No. 15-214

In The Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF FOR RESPONDENT ST. CROIX COUNTY

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QUESTION PRESENTED

Petitioners own two adjacent lots of land that border a nationally designated wild and scenic river bisected by tree-lined bluffs. Each lot is "substandard" because neither lot alone meets a county zoning ordinance's minimum buildable acreage requirement for residential development due to flood risks and other topographical challenges. An exception that lifts that buildable acreage restriction on lots applies to commonly owned, adjacent lots only after the buildable acreage on the substandard lots is combined. As a result petitioners are permitted to build one residence on their two lots, but not a separate residence on each lot, and neither lot can be sold as a separately developable lot.

The question presented is whether a court, in reviewing a regulatory takings challenge to a county's application of its minimum buildable acreage requirement to two commonly owned, adjacent substandard lots, may assess the economic impact of the zoning requirement by comparing the value of the two lots with one residence to the value of the two lots with a residence on each lot.

PARTIES TO THE PROCEEDING

The parties to the proceeding are petitioners Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver. The respondents are St. Croix County and the State of Wisconsin.

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CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in pertinent part, that "private property [shall not] be taken for public use, without just compensation." U.S. Const. Amend. V.

The relevant statutory and regulatory provisions are reproduced in part in the appendix to the petition

(Pet. App. D1) and fully reproduced in the appendix to this brief (App., *infra*, C1-C28, D1-D4).[1]

STATEMENT

A. The St. Croix River: Geography And Historical Significance

1. Petitioners own 2.52 acres of land, originally platted in 1959, as two adjacent lots. The lots border the St. Croix River in St. Croix County, Wisconsin, and are nestled within the lower St. Croix River Valley. The Valley's lifeblood is the St. Croix River, named the

[1] This regulatory takings case represents a second round of litigation following an earlier round involving the state courts' rejection of petitioners' application for a variance. Although the Wisconsin Court of Appeals below relied significantly on that first round of litigation in their rulings on review here, the certified record in this case (and therefore the Joint Appendix) does not include many documents relevant to that first round of litigation. Because those documents seemed potentially helpful to the Court's review and are not otherwise readily available, they are included in an appendix to this brief, with the express acknowledgment that none is formally part of the certified record in this case and the Court may choose to discount them accordingly. The documents include the state court of appeals ruling in the initial round of litigation (App. A), the trial court ruling in the initial round of litigation (App. B), relevant excerpts from the County zoning ordinance in effect at the time of petitioners' application for a variance in 2006 (App. C), earlier versions of the County ordinance (App. D), an excerpt from petitioners' appellate brief in the initial litigation (App. E), and petitioners' original variance application with the County Board of Adjustment (App. F). Appendix G is the Wisconsin Circuit Court's denial of rehearing in this case, which is part of the record.

"*rivière de Ste. Croix*" in 1689 by the French commander Nicolas Perrot, a "picturesque waterway of 164 miles in length that flows steadily through eastern Minnesota and northwestern Wisconsin, eventually merging with the Mississippi River." *United States v. Bradac*, 910 F.2d 439, 440 (CA7 1990); *see* Harold Weatherhead, Westward to the St. Croix, vi (1978) (describing the history of "Naming the St. Croix").

Early settlers captured the beauty of the St. Croix River Valley in their writings. As described by one settler in 1803, "[n]ature is here calm, placid & serene, as if telling man, in language mute, indeed,—not addressed to the *Ears*, but to heart & Soul: It is here man is to be happy." Richard Bardon & Grace Lee Nute, *A Winter in the St. Croix Valley, 1802-03*, 28 Minnesota Hist. 225, 235 (Sept. 1947). Ray Stannard Baker, an American journalist, muckraker, and historian, grew up in the valley. In his memoir, he described how the river shaped his childhood: "[T]he geological interest of the St. Croix Valley * * * helped to lure me, as it lured many another boy of our town, to the exploration of the wild gorge through which the turbulent waters dropped in foaming rapids from the broad and placid river above the town to the rock-guarded Dalles below. Day or night, all my boyhood, the sound of roaring water was rarely absent from my ears." *See* Ray Stannard Baker, Native American: The Book of My Youth, 116 (1941).

Wisconsin and Minnesota have long faced the challenge of preserving the St. Croix River's great

beauty and essential navigability while promoting industry and economic development. For much of the nineteenth century, the St. Croix Valley was synonymous with forestry, particularly pine lumbering. *See* William G. Rector, *The Birth of the St. Croix Octopus*, 40 The Wisconsin Magazine of History, 171, 171-77 (1957). During the 1800s, wheat increasingly rivaled lumber as a St. Croix Valley export and competed for the River's use. In 1865, Horace Greeley boasted of the area, "the cry is Wheat! Wheat! * * * Every steamboat goes down the river with all the wheat on board that she will take, and a couple of wheat laden barges fast to her side." *See Wheat on the Upper Mississippi*, Sunbury American, Oct. 28, 1865, at 1.

2. After World War II, the river's aesthetic beauty and the area's proximity to Minneapolis-St. Paul led to rapid residential development in the towns bordering the St. Croix River. *See* Osh Andersen, et al., *Transformation of a Landscape in the Upper Mid-West, USA: The History of the Lower St. Croix River Valley, 1830 to Present*, 35 Landscape & Urban Planning 247, 264 (1996). A plan in the 1960s to build a coal-fired power plant along the St. Croix River galvanized a citizen campaign to preserve the St. Croix River and to protect the land bordering the river from accelerating and seemingly uncontrolled development. *See* Kate Hanson, *The Wild and Scenic St. Croix River*, 25 The George Wright Forum 27, 27-28 (Issue 2, 2008). In response to these specific concerns and similar concerns expressed about threats to other great rivers in the nation, Wisconsin Senator Gaylord Nelson championed

congressional passage of the Wild and Scenic Rivers Act in 1968, Pub. L. No. 90-542, 82 Stat. 906, which designated the Upper St. Croix River one of only eight rivers deserving immediate national protection "as components of the national wild and scenic rivers system" and placed under the control of the Secretary of the Interior. *Id.* § 3(a)(6), 82 Stat. 907-08; Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 28. Soon thereafter, Minnesota Senator Walter Mondale joined Senator Nelson in persuading Congress to enact further legislation, the Lower Saint Croix River Act of 1972, Pub. L. No. 92-560, 86 Stat. 1174, to include the Lower St. Croix River within the protections of the federal law. Hanson, *The Wild and Scenic St. Croix River*, *supra*, at 29.

The new law designated the upper 27-mile stretch of the Lower St. Croix River a federally administered scenic river and provided that the lower 25-mile stretch of river could immediately qualify for protection upon application of the Governors of Wisconsin and Minnesota and approval of the Secretary of the Interior. Pub. L. No. 92-560, § 2, 86 Stat. 1174. At the request of both States, the Secretary of the Interior approved the inclusion of the lowest portion of the St. Croix River as part of the National Wild and Scenic River System and confirmed that it would be "administered by the States of Minnesota and Wisconsin." Lower Saint Croix National Scenic Riverway, 41 Fed. Reg. 26236, 26237 (1976).

B. State of Wisconsin And St. Croix County Land Use Planning For The Protection Of The Lower St. Croix Riverway

1. The Lower St. Croix River Act of 1972 required the Secretary of the Interior, along with Minnesota and Wisconsin agencies, to develop a "comprehensive master plan" to jointly manage the 52-mile tract of the Lower St. Croix Riverway. Pub. L. No. 92-560, § 3, 86 Stat. 1174. Accordingly, in 1975, the National Park Service, Wisconsin Department of Natural Resources, and Minnesota Department of Natural Resources published their first "Master Plan" for the Lower St. Croix River. Nat'l Park Serv., Minn. Dep't of Nat. Res. & Wis. Dep't of Nat. Res., Master Plan: Lower St. Croix National Scenic Riverway (1975) (reproduced at 40 Fed. Reg. 43240, 43240-58 (1975)).

The State of Wisconsin enacted its legislation implementing the 1972 federal legislation in 1973. *See* St. Croix River Preservation, 1973 Assemb. B. 1242, ch. 197, Wis. Stat. § 30.27 (1973). This statute authorized the Wisconsin Department of Natural Resources to promulgate regulations, including standards for the "issuance of building permits" and the "establishment of acreage, frontage and setback requirements" for the "banks, bluff, and bluff tops" of the river. Wis. Stat. § 30.27(2). Section 30.27 further mandated that all counties within the riverway adopt zoning ordinances that comply with these standards. *Id.* § 30.27(3). To that end, the Wisconsin Department of Natural Resources in 1975 created a set of rules—Chapter NR 118—which established baseline standards for local

zoning ordinances, including minimum buildable acreage requirements; exemptions from those requirements for certain types of pre-existing lots; and variances based on an applicant's showing of unnecessary hardship. The new rules became effective on January 1, 1976. Wis. Admin. Code § NR 118 (1976).

