therefore finds that plaintiffs meet the standard for reconsideration under either Rule 54(b) or Rule 60(b). Plaintiffs' takings claim is no longer dismissed.

II. Plaintiffs' Takings Claims Under *Georgia*

Plaintiffs also allege in their complaint that defendants intentionally infringed by repeating copying even after express notice, and plaintiffs argue that these allegations would support a finding that defendants' conduct violated the CRCA, the Fifth Amendment, and the Fourteenth Amendment. Plaintiffs ask this Court to allow these claims to proceed under *Georgia*. Plaintiffs seek reinstatement of their lawsuit and an opportunity to amend their complaint to plead the consequences of defendants' intentional infringements more fully.

This Court finds that reconsideration of its previous order of dismissal is appropriate in this case under the Rule 54(b) standard. While the Court acknowledges that "[a] Rule 54(b) motion should not be used as an opportunity to rehash issues already ruled upon because a litigant is displeased with the result," this is not the case here. *Ashmore v. Williams*, No. 8:15-cv-03633-JMC, 2017 U.S. Dist. LEXIS 234, at *9 (D.S.C. Jan. 3, 2017) (citing *U.S. Home Corp. v. Settlers Crossing, LLC*, No. DKC 08-1863, 2012 U.S. Dist. LEXIS 150160, at *10 (D. Md. Oct. 18, 2012)). This Court recognized in its 2017 opinion that Congress can abrogate state immunity prophylactically, by imposing liability on States for all violations of a particular statute, or on a case-by-case basis, by imposing liability on States where conduct violates both a federal statute and plaintiffs' constitutional rights. *See Allen*, 244 F. Supp. 3d at 534 (citing *Georgia*, 546 U.S. at 158). Because this Court found that the CRCA was a valid prophylactic abrogation of state sovereign immunity, it never considered whether plaintiffs have a valid claim for abrogation under *Georgia*. Notably, this Court never expressly closed the door to a valid claim of case-by-case abrogation under *Georgia*. Because this Court, the Fourth Circuit, and the Supreme Court all passed on the *Georgia* issue, it is appropriate to consider this claim for case-by-case abrogation following the Supreme Court's decision rejecting the CRCA as a valid prophylactic statute.

The Court further finds that plaintiffs still have viable claims under *Georgia*. In *Georgia*, the Supreme Court noted that "§ 5 [of the Fourteen Amendment] grants Congress the power to 'enforce . . . the provisions' of the Amendment by creating private remedies against the States for *actual* violations of those provisions." 546 U.S. at 158 (alteration in original). The court specifically stated that "[t]his enforcement power includes the power to abrogate sovereign immunity by authorizing private suits for damages against the States." *Id.* at 158-59 (citing *Fitzpatrick*, 427 U.S. at 456). Based on these findings, the *Georgia* court unanimously concluded that abrogation of sovereign immunity necessarily occurs when a plaintiff can establish both a statutory violation of a federal law and a constitutional violation. *Id.* When a plaintiff has established both these elements, "the court need not examine whether that statute could validly prohibit facially constitutional conduct." *Nat'l Ass'n of Bds. of Pharm. v. Bd. of Regents of the Univ. Sys. of Georgia*, No. 3:07-CV-084 (CDL), 2008 U.S. Dist. LEXIS 32116, at *25 (M.D. Ga. Apr. 18, 2008), *aff'd in part, vacated in part on other grounds*, 633 F.3d 1297 (11th Cir. 2011). At oral argument before the Supreme Court in the present case, the State conceded the legal validity of the case-by-case abrogation under *Georgia*, stating that "whenever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court's *Georgia* decision, they can bring a direct constitutional claim." Tr. of Oral Arg., *Allen v. Cooper*, at 39-40 (Nov. 5, 2019).[2]

In this case, plaintiffs have alleged that defendants' conduct amounted to a taking without compensation and simultaneously violated both the CRCA and the Fifth Amendment. Although the Supreme Court ruled that the CRCA was unconstitutional insofar as it attempted to abrogate sovereign immunity prophylactically, *see Allen v. Cooper*, 140 S. Ct. 994, 1007, 206 L. Ed. 2d 291 (2020), the statute remains whenever plaintiff' alleges both a constitutional violation as well as a statutory violation. Therefore, plaintiffs can still use the CRCA as a basis for its *Georgia* claim.

