IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH P. MURR, ET AL., :

Petitioners : No. 15-214

v. :

WISCONSIN, ET AL., :

Respondents. :

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Washington, D.C.

Monday, March 20, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN M. GROEN, ESQ., Sacramento, Cal.; on behalf of the Petitioners.

MISHA TSEYTLIN, ESQ., Solicitor General, Madison, Wis.; on behalf of the Respondent Wisconsin.

RICHARD J. LAZARUS, ESQ., Cambridge, Mass.; on behalf of the Respondent St. Croix County.

ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondents.

C O N T E N T S

P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in case 15-214, Murr v. Wisconsin.

Mr. Groen.

ORAL ARGUMENT OF JOHN M. GROEN

ON BEHALF OF THE PETITIONERS

MR. GROEN: Mr. Chief Justice, and may it please the Court:

The fundamental unfairness in this case is illustrated by one fact: If anyone else in the world, other than the Murr siblings, owned Lot E, that owner could sell or develop it. But the Murrs cannot.

JUSTICE KAGAN: Mr. Groen, may I ask --

JUSTICE KENNEDY: Let me ask you this question. It's a hypothetical. It's not this case. Suppose that three years from now lots such as these two lots in the same ownership become immensely more valuable than the two lots singly. Each lot singly would be worth a hundred thousand, but these lots where you can build a bigger home are worth $500,000.

The county wants a fire -- fire station and it takes Lot E. What do they pay for it under your theory?

MR. GROEN: They should pay for -- compensation for the taking of Lot E. Any taking --

JUSTICE KENNEDY: Which is $100,000. So under your hypothetical, property owners stand to lose $300,000 under my hypothetical and your answer.

MR. GROEN: No, I don't think so. Under the hypothetical --

JUSTICE KENNEDY: The hypothetical is together, they are worth 500,000; singly, they're worth a hundred thousand each.

What is the amount that the -- the county has to pay to take Lot E for the fire station?

MR. GROEN: The analysis must begin with defining the relevant parcel that's the subject of the case analysis.

JUSTICE KENNEDY: And in your view, that's Lot E only.

MR. GROEN: That's right.

JUSTICE KENNEDY: And they pay $100,000 only. That's it.

MR. GROEN: The land owner would have the burden of proving that there are additional damages that they should be compensated for. But the presumption --

JUSTICE KENNEDY: You indicated there's no severance damages. You're taking the entire parcel.

MR. GROEN: You're taking all of Lot E, and they should be paid compensation for Lot E.

JUSTICE KENNEDY: That's right.

MR. GROEN: Whether that compensation is --

JUSTICE KENNEDY: That's $100,000 that go under your theory, land owners in the hypothetical that I put up would lose money and the State would be -- would be getting the windfall.

MR. GROEN: If that hypothetical does not include any integrated economic use between those two parcels; that is correct. The compensation is determined by the lot that is taken.

JUSTICE KENNEDY: But the integrated -- the integrated use is determined by the market. Your -- your theory completely ignores market factors.

MR. GROEN: And that is exactly what the government would argue is that the compensation must be limited to the parcel that is taken. And in eminent domain law, which is the -- the hypothetical that you're providing, in eminent domain law, the presumption is exactly that: Compensation is limited to the parcel taken, unless that presumption can be overcome by the landowner proving that the two parcels are actually -- yes, there's a unity of use between the two --

JUSTICE KENNEDY: Why isn't the value --

then why isn't that true here? Then why doesn't that defeat your theory here?

MR. GROEN: It supports the theory. It's the exact same principle, only in reverse. Rather than the government limiting compensation to just the parcel taken, here the government is saying we want to combine the values of the two in order to find there's no taking. But in both scenarios, you have to begin with the presumption of determining what is the relevant parcel that is subject to that analysis. In both scenarios, either eminent domain or inverse condemnation, you have to begin --

JUSTICE KAGAN: Mr. Groen --

MR. GROEN: -- with a single parcel.

JUSTICE KAGAN: -- can I ask just a clarifying question about your argument? One of the things that makes this case odd is that there are family members all around. Both sellers are the same family and the buyers are the -- but if I'm right, your argument would extend in the exact same way to a situation where you have two sellers who are completely independent of each other. Mr. Jones and Ms. Smith have nothing to do with each other. Another buyer comes in, also has no relationship with Mr. Jones or Ms. Smith, and that buyer would be able to make the exact same

argument that the Murr family is making in this case.

Am I right about your argument?

MR. GROEN: Well, I'm not sure which parcel your -- your hypothetical is talking about.

JUSTICE KAGAN: You have --

MR. GROEN: But -- but -- but

JUSTICE KAGAN: -- two preexisting substandard parcels. Somebody comes in, buys both, but all the parties are independent of each other.

MR. GROEN: Each parcel. Right --

JUSTICE KAGAN: And now the person who has bought these two standard -- substandard lots wants to build on them, and your argument would be the exact same.

MR. GROEN: That -- that's right. They're each independent, discrete, and separate parcels. And the grandfather clause that is attached with this land-use ordinance would protect the development and sale rights of each parcel independently.

JUSTICE SOTOMAYOR: So where does regulatory -- a State's regulatory power come in? This -- Justice Kagan put in a hypothetical to -- to this one owner owns two parcels or two different people own two parcels, and they sell it to your one owner. And the one owner knows the regulation says if

you have two contiguous land pieces, you can only develop on one, if they're both below an acre or whatever the rule is. Your rule would just do away with your expectations as a buyer.

MR. GROEN: Well, no. The -- in that situation, the fact that someone might know that there -- there are regulations on properties does not change the time of the taking. The taking occurs in 1975 when the regulations redefined the property rights, and that redefinition of the property rights does not insulate --

JUSTICE SOTOMAYOR: But the parents -- it may have been a taking for the parents, but they never charged it. The children when they took were subject to the regulation, and they knew it.

MR. GROEN: And --

JUSTICE SOTOMAYOR: They could have said, no, I don't want two contiguous ones, Dad and Mom. I'll go buy the next-door lot from someone else.

MR. GROEN: And this Court in Palazzolo v. Rhode Island ruled that the notice that the Murr children may have had -- they actually didn't know, but let's assume that they did know --

JUSTICE SOTOMAYOR: They should have known.

MR. GROEN: Let's assume that. Let's assume that beyond should have; they actually knew.

Palazzolo stands for the proposition that the -- that the -- the subsequent heir or a buyer does not lose a takings claim. The State is not --

JUSTICE KAGAN: But that's a very --

MR. GROEN: -- absolved of liability.

JUSTICE KAGAN: That's a very different situation. In Palazzolo, all we said was that if the seller has a takings claim, it's not extinguished just because the property is transferred; that the buyer could have the exact same takings claim. But the Murr children are not asking for the -- for the -- they do not have the same takings claim as the Murr parents did; isn't that right?

MR. GROEN: No, I think that's not right. They have the exact same takings claim because we're talking about Parcel E. And the rights that the parents could --

JUSTICE KAGAN: The parents could develop on Parcel E; the children can't.

MR. GROEN: The parents, if they had put it in their own common ownership, which they did for a period of time. Subsequent to 1975, there is a takings claim there. It's the rights inherent in the property. And in each of these -- in -- in all of these scenarios, you have to go back to define --

JUSTICE KAGAN: The parents -- let me try this again.

For the parents, the two properties were two properties. It's only when the property becomes one property that this takings claim arises.

MR. GROEN: The takings claim arises because of the restrictions imposed by the government, not by change in ownership or anything like that. The change in ownership does not change the nature of the property interest. That's the key part of Palazzolo, that if you take away the -- the takings claim or redefine property interests, you're actually changing or altering the nature of property. And -- and that's where we come back not to a takings analysis, but to defining the relevant unit of property to apply the takings analysis.

JUSTICE KAGAN: But the --

CHIEF JUSTICE ROBERTS: Well, then --

JUSTICE KAGAN: The -- I'm sorry.

CHIEF JUSTICE ROBERTS: Please, follow up.

JUSTICE KAGAN: The -- the -- the regulation here, the only thing that it affected for the Murr parents and for the plumbing company was their ability to sell to a buyer who wanted to combine these two lots. That was the only thing that was affected; isn't that right?

