No. 12-1015

IN THE

Supreme Court of the United States

HEARTS BLUFF GAME RANCH, INC.,

Petitioner,

v.

THE STATE OF TEXAS AND THE TEXAS WATER DEVELOPMENT BOARD

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether State action that purposely prevents a permitted and beneficial use of land by its owner, but undertaken with the intent to reserve that land for a future beneficial State use, requires compensation under the takings clause of the Fifth Amendment?

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The Texas Supreme Court in a 6-3 decision[1] dismissed the claims of Hearts Bluff based on sovereign immunity. The Texas Supreme Court held that there was no cognizable taking of property under the Texas Constitution, or (by implication only) under the Fifth Amendment of the United States Constitution. The opinion is reported at 381 S.W.3d 468 (Tex. 2012). The Texas Supreme Court affirmed the judgment of the Austin Court of Appeals. The opinion of the intermediate court is reported at 313 S.W.3d 349 (Tex. App. – Austin 2010). Hearts Bluff filed a timely Motion for Rehearing at the Texas Supreme Court. The Motion for Rehearing was overruled without an opinion on November 16, 2012. *see* 2012 Tex. Lexis 978.

JURISDICTIONAL STATEMENT

Jurisdiction of this Court is founded on 28 U.S.C. §1257. Under Rule 10 of the Supreme Court Rules, this Court should grant this Petition for Certiorari because the decision of the Texas Supreme Court decided important questions of federal law that have not been, but should be settled by this Court, and decided an important federal question in a way that conflicts with relevant decisions of this Court.

The federal question presented in this Petition was first raised in the pleadings filed in the Texas trial court.

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1. The dissent would have returned the case to the trial court for discovery and trial on the merits, including the analysis required by *Penn Central* and *Lucas*.

The Trial Court refused the State's request for dismissal based on the State's Plea to the Jurisdiction. The State was entitled to an interlocutory appeal. In the interlocutory appeal, the State claimed that its conduct did not amount to a taking. Hearts Bluff argued, on appeal, that the State effected a taking under both the Texas State Constitution (Art. I, §17), and under the Fifth Amendment of the United States Constitution. When the Austin Court of Appeals issued its opinion, it failed to analyze or to even mention the federal constitutional claims argued in the Hearts Bluff brief.

Hearts Bluff reiterated its federal claim in its Briefing before the Texas Supreme Court. The majority opinion briefly mentioned that jurisprudence under the Texas Constitution was the same as under the United States Constitution. 381 S.W.3d at 477. The majority opinion also briefly mentioned 2 of the 3 *Penn Central* factors (in the context of a discussion involving Texas jurisprudence, not federal jurisprudence), but failed to correctly cite the facts relevant to those factors. 381 S.W.3d at 489-91. The majority also downplayed the proposition that government interference with investment-backed expectations can be actionable—the majority simply referred to it as a "risk common to land developers." 381 S.W.3d at 490.

The federal issue in this case warrants intervention from this Court because the decision below is one in a pattern of state court decisions that disregard this Court's clear mandate that courts must engage in a fact-specific analysis when evaluating alleged takings. As this Court may have observed, state courts are now using a simple grammatical stratagem to avoid even analyzing the substance of a property owner's claims—they have simply

narrowed the definition of a "taking" to find in favor of the government. By narrowing the definition of a "taking," state courts have avoided engaging in the *ad hoc* analysis of government action that is constitutionally required by the decisions of this Court. It is no wonder landowners rarely, if ever, prevail on *Penn Central* claims.

This Court has already heard, but not yet decided, a similar case – *Koontz v. St. John's River Water Management District* (No. 11-1447) – where a State Supreme Court rebuffed a takings claim by relying on an invented legal technicality to decide that no taking had occurred. In *Koontz*, Florida decided that it was perfectly fine for the government to exact development concessions, including title to real estate, and costly improvements to government-owned wetlands prior to the issuance of a development permit. According to Florida, demanding these concessions does not implicate the Fifth Amendment's prohibition on takings because "nothing was ever taken from Koontz."

