No. 15-214

In the
Supreme Court of the United States

JOSEPH P. MURR, ET AL.,
Petitioners,

v.

STATE OF WISCONSIN AND ST. CROIX COUNTY,
Respondents.

ON WRIT OF CERTIORARI
TO THE WISCONSIN COURT OF APPEALS

BRIEF FOR THE STATES OF CALIFORNIA, HAWAII, ILLINOIS, MAINE, MASSACHUSETTS, MINNESOTA, OREGON, VERMONT, AND WASHINGTON AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JOHN A. SAURENMAN
Senior Assistant Attorney General
JOSHUA A. KLEIN*
Deputy Solicitor General
NICOLE U. RINKE
Deputy Attorney General
STATE OF CALIFORNIA
DEPARTMENT OF JUSTICE
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102
(415) 703-2543
joshua.klein@doj.ca.gov
**Counsel of Record*

(Additional Counsel Listed on Signature Page)

QUESTION PRESENTED

Whether this Court should create a constitutional presumption that, in regulatory takings cases, separately titled adjacent lots under common ownership are to be analyzed separately when deciding whether a governmental regulation affecting one such lot unfairly deprives the owner of the use of his parcel as a whole?

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INTERESTS OF THE AMICI

Amici States are committed to preserving property owners' rights, as a matter of both federal and state law.[1] In exercising their police powers to promote the health, safety and well-being of residents, and to protect the environment, amici also consider the current and future regulatory needs of the community. State zoning laws, like other exercises of state regulatory authority, must honor both of these commitments. They seek to ensure that development occurs in a balanced manner, benefiting both property owners and the larger community.

Regulatory takings cases can turn in significant part on the definition of the parcel as a whole—the unit of property (and attendant rights) against which the impact of a regulation that restricts property use is measured to determine whether the regulation has effected a compensable taking. Petitioners and their amici would define the parcel narrowly, focusing on the single legal lot whose individual use is most restricted, rather than on a larger area under common ownership. That approach could both increase the number of cases in which a regulation affecting one legal lot may be deemed a "total" taking, and fundamentally change the analysis of other cases under *Penn Central Transportation Co. v. City of New York*,

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[1] *See, e.g.*, Cal. Const., Art. I, § 1 (listing, among people's "inalienable rights," the right to "acquir[e], possess[], and protect[] property"); Haw. Const., Art. I, § 2 (similar); Maine Const., Art. I, § 1 (similar); Mass. Const., Art. CVI (similar); *see also, e.g.,* Or. Const., Art. I, § 18 (takings clause); Wash. Const., Art. I, § 16 (takings clause).

438 U.S. 104 (1978), by increasing the proportion of burdened rights to remaining rights.

Those effects would unduly impair the States' ability to fulfill their role in the federal system. As a general matter, States have front-line responsibility for adopting reasonable, locally appropriate regulations affecting land use, public safety, environmental protection, and public health. Under petitioners' approach, States and localities would be forced to choose between forgoing necessary and constructive regulation that benefits the community and risking significant or even prohibitive financial exposure. The result would be to prohibit or discourage important regulatory programs that States have widely found necessary to the fulfillment of their public duties.

The particular type of regulation at issue in this case is a lot merger rule, under which adjacent commonly owned lots of substandard size are allowed less total development than would be allowed if the lots were separately owned. Such provisions have been in wide use across the country for decades.[2] They represent a considered judgment, on the part of the enacting States and localities, that vital community needs counsel against permitting new nonconforming uses of land where the circumstances of multiple-lot ownership make enforcement of current zoning requirements reasonable and fair. Such programs' effectiveness and viability would be severely restrained under petitioners' proposed view.

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[2] *See, e.g.*, Cal. Gov't Code § 66451.11; Mass. Gen. Laws ch. 40A, § 6; *see also* 06-096-1000 Me. Code R. § 12(E)(1); Minn. Stat. §§ 394.36(5)(c)-(e), 462.357(1e)(f)-(h); *see generally* National Association of Counties Br. 12-31.

Those consequences are neither compelled by this Court's precedent nor necessary to fulfill the Takings Clause's purpose. This brief addresses why, in defining the parcel as a whole, courts should not substitute a federal constitutional presumption of separate-lot analysis for the sort of facts-and-circumstances analysis that this Court has traditionally employed to analyze regulatory takings.