MR. GROEN: Well, the parents didn't seek to combine these two lots or to sell to someone who wanted to combine the two lots. The parents owned both parcels. They had one in the plumbing company name. They eventually put that in their own names as well in 1982, after the 1975 restrictions were in place. That didn't merge the parcels. There's -- there hasn't been a merger here. Merger is simply a term that describes what happened, and that is, that the use restrictions preclude the independent sale or development of Lot E. That is the gravamen of the takings complaint.

JUSTICE GINSBURG: And we're told these merger rules have a long history. Many States have them. So why isn't that background State law that would -- would apply?

MR. GROEN: There -- there are lots of -- of land-use regulations of all types, including merger provisions. We do not have a background provision here, a background principle because you can't have a background principle that applies to one person, but not to another. If someone else owned Lot E, they can develop it. So it's not a background principle to say that -- that this only applies to the Murrs.

Same thing in the neighborhood. This is the St. Croix Cove subdivision. There's over 40 developed

residential lots here. There's nothing about building a home on this property that rises to the level of a nuisance or something that takes the right to use the property out of the title that -- that is that property --

JUSTICE KENNEDY: Your answer to Justice Ginsburg is that all of those other State regulations are also invalid.

MR. GROEN: No. Those regulations are fine, whatever they may be, and they come in all -- all types of forms. The question here is what unit of property do we utilize for determining the takings analysis?

CHIEF JUSTICE ROBERTS: I -- I --

MR. GROEN: Once you determine that, then you determine, okay, under that merger law or whatever land-use ordinance, does it reach a level of magnitude of interference that there is a taking? And those would have to be -- be analyzed on the merits of their own situation.

CHIEF JUSTICE ROBERTS: I thought your argument was that under State law, the properties were not formally merged, that the merger was only, I think as the Court put it, an effective merger.

MR. GROEN: That's exactly right. There -- there has been no formal merger. These remain separate

legal lots today. This -- this term "merger" has been used very loosely, and all it really means is that the Murrs' right to independently use and develop Lot E has been destroyed.

JUSTICE ALITO: Do we know -- do we know exactly --

MR. GROEN: They could actually still give it away.

JUSTICE ALITO: I'm sorry.

Do we know exactly how Wisconsin and the county define "common ownership"? For example, if one lot is owned by an individual in that person's own name, and then the adjacent lot is owned by a wholly-owned corporation or LLC, is that considered to be common ownership? Or if one lot is owned by, let's say, four siblings and the other one is owned by only three of the siblings, would that be common ownership?

MR. GROEN: Under the way Wisconsin has applied common ownership, as long as they are not informally the same name -- so here William and Dorothy Murr, they fully owned their plumbing company, and so they were technically in -- in different ownership and that was enough to be in separate --

JUSTICE KENNEDY: Would it be enough if --

MR. GROEN: So --

JUSTICE KENNEDY: -- the husband owned one, wife owned the other? That's different? They're separate?

MR. GROEN: The way Wisconsin has been applying it, it would -- it would encourage that kind of manipulation and --

JUSTICE BREYER: What is the --

MR. GROEN: -- and bring in the incentives.

JUSTICE BREYER: I mean, I've not got beyond Holmes. Holmes says that a regulatory taking violates the Constitution unless it's compensated when it goes too far.

MR. GROEN: Correct.

JUSTICE BREYER: All right. Now, what you want us to do is to put some pretty clear lines in that word "too far."

MR. GROEN: Well --

JUSTICE BREYER: My problem is, I can't think of just what those lines should be, that -- that, perhaps, there are many different circumstances in many different factors.

For example, in your case, I imagined that what the State was concerned about is they want to preserve a lake. At the same time, people own some property around that lake and they used to be able to

build houses. So here's what they say. You can build one. One. And it doesn't matter if you have six lap parcels not together or -- one. One is what you can build because, after all, this Constitution is concerned about, to paraphrase Justice Warren, protecting people, not rocks.

And so we look at the people and say, how does this affect them. And in this case, you have a case, but there's some factors against you, and the -- the Federal Circuit and other opinions of ours have avoided drawing clear lines.

And you see where I'm going. And I just want your general response.

MR. GROEN: Yes. This case does not address the merits of whether there's a taking. This case first has to deal with the threshold question of what is the relevant unit of property --

JUSTICE BREYER: And that's what I'm objecting to.

MR. GROEN: -- and is it one parcel --

JUSTICE BREYER: Now, see that's -- now you're not getting my question.

Because my question is: Why look for that? Is it relevant? Yes. Is it determinative? No. If we start making determinative rules, developers will take

500 acres. They'll break them down into 500 different properties, State perhaps aiding in this, 500 different ones; three of them will be just wetlands, and they'll say, see, you took my three, when, actually, he started out with 500, and it wasn't a big deal.

You -- you see the kind of problem? They're written about in the briefs.

MR. GROEN: Well --

JUSTICE BREYER: I want your general reaction.

MR. GROEN: Well, the general reaction is you must begin with the approved legal lots of record that have actually been approved and that have attained -- because they are legal lots of record, they have rights that's in dispute.

JUSTICE KAGAN: But, Mr. Groen, one of the --

MR. GROEN: That's what Roth is all about.

JUSTICE KAGAN: One of the oddities of your position is that you seem to be taking half of State law. In other words, you're saying well, there are these -- there are these lot lines, and everything has to depend on the lot lines because they've been legally approved. But there have been other things in this case that have been legally approved too, and one of them is

this merger provision. And you seem to be saying: Well, we look to State law for the lot lines, but then we ignore State law for the question of when lots are merged.

And why should we do that? If we're looking to State law, let's look to State law, the whole ball of wax. In other words, saying: Well, when I buy those two lots, they're really not two lots anymore. According to State law, they are one lot.

MR. GROEN: In defining property interests, Roth and this Court in Lucas note 7 both recognized that you look to the State law, not to the whole body of State law, you look to the State law that governs the creation that's the legal recognition of lots and the protection of the property interest.

JUSTICE KAGAN: Well, I -- I think that you're right, Mr. Groen. It's like the legal recognition of property. But the legal recognition of property has something to do with lot lines, and it also has something to do with when lots are merged, when two lots are merged into one. And why would we ignore that question of merger?

MR. GROEN: There's two reasons. One, they have not been merged. That -- and that's the point we were discussing earlier. They have not been formally

merged.

And, two --

JUSTICE KAGAN: And what would it take to be formally merged?

MR. GROEN: Elimination of lot lines.

JUSTICE KAGAN: Why?

MR. GROEN: And that has not happened.

JUSTICE KAGAN: Because if the Court --

MR. GROEN: Because if -- if they remain --

JUSTICE KAGAN: If the State can say we don't have to eliminate lot lines. All we have to do is to say the -- the lot lines don't have legal effect for some purposes.

MR. GROEN: And it's only for the limited purposes of precluding sale or development.

But more than that, your question comes right back. It circles right back to Palazzolo, where you really have to define property interests by the rights that are already in place that secure benefits. That's what Roth stands for. That's what Lucas footnote 7 stands for. And Palazzolo points out the principle that you cannot then go forward and say: Oh, well, the State has redefined this --

JUSTICE KAGAN: Well, again, I think --

MR. GROEN: -- so now you --

JUSTICE KAGAN: -- Palazzolo depends on the buyers having the exact same takings claim as the sellers, which it seems to me does not exist in this case.

But let me ask you a different -- a different way around the question, which is, whether you think reasonable expectations matter at all in your framework?

MR. GROEN: The reasonable expectations that were addressed in Lucas footnote 7 are the expectations that grow out of the traditional understandings of property law. People understand when they buy a lot in a subdivision that they are buying a -- a -- a lot that has a right of use, that -- that has a deed, that has geographic boundaries, and that's --

JUSTICE KAGAN: Okay.

MR. GROEN: -- what they are relying upon.

JUSTICE KAGAN: But here, if I'm buying property in this area, I also know that there are these rules about when you can develop on substandard lots and how it is that contiguous lots are understood for purposes of that development potential. So why aren't I buying subject to those preexisting regulations? In other words, this is not a regulation that just happened to me when I was an owner. I'm buying subject to -- and

property is a bundle of sticks; we know that, right, first year of law school. And I'm buying, you know, certain metes and bounds, but I'm also buying into a certain set of things about what I can and can't do on the property. So why isn't that perfectly consistent with my reasonable expectations? I'm supposed to know the zoning regulations, and when I buy a house, when I buy a piece of land, I'm buying subject to the preexisting zoning regulations.

