No. _____

In the
Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

LIST OF ALL PARTIES

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

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies in this case.

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PETITION FOR WRIT OF CERTIORARI

Joseph P. Murr, Michael W. Murr, Donna J. Murr, and Peggy M. Heaver respectfully petition for a writ of certiorari to review the judgment of the Court of Appeals of Wisconsin.

OPINIONS BELOW

The decision below of the Court of Appeals of Wisconsin is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). The opinion is reproduced in the Appendix at A-1.

The decision of the Circuit Court of St. Croix County is unreported and is reproduced in the Appendix at B-1.

The order of the Wisconsin Supreme Court denying a Petition For Review was issued April 16, 2015, and is reproduced in the Appendix at C-1.

JURISDICTION

The date of the decision sought to be reviewed is December 23, 2014. The Wisconsin Supreme Court denied further review on April, 16, 2015. On June 30, 2015, this Court entered an order extending the time for filing a petition for writ of certiorari to and including August 14, 2015.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III. V, Lower St. Croix Riverway Overlay Dist. § 17.36 I.4.a. It is reproduced verbatim, in relevant part, in the Appendix at D-1. This ordinance is based on Wis. Admin. Code § NR 118.08(4).

STATEMENT OF THE CASE

For approximately 125 miles, the St. Croix River forms the boundary between Minnesota and Wisconsin. About 12 miles east of St. Paul, the river widens and is referred to as Lake St. Croix. Accessed directly by Interstate 94, Lake St. Croix is a popular recreation area. The lake has beautiful beaches and numerous homes along its shores. The lake boasts many recreational facilities, including city parks, a county park, a state park, various private resorts and marine facilities, and at least 10 boat access points. The area is part of the Minneapolis-St. Paul Metropolitan Statistical Area and has a large nearby population base.

On the Wisconsin lakeshore sits the City of Hudson, and just a few miles south is the Town of Troy. There, the lake features a large cove with over 40 waterfront parcels, appropriately known as the St. Croix Cove Subdivision. This is where the subject properties, referred to as Lot E and Lot F, are located.

A. Factual Background

The Petitioners are Donna Murr, Joseph Murr, Michael Murr, and Peggy Heaver (collectively, the Murrs). They are siblings. In 1960, their parents purchased Lot F. This lot was created by a Certified Survey Map and recorded on July 21, 1959.

Lot E sits adjacent to Lot F. Both are waterfront parcels approximately 100 feet wide, and over one acre in size. Lot E was also created by a Certified Survey Map and recorded 6 days later, on July 27, 1959.

There is no dispute that as originally created, each parcel was a separate and distinct legal lot, and each was allowed to be separately developed, used, and sold.

The Murrs' father was a plumber and he ran his own business, William Murr Plumbing, Inc. He was advised by his accountant to place title to Lot F in that business entity, which he did. Soon after purchasing Lot F, the Murrs' parents built a three bedroom recreational cabin, approximately 950 square feet. And so began a family legacy of enjoying many summers, long weekend holidays, birthdays, and 4th of July celebrations at the lake. Of course, the siblings grew up. They started their own families and soon the next generation of kids were enjoying the lakeside cabin. For the Murr family, the cabin has been the family gathering place.

The Murrs' parents had foresight. Recognizing the long-term potential of the area, they decided in 1963 to purchase a second parcel, the above-mentioned Lot E. Lot E has remained vacant and undeveloped to this day, but not so for the rest of the St. Croix Cove Subdivision. Almost all of the other waterfront parcels have been developed with homes and most are occupied year round by full-time residents.

Title to Lot E was in the Murrs' parents own names, rather than the plumbing company. There is no dispute that they bought this adjacent parcel for investment purposes. When the investment ripened, they planned to develop it separately from Lot F, or sell it to a third party.

