

No. _____

In The Supreme Court of the United States

KEVIN QUINN and QUEEN ANNE RESEARCH AND
DEVELOPMENT CORPORATION,

Petitioners,

v.

THE BOARD OF COUNTY COMMISSIONERS FOR
QUEEN ANNE'S COUNTY, MARYLAND; QUEEN ANNE'S
COUNTY SANITARY COMMISSION; ROBERT M. SUMMERS,
PH.D., in his official capacity as the Secretary of the Maryland
Department of the Environment; and MARYLAND
DEPARTMENT OF THE ENVIRONMENT,

Respondents.

*On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fourth Circuit*

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Last term, in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), eight members of this Court established a multifactor test in regulatory takings cases for determining whether legally distinct, but commonly owned contiguous parcels of property, must be combined for takings analysis purposes. Under *Murr*, to determine the proper unit of property against which to assess the effect of a challenged regulatory action, courts must consider three factors: (i) the treatment of the land under state and local law; (ii) the physical characteristics of the land; and (iii) the prospective value of the regulated land.

Here, the Fourth Circuit rejected Petitioners' Takings Clause challenge to a local ordinance that forces the merger of separate parcels simply because they are commonly owned and contiguous to one another. Instead of defining the relevant parcel by applying the *Murr* multifactor test, the court considered only the parcels' physical characteristics and ignored the treatment of the parcels under state and local law, the factor that "should [be] give[n] substantial weight." As a result, the court incorrectly defined the parcels impacted by the ordinance as the parcels post-merger.

The question presented is:

Whether, under the multifactor test set forth in *Murr*, a merger ordinance's impact should be assessed against separate parcels pre-merger when those parcels were purchased as individually platted, recorded, and taxed lots decades before the ordinance became effective.

**PARTIES TO THE PROCEEDING BELOW AND
CORPORATE DISCLOSURE STATEMENT**

Petitioners are Kevin Quinn and Queen Anne Research and Development Corporation. Petitioners were the plaintiffs in the United States District Court for the District of Maryland and the appellants in the United States Court of Appeals for the Fourth Circuit. Petitioner Queen Anne Research and Development Corporation has no parent corporation and has issued no stock to any publically held company.

Respondents are the Board of County Commissioners of Queen Anne's County, Maryland, the Queen Anne's County Sanitary Commission (collectively, the "County"), the Maryland Department of the Environment, and the former Secretary of the Maryland Department of the Environment, Robert Summers, Ph.D. (collectively, the "State"). Respondents were the defendants in the district court and the appellees in the Fourth Circuit.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Kevin Quinn and Queen Anne Research and Development Corporation (“Quinn” or “Petitioners”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

This case presents an issue of substantial importance concerning government regulation that forces the merger of hundreds of legally separate adjacent parcels of real estate simply because those parcels are commonly owned and contiguous to one another. The ordinance at issue is not triggered by a change in ownership of property—it does not apply prospectively to properties that come into common ownership after the ordinance was enacted. Rather, the ordinance forces the merger of commonly owned, contiguous parcels that were under common ownership as of November 12, 2013, notwithstanding their separate treatment under state and local laws and regardless of how long ago the separate lots were acquired.

Petitioners, a real estate development firm and its principal, own hundreds of separately platted and individually recorded parcels of property in Queen Anne’s County, Maryland. When Petitioners purchased these separate parcels decades ago, they were entitled to separately transfer and build a single family home on each. The Queen Anne’s County ordinance at issue here, enacted in 2014, eliminates the legal separateness of each lot and forces Petitioners to merge their contiguous lots before they may build on or transfer them.

In rejecting Petitioners' challenge to the ordinance under the Fifth Amendment Takings Clause, the Fourth Circuit reached a decision that is in conflict with this Court's decision last term in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017). Instead of applying the multifactor test mandated by *Murr* to determine Petitioners' reasonable expectations about whether the property would be treated as one aggregated parcel or, instead, as separate tracts, the Fourth Circuit considered only one of the relevant factors: the physical characteristics of Petitioners' lots. The court ignored the other factors, including the treatment of the land under state law and the value of the property under the challenged regulation. As a result, the court incorrectly defined the relevant parcels impacted by the County's ordinance as the parcels post-merger.