MR. GROEN: I understand the use of reasonable expectations under the Penn Central for determining whether there is a taking. But here, we're -- we have to first determine what unit of property is it. Is it Lot E, or is it Lot E and F combined? And in that situation you have to look at the creation of the property. Property is property. And it doesn't change --

JUSTICE BREYER: But what about -- I -- of course, property is property. But we are still dealing with a provision of the Constitution that, in the regulatory area, is designed to prevent takings that hurt somebody unreasonably. It goes too far.

So why isn't what you want to look at one more thing to look at? But we might look at others too. We might look, for example, at whether the individual

who bought that property at the time he bought it knew about this restriction. We might look at how, overall, he has hurt in any related way. We might look, for example, at the kind of need that was there, and we might see two big questions.

I mean, one big question is -- though it's awfully general -- is, is he being treated unfairly either because we're forcing on him the whole cost or a lot of the cost of something that benefits many, many others, or because we are interfering with investment-backed expectations.

I mean, as you read the cases it seems to me there are a set of factors like that. And my problem with your argument is it wants to take one and then apply a kind of mechanical test.

MR. GROEN: No. It keeps coming back to you -- the -- the task is to first define the unit of property. The Murrs -- the Murr parents have two separate distinct lots. Each is -- is a -- is a lawful legal building site, and if owned by anyone else, it remains a lawful legal building site.

Under the restriction enacted in 1975, it went from two building sites to one building site.

JUSTICE SOTOMAYOR: May I --

MR. GROEN: That is what has been lost.

JUSTICE KAGAN: But --

JUSTICE SOTOMAYOR: May I ask a question? I do think, as I'm reading all of the briefs in this case, that the issue is how much weight should we be giving to the State boundary lines, the State property lines.

You say as a denominator on the takings claim, there -- it's fixed. You used the word "presumption" in your brief, but you haven't explained to me what overcomes the State boundary line -- property lines, so I don't think the word "presumption" has any meaning in your brief.

Others, like St. Croix and -- and the government, and embedded in Justice Breyer's question, thinks the denominator should be a more nuanced calculation, although St. Croix, Wisconsin, and the Solicitor General seem to have a different weight to that.

So let's start with, is yours a fixed presumption? Does anything ever overcome it?

MR. GROEN: Yes.

JUSTICE SOTOMAYOR: Or is it, under every circumstance, the denominator?

MR. GROEN: In -- in -- you must begin with the presumption of identifying the single parcel. And nobody, as you point out --

JUSTICE SOTOMAYOR: What over --

MR. GROEN: -- no -- no parties --

JUSTICE SOTOMAYOR: -- comes that?

MR. GROEN: -- and so that --

JUSTICE SOTOMAYOR: What overcomes that?

MR. GROEN: -- presumption is overcome if you have facts that are sufficient to show in fairness and justice that the individual should bear the burden. And an example, we can draw straight out of eminent domain law. If you have a hotel owned by a person and they own the parking lot next door, there are two separate parcels, and the government is going to condemn the parking lot. The parking lot is used with the hotel as an integrated economic unit. The presumption in eminent domain law is the same principle here. Government is taking only the parking lot, and they will argue we will only pay for the parking lot.

The burden then shifts to the property owner to prove that the parking lot is an integrated part of the operation of the hotel.

JUSTICE SOTOMAYOR: So what's the difference between that and the factors that the other parties are using that says look at how the property's been used over time.

Here, the family has a house on one parcel,

a volleyball court and a barbecue storage area on another. They use the other parcel -- house on one side, the other parcel has access to the beach. The house has not had an economic value to the children. It was there. They're using it.

MR. GROEN: Right.

JUSTICE SOTOMAYOR: So what's the difference --

MR. GROEN: I think you have a --

JUSTICE SOTOMAYOR: -- in terms of --

MR. GROEN: -- an inaccurate visual understanding of what the parcel is. Lot E, and this went up on summary judgment, is a vacant parcel. There's nothing on Lot E. It is its own independent parcel. The Murrs will sometimes walk across it or maybe play volleyball on it, but it is not an integrated economic unit as in the hotel parking lot and the hotel.

In that situation, you can overcome the presumption, and that landowner in that situation will argue that they should be paid compensation --

JUSTICE KENNEDY: So why isn't an integrated unit because they had a barbecue? In other words, your hypothetical --

MR. GROEN: They don't have a barbecue.

JUSTICE KENNEDY: Under your -- well,

whatever they have.

(Laughter.)

JUSTICE GINSBURG: Volley -- volleyball.

JUSTICE KENNEDY: Volleyball court.

Under your hypothetical, if the hotel was on Lot F and the parking lot was Lot E, what would be the fair value if the State took Lot E for a firehouse?

MR. GROEN: The --

JUSTICE KENNEDY: Figure out the fair value? Don't you figure out the value of that on the market to a buyer, not the loss to the seller because he's next door? That has to be.

MR. GROEN: The -- the rule begins with paying for the parking lot, and the burden is on the landowner to show that they -- that person should get additional compensation for the impact to the hotel. That's where that comes from.

JUSTICE KENNEDY: That just can't be if they're separate lots. That's not the law in any State that I know.

MR. GROEN: That's the unity of -- of use rule. That is in condemnation all the time. And --

JUSTICE KENNEDY: But that's -- that's when there's a single parcel.

MR. GROEN: No. That's when they're two

separate parcels. It's the hotel and parking lot example.

JUSTICE KENNEDY: Well, then, under your view, the landowner wins either way.

MR. GROEN: It depends on --

JUSTICE KENNEDY: If the value is great, he gets the double value. If the value is smaller, then he can sell the lot.

MR. GROEN: There has to be in --

JUSTICE KENNEDY: In your example --

MR. GROEN: In that -- -- unity of use.

So, for example, if -- if the parking lot in the hotel, they were just different parcels, and the -- the parking lot was serving some other property and the government took that parking lot, there's no damages to the -- to the parcel with the hotel. There -- and the landowner would not be entitled to anything.

JUSTICE KENNEDY: Well, we won't --

MR. GROEN: It's the same principle here.

JUSTICE KENNEDY: But you're the one who's insisting on divisible -- on -- on the lots being treated separately, not --

MR. GROEN: I'm insisting on --

JUSTICE KENNEDY: -- not in my question.

MR. GROEN: -- the same presumption that you

begin the analysis by identifying the relevant parcel. Here, that has to be Lot E. It was purchased separately. It's a separate deed. It was purchased for separate purposes, and it is the lot that is regulated.

JUSTICE GINSBURG: You say you would begin the analysis. What more is there if you're saying we isolate E and E now is of no value. It can't be sold; it can't be built on. What is the consequence of saying we isolate -- we identify Parcel E. Is it the same as if the government physically took Parcel E?

MR. GROEN: It's -- it's not a physical taking, but it may have the same practical effect.

JUSTICE GINSBURG: But that's a --

MR. GROEN: -- because the -- the value of Lot E is diminished from $410,000 to $40,000. There's a 90 percent decrease in value. And --

JUSTICE GINSBURG: But there is some use that can be made of this other --

MR. GROEN: Lot E cannot be developed on its own. That ability has been taken away.

JUSTICE GINSBURG: Yes, but is it -- if you -- the combined properties are sold --

MR. GROEN: But --

JUSTICE GINSBURG: -- it's going to be a much bigger price tag --

MR. GROEN: But the --

JUSTICE GINSBURG: -- than if just F was sold.

MR. GROEN: But the question is, the -- the Murrs began with two building sites on separate properties. That was taken away. The value that you're talking about is the value that comes from being able to build. Well, the Murrs already have a house on Lot F. So when you say what is there -- the value afterwards, the better methodology is how much would the Murrs or someone who owned Lot F, with an existing house on Lot F, pay to add land to it? How much would they pay to add Lot E to their existing building site?

Now, what the --

JUSTICE BREYER: Let me give you -- let me give you an example which might help me. Let's go back to Holmes case. There's a hundred acres. There are 50 columns of coal to hold up the -- to hold up the ceiling. That he says is okay. No compensation. But wait. Suppose instead of one people -- one person owning all 50 acres, suppose 50 people each own one acre. And in some cases, the column runs through the acre and some it doesn't. Does that make any difference?

