No. 15-1192

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

LOST TREE VILLAGE CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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The Federal Circuit's decisions in this case turn takings jurisprudence on its head. Respondent purchased 1300 acres of contiguous coastal property, including the 4.99 acres of wetlands and submerged lands now known as Plat 57, and profitably developed the 1300-acre area into a gated residential community, with home sites made more valuable because of their proximity to undeveloped wetlands. Those facts should have prompted the court of appeals to treat the entire 1300-acre tract as the "parcel as a whole" when assessing whether the denial of a permit to fill Plat 57 effected a taking. At the very least, the court should have considered Plat 57 together with Plat 55, an "undoubtedly contiguous" parcel that respondent still owned and held for a comparable "usage objective[]." Pet. App. 115a. The court erred by instead holding that Plat 57 should be severed from the rest of the community and alone treated as the relevant parcel, solely because respondent *lacked* any expectation of

developing the wetlands on that tract when it developed the surrounding area. The court then magnified its error by holding that respondent's lack of reasonable, investment-backed expectations for Plat 57 when it developed the rest of the 1300 acres had no bearing on whether a taking occurred. This Court's intervention would provide much needed clarity on these important takings questions in the common scenario of a large real estate project that focuses first on development of unregulated land and only later on development of regulated areas. Respondent's arguments to the contrary lack merit.

1. Respondent does not dispute that the parcel-as-a-whole issue frequently plays a decisive role in takings analysis and has engendered confusion in the lower courts. See Pet. 24-26. Instead, respondent opposes review because the court of appeals assertedly applied the correct legal test and reached the right result in determining the relevant parcel. Respondent is wrong on both counts.

a. Respondent contends (Br. in Opp. 14) that the court of appeals applied the correct parcel-as-a-whole analysis by "consider[ing] a variety of factors bearing on the relevant parcel inquiry." To the contrary, the court focused exclusively on a single factor: Respondent's expectations—or lack thereof—regarding Plat 57. Pet. App. 26a-29a; see *id.* at 25a (stating that economic expectations are "the critical issue") (citation omitted). Because the court thought it dispositive that respondent had "ignored" Plat 57 while developing the rest of John's Island, *id.* at 27a, the court did not give *any* weight to the many facts linking Plat 57 to the 1300-acre community of which it is a part. For example, the court did not consider the timing of res-

pondent's acquisition of the 4.99-acre area as part of a far larger tract, the integrated nature of the gated residential community respondent developed, or the effect wetlands like Plat 57 had on the price respondent could charge for neighboring parcels.[1]

Whereas other courts have declined to consider a claimant's asserted "expectation of separate use" for contiguous, commonly owned parcels, *Murr* v. *Wisconsin*, No. 2013AP2828, 2014 WL 7271581, at *4, *8, n.8 (Wis. Ct. App. Dec. 23, 2015) (per curiam), review denied, 862 N.W.2d 899 (Tbl.) (Wis. 2014), cert. granted, 136 S. Ct. 890 (2016), the court below turned the parcel-as-a-whole inquiry into a single-factor test focused solely on respondent's lack of any expectations to develop Plat 57 while it developed the remainder of the 1300 acres. That seriously misguided approach warrants this Court's review.

b. In seeking to defend the ruling below, respondent repeats the court of appeals' mistake by placing dispositive weight on the timing of its development activities, insisting (Br. in Opp. 3) that its "development expectations for Plat 57 were *distinct*." The

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[1] Respondent asserts (Br. in Opp. 16) that Plat 57, unlike other John's Island wetlands, did not increase the value of surrounding uplands because it consists of a mangrove swamp. But respondent could realize a "much higher purchase price" for home sites located near protected wetlands—whatever their quality—simply because those areas were left undeveloped. C.A. App. A6260. In any event, the Corps of Engineers found that Plat 57 contained "extremely high quality" wetlands, Pet. App. 165a, and respondent did not seek review of that finding. See *Florida Rock Indus., Inc.* v. *United States*, 791 F.2d 893, 905 (Fed. Cir. 1986) (holding that a takings claim must be "assessed on the basis that [the] regulatory action was valid and correct in all respects"), cert. denied, 479 U.S. 1053 (1987).

distinctive thing about them, however, was that they were *nonexistent* while respondent was developing the rest of the John's Island community. See Pet. App. 26a-27a.