In 1994, the parents transferred title to Lot F with the cabin to their six children. This was a gift to all of them; a way to keep the family legacy intact. In 1995, the investment Lot E was also transferred to the children; also a gift. Subsequently, two of the children quitclaimed their interests to their four siblings, again without any exchange of money. These four siblings are the current owners and the parties to this action.

In 2004, the Murr siblings began exploring the possibility of upgrading the cabin, including elevating it to diminish the threat of flood. They planned to sell investment Lot E, and use the proceeds from the sale to fund their project. It was then that they learned from government officials that they could no longer separately develop and sell Lot E.

Development of Lot E was precluded by regulations adopted in 1975 that required a "net project area" of at least one acre. Lot E is approximately 1.25 acres in overall size, but the

ordinance requires subtracting areas for slope preservation zones, floodplains, road rights-of-way, and wetlands, thereby yielding a net project area for development of Lot E of 0.5 acres.[1] But this half acre project area is not enough under the ordinance. There is no dispute that the remaining half acre has a suitable building site for a single family residence that meets the setback requirements. Nevertheless, because of the "net project area" deductions imposed by government, the parcel no longer meets the zoning requirements.

In short, when Lot E was created in 1959, and purchased in 1963, it was of sufficient size, width, and zoning to allow development of a single family house. Indeed, that is the use allowed for all the parcels within the St. Croix Cove Subdivision. However, because of the restrictions that came into place in 1975, the parcel was now defined as "substandard."

Despite being defined as substandard, Lot E would still be allowed to be developed if it was owned by *anyone other than the Murr siblings*. Under the ordinance, a grandfather clause provides that any lot created prior to January 1, 1976, as was Lot E, may still be developed as a single family residence *but only if* the lot "is in separate ownership from abutting lands."[2] Of course, the Murrs own the abutting parcel, Lot F. Because the Murrs own both parcels, this grandfather exception does not apply to them. Had

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[1] Lot F also had a similar net project area of .48 acres. Accordingly, it was also defined as substandard under the 1975 regulations.

[2] St. Croix County Code of Ordinances, § 17.36 I.4.a.1 (Appendix at D-1).

anyone else owned Lot E, that owner would be allowed to build a single family residence. Regrettably, the ordinance also precludes the Murrs from selling Lot E to anyone else unless it is combined with Lot F.[3]

B. Procedural Background

The Murrs sought relief from the ordinance by seeking a variance to allow using Lot E as a separate building site. They argued that on January 1, 1976, the lots were still in separate ownerships (split between the plumbing company and the Murrs' parents), and therefore the grandfather clause should apply. The County Board of Adjustment rejected that interpretation of the ordinance, and upon judicial review, the Wisconsin Court of Appeals affirmed. As stated in the decision below:

> In *Murr v. St. Croix County Board of Adjustment*, 2011 WI App 29, ¶¶ 1-2, 332 Wis.2d 172, 796 N.W.2d 837, we concluded the circuit court properly affirmed the County's denial of Donna Murr's request for a variance to separately sell or develop what are known as Lots E and F, two contiguous parcels on the St. Croix River.

App. at A-2 ¶ 2. The Wisconsin Supreme Court subsequently denied review. App. at A-5 ¶ 7.

Having exhausted their administrative remedies and after receipt of a final decision denying relief, the Murrs filed a complaint alleging an uncompensated taking of vacant Lot E. They contend that without the ability to sell or develop the lot, it is rendered economically useless. The Murrs contended below that

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[3] *Id.* § 17.36 I.4.a.2 (Appendix at D-1).

the situation parallels the facts of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (denial of all economically viable use is a taking).