MR. GROEN: That hypothetical is not

analogous to this situation.

JUSTICE BREYER: I don't care if it's analogous or not analogous. I'm trying to get my thinking clearer, and oddly enough --

MR. GROEN: Same --

JUSTICE BREYER: -- different things make my thinking clearer, and --

MR. GROEN: You have --

JUSTICE BREYER: -- this may be one of them.

(Laughter.)

MR. GROEN: The analysis has to begin by defining the parcel of property that is regulated.

JUSTICE BREYER: You opinion -- in your opinion, if, in the Holmes case, instead of one person owning the whole 50 acres as one lot, there would have been 50 people who each owned an acre. Now, it looks the same, you know, the columns are in the same place, et cetera, and you're saying that does make a difference.

MR. GROEN: If someone --

JUSTICE BREYER: Yes or no?

MR. GROEN: It does make a difference. And the key is to look at the parcel of property that is owned by an individual and is that property being taken away.

JUSTICE KAGAN: So the usual way --

MR. GROEN: There's two questions here.

JUSTICE KAGAN: The usual way, Mr. Groen, or at least a frequent way in which this comes up is a developer buys a hundred acres of land, and that land is split up into 100 one-acre parcels. And let's say 15, one-five, percent of them are on wetlands and can't be built on. It makes an enormous difference whether we're going to say that those 15 percent are independent lots, because if they are, then the developer comes in and says you have to pay me for all of that. But if they're not, the developer is out of luck because it's only 15 percent of the whole. Isn't that right?

MR. GROEN: The beginning part of your analysis says the developer subdivided. The developer cannot subdivide without government approval. And when there's a subdivision that is created under the laws of that State, then rights attach.

JUSTICE KAGAN: Yes. Well, the subdivision has occurred with government approval, and the merger provision has occurred with government approval, saying that this shouldn't be understood in the case of substandard lots as independent.

MR. GROEN: The merger provision is like the wetlands provision: Both restrict use. And then the

question, then, once you've identified the relevant parcel in your hypothetical, the -- the -- the question is, is there a taking of that 15 percent.

The burden would be on the government to show that that 15 percent of the lots is actually part of an integrated economic unit as a whole, and then you proceed under a takings analysis. But in both situations, you must first define the relevant parcel.

Unless there are further questions, I'd like to reserve the remainder of my time for rebuttal.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Tseytlin.

ORAL ARGUMENT OF MISHA TSEYTLIN

ON BEHALF OF THE RESPONDENT WISCONSIN

MR. TSEYTLIN: Mr. Chief Justice, and may it please the Court:

I would like to begin, Mr. Chief Justice, by answering your question, or the point that you made.

The lots here have merged for all relevant purposes under State law. It is true that the lot line between Lot E and Lot F still exists, but that has absolutely no continuing legal relevance under State law.

CHIEF JUSTICE ROBERTS: Your -- your point is -- raises my exact concern. You said "for all

relevant purposes." The -- the question is what purposes are relevant? And it seems to me that what purposes are relevant is analysis under the Takings Clause.

And we all know the -- the issue, I think, that Justice Breyer brought up. Let's say you have three -- three acres of wetlands and you own a hundred acres. You say, well, my property is these three acres and you've taken it all. The law is you don't get -- Mr. Groen doesn't get to define property interests that way because it's gaming the system by saying this is what it is.

Now, another one of my colleagues pointed out, there are two halves of the State law here: Half of it is the lot line, half of it is the merger. And you want to say, well, for takings purposes, all we look at is -- is the merger. And it seems to me that that's just the flip side of what the landowner can't do. You can't sort of preempt the takings analysis by saying we're only going to look at this aspect under which, of course, we win. Just like the property owner says we're only going to look at these three -- three acres under which, of course, we win.

MR. TSEYTLIN: No, Your Honor. I want to be even more specific. What I meant by "all relevant

purposes," I mean for all purposes under State law.

If tomorrow someone went to the county register and deeds and deleted the lot line between Lot E and F, there is not a single right that the Murrs have under State law that they would lose, and there's not a single right they would gain.

CHIEF JUSTICE ROBERTS: Well, but the --

MR. TSEYTLIN: The key point is --

CHIEF JUSTICE ROBERTS: But the key point is they didn't do that. Nobody did that. And I'm looking at page G -- 3 of the appendix to the County's brief, and that's the basis on which the analysis was done. And it says they did not decide whether lots have been formally merged. And it's language that is used throughout. These were effectively merged.

Well, I mean, on the other side of it, they can argue, well, we effectively drew lines around these three acres. And it seems to me that -- that there's a confusion between the definition of "property" and the question of whether or not there's a takings. And if you start analyzing with the takings factors and the way there's property, that muddles the whole analysis.

MR. TSEYTLIN: Well, Your Honor, let me explain the State's methodology. And I think in doing that, I think I'll be able to answer your question more

clearly.

The test to identify the relevant parcel in the State's submission should be one straightforward question: Is the land lot at issue completely separate from any other land under State law? And there, you look at all of State law. And where the State law -- lot line has no meaning for anyone, it has -- it does not give any rights, which is the case here.

JUSTICE ALITO: So if lots are contiguous, that's the end of the question for you; right?

MR. TSEYTLIN: Not at all, Your Honor. Our test is if two lots have a link, a legal link under State law, then they are one parcel. If they have no legal link under State law, then they are completely separate.

JUSTICE KENNEDY: But are you -- you're talking just about State law. It seems to me that your position is as wooden and as vulnerable a criticism as -- as the Petitioner's. You say, whatever State law -- basically you're saying, whatever State law does, that defines the property. But you have to look at the reasonable investment-backed expectations of the owner.

MR. TSEYTLIN: Right, Your Honor. And I want to clarify that what we're talking about here is just the threshold question. And after the threshold

question is determined, the reasonable expectations will, in the vast majority of cases, be analyzed as part of the Penn Central analysis. The approach urged by the Federal government, the county, and in the rebuttal --

JUSTICE KENNEDY: But the reasonable investment-backed expectation was based on the fact that you had a lot-line rule which you've now changed. So you say that the State law can change reasonable investment-backed expectations.

MR. TSEYTLIN: Your Honor, I want to be clear. When you're doing the second step, the hard work of the takings analysis, the existence -- the preexistence of the lot lines, what the investment-backed expectations were can all be taken into account. The problem with the approach urged by the county, the Federal government, and my friends in saying it's a reasonable presumption is you basically have Penn Central squared. I --

JUSTICE ALITO: Well, let me give you this example. A -- it's not that far from this case. A plumber and his wife buy a small lot, but it's a lot on which you can build houses at that time, and they build a modest house.

MR. TSEYTLIN: Uh-huh.

JUSTICE ALITO: And they say, you know,

we're going to -- there's a lot next door, let's buy that; we can use it as a yard for our children when they're growing up. And then after they're grown, we can sell it, and we'll have some money for retirement. And that's a buildable lot at that time.

And then this new regulation is adopted and now the side lot can't be sold at all. And they say: Well, look, you've taken away this valuable asset we were going to use for our retirement.

And the answer is: Well, no, because you could -- you could sell your whole property, and somebody who wants to build a big house could build on that property.

And they say: Well, that's fine, but we like our little house. We'd like to stay in our little house.

Now, what is fair about that situation?

MR. TSEYTLIN: Your Honor, I want to clarify. I believe that in your hypothetical, when you had two lots that were preexisting and owned by the same person and then they were involuntarily merged by government action, the analysis would, in fact, be on each lot separately. It is completely different --

JUSTICE ALITO: What do you mean by they were "involuntarily merged by government action"?

MR. TSEYTLIN: That is, there was a -- they had two lots.

JUSTICE ALITO: Right.

MR. TSEYTLIN: Same person had two lots.

JUSTICE ALITO: Right.

MR. TSEYTLIN: They were each completely independent under State law. A new State law comes in and says those are merged. That is a completely different analysis, and I would agree with Your Honor's premise that --

JUSTICE ALITO: That wouldn't fall under your regulation?

JUSTICE KENNEDY: Yeah. Well, isn't that this case?

MR. TSEYTLIN: No, Your Honor. The -- the fundamental difference in this case is that the merger happened by voluntary action of the plaintiffs. And what the plaintiffs did when they acquired two contiguous substandard lots is --

JUSTICE KENNEDY: But it's by voluntary action as defined by State law. The State law takes that voluntary action. And it's the State law that makes the consequence, and that's the consequence we're talking about.

