Team no. 39

No. 16-0933

In the
UNITED STATES COURT OF APPEALS
FOR THE TWELFTH CIRCUIT

CORDELIA LEAR,
Plaintiff-Appellee-Cross Appellant,

v.

UNITED STATES FISH AND WILDLIFE SERVICE,
Defendant-Appellant-Cross Appellee,
and
BRITTAIN COUNTY, NEW UNION,
Defendant-Appellant

Appeal from the United States District Court
for the District of New Union in No. 112-CV-2015-RNR
Hon. Romulus N. Remus, United States District Judge

BRIEF OF APPELLANT BRITTAIN COUNTY, NEW UNION

Oral Argument Requested

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Jurisdictional Statement

The district court had subject matter jurisdiction over the case that is docketed 112-CV-2015-RNR pursuant to 28 U.S.C. § 1331 (federal question jurisdiction). The district court also had supplemental jurisdiction of the plaintiff-appellee-cross appellant's state law claim pursuant to 28 U.S.C. § 1367. The Court of Appeals has jurisdiction of the appeal of the district court's entry of final judgment, *Lear v. U.S. Fish and Wildlife Service*, no. 112-CV-2015-RNR (D.C.N.U. June 1, 2016), pursuant to 28 U.S.C. § 1291. The final judgment that is being appealed disposed of all issues in this cause and was entered on June 1, 2016. Notices of Appeal were filed by the United States Fish and Wildlife Service ("FWS") and Brittain County, New Union ("Brittain") on June 9, 2016. Notice of Appeal was filed by Cordelia Lear on June 10, 2016. Additionally, "this Court has previously determined it has jurisdiction of the case and that the Federal Circuit does not." R. at 2.

Statement of the Issues

I. Is the ESA a valid exercise of Congress's commerce power, as applied to a wholly intrastate population of an endangered butterfly that would be eliminated by construction of a single-family residence for personal use?

II. Is Lear's takings claim against FWS ripe without having applied for an ITP under ESA § 1539(a)(1)(B)?

III. For a takings analysis, is the relevant parcel the entirety of Lear Island, or merely the Cordelia Lot as subdivided in 1965?

IV. Assuming the relevant parcel is the Cordelia Lot, does the fact that the lot will become developable upon the natural destruction of the butterfly habitat in ten years shield the FWS and Brittain County from a takings claim based upon a complete deprivation of economic value of property?

V. Assuming the relevant parcel is the Cordelia Lot, does the Brittain County Butterfly Society's offer to pay $1,000 per year in rent for wildlife viewing preclude a takings claim for complete loss of economic value?

VI. Assuming the relevant parcel is the Cordelia Lot, do public trust principles inherent in title preclude Lear's claim for a taking based on the denial of a county wetlands permit?

VII. Assuming the relevant parcel is the Cordelia Lot, are FWS and Brittain County liable for a complete deprivation of the economic value of the Cordelia Lot when either the federal or county regulation, by itself, would still allow development of a single-family residence?

Statement of the Case

The following summarizes the district court's "Findings of Fact," R. at 4-7.

I. Facts

Cornelius Lear acquired Lear Island from an 1803 Congressional land grant; the grant gave Cornelius fee simple absolute to "all of Lear Island and to 'all lands under water within a 300-foot radius of the shoreline of said island,' as well as an additional grant of lands under water in the shallow strait separating Lear Island from the mainland. R. at 4-5. The island is two miles long, one mile wide, and approximately 1000 acres. *Id.* at 4. Since 1803, Cornelius Lear and his descendants have occupied the island and used it as "a homestead, farm, and hunting and fishing grounds." *Id.* at 5. Agricultural use of the island ceased in 1965. *Id*.

In 1965, King James Lear "owned the entirety of the 1803 Lear island grant." *Id.* He divided the island into three parcels, one for each of three daughters: Goneril, Regan, and Cordelia. *Id.* The Goneril Lot is 550 acres, the Regan Lot is 440 acres, and the Cordelia Lot is 10 acres. *Id.* James reserved a life estate in each lot for himself, and deeded them to his daughters. *Id.* He died in 2005. *Id*.

In 1992, the FWS designated the Heath—a "nine-acre open field and access strip" on the Cordelia Lot kept open by annual mowing—as a critical habitat for the endangered Karner Blue Butterfly. In New Union, the only remaining subpopulation of the Karner Blue Butterfly ("New

Union Butterfly Population" or "NUBP") lives on the Heath. *Id*. at 5-6. Without annual mowing, tree growth would destroy the butterfly's habitat, causing the extinction of the subpopulation within ten years. *Id*. at 5-7.

In 2012, Cordelia Lear ("Lear") began to consider building a residence on her lot. *Id*. at 6. She contacted FWS and was told that any disturbance of the butterfly's habitat, other than annual mowing, would constitute a take of the butterfly. *Id*. For land development purposes, she could obtain an Incidental Take Permit ("ITP"), which would require a Habitat Conservation Plan ("HCP"). *Id*. The HCP would require her to create and maintain a new habitat for the NUBP. An environmental consultant estimated that preparing the ITP would cost $150,000. *Id*. Lear received a letter confirming what she had previously been told by FWS and referring her to a handbook "for information on how to develop an acceptable HCP." *Id*. Instead of pursuing the ITP, she developed an alternative development proposal ("ADP"), wherein she proposed to fill one-half acre of marsh land to create a new butterfly-free building site. *Id*. at 7. The ADP required a fill permit pursuant to Brittain County Wetlands Preservation Law of 1982 ("BCWPL"). *Id*. Her permit application was denied on the grounds that a permit to fill wetlands would only be approved for a water-dependent use. *Id*.