2. In response to NR 118, St. Croix County amended its zoning ordinance to include a "Lower St. Croix Riverway Overlay District," which mirrors all the detailed requirements for local ordinances set forth in NR 118. *See* Cty. Zoning Ord. § 17.36 (App., *infra*, C5-C22). The County has continued to update its zoning ordinance to reflect subsequent changes by the Wisconsin Department of Natural Resources in NR 118.[2] The County zoning ordinance sets forth its general and specific purposes. They include, but are not limited to "[r]educing the adverse effects of overcrowding and poorly planned shoreline and bluff area development"; "[p]reventing soil erosion and pollution and contamination of surface water and groundwater"; "[p]roviding sufficient space on lots for sanitary facilities"; and "[m]inimizing flood damage." Cty. Zoning Ord. § 17.36.B.1.a. The primary listed purposes

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[2] Unless otherwise expressly noted, references in this brief to the St. Croix County zoning ordinance refer to the ordinance as it existed at the time of petitioners' 2006 application for a variance at issue in this case. *See* note 1, *supra*; App. C, *infra*. Although the relevant substance of the ordinance for the purposes of this case has remained largely the same since, its structure and its section numbering have changed significantly in several parts.

also include "maintaining property values." *Id.* § 17.36.B.1.a.5.

As required by NR 118, the St. Croix County zoning ordinance requires that a lot contain at least one acre of "net project area" to be a "building site." *See id.* § 17.36.G.1.b. "Net project area" is in turn defined to exclude land that is not suitable for building, including "slope preservation zones, floodplains, road rights-of-way and wetlands." *Id.* § 17.09.135. The County zoning ordinance also tracks NR 118 by including an exception for lots pre-dating NR 118's effective date. The exception sets forth specific conditions that must be met for a landowner to be allowed to build or sell a substandard lot:

> Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> 1) The lot is in separate ownership from abutting lands, or 2) The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots*

> *if each of the lots has at least one acre of net project area.*[3]

Id. § 17.36.I.4.a (emphasis added); *see* Wis. Admin. Code § NR 118.08(4). The County ordinance, accordingly, distinguishes between owners of pre-existing substandard lots who also own adjacent, substandard lots and those who do not. The former are eligible for an exception from the minimum buildable acreage requirement only after the buildable acreage available on each of the adjacent lots is combined.[4]

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[3] The original 1975 version of the St. Croix County Zoning Ordinance for the St. Croix Riverway, like the version of NR 118 then in effect, included the same limitation on providing pre-existing substandard lots with a special exemption from the minimum building acreage requirement: the exemption was available "provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *." St. Croix Cty. Zoning Ord., St. Croix River Valley Dist., § 3.10.8 (1975), App., *infra*, D1. But neither originally included the further explicit statement, added in July 2005 to the County ordinance and in 2004 to NR 118, that "[a]djacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area." Cty. Zoning Ord. § 17.36.I.4; Wis. Admin. Code § NR 118.08(4). It is not disputed that the County in practice applied the same restriction on separate sale and development prior to the 2005 amendment, based on its interpretation of the earlier language. Petitioners have never raised any claim in either round of litigation related to the 2005 change in language.

[4] The language of the County zoning ordinance, like the identical language of NR 118, could be read to mean that an owner of two adjacent substandard lots that in combination still lack the one acre of buildable acreage could not construct one building on the two sites but an owner of one substandard lot with less than one acre could. Characterizing such a reading as "seemingly absurd" (App., *infra*, A8 n.9), the state court of appeals in the earlier

Finally, the County zoning ordinance also allows for variances based on a landowner's showing of "unnecessary hardship." Cty. Zoning Ord. §§ 17.36.J.2, 17.70(5)(c)(3). To establish "unnecessary hardship," the applicant for a variance must demonstrate to the County's Board of Adjustment that "special conditions affecting a particular property, which were not self-created, have made strict conformity with restrictions * * * unnecessarily burdensome or unreasonable in light of the purposes of this ordinance. Cty. Zoning Ord. § 17.09.232.

C. The Denial Of Petitioners' Request For A Variance From The Minimum Buildable Acreage Requirement

1. Petitioners own 2.52 acres of beachfront land bordering the Lower St. Croix River, which they received as a gift from their parents through two conveyances in 1994 and 1995. Pet. App. A3, B1. Petitioners' parents purchased the property in the early 1960s as two separate lots, both recorded in 1959. J.A. 82. The St. Croix River runs across the northern border of both

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litigation in this case assumed the validity of the contrary view, advanced by the County, that the exception would be available to the owner of the two adjacent substandard lots, allowing the construction of a building on either lot, or straddling both lots even though the combined acreage of the two lots together still fell below the one acre minimum threshold. *See* note 10, *infra*. It is now common ground in this litigation that "[t]here is no dispute that [petitioners'] property suffices as a single, buildable lot under the Ordinance." Pet. App. A12.

lots; each is roughly rectangular in shape, sits perpendicular to the river, and is bisected by an exceedingly steep slope leading to a bluff. *See* J.A. 60 (aerial photograph of both lots). For the purpose of this litigation, the parties and the courts below refer to the eastern lot as "Lot F," which is 1.25 acres, and the western lot as "Lot E," which is 1.27 acres. J.A. 29-30. *See* Pet. App. A2 n.1.

Soon after purchasing Lot F in 1960, petitioners' parents transferred ownership of the lot to Murr Plumbing Company, which they owned. They also built a small summer recreational cabin on the lot less than 100 feet from the river's ordinary high water mark. Pet. App. A3; App., *infra*, B2. In 1963, the parents purchased Lot E. Pet. App. A3. And, in 1982, Murr Plumbing Company conveyed Lot F back to the Murr parents. Lots E and F, accordingly, were first in common ownership in 1982.[5]

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[5] The state courts below mistakenly assumed (Pet. App. A3, A17, B2, B7) that the two lots did not come under common ownership until 1995: that is, after the Murr parents conveyed Lot E to petitioners, having previously conveyed Lot F to petitioners in 1994. The courts' mistaken assumption appears to derive from the omission from petitioners' complaint of the 1982 transfer of Lot E from Murr Plumbing Company back to petitioners' parents. The complaint refers to the 1960 transfer to the plumbing company and neglects to mention the 1982 reconveyance. *See* J.A. 6 (Complaint ¶ 11). In its briefing before this Court, petitioners continue to perpetuate that error by claiming that "[i]n 1994, the [Murr] parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children" (Pet. Br. 4), and by making legal arguments based on that factual assertion (*id.* at 31).

2. The property's terrain presents a challenging site for development. The petitioners' lots are bisected by a very steep, nontraversable slope, running east-west and leading to a 130-foot tall bluff. App., *infra*, B2; *see* J.A. 60 (aerial photograph). There is some moderately level land both above and below the bluff, but the land at the bottom is sharply constrained for development by the river to the north and the bluff to the south, which is why many other riverway property owners have located their houses at the top of the bluff. Because, moreover, the land's northern border extends to the river's ordinary high water mark, much of that

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Petitioners' arguments directly contradict their express acknowledgment of the 1982 reconveyance in the initial round of litigation before the state court of appeals: "For the sake of full disclosure [Lot F] was transferred from William Murr Plumbing, Inc. back to William and Margaret Murr in 1982. That transfer was not detailed at the board of adjustment hearing, and appellants share this information out of candor to the court." *See* App., *infra*, E3 n.1 (quoting Brief of Petitioner-Appellant-Cross Respondent Donna J. Murr). The County has since confirmed the accuracy of petitioners' disclosure based on the County's independent examination of the records maintained by the County Register of Deeds. That the lots came under common ownership in 1982 rather than in 1995 means that the Murr parents could not, consistent with the County zoning ordinance restrictions on commonly owned, adjacent substandard lots, have conveyed Lots E and F to separate persons in 1994 and 1995. The state court of appeals below, unaware of this fact, assumed the contrary (Pet. App. A17), but the validity of its judgment does not turn on the correctness of that assumption. Should the Court reject our position that affirmance is warranted based on the existing record and remand to the state courts for any reason, those courts will be free then to consider the legal relevance of the 1982 transfer in the first instance.

land below the bluff lies within the St. Croix River's floodplain. *Id.*; J.A. 29-31.

3. Petitioners and their parents have used and enjoyed the two lots in combination since becoming owners. They have used the lot adjacent to the cabin for swimming, camping, and parking. They also created a volleyball court there. Neither they nor the parents ever treated them as distinct parcels in their day-to-day use of the lots.[6]

In 2004, petitioners contacted the County about possibly floodproofing or otherwise modifying their summer recreational cabin. J.A. 76. The cabin constitutes a nonconforming structure because it was built before current development restrictions were in place and it does not meet their standards, including the required 200-foot setback from the ordinary high water mark. *See* Cty. Zoning Ord. § 17.36.G.5.c.1. Because the cabin is located in a floodplain, it has been repeatedly and significantly damaged by floods over the years. Pet. App. A4; J.A. 100-02.

The Petitioners were reportedly "flabbergasted" (J.A. 93) to learn that because of restrictions on residential development on land bordering the St. Croix River—that had been in place since 1975—they were limited in their ability to modify their existing cabin

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[6] *See* Deposition of Joseph Murr, 47-48 (reproduced at Cert. Rec. Docket No. 18, pp. 69-70); Deposition of Peggy Murr Heaver, 9 (reproduced at Cert. Rec. Docket No. 18, p. 75). It is accordingly inaccurate for petitioners to assert that they "never treated their two parcels as a single economic unit." Pet. Br. 29.

and otherwise to construct new developments on Lots E and F. Although petitioners retain options to floodproof and improve their existing cabin under the zoning restrictions, they can do so without obtaining a variance only so long as they remain within the cabin's current footprint, limit improvements to less than 50 percent of the existing home, and floodproof in particular ways. They cannot, however, significantly expand the cabin's footprint or move the cabin within Lot F absent a variance. *See* J.A. 68; Cty. Zoning Ord. §§ 17.36.I.2.c, 17.40.G.3, 17.40.H.1.b.5-6, 17.40.H.3.a. In addition, because each lot lacks the one acre of buildable acreage required by the County zoning ordinance since 1975, petitioners require a variance to build a house on each lot or to sell either lot separately as a developable lot. *See* Cty. Zoning Ord. § 17.36.G.1.b.