The Fourth Circuit's failure to properly apply *Murr* has widespread repercussions for both property owners and local governments. As explained below, this Court should grant plenary review to resolve the conflict with *Murr* and provide needed guidance to lower courts in this area. But whether summary reversal or plenary review is the more appropriate course, the decision below should not stand. This Court should intervene to reaffirm that courts must identify the relevant parcel affected by governmental regulation before proceeding to a takings analysis. In identifying the relevant parcel, courts must consider the property owner's reasonable expectations as shaped by the treatment of the owner's parcels under state and local law.

OPINIONS BELOW

The Fourth Circuit's opinion affirming the district court's judgment is reported at 862 F.3d 433 (4th Cir. 2017), and it is reproduced in Petitioners' Appendix at 1-21. The district court's opinion granting Respondents' pre-discovery motions for dispositive relief is reported at 124 F. Supp. 3d 586 (D. Md. 2015) and reproduced in the Appendix at 22-46. The district court's unpublished order denying Petitioners' motion to alter or amend judgment is reproduced in the Appendix at 47-56.

JURISDICTION

The Fourth Circuit issued its opinion on July 7, 2017. Petitioners timely filed a petition for rehearing en banc, which the court denied on August 4, 2017. Pet. App. 57-58. On October 18, 2017, Chief Justice Roberts extended the time for filing a petition for a writ of certiorari to and including December 29, 2017. Pet. App. 59-60. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution provides, in relevant part, that "private property [shall not] be taken for public use, without just compensation."

The ordinance at issue in this case is Queen Anne's County Ordinance No. 13-24, codified at Code of Public Local Laws of Queen Anne's County § 18:1-

19G. Queen Anne's County Ordinance No. 13-24 is reproduced verbatim in the Appendix at 61-66.

STATEMENT OF THE CASE

A. Factual Background

Beginning in 1984, Quinn purchased individually recorded, separately platted vacant parcels of property on South Kent Island in Queen Anne's County, Maryland. Quinn did not purchase a large tract of land as a single parcel and then subdivide that land into multiple smaller parcels. Rather, Quinn purchased each parcel individually, as each had already been separately platted and individually recorded. Each parcel ranged in size from 5,000 to 70,200 square feet. The majority of the lots are contiguous to one another, and all of them are undeveloped. Quinn purchased these vacant parcels with the intention of separately improving each of them with a single family home. *See* Pet. App. 28-29.

When Quinn acquired the lots, they conformed to the zoning laws then in effect. Under a Certificate of Exemption issued by the Queen Anne's County Planning & Zoning Commission on July 5, 1962 and recorded among the land records, many of Quinn's properties were expressly exempt from area or frontage restrictions and were eligible for use for single family dwellings. Quinn was entitled to develop and build a separate residence on each individual lot. *See* Pet. App. 28-29.

In 1987, after Quinn had already purchased most of his properties, the County zoned the area of

Quinn's parcels as Neighborhood Conservation Zoning District 20. Properties in this district that were recorded and platted after 1987 may not be used for residential development unless the lot size equals or exceeds 20,000 square feet. *See* Pet. App. 26. But because Quinn purchased most of his lots before 1987, Quinn's lots were grandfathered into the new square footage requirement. Accordingly, Quinn was able to obtain separate permits for a residential building on each of those lots, even if the lots did not conform to the square footage requirement of the 1987 law.

On May 27, 2014, decades after Quinn purchased his properties, Queen Anne's County adopted Ordinance 13-24 (the "Ordinance"), which forces the merger of Quinn's contiguous lots that do not conform to the 20,000 square foot requirement. *See* Pet. App. 5, 61-66. Specifically, the Ordinance prohibits approval of a building permit for a non-conforming, undeveloped lot, if the lot was contiguous to, and under the same ownership as, another non-conforming and undeveloped lot as of November 12, 2013. *Id.* at 62-64. The Ordinance also requires a property owner who sells property subject to the Ordinance "to disclose in writing to any buyer of the lot the fact that the lot is subject to merger with another lot or lots." *Id.* at 64-65. Thus, the Ordinance prohibits development on a non-conforming, undeveloped lot unless it is merged with other contiguous, non-conforming and undeveloped lots. Property owners with contiguous non-conforming lots can no longer transfer their lots separately. The Ordinance does not contain any

provision that would exclude from its application separately recorded and platted substandard lots that were acquired before the effective date of the regulation.