The fair market value of the Cordelia Lot without any restriction preventing the construction of a single-family home is $100,000, and property taxes on the lot are $1,500 annually. *Id*. There is no market in Brittain County for the Cordelia Lot for recreational use without the right to develop a residence on the property, and the property does not have any market in its current state as agricultural land. *Id*. Cordelia has rejected a $1,000/year offer by the Brittain County Butterfly Society ("BCBS") for privilege of hosting butterfly viewings during the summer. *Id.*

II. Procedural History

In February 2014, Lear filed suit against FWS and Brittain County, seeking a declaration that the ESA is an unconstitutional exercise of Congress's commerce power as applied to her property and seeking just compensation from FWS and Brittain County for a regulatory taking of her property. *Id*. at 4. After a seven-day bench trial, the court found that the ESA as applied to Lear was not unconstitutional, but that Lear was entitled to just compensation for a taking of her property. *Id.* The court awarded Lear $10,000 in damages against FWS and $90,000 in damages against Brittain County. *Id.* FWS and Brittain County appealed, and Lear filed a cross-appeal. *Id.* at 1. The Court of Appeals requested briefing on all issues listed above. *Id*; *supra* 1-2.

Summary of the Argument

I: This Court should find the Endangered Species Act unconstitutional as applied to a wholly intrastate population of an interstate species because it is not within Congress's commerce power. As applied to the Karner Blue Butterfly, the ESA does not have a substantial effect on interstate commerce.

II: This Court should dismiss Lear's takings claim against FWS as unripe. *Williamson County* held that a takings claim ripens only when the relevant government entity reaches "a final decision regarding the application of the regulations to the property at issue." *Williamson County Regl. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). FWS—the relevant entity—never reached a final decision because Lear never gave them the opportunity: she declined to apply for an ITP. Applying for an ITP would have been neither futile nor overly burdensome: therefore, Lear's takings claim has not ripened.

III: Even if this Court finds that Lear's Takings Claim has ripened, it should construe the property in question as the entirety of Lear Island, not just the Cordelia plot. "Conceptual

severance"—treating a portion of a combined property as the relevant property for a takings analysis—is disfavored. Moreover, Cordelia herself had no "investment-backed expectations" for developing her plot: it was a devise from her father rather than an investment. Because the relevant parcel is the entirety of Lear Island, Lear has not established that her property was deprived of all economic value.

IV: Even if this Court finds that the relevant property is the Cordelia Lot, it should find that the property has not been completely deprived of value because the regulations that currently restrict its development are temporary, not permanent. If Cordelia Lot is not mowed annually, the Karner Butterfly will go extinct in ten years, voiding the FWS restriction that allegedly contributes to a taking of Lear's property. A temporary taking does not deprive a property of the entirety of its economic value.

V: Even if this Court finds that the property has been permanently taken, this Court should find that it still retains some economic value and thus has not been completely deprived of economic value. Lear is free to realize an economic benefit from the property by developing it within the regulatory restrictions or selling.

VI: Even if this Court finds that the property has been completely deprived of economic value, public trust principles preclude a takings claim against Brittain County based on the denial of a county wetlands permit. Lear never had the right to fill the cove marsh, so the denial of a permit to fill the cove marsh does not constitute a taking.

VII: Lear asks this Court to decide the "apparently novel" question whether federal and local regulations combine to deprive Cordelia Lear's property of the entirety of its economic value. This Court should decline the invitation. The "last resort rule" requires that a court decide a case on non-constitutional grounds rather than reach a difficult constitutional question. But regardless,

this Court should reject the district court's contention that FWS and Brittain County are similar to concurrent tortfeasors, who are generally held joint and severally liable when the harm they jointly cause is indivisible. Unlike joint tortfeasors, neither Brittain County nor FWS has acted negligently in passing its regulations. And the alleged harm to Lear's property is not indivisible.

Argument

I. THE ENDANGERED SPECIES ACT IS UNCONSTITUTIONAL AS APPLIED TO A WHOLLY INTRASTATE POPULATION OF AN INTERSTATE SPECIES THAT WOULD BE ELIMINATED BY THE CONSTRUCTION OF A SINGLE-FAMILY RESIDENCE FOR PERSONAL USE BECAUSE IT IS NOT A VALID EXERCISE OF CONGRESS'S COMMERCE POWER.

The Endangered Species Act ("ESA") is unconstitutional as applied to the New Union population of the Karner Blue Butterfly. Section 9 of the ESA prohibits the "take" of any endangered species. 16 U.S.C. § 1538(a)(1)(C). Congress passed the ESA under the power it derives from the Commerce Clause. U.S. Const. art. 1, § 8, cl. 3. However, Congress may only pass laws under the commerce power if they regulate economic activity or have a substantial effect on interstate commerce. *See e.g. United States v. Lopez*, 514 U.S. 549 (1995). By prohibiting the "take" of an intrastate population of an interstate species that would be eliminated by the construction of a single-family residence for personal use, the ESA aims to regulate noneconomic activity. Under the Supreme Court's rulings in *Morrison* and *Lopez*, it is clear that the prohibition against the take of the intrastate population of the Karner Blue Butterfly regulates noneconomic activity. Accordingly, this Court should hold that the prohibition imposed by the ESA on Lear's lot is unconstitutional, as it exceeds Congress's commerce power.

A. The Commerce Clause only allows Congress to regulate economic activity or activities that have a substantial effect on interstate commerce.

The Commerce Clause empowers Congress to regulate three "categories of activity: (1) channels of interstate commerce, (2) instrumentalities of interstate commerce, and (3) activities that have a substantial effect on interstate commerce." *San Luis & Delta-Mendota Water Auth. v. Salazar*, 638 F.3d 1163, 1174 (9th Cir. 2011); *see e.g. Lopez*, 514 U.S. at 558-59. Congress's power to regulate interstate commerce does not extend to "effects upon interstate commerce so indirect and remote that to embrace them . . . would eventually obliterate the distinction between what is national and what is local and create a completely centralized government." *Lopez*, 514 U.S. at 556-557 (*citing NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 37 (1937)).