Defendant argues that plaintiffs' *Georgia* argument fails on the merits. However, plaintiffs seek an opportunity

2. Defendants argue that they made no concessions justifying reconsideration of the prior dismissal of plaintiffs' takings claim. The Court agrees with defendants, and notes that counsel for the State defendants did not concede that the claims were viable in this case, even though counsel acknowledged that constitutional claims may more generally be viable in federal courts under *Georgia*.

to amend to allege more facts to buttress the allegations of taking without due process, intentional infringements, and those responsible. Rule 15 of the Federal Rules of Civil Procedure provides that a party may amend his pleadings with leave of the court. Fed. R. Civ. P. 15(a)(2). Further, Rule 15 directs that leave to amend be freely given when justice requires. *Id.* This liberal rule gives effect to the federal policy in favor of resolving cases on their merits instead of disposing of them on technicalities." *Laber v. Harvey*, 438 F.3d 404, 426 (4th Cir. 2006) (citing *Conley v. Gibson*, 335 U.S. 41, 48 (1957)). The Court has determined that *Georgia* serves as a valid basis for plaintiffs to bring their constitutional claims, and plaintiffs will have the opportunity to show that defendants have intentionally deprived their intellectual property without adequate state remedies to provide due process of law in an amended complaint.

In conclusion, this Court finds that reconsideration of its prior order dismissing plaintiff's takings and constitutional claims is appropriate in light of the Supreme Court's decision in *Knick* and its rejection of the CRCA as a valid prophylactic abrogation of state sovereign immunity. Plaintiffs may amend their complaint to buttress their allegations of "a modern form of piracy." *Allen*, 140 S. Ct. at 999.

CONCLUSION

For the foregoing reasons, plaintiffs' motion for reconsideration [DE 105] is GRANTED. Plaintiffs' takings claim and constitutional claims under *Georgia* are no longer dismissed. Plaintiffs may amend their complaint within twenty-one days of the date of entry of this order.

SO ORDERED, this 18 day of August, 2021.

/s/ Terrence W. Boyle
TERRENCE W. BOYLE
UNITED STATES DISTRICT JUDGE

APPENDIX E — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT, FILED FEBRUARY 20, 2026

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 24-1954
(5: 15-cv-00627-BO)

FREDERICK L. ALLEN; NAUTILUS PRODUCTIONS, LLC

Plaintiffs-Appellees,

v.

JOSHUA H. STEIN, GOVERNOR OF NORTH CAROLINA; SUSAN WEAR KLUTTZ, FORMER SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; MARGRETTE KATHRYN THOMPSON, CHIEF DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; DARIN J. WATERS, DEPUTY SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY; CATHERINE ANN SWAIN, DIRECTOR OF MARKETING OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; JAMES CHRISTOPHER SOUTHERLY, STATE ARCHAEOLOGIST, IN HIS OFFICIAL

CAPACITY; STEPHEN ATKINSON, DEPUTY STATE ARCHAEOLOGIST - UNDERWATER AND DIRECTOR OF THE UNDERWATER ARCHAEOLOGY BRANCH OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; STATE OF NORTH CAROLINA; JEFFREY NEALE JACKSON, ATTORNEY GENERAL OF NORTH CAROLINA, IN HIS OFFICIAL CAPACITY; PAMELA BREWINGTON CASHWELL, SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; SARAH KOONTS, IN HER OFFICIAL CAPACITY; MARIA E. VANN, DIRECTOR OF REGIONAL HISTORY MUSEUMS OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HER OFFICIAL CAPACITY; MIKE CARRAWAY, IN HIS OFFICIAL CAPACITY; WILLIAM SCHORR JOHNSON, DIRECTOR OF COMMUNICATIONS OF THE NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES, IN HIS OFFICIAL CAPACITY

Defendants-Appellants,

and

FRIENDS OF QUEEN ANNE'S REVENGE, A NON-PROFIT CORPORATION,

Defendant.