The Ordinance also extinguishes Quinn's property interest in transferable development rights attached to each lot under Code of Public Local Laws of Queen Anne's County §§ 18:1-100–107. These rights include the ability to transfer to a different property the rights of development if the owner does not intend to develop the lot he owns. Quinn's ownership of each lot located in the Kentmorr residential subdivision also includes rights of access to a private beachfront, but the forced merger of his lots results in the elimination of the right of beachfront access in each lot that is forced to merge with another. *See* Pet. App. 28.

Although the Ordinance was adopted on May 27, 2014, it applies retroactively to properties that were under common ownership as of November 12, 2013, the date on which the County first introduced the Ordinance. *See* Pet. App. 65. The purpose of the Ordinance's retroactive application was to prevent property owners from altering the ownership of their properties between the date the Ordinance was introduced and its effective date.

Quinn purchased each individually recorded lot based on the value of its legal separateness. *See* Pet. App. 29. Quinn has always treated his lots as separately recorded and individually platted parcels. The County has assessed, and Quinn has paid, property taxes for each lot as a separate unit of

property. In total, Quinn has paid more than \$200,000 in property taxes for the parcels.

The Ordinance has destroyed the separate character of each individual parcel. As a result of the Ordinance, a resident dwelling can no longer be built on each of Quinn's individual lots and the lots cannot be sold individually. The Ordinance eliminates the expectations Quinn acquired when he purchased each of the individual lots. *See* Pet. App. 29.¹

B. District Court Proceedings

On November 10, 2014, Quinn filed a lawsuit in the United States District Court for the District of Maryland pursuant to 42 U.S.C. § 1983, alleging violations of the Takings Clause, the Equal Protection Clause, and Quinn's due process rights.

In a preliminary motion before any discovery, the County sought summary judgment as to all counts in Quinn's complaint. The State separately moved to dismiss. In support of its motion for summary judgment, the County relied on an affidavit from a County official, as well as on other materials from outside of the pleadings. By local rule in the District of Maryland, no discovery was permitted because the

¹ If it was not enough for the County to force the merger of Quinn's lots, the County also enacted companion legislation targeting Quinn's properties and excluding them from access to sewer service that will be extended to South Kent Island over the next several years. Most of Quinn's properties are excluded from the service area, yet they are surrounded by lots located in the service area.

district court had not issued a scheduling order. *See* D. Md. Local Rule 104.4.²

On August 13, 2015, the district court granted Respondents' dispositive motions and entered summary judgment against Quinn. Pet. App. 22-46. Applying a bright-line rule that the separate parcels should be treated as merged under the Ordinance, the court reviewed the Ordinance's impact on Quinn's combined parcels:

The Grandfather/Merger Provision ... does not deprive Quinn of all economically viable use of his property. The Grandfather/Merger Provision merely merges the individual lots to form a larger residential lot. While the challenged action does cause some economic harm associated with the loss of individual unrestricted rights of access to the private beachfront and certain Transferrable Development Rights of each individual lot, the Court

² Because Quinn had no ability to take discovery, he submitted a detailed affidavit supporting the complaint and disputing the assertions in the County's affidavit. Quinn's affidavit also explained that discovery was necessary to develop facts essential to oppose summary judgment and identified specific areas of discovery that were necessary. In its reply memorandum, the County inserted additional facts from outside the pleadings, including a second affidavit from a County official, and it relied on those additional materials to argue for summary judgment. Quinn was not permitted to take any discovery, and he had no ability to test the evidence relied upon by the County and district court.

finds that the lots are not stripped of all beneficial use because they are simply developable as larger residential lots.

Pet. App. 37-38. According to the district court, no compensable taking had occurred because Quinn's lots, as merged, retained value as larger residential lots. But before a regulation's impact on a landowner's property rights can be evaluated, the parcel of land affected by the regulation must be correctly identified. The district court did not undertake this threshold analysis to determine the correct unit of property against which to assess the effect of the Ordinance, nor did it even attempt to analyze Quinn's reasonable expectations about how his property would be regulated.