B. Congress cannot regulate a take of ordinary wild animals on private land.

Congress cannot use the commerce power to regulate a take of ordinary wild animals on private land, as the commerce power is limited to the three categories identified in *Lopez*.

i. *Animals are not involved in the channels of interstate commerce.*

Congress's power to regulate the channels of interstate commerce includes the power to regulate highways, airways, and waterways. Diane McGimsey, *The Commerce Clause and Federalism After Lopez and Morrison: The Case for Closing the Jurisdictional Element Loophole*, 90 Cal. L. Rev. 1675, 1696 (2002). The Karner Blue Butterfly is not a channel of interstate commerce.

ii. *Animals are not instrumentalities of interstate commerce.*

Congress's power to regulate the instrumentalities of interstate commerce includes the power to regulate "things used in carrying out commerce, such as motor vehicles, roadways, railways, trains, and planes," as well as forms of communication. *Id*. at 1692. Because the Karner Blue Butterfly is not a thing used to carry out commerce, analyzing the ESA under this *Lopez* prong is also unnecessary. *See Nat'l Ass'n of Home Builders v. Babbitt*, 130 F.3d 1041, 1046 (D.C. Cir. 1997) (With regards to a wholly intrastate population of a rare fly, "it is clear that, in

this instance, section 9(a)(1) of the ESA is not a regulation of the instrumentalities of interstate commerce or of persons or things in interstate commerce").

iii. *Animals do not have a substantial effect on interstate commerce.*

Congress's power to regulate activities having a "substantial effect" on interstate commerce may relate to the Karner Blue Butterfly. Every post-*Lopez* case upholding the constitutionality of the ESA has done so primarily under this third *Lopez* category. This category is, "by all accounts, the category most applicable here." *San Luis*, 638 F.3d at 1174 (holding that the third *Lopez* category is the most relevant with regards to a wholly intrastate fish species).

The Supreme Court has long held that a local activity may be regulated under the commerce power "if it exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn*, 317 U.S. 111, 126 (1942). In *Morrison* and *Lopez*, the Supreme Court recognized "four factors to consider when evaluating whether a law has a substantial effect on interstate commerce: [1] whether the statute regulates commercial activity, [2] "whether the statute contains an express jurisdictional element," [3] "whether the legislative history contains express congressional findings regarding the effects upon interstate commerce," and [4] "whether the link between the regulated activity and the effect on interstate commerce is too attenuated." *San Luis*, 638 F.3d at 1174 (*citing United States v. Morrison*, 529 U.S. 598, 610 (2000)). Each factor is considered in turn.

a. The take of the Karner Blue is not a commercial activity.

The relevant regulated activity is the take of the Karner Blue, not the construction of a single-family residence for personal use. *See generally Home Builders*, 130 F.3d 1041 (three judges, each applying the same framework, all found that the regulated activity was the take of the endangered species). Like the possession of a gun in a school zone, the take of an endangered species is not a commercial activity. *See Lopez*, 514 U.S. at 560 ("Even *Wickard*, which is

perhaps the most far reaching example of Commerce Clause authority over intrastate activity, involved economic activity in a way that possession of a gun in a school zone does not").

b. The takings clause of the ESA lacks an express jurisdictional element.

An express jurisdictional element generally requires that the good subject to the regulation be "in or affecting interstate commerce." McGimsey, *supra*, at 1679; *see Lopez*, 514 U.S. at 561-562. The ESA itself does place a prohibition on the sale or transport of an endangered species in interstate commerce. *See* 16 U.S.C. § 1538(a)(1)(A), (C)-(G). But this jurisdictional element is separate from the takings provision of 16 U.S.C. § 1538(a)(1)(C). The takings provision itself does not mention interstate commerce. *See* 16 U.S.C. § 1538(a)(1)(B). Because the NUBP is wholly intrastate and is stationary, the relevant clause of the ESA is the "takings clause," which lacks an express jurisdictional element.

c. The legislative history does not contain express congressional findings regarding the effects of a take on interstate commerce.

The take prohibition has no congressional findings regarding the effects of a take of a noncommercial species upon interstate commerce. *See* 16 USCS § 1531. Nor does the FWS's final rule classify the Karner Blue as an endangered species. *See Endangered and Threatened Wildlife and Plants; Determination of Endangered Status for the Karner Blue Butterfly*, 57 Fed. Reg. 59, 236 (Dec. 14, 1992).

d. The link between the take of the Karner Blue and the effect on interstate commerce is attenuated.

Lear's take of the Karner Blue is too attenuated to interstate commerce to constitute a legitimate exercise of Congress's commerce power. As it presently stands, Lear has three choices: (1) do nothing, (2) wait ten years before developing her lot, or (3) develop her lot now,

taking the Karner Blue in the process. Unless she commits to a long-term ADP, Congress is powerless to prevent her from waiting ten years before developing the lot. If Congress cannot exercise its commerce power to prevent Lear from developing her lot in ten years, it cannot do so now. In fact, there is no plausible but-for causal chain that is not too attenuated to fall within the commerce power.

C. No post-*Lopez* circuit court case has applied the proper Commerce Clause analysis while finding the ESA constitutional.

Since *Lopez*, six circuit courts have upheld the constitutionality of the ESA. However, all of the cases either misconstrue *Lopez* or rely on circumstances inapplicable to the NUBP.

i. *The framework applied in Home Builders would result in a finding that the ESA is unconstitutional as applied to the NUBP.*

In *Home Builders*, a 2-1 panel of the D.C. Circuit upheld the constitutionality of the ESA. *Home Builders*, 130 F.3d at 1057. In upholding the ESA, the lead opinion held that the extinction of any species "has a substantial effect on interstate commerce by diminishing a natural resource that could otherwise be used for present and future commercial purposes." *Id*. at 1053. However, the dissent noted that the majority's holding would authorize commerce power regulation over "any action that might conceivably affect the number or continued existence of any item whatsoever." *Id*. at 1065 (Sentelle, J., dissenting). And Judge Henderson limited her concurrence to finding the ESA valid when applied to prevent a species' extinction, as extinction could "substantially affect land and objects that are involved in interstate commerce." *Id*. at 1059 (Henderson, J., concurring). The concurrence is silent as to the validity of the ESA as applied to a take of an endangered species that would not cause the species' extinction. In other words, the majority of the *Home Builders* court would not find the ESA valid as applied to the NUBP because Lear's proposed development would not cause the Karner Blue Butterfly to go extinct.