Appendix E

ORDER

The petition for rehearing en banc was circulated to the full court. No judge requested a poll under Fed. R. App. P. 40. The court denies the petition for rehearing en banc.

For the Court

/s/ Nwamaka Anowi, Clerk

APPENDIX F — RELEVANT FEDERAL RULES

1. Federal Rule of Civil Procedure 15(a)(2) provides:

(2) Other Amendments. In all other cases, a party may amend its pleading only with the opposing party's written consent or the court's leave. The court should freely give leave when justice so requires.

2. Federal Rule of Civil Procedure 54(b) provides:

(b) Judgment on Multiple Claims or Involving Multiple Parties. When an action presents more than one claim for relief—whether as a claim, counterclaim, crossclaim, or third-party claim—or when multiple parties are involved, the court may direct entry of a final judgment as to one or more, but fewer than all, claims or parties only if the court expressly determines that there is no just reason for delay. Otherwise, any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities.

3. Federal Rule of Civil Procedure 60(b) provides:

(b) Grounds for Relief from a Final Judgment, Order, or Proceeding. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

APPENDIX G — TRANSCRIPT EXCERPT OF THE SUPREME COURT OF THE UNITED STATES, DATED NOVEMBER 5, 2019

IN THE SUPREME COURT
OF THE UNITED STATES

No. 18-877

FREDERICK L. ALLEN, *et al.*,

Petitioners,

v.

ROY A. COOPER, III, GOVERNOR OF NORTH CAROLINA, *et al.*,

Respondents.

Washington, D.C.
Tuesday, November 5, 2019

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:04 a.m.

* * *

JUSTICE BREYER: What is there that I can go to the same question, a wonderful money-raising thing. What the state decides to do with its own website, charging $5 or something, is to run Rocky, Marvel, whatever, Spider-Man, and perhaps Groundhog Day, all right?

(Laughter.)

JUSTICE BREYER: Now, great idea. [37]Several billion dollars flows into the treasury. Okay? Now, if you win, why won't that happen?

And, by the way, if you're writing to the constitutional convention, you're a member, okay, and you write these words, copyright is to promote the progress of science and useful arts by securing for a limited time to authors -- and to authors, the exclusive right to their respective writings.

But, of course, California decides that the person who wrote Rocky, Marvel, et cetera, will unfortunately receive nothing because everyone will have seen it on the state's own streaming device.

All right. What is your response to that?

MR. PARK: So there are two important separate issues at issue there, and I'll start with the text. So the exclusive right is -- well, sovereign immunity does not invade the exclusive right.

So I think that that hypothetical misunderstands, respectfully, the role of sovereign immunity in our constitutional system. As this Court said in Alden, states are not [38]relieved of their binding obligation to comply with federal law.

And the ordinary remedy required under the Constitution when a sovereign violates federal rights is an injunction and not money damages.

JUSTICE BREYER: Oh, it's -- by the way, we ran it yesterday. You can have your injunction. Do you see my point?

MR. PARK: Yes, exactly. Well, so I agree that under sovereign immunity, as a necessary consequence, there will be hard cases where, you know, statutory violations are not remedied, but that, I think, the important understanding that the founders had is that when you sue a sovereign, on the opposite side of the judgment are the people and the people's money.

And so the entire point of sovereign immunity, as this Court said in Lewis just a few terms ago, is to protect state governments and allow them to make their own choices as to how to spend scarce --

JUSTICE KAVANAUGH: There are not going to be --

MR. PARK: -- government resources.

[39]JUSTICE KAVANAUGH: -- there are not going to be hard cases. There are going to be easy cases.

MR. PARK: Well --

JUSTICE KAVANAUGH: And it's not -- and Justice Breyer's point is that it could be rampant, states ripping off copyright holders. And how is that -- how can that be squared with the exclusive right, if states can do this, which presumably a ruling in your favor will do nothing but encourage them to do?