This case is a still-more-egregious case of a State Court relying on a legal technicality at the expense of the constitutionally required multi-factor analysis of alleged regulatory takings. In this case, Hearts Bluff was entitled to a permit, but the permit was refused because Texas had plans for the site that were inconsistent with Hearts Bluff's plans, and Texas did not want to have to pay the increase in the market value of the Hearts Bluff site that would result if those plans became a reality. The Texas Supreme Court reasoned that even though the State's sovereign acts were the factual cause of the permit denial, the Constitution didn't recognize a taking because it was the Corps who ultimately denied the permit. Like in *Koontz*,

where the government never issued a permit, Texas says that the State took nothing from Hearts Bluff (even though its actions were the factual cause of the denial), and that the Fifth Amendment is, therefore, not implicated. The Court should grant this Petition for Certiorari to make clear that, just as the cases of *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374 (1994) are broadly applicable to government conduct, the Court's requirement to analyze regulatory action by the Government in light of a variety of factors included in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) and *Palazzolo v. Rhode Island*, 533 U.S. 606, 617-18 (2001) is constitutionally required.

CONSTITUTIONAL PROVISION INVOLVED

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; **nor shall private property be taken for public use, without just compensation.** (emp. added)

STATEMENT OF THE CASE

This is a regulatory takings case involving the use of real property as a mitigation bank. A mitigation bank allows developers to satisfy the requirements of the Clean Water Act's §404 Permit Program. A developer whose development may cause unavoidable harm to wetlands can avoid the prohibitions of §404 *if* the developer mitigates the loss to the nation's wetlands by protecting other wetlands in nearby watersheds. Developers do this by purchasing mitigation credits from mitigation banks authorized by the Army Corps of Engineers to offset the negative impact of the developer's project. For example, a developer may pay for an acre of wetlands in a mitigation bank to replace an acre of wetlands that is being damaged at the development site.

Hearts Bluff is a landowner that wanted to create a reliable reserve of "credits" for use in the §404 program. Hearts Bluff purchased environmentally sensitive land that was essentially an East Texas river bottom with very little or no development potential, and spent a great deal of money to conform the property to the Corps' requirements so it could sell mitigation credits to developers seeking to offset environmental damages that their projects caused. The target for Hearts Bluff was not qualification under a discretionary government program; its target was a national permit program that set out specific requirements that an applicant must meet for qualification for a mitigation bank permit.

Before investing money to purchase and develop the real property at issue in this case, Hearts Bluff spent considerable time and money to (1) establish whether

the site was suitable for a mitigation bank, and (2) make sure the Corps agreed that the site was a good one. The Corps, which administers the mitigation bank program, confirmed that the property was suitable for a mitigation bank – later describing the property as "an excellent area and proposal for a bank." Hearts Bluff also confirmed with the Corps that there was no legal impediment that existed to the granting of the permit. Despite repeatedly reassuring Hearts Bluff its land was suitable for a mitigation bank, two years later, the Corps denied the permit because the Corps learned that the State of Texas was now making preliminary plans to build a reservoir at that site. Under the Corps' guidelines, a mitigation bank needs to exist "in perpetuity" in order to satisfy §404 requirements. The Corps reasoned that a State owned water supply reservoir at the Hearts Bluff site would result in the inundation of the mitigation bank and that the mitigation bank would not therefore be "perpetual." The Corps could have granted the permit but, in the case of Hearts Bluff, it refused a permit for the first (and only) time in the history of its program. In connection with the intensive lobbying efforts by state agencies, Texas eventually commissioned government reports on water resources in Texas which focused specifically on the water supply reservoir at issue, resulting in plans to build the reservoir and protect property within the reservoir footprint from being developed by others (including Hearts Bluff) if those activities threatened the viability of the reservoir. Those reports were followed by aspirational state legislation, and these efforts, taken together, allowed Texas to convince the Corps that it would one day need the Hearts Bluff site for future fresh water supplies to the Dallas-Fort Worth metroplex.

STATEMENT OF FACTS

Hearts Bluff is a Texas corporation whose sole business purpose was to develop and operate a mitigation bank on property in the river bottoms of east Texas. Mitigation banks are permitted by the Corps as part of its §404, Clean Water Act program[2]. A mitigation bank is environmentally friendly and promotes the important public policies of preserving, restoring, enhancing and protecting wetlands. It does not require the government to expend significant resources or to exercise police powers to protect the general public or adjacent landowners. In fact, the use of compensatory mitigation banks created by private parties means that the government it is not required to purchase, maintain, or administer mitigation banks for use in conjunction with §404 of the Clean Water Act. Instead, private parties are incentivized to create a "bank" of these credits through simple economics – private parties can purchase relatively inexpensive river bottom property, invest in the property to adapt it to the Corps' requirements and then sell the credits to other developers for a profit under the Corps' supervision. The program accomplishes two purposes that are not often simultaneously attainable—it increases the value of marginally valuable property while devoting the property to environmentally friendly use.