ii. *The Gibbs court applied a fact-specific Lopez analysis that does not apply in the present case.*

In *Gibbs*, the Fourth Circuit held that the ESA was constitutional as applied to an interstate population of the Red Wolf. *Gibbs v. Babbitt*, 214 F.3d 483 (4th Cir. 2000). The court found that because a thriving Red Wolf population would increase tourism, the regulated activity (the take of the Red Wolf) had a direct effect on interstate commerce. *Id*. at 494 (recovery of the Red Wolf population would have the economic impact of increasing interstate tourism-related activities in Tennessee and North Carolina by between $170 million and $540 million). *Gibbs* relied primarily on the fourth *Lopez* factor, which is irrelevant to the NUBP. The NUBP has an infinitesimal effect on interstate commerce. *See* R. at 7 (the BCBS was willing to pay only 1,000/year to host butterfly viewings). Therefore, *Gibbs* is inapposite.

iii. *GDF Realty relied on an analysis rejected by Lopez.*

In *GDF Realty*, the court relied on "the but-for-causal chain approach twice rejected in *Lopez* and *Morrison*." *GDF Realty Invs., Ltd. v. Norton*, 362 F.3d 286, 291 (5th Cir. 2004) (denial of rehearing en banc) (Jones, J., dissenting from the denial of rehearing). Accordingly, this Court should not find *GDF Realty* persuasive.

iv. *Rancho Viejo erroneously held that the regulated activity was not a taking.*

In *Rancho Viejo*, the D.C. Circuit found that the regulated activity was not the take itself. *Rancho Viejo, LLC v. Norton*, 323 F.3d 1062, 1072 (D.C. Cir. 2003) ("regulated activity is Rancho Viejo's planned commercial development, not the [take of] the arroyo toad that it threatens"). This holding is contrary to the weight of authority, as no other circuit court analyzing a post-*Lopez* ESA challenge has found that the regulated activity was something other than the take itself.

v. *Alabama-Tombigbee erroneously applied the Raich framework.*

In *Alabama-Tombigbee*, the court relied heavily on the "regulatory scheme" framework from *Gonzalez v. Raich* in upholding the constitutionality of the ESA. *Alabama-Tombigbee Rivers Coal. v. Kempthorne*, 477 F.3d 1250, 1277 (11th Cir. 2007); *see Gonzalez v. Raich*, 545 U.S. 1 (2005) (holding that the commerce power extends to purely intrastate economic activity that affects interstate commerce). However, the *Raich* framework applies only to activities that are "quintessentially economic." *Raich*, 545 U.S. at 25 (defining 'economics' as referring "to the production, distribution, or consumption of commodities"). The *Raich* framework applies only when a court is analyzing whether wholly local, intrastate economic activity can be regulated under the interstate commerce clause. *Id*. The *Raich* framework cannot be applied to the ESA because the ESA is not quintessentially economic.

vi. *The San Luis court did not analyze the ESA under the Lopez framework.*

In *San Luis*, the court accurately summarized the "substantial effects" test from *Lopez* and *Morrison* but then ignored it, instead following the precedent of pre-*Lopez* ESA challenges and post-*Lopez* challenges to an entirely different law (the Eagle Protection Act). *San Luis*, 638 F.3d at 1174-75. Because *San Luis* does not follow *Lopez*, it should be disregarded.

II. LEAR'S TAKINGS CLAIM AGAINST FWS WAS UNRIPE BECAUSE FWS NEVER REACHED A FINAL DECISION AND APPLYING FOR AN ITP WOULD HAVE BEEN NEITEHR FUTILE NOR OVERLY BURDENSOME

Lear's takings claim against FWS is unripe because FWS never reached a "final decision regarding the application of the regulations to the property at issue." *Williamson County Regl. Plan. Commn. v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186 (1985). This finality requirement "responds to the high degree of discretion characteristically possessed by land-use boards in softening the strictures of the general regulations they administer." *Suitum v. Tahoe*

Regional Planning Agency, 529 U.S. 725, 738 (1997). By failing to apply for a variance—specifically, an ITP—Lear denied FWS the chance to exercise its discretion and failed to meet *Williamson County*'s final decision requirement. Moreover, Lear's application for an ITP would have been neither futile nor overly burdensome.[1]

A. The FWS did not reach a final decision regarding the application of the ESA to Lear Island.

A regulatory takings claim 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." *Williamson County Regl. Plan. Commn.*, 473 U.S. at 186 (1985). The FWS has not done that here. Lear met with an FWS agent who advised her that she would have to obtain an Incidental Take Permit (ITP) in order to develop her property, and advised her of various requirements the ITP would have to meet in order to be successful. R. at 6. This advice was duplicated in a May 2012 letter to Lear. *Id*. Neither the conversation nor the letter constitutes a "final decision" by the FWS. *See U.S. Army Corps of Engineers v. Hawkes Co., Inc.*, 136 S. Ct. 1807, 1813 (2016) (confirming that to be final, an agency action must "mark the consummation of the agency's decisionmaking process [and] must be one by which rights or obligations have been determined, or from which legal consequences will flow").

[1] The issue certified for appeal is whether "Lear's takings claim *against FWS* [is] ripe without having applied for an ITP under ESA § 10 . . ." R. at 2 (emphasis added). This brief does not address whether Lear's "takings claim against Brittain County is similarly ripe," an issue that "no party addressed before [the district court]." *Id.* at 9 n. 5. However, if this Court finds the takings claim against FWS unripe, then it must also dismiss the takings claim against Brittain County, which is predicated on the takings claim against FWS. *See id.* at 11.

