No. 15-214

IN THE

Supreme Court of the United States

JOSEPH P. MURR, *et al.*,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ of Certiorari to the Court of Appeals of the State of Wisconsin

BRIEF OF *AMICI CURIAE* THE WISCONSIN COUNTIES ASSOCIATION, THE WISCONSIN TOWNS ASSOCIATION, AND THE LEAGUE OF WISCONSIN MUNICIPALITIES IN SUPPORT OF RESPONDENTS

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BRIEF OF *AMICI CURIAE* THE WISCONSIN COUNTIES ASSOCIATION, THE WISCONSIN TOWNS ASSOCIATION, AND THE LEAGUE OF WISCONSIN MUNICIPALITIES IN SUPPORT OF RESPONDENTS

INTEREST OF THE *AMICI CURIAE*[1]

Amici curiae are voluntary membership organizations representing every level of local government in the state of Wisconsin.

The Wisconsin Counties Association ("WCA") was created to protect the interests of Wisconsin counties and promote the improvement of county government. WIS. STAT. § 59.52(22) (2013–2014). To meet these obligations, the WCA represents interests common to Wisconsin's seventy-two counties by engaging in legislative efforts, educating and training county officials, and participating in legal proceedings regarding matters that affect county governments.

The Wisconsin Towns Association ("WTA") is a voluntary association of member town and village governments organized to protect town interests and improve town government. WIS. STAT. § 60.23(14) (2013–

[1] The parties' letters consenting to the filing of *amicus curiae* briefs in support of either party or neither party have been filed with the Clerk's office. No counsel for any party has authored this brief in whole or in part, and no person or entity other than the Wisconsin Counties Association, the Wisconsin Towns Association, and the League of Wisconsin Municipalities, or their counsel, has made a monetary contribution intended to fund the preparation or submission of this brief.

2014). Currently, 1248 towns and 20 villages in the state of Wisconsin are members of WTA. In furtherance of its goals, WTA provides three types of services for its members: legislative lobbying efforts, educational programs, and legal activities.

The League of Wisconsin Municipalities ("the League") was created on December 14, 1898, to help Wisconsin cities and villages share ideas and learn from one another, to train and educate city and village officials, and to advocate on behalf of Wisconsin municipalities to the Wisconsin Legislature, the Governor, and state agencies, as well as in the courts. The League's membership includes all 190 cities and 399 of the 411 villages in Wisconsin.

Since becoming a state in 1848, Wisconsin has always maintained a decentralized system of government. Local issues are identified, debated, and decided by local elected or appointed officials. In Wisconsin, land use regulation is an area where local control is of paramount importance. At times, the preference for local regulatory control can adversely affect an individual's interest in a particular property. In recognition of the possibility for tension between local land use regulations and the rights of property owners, the Wisconsin legislature and local governments have designed a statutory and appellate process that balances regulation by local government with property owners' rights.

The WCA, WTA, and the League submit this brief to support continuation of the balance between individual property rights and respect for decision-making at the local level. Wisconsin has established processes by which local governments regulate land use and administer requests for changes to, or exceptions from, generally applicable property regulations. Courts should not permit property

owners to evade those processes by litigating unripe claims. *Amici* understand and accept constitutional constraints on local governments' land use decisions, but believe such constraints should be imposed, and even considered, only when necessary and only after local government processes have been permitted to run their full course.

This case presents the potential for an unnecessary and unripe constitutional adjudication that would strike down a common land use provision widely employed across Wisconsin and the nation. Striking down the provision as unconstitutional threatens to upend land use regulation and impose broad costs on cash-strapped local governments. Where, as here, such effects would be avoided by fidelity to established prudential principles, the prospect is particularly troubling. For those reasons, *amici* urge this Court not to unnecessarily and prematurely resolve the constitutional question pressed by Petitioners.

STATEMENT OF RELEVANT LEGAL BACKGROUND

1. Wisconsin has a rich history of vesting the power to regulate land use in local governments based on the simple premise that local elected and appointed officials know what is best for their communities. As early as 1909, the Wisconsin legislature empowered cities to create planning commissions and zoning ordinances to implement community land use goals and objectives. Milwaukee was a pioneer in this regard, as one of the first cities in the country to establish a plan commission and, in 1920, the first city in Wisconsin to adopt a comprehensive zoning ordinance. BRIAN W. OHM, GUIDE TO COMMUNITY PLANNING

IN WISCONSIN 91 (1999). While the system is at times imperfect, it places decisions in the hands of persons with the greatest ties to the local community affected by those decisions. Moreover, the comprehensive land use and zoning processes Wisconsin utilizes today draw upon over a century's worth of guidance in balancing the tension between the public good and individual rights.

Wisconsin has four types of municipal subdivisions: counties, cities, villages, and towns. As "incorporated" municipalities, cities and villages possess certain inherent and statutory planning powers. WIS. CONST., art. IX, § 3(1); WIS. STAT. §§ 61.35, 62.23 (2013–2014). Areas of the state that remain unincorporated are governed by town and county governments. Counties enjoy primary planning and zoning authority over the unincorporated areas. WIS. STAT. § 59.69 (2013–2014). In some circumstances, towns can exercise certain planning authority distinct from that of counties. WIS. STAT. §§ 59.69, 60.61 (2013–2014)

2. Administration of zoning in Wisconsin is patterned on the U.S. Department of Commerce's model zoning legislation. *See* U.S. DEP'T OF COMMERCE, A STANDARD STATE ZONING ENABLING ACT (rev. 1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf. As a result, Wisconsin divides local zoning power among the local legislative body, the plan commission, and the board of appeals/ adjustment. BRIAN W. OHM, WISCONSIN LAND USE & PLANNING LAW 5-45 (2013 ed.). Under this framework, local governments create a statutorily authorized planning commission that prepares a comprehensive community land use plan, and, in the case of a local government wishing to create a general zoning ordinance, the commission is required to prepare the ordinance and

recommend adoption to the legislative body. WIS. STAT. §§ 59.69(5), 60.61(4), 61.35, 62.23(7)(d). Wisconsin law also allows planning commissions to decide special exceptions and conditional uses. WIS. STAT. §§ 59.694(1), 62.23(7)(e)1 (2013–2014). Boards of appeals/adjustment then sit in a quasi-judicial capacity to review decisions of legislative bodies and administrative officers responsible for implementing and enforcing local zoning codes. WIS. STAT. §§ 59.694, 62.23(7)(e) (2013–2014).