Once permitted by the Corps, compensatory mitigation banks sell "mitigation credits" and then restrict the use of property through deed restrictions so that the property is permanently maintained in its native wetland condition. The value of Hearts Bluff's property would

2. Section 404 of the Clean Water Act may be found at 33 U.S.C. §1344.

have increased by at least $10,000.00 per acre (more than 20 times its value as river bottom) if the mitigation bank it had planned was allowed. That, in turn, would have made a reservoir much more expensive and perhaps even "infeasible" to construct.

Before Hearts Bluff acquired the property, it hired a prominent engineering firm to help it review several potential mitigation banking sites and eventually settled on the property at issue here as most suitable for mitigation banking purposes. Before purchasing the property, Hearts Bluff and its engineering firm worked hand in hand with the Corps and confirmed that the property was suitable for mitigation banking and that plans for a State-owned reservoir (Marvin Nichols Reservoir) would not impede the creation of a mitigation bank at that site. No local, state or federal restrictions existed that would have impaired Hearts Buff's development of the property as a mitigation bank. Hearts Bluff initially sought to permit 1,387 acres and intended to expand its mitigation banking plan to include an additional 1,800 acres.

After working with the Corps for over a year, Hearts Bluff submitted an application in mid-2005 that complied with every condition and all criteria imposed by the Corps for the creation of a mitigation bank. Hearts Bluff invested hundreds of thousands of dollars in the property (not including the seven figure price of the land) to meet the Corps' requirements. The Corps told Hearts Bluff that it would receive a mitigation bank permit, and that the property was "an excellent area and prospect for a bank."

In July of 2006, the Corps reversed its former position and denied Hearts Bluff's request for a permit. The only reason for denying the permit was the fact that the

mitigation bank was within the footprint of the proposed Marvin Nichols reservoir, thus making the site one that was no longer "perpetual". Hearts Bluff asked the Corps' to reconsider but, in July of 2008, the Corps' reaffirmed its previous decision denying the permit. This lawsuit followed.

Marvin Nichols Reservoir had been in Texas state water plans for many years but the State of Texas had never set aside funds for the creation of the reservoir, had never applied to the Corps for a permit to build a dam to create the lake and, until Hearts Bluff applied for its permit, had not undertaken any definite steps to establish the reservoir at that site. Hearts Bluff's permit request spurred the State to action. The State's motive? The cost of condemning or purchasing the Hearts Bluff site would substantially increase if the mitigation bank were established – making the reservoir less feasible or even "infeasible". The State's action caused the denial of the permit.[3]

ARGUMENT

The Court should grant certiorari and hear this case because the decision below is part of a pattern of state-court cases that disregard this Court's regulatory-taking jurisprudence and thereby undermine the fundamental American principle of protection of property rights. By rejecting the circumstance-dependent, multi-factor

3. Although the State engaged in a flurry of activity before the permit was denied, nothing has been done since—demonstrating that perhaps the State's actions were designed more to inhibit Hearts Bluff's plans to operate a mitigation bank than to actually establish a reservoir at that site at any time in the future.

analysis this Court has repeatedly prescribed in regulatory takings cases in favor of a categorical exemption of government action, the decision below undermines the fundamental judicial protections of private property that the Constitution requires.

It is difficult to overstate the respect that America holds for the right to use and enjoy property. The themes of ownership of property are found in literature, music, art and theater because owning property is crucial to our political and economic scheme and to our American experience. The Fifth Amendment prohibits uncompensated confiscation of private property, not because it was the *modus operandi* of our colonial history, but because citizens could not trust the government to stay its hand when its appetite for property exceeded its means. The Fifth Amendment is the citizens' weapon to wield against a government that overreaches its otherwise proper exercise of police power, even in ways that could not have been contemplated when the Constitution was adopted.

Indeed, the ability to own and use property is a fundamental part of the concepts of liberty and equality[4].