SUMMARY OF ARGUMENT

Petitioners propose that, in deciding whether a government regulation results in a taking of land, courts should presume that "the magnitude of government interference [with property rights] should be measured" by the regulation's effect on the landowner's ability to use "the fee title of the single parcel alleged to be taken," without regard to adjacent or nearby lots held by the same owner. Pet. Br. 12. Those wishing to argue against the presumption in a particular case would bear a "burden of proof"—with petitioners specifying neither the extent of that burden, nor the facts and circumstances that would suffice for rebuttal. *Id.*

That position is unsound. Outside of two extremely narrow categories, this Court has, in its regulatory takings decisions, rejected formalistic tests that single out a particular factor as dispositive. Instead, the Court has explained, regulatory takings analysis requires a fact-intensive inquiry into all pertinent factors of a particular case, to determine whether a regulation's effects on a particular property owner are so severe as to require compensation.

That sound approach requires rejecting petitioners' proposed answer to the question in this case. Where a claimant owns multiple adjacent properties,

focusing only or predominantly on the title description of a single fee-simple estate, to the exclusion or detriment of other factors, will frequently function poorly as a test for determining whether the application of a land-use regulation to the landholding is so extreme as to constitute a taking. Instead, as courts have found, numerous other factors may be equally or more important, depending on the facts of the case. For instance, one parcel, although subject to restricted development itself, may interact with the same owner's nearby parcel, such that the restrictions harm the landowner far less than a separate analysis of one parcel would imply. Or the physical characteristics, past use, and acquisition history of two adjacent parcels may indicate that the landowner had no reasonable investment-backed expectation that each lot would be separately developed.

Petitioners' proposed presumption is not justified by the traditional explanations for evidentiary presumptions. The government has no advantage in accessing and producing information relevant to regulatory takings claims; that advantage lies instead with the owner. Nor would the proposed presumption reflect any widely accepted underlying policy choice, in light of the large number of jurisdictions that have found that unitary treatment appropriately fulfills community needs while being fair to landowners. And petitioners have not shown that a federal constitutional presumption would accurately reflect owners' reasonable investment-backed expectations in most (let alone almost all) cases around the country. To the contrary, state and local laws may strongly affect the amount of independence that landowners ascribe to their parcels and the degree of permanence that they can reasonably ascribe to their

lot lines. A nationwide presumption would frustrate courts' ability to consider such local realities. And with respect to lot merger in particular, a history of widespread legislative judgment approving of such provisions as both necessary for the community and fair to landowners counsels against a constitutional presumption to the contrary. That conclusion is strengthened by the facts of this very case. If presumptions are to operate at all in this context, they should be created by local courts to reflect local realities, which petitioners' proposed rule does not do.

ARGUMENT

I. COURTS NEED THE FLEXIBILITY TO CONSIDER COMMONLY OWNED, ADJACENT LOTS AS ONE PROPERTY IN APPROPRIATE CASES

A. This Court Has Required Consideration of All Relevant Facts and Circumstances for Virtually All Regulatory Takings Questions

The "paradigmatic taking requiring just compensation" under the Fifth Amendment "is a direct government appropriation or physical invasion of private property." *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528, 537 (2005). "Beginning with [*Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922)], however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment." *Id.*

In applying that principle, however, this Court has "remain[ed] cognizant that 'government regula-

tion—by definition—involves the adjustment of rights for the public good,' and that 'Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" *Lingle*, 544 U.S. at 538 (citations omitted). "To require compensation in all such cases would effectively compel the government to regulate by *purchase*," which is not the Constitution's design. *Andrus v. Allard*, 444 U.S. 51, 65 (1979). Regulatory takings doctrine thus "aims to identify regulatory actions that are functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. In approaching that inquiry, this Court has "focuse[d] directly upon the severity of the burden" that the regulation at issue "imposes upon private property rights." *Id.*

Only two "relatively narrow categories" of regulation, *id.* at 538, impose burdens that are inherently so severe as to warrant a per se rule requiring compensation: first, where the "government requires an owner to suffer a permanent physical invasion of her property," *id.*; and second, in a "'total regulatory taking[]'" which "completely deprive[s] an owner of '*all* economically beneficial us[e]' of her property" in ways not foreseeable under traditional law, *id.* (quoting *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)).