4. In 2006, petitioners applied to the County for a variance from the minimum buildable acreage requirement. J.A. 61-62.[7] Although formally labeled an application for a "[v]ariance" to use both lots as "separate building sites" (J.A. 62), petitioners acknowledged that their application would "be better characterized as an appeal of the zoning office's interpretation" that

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[7] When petitioners first applied in February 2006, their application included a request to "redraw the lot lines," merging portions of Lots E and F into two new lots: one lot below the bluff and a second lot above the bluff. *See* App., *infra*, F34. But they subsequently amended the application in May 2006 by eliminating this proposal in favor of using the two lots "as separate building sites." J.A. 62 (Item #1).

their property was subject to the minimum buildable acreage requirement. *See* App., *infra*, E2.[8]

5. The County Board of Adjustment denied petitioners' application, rejecting their argument that their two lots should not be considered commonly owned for the purposes of applying the minimum buildable acreage requirement. J.A. 61-73. The Board further concluded that denying the variance would not constitute "unnecessary hardship" entitling petitioners to a variance "because it would not deprive the[m] of reasonable use of their property since their contiguous substandard lots can be developed and sold jointly as a single, more conforming parcel that is more suitable for residential development." *Id.* at 65.

The Board also detailed the significant harm that would result from granting the variance. *Id.* at 66. By allowing an additional residence that failed to meet minimum standards in an area already threatened by overcrowded development, the Board stressed, the County's ability to prevent harmful soil erosion, avoid contamination of surface and ground water, minimize flood damage, and maintain property values would be seriously undermined. The adverse effects of lifting a prohibition on construction would also be effectively permanent and ongoing. *Id.*

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[8] Petitioners also sought five other variances and two exceptions from other restrictions—triggered primarily by the substantial floodplain and exceedingly steep slope on their land—that limited their ability to build a new, larger home on Lot F outside the current footprint of the existing cabin. J.A. 62-63.

6. Petitioners filed a lawsuit challenging the Board's interpretation of the applicability of the minimum buildable acreage requirement to Lots E and F, and both the state trial court and the state court of appeals upheld the Board. App., *infra*, B1-B7 (trial court ruling), A1-A15 (appellate court ruling). The appellate court concluded that the ordinance applies to all commonly owned, adjacent substandard properties, "regardless of when they come under common ownership." *Id.* at A2.[9] The court further agreed with the County that petitioners could build a new home on their pre-existing two lots based on the lots' combined net project area, which was still below the one-acre minimum buildable acreage requirement. *Id.* at A8 n.9.[10]

Finally, the appellate court defended the reasonableness of the exception's distinction based on whether the owner of a substandard lot also owned an adjacent substandard lot. The court explained that its

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[9] The trial court reversed the Board's denial of the other variances and exceptions related to reconstruction of petitioners' existing home on Lot F. App., *infra*, B4-B6; *see* note 8, *supra*. The court of appeals subsequently reversed the trial court's ruling on those additional issues (App., *infra*, A12-A15), which are not at issue before this Court.

[10] "[S]ignificant to [the court's] interpretation of the [ordinance's] manifest intent" was its "assumption" of the correctness of the County's view that the ordinance should not be read to provide that a person could build if she owned only one pre-existing substandard lot with less than one buildable acre, but could not build if she owned two contiguous, pre-existing substandard lots with less than one buildable acre. *See* App., *infra*, A8 n.9; note 5, *supra*.

interpretation was "consistent with the manifest intent of the ordinance and [NR 118] to preserve property values while limiting environmental impacts." App., *infra*, A9. As described by the court, the exemption for substandard lots sought to ensure that "[w]hen the provision became effective, every person who already owned a lot could still build." *Id.* at A10.

For those who owned only a single lot that "was too small [to build] under the new rule," it "was acceptable" to make an exception so they "could still build on their lot or sell it as a developable lot" because otherwise their property value might be completely destroyed. *Id.* But where, as in this case, "the substandard lot owner owned an adjacent lot as well, then the lots were *effectively merged* and the owner could only sell or build on the single larger lot." *Id.* (emphasis supplied). Unlike the owners of a single isolated substandard lot, the owners of adjacent substandard lots, like petitioners, did not require a blanket exemption to avoid the possibility of having their property values completely destroyed. *See id.* Providing them instead with a more limited exemption better "preserved both property values and the environment." *Id.*

D. Petitioners' Regulatory Takings Claim

1. Following the state courts' rejection of their claim that the minimum buildable acreage requirement did not apply to their land, petitioners filed this regulatory takings challenge in state court. J.A. 4-10. They contended that the County's denial of petitioners'

ability to develop or sell Lot E separately from Lot F amounted to an unconstitutional taking of Lot E absent the payment of just compensation. *See id.* at 9-10 (Complaint ¶¶ 34-42).

2. The trial court granted the County's motion for summary judgment. Pet. App. B1-B10.[11] The court found that there was no genuine issue of material fact that petitioners retained "use and enjoyment of their property despite the denial of the variance." *Id.* at B9. They had options to reconstruct and floodproof the existing cabin within its current footprint or, if petitioners preferred the new, larger house contemplated by their application, to replace the cabin with such a house on top of the bluff located on either lot or straddling the two lots. *Id.* The court further noted that "the market value of the property has not been significantly impacted by the denial of the variance to separately sell or develop the lots." *Id.* The difference between the market value of the larger lot with one home and the

[11] The trial court also granted the County's motion on the additional, independent ground that petitioners' takings claim was time-barred as a matter of state law. *See* Pet. App. B6-B7. The state court of appeals affirmed the trial court's summary judgment ruling without reaching the statute of limitations issue (*see id.* at A7). That potentially independent and adequate state law ground in support of the judgment is accordingly not before this Court but would be available for the state court of appeals' consideration, along with a ripeness defense the County raised but the appellate court did not reach, should this Court decline to affirm and remand the case to the state courts.

two lots each with their own home was less than ten percent: $698,000 instead of $771,000. *Id.*[12]

3. The state court of appeals affirmed. Pet. App. A1-A18. The appellate court "agree[d] with the circuit court that the challenged regulatory action, an ordinance that effectively merged the Murrs' two adjacent, riparian lots for sale or development purposes, did not deprive the Murrs of all or substantially all practical use of their property." *Id.* at A1-A2. The state court of appeals also agreed with the trial court that petitioners could "continue to use their property for residential purposes," including the option of replacing their existing summer cabin with a new, year-round residence "entirely on Lot E, entirely on Lot F, or it could straddle both lots." *Id.* at A12-A13. In concluding that there was no "genuine issue of material fact" that the "property decreased in value by less than ten percent" (*id.* at

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[12] The trial court relied (Pet. App. B9) on the County's expert who explained in detail why the reduction in value was relatively small. *See* J.A. 15-60 (property appraisal by Scott R. Williams). While Lot E has about 100 feet of waterfront, Lot F has only 58 feet (*id.* at 32-33), which is less attractive to purchasers of higher end homes in the area. However, the combination of 2.5 acres and 158 feet of riverfront, provided by the ordinance's merger of the two lots, would allow for the construction of the larger, more elaborate, and expensive residence that is popular along the riverfront. *Id.* at 47-59; Affidavit of Scott Williams, 41 (Cert. Rec. Docket No. 17, p. 17-49) ("[T]here is no question that most buyers would prefer to have wider lots with more frontage * * * , more privacy, more elbow room, and higher prestige."). The trial court also found petitioners' expert failed to raise a genuine issue of material fact regarding reduction in value because the testimony failed to consider the value of both lots together and because it was not based on "information as to the effect on fair market value." *See* App., *infra*, G3-G4.

A15-A16), the court of appeals relied on both the Wisconsin Supreme Court's opinion in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996), and the fact that the County zoning ordinance had "effectively merged" petitioners' two commonly owned, substandard adjacent lots. Pet. App. A1, A3, A17.

SUMMARY OF ARGUMENT

The state court of appeals correctly considered the value of petitioners' land with one residence on petitioners' two adjacent substandard lots in comparison to the value of the land with one residence on each lot in ruling on summary judgment that the County's application of its minimum buildable acreage requirements to petitioners' property did not constitute a regulatory taking. Petitioners contend that the court below erred because it should instead have measured the value of the lot that they allege was taken based on its sale or development potential on its own, without considering its sale or development potential when combined with the adjacent, substandard lot that petitioners also own. But this Court's precedent provides no support for such a fictional measure of economic impact, which would ignore the true economic value of petitioner's property under the clear terms of the County zoning ordinance and the particular facts of this case. Petitioners' contrary argument is riddled with error.

1. First, "[t]he Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010). Petitioners, however, pay only lip service to the central role that state law plays under this Court's precedent in defining in the first instance the scope of the property interest that has allegedly been taken by a regulation.