MR. TSEYTLIN: Well, Your Honor, I think the

questions that Justice Kagan was asking clarified this point. That is to say, if you want to, in this case, talk about what this regulation did in 1976, is it put a conditional stair restriction on the parents who owned Lot E.

JUSTICE ALITO: And that's a very fine argument, except for the fact that it's completely contrary to the reasoning in Palazzolo. Justice Kennedy's opinion in Palazzolo rejects that. And the debate between Justice O'Connor in concurrence and Justice Scalia in concurrence is about exactly that. And you don't even cite Palazzolo in your brief, do you?

MR. TSEYTLIN: That is not correct. At pages 41 through 43, we discuss why this is not a Palazzolo-type claim. A Palazzolo-type claim, as Justice Kagan's questions indicated, would be that something happened in 1976 that was unreasonable. And by "unreasonable," I mean that it took property without just compensation. So there would have to be a look back to 1976 to see if the relevant takings test fails.

And it wouldn't fail here, because what happened in 1976? The parents owned Lot E only. The -- and their interest to Lot E was protected by the grandfather clause. The only additional restriction upon the parents that was placed in 1976 by the State

was a conditional sale restriction. That is, you can do anything with the lot you want. You can sell to whoever you want. The only thing you can't do practically is sell it to someone who only wants to buy it if they also own a lot next door and also is substandard. That is a conditional sale restriction, a very minor restriction. And as we pointed out in pages 41 through 43 of our brief, they have not brought that kind of claim, which takes them out of the world of Palazzolo.

JUSTICE ALITO: Now, which --

MR. TSEYTLIN: Go ahead.

JUSTICE ALITO: If -- if one lot is owned by a wholly owned corporation or an LLC and the other is owned by the owner in the owner's own name, are they considered to be under common ownership under Wisconsin law?

MR. TSEYTLIN: No, Your Honor.

JUSTICE ALITO: No.

MR. TSEYTLIN: Unless you can pierce the corporate veil, which is obviously a very high standard.

JUSTICE ALITO: What -- what about --

JUSTICE KENNEDY: -- the same with husband -- husband owns one lot, wife owns the other; they're different?

MR. TSEYTLIN: The State hasn't taken a

final position on that. My understanding is the county, which is the first-line enforcer of this, would interpret it that way.

JUSTICE KENNEDY: Would interpret it what way?

MR. TSEYTLIN: Interpret it that if they're not literally the same person, even if it's husband and wife, even if it's two people and one of them owns one and one of them owns the other, and it's not the same two people and they were --

JUSTICE GINSBURG: May I correct you --

CHIEF JUSTICE ROBERTS: I'm sorry. I didn't hear the end of your sentence.

MR. TSEYTLIN: That is my understanding of the county's interpretation.

CHIEF JUSTICE ROBERTS: Well, what is? That it -- that it's still treated separately?

MR. TSEYTLIN: That if two owns the exact --

CHIEF JUSTICE ROBERTS: Well, that makes it seem we're talking about it in justice and fairness. That seems to make it seem a little quirky that these owners are not entitled to treat them separately, while if they -- they just happen to record them in -- in separate names that they would be a entirely different situation.

MR. TSEYTLIN: Well, let me explain what the State is trying to achieve in this law. It wants to ultimately phase out substandard lots in the long term. It does not want to interfere with any current investment-backed expectations. So what it says is we're going to have a slow phaseout and it's going to be only triggered by the situation where people end up taking the lots in common ownership. And that will happen in the long term.

Most people in this area bring lots into common ownership on purpose. And why would they do that? Because if --

CHIEF JUSTICE ROBERTS: Well, they won't after today, I mean -- or if you win.

(Laughter.)

CHIEF JUSTICE ROBERTS: You'll be -- you'll be smart enough to say: Okay. Husband, you own F; I will own E. And by the way, you're my successor in interest under E, and I'm your successor in interest under F. And -- and then we'll be fine.

MR. TSEYTLIN: Well --

CHIEF JUSTICE ROBERTS: Does it really -- does the whole takings issue really turn on that?

MR. TSEYTLIN: Yes, Your Honor. Let me tell you why we do think it'll be effective. Because most

people bring these lots under common ownership purposefully. And the reason they do that is they want to build a single house up on a bluff, a bigger house. So the reason -- and we think that that will happen over time. It's already happened with eight property owners in this area. So while it is a slow phaseout of lots, it is a perfectly sensible regime. It balances, on one hand, the desire to protect investment settle -- back --

CHIEF JUSTICE ROBERTS: Well, I would suppose that in my hypothetical, the husband owner on one side and the wife owner on the other side, they can build a common house on the two lots, can't they?

MR. TSEYTLIN: The -- the merger of the two lots are bringing into common ownership makes it easier to apply -- comply with other regulatory restrictions on the area about minimum lot size and things of that sort. If you don't bring them into common ownership, then you're -- you're left with the nonconforming structure that's on your nonconforming lot.

JUSTICE KENNEDY: May -- may I have one question? It's a background question.

Suppose these people had Lots E and F merged. Then they bought G and H. Can they still build one house, just one?

MR. TSEYTLIN: It would depend on the size

of G and H, how much net project area. Right now, there's --

JUSTICE KENNEDY: Well, suppose -- suppose they're just like these lots.

MR. TSEYTLIN: Well, Your Honor, so right now, it's about .9 --

JUSTICE KENNEDY: If they have E and F, then they buy G and H, can they build only one house, or two?

MR. TSEYTLIN: Right, Your Honor, just -- just let me have two seconds. I think I can answer the question.

Right now, it's .98 net project area. If Lot G is more than .2 net project area, they can build one house. And then the new lot gets the new net project area. So, basically, in order to have two buildable lots, you have to add up to more than two acres of net project area.

JUSTICE KAGAN: General --

CHIEF JUSTICE ROBERTS: It makes no difference under your approach that the two lots were taxed separately, does it?

MR. TSEYTLIN: No, Your Honor. I --

CHIEF JUSTICE ROBERTS: So that doesn't make it. It makes no difference under your approach that there were lot lines separating the two lots; right?

MR. TSEYTLIN: That's right, Your Honor.

CHIEF JUSTICE ROBERTS: Are there other aspects in which the two lots are treated separately that make no difference under your approach?

MR. TSEYTLIN: So with regard to the tax assessor, that was an -- that was an error that the tax assessor made. In fact, that fact milked it strongly in favor of the -- the rule that we urge. Because in our rule, you look at only State law and you look at whether the lots are actually separate under State law.

Under the all things considered approach --

CHIEF JUSTICE ROBERTS: Are these lots actually separate under State law?

MR. TSEYTLIN: There is no legal situation in which the lot line between Lot E and Lot F makes any difference right now, none.

CHIEF JUSTICE ROBERTS: So -- so that's not quite an answer. Are they legally separate under State law? They're still shown on the plat as separate lots, correct?

MR. TSEYTLIN: That -- that's correct, Your Honor.

CHIEF JUSTICE ROBERTS: So to what extent is it wrong for me to understand that the only -- the only sense in which the merger doctrine that you're talking

about applies is with respect to a takings claim?

MR. TSEYTLIN: No, Your Honor. They -- it's with regard to every possible use or sale of these lots. Any development, any sale, anything else a person in the real world would want to do, there would be no difference. There's not a single action that someone could take that they couldn't take if the lot line was deleted. It makes no difference. The -- the lot line between Lot E and Lot F as it currently stands --

CHIEF JUSTICE ROBERTS: And then so there's no reason -- under State law, there is a procedure to eliminate the lot lines, and you're saying that that procedure is irrelevant in this case?

MR. TSEYTLIN: Given the specific facts of this case it would be completely irrelevant. No one would go through that process because it would not add or subtract any single right to the Murrs if they --

JUSTICE KAGAN: General --

MR. TSEYTLIN: -- deleted that lot line.

JUSTICE KAGAN: May I ask a question. The difference between you and the other folks on that side of the room is that they want to look at reasonable expectations, and State law, in part, defines those reasonable expectations, but they're allowing for the idea that other things might come in as well, and you're

saying it's all and only State law.