After the district court entered summary judgment, Quinn filed a motion to alter or amend, arguing that granting summary judgment without affording Quinn an opportunity to take any discovery was clearly erroneous. On July 6, 2016, the district court denied the motion in a letter order. *See* Pet. App. 47-56.

C. Fourth Circuit Proceedings

When Quinn noticed his appeal to the Fourth Circuit on August 3, 2016, this Court had accepted certiorari in *Murr v. Wisconsin*. *See* 136 S. Ct. 890 (2016) (Mem) (granting certiorari on January 15, 2016). Quinn moved to stay the proceedings in the Fourth Circuit pending this Court's decision in *Murr*, arguing that because the issue in *Murr* was central to Quinn's takings claim, the Fourth Circuit should

defer its decision until after this Court resolved *Murr*. The Fourth Circuit denied Quinn’s motion, and the parties submitted their briefs on the merits.

Oral argument in the Fourth Circuit occurred on May 9, 2017. This Court issued its decision in *Murr* the following month, on June 23, 2017. Although the parties notified the Fourth Circuit by letter that this Court had issued its decision in *Murr*, the Fourth Circuit did not request additional briefing or argument in light of *Murr*’s newly-announced multifactor test for defining the relevant parcel and its emphasis on the reasonable expectations of the property owner. Instead, just 14 days after *Murr* was decided, on July 7, 2017, the Fourth Circuit affirmed the district court’s decision and rejected Quinn’s takings claims. *See Quinn v. Bd. of Cnty. Comm’rs*, 862 F.3d 433 (4th Cir. 2017); Pet. App. 1-21.

The Fourth Circuit concluded that the Ordinance was neither a *per se* taking under *Lucas v. South Central Coastal Council*, 505 U.S. 1003 (1992), nor a taking under *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). Before undertaking its analysis under *Lucas* and *Penn Central*, the court did not define “the proper unit of property against which to assess the effect of the challenged governmental regulation,” as it was required to do under *Murr*. *See Murr*, 137 S. Ct. at 1943. As this Court made clear last term, before a court can assess a regulation’s economic impact on a landowner’s property, it must correctly identify the parcel of land affected by the regulation with reference to the owner’s reasonable expectations

about whether his property would be treated as one parcel or, instead, as separate tracts. *See id.* The Fourth Circuit did not first define the relevant parcel, and instead proceeded directly to an application of the *Lucas* and *Penn Central* tests.

The court held that the Ordinance had not effected a *per se* taking under *Lucas* because it “does not deprive Quinn of all economically beneficial use of his land.” Pet. App. 14. The court’s analysis was limited, however, to the small handful of Quinn’s lots that are included in the newly established sewer service area. Referring only to the small set of lots in the sewer service area and ignoring all of the others, the court concluded that Quinn’s parcels are not deprived of all economically beneficial use. The court explained that Quinn “has at least twelve lots—subject to merger into four lots—that will [receive sewer service].” *Id.* at 13. The court noted that, “[v]iewed as a collective, the lots are still developable, albeit less densely.” *Id.* at 14. The court also explained that, “[e]ven if viewed individually ... each of the ... lots retains value for assemblage into the four lots on which Quinn can now build.” *Id.*

In its discussion of *Lucas*, the court briefly mentioned this Court’s decision in *Murr*, concluding with no analysis that “[t]he multifactor standard established by ... *Murr* suggests that the lots subject to merger should be viewed as a collective.” Pet. App. 13. The court did not consider and weigh each of the *Murr* factors as it was required to do. In fact, the court considered only one factor: the physical characteristics of Quinn’s lots. Although the record contains no reference to the parcels’ topographical

characteristics, the court found that they “are contiguous, and no physical or topographical barriers have been identified that would limit joint development.” *Id.*

The Fourth Circuit also held that the Ordinance did not effect a taking under the *Penn Central* test. *See* Pet. App. 14-17. The court noted that the Ordinance “does not interfere with Quinn’s reasonable investment-backed expectations because his investment in the land was highly speculative.” *Id.* at 15. Even though this Court made clear that “courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law,” *Murr*, 137 S. Ct. at 1945, the Fourth Circuit did not mention the separate treatment of Quinn’s parcels under state law or the retroactive effect of the regulation on parcels Quinn acquired decades ago. The court again focused exclusively on the lack of sewer service to Quinn’s lots as a basis for concluding that Quinn’s intention to separately develop his parcels could not have been reasonable.