4. *See Lynch v. Household Fin. Corp.*, 405 U.S. 538, 552 (1972) ("In fact, a fundamental interdependence exists between the personal right to liberty and the personal right in property. Neither could have meaning without the other."); John Phillip Reid, Constitutional History of the American Revolution: The Authority of Rights 27 (1986) ("There may have been no eighteenth-century educated American who did not associate defense of liberty with defense of property. Like their British contemporaries, Americans believed that just as private rights in property could not exist without constitutional procedures, liberty could be lost if private rights in property were not protected.")

Certainly, America could have adopted a system of property ownership that depended on governmental permission as a precedent to either ownership or use of property. But, as the American founders had discovered during the colonial period, resting property use and ownership on governmental permission would easily translate to unequal political and economic power, and would thus threaten the form of government that the people desired.[5]

To believe this fundamental value exists, one need look no further than the Acts of Congress that encourage property ownership and allow tax deductions for the incidents of property ownership. Property ownership is part of the American Dream, and is part of our shared experience. Numerous founding fathers held the view that without the protection of rights to use and enjoy property, none of our sacred rights is truly safe.[6]

5. Michael B. Kent, Jr., *From "Preferred Position" to "Poor Relation": History, Wilkie v. Robbins, and the Status of Property Rights Under the Takings Clause*, 39 N.M. L. Rev. 89, 94-100 (2009). ("By the time of the Constitutional Convention, Americans had seen firsthand the threats to property interests that could be occasioned by unchecked republican governments. During the Revolution and Confederation era, the state and national legislatures had engaged in several acts injurious to property. . . . In light of this experience, there was widespread agreement among the Convention delegates that the chief goal of any new government was the protection of liberty and property, which they understood as inextricably linked.")

6. Alexander Hamilton described preservation of the "security of property" to the Philadelphia Convention as one of the "great obj[ects] of Gov[ernment]." 1 Records of the Federal Convention of 1787, p 302 (M. Farrand ed. 1911). Similarly, James Madison wrote in The Federalist, that the "protection" of

Almost 90 years ago, this Court held that private property could not be confiscated without payment simply because "the public wanted it very much." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). When the government is limited in its ability to take private property, it follows that the freedom and flexibility of the government to regulate is also limited. But, that is a consequence of our system of limiting government power. "A strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change." *Mahon*, at 260 U.S. 416. Even sound governmental reasoning will not overcome the Fifth Amendment's prohibition. *Nollan*, 483 U.S. at 841 (1987). And, it is not just bare ownership that is protected. It is a right to use the property in a way that is beneficial to the owner. *United States v. General Motors*, 323 U.S. 373, 377-78 (1945) (" [The Takings Clause] may have been employed in a more accurate sense to denote the group of rights inhering in the citizen's relation to the physical thing, as the right to possess, use and dispose of it."). With some personal property, such as works of art, mere possession may be the only real incident of ownership. But, this is not so with real property. Even though the government may have the right to make legitimate restrictions on "noxious" uses of property, land is not held subject to a

"the faculties of men," and of "the rights of property" to which these faculties give rise, "is the first object of government." The Federalist No. 10, at 42 (James Madison) (Max Beloff ed., 2d ed. 1987). Gouverneur Morris pronounced property to be "the main object of Society" and indicated that individuals gave up the state of nature solely "for the sake of property which could only be secured by the restraints of regular Government." Records of the Federal Convention of 1787, at 533.

state power of prohibiting all use. *Lucas*, 505 U.S. at 1010 and 1027-1028. As the Court observed in *Lucas*:

> ...[R]egulations that leave the owner of land without economically beneficial or productive options for its use – typically, as here, by requiring land to be left substantially in its natural state – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigation serious public harm.

It is no small matter for the Government to interfere or damage the property of its citizens. And, it barely matters whether the governmental action is a full physical invasion of the property or a regulatory scheme that prohibits the only economically viable use of land. Both trigger the provisions of the Fifth Amendment, and both require compensation. *General Motors Corp.*, 323 U.S. at 378. In light of these obvious prohibitions, local, state and national governmental entities have devised clever means to appropriate property for the public good without an accompanying physical invasion – hoping to use the property and even substantially control its use without paying for it.