In particular, petitioners propose that lot lines established by state law presumptively define the geographic boundaries of the property for the purpose of evaluating the economic impact of a governmental restriction on that property's use, while ignoring other state laws that authoritatively make clear that state lot lines lack such legal significance. Indeed, in earlier litigation involving these same parties, the Wisconsin courts held that petitioners' two substandard, adjacent lots had been "effectively merged" for the purpose of compliance with the very zoning restriction petitioners challenge as a taking. Petitioners' reliance on the lines dividing their two lots is therefore entirely misplaced. They create no presumptive definition of the scope of property for takings purposes and, even if they did, any such presumption would be easily overcome in this case by other state laws that squarely deny the presumption's legitimacy in Wisconsin.

2. Wisconsin law, as reflected both in the County zoning ordinance and NR 118, is also consistent with how States and local governments nationwide have

long treated commonly owned, adjacent substandard lots. For almost a century, state statutes and regulations and municipal zoning ordinances across the country have drawn precisely the same distinction. They have conditioned the availability of an exemption from minimum acreage requirements to commonly owned, adjacent substandard lots on combining the acreage on the adjacent lots to meet or at least more closely approximate those requirements.

Indeed, the distinct treatment of commonly owned, adjacent substandard lots is so longstanding and widespread as to be fairly considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood" in defining property rights in land. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1035 (1992) (Kennedy, J., concurring). Petitioners, accordingly, cannot persuasively maintain that the ordinance's restrictions on their separate sale of Lot E as a developable parcel either amounted to an unfair surprise or interfered with the reasonable expectations that define their property rights. No doubt that is also why no court has ever held during the approximately one hundred years that such laws effectively merging adjacent substandard lots have been around that they amounted to an unconstitutional taking.

3. Petitioners also misread *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), as well as this Court's subsequent rulings, in claiming that the state court of appeals below ran afoul of this Court's precedent in deciding that petitioners had

failed to make a sufficient showing of adverse economic impact to survive the County's motion for summary judgment. The state appellate court's consideration of the undisputed evidence of the value of Lot E in relation to Lot F is entirely consistent with *Penn Central* and every other instance in which the Court has similarly made clear that a court should consider the economic impact of the "parcel as a whole" in evaluating a regulatory takings claim. *Id.* at 130-31. A fair reading of the Court's case law provides no support for petitioners' suggestion that this case can be fairly distinguished from that controlling precedent on the ground that this case involves an "aggregation" of distinct lots and the Court's cases all involved rejections of landowners' efforts to "segment" distinct lots. The Court's rationale cannot be so cabined.

Lot lines are no more controlling for defining the "parcel as a whole" inquiry than a host of other bases that this Court has previously rejected in regulatory takings cases for dividing commonly owned property rights up into smaller parts. In regulatory takings cases, lot lines are among the generally relevant factors to be considered along with several case-specific factors, including but not limited to contiguousness, ownership history, and unity of use, in deciding how the Takings Clause's concerns with "fairness and justice" warrant defining the parcel in a particular case. But, where, as here, applicable state law directly contradicts the relevance of state lot lines that petitioners nonetheless posit, in no event may they be deemed to

answer the question how the "parcel as a whole" must be defined.

4. Finally, the "parcel as a whole" theory in application to the unusual circumstances of this case might best be viewed as a red herring because it does not resolve petitioners' takings claim. Regardless of how one defines the parcel, whether Lots E and F are separate or combined, petitioners' takings claim is equally without merit. No matter how one draws the lines, sufficient valuable use of petitioners' land remains to warrant dismissal of petitioners' complaint on summary judgment.

Lot E's market value depends on what uses are in fact allowed of Lot E under the terms of the County zoning ordinance, and those allowable uses do not depend upon how a reviewing court chooses to define the "parcel" in a takings case challenging that ordinance. Here, the state courts concluded there was no genuine issue of material fact to support petitioners' allegation that the ordinance reduced significantly the value of Lot E. The state courts found the difference between the market value of the two lots combined, with one residence, was only ten percent less than if there were a residence on both lots and they could be separately sold.

It was that finding that prompted both courts to conclude that summary judgment dismissing petitioners' takings complaint was warranted. Because that same deficiency persists under either of the competing

theories for defining petitioners' property, the judgment of the state courts can be affirmed without even addressing the question presented.

ARGUMENT

THE STATE COURT OF APPEALS CORRECTLY COMPARED THE VALUE OF PETITIONERS' TWO ADJACENT LOTS WITH ONE RESIDENCE TO THE VALUE OF THE TWO LOTS WITH ONE RESIDENCE ON EACH LOT IN RULING THAT THE COUNTY'S APPLICATION OF ITS MINIMUM BUILDABLE ACREAGE REQUIREMENT TO PETITIONERS' PROPERTY DID NOT CONSTITUTE A REGULATORY TAKING

Petitioners ask this Court to "examine the difficult, persisting question of what is the proper denominator in the takings fraction." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001); *see* Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) ("The difficulty is aggravated when the question is raised of how to define the 'particular thing' whose value is to furnish the denominator of the fraction."). Nominally embracing this Court's ruling in *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978), that the extent of deprivation effected by a regulatory action should be measured against the value of "the parcel as a whole" (*id.* at 130-31), petitioners invite this Court to rule that

the physical boundaries of that "whole parcel" should be presumptively defined by lot lines established under state law. *See* Pet. Br. 24-26. The Court should decline the invitation.

Petitioners' view of federal regulatory takings law finds no support in either state law or this Court's takings precedent. It intrudes upon, rather than promotes, a State's recognized authority to define private property rights in land by exaggerating the significance of one aspect of state law—lot lines—and by ignoring state property law "as a whole." It rests on a reading of the Court's opinions that cannot be squared with the actual rulings in those cases. And it is contradicted by the undisputed facts of this case, which make clear that regardless of how one defines petitioners' property, petitioners have not suffered an economic burden sufficient to sustain their takings claim. The judgment of the state court of appeals below should be affirmed.

A. The Judgment Below Rests On Longstanding, Generally Applicable State Law Governing Commonly Owned, Substandard Adjacent Lots And Not On A Per Se Rule Of Federal Constitutional Law

Much of petitioners' brief is misdirected. It faults the state courts below for relying on an interpretation of federal constitutional law that, according to petitioners, fails to give sufficient deference to state law. Petitioners, however, have it backwards. The state court judgment under review does *not* rest on a sweeping

principle of federal constitutional law mandating that, notwithstanding any state law to the contrary, courts in takings cases must always combine contiguous land in evaluating whether a land-use restriction on any part of that land amounts to a regulatory taking. Instead, it is petitioners' own arguments that rest on the proposition that federal constitutional takings law overrides state property law. Petitioners single out one isolated part of state law—that creating lot lines—as presumptively overriding other parts of state property law that limit the legal significance of those same lot lines. This Court's precedent, however, makes plain that proper respect for state property law requires consideration of all and not some state law in defining the scope of property rights in regulatory takings cases, along with a host of other case-specific factors.

1. The extent to which property is protected by the Takings Clause is of course ultimately a question of federal constitutional law, but "property interests * * * are not created by the Constitution." *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980). Nor are property interests created by a landowner's unilateral, subjective expectations concerning what the landowner would prefer to do with the land. "Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law." *Id.* For that same reason, even a regulation that deprives a landowner of all economically viable use of her property is not a taking when the regulation expresses "the restrictions that background principles of the State's

law of property and nuisance already place upon land ownership." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1029 (1992).

Where, as in this case, what is at issue are private property rights in land and the significance of lot lines established under state law, a court may accordingly look to "how the owner's reasonable expectations have been shaped by the State's law of property—*i.e.*, whether and to what degree the State's law has accorded legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id.* at 1017 n.7. The relevant state law includes the law of Wisconsin that established petitioners' lot lines, but also includes Wisconsin's "background principles" of property law. "The Takings Clause only protects property rights as they are established under state law, not as they might have been established or ought to have been established." *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envt'l Protection*, 560 U.S. 702, 732 (2010).

2. Looking therefore to "property rights as they are established" in Wisconsin (*id.*), there is plainly no merit to petitioners' contention that the lines defining Lot E presumptively define the exclusive geographic scope of petitioners' property in evaluating their takings claim. The Wisconsin law that established the lot lines dividing Lot E from Lot F cannot support the great weight that petitioners would place upon those lines. And their argument quickly crumbles.

The lot lines were initially drawn in 1959, a year before petitioners' parents purchased the first lot (Lot F). *See* J.A. 84-85. There was nothing inherently permanent or otherwise immutable about those initial lot lines, which are subject to subsequent change in multiple ways. For example, under Wisconsin law, courts can alter lots (Wis. Stat. § 236.45(2)(am)(1) (2015-2016)); new roads can modify lots (66 Wis. Op. Att'y Gen. 2, 7 (1977)); and adverse possession can add and subtract from lots (Wis. Stat. § 893.24 (2015-2016)). Even more tellingly, abutting landowners in Wisconsin routinely redraw lot lines by selling portions of their land to each other, without any government oversight. *See, e.g.*, Wis. Stat. § 236.45(2)(am)(3). Indeed, the maps in the record of this case show that Lot F's lines are dramatically different today from what they were when first drawn in 1959. There have clearly been significant subsequent subtractions and additions. For example, in 1964, petitioners' parents added to Lot F by purchasing an additional boathouse lot. *See* J.A. 117. A comparison of survey maps in the record shows that Lot F today is approximately half its original size. *Compare* J.A. 85, *with id.* 22, 28, 60. Indeed, contrary to their current statement that they never contemplated action "that would blur the property lines" (Pet. Br. 30), petitioners themselves initially sought to redraw the lot lines for both Lots E and F (App., *infra*, F1, F3-F4, F34), and their parents had previously contemplated doing the same (J.A. 89-92). *See* note 7, *supra*.