The finality requirement is essential for determining the "reach of a challenged regulation." *Palazzolo v. Rhode Island*, 533 U.S. 606, 621 (2001). In *Palazzolo*, the Court noted that:

> a landowner may not establish a taking before a land-use authority has the opportunity, using its own reasonable procedures, to decide and explain the reach of a challenged regulation. Under our ripeness rules a takings claim based on a law or regulation which is alleged to go too far in burdening property depends upon Lear's first having followed reasonable and necessary steps to allow regulatory agencies to exercise their full discretion in considering development plans for the property, including the opportunity to grant any variances or waivers allowed by law. As a general rule, until these ordinary processes have been followed the extent of the restriction on property is not known and a regulatory taking has not yet been established.

Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regl. Plan. Agency, 535 U.S. 302, 339–40 (2002) (quoting *Palazzolo*, 533 U.S. at 620-21). Lear made no effort to follow the "reasonable and necessary steps" to allow FWS to exercise its full discretion, and she did not apply for any "variances or waivers allowed by law." Therefore, the extent of the restriction on Lear Island is "not known," and a regulatory taking has "not yet been established."

B. Applying for an ITP would not have been futile.

The Supreme Court has recognized an exception to *Williamson County*'s finality requirement when further applications for a variance would be futile. *Palazzolo*, 533 U.S. at 625–26 (2001) ("Where . . . [agency's] denial of the application makes clear the extent of development permitted . . . federal ripeness rules do not require the submission of further and futile applications with other agencies"). Lear's application for an ITP was not futile, so the exception does not apply.

i. *The futility exception applies only after plaintiff has been denied one or more variances.*

The purpose of the futility exception is not to excuse landowners like Lear from following the appropriate and reasonable administrative procedures for applying for a variance before filing a takings claim in federal court. Instead, it "serves to protect property owners from being required to submit multiple applications when the manner in which the first application was rejected makes it clear that no project will be approved." *Heck v. U.S.*, 134 F.3d 1468, 1472 (Fed. Cir. 1998). FWS never rejected Lear's application for an ITP because she never made one. Nor did FWS make clear through its informal advice to Lear that no project would be approved.[2] On the contrary, it explained exactly what Lear needed to include in her ITP application *in order for it to be approved.* R. at 6.

Some circuits have held that the futility exception cannot apply (and the corresponding takings claim cannot ripen) unless the property owner has submitted at least one "meaningful application" for a variance. *Bannum, Inc. v. City of Louisville, Ky.*, 958 F.2d 1354, 1363 (6th Cir. 1992) ("For the exception to be available to an aggrieved landowner, the landowner must have submitted at least one "meaningful application" for a variance from the challenged zoning regulations"). Lear never applied for an ITP, and FWS never indicated that an application would be futile.

ii. *FWS was not given the opportunity to exercise its discretion over whether to grant an ITP.*

By denying FWS the opportunity to exercise its discretion over whether to grant an ITP, Lear prevented her takings claim from ripening. But the agency's discretion is relevant also to

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[2] Even if the agency *had* made this clear through informal channels, the futility exception would not apply because a takings claim ripens only when a final agency decision makes clear the extent of the development permitted.

the cost of the ITP, which Lear alleged rendered her application futile. R. at 9 ("this Court finds that application for a permit would be futile where it is undisputed that the cost of applying for a permit exceeds the fair market value of the property in question"). The court's holding here ignores *Morris*:

> [T]he agency has discretion to assist the Morrises with the application. Because we have no idea and no way to predict what influence the wielding of that discretion will have on the cost of the application to the Morrises, this case cannot be ripe . . . and we thus cannot reach the Morrises' novel theory that a compensable taking can arise from the cost of complying with a valid regulatory process where the government has never actually restricted the use of the property in question.

Morris v. United States, 392 F.3d 1372, 1377 (Fed. Cir. 2004).

Lear's position is almost exactly the same.[3] Her only evidence of the ITP's cost is the consultant's $150,000 estimate. R. at 6. But taking that estimate as "undisputed" ignores the role that FWS's discretion plays in the ITP application process. Lear's failure to apply for an ITP robbed FWS of the chance to exercise that discretion and establish a more complete record on which this Court could evaluate Lear's takings claim.

iii. *An application for a variance that is difficult or unlikely to succeed is not necessarily futile.*

Arguing (as the district court does) that an application is futile because it imposes "conditions that it would be impossible for Plaintiff to satisfy," R. at 9, fundamentally misconceives the nature of the futility exception: "a difficult position does not necessarily equal a futile position." *Heck v. U.S.*, 37 Fed. Cl. 245, 252 (Fed. Cl. 1997), *aff'd sub nom. Howard W.*

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[3] The agency in *Morris* was the National Marine Fisheries Service, not FWS. However, there is no reason to doubt that the two agencies enjoy similar discretion over ITP applications, including helping to prepare them.

Heck and Associates, Inc. v. U.S., 134 F.3d 1468 (Fed. Cir. 1998). The futility exception is meant to apply only to instances in which the agency has made it clear that it does not intend to grant an application. *See Morris v. U.S.*, 392 F.3d 1372, 1376–78 (Fed. Cir. 2004) ("A plaintiff cannot plead futility whenever faced with long odds or demanding procedural requirements . . . '[t]he mere fact that an adverse decision may have been likely does not excuse a party from a statutory or regulatory requirement that it exhaust administrative remedies.'"). Lear finds herself in the "difficult" position of dealing with an uncooperative neighbor and facing a potentially expensive application process. R. at 6. She is not in the "futile" position of being required to apply for additional variances that FWS does not intend to grant.

C. Applying for an ITP would not have been "so burdensome as to effectively deprive plaintiffs of their property rights"

The district court erred in suggesting that Lear's claim was ripe because applying for an ITP would have been "so burdensome as to effectively deprive plaintiffs of their property rights." R. at 9 (*quoting Hage v. United States*, 35 Fed. Cl. 147, 164 (1996)) (internal quotation marks omitted). Neither this Court nor the Supreme Court has recognized "burdensomeness" as an independent exception to the finality requirement. *Hage*, which the district court relies on, is not binding. But even if this Court follows *Hage*, it should not find that the ITP application was so burdensome as to deny Lear her property rights.