To be sure, respondent eventually became interested in developing Plat 57 when it "scoured" its remnant parcels to identify any that were "even remotely possible to be developed." Br. in Opp. 6 (citation and brackets omitted). But that simply reflects the normal course of development. Respondent quite naturally focused on the unregulated uplands, concededly ignored the 4.99 acres at issue here as part of that development, and only later took a shot at developing the remnants of regulated wetlands. The relative timing of those efforts provides no basis to sever the wetlands from the uplands in the 1300 acres and view the former in isolation when assessing respondent's takings claim.

Instead, as the petition explains (Pet. 17), the court of appeals "should have treated the entire 1300-acre tract as the relevant parcel as a whole."[2] Respondent contends (Br. in Opp. 11-12) that the entire community cannot be the relevant parcel because respondent sold individual home sites as it developed them. This Court has not had an opportunity to consider the extraordinary proposition that a developer may whittle down the relevant parcel by selling the portion it has developed until only a regulated remnant remains. The Court should grant review and hold that the economic impact of the regulatory action must be measured against the value derived from the entire 1300-

[2] Respondent is simply wrong in asserting (Br. in Opp. 12) that the government "no longer advocates" that the "entire community" is the relevant parcel. See Pet. 16-20.

acre tract that respondent profitably developed into an integrated gated community. Cf. *Rith Energy, Inc.* v. *United States*, 270 F.3d 1347, 1349-1350 (Fed. Cir. 2001) (rejecting argument that the value of a coal lease at the time a mining permit was revoked should exclude coal that had already been mined).

The court of appeals was also wrong to isolate Plat 57 from other property respondent still owned in the John's Island community, including Plat 55. Those commonly owned remnants were acquired in the same transaction with the same overarching project purpose to form part of the John's Island community.

Respondent's arguments to the contrary misstate the facts and lack merit. First, respondent asserts (Br. in Opp. 11) that it "had sold every other parcel of developable property within the community" by 1995. But it is undisputed that respondent continued to own three lots in Plat 55 suitable for development of homes. Pet. App. 81a-82a, 115a. Second, respondent maintains (Br. in Opp. 13) that Plats 55 and 57 are not contiguous. But as both lower courts observed, the tracts are "undoubtedly contiguous," Pet. App. 28a, 115a, because respondent owns both parcels and "a 323-foot strip of land" connecting them. *Id.* at 114a (citing respondent's consultant's testimony and respondent's post-trial brief); see *id.* at 82a n.14. Third, respondent suggests (Br. in Opp. 13) that Plats 55 and 57 do not have similar development prospects. But the trial court found that respondent "hopes to sell for profit the lots on Plat 55 just as it did the projected lot on Plat 57." Pet. App. 115a.

In short, the court of appeals' fundamentally flawed parcel-as-a-whole analysis—which single-mindedly focused on the timing of development

expectations—resulted in the erroneous conclusion that Plats 55 and 57 should be disaggregated from each other and from the overall John's Island community of which they are a part. The court recognized that "[t]he Supreme Court has not settled the question of how to determine the relevant parcel in regulatory takings cases," even though that question plays a "crucial" role in the takings analysis. Pet. App. 24a. This case is an ideal vehicle to consider that issue.