3. In addition, Wisconsin law allows counties, cities, villages, and towns to coordinate in developing and adopting master plans relating to the physical development of the broader regions in which they are situated. WIS. STAT. § 66.1001 (2013–2014). These plans provide consistency and a framework for local legislative bodies to adopt ordinances, and they place questions about local land use within a long-term regional context. A comprehensive plan must consider elements of intergovernmental cooperation among the various local governments in relation to land use and planning. As a part of the planning process, counties and other local governments solicit feedback from the community. St. Croix County's Comprehensive Plan is illustrative: public participation in the planning process included public workshops, a statistically valid public opinion survey, open houses, a webpage with project information, and a public hearing. *See* ST. CROIX CTY., WIS. 2012–2035 COMPREHENSIVE PLAN (adopted Nov. 5, 2012), http://www.co.saint-croix.wi.us/index.asp?SEC={19386-9EB-C649-48C6-A778-A6026605796B}. If the affected municipalities approve a regional master plan, all future zoning code amendments and other land use decisions must be consistent with that plan. WIS. STAT. § 66.1001(3).

4. To implement and administer zoning ordinances, local governments create zoning departments. The overwhelming majority of counties in Wisconsin have a dedicated zoning administrator and staff whose primary function is to provide guidance to local citizens in interpreting ordinances and to decide whether to grant or deny zoning applications and permits. In St. Croix County, for example, applicants for land use permits must send completed applications to the zoning administrator for review. The administrator's review process includes sending each application to appropriate reviewing agencies for comment, visiting the applicant's property, meeting with the applicant, and preparing findings for approval or denial of the permit within 60 days. *See Land Use Permit Application.* ST. CROIX CTY., WIS. (rev. May 2016), http://www.co.saint-croix.wi.us/vertical/sites/%7BBC2127FC-9D61-44F6-A557-17F280990A45%7D/uploads/Land_Use_Permit_Application_Fillable.pdf.

5. A person adversely affected by a local government's land use decision may challenge that decision to the board of appeals, in the case of a city, or the board of adjustment, in the case of a county. Boards of appeals/adjustment are comprised of local residents of the political subdivision. Board of adjustment members must reside in unincorporated areas of the county, meaning the members are subject to the very same zoning code at issue in any appeal. WIS. STAT. § 59.694(2)(c). A board of appeals/adjustment sits in a *de novo* capacity, reviewing administrative land use decisions by local officials or committees. *Osterhues v. Bd. of Adjustment for Washburn Cty.*, 2005 WI 92, ¶¶33–34, 282 Wis. 2d 228, 698 N.W.2d 701.

6. The ordinance at issue here governs land use within the Lower St. Croix Riverway Overlay District. *See* St.

Croix Cty., Wis., Code of Ordinances, Land Use & Dev., subch. III.V, § 17.36 (2005). The ordinance treats adjacent, substandard lots under common ownership as one lot. *Id.* § 17.36.I.4.a.2. This provision is not unique to St. Croix County, nor is it unique to the Lower St. Croix Riverway. Indeed, fifty of Wisconsin's seventy-two counties—nearly seventy percent—have enacted zoning ordinances that effectively combine commonly owned, contiguous, substandard lots into a single lot. *See* App., *infra*.

Specifically, thirty-three counties—more than forty-six percent—implicitly combine commonly owned, contiguous, substandard lots through zoning ordinances. *Id.*; *see, e.g.*, Code of Green Lake Cty. § 350-22(A)–(B) (2015) ("If abutting lands and the substandard lot are owned by the same owner, the substandard lot shall not be sold or used without full compliance with the terms of this chapter.").

An additional seventeen counties—nearly twenty-four percent—explicitly consider commonly owned, contiguous, substandard lots as a single lot. App., *infra*; *see, e.g.*, Bayfield Cty. Ordinance tit. 13, ch. 1, art. B, § 13-1-26(d) (2012) ("If a substandard lot is in common ownership with abutting lands, the contiguous lots shall be considered a single parcel under the terms of this ordinance.").

7. St. Croix County adopted its ordinance subsequent to a series of legal developments at the federal, state, and county levels to protect the Lower St. Croix River. *See* Br. for Resp't St. Croix Cty. at 4–10. While the ordinance has been amended and updated in the decades since, the treatment of commonly owned, contiguous, substandard lots as a single lot has not changed. *See id.* at 9 n.3.

STATEMENT OF RELEVANT FACTS

1. Petitioners urge this Court to decide a broad question of constitutional interpretation. But in so doing they elide two critical facts. First, this case can be—and, in fact, has been—decided entirely under Wisconsin's applicable statute of limitations. Second, Petitioners never took the steps necessary to make the constitutional takings question presented in this case ripe for adjudication.

2. William and Margaret Murr ("the Murrs"), parents of Petitioners, purchased two adjacent lots along the Lower St. Croix River in the early 1960s. Br. for Resp't St. Croix Cty. at 10. The Murrs built a cabin on the eastern lot ("Lot F"), and transferred title to both that lot and the cabin to their family plumbing business. *Id.* at 11. Title to the western lot ("Lot E"), which they did not develop, remained in their names.

Though neither Petitioners nor the courts below recognized this potentially material fact, in 1982, the Murrs reclaimed title to Lot F from the family business. *Id.* at 11 & n.5. This was the first time Lots E and F came under common ownership subsequent to St. Croix County's adoption of the Lower St. Croix Riverway Overlay District.

In 1994 and 1995, the Murrs transferred title to Lots E and F to their six children.[2] Pet'rs' App. A3, ¶5. Two of the children subsequently quitclaimed their interests in the property to their siblings, leaving Petitioners as the owners of record. *Id.* A3 n.3.

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[2] Given that the lots were under common ownership as of 1982, it should not have been possible to transfer ownership of the lots separately in 1994 and 1995. Recordation of the separate transfers appears to have been an administrative error.

3. In 2004, Petitioners approached St. Croix County zoning officials about the possibility of expanding and flood-proofing the cabin on Lot F. Br. for Resp't St. Croix Cty. at 13. In December 2004, Petitioners filed a land use permit application with the St. Croix County Planning and Zoning Department. *See* Dep. Tr. of Donna Murr at 40:14–41:5 (Certified R. Docket No. 22, pp. 61–62); Dep. Tr. of Peggy Murr Heaver at 24:18–25:5 (Certified R. Docket No. 22, pp. 146–47); Dep. Tr. of Keith Heaver at 13:3–23 (Certified R. Docket No. 22, p. 118). The County responded with a detailed letter advising Petitioners that the property is subject to zoning regulations for several overlay districts, including the Lower St. Croix Riverway Overlay District. *See* Dep. Tr. of Donna Murr at 48:7–50:6 (Certified R. Docket No. 22, pp. 63–64); Dep. Tr. of Peggy Murr Heaver at 24:6–17 (Certified R. Docket No. 22, p. 146).

Over the next thirteen months, Petitioners carried on an extended dialogue with County zoning officials, as well as officials from the Town of Troy and the Wisconsin Department of Natural Resources ("DNR"). Repeatedly during these discussions, County zoning staff communicated to Petitioners that the legal standard for obtaining a variance from applicable zoning regulations would be difficult to meet and that Petitioners had several options for conforming uses of the property. *See* Dep. Tr. of Donna Murr at 66:21–77:11 (Certified R. Docket No. 22, pp. 68–71); Dep. Tr. of Peggy Murr Heaver at 29:4–20 (Certified R. Docket No. 22, p. 148).