Even more fundamentally, the government's initial creation of lot lines does not reflect a formal governmental determination (let alone a guarantee) regarding the suitability of those lots for a particular kind or amount of residential development. That more formal determination of suitability for residential development instead occurred for petitioners' lots (and all lot owners along the riverway) in 1975, after a rigorous assessment of the very significant physical challenges for residential development presented by the geology of the lands located along the St. Croix River in both Wisconsin and Minnesota. *See* pp. 6-10, *supra*. That comprehensive assessment in turn led to the adoption of state law, in the form of the St. Croix County zoning ordinance in compliance with NR 118, which both restricted development based on minimum buildable acreage requirements and created an exception for certain types of pre-existing lots that failed to meet the new standards.

The judgment of state and municipal lawmakers was that where, as in this case, there are two adjacent substandard lots under common ownership, those lots should be effectively merged for the purposes of meeting the minimum buildable acreage requirement before any exemption to that requirement could be applied. Cty. Zoning Ord. §§ 17.36.G.1, 17.36.I.4. The justification for the distinction between commonly owned, adjacent substandard lots and single, isolated substandard lots is straightforward. Those who own adjacent substandard lots are less in need of an

automatic exemption from the minimum acreage requirement to avoid hardship. Unlike owners of isolated lots who, absent a complete exemption, will have no ability to develop their property, the owners of adjacent lots can take advantage of their combined acreage to more fully satisfy the acreage requirement.

Petitioners' own circumstances are illustrative. They do not need the benefit of the complete exemption from the minimum buildable acreage requirement to be able to make economically valuable use of their land. Under the terms of the County's zoning ordinance, it is undisputed that petitioners are allowed to build one residence on their two lots, which allows their property to retain significant economic value. Petitioners, moreover, are allowed to build that residence even though the amount of buildable acreage on their two lots combined (.98 acres) still falls short of the one-acre minimum. Petitioners, therefore, are still benefiting from a partial lifting of the County zoning ordinance's minimum buildable acreage requirement.

The palpable reduction in hardship to the owner of adjacent substandard lots also underscores why, contrary to petitioners' contention (Pet. Br. 7, 31), the County zoning ordinance's distinctive treatment of such landowners is both fair and just. Any lifting of a development restriction on a substandard lot has a substantial cost. The exception permits a permanent residence to be built in a location that the land-use planners and local officials have otherwise deemed physically unsuitable for such a residence, which necessarily undercuts the State's and County's ability to

prevent harmful soil erosion, surface and ground water contamination, and flood damage in a treasured riverway. There is nothing temporary or transitional about those very real costs.

No less weighty is the legal import of the County zoning ordinance's treatment of commonly owned, adjacent substandard lots for the lot line dividing Lots E and F. As aptly described by the state appellate court below and in the earlier litigation, Lots E and F are "effectively merged" as a matter of state law. Pet. App. A1; App., *infra*, A10. State law therefore already determined the legal relevance of lot lines for the purposes of state property law.

Petitioners cannot pick and choose among relevant state laws that define the scope of their property rights. Yet, that is in effect what they propose here. The state laws they view as friendly to their argument, they contend, create a presumption as a matter of federal constitutional law. And those state laws that contradict their view are relegated, under their analysis, to a secondary status. But, of course, that is not how state property law works in defining private property rights in land under this Court's takings precedent. One must look to the whole of state property law, akin to how this Court has made clear that one looks to the parcel "as a whole" in defining the relevant property for regulatory takings analysis.[13]

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[13] Petitioners' reliance (Pet. Br. 5) on the fact that for many years their tax assessments for Lots E and F were apparently

3. Nor, contrary to petitioners' repeated suggestion (Pet. Br. 5, 27), is there any reasonable basis for their reported surprise that the County's zoning ordinance treated commonly owned, adjacent substandard lots in this particular manner. The County drew the same distinction in the very first zoning ordinance that the County adopted in 1975 in response to the 1972 national legislation authorizing protection of the Lower St. Croix River.[14] The 1975 ordinance imposed a

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based on the incorrect assumption that the two lots were separately saleable or developable is entirely misplaced. Those tax assessments have no bearing on the merits of their takings claim. Tax assessors do not purport to be experts on what zoning restrictions in fact allow, which would require detailed expert inspection of the properties' physical characteristics; nor do they speak authoritatively for the zoning board and local government land-use officials. *Cf.* 5-22 *Nichols on Eminent Domain*, § 22.01 (2015) ("It is almost everywhere the law that the value placed upon a parcel of land for the purposes of taxation by the assessors of the town in which it is situated is no evidence of its value for other than tax purposes."). Whenever a landowner believes that her land is being taxed at too high a rate, she can challenge an assessment and, if successful, obtain a lower assessment and pay lower taxes. *See District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 882 (CADC 1999) ("[A]ppellants retain the right to recombine the parcels and treat them as one property for the purposes of taxation * * *."). Wisconsin, like other States, provides property owners with the opportunity to contest tax assessments, and that is precisely what the petitioners did after losing their challenge to the County's denial of their variance application. Their two lots have been valued as a combined lot ever since. *See* J.A. 23, 24, 80.

[14] Further underscoring the longstanding nature of the County's distinct treatment of commonly owned, adjacent substandard lots, the County's zoning ordinance in 1967, eight years before the river valley restrictions were adopted, restricted its exemption for pre-existing lots served by a public sewer but not

minimum buildable acreage requirement of one acre and included a "special exception" from that requirement for lots, like petitioners', recorded before the new ordinance's adoption, so long as the "lands abutting the parcel in question are not under ownership or control of the applicant." Cty. Zoning Ord. § 3.10.8 (1975), App., *infra*, D1. And, even as the County modified the zoning ordinance's technical requirements somewhat over time, there was one constant: the exception for pre-recorded lots would not apply to substandard lots when the applicant owned an adjacent lot. *See* Cty. Zoning Ord. § 3.12.H.1 (1978), App., *infra*, D2 ("[Pre-existing substandard lots] may be allowed as building sites as a special exception provided that lands abutting the parcel in question are not under ownership or control of the applicant * * *."); Cty. Zoning Ord. § 17.36(5)(n)(1) (1986), App., *infra*, D3 (A requirement for a special exception is that "[t]he lot is in separate ownership from abutting lands or, if lots in an existing subdivision are in common ownership, each of the lots has at least one acre of net project area.").

Petitioners' stated surprise at learning that the County zoning ordinance treated commonly owned, adjacent substandard lots differently cannot therefore be fairly characterized as resulting from a lack of adequate notice. It is simply not true that petitioners "had every reason to understand that Lot E was separate

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meeting minimum size requirements "[i]f abutting lands and the substandard lot are owned by the same owner," and imposed limits on the substandard lots being "sold or used." St. Croix Cty. Zoning Ord. § 6.31(3) (1967).

and distinct from Lot F." Pet. Br. 29. The distinct treatment for substandard lots like theirs had been on the books for decades. *See* J.A. 67; pp. 41-45, *infra* (similar state and local laws are both longstanding and exist nationwide).

4. Petitioners have also not been singled out. The restrictions that apply to their property derive from the physical characteristics of their land. Petitioners' lots did not become substandard because the County imposed a minimum acreage requirement smaller than their lot sizes. Each lot is larger in size than the minimum acreage requirement and both lots instead became substandard because of their "unique terrain," which made most of their land unsuitable for development. App., *infra*, B4, B5.

The northern border for both lots is the ordinary high water mark of the St. Croix River and each lot is bisected by an exceedingly steep, nontraversable wooded slope leading to a 130-foot tall bluff. The proximity to the river presents significant flood risks (as experienced by petitioners on multiple occasions (*see* Pet. App. A4; J.A. 100-02)); and the bluff presents serious problems of erosion and stability. Indeed, the problems with petitioners' land for development are so great that petitioners still fall short of the one buildable acre minimum requirement even after combining the total buildable acreage available on both lots. The only reason petitioners are nonetheless permitted to replace their small, existing summer recreational cabin with a larger, new residence on their two lots is because of their entitlement to an exception for their

pre-recorded lots. *See* notes 4 & 10, *supra*. Petitioners therefore are beneficiaries of the same exception from the minimum acreage requirement that they claim unconstitutionally takes their property.

Petitioners are also not being treated any differently from their similarly situated neighbors.[15] As the Board explained in denying petitioners' application for a variance, "[a]t least eight other property owners in the immediate Cove Court/Court Road area own one or more contiguous substandard lots along the river with just one building site. Many of these contiguous lots are over two acres combined." J.A. 67. Because, moreover, the same merger rules apply up and down, and on both the Wisconsin and Minnesota sides of the St. Croix River, far more than just petitioners' immediate neighbors have been subject to the same restrictions. What would therefore be truly unfair would be to single out petitioners for special treatment—exempting them from generally applicable sale and development restrictions—while allowing petitioners to enjoy the increased property values that have resulted from

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[15] In the earlier litigation, petitioners complained that the County granted a hardship variance from the acreage requirement to a neighbor, who owned adjacent, substandard lots, and petitioners may raise that contention again here. The state court of appeals properly declined to consider that claim on procedural grounds (App., *infra*, A13) and, for that reason, the record in this case does not present the relevant facts, including that the neighbor presented a far stronger case for a hardship variance because, unlike petitioners, the neighbor did not have the option to build on the bluff above, owned only one substandard lot, and was not similarly seeking to build in a floodplain. In short, the neighbor lacked development options available to petitioners.

those very same restrictions on other landowners. *See* Brief of Carlisle Ford Runge, *et al.*, as *Amici Curiae*, Pt. V (describing increased property values enjoyed by petitioners because of zoning restrictions and corresponding windfall that would be gained by petitioners if they, alone, were exempted from buildable acreage requirement).

