No. 15-214

In the Supreme Court of the United States

JOSEPH P. MURR, ET AL., PETITIONERS,

v.

STATE OF WISCONSIN, ET AL.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

BRIEF FOR RESPONDENT STATE OF WISCONSIN

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QUESTION PRESENTED

Whether land lots that were created and defined under state law, which merged pursuant to a preexisting state law merger provision, are a single "parcel" for regulatory takings purposes.

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INTRODUCTION

Since 1976, Wisconsin law has provided that when contiguous substandard lots within the Lower St. Croix National Scenic Riverway come into common ownership, those lots merge, such that they cannot be sold or developed separately. Wisconsin law also includes a grandfather clause that protects those who owned land in the area on January 1, 1976. This pairing of a lot merger provision with a grandfather clause is how many States reasonably strike the balance between phasing out substandard lots to reduce overcrowding and safeguarding property owners' settled expectations.

Petitioners voluntarily triggered this state law merger provision by bringing two contiguous substandard lots into common ownership through real estate transactions that concluded in 1995. After being denied certain variances and conditional uses, Petitioners filed a takings claim. Given that takings analysis "has traditionally been guided by the understandings of our citizens regarding the content of . . . the 'bundle of rights' that they acquire *when they obtain title to property*," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1027 (1992) (emphasis added), it is plain that Petitioners took title to a single merged lot in 1995 under both state law and takings law. The land at issue is thus a "single" parcel, just as the Wisconsin Court of Appeals properly held. Petitioners' argument that the courts should view their land as two separate parcels, based upon how they were

treated under state law before they triggered the merger provision, would "divide a single parcel into discrete segments," something this Court has held impermissible. *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130 (1978).

While Petitioners' land is one parcel under any reasonable approach, the State of Wisconsin respectfully submits that this Court should decide this case in a manner that provides guidance in this complex area of law. Identifying the relevant "parcel" for regulatory takings purposes has been a "difficult, persisting question." *Palazzolo v. Rhode Island*, 533 U.S. 606, 631 (2001). This problem can be solved by the approach that this Court suggested in *Lucas*: the relevant parcel should be identified by property owners' objectively "reasonable expectations" as "shaped by the State's law of property." 505 U.S. at 1016 n.7. This approach would provide an objective basis for identifying the relevant parcel, while giving sufficient respect to all of the interests at stake.

STATEMENT

A. Land Lots Are Creatures Of State Law

1. Under the Constitution, each State has the sovereign right to control the creation and significance of lot lines within its borders. *See Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 708 (2010) ("Generally speaking, state law defines property interests . . . ."); *McKeen v. Delancy's*

Lessee, 9 U.S. (5 Cranch) 22, 32 (1809) (recognizing the primacy of "the statutes of a state on which land titles depend"). Indeed, a "lot" in this country is now defined as a "plot or portion of land assigned *by the state* to a particular owner." 9 *Oxford English Dictionary* 40 (J.A. Simpson & E.S.C. Weiner eds., 2d ed. 1989) (emphasis added); *see also id.* (explaining that this meaning of the term "lot" applies "[n]ow chiefly in *U.S.*"). [1]

2. Historical practice supports the understanding that lot lines are creatures of state law.

Since at least the early 16th Century, English landholdings were defined through "naming and bounding" by way of written "metes and bounds." David Buisseret, *The Mapmakers' Quest: Depicting New Worlds In Renaissance Europe* 152 (2003).[2] "Metes"

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[1] Municipalities, zoning boards, and other local entities are "merely [ ] department[s] of the state," and thus "remain[ ] the creature[s] of the state exercising and holding powers and privileges subject to the sovereign will." *City of Trenton v. New Jersey*, 262 U.S. 182, 187 (1923).

[2] Of course, boundaries were not invented by the English. The Romans celebrated a festival called "Terminalia" to honor the god of boundaries during which "landowners would meet at their common boundary stone." Walter G. Robillard & Donald A. Wilson, *Brown's Boundary Control and Legal Principles* 4 (4th ed. 1995). The Greeks labeled boundaries as "sacrosanct." *Id.* at 3. And the Bible confirms the long pedigree of land boundaries: "Do not move your neighbor's boundary stone set up by your predecessors in the inheritance you receive in the land the Lord your

literally means "measurements" or "to assign measurements," while "bounds" simply means "boundaries." 9 Julius L. Sackman, et al., *Nichols on Eminent Domain*, § G33.03(2)(a) (3d ed. 1997).[3] Describing lands by "metes and bounds" relied upon local geographical features such as marks on the ground, fences, physical monuments, and natural features, such as rivers. *Id.* A typical description for a small parcel would be: "Bounded on the north by Bog Creek . . . bounded on the east by a stone wall . . . ." 11 *Thompson on Real Property* § 94.07(s)(1) (David A. Thomas ed., 2d ed. 2009). Metes and bounds were then recorded in official cadastral survey books. *See*

God is giving you to possess." *Deuteronomy* 19:14 (New International Version).

[3] In Medieval England, the ritual of "beating the bounds" was of particular importance to defining the boundaries of a parish, manor, or royal forest. Allegra di Bonaventura, *Beating the Bounds: Property and Perambulation in Early New England*, 19 Yale J.L. & Human. 115, 118 (2007). These "periodical surveys" preserved "ancient boundaries" by, among other methods, requiring young boys to beat a boundary mark "with peeled willow wands to impress its location on their memories." 3 *The New International Encyclopedia* 16 (2d ed. 1917). "[T]o preserve evidence of particular boundaries," the "boys themselves" were sometimes whipped "on the spot" in exchange for a fee, "it being thought that the impression made on the memory was thus more likely to be lasting." *Id.* The testimony of boys—beaten during these ceremonies—was used to settle more than one boundary dispute. *See* Walter G. Robillard, et al., *supra*, at 6; Bob Bushaway, *By Rite: Custom, Ceremony and Community in England 1700-1880*, 84 (1982).

Judith A. Tyner, *The World of Maps: Map Reading and Interpretation for the 21st Century* 51 (2015).

American colonists imported this metes-and-bounds system into the New World, using this recording method to divide up the abundant land that they sought to distribute and develop. *See* 14 Richard R. Powell, *Powell on Real Property* § 81A.05(b)(i) (Michael Allan Wolf ed., 2013); *see also* 1 Walter Robillard, *Clark on Surveying and Boundaries* § 6.01 (8th ed. 2014). The term "lot" derives from the practice of "casting of lots," a method of selecting plots of land for development commonly used by American settlers. 1 *Thompson on Real Property, supra*, § 6.12(e)(2); 9 *Oxford English Dictionary*, *supra*, at 40 (citing early American usages).

As Americans moved westward, the need to describe accurately the subdivision of raw land into saleable tracts became critical. Following the adoption of the Land Ordinance of 1785, the land of the future State of Wisconsin (along with Ohio, Indiana, Illinois, and Michigan) was surveyed, mapped, and organized into a "rudimentary framework for control of [future] land subdivisions." Rodger A. Cunningham, William B. Stoebuck, & Dale A. Whitman, *The Law of Property* § 9.15 (Lawyer's ed. 1984). The Land Ordinance relied heavily on the term "lot" (using the term twenty times), calling for "plats of [ ] township[ ] . . . marked by subdivisions into lots of one mile square, or 640 acres." Ordinance of May 20, 1785, 28 J. Continental Congress 376 (John C. Fitzpatrick ed., 1933). While

some "lots" were to be reserved for the United States, and others reserved for "the maintenance of public schools," and the remainder "so many lots" were to be reserved "for future sale." *Id.* at 378.