4. In February 2006, Petitioners applied to the St. Croix County Planning and Zoning Department for six zoning variances and one special exception. Br. for Resp't St. Croix Cty. at 14. None of Petitioners' requests sought

permission to sell Lot E separately from Lot F. *Id.* at 14 n.7; Resp't's App. F1–2. County zoning staff evaluated Petitioners' seven requests at length. Resp't's App. F3–28. They also invited feedback on Petitioners' applications from the Town of Troy, the St. Croix County Land and Water Conservation Department, the DNR (which exercises regulatory supervision of land management along the Lower St. Croix River), and FEMA (which insures homes, including Petitioners' cabin, within the floodplain of the Lower Saint Croix River). *Id.* F8–9. Based upon review of Petitioners' applications, discussions with Petitioners, a site visit to the property, consultation with other regulatory agencies, and extensive findings, County zoning staff recommended denial of Petitioners' applications. *Id.* F28–33.

The St. Croix County Board of Adjustment scheduled a hearing on Petitioners' applications for the Board's March 23, 2006 meeting. *Id.* F1. After reviewing the County staff recommendations, Petitioners voluntarily withdrew their applications before the scheduled hearing. *See* Dep. Tr. of Peggy Murr Heaver at 21:11–23:13 (Certified R. Docket No. 22, p. 146).

5. Petitioners subsequently renewed five of their applications and submitted three more, placing requests for six variances and two special exceptions before the Board of Adjustment. Br. for Resp't St. Croix Cty. at 14–15 & n.8. A new variance application submitted by Petitioners, sought, for the first time, permission to sell Lot E separately from Lot F. *Id.* at 14–15 & n.7. County zoning staff again evaluated Petitioners' requests in detail and again sought input from other interested regulatory authorities. J.A. 63–73. Both the St. Croix County Land and Water Conservation Department and the DNR

recommended denial of Petitioners' applications. *Id.* 64. FEMA received copies of Petitioners' applications but did not provide the County with comments or a recommendation. *Id.* The Town of Troy Planning Commission supported the applications to flood-proof the cabin but sought to postpone any decision "on the use of contiguous substandard lots in common ownership." *Id.* The Board of Adjustment denied Petitioners' applications. *Id.* 61–73.

6. Petitioner Donna Murr sought certiorari review of the Board of Adjustment decision in the Wisconsin courts. The trial court affirmed the Board of Adjustment's denial of the variance to allow separate development or sale of Lots E and F but reversed the denial of Petitioners' other requests. Resp't's App. B1–7. On appeal, the Wisconsin Court of Appeals affirmed the Board of Adjustment's decision in all respects. *Id.* A1–15. The Wisconsin Supreme Court denied Donna Murr's petition for review. *Murr v. St. Croix Cty. Bd. of Adjustment*, 335 Wis. 2d 146, 803 N.W.2d 849 (2011).

7. While Donna Murr's certiorari suit was proceeding through the Wisconsin courts, County zoning staff and others continued to work with Petitioners to identify a plan that would allow Petitioners to flood-proof their cabin within parameters acceptable to all relevant zoning authorities. *See* Dep. Tr. of Donna Murr at 56:24–57:5, 59:20–60:9, 101:8–15 (Certified R. Docket No. 22, pp. 65–66, 77); Dep. Tr. of Peggy Murr Heaver at 34:14–35:3, 43:22–47:13 (Certified R. Docket No. 22, pp. 149, 151–52); Dep. Tr. of Keith Heaver at 18:4–19:7 (Certified R. Docket No. 22, p. 119). As late as spring 2011, the parties were meeting to discuss options, and Petitioners asserted that they would be submitting "a specific plan" for the cabin to the County zoning staff for evaluation. Dep. Tr. of Peggy Murr Heaver

at 46:11–47:13 (Certified R. Docket No. 22, p. 152). Petitioners never followed through by submitting a plan.

8. Instead, Petitioners filed this suit against St. Croix County and the State of Wisconsin. They alleged that County ordinances and DNR regulations "deprive[d them] of all, or practically all of the use of Lot E because the lot cannot be sold or developed as a separate lot." J.A. 9.

9. Following discovery, St. Croix County and the State of Wisconsin moved for summary judgment. They identified four alternative grounds on which summary judgment was appropriate: (1) Petitioners' claim was time-barred under the applicable Wisconsin statute of limitations; (2) the case was not ripe for adjudication because Petitioners had not exhausted their administrative remedies; (3) Petitioners had no cognizable property right in Lot E separate from Lot F because the ordinance considered them as one property; and (4) Petitioners could not demonstrate a regulatory taking because they had not been deprived of all or substantially all of the beneficial use and value of their property. Pet'rs' App. A5–6, ¶9.

The trial court granted summary judgment in favor of the County and the State. It based judgment on two independent grounds. First, the trial court held Petitioners' claim untimely under Wisconsin Statute section 893.93(1)(a). *Id.* A6, ¶10; *id.* B7. Second, "[d]espite this conclusion, the court also reached the merits" and held there was no taking. *Id.* A6, ¶10; *see also id.* B9. The trial court did not acknowledge—much less adjudicate—the arguments about ripeness and lack of a cognizable property right after merger. *Id.* B1–10.

10. On appeal, the Wisconsin Court of Appeals affirmed the grant of summary judgment. *Id.* A2, ¶1. It did

so in an unpublished, per curiam opinion that has neither precedential nor even persuasive value as a matter of Wisconsin law. *See* WIS. STAT. § 809.23(3) (2013–2014). The Court of Appeals concluded that Petitioners' "takings claim fails on its merits as a matter of law." Pet'rs' App. A7, ¶12. That court opted not to "reach the issue of whether their claim was timely filed," preferring to "assume, without deciding, that it was." *Id.*

The Wisconsin Supreme Court denied review. *Id.* C2. This Court granted certiorari. *Murr v. Wisconsin*, 136 S. Ct. 890 (2016).

SUMMARY OF ARGUMENT

Petitioners ask this Court to review a procedurally improper, non-precedential opinion from an intermediate state court. The lower courts did not consider—based on a mistaken assumption about when Lots E and F first came under common ownership—a potentially material fact that could only have strengthened the trial court's conclusion that this case was time-barred. The Wisconsin Supreme Court declined Petitioners' request for review. And no court has even considered the threshold argument that the case is not ripe for adjudication. All of these factors point to the conclusion that this Court should decline to reach the question Petitioners have posed.

Constitutional adjudication is unnecessary here, as this case can be—and indeed has been—resolved on nonconstitutional grounds. Thus, both the long-established rule of constitutional avoidance and the ripeness doctrine announced in *Williamson County Regional Planning Commission v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985), militate against answering the consti-

tutional question Petitioners have presented here. Instead, this Court should dispose of the case on other grounds.