5. Finally, petitioners mischaracterize the state court's judgment as depending entirely on a *per se* rule of federal constitutional law that provides courts should always treat commonly owned contiguous parcels as the "parcel as a whole" in determining the landowner's economic burden in regulatory takings cases. Pet. Br. 13. As emphasized in the County's brief in opposition (Opp. 25-26) to the petition for certiorari, however, the state court of appeals' judgment below does not depend upon the sweeping, unqualified rule of federal constitutional law set forth in the petition's question presented. Both the court of appeals' reasoning and, in all events, its judgment are sufficiently supported by the merger rule's central role in defining petitioners' property. No more is needed.

The appellate tribunal below made clear from its very first sentences how it "agree[d] with the circuit court" that the County ordinance had "effectively merged" the petitioners' two adjacent lots. Pet. App. A1-A2. The court further found, based again on the ordinance's plain terms, that petitioners "never possessed an unfettered 'right' to treat the lots separately." *Id.* at A17-A18. This finding underscored the

unreasonableness of petitioners' placing such dispositive weight on the lot lines as a matter of state law. The legal significance of the County zoning ordinance, including its merger provision for commonly owned, adjacent substandard lots, was a central element of the lower courts' disposition of this case in both rounds of litigation and cannot be disregarded. None of that discussion of applicable state law would have been necessary or relevant had the state court been relying, as petitioners nonetheless assert, on a *per se* rule of federal constitutional law that defined the "parcel as a whole" regardless of state law.

Nor is the state court of appeals' ruling otherwise best understood as embracing a *per se* rule that commonly owned contiguous lots must always be aggregated in all regulatory takings cases regardless of any other factors and factual nuances. At most, the lower court was simply rejecting *petitioners'* proposed *per se* rule based on state lot lines, consistent with this Court's instruction to "resist the temptation to adopt *per se* rules" in regulatory takings cases. *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 326 (2002). In this particular case, moreover, there was directly applicable state law that flatly contradicted petitioners' reliance on state lot lines as the basis of their own *per se* rule. In other cases, as discussed below (*see* pp. 52-53, *infra*), courts properly consider a host of case-specific factors in determining the scope of the "relevant parcel" in assessing a regulation's economic impact. The courts of Wisconsin have not held to the contrary but, like

other federal and state courts, have engaged in case-specific inquiries turning on the particular facts and circumstances of each case. *See, e.g.*, *R.W. Docks & Slips v. State*, 548 N.W.2d 785, 786-91 (Wis. 2001).

The County acknowledges that isolated language, largely limited to a single sentence within the state court of appeals' unpublished opinion, is nonetheless susceptible to a broader reading. The court's statement (Pet. App. A11)—that "[r]egardless of how that property is subdivided, contiguousness is the key fact under *Zealy* [*v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996)]"—could be misunderstood to mean that contiguous property should always be aggregated in defining the "parcel as a whole" in a regulatory takings case regardless of any other factors. As raised in the County's brief in opposition (Opp. 25-26), the County does not believe that is the better reading of the ruling of either the court of appeals in this case,[16] or of the Wisconsin Supreme Court in *Zealy*.[17] And, in all events, the

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[16] As described above, the lower courts' repeated emphasis on how the County ordinance effectively merged petitioners' two lots is inconsistent with the notion that those courts concluded that state law was irrelevant to the "parcel as a whole" issue. In addition, the court's reference to contiguousness as the "key fact" is far different from an unequivocal statement that contiguousness always defines the scope of a parcel of land in all takings cases. In this case, contiguousness was certainly the "key" fact because it triggered the County ordinance's merger provision. The word "key" also does not deny the possible relevance of other factors.

[17] Rather than relying on an inflexible categorical approach to all takings cases, the *Zealy* court is better understood as merely rejecting the particular reasons (accepted by the court of appeals

County does not defend the judgment on that broader reading of *Zealy*, but instead on the narrower grounds

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in that case) that the property owner proffered for defining the parcel more narrowly. That is why the state high court explained at some length the "possible difficulty in the application of the rule proposed by the court of appeals in the present case." 548 N.W.2d at 533. *Zealy* was also what petitioners themselves would characterize as a "segmentation" rather than an "aggregation" case. In *Zealy*, the takings plaintiff owned a single parcel consisting of 10.4 contiguous acres, with no suggestion in the opinion of further division into formal, distinct lots, and municipal zoning laws permitted development of some, but not all, of that parcel for residential purposes. The plaintiff argued that the courts should "take into account such factors as 'a landowner's anticipated investment opportunities * * * in order to determine what the parcel at issue should be." *Id.* at 532. In rejecting that claim, the *Zealy* court explained that "[l]ooking to a landowner's anticipated use of various parcels and sub-parcels of land in order to determine the extent of the parcel at issue would require ascertaining a landowner's subjective intent before being able to evaluate a possible takings claim." *Id.* at 533. It "would confuse both the agencies responsible for zoning and the courts called on to adjudicate such claims, and increase the difficulty of an already complex inquiry." *Id.* The state court, accordingly, rejected the landowner's claim that it should consider exclusively the adverse economic impact of the development restriction on the value of the portion of the parcel on which residential development was not allowed, without also taking into account the value of the portion on which such development was permitted. Not only does *Zealy* clearly comport with this Court's own precedent, including *Penn Central* as petitioners themselves read it, because it would fit their definition of a "segmentation" case, but the ruling also makes obvious good sense. The *Zealy* court should not be misunderstood to have done anything more. That the County in litigation below pressed a broader argument, in addition to the narrow argument based on the merger provision, is also of no continuing significance. This Court reviews lower court reasoning and judgments, and not parties' unsuccessful legal arguments.

described herein that are fully supported by the record and this Court's precedent.[18]

B. Applicable State Law In This Case Is Consistent With Longstanding And Nationwide Practices Of State And Municipal Governments

1. The County did not originate the practice of treating commonly owned, adjacent substandard lots differently in determining the extent to which preexisting lots would be entitled to exemptions from subsequently established zoning requirements. The practice is longstanding and widespread. Often described as "merger provisions," state and municipal zoning laws across the nation have for almost a century drawn the very same distinction based on the fundamental fairness of identifying those most in need of a hardship exemption. They strike the balance between the community's interest in achieving the zoning requirement's important purposes and the landowner's interest in developing a substandard lot.

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[18] Should this Court disagree with our submission and conclude, contrary to our view, that the lower courts' judgment necessarily rests on an uncompromising *per se* definition of the "parcel as a whole" in takings cases and choose not to consider the readily available alternative, narrow bases for sustaining that judgment, the case should be remanded to provide the parties with the opportunity to litigate the proper basis for defining the parcel before the state courts in the first instance.

To be sure, the precise terms of those state and municipal laws differ at their margin in their particulars and their operation, underscoring the advantages of federalism. But their basic approach and underlying rationale are fundamentally the same in all their permutations. The owner of a nonconforming lot "is entitled to an exception only if his lot is isolated. If the owner of such a lot owns another lot adjacent to it, he is not entitled to an exception. Rather, he must combine the two lots to form one which will meet, or more closely approximate, the frontage and area requirements of the ordinance." 2 Robert M. Anderson, *American Law of Zoning*, § 8.49 (1968). As described by the Maine Supreme Court, a merger provision "is designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property." *Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015).

2. An amicus brief filed in support of respondents by the State and Local Legal Center on behalf of the National Association of Counties and a host of other state and local governmental organizations fully documents the long and rich history of such state and municipal merger provisions. *See* Brief of Nat'l Ass'n of Counties, *et al.*, as *Amici Curiae*. Merger provisions can be found as early as 1926, and they became so common a few decades later as to be included in the Model Zoning Ordinance published by the American Society of Planning Officials in 1960. *Id.* at 9-10, *citing* American Society of Planning Officials, *The Text of a Model*

Zoning Ordinance, 26 (2d ed. 1960). Many States enacted statutes that specifically authorize municipalities to include merger provisions; in many States, local governments have adopted merger provisions based on general state legislative grants of authority; and in other States, merger is a common law doctrine that applies even in the absence of any formal state legislation. *See* Nat'l Ass'n of Counties Amicus Br. 12-14. The amicus brief lists illustrative examples of merger provisions from 132 municipal zoning ordinances located in 33 different States, crisscrossing the country from east to west and north to south. *Id.* at 14-31.

3. The prevalence of merger provisions is highly relevant to this case. First, it establishes their settled role in how States define the metes and bounds of private property rights in land, especially the limited legal import of lot lines as a matter of state law. Second, it makes clear that anyone remotely knowledgeable about land use law, including realtors, mortgagees, title companies, builders, and local counsel, knows the implications of owning adjacent, substandard lots. *See id.* at 32-34. The relevant law is therefore readily accessible to landowners, including petitioners and their parents, based on the exercise of the kind of minimal due diligence routinely engaged in by owners of real property who contemplate possible development possibilities and real estate transactions.