This Court's circumstance-dependent regulatory-takings jurisprudence is meant to prevent states from using these clever methods to trample on property rights protected by the Fifth Amendment. It was *Penn Central* that first required state courts to consider how to best define government action that constitutes a "taking" under the Fifth Amendment. This Court declared that the "Fifth Amendment's guarantee . . . [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." *Armstrong v. United States,* 364 U. S. 40, 49 (1960). But, even that statement about "justice and fairness" left the Court without any "set formula" for determining when economic injuries caused by public action must be compensated by the government, rather than remain disproportionately concentrated on a few persons. See *Goldblatt v. Hempstead,* 369 U.S. 590, 594 (1962). This Court has consistently said that whether a particular restriction will be rendered invalid by the government's failure to pay for any losses proximately caused by it depends largely "upon the particular circumstances [in that] case." *Palazzolo,* 533 U.S. at 617-618 ; *United States v. Central Eureka Mining Co.,* 357 U. S. 155, 168 (1958).

This circumstance-dependent analysis that takes into account the actual character and effects of government action is critical because, if the uses of private property were subject to unbridled, uncompensated qualification under the police power, "the natural tendency of human nature [would be] to extend the qualification more and more until at last private property disappear[ed]." *Mahon,* 260 U.S. at 415. These considerations gave birth to the oft-cited maxim that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* In the subsequent 90-odd years, the Court still has refused any definitive guide for determining how far is too far, preferring to "engag[e] in . . . essentially *ad hoc,* factual inquiries."" *Penn Central Transportation Co. v. New York City,* 438 U. S. 104, 124 (1978).

The Texas Supreme Court rejected this well-established framework by determining categorically that the state of Texas's action was not a taking because the state of Texas was not the actor that denied the permit. But this technical rule ignores the *reality* that it was the state of Texas that caused the deprivation of Hearts Bluff's right to beneficial use of its own property. This is completely out of line with Takings Clause jurisprudence, which focuses on economic reality not strained technical formalities. Here, of course, the government scheme effecting a taking of Hearts Bluff's property is not the permitting process employed by the Corps under §404 of the Clean Water Act. No, it is the State's actions, including its designation of a "future site" for a reservoir without funding it that prevented the only economically beneficial use available to Hearts Bluff. The State's actions and the Marvin Nichols Reservoir legislation shqld have triggered an analysis under *Penn Central* with respect to the Hearts Bluff property. It should have required its trial courts to consider the economic effect on the landowner, the extent to which the government action interferes with reasonable investment-backed expectations, and the character of the government action, plus any other relevant factors. *Penn Central Transportation Company v. City of New York,* 438 U.S. 104, 124 (1978).

That is precisely what Texas refused to do, abdicating its responsibility to engage in a judicial analysis of the regulatory action by relying on a legal technicality. It chose the same path that Florida chose in *Koontz* – deciding that there was no taking at all. That is a clever means of by-passing the obligation to pay, while furthering the state's goal of preserving specific private property for a specific future public use. But as clever as it is, it is completely out of line with this Court's repeated eschewing of bright

line rules and insistence that regulatory –takings cases be analyzed under circumstance-dependent, multi-factor tests. The dissent in the Texas Supreme Court pointed this out very clearly:

> Hearts Bluff has alleged facts that, if proven, could show that the State intentionally injured Hearts Bluff to advance its own economic interests. The Court simply cannot bring itself to take as true, as it must in reviewing a dismissal on the pleadings, a landowner's allegation that its development plans were scuttled, and the value of its property ruined, by a state agency intent on keeping its condemnation options open indefinitely.

381 S.W.3d at 499 (Hecht, J. dissenting).

The Texas Supreme Court did not deny compensation based on a full trial record. It approved a pre-trial dismissal of the case, and utterly failed to consider the *ad hoc* factual inquiry that the Constitution demands. Instead, it engaged in a *per se* classification of the government action in this case as absolutely permissible. It permitted its state officials to use the State's power as the sovereign to inhibit the development of property it did not yet own – Hearts Bluff's property – in order to keep its possible future land acquisitions costs to a minimum. The State did all of this *against* the interests of the citizens of the State. It permitted its state officials to manipulate the market for land by preventing valuable and beneficial uses of land that might one day increase the state's cost of acquisition (if it ever decided that the planned reservoir came to fruition). As one Texas appellate court has wisely observed:

> But where the purpose of the governmental action is the prevention of development of land that would increase the cost of a planned future acquisition of such land by government, the situation is patently different. Where government acts in this context, it can no longer pretend to be acting as a neutral arbiter. It is no longer an impartial weigher of the merits of competing interest among its citizens. Instead, it has placed a heavy governmental thumb on the scales to insure that in the forthcoming dispute between it and one, or more, of its citizens, the scales will tip in its own favor. The social desirability of leaving government free to seek its own enrichment at the expense of those whom it governs under the guise that it has the power to regulate harmful conduct is not readily apparent. See Sax, *Takings and the Police Power*, 74 Yale L.J. 36 (1964). To permit government, as a prospective purchaser of land, to give itself such an advantage is clearly inconsistent with the doctrine that the cost of community benefits should be distributed impartially among members of the community. The prohibition against uncompensated takings was "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". *Armstrong v. United States*, 364 U.S. 40, 49, (1960).

San Antonio River Authority v. Garrett Bros., 528 S.W.2d 266, 274 (Tex. Civ. App.--San Antonio 1975).

Texas has now armed the government with powers in the market place not possessed by its citizens. The government no longer needs to buy (or condemn) property it may need in the future but has not yet acquired. Instead, the government can now manipulate the market so long as it cloaks its justification for doing so with "the common good." It needs only to enact a legislative velvet rope around the property of a single citizen to reserve its own right to use that land in the future. Texas has armed its government officials with the very power that the Constitution sought to take away—the right to use the government's sovereign power to intentionally harm its citizens without having to pay for it.

This Court should be wary of any request to *increase* the rights of the government. Our constitutional system, and particularly the covenants embodied in the Bill of Rights, intentionally limits government power. It reserves all rights to the people *except* those that are specifically granted to the government. And, where the Constitution specifically denies power to the government (like the prohibition in the Fifth Amendment), the Court should be suspicious of any argument by the government that seeks to work around that specific prohibition. Allowing the government to do, in practice, precisely what it is prohibited from doing in principle, rewrites the plain words to which the people consented when they formed the government.

The Texas Supreme Court's opinion creates another remarkable and dangerous precedent. It permits the State to cause others to do the work that the Constitution prohibits the State from doing, or that it lacks the current legislative power to do, or that it lacks the money to do.

The facts here unmistakably point to Texas realizing that what Hearts Bluff intended to do with its property would conflict with the State's plans when the State lacked the money and legislative mandate to thwart the pending action. So, the State intentionally caused a surrogate – the federal government – to do what the State could not. The continued expansion of regulatory schemes in state and federal government threatens to set up an adversary system in which the people must fight the government that they created in order to preserve their rights, instead of having a government that respects its position as a creation of the people, subservient to their rights and limited in its power.

And, its not as though the use of surrogates to commit otherwise prohibited acts is new. Courts have seen it, and they have condemned it. *Joint Ventures, Inc. v. Florida DOT*, 563 So.2d 622 (Fla. S. Ct. 1990) and *Ventures in Property I v. City of Wichita*, 594 P.2d 671 (S.C. Kansas 1979) from other state courts allow recovery against one governmental entity when it caused another governmental entity to deny a permit. It is clearly out of line with precedent for the court below to categorically exempt Texas's action from appropriate regulatory-takings review because Texas acted through a federal agency as a surrogate.

The opinion of the Texas Supreme Court also steps of line with this Court's Takings Clause jurisprudence by inappropriately minimizing the importance of investment-backed expectations. The fact that Hearts Bluff was merely seeking a permit does not take this case outside the standard Takings Clause analysis, which the court below failed to adequately conduct. This Court has often

reviewed permit denials under the *Penn Central* and *Lucas* tests. In fact, most land use restriction cases involve a request for a permit that was denied. The denial is the event that led to the allegation that a taking had occurred. If the lack of a permit meant that there was no compensable interest, all of the permit denial cases would have been summarily dismissed. As this Court has said in the context of a §404 permit case:

> A requirement that a person obtain a permit before engaging in a certain use of his or her property does not itself "take" the property in any sense. After all, the very existence of a permit system implies that permission may be granted, leaving the landowner free to use the property as desired. Moreover, even if the permit is denied, there may be other viable uses available to the owner. Only when a permit is denied and the effect of the denial is to prevent "economically viable" use of the land in question can it be said that a taking has occurred.

United States v. Riverside Bay View Homes, Inc., 474 U.S. 121, 127 (1985).