MR. PARK: So I think that's the beauty of the Copyright Remedy Act, combined with this Court's Georgia decision. So, on extreme hypotheticals, such as Justice Breyer outlined --

JUSTICE KAVANAUGH: Why is it extreme? You've said hard cases and now extreme. Why won't it just be a standard case and not so extreme?

MR. PARK: Well, so whenever a plaintiff can reasonably allege that there has been intentional copyright infringement and there are not adequate remedies, then, under this Court's Georgia decision, they can bring a [40] direct constitutional claim. We don't dispute that.

And so I think, to the extent that the Georgia issue is relevant here at all, it's to the fact that it relieves many of these concerns that, Justice Breyer and Justice Kavanaugh, you've outlined. I think that -- well, so, if we were to discuss the Georgia issue here, I think we have been here litigating this case against Mr. Allen for four years, and the first time that he ever raised this Georgia issue of a direct constitutional challenge was in his reply brief in this Court.

You won't see it in the petition. You won't see it in his briefs below or in the transcripts of the argument. And, of course, for that reason, the lower courts never addressed it. They never --

JUSTICE BREYER: Your view is that -- that, in fact, under the Fourteenth Amendment, this statute is valid insofar as my Captain Marvel example deliberately takes property from people. So is that what your point is?

MR. PARK: Yes, if the --

JUSTICE BREYER: All right. If that's [41]your point, then you concede their point, whether they raised it or not, somebody else would, you concede that this legislation is valid. You're just saying it only applies to instances where the state deliberately takes Captain Marvel.

That would cure my problem to a considerable degree, but that is the concession on your part?

MR. PARK: I think it follows naturally from this Court's Georgia decision, but I would add one additional element, which is, to complete a due process violation for a deprivation of property, two additional features are required; you need to be deliberate and there needs to be no alternative remedy.

And, here, there are other alternative remedies that could be available.

JUSTICE GINSBURG: Let -- let's take deliberate first. So it is alleged that North Carolina is infringing on copyright, copyrighted works. There's a settlement. And then North Carolina starts up doing exactly the same thing that it did before the first. That sounds pretty intentional to me.

[42]MR. PARK: I think it would be intentional if the State had not explicitly bargained for a provision that says we can use Mr. Allen's images for non-commercial purposes.

And now I think that that highlights how this dispute is really a dispute over the scope of a contractual license that the State received. There is a pending breach of contract lawsuit in state court where the State and Mr. Allen's business partner, Intersal, are debating these exact facts, whether we've exceeded the scope of our license by, for example, not putting watermarks on the images and that sort of thing. So I think that relieves --

JUSTICE SOTOMAYOR: Do -- I'm sorry, finish.

MR. PARK: I just was going to point out as well that I think that relieves any actual due process violation that could be here because, of course, there's -- the alternative remedy is a breach of contract lawsuit, which we have not asserted sovereign immunity for. We've affirmatively waived our immunity in state court for breach of contract claims.

JUSTICE SOTOMAYOR: What do I do with [43] the Blackbeard law? It is deeply troubling. It's a state saying, even if I'm infringing, you can't get anything. That's basically how I read that law.

What remedies do they have under federal law for a state doing something like that?

MR. PARK: So I agree it's a strange law. I think there are two separate points I'd like to make.

So, first, it can't possibly have any relevance to this lawsuit because it was passed in 2015, two years after the alleged infringements in question. And it was --

JUSTICE SOTOMAYOR: Well, it could to a Georgia argument, obviously.

MR. PARK: Well, so I think -- and I think that exposes the second issue, which is that there are -- there are two types of claims in this complaint. There are -- there's a copyright infringement claim and related claims, and there's a declaratory judgment claim asking that that law be declared preempted.

Now Mr. Allen has not sought cert on the declaratory judgment claim, and that would [44]be the remedy in that circumstance. But the district court -- sorry, the Fourth Circuit -- and this is on pages 37 to 39 of the Petition Appendix -- the Fourth Circuit rejected the declaratory judgment claim because it held that the 2013 settlement agreement said that your -- your images, Mr. Allen, are subject to the public records law, and the 2013 version of the law said that photographs that the state receives in public business are public records.

And so that amendment couldn't possibly have affected Mr. Allen's rights to his images.

* * *