The district court misstates the burdensomeness test applied in *Hage*: in order for a claim to ripen without the plaintiff applying for a permit, the procedure must be "unreasonable" as well as overly burdensome. *Robbins v. U.S.*, 40 Fed. Cl. 381, 388 (1998), aff'd, 178 F.3d 1310 (Fed. Cir. 1998) ("this quotation [from *Hage*] omits another factor involved in showing futility"). Lear does not allege that the procedure for applying for an ITP is "unreasonable"; only that in this particular instance it would have—for reasons wholly outside of FWS's control or

responsibility—been difficult for Lear to meet the conditions the agency indicated were necessary for a successful application. R. at 6 ("Goneril Lear has refused to consider cooperating in any HCP that involves restrictions on her property"). Because Lear does not allege that the ITP application procedure is unreasonable (nor is there any evidence to that effect), the *Hage* standard is not satisfied. It is also far from clear that applying for an ITP would have been "overly burdensome."[4] The only evidence in the Record for the burden on Lear is the consultant's estimate that preparing the application would cost $150,000. R. at 6. But the court in *Morris* rejected relying on such a definite estimate of the cost of an ITP, and also emphasized the discretion and involvement of FWS in the ITP application process. *Morris v. U.S.*, 392 F.3d at 1376–78 (explaining that NMFS is heavily involved in the ITP application process and that the ITP Handbook recommends that applicants request assistance from NMFS). There is no evidence that Lear even looked at the presumably similar FWS Handbook.

Had Lear actually followed the proper agency procedure, she may well have discovered that the cost of the ITP would have been significantly less than $150,000. But because she never applied for the ITP, this Court can not know for sure. As the *Morris* court rightly emphasizes, this is exactly why takings claims are normally said to ripen only after the proper agency procedures have been followed and the agency has reached a final decision on the extent of the regulation; "to allow a claim to ripen on the assertion that the exercise of an agency's discretion

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[4] The district court itself seemed to recognize that the burdensomeness of the ITP application was not established: "Pursuit of a permit is also unnecessary *if* a Plaintiff can establish that [the procedure is overly burdensome]." R. at 9 (emphasis added). The court never explicitly held that the antecedent was met.

would have a certain result, without permitting the agency to exercise that discretion would offend the requirement from *Abbott Laboratories v. Gardner,* 387 U.S. 136, 149, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967), that the issue be fit for review." *Morris*, 392 F.3d at 1377.

III. THE RELEVANT PARCEL FOR ANALYZING LEAR'S TAKINGS CLAIM IS THE ENTIRETY OF LEAR ISLAND, NOT MERELY THE CORDELIA LOT

A. Conceptual severance is not favored in Takings Clause jurisprudence.

Lear asks this Court to "conceptually sever" her lot from the rest of Lear Island. Conceptual severance "appl[ies] a takings analysis to just one portion of a combined property." R. at 9. The balance of takings clause jurisprudence disfavors conceptual severance. Instead of severing the Cordelia plot, this Court should treat the entirety of Lear Island as the relevant parcel for analyzing Lear's takings claim. In *Penn Central*, the Supreme Court emphasized that "in deciding whether a particular governmental action has effected a taking, this Court focuses . . . on the nature and extent of the interference with rights in the *parcel as a whole*." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 130–31 (1978). Later cases echoed this skepticism. *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (following *Penn Central* in disapproving of conceptual severance). This Court should follow the Supreme Court and decline to sever the Cordelia Lot from Lear Island.

B. Investment backed expectations don't exist for property acquired through devise.

An important factor in analyzing takings claims is the "investment-backed expectations" of the property owner. Some cases have cast doubt on the idea that property acquired through gift, descent, or devise can give rise to investment-backed expectations. *See Hodel v. Irving*, 481 U.S. 704, 715 (1987) ("the extent to which any of the appellees' decedents had 'investment backed expectations' . . . is dubious . . . the property . . . is overwhelmingly acquired by gift,

descent, or devise"); *Klauser on Behalf of Whitehorse v. Babbitt*, 918 F. Supp. 274, 280 (W.D. Wis. 1996) ("In *Hodel* . . . few owners could have any legitimate investment backed expectations in their property interests because most of these owners had acquired the property by gift, descent or devise rather than by purchase for investment."). Lear inherited her the Cordelia Lot from a devise from her father. R. at 5. Therefore, the status of her investment-backed expectations is dubious. Instead, this Court should analyze the investment-backed expectations of the original acquirers of Lear Island. R. at 9.

C. Separate parcels need not be conceptually severed in takings claims analyses.

The district court erroneously suggests that when "ownership of the relevant lots has been transferred to different parties," conceptual severance is appropriate. R. at 10. *Loveladies* (which the court pincites with no parenthetical) does not support that proposition, and treating separate parcels as one unit for the purposes of takings claim analyses is not unprecedented. *See County Bd. of Equalization v. Stitching Mayflower Rec. Fonds*, 6 P.3d 559, 563 (Utah 2000) (treating three separate non-contiguous parcels owned by one landowner as a single unit for tax purposes). The Supreme Court's skepticism towards conceptual severance and Lear's acquisition of the Cordelia Lot through devise rather than purchase count in favor of this Court treating the entirety of Lear Island as the relevant property for Lear's takings clause claim.

IV. THE FACT THAT THE CORDELIA LOT WILL BECOME DEVELOPABLE UPON THE NATURAL DESTRUCTION OF THE BUTTERFLY HABITAT IN TEN YEARS PRECLUDES LEAR'S TAKINGS CLAIM.