In all other cases, this Court has found regulatory takings questions to be intensely fact-dependent. "The Takings Clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Arkansas Game &*

Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012). Because those "concepts of fairness and justice … are less than fully determinate," this Court has, for decades, "eschewed any set formula for determining when justice and fairness require that economic injuries caused by public action be compensated by the government." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 336 (2002) (citations and internal quotation marks omitted)).[3] Instead, the Court has stressed, all relevant factors must be analyzed, and the outcome in any case will "'depend[] largely upon the particular circumstances [in that] case." *Id.* (internal quotation marks omitted).[4]

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[3] *See also Arkansas Game & Fish*, 133 S. Ct. at 518 ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking."); *Lucas*, 505 U.S. at 1015 ("In 70-odd years of succeeding regulatory takings jurisprudence, we have generally eschewed any set … formula for determining how far is too far, preferring to engag[e] in … essentially ad hoc, factual inquiries." (internal quotation marks omitted)); *Eastern Enter. v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion) (the inquiry, "by its nature, does not lend itself to any set formula," and is "essentially ad hoc and fact intensive"); *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 124 (1978) ("this Court … has been unable to develop any 'set formula' for determining when 'justice and fairness' require that economic injuries caused by public action be compensated by the government").

[4] *See also Arkansas Game & Fish*, 133 S. Ct. at 518 ("most takings claims turn on situation-specific factual inquiries"); *Palazzolo v. Rhode Island*, 533 U.S. 606, 636 (2001) (O'Connor, J., concurring) ("The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."); *Penn Central*, 438 U.S. at 124 (characterizing regulatory takings cases as "essentially ad hoc, factual inquiries," in which the result "depends largely 'upon the particular

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B. Determining What Constitutes the Parcel as a Whole Requires a Similar Multifactor Approach

Consideration of all relevant factors is similarly appropriate when determining in a given case what should be treated as the parcel as a whole—that is, the boundaries of the land that courts must take into account when they evaluate a regulation's effects on, and the remaining economic use available to, the landowner.

1. The Definition of the Parcel as a Whole Determines Much of an Overall Takings Inquiry

A court's determination of what constitutes the parcel as a whole will often determine the outcome of a regulatory takings case. Where a regulation would result in the elimination of all economic use of a narrowly defined lot, but not of the larger property of which it is a part, the determination of the parcel as a whole may be decisive as to whether a total taking has occurred requiring compensation under *Lucas*.[5] Even where a total taking is not alleged, evaluation of the regulation's effect on a property owner, and its compatibility with the owner's reasonable investment-backed expectations under *Penn Central*, may effectively turn on the parcel's definition. The regulation's impact on an owner's use of the larger unit

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circumstances [in that] case'" (alteration in original)).

[5] *Cf. Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993).

may be slight, while the effect on a smaller sub-unit seems more severe.

Employing a categorical or near-categorical rule to define the parcel as a whole would therefore undermine this Court's repeated acknowledgment of the need for flexible, fact-specific analysis in resolving regulatory takings claims. Courts would effectively decide the claim through the application of a rigid rule regarding what constitutes the parcel as a whole, rendering any remaining flexibility within the framework of little effect.

2. Courts Have Identified Numerous Factors Relevant to Determining the Parcel as a Whole

In deciding particular cases, courts have correctly noted numerous factors, in addition to the boundaries of a single estate, which bear on what should be treated as the parcel as a whole when a regulation affects one of a landholder's multiple properties. *See generally* Siegel, *How the History and Purpose of the Regulatory Takings Doctrine Help to Define the Parcel as a Whole*, 36 Vt. L. Rev. 603, 610-613 (2012).

Courts look, for example, to the properties' physical and geographic characteristics, including their contiguity. *See, e.g., District Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999); *Kaiser Dev. Co. v. City and County of Honolulu*, 649 F. Supp. 926, 947 (D. Haw. 1986), *aff'd* 913 F.2d 573 (9th Cir. 1990); *Ciampitti v. United States*, 22 Cl. Ct. 310, 318 (Fed. Cl. 1991); *K&K Constr., Inc. v. Department of Nat. Res.*, 575 N.W.2d 531, 536 (Mich. 1998). They place weight on the his-

torical background of the properties' acquisition and use, *e.g.*, *District Intown*, 198 F.3d at 880; *Kaiser Dev. Co.*, 649 F. Supp. at 947, including the existence or nonexistence of plans for common development, *K&K Constr.,* 575 N.W.2d at 537. They can inquire as to "the extent to which the restricted lots benefit the unregulated lot." *District Intown*, 198 F.3d at 880; *see also Machipongo Land & Coal Co., Inc. v. Pennsylvania*, 799 A.2d 751, 768 (Pa. 2002); *Ciampitti*, 22 Cl. Ct. at 318. Or they may look for other "'factual nuances'" that reveal the "economic expectations of the claimant." *Forest Props., Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999).