On July 21, 2017, Quinn filed a timely petition for rehearing en banc, which the court denied on August 4, 2017. Pet. App. 56-57.

REASONS FOR GRANTING THE PETITION

The Fourth Circuit’s decision below flouts this Court’s recent decision in *Murr*, warranting plenary review or summary reversal. Defining the relevant parcel of property against which to assess the effect of regulatory action is the necessary antecedent to

undertaking a takings analysis under *Lucas* or *Penn Central*. *Murr* thus requires courts, as a threshold step, to determine “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.” 137 S. Ct. at 1945. “[N]o single consideration can supply the exclusive test for” defining the relevant parcel. *Id.* at 1946.

Yet the Fourth Circuit disregarded the threshold analysis of defining the relevant parcel and proceeded directly to an analysis of the Ordinance’s impact on Quinn’s lots. In discussing the takings question, the court briefly mentioned *Murr* in passing, but it did precisely what this Court has prohibited: it relied exclusively on one factor to conclude that Quinn’s parcels should be assessed post-merger for takings purposes. Had the lower court properly considered all of the relevant *Murr* factors, the court would have recognized that Quinn’s reasonable expectations mandated treating his parcels separately for takings purposes. Unlike the property owners in *Murr*, who subjected their parcels to merger by voluntarily bringing their parcels under common ownership after the challenged regulations were enacted, Quinn separately purchased each of his parcels decades before the Ordinance at issue here was enacted. This case is a perfect complement to *Murr*.

Whether through summary reversal or plenary review, this Court should use this opportunity to reaffirm that that courts must identify the relevant parcel affected by governmental regulation before

proceeding to a takings analysis, and in doing so, courts must consider the property owner's reasonable expectations as shaped by the treatment of the owner's parcels under state and local law.

A. To identify the relevant parcel in a takings case, *Murr* mandates a multifactor analysis of a property owner's reasonable expectations.

The Fifth Amendment Takings Clause provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause "does not prohibit the taking of private property, but instead places a condition on the exercise of that power." *First English Evangelical Lutheran Church of Glendale v. L.A. Cnty., Cal.*, 482 U.S. 304, 314 (1987).

Until *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922), the Court had interpreted the government's conditional requirement to provide just compensation only for physical invasions or appropriations of land. In *Mahon*, this Court extended the just compensation requirement to government restrictions on land use that go "too far." *Id.* at 415-16.

In *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978), this Court established a three-factor ad hoc test to determine if a regulation has gone "too far." The test requires consideration of: (i) the economic impact of the regulation on the landowner; (ii) the extent to which the regulation interferes with the landowner's investment-backed

expectations; and (iii) the character of the government action. *Id.* at 124.

Penn Central also established the general principle that courts must consider the “parcel as a whole” to determine whether government regulation results in a taking. In rejecting a takings claim challenging the regulation of a property owner’s “air rights,” the Court explained:

“Taking” jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*”

Id. at 130-31 (emphasis added). Based on its determination that the relevant parcel was a city tax block, the Court held that the restriction on air rights—a segment of the city tax block—did not effect a taking.

The Court established a category of *per se* regulatory taking in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Without regard to the *Penn Central* factors, the Court held that a regulation constitutes a taking if it deprives an owner of all economically beneficial use of property, “unless the proscribed use interests were not part of the title to begin with.” *Id.* at 1027. The Court left

open the possibility that a *per se* taking may occur even if the owner did not lose all use of the property. *Id.* at 1016-17 n.7. The Court noted that the total takings rule “does not make clear the ‘property interest’ against which the loss of value is to be measured.” *Id.* However, it emphasized that the relevant parcel can be affected by the owner’s reasonable expectations, which state property law may shape. *Id.*

The Court adhered to the “parcel as a whole” concept in cases after *Lucas*, but until very recently it did not comprehensively address how to define the relevant parcel. See *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg’l Planning Agency*, 535 U.S. 302, 331-32 (2002) (explaining that an interest in real property is “defined by its metes and bounds that describe its geographic dimensions”); *Keystone Bituminous Coal Ass’n v. DeBenedictis*, 480 U.S. 470, 497 (1987) (“Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction.” (internal quotation marks omitted)).