The Supreme Court has held that "compensation is required when a regulation deprives an owner of all economically beneficial use of his land." *Tahoe-Sierra Pres. Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 330 (2002) (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). In its jurisprudence, the Court has "eschewed any set

formula for determining how far is too far, preferring to engage in essentially *ad hoc*, factual inquiries." *Id*. at 1015 (internal citations omitted). However, when regulatory takings are involved, this Court grants "categorical treatment" and does not conduct a factual inquiry "where regulation denies all economically beneficial or productive use of land." *Id*. at 1015. Ironically, because the question of whether the Cordelia Lot has been completely deprived of economically beneficial value is at the center of the present case, this Court cannot grant categorical treatment and must instead conduct a fact-specific inquiry.

A. The restrictions on the Cordelia Lot are temporary.

The dictionary defines "temporary" as "lasting for a time only; existing or continuing for a limited time; impermanent." *Greer v. Sysco Food Servs.*, 475 S.W.2d 655, 666-67 (Mo. 2015). By definition, something that is impermanent is temporary.

i. *The restrictions on Lear's lot are will expire in ten years.*

Any restriction that FWS places on Lear's land is not permanent, as it will expire upon the extinction of the NUKP in ten years. R. at 5-7. After ten years, Lear will be free to develop her land as she pleases. Because the Cordelia Lot's full economic value will be realized in ten years upon the natural destruction of the NUKB, FWS's restriction on land development has not completely deprived the property of its economic value.

ii. *To the extent that the restrictions on Lear's lot may be adjudicated permanent, it is Lear's actions that will make them permanent.*

The record leaves available three avenues by which the Cordelia Lot may incur a permanent taking: Lear may (1) continue to annually mow the Heath despite knowing that refraining from doing so will obviate FWS's development restrictions after ten years, (2) develop the land pursuant to a valid HCP that will require her to maintain the Karner Blue habitat *ad infinitum*, or (3) pursue a frivolous ITP that costs more than the land is worth. Should Lear

decide to undertake one of the above courses of action, it is her actions, and not those of the FWS or the county, that will have constituted a permanent taking. *See Biggs v. Sandwich*, 124 N.H. 421, 428 (1984) (plaintiffs' knowledge of a town ordinance which barred their right to obtain a permit to fill wetlands and decision to build without a permit in the face of that risk rendered any hardship they suffered self-imposed). If Lear is permitted to self-impose the taking, she will functionally set up a lawsuit against the county, which the county will be powerless to prevent. Public policy disfavors allowing plaintiffs to "set up a lawsuit" by consenting to actions that would otherwise give rise to a cause of action. *See generally Lee v. Paulson*, 273 Ore. 103 (Or. 1975) (consenting to the reading of a defamatory statement creates a privilege to defamation, preventing a plaintiff from "setting up a lawsuit").

B. The Supreme Court requires a fact-specific inquiry when determining whether a temporary restriction amounts to a taking.

The Supreme Court recognizes a distinction between permanent and temporary invasions. *Loretto v. Teleprompter Manhattan Catv Corp.*, 458 U.S. 419, 428 (1982) (noting that the Court has found only *permanent* occupations of real property to constitute takings). In 2002, the Court considered whether "it is enough that a regulation imposes a temporary deprivation—no matter how brief—of all economically viable use to trigger a *per se rule* that a taking has occurred." *Tahoe-Sierra* 535 U.S. at 320 (emphasis added). The answer was "neither 'yes, always' nor 'no, never'; the answer depends on the particular circumstances of the case." *Id*. at 321. Instead, the Court held that "concepts of fairness and justice that underlie the Takings Clause" would be best served by following *Penn Central*, which requires "careful examination and weighing of all the relevant circumstances." *Id*. at 334-335.

C. A fact-specific inquiry shows that a taking has not occurred.

In 2001, the Supreme Court articulated a three-factor test for determining whether a taking has occurred: [1] "the regulation's economic effect on the landowner, [2] the extent to which the regulation interferes with reasonable investment-backed expectations, and [3] the character of the government action." *Palazzolo*, 533 U.S. at 617 (*citing Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)). An analysis of these three factors weighs against finding that a taking has occurred.

i. *The restriction has a de minimis economic effect on Lear.*

The ten-year restriction on building a single-family home has a minor economic effect on Lear. After ten years, Lear would have paid $15,000 in property taxes. R. at 7. But after subtracting the potential income from the BCBS's tour fees, Lear would be out only $5,000 from FWS's development restriction. Even if Lear cannot find any other economically viable use for the lot, the FWS restriction only amounts to a 5% diminution of the property's value. This is not enough to constitute a taking, as the Supreme Court has "uniformly rejected the proposition that the diminution in property value, standing alone, can establish a taking" where the diminution is due to land-use regulations. *Penn Central*, 438 U.S. at 131 (collecting cases).

ii. *Lear had no reasonable investment-backed expectations.*

The ten-year restriction on developing the Cordelia Lot has no impact on Lear's investment-backed expectations, as Lear has no investment in the property. The property has been owned by Lear's family since 1803, and the land was deeded to Lear in 1965 (albeit held in life estate by her father until 2005). Because Lear had no investment in the property, her ability to recover on a regulatory takings theory is diminished. *See Brown v. Legal Found.*, 538 U.S. 216, 234 (2003) (no regulatory taking occurred where a transaction "had no adverse economic impact on [the aggrieved party] and did not interfere with any investment-backed expectation" of

the party); *see also supra* 19-20. Additionally, the ability to develop land at any time that Lear pleases is not a reasonable investment-backed expectation when Lear knew or could have known that the property has been restricted under the ESA since 1992. *See Claridge v. New Hampshire Wetlands Bd.*, 125 N.H. 745, 751 (N.H. 1984) ("A person who purchases land with notice of statutory impediments to the right to develop that land can justify few, if any, legitimate investment-backed expectations of development rights which rise to the level of constitutionally protected property rights").

iii. *The character of the government action does not single out Lear.*

Government actions run afoul of the Fifth Amendment when they "forc[e] some people alone to bear the public burdens which… should be bore by the public as a whole." *Webb's Fabulous Pharms. v. Beckwith*, 449 U.S. 155, 163 (1980) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). In the present case, the ten-year restriction does not "unavoidably singl[e] out individuals for disparate or unfair treatment." *Penn Central*, 438 U.S. at 132. In fact, the restriction in question favors Lear's property over other out-of-state property owners who have endangered species permanently residing on their properties. While other landowners may be encumbered by a permanent population of Blue Lupine Flowers, Lear need only wait ten years for the habitat to be naturally destroyed. Ironically, the arboreal nature of Lear's lot singles her out for *preferential* treatment under the law.