2. Review is also warranted to clarify whether courts may consider the absence of reasonable, investment-backed expectations when a claimant alleges a total taking.

a. Respondent relies (Br. in Opp. 18-24) on *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003 (1992), to contend that it is irrelevant whether a claimant alleging a total taking lacked any reasonable, investment-backed expectations. But *Lucas* did not consider that issue because the claimant had made a substantial investment when it acquired land two years before the relevant regulatory restrictions were adopted. *Id.* at 1006-1008; see *Good* v. *United States*, 189 F.3d 1355, 1361 (Fed. Cir. 1999) (observing that "[t]he *Lucas* Court did not hold that the denial of all economically beneficial or productive use of land eliminates the requirement that the landowner have reasonable, investment-backed expectations," because "there was no question" that the plaintiff in *Lucas* had such expectations), cert. denied, 529 U.S. 1053 (2000).[3]

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[3] Although the Federal Circuit later dismissed the discussion of investment-backed expectations in *Good* as dictum, see *Palm Beach Isles Assocs.* v. *United States*, 231 F.3d 1354, 1361 (2000), its switch on the issue demonstrates that the relevance of investment-

Respondent is wrong to suggest (Br. in Opp. 22) that the *Lucas* majority affirmatively rejected the view in Justice Kennedy's concurrence in the judgment, which observed that "[w]here a taking is alleged from regulations which deprive the property of all value, the test must be whether the deprivation is contrary to reasonable, investment-backed expectations." 505 U.S. at 1034 (Kennedy, J., concurring in judgment); see *Palazzolo* v. *Rhode Island*, 533 U.S. 606, 617 (2001) (citing Justice Kennedy's *Lucas* opinion with approval and noting that the Court has recognized "certain qualifications" to the proposition that the complete elimination of value "will require compensation").

Respondent also cannot square its proposed rule with *Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986 (1984), which denied a claim alleging a total taking of a claimant's trade secrets because the claimant "could not have had a reasonable, investment-backed expectation that [the government] would keep the data confidential." *Id.* at 1006. Respondent observes (Br. in Opp. 23) that *Monsanto* involved a preliminary question whether the trade secrets were protected property. But the Court held that they *were* protected. 467 U.S. at 1003-1004. Thus, the finding of no taking did not turn on "questions of property definition and protection," Br. in Opp. 23, but on the Court's conclusion that the absence of any reasonable, investment-backed expectation was "so overwhelming * * * that it disposes of the taking question," 467 U.S. at 1005. Respondent's attempt (Br. in Opp. 22-23) to distinguish *Monsanto* as turning on the

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backed expectations to the total-taking analysis warrants this Court's review.

particular statutory scheme, moreover, only underscores the error in the court of appeals' categorical conclusion that an alleged total taking must always be evaluated "without consideration" of investment-backed expectations. Pet. App. 7a. The Court should grant review and reverse that flawed *per se* rule.

b. Respondent alternatively contends (Br. in Opp. 2-3, 9, 17) that it did have reasonable, investment-backed expectations for Plat 57. The court of appeals did not consider that contention, and it provides no basis to decline review of the court's erroneous legal analysis. But, in any event, respondent's arguments lack merit.

Respondent acknowledges (Br. in Opp. 2-3) that it had no investment-backed expectation of developing Plat 57 for nearly 30 years after it acquired the property in 1974. At the time of purchase, the Clean Water Act (CWA), 33 U.S.C. 1251 *et seq.*, prohibited filling wetlands like Plat 57 without a permit. See Pet. 4.[4] Thus, as the court of appeals found, Plat 57 was "ignored" and entirely "absent from [respondent's] development plans" for several decades. Pet. App. 27a.

Respondent contends (Br. in Opp. 6) that it formed expectations for Plat 57 in 2001, when it received gratuitous wetlands "mitigation credits." Although respondent may have hoped to squeeze additional profit from the John's Island project, its belated

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[4] Respondent misleadingly suggests (Br. in Opp. 21 n.6) that wetlands regulation was "relatively limited" when it acquired Plat 57. There can be no dispute that the saltwater tidal wetlands on that tract were subject to federal jurisdiction and permitting restrictions before respondent acquired them. See 39 Fed. Reg. 12,115, 12,121 (Apr. 3, 1974).

expectations were neither reasonable nor investment-backed. Respondent asserts (Br. in Opp. 9) that it expected to receive a fill permit because it had previously obtained permits to construct bridges, causeways, and canals in the community. But those "water dependent" projects were subject to a different CWA analysis. 40 C.F.R. 230.10(a)(3). Respondent also emphasizes (Br. in Opp. 9) that a company affiliated with it obtained a fill permit for a different wetlands parcel in John's Island in 2002. To obtain that permit, however, respondent represented that "any other development" in the community would involve parcels with "developable uplands." Pet. App. 192a.[5] Respondent accordingly could not have reasonably expected that it would thereafter be granted permission to fill Plat 57. Nor could the issuance of a state permit make respondent's expectations reasonable (Br. in Opp. 9), because the state agency did not consider whether practicable alternatives existed. See Pet. 22 n.4.