Now, I'm pretty sympathetic to the idea that preexisting State law really does influence quite a bit your expectations about what property you own and what you can do with it. But still, what's the harm of doing what the government and the county want rather than what you want in terms of saying the analysis should be a little bit more fluent, fluid, sure, State law matters, but maybe other the things matter too in a particular situation.

MR. TSEYTLIN: Because what you get with any of their approaches is Penn Central squared. That is to say, you have a complex multifactor analysis, basically an all-things-considered analysis at step one, just to figure out the parcel. And then, in the vast majority of cases, you then do a complex multifactor analysis and you -- which is going to look at a lot of the same factors.

I think one area of agreement among the parties and amicus briefs in this case is this is -- area of law is incredibly complicated. It's difficult to make your way through the weeds. It --

JUSTICE ALITO: Would it matter to you if it were not possible to build a house that bridged the two lots? Suppose one was at the bottom -- one lot is at

the bottom of a cliff and the other is at the top of a cliff. Would that matter to you?

MR. TSEYTLIN: In defining what the relevant parcel is it would not. It would matter quite a bit in doing the hard work of doing the Penn Central analysis, and that's one of the key points I'd like to reemphasize.

We believe -- may I finish my sentence?

CHIEF JUSTICE ROBERTS: Sure.

MR. TSEYTLIN: We believe that most of the work under takings law should be done at that second step, usually Penn Central.

We believe the first step, the parcel question, should be determined in a straightforward way so the Court can move on to doing the hard work of Penn Central.

Thank you, Your Honors.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Lazarus.

ORAL ARGUMENT OF RICHARD J. LAZARUS

ON BEHALF OF THE RESPONDENT ST. CROIX COUNTY

MR. LAZARUS: Mr. Chief Justice, and may it please the Court:

Just like cities and counties in at least 33 States have done for decades, for more than 40 years,

St. Croix County has excluded from its grandfather clause for preexisting lots commonly owned substandard adjacent lots. During all those decades, no court at any time in any jurisdiction in the United States has held that exclusion amounts to a taking and for good reason: It's fair and it's just. And the same reason --

CHIEF JUSTICE ROBERTS: Well, that's -- and it gets to the questions I was asking early, fairness and justness.

But the -- and if -- actually the -- the point is -- last made by -- by your friend, there are two different questions. What is property and whether there's been a taking. And I thought the question of fairness and justice is justice is applied to the second question. I didn't think it was applied to defining what the property was because then you really do get, as he said, Penn Central squared.

You're looking at fairness and justice. How should we define this property? Well, fairness and justice for what purpose? Well, for the Takings Clause. And then once you define it, then you say well, it's fairness and justice for whether there's been a taking.

It seems to me that you're just kind of teeing up the definition of property to give you the

right answer under the Takings Clause.

MR. LAZARUS: Your Honor, in -- in this case, in Valley, there is some circularity here, but let me tell you why there is some circularity here.

And that is because they're making and taking the challenge to a very odd -- a very odd topic, and that is the absence of an exclusion. And -- and the reason why there's no exclusion for these kinds of substandard commonly adjacent lots is precisely because government has determined over decades that, in this situation, the economic impact isn't so great. There isn't so hardship.

So the premise of the -- of these ordinances is the absence of hardship. And since the purpose of the Penn Central analysis or the Lucas analysis for economic impact is to identify when the hardship really is so great to justify the payment of just compensation, it's not surprising that the very teachings of these ordinances is directly relevant to how you evaluate the property.

JUSTICE ALITO: How can you say that the impact is not -- is categorically not great? If some -- somebody buys a lot next to that person's house with the expectation of selling it at some point in the future to meet real needs that come up then, and then the -- a

regulation is adopted that says well, sorry, you can't sell it, that there's no hardship there?

MR. LAZARUS: The -- the hardship -- the question though is how do you define the extent of the hardship. And what you want -- what you need to look at under the Penn Central analysis is what the economic impact is, and to define the parcel part of that is to -- to identify what the impact is.

In -- for instance, in this case, the economic impact on the Murrs, right, has to take into account the shared value of the two because the fact is, if you look to what -- there is no general issue of material fact with the lower courts on this question. The value of the two parcels together for one house is $698,000. The value of two houses separate, with a house on each, is $771,000.

JUSTICE ALITO: Well, that's fine except that, in order to realize the value of the two lots put together, they would have to move away.

MR. LAZARUS: Right. But -- and -- and the -- and they --

JUSTICE ALITO: Now, they think that's irrelevant.

MR. LAZARUS: The takings inquiry is what the economic impact is on them. It shouldn't be a

different test depending upon their particular subjective preferences, then someone else's subjective preferences. The -- the fact is --

JUSTICE ALITO: I thought the -- I thought that what you're saying is we have to look at what's fair and just, and now you say, well, we disregard the situation of -- of the particular people who are involved.

MR. LAZARUS: Well, no. You're looking at -- it's several things. You're looking at first what the economic impact is. Define the parcel in a way which actually evaluates the real impact. Not a fictional impact, but the real impact. The real impact here is very little.

You're also taking account the -- the State law. You're looking at the law at the time to figure out what the reasonable expectations are of people. You're taking that into account as well.

The other thing you're taking into account, Your Honor, is the point you mentioned before. Contiguousness by itself wouldn't be enough. We aren't arguing that. One thing you look at is the State law for expectations.

You also look at the physical and geographic characteristics of the property; in other words, to find

out whether there was any real potential here for unity of use and integrative use. For instance, in this case, if Lot E and F were different and you had one up above and one down below, that might well be a harder case to suggest that there was that kind of unity of use, integrated.

And you look at those three things, because what you're trying to look for to evaluate the parcel is you're trying to see what the real burden is that people are suffering in the case.

You know, it's a remarkable finding that there's such a little difference in value between one house on two and two houses each on one. And the -- and the reason for that, there's actually a formal term in economics for it. It's called the complementarity principle. You don't need to know that term. It's just common sense.

There's some kinds of property, land is one of them, that can create value joined that doesn't exist when separate. The most extreme example are shoes. No one would pay very much for just a right shoe or a left shoe, but they pay a fair amount for the two shoes together. Land is not an extreme example like shoes, but the same phenomenon exists --

CHIEF JUSTICE ROBERTS: It seems to me

you're -- you're trying to figure out then what the land interest is. And usually there's a regular way to do that, which is you go down to the county office and you look at what the -- the lines are between your property and somebody else's or your lot and a different lot. You don't look to whether one is below and one is above, or that, and it seems to me that gets into a very complicated situation when for Federal takings purposes you're redefining what State law says property is.

MR. LAZARUS: What -- what you're doing -- what you're doing, Your Honor, is you're trying to determine the economic impact. There's no question State law defines what you own, but the question of whether it's a taking -- it's a question of Federal constitutional law, and the economic impact inquiry has to see to what extent there really is this incredibly disproportionate burden they're facing or not.

In -- in the Penn -- in the Penn -- oh sorry. In the Penn Central case, in the Keystone Bituminous case, every one of those cases State law defined as separate property interests, things can be bought and sold, the air rights can be bought and sold, the support estate can be bought and sold, real estate can be bought and sold under State law. There are distinct property rights under State law, and the Court

nonetheless, as a matter of Federal constitutional law, joined them together because the Court wanted to find out whether, in fact, there was that kind of economic burden. And they even did it in cases involving lot lines.

JUSTICE BREYER: Well, what about adding here when I look to see the reasonableness of the regulation. I mean, suppose in Holmes' case, the regulation had said you have to leave columns of a thousand feet of coal. But every expert said, or everyone who knew about it, said you don't need more than 50 feet.

MR. LAZARUS: Well, certainly it's true, the ultimate analysis, you pay attention to reasonableness. You -- you pay attention to whether the government -- you don't get to accept the government saying it doesn't automatically qualify --

JUSTICE BREYER: Does that fit in your three?

MR. LAZARUS: Absolutely, Your Honor. It fits under Penn Central. And in this case -- in this case, this is really the easy case. It's almost a sui generis case because the -- the State law at issue was one which -- which is premised on the notion that under this circumstance you actually don't face such a great

hardship. That's exactly why they don't get the exemption.

This isn't -- they are not challenging restriction. They're actually challenging not getting exemption which someone else is getting. And the reason they're not getting that exemption is they don't have the same hardship that other people have.