C. The Wisconsin Court Rejects a Categorical Taking by Defining the Relevant Parcel as Including Both Lots E and F

The Wisconsin Court of Appeals applied federal takings law to reject the Murrs' claim for compensation.[4] The analysis begins with the recognition that the "federal and state constitutions do not prohibit the taking of private property for public use, but they do require that government provide just compensation for any taking." App. at A-7 ¶ 13. In footnote 7, the court quoted the Fifth Amendment's Takings Clause and noted its similarity to the Wisconsin constitutional provision. *Id.*

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[4] The Murrs presented their claim under the state constitutional provision, however, the Wisconsin Court of Appeals determined the takings analysis based on federal takings law, and most particularly this Court's decision in *Penn Central*. Where the state court of last resort *actually determines* a federal question, it does not matter whether the federal claim was properly before it in order to confer jurisdiction under 28 U.S.C. § 1257. *Orr v. Orr*, 440 U.S. 268, 274-75 (1979). It is enough that the state court reached and decided the federal question, as though properly raised. *Jenkins v. Georgia*, 418 U.S. 153, 157 (1974); *Ocala Star-Banner Co. v. Damron*, 401 U.S. 295, 299 n.3 (1971). Under these circumstances, the Court has recognized jurisdiction, including in takings cases. *See*, e.g., *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 159 n.5 (1980) (taking claim raised under the Florida Constitution but general ruling of no unconstitutional taking was sufficient basis for Supreme Court consideration of the federal issue). *See generally* Stephen M. Shapiro, Supreme Court Practice § 3.19 (10th Ed., 2013).

Turning to the merits, the Wisconsin court recognized that defining the relevant parcel was central to analyzing the taking claim. The Murrs argued that the relevant parcel for takings purposes is investment Lot E, and only Lot E. They did not include any claim for a taking of Lot F. In contrast, the government defendants argued that for purposes of analyzing whether there was a denial of all economically viable use, the relevant parcel was Lot E *combined with* Lot F.

The Wisconsin appellate court ruled that because the two lots are contiguous, and happen to be owned by the same people, this Court's "parcel as a whole" rule from *Penn Central* requires combining the two parcels for takings analysis. As stated below:

> "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . .'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

App. at A-10 ¶ 18 (quoting *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (emphasis added).

The Murrs argued that they had been deprived of at least one of their two separate and discrete parcels. From their perspective, these were two separate parcels, created as legally separate lots, taxed

separately, and purchased separately. The lots were never developed together, and were purchased for completely different reasons. But because the Murrs owned both parcels, the Wisconsin court ruled that together, these two parcels combined were the Murrs' "parcel as a whole." This conclusion was driven by the contiguous ownership.

> [T]he Murrs assert they have been wholly deprived of the use of at least one of their two separate parcels. We disagree. There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, **contiguousness is the key fact** . . . .

App. at A-10 ¶ 19 (emphasis added). The court repeated again that the Supreme Court of the United States "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." Accordingly, the court below concluded by proclaiming

> a well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

App. at A-11 ¶ 20 (emphasis added).

Given this analysis of *Penn Central*, it was very easy for the Wisconsin court to find there was no taking as a matter of law.

> With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a

> single, buildable lot under the ordinance. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes.

App. at A-12 ¶ 22.[5] Of course, as will be shown below, the "rule" that the Wisconsin court derives from *Penn Central* strikes a resounding gong highlighting the significant conflict that has developed among the state and federal courts concerning the "parcel as a whole" issue.

Based on this rationale, the court below concluded that "the Murrs' property, viewed as a whole, retains beneficial and practical use as a residential lot." App. at A-18 ¶ 31. The court concluded as a matter of law that the Murrs have not alleged a compensable taking. *Id.*

[5] Under the ordinance, the Murrs were allowed to build on Lot E, or retain the cabin on Lot F, but not both. They could build on Lot E only "if they choose to raze the cabin." App. at A-12 ¶ 22.

ARGUMENT

REASONS FOR GRANTING THE WRIT

I

THE "PARCEL AS A WHOLE" CONCEPT PRESENTS A CRITICAL ISSUE OF FEDERAL TAKINGS LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

A. Determining the Relevant Parcel Is a Critical Issue That Controls the Outcomes of Many Takings Claims

Under either the *Lucas* categorical taking for denial of all economically viable use, or the *Penn Central* ad hoc, multi-factor approach, a court must determine the value and use of the property before and after the application of the restricting ordinance. But in order to measure the lost value, a unit of property must be determined to be the denominator in that calculation. This Court recognizes this is a "critical question[]" in the takings analysis.

> Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the **critical questions** is determining how to define the unit of property "whose value is to furnish the denominator of the fraction."

Keystone Bituminous Coal Association v. DeBenedictus, 480 U.S. 470, 496 (1987) (quoting Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1192 (1967) (emphasis added)). The Federal Circuit likewise explained:

> In many cases, as here, the definition of the relevant parcel of land is a **crucial antecedent** that determines the extent of the economic impact wrought by the regulation.

Lost Tree Village Corporation v. United States, 707 F.3d 1286, 1292 (Fed. Cir. 2013) (emphasis added). In takings involving parcels of land, this legal question is confronted in practically every case.

> Definition of the relevant parcel affects not only whether a particular regulation is a categorical taking under *Lucas*, but also affects the *Penn Central* inquiry into economic impact of the regulation on the claimant and on investment backed expectations. The relevant parcel determination is a question of law based on underlying facts.

Lost Tree Village, 707 F.3d at 1292.

B. This Court Recognizes the "Parcel as a Whole" Concept Has Been Inadequately Developed, and Requires Supreme Court Guidance, Yet the Court Has Been Unable to Reach the Issue in Previous Takings Cases

Fifth Amendment jurisprudence is greatly lacking in determining what is the "parcel as a whole." This Court's frustration and discomfort with the existing law has been expressly acknowledged. In *Lucas*, the Court explained:

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since it does not make clear the "property interest" against which the loss of value is to be measured.

Lucas, 505 U.S. at 1016 n.7. This has resulted in inconsistent decisions.

> Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. (comparing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), with *Keystone Bituminous Coal Association v. DeBenedictus*). Despite acknowledging the problem, the facts in *Lucas* did not present the opportunity to address the issue. *Lucas*, 505 U.S. at 1016 n.7.

The Court recognized again its "discomfort" with the "parcel as a whole" rule in *Palazzolo v. Rhode*

Island, 533 U.S. 606 (2001). But again, the circumstances did not allow reaching the issue.

> This contention asks us to examine the difficult, **persisting question** of what is the proper denominator in the takings fraction. Some of our cases indicate that the extent of deprivation effected by a regulatory action is measured against the parcel as a whole; but we have at times expressed **discomfort with the logic of this rule**, a sentiment echoed by some commentators. Whatever the merits of these criticisms, we will not explore the point here. Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari.

Id. at 631 (citations omitted; emphasis added).

One of the critiquing commentators expressly cited in *Palazzolo* is John Fee, whose article in the University of Chicago Law Review is recognized as a significant work in its effort to point the Court in a logical direction for addressing the relevant parcel question. *Palazzolo*, 533 U.S. at 631 (citing John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994). In his opening paragraphs to describe the problem, John Fee presents the classic hypothetical that mirrors exactly the facts of the case presented by the Murr family in this petition. The Murrs own two side-by-side lots, one that is restricted and not allowed to be independently developed and sold, and the other with long-standing residential use. Matching that description, the Fee article explains:

> What the Court [in *Lucas*] did not decide, however, is how to determine the relevant parcel of land that is subject to the regulatory taking inquiry. Suppose, for instance, that only one of Lucas's two parcels were subjected to the government regulation. Would there have been a taking of only that parcel? Or would the Court have analyzed the effect of the regulation on the two lots combined, finding that—because some beneficial use remained for the property as a whole—no taking had occurred?

Fee, 61 U. Chi. L. Rev. at 1535-36. That is precisely the factual context of this petition. The importance of the issue is well recognized, and the time and circumstances are ripe for this Court to finally address the issue.