In reality, it rarely matters whether the grant of a permit is conditioned on some condition precedent (like the payment of a development fee), or whether the permit is denied for failure to meet some condition subsequent (like the granting of an easement) or whether the permit is ineligible for consideration until some prior condition is met. In every case, once the landowner proves that he had an objective and legitimate expectation of having his use

approved by permit, the refusal of a permit can form the basis for the "taking." As the Federal Circuit has stated:

> Precedent shows that the ability to exercise every one of the "sticks" (rights) in the "bundle" of fee simple rights at the time of a taking is not a prerequisite to establishing a valid property interest under the Fifth Amendment . . . [a] plaintiff is disqualified from claiming a Fifth Amendment taking only if he or she has "no valid property interest," . . . or if he or she is "without undisputed ownership" of the property at the time of the takings. . . .

Cienega Gardens v. United States, 331 F.3d 1319, 1329 (Fed. Cir. 2003) (citations omitted).

Here, Hearts Bluff's expectations were fashioned by two separate forces. First, there were no local, state or federal restrictions on Hearts Bluff's ability to use its property as a mitigation bank. Even the Corps initially agreed that the property was suitable for a mitigation bank. Second, the Corps had created a program that encouraged private parties to develop property as mitigation banks. This program benefitted the Corps and §404 permittees by creating reliable sources of these credits and it benefitted property owners by creating an opportunity to profitably develop real property. The Corps' program and its actions shaped Hearts Bluff's reasonable investment backed expectations.

Hearts Bluff economic interest in the property was obviously seriously impacted. It sought to enter into

a specific line of business – operation of a mitigation bank. It purposely surveyed available property with that particular use in mind. It needed property that could be perpetually dedicated to mitigation banking, because the Corps' requirement that the bank exist in perpetuity would effectively preclude Hearts Bluff from taking advantage of any future development opportunities. It had to have wetlands to be eligible for the mitigation bank program. All of Hearts Bluff activities in this case point toward a specific use for a specific purpose. Its economic interest was inextricably intertwined with the contemplated use as a mitigation bank, and the value of the property would have increase substantially with that proposed use. The Texas Supreme Court violated this Court's clear precedent by failing to adequately analyze these interests.

And, the action taken by Texas cannot be seen as a regulation of otherwise "noxious" interests. Texas will, of course, claim that the prohibition of noxious use really encompasses every regulation that is for the public good – which the establishment of a reservoir for drinking water will surely be. But, that is not what the Court said in *Lucas* and defining "noxious" that broadly essentially deprives the word of its common meaning. The distinction between harm-preventing and benefit-conferring regulation is often in the eye of the beholder. It is quite possible to see the establishment of a reservoir as preventing harm in the form of preserving resources. It is equally possible to see blocking the mitigation bank as conferring a benefit on Texas – allowing a large metropolis an unwritten option to acquire infrastructure to continue expansion. And, in any event, mitigation banking also confers benefits on society as a whole in accordance with §404. In the

parlance of Texas law, this "...distinction between the power of eminent domain and an exercise of the police power along this line would ... involve us in ã sophistic Miltonian Serbonian Bog." *Brazos River Authority v. City of Graham*, 354 S.W2d 99, 105 (Tex. 1962).[7]

The distinction between regulation that prevents harmful use and that which confers public benefits is difficult, if not impossible, to discern on an objective basis. So, in order to avoid this value-based judgment – a judgment that cannot be reliably predicted – this Court has said that:

> Where the State seeks to sustain regulation that deprives land of all economically beneficial use, we think it may resist compensation only if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with. This accords, we think, with our "takings" jurisprudence, which has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the "bundle of rights" that they acquire

7. In *Claridge v. New Hampshire Wetlands Board,* 125 N.H. 745, 752, 485 A. 2d 287, 292 (1984), the Court held that an owner may, without compensation, be barred from filling wetlands because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support. On the other hand, another state court held that an owner barred from filling tidal marshland must be compensated, despite the municipality's "laudable" goal of "preserv[ing] marshlands from encroachment or destruction", *Bartlett v. Zoning Comm'n of Old Lyme,* 161 Conn. 24, 30, 282 A. 2d 907, 910 (1971).