3. Petitioners' Narrower Approach Would Overlook Key Factors

Anything other than a wide-ranging inquiry, responsive to the facts of the particular case, risks overlooking factors that are critical to evaluating whether a regulation's effect on one out of a number of adjacent, commonly owned lots is so significant as to be "tantamount to a direct appropriation or ouster," *Lingle*, 544 U.S. at 537, requiring the payment of compensation.

a. In many cases, for instance, an accurate determination of the impact on an owner's reasonable investment-backed expectations cannot be made without considering "the extent to which the restricted lots benefit the unregulated lot." *District Intown*, 198 F.3d at 880; *see also Ciampitti*, 22 Cl. Ct. at 318 ("the extent to which the protected lands enhance the value of remaining lands"); *Machipongo Land,* 799 A.2d at 768 ("the extent to which the regulated holding benefits the unregulated holdings").

In certain contexts, the fact that one lot is subject to restricted use will allow increased beneficial use of a co-owned adjacent lot—as when a parking lot increases the profitability of the business next door, *cf.* Nevada Br. 25 ("it is common for a restaurant or a store to use one lot as a place of business, and a contiguous lot for parking"), or where an adjacent vacant lot improves the solitude and privacy of a neighboring residence. Local regulations may also be relevant, since they may acknowledge the density-reducing effect of the vacant lot by allowing the owner to make increased use of his adjacent lot. In such scenarios, any diminution in the value of one property is accompanied by an increase in that of the other. If both properties have the same owner, then analysis of just one property can significantly overstate the regulation's actual effect on the owner.

Indeed, that appears to be the case here. Notwithstanding petitioners' allegation that one of their two lots has been deprived of virtually all economic value, a property appraisal evaluated the combined value of two separate buildable lots on the property at $771,100, and the value of one buildable combined lot as just 10% less. J.A. 58-59. That is because, as the appraiser recognized, an owner would enjoy greater water frontage on the two lots together than on either individual lot, and because purchasers are willing to pay a significant premium for the privacy and comfort of having what would function effectively as a large single lot.[6]

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[6] *See* Certified R., Doc. 17, at 49 (Williams Appraisal, at 41: "Given a preference, I believe there is no question that most buyers would prefer to have wide lots with more frontage. Wider lots enable larger homes, more outbuildings, more privacy, (continued…)

Of course, any diminution of value may be undesirable to the owner. But not all such effects will rise to the level of a taking. *See Lingle*, 544 U.S. at 538 ("[W]e must remain cognizant that 'government regulation—by definition—involves the adjustment of rights for the public good,' and that 'Government could hardly go on if to some extent values incident to property could not be diminished without paying for every such change in the general law.'" (citations omitted)).

Indeed, *Penn Central* itself effectively viewed "[t]he relevant land" as "the aggregation of the owners' parcels subject to the regulation." *Suitum v. Tahoe Reg. Planning Agency*, 520 U.S. 725, 749 (1997) (Scalia, J., dissenting). The Court's determination that no taking resulted from the restriction of an owner's air rights rested, in part, on the offsetting effect of the City's grant of rights in other nearby parcels:

> [The owner's] ability to use these rights has not been abrogated; they are made transferable to at least eight parcels in the vicinity of the Terminal, [some] of which have been found suitable for the construction of new office buildings… While these rights may well not have constituted "just compensation" if a "taking" had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are

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more elbow room, and higher prestige.").

> to be taken into account in considering the impact of regulation.

Penn Central, 438 U.S. at 137.[7]

b. The history of the acquisition and use of legally separate parcels is often relevant to the analysis, particularly insofar as it sheds light on whether a regulation has unfairly affected an owner's reasonable investment-backed expectations. *See, e.g.*, *Forest Props.*, 177 F.3d at 1365 (considering the owner's treatment of the lots over time); *District Intown*, 198 F.3d at 880 ("the dates of acquisition" and "the extent to which the parcel has been treated as a single unit"); *Kaiser Dev.*, 649 F. Supp. at 947 ("unity of use," "historical considerations, and how the land has been treated both by the landowner and by the government").

In *District Intown,* for example, a property owner, in 1961, purchased a single parcel, consisting of an apartment building and landscaped lawn, on Connecticut Avenue across from Washington D.C.'s National Zoo. 198 F.3d at 877. The owner treated the property as one unit for decades. *Id.* In 1988, however, the owner subdivided the property into nine separate lots—one where the apartment building was, and the other eight formed by dividing the lawn. *Id.* When the owner's application for a permit to construct eight townhomes on the eight newly titled lots was denied because of the property's historic land-

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[7] *Cf. Suitum*, 520 U.S. at 749 (Scalia, J., dissenting) (disapproving of consideration of offsetting benefits conferred on non-adjacent parcels, but acknowledging that *Penn Central* correctly considered benefits conferred on adjacent parcels).

mark designation, the owner sought compensation under the Takings Clause. *Id.* at 877-878.