C. The Factual Context Presented in This Petition Is Ideal for Providing Practical Guidance to the Relevant Parcel Question and How the "Parcel as Whole" Concept Is to Be Applied

This petition provides the Court with the best factual context for developing the parcel as a whole jurisprudence. First, and most important, the case involves land, traditional parcels, and common residential lots. Furthermore, the alleged taking is not of an unusual property interest. This is in contrast to cases such as *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), where, in the context of a moratorium that only temporarily precluded all use, the plaintiff argued for a taking of a "temporal slice" of the fee interest. The petitioners' "conceptual severance" argument was

unpersuasive, as the Court relied on the parcel as a whole concept to reject dividing the property into temporal segments. *Id.* at 331. While important, such precedent does not answer the far more common and persistent problem facing the Murr family.

Similarly, *Andrus v. Allard*, 444 U.S. 51 (1979), has little bearing on most property owners. There, a prohibition on commercial transactions in eagle feathers was not a taking. The Court would not divide the property interest into discrete segments, and affirmed that "where an owner possesses a full bundle of property rights, the destruction of one strand of the bundle is not a taking." *Id.* at 65-66. In contrast, the Petitioners here allege a taking of the entire fee interest of Lot E. The question presented focuses on the problem of contiguous ownership, and that issue, as pointed out by John Fee, has not been answered by this Court, but should be.

Other cases similarly derive from unusual fact patterns. *See*, e.g., *Penn Central* (alleging a taking of air space); *Keystone Bituminous Coal Association* (taking allegation based on requirement that pillars of coal be left in place). In contrast, the factual context here provides the opportunity for understanding how the parcel as a whole concept applies in the typical situation of horizontal divisions of property into lots and parcels where the allegation is a taking of the entire fee interest. This is a question that needs resolution.

> The Supreme Court has thus failed to provide clear guidance to courts on the denominator question—especially in horizontal cases. Not only has the Court never decided a case involving the horizontal

> division of land, but it has failed to define "parcel as a whole." Until this issue is resolved, lower courts will continue to face the crucial question: economically viable use of *what* land?

Fee, 61 U. Chi. L. Rev. at 1545 (italics in original). This case squarely presents that opportunity.

D. State and Federal Courts Are in Substantial Conflict

In the context of actual land (as contrasted with air space, temporal segmentation, or cases involving merely a strand in the bundle of rights), the federal and state courts have been left without clear guidance from this Court on when to aggregate parcels for takings analysis. Not surprisingly, the result has been inconsistent and contradictory approaches.

On one extreme, the Wisconsin court below focused on contiguity as the "key fact" and held that the *Penn Central* "parcel as a whole" concept establishes a "rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." App. at A-11 ¶ 20. Michigan is similar. *See Bevan v. Brandon Township*, 475 N.W.2d 37, 43 (Mich. 1991) (despite division into separate, identifiable lots, the court ruled that "contiguous lots under the same ownership are to be considered as a whole").

Not willing to go that far, the Massachusetts Supreme Court did not establish a "rule" based on commonly owned contiguous property, but instead viewed those facts as establishing a rebuttable presumption for defining the parcel as a whole.

> We conclude that the extent of contiguous commonly owned property gives rise to a rebuttable presumption defining the relevant parcel.

Giovanella v. Conservation Commission of Ashland, 857 N.E.2d 451, 458 (Mass. 2006). That court based its presumption on a view of common sense. "Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property." *Id.* But the court also confessed that such a rule is "the most easily measured." *Id.*

In sharp conflict, Florida makes the opposite presumption. There, adjoining lots created under the state laws are presumed to be separate.

> [W]e believe that a presumption of separateness as to vacant platted urban lots is reasonable and would facilitate the determination of the separateness issue in the absence of contrary evidence.

Department of Transportation, Division of Administration v. Jirik, 498 So. 2d 1253, 1257 (Fla. 1986). That court had a different view of common sense, pointing out instead that the formal process of subdividing lots should not so easily be disregarded by government in defending takings claims. *Id.*

> Furthermore, an owner of platted city lots cannot easily abandon or disregard formally established divisions because planning boards, city commissions, and other governmental entities must approve such decisions.