But even more fundamentally, the longstanding and widespread prevalence of merger provisions evidences why Wisconsin's treatment of commonly owned,

adjacent substandard lots, as reflected in both NR 118 and the County zoning ordinance, can fairly be considered part of what Justice Kennedy has described as "the whole of our legal tradition" upon which "reasonable expectations must be understood." *Lucas*, 505 U.S. at 1035 (Kennedy, J., concurring). Merger provisions "are based on objective rules and customs that can be understood as reasonable by all parties involved." *Id.* The application of Wisconsin law accordingly supplies a proper base for defining the limits of petitioners' legitimate expectations in the use of their land, in the same manner that the Court held that Florida riparian law did in *Stop the Beach Renourishment, Inc. v. Florida Dept. of Environmental Protection*, 560 U.S. at 732. And invocation of Wisconsin state law to define those expectations is not akin to the far more sweeping categorical claim, rejected by this Court in *Palazzolo v. Rhode Island*, that a purchaser or successive title holder of property is deemed to have notice of any state law restrictions that pre-dated ownership and is therefore barred from claiming that any such restriction is a regulatory taking. *See* 533 U.S. at 626-27.

No doubt that is why no court has ever held in at least the one-hundred years that merger provisions like Wisconsin's have been around that they amount to an unconstitutional taking. In those rare instances when the argument has been made, courts have quickly dismissed the claim of unconstitutionality. *See, e.g.*, *DiMillio v. Zoning Board of Review of the Town of South Kingston*, 574 A.2d 754, 757 (R.I. 1990) (rejecting takings claim because under the merger provision

"[t]he unimproved portion of petitioner's lot adds value to the lot with the existing dwelling, and the vacant lot remains available to enlarge the existing home"); *Quinn v. Board of County Comm'rs for Queen Anne's County, Md.*, 124 F. Supp.3d 586 (D. Md. 2014) (upholding merger provision).

C. The County Ordinance's Treatment Of Petitioners' Property Is Entirely Consistent With This Court's Regulatory Takings Precedent For Defining The Parcel

Merger provisions, like the County's here, are also in complete harmony with this Court's regulatory takings precedent. The Court has never intimated that a State lacks the power to decide as a matter of state law that lot lines are not controlling in such circumstances. And the state court of appeals' consideration of the value of Lot E combined with Lot F in evaluating the merits of petitioners' takings claim is in obvious accord with this Court's repeated admonition, beginning in *Penn Central*, that courts should consider the economic impact on the "parcel as a whole" in takings cases. 438 U.S. at 130-31.

1. The Court's seminal ruling on the so-called "denominator question" of regulatory takings law – regarding how to define the property for the purpose of assessing a regulation's economic impact – is, of course, *Penn Central Transportation Co. v. New York City*, 438 U.S. 104 (1978). In *Penn Central*, the Court held that "'[t]aking' jurisprudence does not divide a single parcel

into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated." *Id.* at 130. This Court "focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole.*" *Id.* at 130-31 (emphasis added); *see Concrete Pipe & Prods. of Calif., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 644 (1993) ("[W]e rejected this analysis six years ago in [*Penn Central*], where we held that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable."). While claiming to embrace *Penn Central*, petitioners seek to distinguish the *Penn Central* line of precedent based on their view that what *Penn Central* rejects is a court's *segmentation* of a discrete parcel of property into smaller parts, and that the Wisconsin courts misread *Penn Central* as requiring the *aggregation* of distinct parcels of property. *See* Pet. Br. 13-16. Petitioners' proffered distinction, however, is doubly flawed.

a. First, even if *Penn Central* could be so narrowly read (which we dispute below), the judgment of the state courts dismissing petitioners' takings claim does not depend on its broader reading. As described above (*see* pp. 28-32, *supra*), this is not a case where the courts unilaterally insisted on combining what were otherwise distinct parcels as a matter of state law. The opposite is true. The state courts in prior litigation squarely held that Lots E and F were not, as a

matter of state law, distinct parcels for the purposes of applying the County's minimum building acreage requirement. The two parcels had been "effectively merged" by state law for decades. Pet. App. A1-A2; App., *infra*, A10.

Contrary to petitioners' characterization, *Penn Central* is not therefore being invoked in this case to aggregate land that as a matter of state law constitutes two distinct parcels. State law has itself aggregated the two lots and petitioners now seek to segment into smaller pieces what state law has effectively defined to be the "whole parcel." But, of course, that is precisely what petitioners acknowledge the *Penn Central* Court clearly held should not be done.

b. The second flaw in petitioners' reasoning is that *Penn Central*'s rationale in favor of considering the "parcel as a whole" cannot in any event be fairly limited to so-called "segmentation" cases. The "fairness and justice" concerns underlying the Takings Clause, which support looking to the entire parcel, do not wholly disappear if the landowner's property consists of two adjacent lots.

Here too, petitioners overstate both the legal significance of lot lines, standing alone, and the meaningfulness of the segmentation/aggregation distinction. They also understate the logical reach of the Court's precedent.

i. In *Penn Central*, the Court rejected the property owner's claim that regulatory takings analysis should separate out from their parcel of land their "use

of air rights * * * irrespective of the impact of the restriction on the value of the parcel as a whole." *Id.* at 130 n.27. Although petitioners dub this a "segmentation" case, the Court can no less fairly be understood to have aggregated the air rights and the surface development rights in assessing the economic impact of the land use restriction on the owner's entire parcel as a whole. *Cf. Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., concurring) (emphasis added) ("[In *Penn Central*, t]he relevant land, it could be said, was the *aggregation* of the owner's parcels subject to the regulation (or at least the contiguous parcels) * * *."). Significantly, the air rights at issue in *Penn Central* were an exceedingly valuable property right distinct from the surface development rights, and they could be separately bought and sold under state law.

ii. Similarly, in *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987), the Court held that the coal required to be left in the ground did "not constitute a separate segment of property for takings law purposes." *Id.* at 498. According to the Court, it was not preclusive of defining the parcel more broadly that applicable state law recognized a separate interest in land, known as the support estate, which could be conveyed separately: "[O]ur takings jurisprudence forecloses reliance on such legalistic distinctions within a bundle of property rights." *Id.* at 500. While certainly not denying the relevance of all state law in determining the bounds of takings analysis, the Court rejected the notion that "whether state law allowed the

separate sale of the segment of property" necessarily narrowed the "parcel" for takings purposes. *Id.* Here again, the Court aggregated the surface and support estates even though state law recognized them as distinct rights and estates. The Court therefore did not treat a state law determination that property rights could be severed as meaning that those severed interests could not also be aggregated in determining what constitutes the "parcel as a whole" for regulatory takings purposes.

iii. *Palazzolo v. Rhode Island*, decided in 2001, is, moreover, squarely on point and directly contradicts petitioners' reliance on lot lines. The plaintiff landowner in that case claimed that a state wetlands regulation amounted to an unconstitutional taking of his property without compensation. 533 U.S. at 611. In rejecting that claim, the Court relied on the fact that it was undisputed that the landowner could build a house on one small upland portion of his 20 acres and the value of that development was sufficient to defeat the claim of a *per se* taking under *Lucas*. *Id.* at 631. The Court reached this result even though it was undisputed that the 20 acres consisted of 74 distinctly platted subdivision lots previously approved by the State. *Id.* at 613, 616, 623. The Court never intimated that the existence of the 74 individual lots was inconsistent with treating the landowner's 20 acres as the "entire parcel." *Id.* at 631-32.

Nor is the *Palazzolo* Court's description of the 74 individual lots as the "entire parcel" at all undercut by its refusal to consider the landowner's belated claim in

that case that the Court should ignore the value of that upland parcel in determining whether the non-uplands portion had been taken. While declining to do so because the landowner had failed to press the issue in his jurisdictional petition (*id.*), the Court simultaneously made clear that the landowner's procedural shortfall had been his failure to challenge the "parcel as a whole rule" altogether—a rule with which the Court suggested it had "at times expressed discomfort." *Id.* at 631. The Court did not question that if the parcel as a whole rule applied, then the entire 20 acres, including all 74 lots, constituted the "entire parcel" under the logic of *Penn Central*. *Id.* at 631-32. At the very least, the Court in *Palazzolo* did not grasp, let alone embrace, what petitioners now assert is a limiting principle long hidden within *Penn Central*.

iv. The Court's more recent endorsement of the "parcel as a whole rule" in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), similarly resists the aggregation/segmentation distinction. In arguing that a temporary moratorium on land use development amounted to an unconstitutional taking requiring the payment of just compensation, the plaintiff landowners contended that the Court should focus only on that time period when the moratorium applied, effectively severing the property temporally for the purpose of takings analysis. *Id.* at 320. Once again, the Court squarely rejected the propriety of such a conceptual severance. *Id.* at 331. It was no matter that state law would have permitted a landowner to create a distinct property interest in the

land of a temporal nature, such as a leasehold. Petitioners can characterize that as a refusal to "segment" the property temporarily, but it is no less a ruling by the Court that those distinct state law property interests defined by discrete segments of time should be "aggregated" in considering the economic impact of the land use restriction on the "parcel as a whole."