Last term, the Court directly confronted how to define “the proper unit of property against which to assess the effect of the challenged governmental action.” *Murr v. Wisconsin*, 137 S. Ct. 1933, 1943 (2017). The property owners in *Murr*, who owned two contiguous lots, brought an action alleging that an ordinance requiring the merger of their commonly owned lots resulted in an unlawful taking. *Id.* at

1940-41. The ordinance was enacted in the 1970s, and its merger provision prohibited the separate sale or development of adjacent, substandard lots under common ownership. *Id.*

The Murrs' lots, known as Lot F and Lot E, were acquired by the Murrs' parents in the 1960s, before the enactment of the challenged regulation. *Id.* Lot F was improved with a cabin and Lot E was undeveloped. The Murrs' parents transferred Lot F to the Murrs in 1994 and Lot E in 1995. Upon this transfer—decades after the enactment of the merger ordinance—the lots came under common ownership.

Critically here, to resolve whether the ordinance amounted to a regulatory taking, the Court recognized that it first must determine “the proper unit of property against which to assess the effect of the challenged governmental action.” *Id.* at 1943. The Court reiterated that defining the property should occur “at the outset” of the takings analysis and before considering whether a taking has occurred. *Id.* at 1944.

The Court rejected a “bright-line” approach to defining the relevant parcel. *Id.* at 1949 (“To the extent the state court treated the two lots as one parcel based on a bright-line rule, nothing in this opinion approves that methodology.”). Instead, the Court mandated a multifactor analysis, making clear that “courts *must* consider a number of factors” and that “no single consideration” is dispositive. *Id.* at 1945 (emphasis added). Those factors include: “[1] the treatment of the land under state and local law; [2] the physical characteristics of the land; and [3]

the prospective value of the regulated land.” *Id.* The inquiry should determine “whether reasonable expectations about property ownership would lead a landowner to anticipate that his holdings would be treated as one parcel, or, instead, as separate tracts.” *Id.*

As to the first factor, the Court emphasized that “courts should give substantial weight to the treatment of the land, in particular how it is bounded or divided, under state and local law.” *Id.* It explained that the timing of the effect of the regulation as compared to the owner’s acquisition is critical to evaluating the property owner’s expectations:

A reasonable restriction that *predates* a landowner’s acquisition ... can be one of the objective factors that most landowners would reasonably consider in forming fair expectations about their property. ... In a similar manner, a use restriction which is triggered only *after*, or because of, a change in ownership should also guide a court’s assessment of reasonable private expectations.

Id. (emphasis added).

The second factor addresses the property’s physical characteristics: for example, the physical relationship between distinguishable tracts, the property’s topography, and the surrounding environment. *Id.* at 1945-46.

The third factor for evaluating an owner’s reasonable expectations requires a value assessment.

Courts must consider evidence of how the challenged regulations affect the value of the property, “with special attention to the effect of burdened land on the value of other holdings.” *Id.* at 1946. The Court offered several examples of the analysis:

Though a use restriction may decrease the market value of the property, the effect may be tempered if the regulated land adds value to the remaining property, such as by increasing privacy, expanding recreational space, or preserving surrounding natural beauty. A law that limits use of a landowner’s small lot in one part of the city by reason of the landowner’s nonadjacent holdings elsewhere may decrease the market value of the small lot in an unmitigated fashion. The absence of a special relationship between the holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge. On the other hand, if the landowner’s other property is adjacent to the small lot, the market value of the properties may well increase if their combination enables the expansion of a structure, or if development restraints for one part of the parcel protect the unobstructed skyline views of another part. That, in turn, may counsel in favor of treatment as a single parcel and may reveal the

weakness of a regulatory takings challenge to the law.

Id.