In evaluating both a *Lucas* total taking claim and a *Penn Central* claim, the court of appeals recognized as the key question whether the relevant parcel consisted "of the property as a whole" or whether "the eight lots for which construction permits were denied" should be treated individually. *Id.* at 879. In light of the lots' historically unitary purchase and ownership and their spatial and functional contiguity, the court found the lots to be "functionally part of the same property." *Id.* at 880. As a result, the court concluded, neither a total taking under *Lucas* nor a *Penn Central* taking had occurred, because the apartment building remained a productive use of the overall property and the owners were receiving a reasonable rate of return on their investment. *Id.* at 882-884. As *District Intown* recognized, the history of acquisition and use of multiple properties may say more than the lot lines alone about whether the owner's investment was premised on separate or unitary use.[8]

II. PETITIONERS' PROPOSED PRESUMPTION WOULD BE INAPPROPRIATE

Petitioners claim to seek not a per se rule but rather a presumption of separate treatment for lots under separate title. But if presumptions are appropriate at all in this context, they would need to

[8] Indeed, ignoring such historical factors could encourage the manipulation of subdivisions and lot lines to gain takings compensation for properties that were *never* expected to be separately used.

be responsive to local expectations and needs. A nationwide constitutional presumption would therefore be inappropriate.

A. Petitioners' Presumption Is Unjustified in Light of the Characteristics of Regulatory Takings Disputes and Local Variation in Customs and Laws

Although presumptions are applied in the law for various reasons, *see* 2 Broun et al., *McCormick on Evidence* § 343 (7th ed. 2013), none of the traditional reasons justifies the constitutional presumption petitioners propose here.

"[S]ome presumptions are created to correct an imbalance resulting from one party's superior access to the proof" that is relevant to a claim. *Id.* But in disputes over the parcel as a whole any information asymmetry benefits the landowner. The government's pertinent records—statutes, regulations, and land records—are public. In contrast, the landowner is likely to have at her disposal private documents (and may assert personal knowledge) regarding her historical expectations and plans for the property. With respect to this traditional basis for presumptions, a presumption calculated to make the landowner produce the information that is specially in her possession would make more sense than any presumption about following lot lines per se.

Some presumptions reflect a policy judgment about who must bear the risk of an erroneous decision. In criminal trials, for instance, the presumption of innocence reflects a substantive commitment to avoiding the particular problem of erroneous convictions. *See In re Winship*, 397 U.S. 358, 364 (1970)

("It is critical that the moral force of the criminal law not be diluted by a standard of proof that leaves people in doubt whether innocent men are being condemned."). But where a legislatively created merger requirement is at issue, *see* pp. 18-20, *infra*, this rationale arguably supports a presumption in favor of following the statute, rather than petitioners' contrary presumption. Traditionally, the law defers to most legislative judgments balancing community and individual needs. *See Lingle*, 544 U.S. at 545.

Finally, the most common justification for a presumption is an empirical judgment that the presumption accurately reflects what is in fact likely to be true in most cases. *See* 2 *McCormick on Evidence* § 343 ("Most presumptions have come into existence primarily because … proof of fact B renders the inference of the existence of fact A so probable that it is sensible and timesaving to assume the truth of fact A until the adversary disproves it."). But petitioners' unsupported assertions do not show that a title description alone will in most cases accurately reflect owners' reasonable expectations—let alone that consideration of the title description alone would be more accurate than an analysis considering the title description along with other factors. Indeed, petitioners' own case illustrates the danger that their presumption would not accurately reflect a particular landowner's situation. *See* pp. 21-23, *infra*.