Three different methods of land division ultimately came into common usage: metes and bounds, government survey, and lot and block. *See* 11 *Thompson on Real Property*, *supra*, § 94.07(s). Metes and bounds is a system used to describe property based on landmarks and the length and direction of the boundaries from the perspective of someone walking the property. *See id.* § 94.07(s)(1). The government survey system divides up newly acquired public land into future saleable grids by creating "guide meridians," "townships," and "sections" or "lots." *Id.* at § 94.07(s)(2); *see also* Walter Robillard, *supra*, § 5.01; Cunningham, Stoebuck, & Whitman, *supra*, § 9.15. Finally, the lot and block system subdivides larger tracts of land, generally in urban and suburban areas. "When a tract is to be sold out in small parcels, it is customary to have the land surveyed into lots, or into blocks which in turn are subdivided into lots." 3 *American Law of Property* § 12.102 (Casner ed. 1952). The lots are recorded on a "plat of a survey [ ] filed with the recording office and copied into a 'plat book.'" *Id.* A "plat," in turn, is a "map or plan of delineated or partitioned ground; esp., a map describing a piece of land and its features, such as boundaries, lots, roads, and easements." *Plat* (2), *Black's Law Dictionary* (10th ed. 2014).

Today, parcels of land can be described using any of these systems, and sometimes more than one. *See* 11 *Thompson of Real Property*, *supra*, §§ 94.07(s), (s)(3); *see also* 4 *Tiffany Real Property* §§ 992, 994 (3d ed. 2015). For example, the lots at issue in this case are described both by reference to certified survey maps filed in the county register of deeds and by metes and bounds descriptions. JA 11–12.

3. As part of the very first laws passed after statehood, Wisconsin required all towns to be surveyed, with lots described on a plat map, and recorded with a county register of deeds. *See* Wis. Laws of 1849, ch. 41, §§ 1, 2, & 6.

Today, Wisconsin law provides for the creation of lots through the subdivision of land, which involves an initial survey of land and the creation of a plat map identifying the lot lines and each lot's area in square feet. Wis. Stat. §§ 236.03, .20(2)(c), (e), & (j). The final plat must then be recorded, subject to the approval of appropriate officials or boards. *See* Wis. Stat. §§ 236.10–.295; *Town of Sun Prairie v. Storms*, 327 N.W.2d 642, 643 (Wis. 1983).

Wisconsin law does not require that platted lot lines be permanent fixtures, although property owners must comply with state law when redrawing or adjusting those lines. So long as the change does not alter the exterior boundaries of the lot, the lot may be altered using the same methods utilized for subdivisions of property. *See* Wis. Stat. §§ 236.02(11), .45.

Such an alteration may be accomplished by either a "certified survey map" or a plat, depending on the number of lots created in the alteration and the applicable local ordinances. Wis. Stat. §§ 236.34, .45. A "certified survey map" is less involved than a plat and requires fewer administrative approvals. *Compare* Wis. Stat. § 236.34 *with* §§ 236.10–236.21. If the change requires the alteration of the exterior boundaries of the lot, then a replat is required. *See* Wis. Stat. § 236.02(11). If the replat affects areas designated for public use, then it must be approved by a court in the county in which the land is located. Wis. Stat. § 236.36. Any alteration must comply with all applicable state and local regulations and be approved by the relevant officer or committee before being recorded with the office of the register of deeds of the county in which the land is situated. Wis. Stat. §§ 236.10, .13, .25, .335, .34.

Unless a specific state law or regulation, or state-authorized local law, ordinance or regulation, provides to the contrary, each platted lot in Wisconsin may be sold and developed separately from its neighboring lots. *See generally* Wis. Stat. §§ 706.01(7r), .02, .05.

B. Lot Merger Is A Commonly-Used Tool For Phasing Out Substandard Lots

A "substandard lot" is a parcel of land that fails to meet minimum lot-size requirements. 7 Patrick J. Rohan, *Zoning and Land Use Controls* § 42.03(2)(a)

(Eric Damian Kelly ed., 1997). "[L]ots that are lawfully subdivided when they are created are classified as nonconforming 'substandard' lots when subsequent regulations increase the minimum lot size, setbacks, or other dimensional requirements." 2 Patricia E. Salkin, *American Law of Zoning* § 12.12 (5th ed. 2016). The need to phase out substandard lots, while protecting property owners' settled expectations, is a recurring challenge in real property law. States and their political subdivisions have endeavored to solve this problem by adopting a variety of minimum lot-size restrictions, grandfather clauses, and merger provisions.

1. During the mid-19th century, many States did not have any minimum lot-size restrictions. *See* 7 Rohan, *supra*, § 42.03(2)(a). As a result, "land speculation led to the platting of thousands of subdivisions," and "[m]any of these were poorly designed, with small lots and inadequate streets, and were lacking utilities." 13 Richard R. Powell, *supra*, § 79D.03(1)(b).

As States realized the "host of evils" that narrow lots created, *see* U.S. Department of Commerce, *A Standard City Planning Enabling Act* 27 n.71 (1928), and the "benefits" that minimum lot provisions could provide, Salkin, *supra*, § 9:66, they amended their laws to provide for such regulations. For example, while Wisconsin's original laws did not contain any minimum lot-size requirements, that eventually changed. In 1955, Wisconsin passed a statute requiring that, in counties having a population of less than

40,000 residents, "each lot in a residential area shall have a minimum average width of 60 feet and a minimum area of 7,200 square feet." Wis. Laws of 1955, ch. 570, § 4 (codified at Wis. Stat. § 236.16). The law was later amended to require lots to have "access to a public street unless otherwise provided by local ordinance." Wis. Laws of 1961, ch. 214, § 11 (codified at Wis. Stat. § 236.20(4)(d)). The law permitted cities, towns, and counties to adopt more restrictive requirements, including more restrictive minimum lot-size requirements. Wis. Laws of 1955, ch. 570, § 4 (codified at Wis. Stat. § 236.45).

2. When a State or its political subdivisions adopts a new minimum lot-size restriction, existing lots are often rendered substandard. *See* 3 Arden H. Rathkopf, et al., *Rathkopf's The Law of Zoning and Planning* § 49:4 (4th ed. 2016). Absent other relief, these substandard lots could not be developed, working a hardship upon the owners. *See id.* § 49:16. Accordingly, lot-size restrictions typically include grandfather clauses, permitting the continued use of now substandard lots. *See id.* § 49:25. These grandfather clauses are generally limited to lots in single, separate ownership at the time of the enactment of the minimum lot-size restrictions. *See id.* § 49:13.

Lot merger is a companion concept to minimum lot-size restrictions and grandfather clauses. Because the combination of lot-size restrictions and concomitant grandfather clauses is designed to eliminate substandard lots while protecting settled property rights,

state law will often include a merger provision, either in the regulatory text or by way of judicial construction. *See* Salkin, *supra*, §§ 9:69, 12:12 & n.8 (collecting cases). A merger provision typically requires that contiguous substandard lots that come into common ownership will merge into one lot, such that they cannot be separately developed or sold. *Id.*; *see also* Rathkopf, *supra*, § 49:13; Rohan, *supra*, § 42.03(2)(a).

3. Many States have addressed the merger of nonconforming lots, and have done so in a variety of ways, reflecting varying policy preferences and special needs. In addition, many municipalities have adopted merger provisions, consistent with authorization granted under state law. *See generally* Rathkopf, *supra*, § 49:13. This subsection provides a brief sampling of some approaches to merger adopted by state legislatures themselves, which is only a small slice of such provisions that have been adopted by States and their subdivisions.

Some States provide explicit permission to local governmental units to enact merger provisions, subject to certain mandatory standards. California, for example, allows municipalities to adopt ordinances merging contiguous, commonly owned parcels, assuming that one of the lots is nonconforming. *See* Cal. Gov. Code § 66451.11. Similarly, Rhode Island authorizes cities and towns to adopt merger provisions for "contiguous unimproved, or improved and unimproved, substandard lots of record in the same ownership," in order to create "dimensionally conforming

lots or to reduce the extent of dimensional nonconformance." R.I. Gen. Laws § 45-24-38.