The Court then applied each of the factors it had identified to the Murrs' property and held that the lots should be treated as one unit. *Id.* at 1948. First, because the state and local regulations had been in effect for years before the Murrs' lots came into common ownership, the Court determined that the Murrs reasonably should have expected that the lots would be treated as one. The Court emphasized that the Murrs' property was affected by the merger ordinance "*only* because of [the Murrs'] voluntary conduct in bringing the lots under common ownership after the regulations were enacted." *Id.* (emphasis added). This voluntary conduct of merging the lots under state law, explained the Court, "informs the reasonable expectation they will be treated as a single property." *Id.*

Second, the Court explained that the physical characteristics of the Murrs' property supported treating the lots as one because the lots adjoin on their longest edge, and the shape and terrain of the property hinder individual use. *Id.* Again the Court was persuaded by the sequence of the local efforts to regulate the area and the Murrs' decision, long after the regulation took effect, to bring the lots under common ownership. The Court stressed that the Murrs "could have anticipated public regulation might affect their enjoyment of their property, as the Lower St. Croix was a regulated area under federal,

state, and local law long before [the Murrs] possessed the land.” *Id.*

To analyze the third factor, the Court turned to the trial court’s record of the lot value as merged and unmerged. The Court concluded that considering the Murrs’ lots as one adds value to Lot F because Lot E brings “increased privacy and recreational space, plus the optimal location of any improvements,” and because the value of both lots increased if they were treated as one unit. *Id.* at 1948-49.

B. It was undisputed in *Murr* that lots should be defined as separate parcels for taking purposes if they had been acquired before the merger ordinance became effective.

This Court’s decision in *Murr* highlights the Court’s focus on the expectations of a property owner and, in particular, the state of preexisting State law at the time of the owner’s acquisition. In its merits brief, the State of Wisconsin acknowledged that “[w]here the State has chosen to make separately platted lots individually developable and saleable, a landowner’s objectively reasonable expectations will naturally be that a lot is a separate ‘parcel.’” Brief of Respondent State of Wisconsin, *Murr v. Wisconsin*, No. 15-214, 2016 WL 3227033, at *24. The State noted, however, that “in light of the preexisting lot merger provision,” the Murrs “had no economic expectations of being able to develop and sell [their lots separately].” *Id.* at *26.

During oral argument in *Murr*, the Justices emphasized the significance of the sequence of property acquisition and regulation on shaping a property owner's reasonable expectations. Justice Kagan stated she was "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." Transcript of Oral Argument at 46, *Murr v. Wisconsin*, No. 15-214.

Justice Alito likewise focused on this point in presenting a hypothetical to counsel for the State of Wisconsin. Wisconsin agreed that the lots would be defined separately if they had been under common ownership when the merger became effective. Oral Argument at 35-37, *Murr v. Wisconsin*, No. 15-214 (emphases added). Acknowledging that Justice Alito's hypothetical is "completely different" from *Murr*, Wisconsin clarified: "[W]hen 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.*" *Id.* at 36 (emphasis added). According to Wisconsin, the "fundamental difference" between the hypothetical and *Murr* is that the Murrs merged by "voluntary action" by bringing the parcels into common ownership after the regulation became effective. *Id.* at 37.

The United States, an amicus party supporting the respondents in *Murr*, also highlighted the Murrs' voluntary act of bringing the lots under common ownership *after* the merger as a reason they reasonably should have expected such regulation. *Id.* at 67.

C. The Fourth Circuit’s analysis conflicts with *Murr*.

The Fourth Circuit did not follow *Murr*’s multifactor test for defining the relevant parcel based on Quinn’s reasonable expectations. Had the court done so, it would have been compelled to define Quinn’s property as separate lots—the manner in which state law defined them at the time of Quinn’s acquisition many years before the forced merger.

The Fourth Circuit put the cart before the horse. It disregarded the threshold exercise of defining the relevant parcel before analyzing the Ordinance’s impact on Quinn’s lots. Instead, without applying the *Murr* factors, the court went straight to a discussion of *Lucas*, concluding that the Ordinance “does not resemble a regulation that is pressing Quinn’s land ‘into some form of public service.’” Pet. App. 13 (quoting *Lucas*, 505 U.S. at 1018). This approach is inconsistent with the Court’s instructions in *Murr* that a court should identify the parcel of land affected by a regulation *before* assessing that regulation’s impact on a landowner’s property. *Murr*, 137 S. Ct. at 1944.