Petitioners' proposed presumption is particularly unlikely to match the needs of individual cases because it would operate nationwide, without respect to local variation in legal and historical circumstances. There is wide variation in state and local property law, and it is simplistic to assume that state legal regimes and customs would necessarily lead landown-

ers throughout the country to regard individual parcels as inherently separate. *See, e.g., Town of Franklin v. Metcalfe*, 30 N.E.2d 262, 265 (Mass. 1940) (in Massachusetts, "'[c]ontiguous parcels of land, though divided upon a plan for purposes of sale, may often be assessed as a unit'" for tax purposes); *Preston v. Board of Appeals*, 744 N.E.2d 1126, 1128 (Mass. App. Ct. 2001) ("even before the advent of zoning laws, where contiguous parcels were conveyed as separate parcels, the whole tract constituted one 'lot' for purposes of determining attachment of a mechanic's lien"); *Automated Bldg. Components, Inc. v. New Horizon Homes, Inc.*, 514 N.W.2d 826, 829-830 (Minn. Ct. App. 1994) (treating multiple lots "as one for purposes of liens accruing in consequence of building," because under longstanding precedent a "lien extends to a 'lot' as defined by the way the property is used rather than the way it is platted").

The history of subdivisions and land recording varies across jurisdictions, which have developed particular rules to address particular problems.[9] Depending on the jurisdiction, land can be subdivided and lot lines adjusted with varying degrees of formality and public review, which could also affect the degree of reliance that a property owner should reasonably place on any expectation of separate use.[10] And the boundaries of a particular lot can

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[9] *See, e.g.*, *Gardner v. County of Sonoma*, 29 Cal.4th 990, 994-995 & n.1 (2003) (addressing status of 1865 subdivision which was recorded before enactment of California's 1893 Subdivision Map Act).

[10] For example, in California, owners may adjust lot lines between adjoining parcels as a ministerial matter, so long as four or fewer parcels are affected, the resulting lots are conforming, and the adjustment results in no greater number of

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change as well through the operation of local law regulating subjects such as adverse possession.

It is possible to envision presumptions responsive to such local factors, which might be justifiably established by local courts. *See, e.g., Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 458 (Mass. 2006) (presuming that contiguous properties in Massachusetts constitute a single parcel as a whole). But the existence of extensive local variation would make the adoption of a national, constitutionalized rule unwise.[11]

B. Widespread Legislative and Judicial Approval of Lot Merger's Utility and Fairness Counsels Against Petitioners' Presumption

As the National Association of Counties has explained, lot merger ordinances are widespread, longstanding tools for promoting the kind of community, land-use, and environmental goals that lead governments to mandate minimum lot sizes. *See* 3

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parcels. *See* Cal. Gov't Code § 66412(d); Barclay & Gray, *Curtin's Land Use & Planning Law* 79 (34th ed. 2014).

[11] Petitioners also err in attempting to ground their presumption on assertions about the understandings of only a particular class of owners. Petitioners assert that individual owners and families understand rights in one lot to be wholly separate from rights in another. Pet. Br. 27. It is not clear why that would be so. But even if it were true, the presumption petitioners propose would apply as well when compensation is sought by sophisticated corporate owners advised by well-paid counsel—another factor which suggests that it would be unwise to create a broad national presumption that would be applicable to all cases.

Rathkopf's The Law of Zoning and Planning § 51.12 (4th ed. & Supp. 2016) (explaining that lot-size requirements protect water supplies, safeguard environmentally sensitive areas, prevent erosion and pollution, control traffic, and preserve property values); National Association of Counties Br. 5-12. Legislative bodies view lot merger provisions as a way to balance fairness to individual owners with the community's interest in phasing out substandard lots for the common benefit. *See Day v. Town of Phippsburg*, 110 A.3d 645, 649 (Me. 2015) (zoning requirements, merger provision, and grandfathering clause were "designed to strike a balance between a municipality's interest in abolishing nonconformities and the interests of property owners in maintaining land uses that were allowed when they purchased their property"); National Association of Counties Br. 11.

State legislatures across the country have therefore either provided for lot merger themselves, or empowered local governments to enact lot merger ordinances.[12] We are not aware of any court that has found the operation of such a provision to effect a taking. To the contrary, courts have rejected such claims. *See e.g.*, *Sibley v. Inhabitants of Wells*, 462 A.2d 27, 31 (Me. 1983) (rejecting a takings claim premised on merger, because the regulated lot "has substantial use and value in conjunction with the adjacent lot"); *Tekoa Constr., Inc. v. City of Seattle*, 781 P.2d 1324, 1328-1329 (Wash. Ct. App. 1989). Taken together, the decisions of democratically elected representatives and state court judges reflect a widely

[12] *See, e.g.*, Cal. Gov't Code § 66451.11; Mass. Gen. Laws ch. 40A, § 6; Minn. Stat. § 394.36(5)(d); N.M. Stat. § 47-6-9.1; R.I. Gen. Laws § 45-24-38; Vt. Stat., tit. 24, § 4412(2)(B).

held judgment that merged treatment is fair to the majority of landowners and accords with property owners' likely expectations. *See, e.g.*, *Giovanella*, 857 N.E.2d at 458 ("Common sense suggests that a person owns neighboring parcels of land in order to treat them as one unit of property."); 56 Op. Cal. Atty. Gen. 509, 513 (1973) (current "community standards with respect to lot design, area, improvements, flood, sewer, and similar requirements" may be reasonably applied to commonly owned adjacent parcels in some circumstances where it would be "oppressive" to apply them to smaller separately owned parcels). To disregard these careful local judgments in favor of a presumption of separate treatment would require far more justification than petitioners set forth.