Other States either require or prohibit merger under certain conditions. Minnesota, for example, mandates that counties "regulate the use of nonconforming lots" in "shoreland areas" by, among other ways, ensuring that "two or more contiguous lots of record under a common ownership," which do not meet certain minimum standards, "must be combined . . . as much as possible." Minn. Stat. § 394.36(5)(c) & (d); *see id.* § 394.36(5)(e) (grandfather clauses). Vermont, in turn, allows merger by local ordinance unless the nonconforming lot meets appropriate standards for water supplies and wastewater systems. Vt. Stat. tit. 24, § 4412(2)(B).

Some States significantly limit the authority of political subdivisions to merge lots without the owners' consent. New Hampshire provides only for "voluntary merger," N.H. Rev. Stat. § 674:39-a, and even gives landowners a method for un-merging ("restored to their premerger status") if lots were "involuntarily merged prior to September 18, 2010," *id.* § 674:39-aa. Colorado similarly requires "consent to the merger of said parcels." Colo. Rev. Stat. § 30-28-139(2)(a). Other States are particularly concerned with notice and process, such as New Mexico, which allows merger of contiguous parcels only after "notice and public hearing." N.M. Stat. § 47-6-9.1; *see also* Cal. Gov. Code § 66451.13; Colo. Rev. Stat. § 30-28-139(1)(a).

Finally, some States have internally diverse merger regulations, providing for merger in different circumstances. California, for example, employs a subdivision statute specifically related to Napa County. Cal. Gov. Code § 66451.22. This statute explains that in order to "adequately protect the value and productivity of the county's agricultural lands, Napa County needs relief from the Subdivision Map Act's implied preemption of local ordinances that may require merger of parcels that do not meet current zoning and design and improvement standards." *Id.* § 66451.22(a)(4). Minnesota similarly contains a merger provision designed specifically for "shoreland lots." Minn. Stat. §§ 394.36 & 462.357(1e)(d).

C. Factual Background

1. "The Lower St. Croix Riverway is a narrow corridor that runs for 52 miles along the boundary of Minnesota and Wisconsin, from St. Croix Falls/Taylors Falls to the confluence with the Mississippi River . . . ." *Cooperative Management Plan: Lower St. Croix National Scenic Riverway* (Jan. 2002), at 3.[4] "The riverway's scenery, plentiful fish and wildlife, largely unpolluted, free-flowing character, numerous access points, and closeness to the Twin Cities attract many people in the late spring, summer, and fall." *Id.* The River "exhibits a highly scenic course," complemented by "a lake-like river environment" near Petitioners'

[4] https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf.

property. *Sierra Club N. Star. Chapter v. Pena*, 1 F. Supp. 2d 971, 982 (D. Minn. 1998) (citation omitted). In 1972, Congress designated the Lower St. Croix Riverway as one of the "selected rivers of the Nation, which, with their immediate environments, possess outstandingly remarkable scenic, recreational, geologic, fish and wildlife, historic, cultural, or other similar values." *See* 16 U.S.C. § 1271.

The Wisconsin Legislature has enacted special protections for this area to fulfill the State's responsibility to "protect and preserve [Wisconsin's] waters for fishing, hunting, recreation and scenic beauty." *Wisconsin's Envt'l Decade, Inc. v. Dep't of Nat. Res.*, 271 N.W.2d 69, 72 (Wis. 1978). In particular, the Legislature required the Wisconsin Department of Natural Resources (WDNR) to adopt "specific standards for local zoning ordinances which apply to the banks, bluffs and bluff tops of the Lower St. Croix River." Wis. Stat. § 30.27(2)(a). The standards must regulate new construction and establish "acreage, frontage and setback requirements." *Id.* § 30.27(2)(a)2. The Legislature also required all "counties, cities, villages and towns lying, in whole or in part, within the" River to "adopt zoning ordinances complying with the [WDNR] guidelines and standards." *Id.* § 30.27(3).[5]

[5] Wisconsin worked with Minnesota and the Federal Government to develop a cooperative management plan for the River. *See Cooperative Management Plan: Lower St. Croix National Scenic Riverway* (Jan. 2002), https://www.rivers.gov/documents/plans/lower-st-croix-plan.pdf. Wisconsin's

WDNR satisfied its duty under Wis. Stat. § 30.27 by adopting mandatory standards for St. Croix River zoning regulations. Wis. Admin. Code ch. NR 118. The WDNR regulations provide that the Lower St. Croix Riverway be divided into five management zones, with different minimum lot sizes for different management zones. *Id.* § NR 118.04. In the rural residential zone, where Petitioners' property is located, JA 66, WDNR requires that "[t]he minimum lot size [ ] have at least one acre of net project area." Wis. Admin. Code § NR 118.06(1)(a)2.a. "Net project area" is defined as "developable land area minus slope preservation zones, floodplains, road rights-of-way and wetlands." *Id.* § NR 118.03(27). A lot that does not conform to the minimum lot size requirement is deemed "substandard." *See id.* § NR 118.03(48).

The WDNR regulations include a grandfather clause for lots rendered substandard by the new lot size requirements, which provides that "[l]ots of record in the register of deeds office on January 1, 1976 . . . which do not meet the requirements of this chapter, may be allowed as building sites provided that" either "[t]he lot is in separate ownership from abutting lands, or [t]he 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." *Id.* § NR 118.08(4). The standards also

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participation in this project was voluntary, *see* 16 U.S.C. § 1283(a), and the State protects the Wisconsin portion of the River through its own sovereign choices.

provide 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." *Id.*[6]

The Wisconsin Court of Appeals has adopted an authoritative interpretation of the WDNR regulations as merging two substandard, contiguous when those lots come into common ownership. *Murr v. St. Croix Cnty. Bd. of Adjust.* (*Murr I*), 796 N.W. 2d 837, 844 (Wis. Ct. App. 2011).[7] In a section of a published opinion titled "Merger of Lots," the court rejected the argument that for lots to merge, the State must have adopted a more "explicit merger clause." *Id.* at 843. Instead, the court interpreted the WDNR regulations as merging "adjacent substandard lots [when such lots] come under common ownership." *Id.* at 844. Given that this interpretation of the WDNR regulations was entered in a case involving the same parties as those here, this interpretation is binding. *See Masko v. City of Madison,* 665 N.W.2d 391, 394–95

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[6] As required by state law, Wis. Stat. § 30.27(3), St. Croix County has adopted zoning ordinances at least as restrictive as the WDNR regulations. *See* JA 7; *see also* St. Croix County, Wis., Code of Ordinances § 17.36 (2005); Wis. Admin. Code § NR 118.02(3). For simplicity, the State refers only to the WDNR regulations.

[7] This was Petitioners' appeal in a separate, but related case, which is not under review by this Court. *See infra* pp. 19–20.