Id. The court concluded, "We therefore hold that vacant city property constitutes presumptively separate units if platted into lots." *Id.* If the Murrs were in Florida, they likely would have received compensation for the taking of Lot E.

Idaho and Ohio also are more likely to treat separate parcels separately. *See City of Coeur d'Alene v. Simpson*, 136 P.3d 310 (Idaho 2006) (reversing trial court decision that aggregated two contiguous parcels); *State ex rel. R.T.G., Inc. v. Ohio*, 780 N.E.2d 998, 1009 (Ohio 2002) (approximately 100 acres outside of the regulated area was not included in the relevant parcel even though it was contiguous and commonly owned).

Similar division is found among the federal courts. The D.C. Circuit Court of Appeals combined nine separate parcels under common ownership for takings analysis in *District Intown Properties Ltd. Partnership v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999). The concurrence pointed out:

> The majority applies an apparent presumption that contiguous parcels under common ownership should be treated as one parcel for purposes of the takings analysis. This presumption tends to reduce the likelihood that courts will order compensation.

Id. at 885 (Williams, J., concurring). But the majority responded to this criticism by pointing out, "Unless and until the [Supreme] Court instructs otherwise, we are obliged to judge within the bounds of established precedent." *Id.* at 882. Of course, the problem is the differing views of just what is the established precedent with regards to the parcel as a whole.

Other federal courts do not view common ownership as creating a presumption of aggregation.

> Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified. The trial court's conclusion to the contrary was error.

Palm Beach Isles Associates v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000). *See also American Savings & Loan Association v. County of Marin*, 653 F.2d 364, 369-71 (9th Cir. 1981) (contiguously owned parcels not presumptively aggregated).

In short, the various approaches to treating contiguous, commonly owned properties in defining the relevant parcel is a significant issue that warrants review by this Court. As pointed out by Professor Mandelker,

> The Supreme Court's views on this issue are conflicting, and no principled basis for determining the segmentation of property interests has emerged.

Daniel R. Mandelker, *New Property Rights Under the Takings Clause*, 81 Marq. L. Rev. 9, 16 (1997). The time has arrived for this area of law to finally be addressed.

> Defining the relevant parcel based solely on contiguous common ownership has an advantage in that it is easy to apply. But it does little to serve the policies underlying the Takings Clause. As a standard of just

> compensation, it is simply illogical. Why should the law declare that a landowner may not own more than one adjacent "parcel" of land, each independently protected by the Fifth Amendment? A unity-of-ownership standard, for its simplicity, results in arbitrary treatment of landowners and harmful distortions of real estate markets.

John E. Fee, *Of Parcels and Property*, *in* Taking Sides on Takings Issues: Public and Private Perspectives 101, 112 (Thomas E. Roberts, ed. 2002). The arbitrariness of such a rule is evident in the present case where if *any person other than the Murrs* owned Lot E, that owner would be able to construct a home under the grandfather clause in the ordinance. It is only the Murrs, as the abutting owners, who are forced into the merger of these otherwise discrete and separate lots. This significant issue warrants review.

> How to define the horizontal boundaries of land for purposes of determining whether there is a regulatory taking—the very issue the Court dodged in *Palazzolo*—is perhaps the **most significant unresolved question** [concerning the Takings Clause].

Id. at 102 (emphasis added). The present case provides the opportunity that was absent in *Palazzolo* and *Lucas*.

CONCLUSION

The time and opportunity has arrived for this Court to finally resolve a persistent and key issue in regulatory takings law. The "parcel as a whole" concept has never been applied by this Court to a horizontal division of a fee interest in land. Yet, this factual context will be most useful to lower federal and state courts. For all the reasons expressed, it is urged that the petition for writ of certiorari be granted.

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Respectfully submitted,

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