Countless communities and property owners, moreover, have relied on these legislative and judicial decisions in ordering their affairs. *See* National Association of Counties Br. 14-31 (listing examples of local ordinances). Indeed, some landowners have presumably made their investment decisions in particular communities based on the expectation that nonconforming lots would be eased out over time through the operation of lot merger provisions—a reasonable expectation, given the widespread and largely unchallenged existence of such provisions. Adopting petitioners' proposed presumption would afford petitioners' purported expectations special protection over the reasonable expectations of countless other citizens, property owners, and communities.[13]

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[13] The problem is not solved by the fact that petitioners term their presumption "rebuttable." Pet. Br. 24-26. Petitioners do not explain the level or kind of proof that would be sufficient to rebut their presumption. If the presumption could be

(continued…)

C. Petitioners' Own Case Illustrates Why Their Presumption Is Unwarranted

Petitioners own two adjacent properties: Lot E (which is currently vacant) and Lot F (which has a cabin). Pet. Br. 3-4. They complain that county zoning ordinances effectively prevent them from building on or selling their Lot E property. *Id.* at 5-6. They believe that restrictions on Lot E should be analyzed without regard to their remaining ability to use Lot F (or Lot E in combination with Lot F), such that their present inability to separately build on or sell Lot E amounts to a taking of that lot. Pet. App. A-5. When examined closely, petitioners' own case undercuts their argument that a presumption of separate treatment can be assumed to reflect the facts of most cases.

1. As amici understand the facts, separate analysis of the two lots would not reflect how the restrictions on Lot E actually work. It appears that St. Croix County's zoning laws do not in fact prohibit petitioners from building on Lot E. Although those laws prohibit them from building two houses on Lots E and F, that leaves petitioners with several options for the use of Lot E. *See generally* Pet. App. A-12.

(…continued)
easily or routinely rebutted, then petitioners' proposal would do little to increase efficiency and predictability, since courts and parties, though entertaining the presumption, would still be required to give all due weight to the numerous other relevant factors. If, on the other hand, the presumption is strong enough to require that properties be treated as separate even where the totality of circumstances does not support that characterization, then petitioners have not explained any overriding interests which make it necessary to tolerate such erroneous results.

They could replace their Lot F cabin with a new structure on Lot E, or with a single structure built on both lots. *Id.* at 12-13.

Even if petitioners choose instead to maintain their existing structure exclusively on Lot F, they will still, as an objective matter, derive significant benefit from their adjacent Lot E in their use of Lot F. A vacant Lot E provides Lot F with added beachfront and open space, resulting in a property appraiser valuing the combined lot as only ten percent less valuable than two individually built-on lots. *See* p. 11 & n.6, *supra*. And, like their neighbors, petitioners also benefit from the overall density limits the community has adopted, which reduce congestion, protect the environment, and increase property values as a whole in the vicinity. There is no reason to believe that these factors are unique to petitioners' case. Rather, it is likely that in many lot merger cases, the combined lot may enjoy offsetting advantages that must be carefully analyzed in light of the precise regulatory regime and property at issue.

2. The chronology of petitioners' and their predecessors' ownership and use of the properties also undercuts any claim that their presumption would accurately reflect facts on the ground.

Even where a land-use law imposes new restrictions on the use of property, that does not necessarily create a taking. *See Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 386 (1926) (upholding application of the then-*new* "[b]uilding zone laws"). As a result, an owner's reasonable investment-backed expectations must include the expectation that future zoning adjustments may alter the allowable use of their land.

But a claim of interference with reasonable investment-backed expectations is even weaker where the application of the restrictions at issue stems from actions the owner took after the regulation was already in place, as seems to be the case here. The St. Croix merger ordinance that affects petitioners' development rights as common owners of Lots E and F was enacted in 1975. Pet. Br. 5. At that time, however, the ordinance had no effect on petitioners or their predecessors, because the lots were not in common ownership. *See id.* at 3-4. As a result, for years after the ordinance's enactment, Lot E's owner apparently retained, under St. Croix's law, the ability to sell Lot E or to build on it. The merger ordinance became operative on these properties only because of the decision—after the ordinance was in place—to place both lots in common ownership.