(Wis. Ct. App. 2003); *Wis. Pub. Serv. Corp. v. Arby Const., Inc.*, 818 N.W.2d 863, 870 (Wis. 2012).[8]

2. Petitioners' property sits in the middle of the Cove Court subdivision in St. Croix County, which

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[8] The WDNR regulations, Wis. Admin. Code ch. NR 118, which have undergone several changes since originally promulgated in 1975, are admittedly "not a model of clear draftsmanship." *Murr I*, 796 N.W.2d at 843; *see* Wis. Admin. Reg., Dec. 1975, No. 240, at 96-10 (providing that "substandard lots" that are "of record in the register of deeds office on the effective date of these rules or an enactment of amendment of the local ordinance" otherwise conforming to zoning and sanitary code requirements "may be allowed by the county as building sites provided that [t]he lot is in separate ownership from abutting lands"); Wis. Admin. Reg., June 1980, No. 294, at 392-1 (providing that pre-existing "substandard lots" otherwise conforming to zoning and sanitary code requirements "may be allowed as building sites provided that . . . [t]he lot is in separate ownership from abutting lands, or, if lots in an existing subdivision are in common ownership, that each of the lots have at least one acre of net project area"); Wis. Admin. Reg., Aug. 1986, No. 368, at 438 (clarifying that the grandfather clause applies to "[substandard] [l]ots of record in the register of deeds office on January 1, 1976 or the date of enactment of an amendment to a local ordinance"); Wis. Admin. Reg., Oct. 2004, No. 586, at 182-1 (adding the provision 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"). Any ambiguities in the text—either in its present form or during its various prior iterations—are not part of this case because the Wisconsin Court of Appeals adopted a definitive interpretation of the WDNR regulations in 2011, which is binding on the parties.

subdivision "features some of the most crowded development" in the rural residential zone of the Lower St. Croix Riverway. JA 66. Originally platted as two separate lots in the 1950s, JA 11–12, Lots E and F are bisected by a steep slope, with a drop of roughly 130 feet down to the water. JA 30; *see* JA 22, 28, 60 (maps). While each lot is approximately 1.25 acres, JA 6, because of the slope, neither lot has more than one acre of net project area. Accordingly, both lots are substandard under the WDNR regulations. Wis. Admin. Code § NR 118.08(6)(1)(a)2.a; JA 40. Lot F contains a building site with a cabin, while Lot E has no building site. JA 75.

As of January 1, 1976, the lot with the cabin, Lot F, was owned by William Murr Plumbing, Inc., and the vacant Lot E was separately owned by William and Margaret Murr. JA 6. As a result, the two Lots did not merge in 1976 under the WDNR regulations. Petitioners took title to both lots in two separate real-estate transactions in 1994 and 1995, thus merging them under state law. JA 20.[9]

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[9] As Petitioners have conceded, the two Lots actually first came under common ownership in 1982 when Lot F was "transferred from William Murr Plumbing, Inc. back to [the Murr parents]." Br. of Pet.-Appellant-Cross-Resp't, Murr I, 796 N.W.2d 837 (Wis. Ct. App. 2011) (No. 2008AP2728), 2009 WL 3848184, at *17 n.1. Thereafter, the Murr parents transferred Lot F and Lot E to Petitioners in 1994 and 1995, respectively. JA 6. The 1982 transaction has no relevance to the issues before this Court,

In 2006, Petitioners sought a variance from the St. Croix County Zoning Board of Adjustment for numerous issues, including to allow both lots to be used as "separate building sites." JA 62. The Board denied the variance, noting that Petitioners' two contiguous lots were substandard and in common ownership and that they could only be "developed and sold jointly as a single, more conforming parcel that is more suitable for residential development." JA 65. The Board explained that granting the variance "could result in yet another residence with access to the river, additional tree cutting and excavating, and another sanitary system in an area with serious limiting factors." JA 66. The Board also stated that development could lead to "soil erosion and pollution and contamination of surface water and groundwater," insufficient "space on lots for sanitary facilities," potential "flood damage," and detrimental impacts on "property values." JA 66. At least "eight other property owners in the immediate Cove Court/Cove Road area own one or more contiguous substandard lots along the river with just one building site." JA 67.

Later in 2006, Petitioners brought suit in St. Croix County Circuit Court, which—as relevant here—affirmed the Board's decision denying the variance to sell or use the two lots as separate building sites. *Murr I*, 796 N.W.2d at 840. On appeal, in 2011, the

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given that the parties have litigated the takings case on the assumption that the merger provision did not trigger until 1995.

Wisconsin Court of Appeals upheld the Board's decision. *Id.* at 840, 846. Petitioners argued that the lots had not merged because of the grandfather clause. *Id.* at 843. The Court of Appeals rejected this argument, holding that the grandfather clause did not apply and that Lot E and Lot F merged in 1995 when the two lots came under common ownership. *Id.* at 844. In reaching this decision, the court also gave an authoritative interpretation of the meaning of the WDNR regulations, as discussed above. *See supra* pp. 16–17. On May 24, 2011, the Supreme Court of Wisconsin denied review in the case, and upon remittur, the Court of Appeals' decision became the final judgment in the case. *See Murr v. St. Croix Cnty. Bd. Adjustment*, 803 N.W.2d 849 (Table) (Wis. 2011).[10]

3. Shortly after losing their appeal, in 2012, Petitioners filed a new action under Wis. Stat. § 32.10 and Article I, Section 13 of the Wisconsin Constitution, Wisconsin's takings clause, claiming that their property was taken without just compensation. The circuit court granted summary judgment to the defendants, finding that Petitioners' claim was time-barred. The court also analyzed the alleged taking "on the Murrs' property as a whole, not each lot individually." Pet. App. A-6. The court held that there was not a taking because the "Murrs' property, taken as a whole, could be used for residential purposes,

[10] Following final judgment definitively determining that the lots had merged, the St. Croix County Treasurer began taxing the lots under one, single assessment. *See* JA 23.

among other things." Pet. App. A-6. Specifically, the circuit court noted that a "year-round residence could be built on top of the bluff and the residence could be located entirely on Lot E, entirely on Lot F, or could straddle both lots." Pet. App. A-6. Whatever the loss, it did not amount to an unconstitutional taking—"the merger decreased the property value by less than ten percent." Pet. App. A-6.

On appeal, the Wisconsin Court of Appeals, in an unpublished, per curiam decision, affirmed. The court explained that, under the WDNR regulations, Petitioners "*never* possessed an unfettered 'right' to treat the lots separately." Pet. App. A-17–18 (emphasis added). "The 1995 transfer of Lot E brought the lots under common ownership and resulted in a merger of the two lots." Pet. App. A-3. The court focused on the Petitioners' "property as a whole," noting that there is "no dispute that their property suffices as a single, buildable lot under the Ordinance." Pet. App. A-12.

In rejecting Petitioners' argument that the property should be segmented into two lots, for purposes of the takings analysis, the Court of Appeals relied upon the Supreme Court of Wisconsin's decision in *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996). *See* Pet. App. A-10–11. In *Zealy,* the landowner had argued that the city accomplished a regulatory taking by creating a conservancy district over 8.2 acres of his single 10.4-acre parcel. *Zealy*, 548 N.W.2d at 529–30. In ruling for the landowner, the

Zealy Court of Appeals "held that a landowner's anticipated investment opportunities should be examined in order to determine what the parcel at issue should be." *Id.* at 532. The *Zealy* Supreme Court reversed, rejecting the owner's attempt to segment a single parcel based upon his claimed plans to use different parts of the property for different purposes. *Id.* at 535. The court noted the "difficulty in the application of the rule" that would look to the "landowner's subjective intent," adding that such an approach "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.* at 533.

Like the landowner in *Zealy*, Petitioners sought to segment a single parcel—that is, the combined Lots E and F after they merged in 1995—by relying upon their subjective plans for the property. Pet. App. A-3. The Court of Appeals in this case was thus entirely correct that *Zealy* prohibited such segmentation. Pet. App. A-10–11. However, in broad wording that was not necessary to its decision, the court also made the apparently categorical assertion that "contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." Pet. App. A-11.

The Court of Appeals then concluded its analysis by noting that "[t]here is no dispute that the property suffices as a single, buildable lot," and that Petition-

ers may "build a year-round residence" "located entirely on Lot E, entirely on Lot F" or "straddl[ing] both lots." Pet. App. A-12–13. Petitioners can make whatever arrangement they want as to the land, subject, of course, to other regulations, so long as they recognize that the merged lot is a "single, buildable lot" with a single residence. Pet. App. A-12. Because of the many options available, the court found no taking. Pet. App. A-13.

Petitioners sought review in the Supreme Court of Wisconsin, but their petition for review was denied. *Murr v. Wisconsin*, 862 N.W.2d 899 (Table) (Wis. 2015). Petitioners then filed a petition for certiorari in this Court, the State waived its response and St. Croix County opposed. This Court then granted certiorari. 135 S. Ct. 890 (Jan. 15, 2016).