The -- the owner of the isolated lot, substandard lot, asks for some kind of exemption. They face the prospect of a complete economic wipeout. But the owner of two substandard adjacent lots, they don't. That person, like the Murrs, they have development options.

In addition, they have the opportunity, as I said before, to created value, value that doesn't exist separate. And in this case, the value of joining the property together, the reason why this property -- which is beautiful property, stunningly beautiful, St. Croix River, at the bend of the river. The reason why it's so valuable is two things: River frontage and privacy. That's the touchstone of value here.

Lot F is only 58 feet wide at the bottom, the distance between the two columns in this room, and right next to a public area. Lot E has a hundred feet, twice that, of river frontage. And off to the west,

more privacy. When you add those two lots together, the value of this luxury lot at the bend of the river is so great, it actually almost overcomes the loss of value of not having the second home on the lot.

JUSTICE SOTOMAYOR: I'm sorry. I've had a problem with the appraisal figures, and it may be a step I'm missing.

Why would anybody pay $400,000 for a lot they can't build on?

MR. LAZARUS: Because --

JUSTICE SOTOMAYOR: The two values -- your example said the two lots put together are less valuable, or more valuable?

MR. LAZARUS: Just a little less valuable.

JUSTICE SOTOMAYOR: Yeah. I know there's only a ten percent difference. But as I understood the appraisal figures, and are now using estimates, each lot was worth about 350 and 400,000 separately, for a value of 750. Together they were valued at 680. So they weren't -- you didn't double the price --

MR. LAZARUS: No. But what you do -- if -- you didn't lose very much. By not being able to build a second home, the value doesn't sort of halve. Instead, the value goes only by -- down by nine percent. And the reason is that the combined lot is this luxury lot.

This is a high-end area --

JUSTICE SOTOMAYOR: I understand why the combination, but why would anybody buy the lot you can't develop on?

MR. LAZARUS: Well, the question is not the -- what the value of Lot E as a unit that you can't develop or -- or build on. The question is what the value of Lot E is to the Murrs, who also own Lot F, because that's how you define what the burden is to them. And the burden to them -- if -- if someone only owned Lot E, then the hardship exemption would apply and they could build. That's exactly the distinction that the ordinance draws between the two.

JUSTICE BREYER: Is this right? Just say yes or no, and if it's wrong, I'll figure it out later.

(Laughter.)

JUSTICE BREYER: Are you saying -- look, of course you look at the lines that the State draws, but that isn't determinative because you want to know the total impact on the person, which may get you to look at nearby property or other things. You want to know how reasonable this regulation that affects it is; you want to know whether he knew when he bought it, and perhaps there are others.

Is that basically what you're saying?

You're not denying that you look at the State's lines. It's just that they are not determinative?

MR. LAZARUS: Mr. Chief Justice, may I answer the question?

CHIEF JUSTICE ROBERTS: He wanted one word.

MR. LAZARUS: Yes.

(Laughter.)

MR. LAZARUS: Yes. Yes.

CHIEF JUSTICE ROBERTS: Thank you, Counsel. Ms. Prelogar.

ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

FOR UNITED STATES, AS AMICUS CURIAE,

SUPPORTING THE RESPONDENTS

MS. PRELOGAR: Mr. Chief Justice, and may it please the Court:

I'd like to begin with your question, Mr. Chief Justice, about why it wouldn't be sensible to just look at lot lines here as the starting point for defining the parcel as a whole.

And as Justice Breyer just noted, we think the lot lines are certainly relevant, especially insofar as they might shape reasonable expectations about how property owners expect to use their property and what they expect to remain separate and distinct. But we urge this Court not to adopt a presumption or a bright

line rule that focuses on lot lines in isolation. And we really see two principal problems with that, one of which is practical, and the other is legal.

CHIEF JUSTICE ROBERTS: Well -- I'm sorry. Go ahead.

MS. PRELOGAR: Turning to the practical point first, especially when you're looking at contiguous commonly-owned property, which is the situation the Court is confronting here. We think that lot lines will frequently not be an accurate indicator of how that claimant is being burdened by the particular regulation, and that's because when you have those contiguous commonly-owned lots, there's a physical unity that frequently opens up the potential for linked use, linked development, a direct reciprocity of advantage, and shared value.

And so when thinking about how to address the parcel as a whole issue, where the whole purpose, the whole point is to get a feel for how the regulation is actually impacting this claimant, focusing on lot lines would exclude relevant considerations about the on-the-ground economic realities.

CHIEF JUSTICE ROBERTS: So that's -- I just don't know how that works with -- with property. Not asking whether there's a takings, but asking whether

there's property.

You say it -- it depends on spacial, functional, and what's the third thing?

MS. PRELOGAR: Temporal.

CHIEF JUSTICE ROBERTS: Temporal considerations.

Now, you usually don't say that when you're asking about property. You say, I owned Lot E or I own Lot F, and here it is on the map; that's what I own. You don't sit down and say: Well, but with spacial considerations I own this much of it, and when temporal considerations, add this, and functional that.

It seems to me that those concerns are pertinent at considering whether there's a taking of the property. But when it comes to what the property is, that's a whole different question, and you don't get into spacial, you get into what the plat looks like in the county office.

MS. PRELOGAR: I think it's absolutely the case that for terms -- in terms of defining what's a protected property interest, at the outset you look to State law, you look to lot lines, and no one's contesting here that there's a protected property interest. But we think that this relevant parcel determination does come into the second part of the

inquiry in terms of whether there's been a taking.

It's about how do you get a feel for the -- the relevant unit of property that's at issue to determine how this regulation is actually affecting this claimant, and so we would put those considerations on the taking side of the line.

This Court has always shown a preference in deciding, as Justice Breyer said, and -- and Justice Holmes' famous formulation whether a regulation goes too far, the Court's always shown a preference for being able to engage in that kind of contextual analysis that focuses on all of the relevant facts and circumstances.

JUSTICE SOTOMAYOR: The problem I have with your test, which has the -- the three components, is I don't actually see anywhere in there any weight given to the State property lines.

MS. PRELOGAR: Well --

JUSTICE SOTOMAYOR: You don't explicitly list it among those three items. You don't tell us how you're weighing it or not weighing it, what presumptions you're giving it or not. So where does it fit in to your -- your -- your three factors?

MS. PRELOGAR: We think that it frequently goes to the functional considerations because it shapes expectations about how land can properly be used,

whether it's an entirely separate and distinct issue. So we do think that there's a role for State law to play. And here we think, actually, that's one of the --

JUSTICE SOTOMAYOR: If we think there should be more of a role, where would you put it? St. Croix puts it on the second prong. Where would you end up putting it, and why do you disagree with how they use it?

MS. PRELOGAR: I think it's very important not to adopt any kind of presumption or bright line rule for the relevant parcel. And so I also would put it on the second prong of conducting the Penn Central analysis.

But the reason for that is because the relevant parcel that the threshold definitional question is going to provide the touchstone that contextualizes the whole rest of the takings inquiry. And if the Court were to artificially narrow it and look only at lot lines, or to presumptive weight to those lot lines, then that's going to be the focal point for measuring economic impact for looking at investment-backed expectations.

JUSTICE ALITO: Suppose you have lots that are not contiguous but they're very close to each other. Now, under your flexible approach with all these

different dimensions, are they ruled out as a single parcel?

MS. PRELOGAR: I think it would be very difficult to say that those kinds of noncontiguous properties function as an integrated economic unit. So I think it would be the rare case where it would be appropriate to aggregate those property interests. But I think that it is important to keep in mind that there are so many different ways that property interests arise, that it is important to have a flexible, nuanced approach here.

And Justice Alito, I would just point to the example we raised about the large developer who acquires a large tract, maybe a thousand acres of property, and subdivides it into hundreds --

JUSTICE ALITO: That can easily be taken care of by making the rule look to the -- the lots as defined at the time of the acquisition rather than something that was done prior to -- prior to the time when -- when a rule would be -- would be applied. But, you know, it's fine to say that there are all these dimensions and they should be nuanced and who can be opposed to something that's nuanced. But what are we looking for? What are we looking for? We're looking at all these dimensions to determine what? Could you just

say as precisely as you can what we would -- we should be looking for in defining what is the property that is taken using all of the different dimensions that are relevant in your view?