2. Lot lines are, at bottom, no different from any of these other ways to carve up a property owner's interest in land or other types of property, whether spatially, temporally, horizontally, or vertically. Like air rights, support estates, and leaseholds, lot lines do not conclusively—or as proposed by petitioners, presumptively—define the "parcel as a whole" for regulatory takings analysis. Indeed, were the rule otherwise, one could fairly anticipate that owners of property would quickly respond by dividing property rights, including in land, into ever smaller "parcels" to maximize their takings claims at the expense of the government's police power. *See City of Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) ("[T]he government would be powerless to prevent landowners from merely dividing up ownership of their property so as to definitively influence the denominator analysis."). Neither the Fifth Amendment's concerns with "justice" nor its commitment to "fairness" would be served by a federal constitutional rule of law that encouraged such manipulative behavior and self-created hardships. *See Bevan v. Brandon Twp.*, 475 N.W.2d 37, 43 (Mich. 1991), quoting *Korby v. Redford Twp.*, 82 N.W.2d 441, 443 (Mich. 1957) (explaining that perverse results would

occur if "'[a]rtificial device[s]' such as tax identification numbers and separate deeds" controlled takings analysis because "it would be competent for landowners to perpetually defeat future zoning restrictions by crisscrossing their lands on a plat map with lines ostensibly dividing the same into parcels so small that each would be unsuited to any foreseeable use unless combined with others" (second alteration in original)).

3. Does this mean that lot lines are wholly irrelevant in defining the relevant "parcel as a whole" in takings analysis? Or that contiguous, commonly owned parcels are always merged for takings purposes under every possible factual scenario? Of course not. That is not the County's position before this Court. As a general matter, a court in a takings case should consider many factors, including lot lines, in deciding the shape of a property owner's reasonable expectations.

For land, as courts have held, relevant factors include, but are not necessarily limited to, the extent to which parcels are contiguous, ownership history, physical characteristics, unity of use, the extent to which the restricted portion benefits the unregulated portion, and how the government, including state and local governments have treated the land. *See, e.g.*, *District Intown Props., Ltd. v. District of Columbia*, 198 F.3d 874, 880-82 (CADC 1999). As the state court of appeals explained, however, those factors relevant "to determining the extent of the property at issue for purposes of a regulatory taking" do not extend to "[a] property's owner's subjective, desired use." Pet. App. A17 n.8.

The undisputed facts of this case allow for the sensible result achieved by the lower courts. Petitioners' case rests entirely on their insistence that the lot lines established under state law are controlling, on at least a presumptive basis, in defining their property. Such a claim, however, is legally untenable where, as in this case, the state courts have already ruled as a matter of state law in prior litigation that the lot lines do not have the significance that petitioners ascribe to them. The lot lines do not override state law in existence for decades that makes clear that commonly owned, adjacent substandard lots are effectively merged in applying the minimum buildable acreage requirement. Nor does the Takings Clause override a State or local government's decision in this regard and, in effect "dictate to the States [how] their general laws of property * * * are to be construed." Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism*, 35 William & Mary L. Rev. 301, 327 (1993). For that same reason, even if contrary to our submission, the Court were to conclude that lot lines presumptively define the "parcel as a whole" in takings analysis, any such presumption would clearly be defeated in this case by Wisconsin law.

D. The State Courts Below In All Events Properly Declined To Consider Petitioners' Ownership Of Lot E In Isolation From Their Ownership Of Lot F In Granting Summary Judgment In Favor Of Respondents

Finally, the parcel as a whole inquiry in this case is, in all events, largely a red herring. No matter how one formally defines the parcel in this case, whether one treats Lots E and F somehow as distinct "parcels as a whole," as petitioners contend, or treats Lots E and F together as the "parcel as a whole," as the lower courts ruled, the result in this case would be exactly the same. Petitioners would still have failed to make a sufficient showing of adverse economic impact from the restrictions on separate sale and development to defeat the County's motion for summary judgment. And affirmance of the judgment of the state court of appeals would be no less warranted.

1. The state appellate court affirmed the trial court's grant of respondents' motion for summary judgment. The gravamen of both the state trial court's and the court of appeals' rulings was the same: petitioners' failure to raise any genuine issues of material fact regarding their economic losses sufficient to maintain their claim that Lot E had been taken. Pet. App. A12-A18, B9. Both courts found that petitioners' economic losses from the restriction on separate sale and development fell far short of that mark: less than a ten percent reduction. Lots E and F are worth $698,000 if petitioners are permitted to build only one house on

the two lots combined, rather than $771,000 if petitioners were permitted to build a house on each lot. *Id.* at A6, A15-A16, B9.

Petitioners contend that the state courts erred by defining the relevant parcel for takings purposes to include both Lots E and F, rather than just treating Lot E by itself as the relevant parcel. For the reasons discussed at length above, petitioners are incorrect. Because of the County zoning ordinance's longstanding merger provision, the state courts properly applied this Court's precedent by combining petitioners' adjacent, substandard lots in assessing the extent of their economic loss for regulatory takings purposes. But, even assuming petitioners were correct, the result in this case would be no different, because the economic impact of the sale and development restrictions on petitioners' property ultimately turns not on how one defines the parcel, but on the uses of Lots E and F that the County zoning ordinance in fact permits. *Cf.* Pet. App. A13 ("We are not concerned with what uses are prohibited * * *[,] but rather only what use or uses remain.").

2. As explained by the state courts below (Pet. App. A6, A12-A13, B9), the County zoning ordinance allows petitioners to replace the existing recreational summer cabin with a larger, far nicer year-round house on Lot E alone or on land straddling both Lots E and F. In either of those circumstances, such a house would plainly be very valuable. But even if petitioners chose to build the new home solely on Lot F, combining that

house with the land located on Lot E would add significant value to petitioners' property. For the reasons detailed by the County's expert appraiser (J.A. 15-60), the value of a larger house on a larger lot that includes the longer stretch of St. Croix River beachfront provided by Lot E would be almost as much as the sum of the value of the two lots assuming each was separately developable. The difference in value, which the state courts below both concluded was not a genuinely disputed issue of material fact, would be a ten percent reduction: from $771,000 to $698,000. Pet. App. A15-A16, B9; App., *infra*, G3-G4; *see* pp. 17-20 & note 12, *supra*.

Why is the reduction in value so relatively small? The appraiser's explanation, supported by both the lower state courts' findings, is simple. Lot E, unlike Lot F, has far more beachfront (roughly twice the amount) to offer. A single residence on combined Lots E and F would therefore have the benefit of both the larger lot and the increased beachfront, privacy, and prestige, whether the house was placed on Lot E, Lot F, or across both. J.A. 32-33, 45-59; *see* note 12, *supra*.

How a court chooses to define "the parcel" for regulatory takings analysis will not change any of those numbers. Even if, as the County ordinance provides, Lot E's value is derived from its potential to be combined with Lot F (the same way that Lot F's is derived from Lot E), that is still significant market value. The "parcel as a whole" inquiry does not change the basic underlying economics of market valuation. Lot E is worth less, but it still retains significant economic value when combined with Lot F.

3. At bottom, petitioners' mistake lies in their erroneous economic assumption that if Lot E cannot be sold or developed at all apart from Lot F, then it must be worth nothing. But that is not how economics and market valuation of property work in practice. Merely because Lot E cannot be sold or developed in isolation of Lot F does not mean that it does not retain, as far as the market is concerned, significant economic value precisely because it can be developed in conjunction with Lot F and its added beachfront and acreage contribute enormous economic worth. *See* note 12, *supra*. Petitioners' contrary view depends on hypothetical facts that, ignoring the actual terms of the ordinance, falsely assume petitioners have no use of Lot E at all. *See* Pet. Br. 9.

The courts below therefore correctly rejected petitioners' argument and concluded that petitioners' own expert failed to raise a genuine issue of material fact sufficient to call into question the opinion of the County's expert witness that the adverse economic impact of the County zoning ordinance was less than a ten percent reduction in total market value. *See* App., *infra*, G3 ("[R]eliance on appraisal values that consider only a portion of the Murrs' property do[es] not create a genuine issue of material fact."). The trial court, moreover, found further, independent fault with petitioners' expert witness. In denying petitioners' motion for reconsideration, the court found that the views of petitioners' expert were not entitled to weight because they were not based on data related to fair market value at all, but "only assessment data." *Id.* at G4. The

court noted that "[p]etitioners[] have not cited legal authority that would create a genuine issue of material fact, specifically where [petitioners' expert], stated he had no information as to the effect on fair market value." *Id.* These findings are fatal to the merits of petitioners' takings claim regardless of how one defines petitioners' parcel for takings analysis purposes.

* * * * *

As in *Village of Euclid v. Ambler Realty*, 272 U.S. 365 (1926), the County zoning ordinance challenged in this case represents a responsible exercise of a local government's police power addressing "the complex conditions of our day." *Id.* at 387. The ordinance neither goes "too far," within the meaning of Justice Holmes' famous (albeit characteristically cryptic) formulation in *Pennsylvania Coal v. Mahon*, 260 U.S. 393, 415 (1922), nor otherwise implicates the Fifth Amendment's bottom-line concerns with ensuring "fairness and justice" (*Armstrong v. United States*, 364 U.S. 40, 49 (1960)). The state courts properly dismissed petitioners' takings claim on summary judgment.

CONCLUSION

The judgment of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted.

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