Adhering to prudential procedural rules would preserve the constitutional question for another day, when it is presented by a proper vehicle. This approach would demonstrate "sound judicial administration," *Alma Motor Co. v. Timken-Detroit Axle Co.*, 329 U.S. 129, 142 (1946), in keeping with "[t]he best teaching of this Court's experience," *Poe v. Ullman*, 367 U.S. 497, 503 (1961) (quoting *Parker v. Cty. of L.A.*, 338 U.S. 327, 333 (1949)). It would also honor the fundamental principles of federalism and comity, by ensuring that administrative procedures are exhausted and Wisconsin courts construe relevant state and local laws before this Court considers breaking new ground in constitutional interpretation. Moreover, by declining to reach Petitioners' constitutional question before it is ripe, this Court would safeguard the careful balance Wisconsin law has struck between a democratic preference for local decision-making and respect for property owners' constitutional rights.

ARGUMENT

I. THE COURT SHOULD NOT REACH THE CONSTITUTIONAL QUESTION PRESSED BY PETITIONERS.

This Court wades into the waters of constitutional adjudication only when necessary. Here, the parties' dispute can be—and has been—resolved on state-law grounds that do not require novel constitutional construction. Those grounds and the Court's settled practice of constitutional avoidance weigh against deciding the broad and contentious constitutional question posed by

Petitioners. Prudence counsels disposing of this case on other grounds and reserving the takings question for a future day.

A. The Rule Of Constitutional Avoidance Holds That Constitutional Decisions Should Be Reached Only When Necessary.

It is a "cardinal rule" of this Court to decide constitutional issues only where necessary. *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 501–02 (1985) (quoting *United States v. Raines,* 362 U.S. 17, 21 (1960)). This "fundamental rule of judicial restraint," *Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Eng'g, P.C.*, 467 U.S. 138, 157 (1984), "conceived out of considerations of sound judicial administration," *Alma Motor Co.*, 329 U.S. at 142, comprises "[t]he best teaching of this Court's experience," *Poe,* 367 U.S. at 503 (quoting *Parker,* 338 U.S. at 333).

1. The rule of constitutional avoidance is established by consistent, settled practice in this Court.

The rule of constitutional avoidance dates back to Chief Justice John Marshall's holding, while riding circuit, that constitutional decisions should be rendered only "[i]f they become indispensably necessary to the case" and must be avoided "if the case may be determined on other points." *Ex parte Randolph,* 20 F. Cas. 242, 254 (C.C.D. Va. 1833). Indeed, the Court's "*duty to avoid* constitutional issues that need not be resolved in order to determine the rights of the parties" stands "equally strong" as the Court's "*duty to decide* constitutional questions when necessary to dispose of the litigation before [it]." *Cty. Ct. of Ulster Cty., N.Y. v. Allen,* 442 U.S. 140, 154 (1979) (emphases added).

Justice Brandeis famously articulated the rule of constitutional avoidance in *Ashwander v. Tennessee Valley Authority*, 297 U.S. 288 (1936). The Court deemed constitutional the government's actions at issue in the case. *Id.* at 339–40. In concurrence, Justice Brandeis expressed doubt that the Court should have decided constitutionality when other dispositive grounds were present. *Id.* at 341–56. In addition to respect for "long-established practice," Justice Brandeis cited "[c]onsiderations of propriety" as militating against unnecessary constitutional adjudication. *Id.* at 341 (quoting *Blair v. United States*, 250 U.S. 273, 279 (1919)). Justice Brandeis prescribed constitutional avoidance even in cases where "it would be convenient for the parties and the public to have promptly decided" a constitutional question. *Id.* at 345.

Justice Brandeis proffered seven prudential rules—followed in the eighty years since—to help the Court "avoid[] passing upon a large part of all the constitutional questions" brought before it. *Id.* at 346. Among those:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Appeals from the highest court of a state challenging its decision of a question under the Federal Constitution are frequently dismissed because the judgment can be sustained on an independent state ground.

Id. at 347 (internal citations omitted). The rule derived from Justice Brandeis's *Ashwander* opinion has guided this Court's consideration in scores of cases since. *See, e.g.*, *Bond v. United States*, 134 S. Ct. 2077, 2087 (2014); *Dep't*

of Commerce v. U.S. House of Representatives, 525 U.S. 316, 343–44 (1999); *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 485 U.S. 660, 669–74 (1988) ("*Smith I*"); *Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 211–12 (1960); *Alma Motor Co.*, 329 U.S. at 142.

At its core, the rule of constitutional avoidance requires the Court to exhaust all nonconstitutional grounds for decision "prior to reaching any constitutional questions." *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 99 (1981). The rule not only functions as a "corollary offshoot of" Article III's case or controversy requirement, *Minnick v. Cal. Dep't of Corr.*, 452 U.S. 105, 123 n.30 (1981) (quoting *Rescue Army v. Mun. Ct. of L.A.*, 331 U.S. 549, 570 (1947)), but also "carries a special weight in maintaining proper harmony in federal-state relations," *Clay*, 363 U.S. at 211–12. In light of all the precedent considered above, "it is a well-established principle governing the prudent exercise of this Court's jurisdiction that normally the Court will not decide a constitutional question if there is some other ground upon which to dispose of the case." *Bond*, 134 S. Ct. at 2087 (internal quotation marks omitted).

2. The rule of constitutional avoidance applies even where lower courts have focused on constitutional issues.

The archetypal case for constitutional avoidance is one where there are two fully developed, legally independent rationales available—one rooted in constitutional argument and one based on some other legal authority. *See, e.g.*, *Gulf Oil*, 452 U.S. at 89. But the rule of constitutional avoidance applies with equal force where, for any of a number of reasons, the constitutional issue is fully developed but need not be decided because some

nonconstitutional basis may dispose of the case. Thus, where it is unclear whether a lower court ruling is based on state law or the federal Constitution, this Court has remanded to avoid an unnecessary constitutional decision. *See City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 294–95 (1982). Likewise, where further proceedings can clarify the legality of the conduct at issue and may render constitutional arguments superfluous, this Court has found "no need to address the constitutional issue" and remanded. *Jean v. Nelson*, 472 U.S. 846, 854–55, 857 (1985). And, when lower courts adjudicate constitutional questions without first answering potentially dispositive statutory questions, this Court remands for analysis of the nonconstitutional issues. *See, e.g., Clay*, 363 U.S. at 209–10, 212.

This Court has recognized, and even embraced, that remands for full exploration of nonconstitutional arguments leave the door open for a case to return under circumstances in which the Court could "discharge [its] responsibilities free of concern that [it] may be unnecessarily reaching out to decide a novel constitutional question." *Aladdin's Castle*, 455 U.S. at 295. For example, in *Smith I*, this Court declined to resolve a constitutional question where a ruling on a preliminary state-law issue had the potential to obviate constitutional adjudication. 485 U.S. at 664–74. *Smith I* asked whether the Free Exercise Clause allowed a state to deny unemployment benefits to someone fired for ingesting peyote during a religious ceremony. *Id.* at 661–62. The Oregon Supreme Court found no First Amendment violation. *Id.* at 664–67. This Court determined that the necessity of answering the question depended on the legality under Oregon state law of ingesting peyote. *Id.* at 669–74. The Court thus remanded to the Oregon Supreme Court for further

consideration, noting that a ruling on the preliminary issue of state law could obviate the First Amendment question. *Id.* at 674.