Petitioners propose a constitutional presumption which would invite courts, in similar cases, to ignore the possible relevance of such considerations in determining whether the merger ordinance is "functionally equivalent to the classic taking in which government directly appropriates private property or ousts the owner from his domain." *Lingle*, 544 U.S. at 539. This Court should decline the invitation. *Cf. Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (it would be "error to expunge" from the analysis consideration of "the timing of the regulation's enactment relative to the acquisition of title").

III. NEVADA'S ARGUMENTS DO NOT STRENGTHEN THE CASE FOR PETITIONERS' PRESUMPTION

Amici Nevada et al. make three additional arguments that deserve brief comment. First, Nevada

contends that an approach centered on individual parcels is necessary to respect the text and original understanding of the Takings Clause. Nevada Br. 4-5. But Nevada points to nothing showing that those who adopted the Fifth or Fourteenth Amendments had any view regarding the definition of the relevant parcel—and the regulatory takings doctrine in fact postdates those Amendments' adoption. The Takings Clause's text requires the payment of compensation only when "the government *acquires* private property for a public purpose, whether the acquisition is the result of a condemnation proceeding or a physical appropriation." *Tahoe-Sierra*, 535 U.S. at 321 (emphasis added). Because the Constitution "contains no comparable reference to regulations that prohibit a property owner from making certain uses of her private property," *id.* at 321-322, it is difficult to see how a particular approach to implementing the regulatory takings doctrine, whatever its merits or flaws, could violate the Framers' intent. *See generally Eastern Enter.*, 524 U.S. at 540 (Kennedy, J., concurring) (noting that the 1922 decision in *Mahon* broke new ground in holding that regulation might support a takings claim in the absence of physical appropriation).

Second, Nevada argues that without an analysis centering on individual lots, States will be tempted to overregulate in ways that inhibit the beneficial use of land. Nevada Br. 21-25, 28-29. But States and localities have a vital interest in the productive, efficient use of land, which provides employment, housing, and other benefits for their residents, and tax revenues to fund government itself. Local communities, through their elected representatives, can and do consider whether particular regulatory requirements

undercut those goals. Petitioners' proposed nationwide presumption would add nothing to their efforts.

Finally, Nevada claims that its approach is necessary to safeguard States from abusive regulatory takings of state-owned land by the federal government. *See* Nevada Br. 25-28 (hypothesizing that the United States could "under some pretense, … bar[] all or most development on all property owned by Nevada in Lincoln County"). But Nevada points to no example of the federal government attempting anything of the sort. As noted above, States and localities have enacted their land use laws (including merger ordinances of the type considered here) to address vital matters of public concern. To hamstring them in those real-life efforts in order to prevent a purely theoretical form of federal overreach would not advance federalism. To the extent issues of intergovernmental relations are of concern, they should be addressed as such in some appropriate case.

CONCLUSION

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

Respectfully submitted,

KAMALA D. HARRIS
Attorney General of California
EDWARD C. DUMONT
Solicitor General
JOHN A. SAURENMAN
Senior Assistant Attorney General
JOSHUA A. KLEIN*
Deputy Solicitor General
NICOLE U. RINKE
Deputy Attorney General
**Counsel of Record*

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(Counsel listing continues on next page)

DOUGLAS S. CHIN
Attorney General
State of Hawaii
425 Queen Street
Honolulu, HI 96813

LISA MADIGAN
Attorney General
State of Illinois
100 West Randolph St.
12th Floor
Chicago, IL 60601

JANET T. MILLS
Attorney General
State of Maine
6 State House Station
Augusta, ME 04333

MAURA HEALEY
Attorney General
Commonwealth of
Massachusetts
One Ashburton Place
Boston, MA 02108

LORI SWANSON
Attorney General
State of Minnesota
445 Minnesota Street
Suite 900
St. Paul, MN 55101
On behalf of the
Minnesota Department
of Natural Resources

ELLEN F. ROSENBLUM
Attorney General
State of Oregon
1162 Court Street N.E.
Salem, OR 97301

WILLIAM H. SORRELL
Attorney General
State of Vermont
109 State Street
Montpelier, VT 05609

ROBERT W. FERGUSON
Attorney General
State of Washington
1125 Washington
Street SE
P.O. Box 40100
Olympia, WA 98504