

No. 20-1408

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UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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MICHAEL ZITO; CATHERINE ZITO,

Plaintiffs – Appellants,

v.

NORTH CAROLINA COASTAL RESOURCES COMMISSION,

Defendant – Appellee.

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

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**PLAINTIFFS-APPELLANTS' OPPOSITION TO NORTH  
CAROLINA COASTAL FEDERATION'S MOTION FOR LEAVE  
TO FILE ADDENDUM TO AMICUS CURIAE BRIEF**

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Plaintiffs-Appellants Michael and Catherine Zito (the Zitos) oppose the North Carolina Coastal Federation's (Federation) Motion for Leave to File Addendum (ECF 26-1) to their amicus curiae brief in support of Defendant-Appellee North Carolina Coastal Commission (Commission).

### **BACKGROUND**

This dispute arises from a claim that the Commission has taken the Zitos' residential beachfront lot by depriving them of all use and value of their private property. The Zitos lost a home on the lot to fire in 2016 and their private property rights to the Commission two years later when it refused to allow them to rebuild. JA 008-009, ¶¶ 2-3. The Zitos' lot is in a dense residential subdivision and is surrounded on three sides by other homes. JA 011, ¶¶ 14-16. The parcel is not a public beach or open to the public in any way. And yet, the Commission refused to allow the Zitos to replace their family home, leaving them with an empty and useless lot.

The Zitos accordingly sued the Commission for just compensation on the ground that its refusal to allow a home on their lot was a "taking" of property, in violation of the Fifth Amendment. The district court dismissed the claim, ruling that the Commission enjoys sovereign immunity from claims, like the Zitos', arising under the Takings Clause.

ECF 16 at 2. That sovereign immunity ruling is the only ruling before this Court on appeal.

The Federation recently filed an amicus curiae brief with this Court, ECF No. 34, and in so doing sought leave to file a 568-page Addendum of law review articles, news clippings, government publications, and other documents. The Zitos oppose the Federation's request because none of the material is relevant to the issue before the Court.

### ARGUMENT

The brief of an amicus curiae must be “relevant to the disposition of the case.” Fed. R. App. P. 29(a)(3)(B). Material that is sought to be judicially noticed in conjunction to the amicus brief must also be relevant to the issues on appeal. *Hughes v. Bedsole*, 48 F.3d 1376, 1389 n.16 (4th Cir. 1995) (denying amicus' request to supplement record because proposed material “was not relevant to our decision”); *United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1998) (“We cannot imagine that . . . Congress intended to override [Federal Rule of Evidence 402], and make judicial notice mandatory, when a matter that appeared in the Federal Register is irrelevant to the proceeding at hand.”).

The issues before this Court are straightforward: (1) Whether enactment of the Fourteenth Amendment, and its incorporation of a Just Compensation Clause remedy for takings, abrogated North Carolina's immunity from a federal suit seeking compensation for a taking of private property; and (2) alternatively, whether North Carolina's procedure for takings claims against the North Carolina Coastal Commission fails to provide just compensation, thereby permitting the claim in federal court under *Hutto v. South Carolina Retirement System*, 773 F.3d 536, 552 (4th Cir. 2014). ECF 16 at 1. In short, the issues before the Court relate to the purely legal question of whether sovereign immunity bars the Zitos' takings claim.

The Addendum material that the Federation seeks to introduce has no bearing on the jurisdictional issues on appeal. The material is not related to sovereign immunity, state court takings remedies that might affect sovereign immunity considerations under *Hutto*, 773 F.3d at 552, or any other possible sovereign immunity sub-issue. The 500+ pages of material the Federation seeks to introduce is instead potentially related to the merits issue of whether the Commission effected a regulatory

taking of the Zitos' lot. But that issue was not briefed or passed on below and is not before this Court on appeal.

As district courts in this Circuit have held time and again, amicus filings will be rejected if they “are not necessary for the Court’s determination of the legal issues at hand.” *Wheelabrator Baltimore, L.P. v. Mayor & City Council of Baltimore*, No. CV GLR-19-1264, 2020 WL 1491409, at \*1 n.1 (D. Md. Mar. 27, 2020). Similarly, amicus material that “encompasses a significant number of issues and statutes that have no necessary bearing on th[e] case” will be rejected. *Sierra Club v. Virginia Electric and Power Co.*, No. 2:15cv112, 2016 WL 5349081, at \*2–3 (E.D. Va. Feb. 4, 2016). Such material cannot “assist the Court in fairly, accurately, and efficiently resolving th[e] matter.”<sup>1</sup> *Id.* at \*3.

There is no reason not to apply these principles applicable here. The Federation’s 568-page Addendum on topics such as climate change and coastal erosion has no bearing on whether North Carolina may assert

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<sup>1</sup> See also *Peele v. Morton*, 396 F. Supp. 584, 589 (E.D.N.C. 1975) (denying motion to file material that “can render little further assistance to the Court”); *Yadkin Riverkeeper, Inc. v. Duke Energy Carolinas, LLC*, No. 1:14-cv-753, 2016 WL 6783918, at \*2 (M.D.N.C. Jan. 29, 2016) (rejecting amicus brief that failed to address the issue before the court and “focuses instead on the impact of the Court’s rulings, which is not helpful in resolving the issue” (citation omitted)).

immunity from this suit. The Addendum thus would not assist this Court in “fairly, accurately, and efficiently resolving this matter.” *Sierra Club*, 2016 WL 5349081, at \*3. The Federation’s Motion should be denied.<sup>2</sup>

### CONCLUSION

The Zitos respectfully request that this Court deny the Motion for Leave to File Addendum to the Federation’s proposed amicus brief.

DATED: August 10, 2020.

Respectfully submitted,

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

s/ Erin E. Wilcox  
ERIN E. WILCOX

*Attorneys for Plaintiffs – Appellants Michael Zito, et al.*

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<sup>2</sup> This Court should likewise decline to take judicial notice of the proposed Addendum. Judicially-noticed legislative facts must still be relevant to the case at hand. *See United States v. Wolny*, 133 F.3d 758, 765 (10th Cir. 1998) (“We cannot imagine that . . . Congress intended to override [Federal Rule of Evidence 402], and make judicial notice mandatory, when a matter that appeared in the Federal Register is irrelevant to the proceeding at hand.”). Legislative facts are “those which have *relevance to legal reasoning and the lawmaking process*, whether in the formulation of a legal principle or ruling by a judge or court or in the enactment of a legislative body.” Fed. R. Evid. 201(a) Advisory Committee Notes 1972 (emphasis added). Nothing in the proposed Addendum relates to the legal issues on appeal and judicial notice of its contents would add nothing to this Court’s decision.

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

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

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(s) Erin E. Wilcox

Party Name Appellants Michael Zito, et al.

Dated: 8/10/2020