On remand, the Oregon Supreme Court held that "religiously inspired use of peyote fell within the prohibition of the Oregon statute." *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 876 (1990) ("*Smith II*") (internal citation omitted). Because that determination brought the constitutional issue unavoidably to the fore, this Court granted certiorari a second time, ultimately holding that the Free Exercise Clause permits a state to deny unemployment compensation to someone fired for ingesting peyote during a religious ceremony. *Id.* at 890.

The Court's actions in *Smith I* did not preclude a decision on the constitutional question *at some point*; rather, *Smith I* was an exercise in "sound judicial administration," *Alma Motor Co.*, 329 U.S. at 142, in line with the Court's "duty to avoid constitutional issues that need not be resolved," *Allen*, 442 U.S. at 154. Once constitutional adjudication became unavoidable in *Smith II*, however, the Court properly discharged its "duty to decide constitutional questions when necessary to dispose of the litigation." *Id.*

To be sure, this Court has strayed from constitutional avoidance. In *Zobrest v. Catalina Foothills School District*, the majority held that "the prudential rule of avoiding constitutional questions ha[d] no application," because in both the trial court and the appellate court, "the parties chose to litigate the case on the federal constitutional issues alone." 509 U.S. 1, 7–8 (1993). "The fact that there may be buried in the record a nonconstitutional ground for

decision," the majority held, "is not by itself enough to invoke" constitutional avoidance. *Id.* at 8.

Four Justices dissented in *Zobrest,* condemning the majority for "blithely" shrugging off "longstanding principles of constitutional adjudication" and "unnecessarily address[ing] an important constitutional issue." *Id.* at 14, 16 (Blackmun, J., dissenting). "The obligation to avoid unnecessary adjudication of constitutional questions does not depend upon the parties' litigation strategy, but rather is a 'self-imposed limitation on the exercise of this Court's jurisdiction [that] has an importance to the institution that transcends the significance of particular controversies.'" *Id.* at 16 (quoting *Aladdin's Castle,* 455 U.S. at 294). The dissent explained that the rule of constitutional avoidance serves "to protect not parties but the law and the adjudicatory process." *Id.*

Broadly applied, the approach of the *Zobrest* majority would grant parties and lower courts an alarming ability to hijack the issues presented in a case and push this Court into unnecessary constitutional adjudications simply by confining their focus below to constitutional issues. Perhaps recognizing this danger, cases since *Zobrest* have hewn tightly to the prudential rule of constitutional avoidance. *See, e.g., Greater New Orleans Broad. Ass'n v. United States,* 527 U.S. 173, 184 (1999) (describing the Court's practice of not "reach[ing] out to make novel or unnecessarily broad pronouncements on constitutional issues when a case can be fully resolved on a narrower ground"); *Dep't of Commerce,* 525 U.S. at 343–44.

This Court's recent decisions have reinforced the already sturdy foundation upon which the rule of constitutional avoidance stands. *See, e.g., Bond,* 134 S. Ct. at 2087; *Nw. Austin Mun. Util. Dist. No. One v. Holder,*

557 U.S. 193, 205 (2009); *see also Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot.*, 560 U.S. 702, 744–45 (2010) (Breyer, J., concurring in part and concurring in the judgment); *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 450 (2008). The rationale used by the *Zobrest* majority to stiff-arm the rule of constitutional avoidance has not been repeated—or even cited—by this Court since. *Zobrest* stands as a singular deviation from an otherwise unquestioned "cardinal rule," *Brockett*, 472 U.S. at 501–02, based upon "[t]he best teaching of this Court's experience," *Poe*, 367 U.S. at 503 (quoting *Parker*, 338 U.S. at 333).

B. The Wisconsin Court Of Appeals Failed To Explore Potentially Dispositive Nonconstitutional Arguments, Bringing This Case Squarely Within The Rule Of Constitutional Avoidance.

The Wisconsin Court of Appeals was presented with two issues: first, whether the statute of limitations barred Petitioners' suit; second, if Petitioners' suit was timely, whether they suffered a regulatory taking. Pet'rs' App. A7, ¶12. The Court of Appeals improperly analyzed these questions in reverse, concluding that Petitioners' "takings claim fails on its merits as a matter of law," and "[a]ccordingly, we do not reach the issue of whether their claim was timely filed." *Id.* A7, ¶12.

Presented with two grounds for decision—the first statutory, the second constitutional—the Court of Appeals chose to consider only the constitutional one. This recalls *Clay*, where this Court remanded because the Fifth Circuit "apparently found it easier to decide the constitutional question that would be presented only if the [state] statute did apply," 363 U.S. at 209, and *Smith I*, where this Court remanded because the Oregon courts had skipped over a

key threshold question of state law, 485 U.S. at 674. The rule of constitutional avoidance that dictated the outcome in both of those cases applies with equal force here.

By considering only the takings issue, the Court of Appeals violated the Wisconsin courts' rule of constitutional avoidance.[3] It failed to consider, much less exhaust, nonconstituonal grounds for decision. In doing so, it unnecessarily opined about the "parcel as a whole" concept. Pet'rs' App. A9–13, ¶¶17–22. At a minimum, the Court of Appeals should have fully explored and decided the statute of limitations question before entertaining the constitutional takings question.

Neither the Wisconsin Court of Appeals decision nor Petitioners' framing of the case changes the fact that this Court should not decide the constitutional issue pressed here. Doing so would violate the Court's "deeply rooted" rule of constitutional avoidance. *Spector Motor Serv., Inc. v. McLaughlin*, 323 U.S. 101, 105 (1944). The takings question never arises if Petitioners' suit is barred by the statute of limitations, as the trial court in fact held. Pet'rs' App. B7. "[S]ound judicial administration" thus counsels that Wisconsin courts should apply the state-law statute of limitations before this Court reaches out to make an unnecessary constitutional ruling. *Alma Motor Co.*, 329

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[3] Like this Court, Wisconsin courts follow a rule of constitutional avoidance developed through case law. *See, e.g.*, *Waters ex rel. Skow v. Pertzborn*, 2001 WI 62, ¶ 14, 243 Wis. 2d 703, 627 N.W.2d 497 ("When a case may be resolved on non-constitutional grounds, we need not reach constitutional questions."); *Miesen v. State Dep't of Transp.*, 226 Wis. 2d 298, 309, 594 N.W.2d 821 (Ct. App. 1999) ("[W]e should decide cases on the narrowest possible grounds and should not reach constitutional issues if we can dispose of the appeal on other grounds.").

U.S. at 142. On the other hand, if the Wisconsin courts determine that Petitioners' suit was timely (and that no other state-law ground raised below is dispositive), then constitutional adjudication may become "unavoidable." *Spector Motor Serv.*, 323 U.S. at 105. Only at that point should this Court consider an important issue of Fifth Amendment law in this case.[4]

C. The trial court's unrebutted analysis shows that this case can be disposed of on independent and adequate state-law grounds.