Although the panel mentioned *Murr* and acknowledged its “multifactor standard,” the Fourth Circuit made no meaningful attempt to apply the factors or otherwise determine Quinn’s reasonable expectations as to whether his lots would be treated separately or together. A proper focus on the *Murr* factors would have yielded a different result.

First, had the Fourth Circuit given “substantial weight” to how the land “is bounded or divided ...

under state and local law,” *Murr*, 137 S. Ct. at 1945, it could not have escaped the conclusion that this factor favored treating Quinn’s lots as separate tracts. That is how local law defined the lots at the time Quinn acquired them decades before the merger was forced upon him. That is how the State taxed the parcels for the decades Quinn owned them. And that is how Quinn actually regarded them, and intended to use them, when he purchased them as separately platted and recorded parcels.

These facts highlight the critical distinction between *Murr* and this case. The Murrs subjected their land to the merger “only because of voluntary conduct in bringing the lots under common ownership *after the regulations were enacted.*” *Murr*, 137 S. Ct. at 1948 (emphasis added). On the other hand, Quinn could not have reasonably expected that the lots would be treated as a collective, because preexisting state and local law at the time of Quinn’s purchase permitted development and sale of the lots as separate parcels. The forced merger came many years later but applied retroactively, defying Quinn’s reasonable expectations. The Fourth Circuit ignored this distinction in the sequencing of the property acquisition and the unforeseeable change in government regulation.

Second, all that the Fourth Circuit could say about the “physical characteristics of the property” was that “no physical or topographical barriers have been identified that would limit joint development” of Quinn’s lots. Pet. App. 13. But the converse is also true: no physical or topographical qualities have been identified that would permit joint development. This

is because the record contains very little evidence of the property's "physical or topographical" qualities. And unlike the waterfront property in *Murr* that had been a "regulated area under federal, state, and local law long before the [Murrs] possessed the land," *Murr*, 137 S. Ct. at 1948, Quinn could not have "anticipated public regulation" of his landlocked parcels because they did not fall within a critical area regulated for environmental protection. Rather, public instruments recorded in the local land records assured his right to develop his parcels without any area or frontage restrictions.

Third, although it skipped over any discussion of value as it applies to Quinn's expectations about the relevant parcel, the Fourth Circuit attempted to address the effect of the merger on Quinn's property in applying the *Penn Central* test. The court faulted Quinn for not "present[ing] evidence of the actual change in value" of his lots, yet it concluded that "the economic harm from the [Ordinance] is not severe." Pet. App. 15. Not only are these two conclusions inconsistent, but they lack any factual justification. The only evidence in the record pertaining to value indicates that the properties lost all value as a result of the merger. In addition, *Murr* emphasized the importance of considering the regulation's effect on property values—one that considers the nature of the surrounding space, alternative uses of the property, the relative values of the lots pre- and post-merger, and the any property enhancement available only if the parcels are combined. The Fourth Circuit ignored all of these considerations.

By ignoring the *Murr* test, the Fourth Circuit incorrectly defined the relevant parcel for takings claims purposes. Quinn could not have reasonably expected his property to be treated as a collective because he bought the parcels as separately platted and recorded lots under applicable law. He then paid the State-assessed tax on each separate lot for decades before the local government imposed a retroactive development restriction that eliminated all economically viable use of his merged lots. The merger effected an unconstitutional regulatory taking without compensation.

In light of the Fourth Circuit's disregard for the multifactor analysis dictated by *Murr*, this Court should grant plenary review of summary disposition. In all events, this Court should intervene to reaffirm that lower courts must respect property owners' reasonable expectations in defining the proper unit of property against which to measure the impact of a challenged governmental regulation.

D. The Fourth Circuit's failure to follow *Murr* will have negative consequences for property owners and economic development.

If the Fourth Circuit's disregard for preexisting parcel boundaries under state law were to stand, property owners and potential land purchasers could never form reasonable expectations about the future treatment of their adjacent parcels as separate or combined. The state-law boundaries would be meaningless—forever subject to the unmeasurable risk that the government could eliminate lot lines at

any time and, with no prospect of compensation, dramatically alter the character and value of their parcels. The uncertainty will chill transfers of property, discourage investment, and stymie economic growth.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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