SUMMARY OF ARGUMENT

I. This Court has developed a regulatory takings jurisprudence that requires courts to identify, as a threshold matter, the relevant "parcel" that is allegedly being taken. While this Court has never definitively explained how to define the relevant parcel, *Lucas* offered an important clue: "The answer to th[e] difficult question" of identifying the relevant parcel "may lie in *how the owner's reasonable expectations have been shaped by the State's law of property*." 505 U.S. at 1016 n.7 (emphasis added). The State of Wisconsin submits that the approach suggested by *Lucas* is the proper method for identifying the parcel.

The *Lucas* approach is consistent with this Court's caselaw. This Court has uniformly identified the property rights protected by the Takings Clause as those recognized by state law, *see Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972), *Stop the Beach,* 560 U.S. at 708, including when it comes to real property*, see Penn Central*, 438 U.S. at 130–131; *Lucas*, 505 U.S. at 1030. It is thus entirely sensible to look to the reasonable expectations shaped by that same state law when determining the relevant "parcel."

The approach suggested by *Lucas* is particularly appropriate when applied to land lots. The definition, alteration, and significance of lot lines are creatures of state law, and have been from the Founding. Where the State has chosen to make separately platted lots individually developable and saleable, a landowner's objectively reasonable expectations will naturally be that a lot is a separate "parcel." On the other hand, when a substandard land lot is subject to a merger provision under state law, such that it cannot be sold and developed separately from a neighboring, commonly owned lot, then the owner's objectively reasonable expectations would be that the lot is not a separate parcel. And, of course, each State has the sovereign right to decide the significance of lot lines in any particular locale, which decisions will shape property owners' objectively reasonable expectations.

Adopting the *Lucas* approach for land lots would forward "fairness and justice." *Armstrong v. United*

States, 364 U.S. 40, 49 (1960). By focusing on the *objective* expectations as shaped by state law, this methodology would ensure that all land that is regulated identically under state law is treated equally for regulatory takings purposes, without regard to property owners' idiosyncrasies or subjective plans for the land. The *Lucas* approach would also help to minimize strategic behavior by both sovereigns and property owners by establishing an objective baseline for determining the parcel. Notably, if a State sought to unexpectedly change its law, without providing adequate grandfather protection, that change itself could be subject to a challenge under the Takings Clause.

II. Applying the approach suggested by *Lucas* to the facts of the present case, it is clear that Lots E and F are a single parcel. When Petitioners "obtain[ed] title to" Lot E, *Lucas*, 505 U.S. at 1027, their objectively reasonable expectations were that, pursuant to the WDNR regulations, they would take title to a single merged parcel, not to two separate lots. As a result, Lots E and F are a single parcel for any regulatory takings claim that Petitioners would want to bring, whether that claim is against the State for regulating their land, as they have in this case, or against the Federal Government for any regulation that the Government may adopt.

The Wisconsin Court of Appeals was thus entirely correct to reject Petitioners' request to segment their merged parcel into two separate parcels for purposes of their regulatory takings claim. Petitioners' efforts

to distinguish between segmenting a single parcel (which *Penn Central* prohibits) and aggregating separate parcels (which *Lucas* explained is "unsupportable") thus cut entirely against their argument because this is a segmentation case, not an aggregation case. And to the extent Petitioners and their *amici* are concerned about a rule that would aggregate all contiguous, commonly-owned lots, that is not the law, as *Lucas* itself made clear. Rather, the inquiry in each case is the objectively reasonable expectations of the landowners, as shaped by state law. Where, as here, property owners acquire two substandard lots that are subject to a preexisting lot merger provision, those reasonable expectations are that they take title to a single merged parcel.

III. If this Court concludes that the approach suggested by *Lucas* is not appropriate, and instead adopts a multifactor test like that used by some lower courts, the result in the present case would be the same. In light of the preexisting lot merger provision, Petitioners had no economic expectations of being able to develop and sell Lot E separately from Lot F. That the lots are contiguous, were acquired by Petitioners just one year apart, and have been consistently treated by Petitioners as a single piece of land further support the conclusion that Lots E and F are a single parcel.

ARGUMENT

I. As This Court Suggested In *Lucas*, The Relevant Land "Parcel" Should Be Defined By Objectively "Reasonable Expectations," As "Shaped By The States' Law Of Property"

A. The Fifth Amendment's mandate that "private property [shall not be] taken for public use, without just compensation," U.S. Const. amend. V, is applicable to the States under the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). "As its text makes plain, the Takings Clause 'does not prohibit the taking of private property, but instead places a condition on the exercise of that power.'" *Lingle v. Chevron USA Inc.*, 544 U.S. 528, 536 (2005) (quoting *First English Evangelical Lutheran Church of Glendale v. Cnty. of Los Angeles*, 482 U.S. 304, 314 (1987)). The Clause offers protection from the government "forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Id.* at 537 (quoting *Armstrong*, 364 U.S. at 49).

In *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), this Court properly recognized that the Takings Clause applies to what has become known as "regulatory takings." *Mahon* explained that if the Takings Clause was limited only to physical appropriations of property, "the natural tendency of human nature [would be] to extend the qualification more

and more until at last private property disappear[ed].'" *Id.* at 415. *Mahon* did not provide extensive guidance as to how to identify the "property" allegedly being taken, or how to measure whether a taking had, in fact, occurred. *See Lingle*, 544 U.S. at 537–38; *Lucas*, 505 U.S. at 1015. Instead, this Court offered the guiding principle—"while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking," *Mahon*, 260 U.S. at 415—leaving it to future cases and the common law method to work out the doctrine needed to give life to this protection.

Since *Mahon*, this Court has delineated two categories of regulatory takings claims that require the court to identify the specific "parcel" allegedly being taken. First, where the regulation "denies all economically beneficial or productive use of land," there is a *per se* taking, requiring just compensation. *Lucas*, 505 U.S. at 1015. Identifying the relevant parcel is also critical to this type of takings claim because only by pinpointing the particular property can a court determine whether the challenged governmental action denies "all" economic value of that property. *Id.* at 1015–16 & n.7. Second, the vast majority of regulatory takings cases fall under the three-part framework articulated in *Penn Central*, 438 U.S. 104. Identifying the relevant parcel is critical to this inquiry because the central holding of *Penn Central* is that the single "parcel" in that case could not be "divide[d] . . . into discrete segments." *Id*. at 130. Since

such segmentation of a parcel is impermissible, it is critical to identify what the "parcel" is.[11]

This Court has never definitively explained how the non-segmentable "parcel" should be identified, describing this as a "difficult, persisting question." *Palazzolo*, 533 U.S. at 631. Having said that, this Court in *Lucas* offered an important suggestion: "The answer to th[e] difficult question" of identifying the relevant parcel "may lie in *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." 505 U.S. at 1016 n.7 (emphasis added). Respondent State of Wisconsin submits that this is the proper approach for identifying the relevant "parcel."

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[11] This Court has also identified a separate regulatory takings category: "where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation." *Lingle*, 544 U.S. at 538 (citing *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982)). Such takings claims do not appear to implicate any need to specify the particular "parcel" at issue, given that *any* physical occupation—no matter how small a part of the property—constitutes that sort of taking. *Loretto*, 458 U.S. at 426–27*; see also Horne v. Dep't of Agric.*, 135 S. Ct. 2419, 2429 (2015).

B. The state-law focused approach that this Court suggested in *Lucas* is consistent with this Court's caselaw.

This Court has uniformly defined the "property" protected by the Takings Clause with reference to state law. "Property interests, of course, are not created by the Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Roth*, 408 U.S. at 577. Or, as this Court recently explained in *Stop the Beach*, "[g]enerally speaking, state law defines property interests." 560 U.S. at 707 (citing *Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998)).