"This Court will not take up a question of federal law presented in a case 'if the decision of [the state] court rests on a state law ground that is *independent* of the federal question and *adequate* to support the judgment.'" *Lee v. Kemna*, 534 U.S. 362, 375 (2002) (quoting *Coleman v. Thompson*, 501 U.S. 722, 729 (1991)) (emphases in original). The independent-and-adequate doctrine "applies whether the state law ground is substantive or procedural." *Coleman*, 501 U.S. at 729. The state-law ground must be independent, meaning "free of entanglement with the federal question," and it must be adequate, meaning

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[4] Even were *Zobrest* a viable exception to the rule of constitutional avoidance—and it is not—the rationale of that case is inapplicable here. Unlike in *Zobrest*, the parties here argued nonconstitutional grounds before both the trial court and the Court of Appeals. *Compare Zobrest*, 509 U.S. at 7–8, *with* Pet'rs' App. A7, B7. Here, the trial court even *ruled* that the statute of limitations foreclosed the petitioners' suit. *Id.* B7. The *Zobrest* Court stated that "[t]he fact that there may be buried in the record a nonconstitutional ground for decision is not by itself enough to invoke" the prudential rule of constitutional avoidance. 509 U.S. at 8. Here, by contrast, the non-constitutional ground is not buried in the record but occupies multiple pages of the trial court's opinion. Pet'rs' App. B6–7.

capable of fully supporting the judgment without reference to federal law. STEPHEN M. SHAPIRO, *ET AL.*, SUPREME COURT PRACTICE 209 (10th ed. 2013). In divining the basis for a judgment below, the Court has looked beyond the opinions on appeal, reviewing trial court opinions, *see Colo. Anti-Discrimination Comm'n v. Cont'l Air Lines, Inc.*, 372 U.S. 714, 718 (1963); *see also Barr v. Matteo*, 355 U.S. 171, 173 (1957), as well as pleadings and other court papers, *see Staub v. City of Baxley*, 355 U.S. 313, 318 (1958); *First Nat'l Bank v. Anderson*, 269 U.S. 341, 346 (1926).[5]

Here, the trial court held that Petitioners' "claim is barred by the applicable six year statute of limitations." Pet'rs' App. B7. That statute, Wisconsin Statutes section 893.93(1)(a) (2013–2014), is an independent state-law ground, free of entanglement with the federal takings question. It is also an adequate ground, capable of fully supporting the judgment below. It remains unclear why, having declared Petitioners' claim untimely, the trial court proceeded to consider the merits.[6] Even less clear is why the Court of Appeals sidestepped the statute of limitations entirely. *See* Pet'rs' App. A7–8, ¶12. Regardless, the statute of limitations issue was decided the only time it was addressed, and that decision was—and is—sufficient to resolve the case on nonconstitutional grounds.

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[5] Analogously, in habeas proceedings where the final state-court opinion is silent on a particular issue, this Court "looks through" that opinion and reviews the "last reasoned state-court opinion" examining the issue. *Ylst v. Nunnemaker*, 501 U.S. 797, 804 & n.3 (1991).

[6] The Court of Appeals recognized the irregularity of the trial court's actions, stating that "[d]espite this conclusion [that the statute of limitations barred the petitioners' claim], the court also reached the merits." Pet'rs' App. A6, ¶10.

As a safeguard, this Court "insist[s] that the nonfederal ground of decision have fair support," *Stop the Beach*, 560 U.S. at 725 (internal quotation marks omitted), so that the independent-and-adequate doctrine does not become "a mere device to prevent a review of the decision upon the Federal question," *Enter. Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917). This prevents reliance on "unfounded" or "essentially arbitrary" state grounds as a means of evading adjudication of the federal question. *Id.* But the safeguard applies here in reverse. Just as an untenable state-law analysis cannot justify this Court declining to review a properly presented federal question, the Wisconsin Court of Appeals' deliberate evasion of the statute of limitations issue cannot provide a basis for moving ahead with adjudication of a contested and important constitutional question that likely need not be reached at all.[7]

In light of the rule of constitutional avoidance and the presence of a potentially independent and adequate state-law ground for decision, this Court should defer decision of the constitutional issue pressed by Petitioners.

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[7] Nor does the presumption of inadequacy introduced in *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983), apply in this case. The Court of Appeals was initially presented with two issues: whether the statute of limitations barred this suit, and whether Petitioners suffered a regulatory taking. Although the Court of Appeals apparently believed federal law mandated the outcome *with respect to the constitutional issue*, it cannot be said that that court thought federal law required it to *choose to take up that issue* prior to deciding a potentially dispositive state-law ground for decision. Thus, there is no basis to presume that the Court of Appeals believed the statute of limitations issue was inadequate to resolve this case.

II. PETITIONERS' CONSTITUTIONAL CLAIM IS NOT RIPE FOR ADJUDICATION.

This Court has repeatedly held that "an essential prerequisite" to a regulatory takings action "is a final and authoritative determination of the type and intensity of development legally permitted on the subject property." *MacDonald, Sommer & Frates v. Yolo Cty.*, 477 U.S. 340, 348 (1986). This is necessarily true because "[a] court cannot determine whether a regulation has gone 'too far' unless it knows how far the regulation goes." *Id.*; *accord, e.g.*, *Williamson Cty.*, 473 U.S. at 186 ("[A] claim that the application of government regulations effects a taking of a property interest is not ripe until the government entity charged with implementing the regulations has reached a final decision regarding the application of the regulations to the property at issue."). This ripeness doctrine remains a cornerstone of takings jurisprudence.[8] Wisconsin state courts have acknowledged and followed the doctrine. *See, e.g.*, *Eberle v. Dane Cty. Bd. of Adjustment*, 227 Wis. 2d 609, 635–39, 595 N.W.2d 730 (1999); *Hoepker v. City of Madison Plan Comm'n*, 209 Wis. 2d 633, 651–53, 563 N.W.2d 145 (1997).

Failing to approve or rejecting a particular development plan is not necessarily a "final decision" reviewable by this Court. *Williamson Cty.*, 473 U.S. at 194. In *Yolo County*, for example, the fact that a developer had "submitted one subdivision proposal and [had] received the Board's response thereto" did not, by itself, mean that a "final

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[8] Earlier this year, in *Arrigoni Enterprises, LLC v. Town of Durham, Connecticut*, 136 S. Ct. 1409 (2016), the Court denied certiorari where the petition expressly invited reconsideration of the ripeness doctrine set forth in *Williamson County* and *Yolo County*.

decision" had been rendered. 477 U.S. at 348–52. Because the developer had not submitted other, less intrusive proposals, there remained a "possibility that some development [would] be permitted." *Id.* at 352. Thus, the ripeness of a takings claim "depends upon the landowner's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property." *Palazzolo v. Rhode Island*, 533 U.S. 606, 620–21 (2001). Only "once it becomes clear" that the authority lacks further discretion to permit development does a takings claim ripen sufficiently for litigation. *Id.* at 620. To determine whether a landowner followed "reasonable and necessary steps" and allowed the land use authority the opportunity to fully exercise its regulatory discretion, the Court examines the record. *See id.* at 618–26; *Williamson Cty.*, 473 U.S. at 188–90.