> when they obtain title to property. It seems to us that the property owner necessarily expects the uses of his property to be restricted, from time to time, by various measures newly enacted by the State in legitimate exercise of its police powers; "[a]s long recognized, some values are enjoyed under an implied limitation and must yield to the police power." *Pennsylvania Coal Co. v. Mahon*, 260 U. S., at 413. ...In the case of land, however, we think the notion ... that title is somehow held subject to the "implied limitation" that the State may subsequently eliminate all economically valuable use is inconsistent with the historical compact recorded in the Takings Clause that has become part of our constitutional culture.

Lucas, 505 U.S. at 1027.

Certainly, there was nothing in the title acquired by Hearts Bluff that prohibited use as a mitigation bank. Not only was that the express purpose of the acquisition, Hearts Bluff made a thorough investigation into the suitability of the land for a mitigation bank *before* it purchased the land. Texas will certainly claim that the mere passage of title does not *grant* the mitigation bank permit, but that argument misses the point. The government may well be entitled to make explicit a prohibition on use that was previously based on property law or even other more general existing rules or understandings. But, using river bottom land in a manner that preserves its existing condition in perpetuity is not a use that is barred by law, by traditional property principles or by general nuisance law. Instead, it is a "productive use that was previously

permissible under relevant property and nuisance principles." *Lucas*, 505 U.S. at 1029-1030.

Nothing prevented Hearts Bluff from voluntarily setting aside its property for use as wetlands—that right was part of its "bundle of sticks." What Hearts Bluff could not do without a permit from the Corps was sell mitigation credits to third parties who were required to offset unavoidable damage to wetlands caused by their development activities. Thus, the State's actions in preventing the granting of the permit implicate *Penn Central*—there has been a severe economic impact on Hearts Bluff's property and the State's actions did interfere with distinct investment back expectations. Hearts Bluff has been singled out by the State to bear the burden of the State's desire to place a reservoir on that site in the future and, in doing so, to save the State money by purchasing the property as bottom land, and not as a mitigation bank.

The consideration of property interests does not seek to divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. Instead, the cases demonstrate that it is "the character of the action and the nature and extent of the interference with rights in the parcel as a whole..." that determine whether there has been a compensable taking. *See Penn Central*, 438 US at 130-131. "In fact, 'every sort of' [real property] interest the citizen may possess 'counts as a property interest under the Fifth Amendment.'" *Palazzolo v. Rhode Island*, 533 U.S. at 634-35 (O'Connor, J. concurring).

An interest worthy of protection may be found in "... rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* In *Roth*, this Court said:

> To have a property interest in a benefit, a person clearly must have more than an abstract need or desire for it. He must have more than a unilateral expectation of it. He must, instead, have a legitimate claim of entitlement to it. It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined. It is a purpose of the constitutional right to a hearing to provide an opportunity for a person to vindicate those claims.
>
> Thus, the welfare recipients in *Goldberg v. Kelly*, 397 U.S. 254 (1970), had a claim of entitlement to welfare payments that was grounded in the statute defining eligibility for them. The recipients had not yet shown that they were, in fact, within the statutory terms of eligibility. But we held that they had a right to a hearing at which they might attempt to do so.

Board of Regents of State Colleges v. Roth, 408 U.S. 564, 577 (1972). Hearts Bluff had already "vindicated" its claim of a right to the §404 permit. It qualified under the Corps' nationwide permit program; it had been told that the site was appropriate, and had been told that it *would* be receiving a permit.

Texas might be excused for believing that the reservation of property particularly suited for the bottom of a fresh-water reservoir serves the greater good. But, it cannot be excused for refusing to pay the owner for sacrificing the owner's interests in the name of the greater good. The action taken by the State of Texas was intended to benefit a future generation's need for fresh drinking water. That action imposed a significant cost on a single property owner – who is forced to wait on legislative will and budgetary constraints to recoup the cost imposed. It may well be that the plans of the State of Texas change, and that the reservoir is never approved. In the interim, Texas has purposely designated Hearts Bluff as the single property owner to bear the cost of holding property in case Texas needs it. That action is inconsistent with this Court's work attempting to realize the promise of the Fifth Amendment's taking prohibition.

WHEREFORE PREMISES CONSIDERED, Hearts Bluff Game Ranch, Inc. prays that the Court grant this Petition for Certiorari, and that the judgments below be reversed, the case remanded for trial on the merits, and that Hearts Bluff have such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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APPENDIX