Moreover, respondent's expectations regarding Plat 57 were not backed by any cognizable investment. Respondent asserts (Pet. 9 n.1) that it expended funds pursuing development permits, but that argument would nullify the "investment-backed" component of the inquiry in this context because every landowner makes an expenditure during the permitting process.

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[5] Respondent disputes (Br. in Opp. 10) that it made that representation, but the Corps' contrary factual finding must be presumed correct given respondent's failure to challenge the Corps' decision. See *Florida Rock Indus.*, 791 F.2d at 905. Nor does Plat 57 fall within the caveat to that representation for "land that had not yet been surveyed to identify upland areas that could be developed at some future date," Pet. App. 176a, because Plat 57 does not contain such areas, *id.* at 19a.

The absence of reasonable, investment-backed expectations was "so overwhelming" in this case that it should have "dispose[d] of the taking question." *Monsanto*, 467 U.S. at 1005.

3. If allowed to stand, the court of appeals' rulings will embolden large developers like respondent to allege a total taking of the portion of their projects subject to regulation after they have developed and sold the unregulated portion. Respondent contends (Br. in Opp. 1) that the facts here are "unique" and that the court's decisions are "sui generis." But as respondent's amicus represented below, "[i]t is common for both residential and commercial project development to occur in several phases," and "not unusual for a developer to retain an interest in individual, or outlier, parcels long after a development phase has been completed and sold." Nat'l Ass'n of Home Builders C.A. Amicus Br. 4. See also, *e.g.*, *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1377 (claimants sold 250 acres of 311.7-acre parcel before alleging taking of 50.7 acres subject to CWA restrictions), aff'd on reh'g, 231 F.3d 1354 (Fed. Cir. 2000); *Loveladies Harbor, Inc.* v. *United States*, 28 F.3d 1171 (Fed. Cir. 1994) (claimants developed 199 acres of 250-acre parcel into single-family homes before alleging taking of 12.5-acre tract subject to CWA restrictions); *Reahard* v. *Lee Cnty.*, 968 F.2d 1131, 1133 (11th Cir. 1992) (claimants "subdivided, developed, and sold" 500 acres of 540-acre parcel of "waterfront land" as a "single-family subdivision" before alleging taking of 40-acre residuum).

Indeed, this case presents a far more typical set of facts than *Murr* v. *Wisconsin*, cert. granted, 136 S. Ct. 890 (2016), where the petitioners allege a taking

based on the denial of a hardship variance from an ordinance barring separate sale or development of contiguous substandard riverfront lots that are commonly owned. Aside from arising in a rather unique context, other issues may arise in *Murr* that could also distinguish it from this and other more typical cases and could affect the takings analysis. For example, the petitioners assert that the two lots were "not in common ownership" before the petitioners acquired them, Pet. Br. 4, *Murr*, *supra* (No. 15-214), and that the two parcels were "never treated * * * as a single economic unit," *id.* at 30. And the respondents in *Murr* in turn may well dispute these and others of the petitioners' assertions about the setting for review of the parcel-as-a-whole issues in that case.

Because *Murr* may not provide an adequate vehicle to fully consider the parcel-as-a-whole issue—and because this case presents the further issue of the role of investment-backed expectations under *Lucas*—the Court should grant review in this case and set it for argument together with *Murr*. If the Court declines to grant the petition at this time, however, it should hold the petition pending its decision in *Murr*.

* * * * *

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted. In the alternative, the Court should hold this petition pending its decision in *Murr*, and then dispose of the petition as appropriate in light of that decision.

Respectfully submitted.

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