Examples from this Court's Takings Clause jurisprudence abound. In *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986 (1984), this Court found that trade secrets were subject to protection under the Takings Clause because they were property under Missouri law. *Id.* at 1003–04. Similarly, in *Preseault v. I.C.C.*, 494 U.S. 1 (1990), this Court noted that rails-to-trails conversions may or may not require compensation depending on the nature of property rights under state law. *Id.* at 16 & n.9; *see also id.* at 20–23 (O'Connor, J., concurring); *accord Phillips*, 524 U.S. at 163–68 (1998). Most relevant here, this Court has described real property in terms of state law. *See Penn Central*, 438 U.S. at 130–31 (the city tax block designated as

the "landmark site" under New York law); *Lucas*, 505 U.S. at 1016 n.7 ("fee simple interest" under South Carolina Law).

While these cases did not explicitly adopt the approach to the "parcel" question suggested by *Lucas*, their uniform reliance on state law as defining property rights to begin with is entirely consistent with looking to the objectively reasonable expectations that this state law creates.

This Court's decisions dealing with Pennsylvania mining "estates"—*Mahon*, 260 U.S. 393, and *Keystone Bituminous Coal Association v. DeBenedictis*, 480 U.S. 470 (1987)—illustrate the critical point that the *Lucas* approach requires looking at the property owners' objectively reasonable expectations as shaped by *all* of a State's laws. In *Mahon*, this Court held that the Kohler Act's prohibition on certain subsidence-causing mining was a taking, explaining that the right to mine the coal at issue was "a very valuable estate" under state law. 260 U.S. at 414. *Keystone*, in turn, dealt with the Subsidence Act, which prohibited similar subsidence-causing mining. The *Keystone* majority held that the Subsidence Act did not "take" the so-called "support estate" under Pennsylvania law. In explaining this conclusion, the *Keystone* majority deferred to "[t]he Court of Appeals, which is more familiar with Pennsylvania law than we are," in concluding that the support estate had no independent "value," except when paired with the mineral estate. 480 U.S. at 500–01. In contrast, the *Keystone*

dissent would have treated the support estate as a separate "parcel," given that it viewed the estate as "severable and of value in its own right" under Pennsylvania law. *Id.* at 514–15, 519–20 (Rehnquist, J., dissenting).

While these opinions reached arguably "inconsistent" results, *Lucas*, 505 U.S. at 1016 n.7, those differences can be explained by divergent *factual* understandings of objectively reasonable expectations under all of Pennsylvania's laws, disagreements that fit comfortably under *Lucas*. According to *Mahon* and the *Keystone* dissent, the estate was a "very valuable," "severable" property under state law. *Mahon*, 260 U.S. at 414; *Keystone*, 480 U.S. at 519–20 (Rehnquist, J., dissenting). It was thus objectively "reasonable," *Lucas*, 505 U.S. at 1016 n.7, for owners to view this estate as a separate "parcel."[12] In contrast, in the view of the *Keystone* majority, the support estate had no independent "value" under state law, except as it supported the mineral estate. 480 U.S. at 500–01. It would thus be objectively "reasonable," *Lucas*, 505

[12] *See* Benjamin Allee, Note, Drawing the Line in Regulatory Takings Law: *How a Benefits Fraction Supports the Fee Simple Approach to the Denominator Problem*, 70 Fordham L. Rev. 1957, 1985 (2002) ("[*Mahon*] exemplifies the [*Lucas*] footnote seven approach."); John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535, 1545 (1994) ("[The *Lucas*] footnote bears a striking resemblance to the *Keystone* dissent.").

U.S. at 1016 n.7, to treat the support and mineral estates as part of a single, non-segmentable "parcel."[13]

Notably, neither the *Mahon* Court, the *Keystone* majority, the *Keystone* dissent, nor any other opinion of this Court that Wisconsin is aware of has looked at factors outside of objectively reasonable expectations shaped by state law, such as the landowners' subjective plans for the property. *See infra* pp. 44–45.

C. The *Lucas* approach is particularly appropriate when dealing with land divided by lot lines under state law.

Applying the approach suggested by *Lucas* to land parcels is entirely sensible in light of the primacy of the States in defining the law of land subdivision. The creation, alteration and significance of lot lines is entirely a function of the law of the State where the land is located. *See generally Or. ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 378–81 (1977); *McKeen*, 9 U.S. (5 Cranch) at 32. Specifically, each State decides the manner in which lots are drawn, the process for changing lot lines, the legal sig-

[13] *See* Mark W. Cordes, *Leapfrogging the Constitution: The Rise of State Takings Legislation*, 24 Ecology L.Q. 187, 217 n.191 (1997) (describing the majority's decision in *Keystone* as "consistent" with the *Lucas* approach).

nificance of lots being separately platted, the conditions under which lots "merge," and the like. *See supra* pp. 2–3, 7–8, 11–13.

Applying the *Lucas* approach would respect each State's choices in this sovereign area. Where the State has made the choice of providing, as a matter of state law, that separately platted land lots may be sold and developed without regard to any neighboring lots, then landowners' objectively "reasonable expectations" would naturally be that the lots are separate "parcels" for regulatory takings purposes. *See* Nat'l Ass'n of Home Builders Amicus Br. 8–11; Se. Legal Found. Amicus Br. 11–12; Mountain States Legal Found. Amicus Br. 16–17. On the other hand, when a separately platted lot is subject to a merger provision, *see infra* pp. 37–38, or has no value under state law except when paired with another lot, *Keystone*, 480 U.S. at 500–01, or is otherwise restricted with a relevant state law provision, then "reasonable expectations" would be that the lot is not a separate parcel. And, of course, each State has the sovereign right to make its own choices as to how and when to privilege lot lines, including adjusting its prior laws so long as it provides adequate protection for settled expectations that developed based upon preexisting law. Notably, the variety of different lot merger regimes surveyed above, some providing more protection for land lots than others, *supra* pp. 11–13, illustrates the States functioning as "laboratories for devising solutions to difficult legal problems" in this area. *Ariz. State Legislature v. Ariz. Indep. Redistricting*

Comm'n, 135 S.Ct. 2652, 2673 (2015) (citation omitted).

Adopting the *Lucas* approach for land lots would also avoid unpredictable, subjective, or idiosyncratic inquiries that are focused on the particular landowner. Some lower courts have determined the relevant "parcel" by looking at a hodgepodge of case-specific factors, such as the manner in which a landowner has treated the particular land, the landowner's development plans, and the land's purchase history. *See infra* pp. 43–44. These inquiries introduce disuniformity into the classification of land that is treated identically under state law. Given that regulatory takings analysis already lacks sufficient clarity, *see, e.g.*, Chamber of Commerce Amicus Br. 5–14; Cato Inst. Amicus Br. 6–12; Bruce A. Ackerman, *Private Property and the Constitution* 8 (1977); J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 Ecology L.Q. 89, 102 (1995); Richard A. Epstein, *The Seven Deadly Sins of Takings Law: The Dissents in Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955, 966 (1993); John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. Cal. L. Rev. 1003, 1006–07 (2003), permitting consideration of these unpredictable factors should be avoided. And while complicated questions in this area of law are bound to come up, the *Lucas* approach provides an *objective* test for undertaking this inquiry.