Here, the record is incontrovertible. Petitioners filed this takings lawsuit before they exhausted all "reasonable and necessary steps" that would "allow regulatory agencies to exercise their full discretion" with respect to efforts to flood-proof Petitioners' cabin and comply with the overlapping zoning regulations applicable to the property. *Palazzolo*, 533 U.S. at 620–21. Leading up to the St. Croix County Board of Adjustment's denial of the variance application to use Lots E and F separately, County zoning officials were in dialogue with Petitioners for more than eighteen months, from late-2004 through June 2006. *See* Br. for Resp't St. Croix Cty. at 13–15; Dep. Tr. of Peggy Murr Heaver at 26:4–15, 34:14–41:21 (Certified R. Docket No. 22, pp. 147, 149–51). Throughout those conversations, County officials repeatedly identified and suggested alternative development plans to Petitioners. *See* Dep. Tr. of

Donna Murr at 66:21–77:11 (Certified R. Docket No. 22, pp. 68–71); Dep. Tr. of Peggy Murr Heaver at 29:4–20 (Certified R. Docket No. 22, p. 148). Petitioners never pursued those alternatives. Indeed, several years after the Board of Adjustment decision at issue here and shortly before filing this lawsuit, Petitioners indicated to County officials that they would be submitting a new development plan for regulatory consideration. *See* Dep. Tr. of Peggy Murr Heaver at 46:11–47:13 (Certified R. Docket No. 22, p. 152). They never did. In deposition testimony, Petitioner Peggy Murr Heaver explained that Petitioners "still want to pursue these [other development options outlined by the County] at some point in time. It's just that we are in the process of the doing the taking." *Id.* at 47:11–13 (Certified R. Docket No. 22, p. 152).

In the absence of the promised 2011 plan—or any other attempt to gain regulatory approval for use of their property—Petitioners' takings claim is not ripe. Respondents briefed this argument thoroughly at the summary judgment stage. *See* St. Croix Cty.'s Br. in Supp. of Its Mot. for Summ. J. at 14–18 (Certified R. Docket No. 16, pp. 14–18); St. Croix Cty.'s Reply Br. in Further Supp. of Its Mot. for Summ. J. at 4–6 (Certified R. Docket No. 23, pp. 4–6); Def. State of Wis.'s Reply Br. in Supp. of Mot. for Summ. J. at 9–10 (Certified R. Docket No. 28, pp. 9–10). The trial court did not address the ripeness issue, having granted summary judgment on the basis that the suit was time-barred. Pet'rs' App. B1–10. Nor did the Court of Appeals address the issue, since it had not been ruled upon below. *Id.* A7, ¶12. But the fact remains that Petitioners' claim is not ripe and that, because Petitioners failed to take further steps to define "how far the regulation[s] go[]" with respect to their property, *Yolo Cty.*, 477 U.S. at 348, there is no basis for deciding whether a

regulatory taking has occurred. The absence of such a basis militates against this Court reaching the merits of Petitioners' claims.

The fact that the ripeness issue was not addressed below does not mean this Court should not base its decision on ripeness. Indeed, in both *Williamson County* and *Yolo County,* ripeness was first addressed by this Court. *Williamson Cty.*, 473 U.S. at 182–85; *Yolo Cty.*, 477 U.S. at 345–48. Furthermore, if this Court has any doubts about the ripeness analysis, the issue should first be considered in the Wisconsin courts. *See, e.g.*, *Ford Motor Co. v. United States,* 134 S. Ct. 510, 510–11 (2013) (per curiam) ("This Court is one of final review, not of first view." (internal quotation marks omitted)).

There is, admittedly, a tension between the statute of limitations argument accepted by the trial court and the ripeness argument. Nonetheless, such a tension is acceptable between arguments presented in the alternative and should be resolved in the first instance by the Wisconsin courts. For this Court to resolve this question—through its own analysis of the applicable Wisconsin statute of limitations or by unfounded assumptions about what the Wisconsin courts would conclude in conducting their own adjudication—would violate fundamental principles of federalism and comity. And to set aside the ripeness doctrine would not only contravene this Court's precedents on ripeness, but also disregard and disrespect the crucial role that local governments play in land use decisions under Wisconsin law.

III. THIS COURT HAS SEVERAL PROCEDURAL OPTIONS THAT DO NOT REQUIRE DECIDING THE CONSTITUTIONAL QUESTION PRESSED BY PETITIONERS.

In this case, the Court can choose among three exits from the freeway of constitutional adjudication. Each option ensures that the Court does not "pass on questions of constitutionality . . . unless such adjudication is unavoidable." *Spector Motor Serv.*, 323 U.S. at 105.

First, the Court can dismiss the writ of certiorari as improvidently granted, either with or without opinion. *E.g.*, *Madigan v. Levin*, 134 S. Ct. 2 (2013); *Nike, Inc. v. Kasky*, 539 U.S. 654, 663 (2003) (Stevens, J., concurring in dismissal of writ of certiorari as improvidently granted) (quoting *Ashwander*, 297 U.S. at 346 (Brandeis, J., concurring)); *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994). Dismissal here would leave the Wisconsin Court of Appeals decision in place. That opinion is unpublished and therefore non-precedential. WIS. STAT. § 809.23(3)(a). Further, because it is a per curiam opinion, it cannot be cited even for persuasive value. *Id.* § 809.23(3)(b). The opinion is, for all intents and purposes, a dead letter with respect to anyone other than the parties. Dismissal would, therefore, not perpetuate the Court of Appeals' constitutional analysis. It would, instead, preserve the constitutional question pressed by Petitioners until a proper vehicle for its resolution comes along.

Second, the Court can remand the case to the Wisconsin courts for adjudication of the statute of limitations question and/or the ripeness issue. *See* 28 U.S.C. § 2106 (2014); 36 C.J.S. FEDERAL COURTS §§ 366, 368. When relying on the rule of constitutional avoidance, this Court often vacates and remands for further

proceedings consistent—or at least "not inconsistent"—with its opinion. In *Smith I*, for example, after determining that a ruling on a preliminary state law issue could moot a federal constitutional question, this Court vacated the judgment and remanded the case to the Oregon Supreme Court for further proceedings. 485 U.S. at 674; *accord, e.g.*, *Three Affiliated Tribes*, 467 U.S. at 159; *Clay*, 363 U.S. at 209–10, 212.