MS. PRELOGAR: I think the clearest articulation I have is to say that you should be looking for what in the interest of fairness and justice is an accurate way to measure economic impact. And that's the point of the relevant parcel determination. It's focused specifically on the economic impact prong of the equation.

JUSTICE ALITO: And is it the economic impact on these particular owners or on some category of hypothetical owners?

MS. PRELOGAR: It's always been an individualized inquiry focused on these particular owners. And I think that the facts of this case well illustrate the point that when you're conducting that kind of evaluation, it's often the case, as -- as Mr. Lazarus said, that you're going to have a shared value, a reciprocal value that --

JUSTICE ALITO: But what if a lot -- but what if a lot was -- was preserved? What if it was bought for the purpose of selling it at some point in the future and/or it was preserved for that purpose so

that nothing was built on it so that it could readily be sold?

MS. PRELOGAR: I think that those kinds of reasonable investment-backed expectations have a role to play, but I don't think that they can be dispositive. Because, again, the point of the relevant parcel determination is to accurately gauge economic impact. But I do think that it's important --

JUSTICE ALITO: Well, why wouldn't they be determinative? I thought you said it was we look to legitimate expectations. There, their expectations are completely frustrated.

MS. PRELOGAR: It's certainly the case that anytime anyone's alleging a regulatory taking, the premise of the claim is that they're being prevented from doing something with their property that they wanted to do with it. We think that that's not sufficient to alone define the relevant parcel because it might be the case, as it is here, that there's actually not much of an economic impact at all.

And if that's the case, then this isn't the kind of regulation that is requiring someone to shoulder a burden that in the interest of fairness and justice should be --

JUSTICE ALITO: Well, that comes back to

my -- but -- but you're saying that they have to move. They can't afford to build a big house here, which is what everybody wants. They don't want these little modest houses anymore. They want McMansions. They -- they have to move. That's what you're saying.

MS. PRELOGAR: But to the extent that a court were to conclude that that is an undue interference with their investment-backed expectations or that the character of that government action is actually unjust and anomalus, then I think that this Court's precedent already builds in sufficient protection for those kinds of interest without trying to rely solely on expectations to identify the relevant parcel.

JUSTICE KENNEDY: I -- but I thought reasonable investment-backed expectations were objective. You're now making them subjective.

MS. PRELOGAR: Oh, no. To be clear, Justice Kennedy, we do think that it has to be an objective inquiry. And I understood Justice Alito to be focusing on a fact pattern where the property was acquired before the relevant regulatory restriction was enacted and thereby frustrated the expectations.

Here, we think it's actually a critical fact that Petitioners voluntarily brought this land under

common ownership and so triggered the application of the merger provision decades after the relevant regulatory restriction was in place. And that does weaken the idea that there were any objectively reasonable expectations --

JUSTICE SOTOMAYOR: Well, I actually think they did it -- the parents did it after the ordinance's, from my timeline, creation. The ordinance was passed in 1976. And in 1982, the parents took the property under common ownership from the Atlantic Plumbing Company.

MS. PRELOGAR: That's correct. So that there --

JUSTICE SOTOMAYOR: So neither the parents or the children, if they had been paying attention to the regulatory scheme, had a reasonable expectation that the ordinance wouldn't affect them.

MS. PRELOGAR: That's exactly correct. We think that the timing here of the relevant transfers of property reinforces the idea that it's proper to view these two parcels together as an integrated whole.

And the other facts that I would add to that are the spatial ones, the fact that these are contiguous commonly owned tracts with possibilities for linked development and linked uses that creates that direct shared value that is borne out by the valuation evidence

in this case. Because it is significant here that if you view these lots together as an effectively merged parcel, as they are under State law, then the value is only 10 percent less than the value of two separate lots with two separate building sites. And --

CHIEF JUSTICE ROBERTS: But by saying "effectively merged," you mean not really merged?

MS. PRELOGAR: Absolutely. We're not suggesting that the lot lines have been erased here. And so we do think that those lot lines continue to have a role to play.

CHIEF JUSTICE ROBERTS: Except with respect to takings.

MS. PRELOGAR: No. We think that they do have a role to play with respect to takings, but that it's also important to conduct the same kind of contextual analysis that's been the hallmark of this Court's regulatory takings jurisprudence.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Mr. Groen, you have four minutes remaining.

REBUTTAL ARGUMENT OF JOHN M. GROEN

ON BEHALF OF THE PETITIONERS

MR. GROEN: Thank you.

Beginning with the multifactor nuanced approach, the reason why that kind of approach to

defining the property interest -- remember, the first issue, you have to define the property interest that is the subject of the takings -- of the takings claim. The reason is because the whole real estate industry, from mortgage lenders to property owners to title insurance companies, all rely upon the geographic boundaries. And it's exactly as was suggested --

JUSTICE SOTOMAYOR: With the regulations that affect those boundaries.

MR. GROEN: I'm sorry?

JUSTICE SOTOMAYOR: With the regulations that affect those boundaries. Whether it's a title company or anyone else --

MR. GROEN: But we --

JUSTICE SOTOMAYOR: -- they look at what the paper talks about as a property line and what regulations do with respect to that line.

MR. GROEN: And when the regulations redefine and impose a new definition, the reliance that previously existed is undermined. And that is the gravamen of the takings claim. It is not a redefinition that absolves liability.

JUSTICE SOTOMAYOR: So what do we do --

MR. GROEN: It's a redefinition --

JUSTICE SOTOMAYOR: -- with the fact as I see

it that these properties were bought separately, one by the parents, the other by their company, and that post regulations, knowing exactly what they were doing -- and you say they didn't, but that has to do with their choice, because you buy everything subject to regulation. You may not choose to look at it, but you -- you should. Ignorance of the law is not a defense anywhere. I don't know why it should be in the regulatory context.

But putting that aside, they took the title to the property in their own names post regulation.

MR. GROEN: Yes, they did. This is a normal American family who understands when you buy property and you have a deed and it's zoned for residential use in a subdivision, you get to use it. And you get to pass it on to your kids.

JUSTICE SOTOMAYOR: But you get to use everything you own with -- subject to regulatory requirements.

MR. GROEN: That's right.

JUSTICE SOTOMAYOR: I buy a piece of property 10 years ago or 20 years ago, and I didn't know I had to put a sprinkler system in. Today, if you want to do any kind of renovation, you got to put one in.

MR. GROEN: But --

JUSTICE SOTOMAYOR: There's lots of regulations that you didn't buy expecting --

MR. GROEN: That's right.

JUSTICE SOTOMAYOR: -- but they do affect you.

MR. GROEN: But the Murrs bought two separate parcels that comprised two separate building lots, and that has now --

JUSTICE SOTOMAYOR: They --

MR. GROEN: -- been taken --

JUSTICE SOTOMAYOR: They --

MR. GROEN: -- away from them.

JUSTICE SOTOMAYOR: They didn't buy them.

MR. GROEN: That --

JUSTICE SOTOMAYOR: They got them in 1982 subject to knowing that they could only develop on one.

MR. GROEN: Well, that circles right back to the Palazzolo argument that we discussed earlier.

The other issue I'd like to address is this reliance that -- that I -- that we're just talking about with subdivisions and deeds, that is a system that all of this country relies upon. And if we're going to undermine that, that is a serious step in taking away rights and property that people traditionally understand and use in their daily lives. That's the protection

that's talked about in Roth v. Board of Regents.

The second thing is this valuation question. And couple of points on that. All the discussion about, well, the property is valuable because it's waterfront, all of that discussion goes to the merits of the takings claim; in other words, how much economic impact is there? The first step is to define the relevant unit of property for analysis. And that step is looking at the deeds and the -- the geographic boundaries of Lot E. That is the presumption.

When you turn to the valuation question, the notion that Lot -- the combined Lot E-F has value because it's waterfront, that is ignoring the fundamental aspects that the valuation in a residential lot is because you can build on it. And that is what has been taken from the Murrs. They previously had two building sites; now they have one.

The valuation that the county discusses, the value is not attributed to Lot E, because Lot F has the building site. So, really, the county is getting a windfall by suggesting that, oh, well, you can have this bigger, better lot, and that will enable you to -- to recover from the compensation. That goes to -- to the question on -- we have of how do you -- how do you determine the amount of damages?

Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:15 a.m., the case in the above-entitled matter was submitted.)