Finally, the approach suggested by *Lucas* would reduce the opportunities for strategic manipulation

by the parties. With regard to concerns about manipulation by the sovereign, *e.g.* Mountain State Legal Found. Amicus Br. 17, when the party engaging in the alleged taking is not the State itself—for example, if the case involves the Federal Government seeking to regulate private land located within a State—the *Lucas* approach provides a neutral baseline between the Federal Government and the property owner. And when the sovereign party is the State or one of its political subdivisions, *ex ante* state law would similarly foreclose opportunities for strategic manipulation by the State. *See Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 888 (D.C. Cir. 1999) (Williams, C.J, concurring in judgment) (citing Laura M. Schleich, *Takings: The Fifth Amendment, Government Regulation, and the Problem of the Relevant Parcel*, 8 J. Land Use & Envtl. L. 381 (1993)). Indeed, if a State sought to change unexpectedly its state law treatment of land, without providing a grandfather clause to protect settled expectations under *ex ante* state law, this change could itself be challenged under the Takings Clause. *See Lucas*, 505 U.S. at 1027.

Nor would adopting the *Lucas* approach raise concerns about strategic behavior by landowners to "manufacture" takings claims. *See Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting). If a landowner secured state approval to subdivide property *after* the challenged provision had been enacted, this would not help in any takings case because the pertinent objective expectations are under *ex ante* state law. And

any subdivision that was approved by state authorities prior to the relevant regulation—for example, in a State where such subdivision created an objectively reasonable expectation that the lots could be sold and developed separately—would not be problematic. This would merely be the exercise of the landowners' rights, which would have been approved by the relevant state authorities.

II. Contiguous, Commonly Owned Land Lots Are One "Parcel" Under The Approach Suggested By *Lucas* Where—As Here—The Lots Are Merged Under State Law

A. Applying the approach suggested by *Lucas* to this case yields the straightforward conclusion that Lots E and F are a single parcel. As *Lucas* explained, takings law "has traditionally been guided by the understandings of our citizens regarding the content of . . . *the 'bundle of rights' that they acquire when they obtain title to property*." *Lucas*, 505 U.S. at 1027 (emphasis added). When Petitioners obtained title to Lot E in 1995, they were "charged with knowledge" that the Lot was subject to a preexisting merger provision that would trigger if Lot E was brought into common ownership with a contiguous substandard lot. Pet. App. A-16. Nevertheless, Petitioners acquired Lot E when they already owned Lot F.

It is thus clear that Petitioners' objectively "reasonable expectations" as "shaped" by Wisconsin law, *Lucas*, 505 U.S. at 1016 n.7, were that they took title

to a single merged parcel in 1995, not to two separate parcels. As the Wisconsin Court of Appeals correctly explained, Petitioners "never possessed an unfettered 'right' to treat the lots separately." Pet. App. A-17–18. As a direct result, Lots E and F are now a single parcel for purposes of any takings claim that Petitioners may wish to bring regarding this land, whether that challenge is against state restrictions on the development of substandard lots, as in the present case, or against some newly enacted Federal regulations that impact the usage of land situated on the Lower St. Croix River.

The Wisconsin Court of Appeals thus properly relied upon the Supreme Court of Wisconsin's decision in *Zealy*, in rejecting Petitioners' request to segment a single merged parcel into two separate parcels and then analyze the taking as to one of those parcels. Pet. App. A-12–18. *Zealy*, like *Penn Central*, held that it was inappropriate to "divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated," 548 N.W.2d at 532 (quoting *Penn Central*, 438 U.S. at 130), including where the landowner has a subjective expectation of a particular use of a segment, *id.* That principle governs this case because the lots merged into one parcel under state law when Petitioners acquired Lot E. Petitioners' claimed subjective desire to develop and sell the lots separately cannot be used to segment this merged parcel.

B. Petitioners make a series of meritless arguments in response to the straightforward conclusion that, in light of the merger provision, the lots are a single parcel for Takings Clause purposes.

First, Petitioners spend considerable energy arguing that *Penn Central* was about *segmenting* a single parcel, whereas, in their view, this case is about *aggregating* parcels. Pet. Br. 13–19; *accord* Wis. Realtors Ass'n Amicus Br. 4–8; Cato Inst. Amicus Br. 6; States of Nevada et al. Amicus Br. 4; Nat'l Ass'n of Home Builders Amicus Br. 11. But whether this case is about "segmentation" or "aggregation" depends entirely on whether the Petitioners' property is one or two parcels. And, as explained above, the Petitioners' objectively "reasonable expectations" as "shaped" by Wisconsin law, *Lucas*, 505 U.S. at 1016 n.7, are that the lots merged into a single parcel when Petitioners brought them into common ownership in 1995. *See supra* pp. 37–38. Accordingly, this is just another case, like *Penn Central*, where the property owners are improperly seeking to segment a single parcel.

Some of Petitioners' *amici* appear concerned with a rule aggregating multiple parcels when state law creates objectively reasonable expectations that the parcels are entirely separate. *See, e.g.*, States of Nevada, et al. Amicus Br. 3; Chamber of Commerce Amicus Br. 16–17. To the extent that some language in the Wisconsin Court of Appeals' decision could be read to require aggregation of contiguous real property in

all circumstances, Pet. App. A-11, such dicta was unnecessary to resolving the present case because the relevant property is a merged parcel. Notably, where aggregation of contiguous, commonly owned property is contrary to "reasonable expectations," as "shaped" by state law, such aggregation would indeed be inappropriate, as *Lucas* itself made plain. *See Lucas*, 505 U.S. at 1016 n.7; *id.* (describing as "extreme" and "unsupportable" the automatic aggregation approach adopted by the New York state court in *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333–334 (1977)).

Second, Petitioners place reliance on the fact that "Lot E was created pursuant to the laws and procedures of Wisconsin." Pet. Br. 28; *see also* Wis. Realtors Ass'n Amicus Br. 11–20. But the "laws and procedures of Wisconsin" also include the merger provision that took effect in 1976, years *before* Petitioners placed Lots E and F into common ownership. It is *all* of Wisconsin's laws that "shape" property owners' objective "reasonable expectations." *Lucas*, 505 U.S. at 1016 n.7. Under that complete view of state law, the lots are one parcel. *Supra* pp. 14–18.

That Lots E and F were separately taxed by the St. Croix County Treasurer between 1995 and 2011, Pet. Br. 5, 9, does not lead to a different conclusion. There is no indication in the record that Petitioners informed the St. Croix County Treasurer in 1995 that adjacent Lots E and F were in common ownership and substandard, which are necessary predicates for lot

merger. When the Wisconsin courts conclusively determined that the two Lots had merged, *Murr I*, 796 N.W.2d at 844, the Treasurer began taxing the lots under one combined assessment. JA 22–23. In any event, tax treatment is not the touchstone. When two lots have merged under state law—such that they cannot be sold or developed separately—it would be objectively unreasonable for an owner to rely upon local tax classification. *See, e.g.*, *In re Application for Vacation of Part of A.A. Carlson's Plat*, 699 N.W.2d 254 (Wis. Ct. App. 2005) (unpublished table decision) (multiple platted lots did not become one parcel by being assigned a single tax identification number).

Finally, Petitioners wrongly suggest that the present case involves a challenge to the enactment of the lot merger provision itself. Pet. Br. 12 (referring to "the challenged ordinance"); *accord* States of Nevada, et al. Amicus Br. 17 (referring to "newly enacted legislation or decrees"). But a challenge to the enactment of the provision would look at the world as it was *on January 1, 1976*, *see District Intown*, 198 F.3d at 888 (Williams, C.J., concurring in judgment), in order to determine if the State took anything from landowners "that they [had] acquire[d] when they obtain[ed] title to property." *Lucas*, 505 U.S. at 1027. On January 1, 1976, the Murr parents owned only Lot E, while the plumbing company owned Lot F. JA 6. Under the grandfather clause, the Murr parents retained their right to continue to develop and sell Lot E as they could before January 1, 1976, consistent with their preexisting objectively reasonable expectations.