If the Wisconsin Court of Appeals (and, potentially, the Wisconsin Supreme Court after it) were to follow the trial court in deeming Petitioners' suit time-barred, that would render constitutional adjudication unnecessary. Of course, if the Wisconsin courts ultimately decided that neither the statute of limitations nor the ripeness doctrine resolved the case and again issued a constitutional ruling, the case could come back to this Court. *See* 18–19, *supra* (discussing *Smith I* and *Smith II*). At that point, unlike now, the Court could "discharge [its] responsibilities free of concern that [it] may be unnecessarily reaching out to decide a novel constitutional question." *Aladdin's Castle*, 455 U.S. at 295.

Third, the Court can certify the statute of limitations question, the ripeness question, or both to the Wisconsin Supreme Court. The Wisconsin Supreme Court is expressly authorized to "answer questions of law certified to it by the supreme court of the United States." WIS. STAT. § 821.01; *cf., e.g.*, *Clay*, 363 U.S. at 212 (discussing the possibility of certifying a state-law question to the state court in a constitutional avoidance case). The Wisconsin Supreme Court has previously accepted certified questions concerning a statute of limitations. *See Doe v. Am. Nat'l Red Cross*, 176 Wis. 2d 610, 612–13, 500 N.W.2d 264 (1993). If this Court were to certify a question, it would

retain jurisdiction pending an answer. *Fiore v. White*, 528 U.S. 23, 29–30 (1999). Were the Wisconsin Supreme Court to hold Petitioners' suit time-barred or unripe, no constitutional adjudication would be needed. On the other hand, if resolution of the certified question(s) did not end the case, this Court could proceed to decide the constitutional issue.

CONCLUSION

The Court should adhere to prudential doctrines and decline to answer the constitutional question pressed by Petitioners, which does not need to be decided here and is unripe for adjudication. Disposing of the case without deciding the question presented would respect and advance the careful balance Wisconsin has struck between individual property rights, on the one hand, and state and local decision-making, on the other.

Respectfully submitted,

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APPENDIX

PROVISIONS OF COUNTY LAND USE ORDINANCES THAT ADDRESS COMBINING COMMONLY OWNED, CONTIGUOUS, SUBSTANDARD LOTS IN WISCONSIN COUNTIES

County	Relevant Ordinance	Nature of Provision	Affected Lots
Adams	Shoreland, Wetland and Habitat Protection Ordinance 6-2.00	Explicit	Shoreland
	Comprehensive Zoning Ordinance 9-3.03	Implicit	All
Ashland	Shoreland Amendatory Ordinance 9.4–9.5	Implicit	Shoreland
Barron	17.17(b)(6)	Implicit	All
Bayfield	§ 13-1-26(d)	Explicit	Shoreland
Brown	22.15(1)–(2)	Implicit	Shoreland
Calumet	82-108(a)	Explicit	All
Clark	22-334(a)(3), (b)	Implicit	Shoreland
Columbia	16-5-32(a)(3), (b)	Implicit	Shoreland
Dodge	10.5.1	Implicit	Residential & Agricultural
	7.3.10	Explicit	All
Door	9.04(1)	Explicit	All
Douglas	Ch. 8.0 § 4.2.5(b)	Explicit	Shoreland
	Ch. 8.4 § 4.32	Explicit	All
Dunn	13.3.7.04	Implicit	All
Eau Claire	18.19.080(B)	Implicit	Shoreland
Florence	Ch. 10 Subch. 1 2.08(E)	Explicit	All
Fond du Lac	44-203(a)–(b)	Implicit	Shoreland
Grant	§ 3.26(1)	Implicit	All
Green Lake	§ 350-22(A)–(B)	Implicit	All
Iowa	400.07 §§ 4.31–4.32	Implicit	Shoreland
Iron	9.5.6(B)	Explicit	All
Jackson	16.04(1)(d)–(e)	Implicit	Shoreland
	17.82(2)	Implicit	All

County	Relevant Ordinance	Nature of Provision	Affected Lots
Jefferson	11.09(e)	Implicit	All
Juneau	Ch. 905.2.3 §§ 3.31–3.32	Implicit	Shoreland
Kenosha	12.28-6	Explicit	All
Kewaunee	4.31–4.32	Implicit	Shoreland
La Crosse	20.231–20.232	Implicit	Shoreland
Lafayette	6-2-4.31, 6-2-4.32	Implicit	Shoreland
Landglade	17.12(6)(a)	Implicit	All
Manitowoc	9.08(5)(a)	Implicit	Shoreland
	8.07, 8.19	Explicit	All
Menominee	22.040(C)(1)–(2)	Implicit	Shoreland
Oconto	14.408(4)(h)	Explicit	All
Outagamie	§ 44-14	Explicit	Shoreland
	§ 54-44(b)	Explicit	All
Ozaukee	§ 7.0304	Implicit	Shoreland
Pepin	16.04(3)(a)–(b)	Implicit	Shoreland
	19.03(2)	Implicit	Mississippi River Bluff
Pierce	§ 240-68(A)	Explicit	All
	§ 239-11(D)	Implicit	St. Croix Riverway
Polk	St. Croix Riverway Ordinance art. H § 4	Implicit	Lower St. Croix Riverway
Racine	Ch. 20 art. 5 § 20-191(d)	Implicit	All
Richland	Ord. No. 2003-16 § I(G)(2)(a)(5)(b)	Explicit	General Commercial & Single Family Residential Districts
Rusk	§ 50-32(e)(2)	Explicit	All
Sauk	8.05(3)(a)–(b)	Implicit	Shoreland
Sawyer	Zoning Ordinance 4.25(2)	Explicit	All
Shawano	Shoreland Zoning Ord. 4.31–4.32	Implicit	Shoreland

County	Relevant Ordinance	Nature of Provision	Affected Lots
St. Croix	Subch. III.V § 17.36(I)(4)(a)	Implicit	Lower St. Croix Riverway
Taylor	31.04(3)(a)–(b)	Implicit	Shoreland
Trempealeau	Shoreland Zoning Ordinance 4.31–4.32	Implicit	Shoreland
	Comprehensive Zoning Ordinance 8.04(1)	Explicit	All
Vernon	Ch. 50 Art. IV § 50-131(c)(1)–(2)	Implicit	Shoreland
Washburn	§ 38-595(1)	Implicit	Shoreland
	§ 38-541	Explicit	All
Washington	23.09(3)(a)	Implicit	Shoreland
Waukesha	Shoreland and Floodland Protective Ordinance § 3(j)(2)(E)	Implicit	Shoreland
	Basic Zoning Ordinance 3.11(2)(E)	Implicit	All
Waupaca	Ch. 34 § 2.05(4)	Explicit	All
Waushara	§ 58-903(c)	Implicit	Shoreland
	Art. V Div. I § 58-823(c)(1)–(2)	Implicit	All

The following counties are not listed above because they do not include in their ordinances a provision for combining commonly owned, contiguous, substandard lots: Buffalo, Burnett, Chippewa, Crawford, Dane, Forest, Green, Lincoln, Marathon, Marinette, Marquette, Milwaukee, Monroe, Oneida, Portage, Price, Rock, Sheboygan, Vilas, Walworth, Winnebago, and Wood.