Murr I, 796 N.W.2d at 844. The merger provision merely provided that if anyone took title to both Lot E and another contiguous, substandard lot, this would "merge" the two substandard lots. *Id.*

The Murr parents could have challenged the enactment of this provision in 1976 as a regulatory taking as to Lot E, but such a challenge would have been far more limited than the takings claim in the present case. In light of the grandfather clause, what the Murr parents lost in 1976 was the practical ability to sell Lot E to buyers who only wanted to buy that Lot if they could also acquire contiguous, substandard lots, and thereafter develop and re-sell those lots separately. Assuming this diminished the resale value of Lot E in 1976 to some extent, that diminution would have been minor compared to the valuable, waterfront real estate still embodied in Lot E after 1976. JA 51–52. Critically, Petitioners in this case have *not* sought to bring such a limited takings claim based upon any alleged diminution of value of Lot E in 1976, as their parents' successors in interest. *See Palazzolo*, 533 U.S. at 626–30. Not only would such a challenge be clearly time-barred, s*ee* Wis. Stat. § 893.52, but it would be extremely unlikely to succeed because the Murr parents lost very little in 1976 in light of the grandfather clause.

Contrary to this understanding, Petitioners appear to believe that they can challenge a lot merger provision by voluntarily triggering it and then litigat-

ing the case on the fictitious assumption that the provision was enacted after their acquisition. As explained above, this is contrary to the objectively reasonable expectations of property owners who acquire lots that are subject to a preexisting merger provision. *See supra* pp. 37–42. In addition, this would create an obvious opportunity for "manufactur[ing]" takings claims. *Palazzolo*, 533 U.S. at 655 (Breyer, J., dissenting). Under Petitioners' theory, a landowner could purposefully trigger a lot merger provision and thereby obtain a windfall recovery from the State, even where the seller had been protected by a grandfather clause. This would leave many merger provisions subject to strategic attacks, thus needlessly frustrating the laudable goal of gradually phasing out substandard lots while protecting current owners through grandfather clauses.

III. Even If This Court Decides That A Multifactor Analysis Is Warranted, The Lots Here Are Still One "Parcel"

In determining the relevant "parcel" for regulatory takings purposes, certain lower courts look at some combination of factors, including the landowner's economic expectations, the degree of contiguity of the land, the date of acquisition, and the extent to which the land has been treated as a single unit. *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) ("economic expectations"); *Dist. Intown*, 198 F.3d at 880 ("the degree of contiguity, the dates of acquisition, the extent to which the parcel has

been treated as a single unit"); *Appolo Fuels, Inc. v. United States,* 381 F.3d 1338, 1346 (Fed. Cir. 2004) (considering the dates of acquisition as part of "one unified . . . plan."); *Lost Tree Village Corp. v. United States*, 707 F.3d 1286, 1293 (Fed. Cir. 2013) ("treats the parcels as distinct economic units"). Wisconsin believes that such an idiosyncratic and subjective multifactor approach should be definitively rejected, especially if any of the factors could lead to non-uniform treatment of land that is parceled and regulated identically under state law. *See supra* p. 35. Instead, the proper approach is the one this Court suggested in *Lucas*.

If this Court disagrees and decides that a multifactor approach is warranted, the result here would be the same: Lots E and F are a single parcel for regulatory takings purposes.

First, Petitioners had no "economic expectations" for Lot E separate and distinct from their economic expectations for Lot F. *Forest Props.*, 177 F.3d at 1365. To the extent this "economic expectations" inquiry is an objective test—which would look to what reasonable landowners in Petitioners' position would expect—Petitioners could not possibly have had "economic expectations" of developing and selling Lot E separately from Lot F, as a matter of law. Given that Petitioners were "charged with knowledge of existing zoning laws," they took title to Lot E in 1995 with the understanding that this was not a "distinct, saleable, developable site." Pet. App. A-16.

And to the extent the "economic expectations" factor considers *subjective* expectations—even if contrary to what reasonable property owners would understand under state law—this only highlights the problematic nature of asking such questions in this area. *See supra* pp. 21–22, 35. But even as to such a subjective inquiry, the record lacks any indication of Petitioners' subjective "expectations" when they acquired Lot E. While the Murr *parents* may have purchased Lot F as "an investment" in the 1960s, JA 6, there is no support in the record for Petitioners' suggestion that they acquired Lot E in 1995 with the intent to develop and sell it separately from Lot F. Pet. Br. at 30. Petitioners' attempt to conflate the "purchase, use, and plans for Lot E" by the Murr parents, Pet. Br. at 30, with their own expectations for that land in 1995, is improper given that they are asserting their own rights, not their parents' rights, as their successors in interest. *Supra* pp. 42–43.

Second, Lots E and F are "contiguous," *District Intown*, 198 F.3d at 880, for the entire length of their longest side. JA 28.

Third, the "date[ ] of acquisition," *District Intown*, 198 F.3d at 880, for Lot E does not support the claim that the lots should be considered separate. Petitioners took title to Lot F in 1994 and then shortly thereafter took title to Lot E in 1995. JA 6. While Petitioners argue that their acquisition of "Lot E [was] completely independent from Lot F," Pet. Br. at 31, there is no indication in the record that this one-

year gap manifests an intention to treat the two lots separately.

Finally, Petitioners have "treated" the land as a single unit, not as two separate lots. *Dist. Intown*, 198 F.3d at 880; *Forest Props.,* 177 F.3d at 1365; *Lost Tree,* 707 F.3d at 1293. When testifying about their property, Petitioners drew no meaningful distinction between the two lots. One of the Petitioners, for example, characterized both lots together as a "family gathering place." R. 18:11.[14] She discussed the beach as a single beach, not two separate beaches: "The swimming is safe. There's no drop-offs, there's no current. You can feel comfortable watching your little great-nephews out there swimming and not worry about boat traffic and unsafe conditions." R. 18:11. Summarizing her understanding of the property, again with no distinction between Lots E and F, she testified: "And it's just a really great place to keep the family together now that mom and dad are gone." R. 18:11.

Petitioners claim that they use Lot E "completely independent[ly]" from Lot F. Pet. Br. at 31. But the record reflects that the two lots are used in tandem for family recreation. Lot F contains a cabin, and Lot E contains a propane tank for the cabin. R. 22:85. Lot E contains a volleyball court for use when guests stay at the cabin on Lot F. Pet. App. B-9; R. 22:103. And

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[14] Cites to the record refer to the record of the St. Croix County Circuit Court in *Murr v. Wisconsin*, No. 12CV258.

both lots have beach access to the same stretch of beach. R. 18:11. Simply put, Lots E and F are a single parcel of land.

CONCLUSION

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

Respectfully submitted,

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June 2016

No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR *et al.*,

Petitioners,

v.

STATE OF WISCONSIN, *et al.*,

Respondents.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that all parties required to be served, have been served, on this 10th day of June, 2016, in accordance with U.S. Supreme Court Rule 29.5(c), three (3) copies of the foregoing **BRIEF FOR RESPONDENT STATE OF WISCONSIN** by placing said copies in the U.S. mail, first class postage prepaid, addressed as listed below. I further certify that in accordance with Supreme Court of the United States Rule 25.9, an electronic version of the foregoing was also served.

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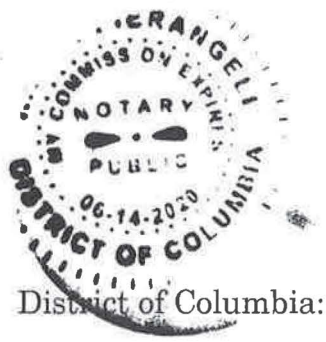

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NOTARY PUBLIC, DISTRICT OF COLUMBIA
My Commission Expires June 14, 2020.

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CERTIFICATE OF COMPLIANCE WITH WORD COUNT LIMITATIONS

I, Misha Tseytlin, counsel for Respondent State of Wisconsin and member of the Bar of this Court, certify pursuant to Rule 33.1(g) of the Rules of this Court that the Brief for the State of Wisconsin contains 11,280 words, excluding parts of the brief that are exempted by Rule 33.1(d).

June 9, 2016

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