D. <u>It is against public policy to award damages to Lear.</u>

The Supreme Court has acknowledged that "it goes without saying that courts can and should preclude double recovery by an individual." *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 297 (2002) (quoting *General Tel. Co. v. EEOC*, 446 U.S. 318, 333 (1980)). Awarding damages to Lear for a complete taking would amount to double recovery by allowing Lear to own the land while retaining the profit that she would have made if she had sold the land. In ten years, she will

own the land free from the FWS encumbrance and will be able to redeem its full market value. Such an award would amount to a double recovery, which would be contrary to public policy.

V. THE BRITAIN COUNTY BUTTERFLY SOCIETY'S OFFER TO PAY $1,000 PER YEAR FOR WILDLIFE VIEWINGS PRECLUDES A TAKINGS CLAIM FOR COMPLETE LOSS OF ECONOMIC VALUE BECAUSE IT INDICATES THAT THE LOT STILL HAS ECONOMIC VALUE.

Due to deficiencies in the record and Lear's lack of diligence, it is not clear what economic value Cordelia Lot may have. It is known that: (1) there is no market for the Cordelia Lot *for recreational use* without the right to develop a residence on the property; (2) there is no market for the Cordelia Lot *in its current state* as agricultural or timber land; (3) fair market value of the Cordelia Lot without any restrictions preventing the development of a single-family home is $100,000; (4) property taxes due yearly on the Cordelia Lot total $1,500; (5) the BCBS has offered $1,000 per year for the privilege of conducting outings *during the summer months*; and (6) a permit to fill the cove marsh wetlands would only be granted for a water dependent use. R. at 4-7. Because these restrictions do not strip the land of all of its economic value, Lear is precluded from recovering on her takings claim.

A. The land still has value to Lear.

The offer from the BCBS shows that the land may have some remaining economic value despite the current restrictions on its development. Provided that the proposed use of the land does not run afoul of FWS's restriction on land development and the Brittain County Wetlands Preservation Law, Lear is free to rent, develop, or sell the land.

i. *Lear can rent or lease the land.*

By renting the land to the BCBS for $1000/year, Lear would at a minimum recover 66.6% of the total due on annual taxes, and the land would be in use for at most three months. Lear need only rent the land out for $500 over the remaining nine months of the year to avoid

being deprived of *all economic use* of the land. However, because Lear has not sought alternate uses for her land, we do not know whether a compensable taking has occurred. When the record "[leaves] us uncertain whether the property at issue had in fact been taken," the Supreme Court has traditionally "declined to reach the question" of whether a monetary remedy is required. *MacDonald v. County of Yolo*, 477 U.S. 340, 351-52 (1986) (collecting cases indicating that a takings claim is premature when the record leaves open the possibility for other land uses not pursued by the landowner); *see also First Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 311 (1987) ("Factual disputes yet to be resolved by state authorities might still lead to the conclusion that no taking had occurred"). Accordingly, this Court should not find that a taking has occurred merely because Lear has failed to explore alternative uses.

ii. *Lear can develop the property in a manner consistent with the Wetlands Preservation Law.*

Under the Wetlands Preservation Law, permits to fill wetlands are granted only for water-dependent uses. Lear's only attempt to develop the cove marsh was impermissible under the BCWPL. However, many other economically valuable activities qualify as water-dependent uses: marinas, boat yards, fisheries, shipping terminals, and restaurants are all water-dependent. *Payne v. City of Miami*, 52 So. 3d 707, 730 (Fla. Dist. Ct. App. 2010). A wind energy facility could also be classified as water-dependent. Joseph J. Kalo & Lisa C. Schiavinato, *Wind Over North Carolina Waters: The State's Preparedness to Address Offshore and Water-Based Wind Energy Projects*, 87 N.C.L. Rev. 1819 (2009).

The mere fact that Lear cannot fill the marsh cove to build a residential home site does not indicate that she cannot fill the cove for an economically valuable, water-dependent use. Because Lear has not yet pursued a use of the property that is consistent with the BWPCL, we do not yet know if a taking has occurred. *See Agins v. Tiburon*, 447 U.S. 255, 260 (1980) (holding

that where a party has "not submitted a plan for development of their property as the ordinances permit, there is as yet no concrete controversy regarding the application of specific provisions"); *MacDonald*, 477 U.S. at 353 n.9 ("Rejection of exceedingly grandiose development plans does not logically imply that less ambitious plans will receive similarly unfavorable reviews").

iii. *Lear can sell the land.*

Finally, Lear can sell the land. If Lear's land is truly devoid of economic value, Lear will be unable to sell it. Until Lear attempts unsuccessfully to sell the land, a takings claim for a complete deprivation of value is premature.

B. Lear is not entitled to recover on a takings theory merely because she cannot develop the property as she pleases.

While the land use restrictions imposed by the FWS and the BCWPL may not allow Lear to use the Cordelia Lot however she pleases, such restrictions do not necessarily render the property valueless or constitute a taking. Denying a landowner of a property's most profitable use does not constitute a taking. *Concrete Pipe & Products of California, Inc. v. Construction Laborers Pension Trust*, 508 U.S. 602, 644-45 (1993).

VI. PUBLIC TRUST PRINCIPLES INHERENT IN TITLE PRECLUDE LEAR'S TAKINGS CLAIM BASED ON THE DENIAL OF A COUNTY WETLANDS PERMIT BECAUSE LEAR NEVER HAD A RIGHT TO FILL THE COVE.

Even if this Court finds that the Cordelia Lot has been deprived of all economically beneficial use, Brittain County is not liable for damages because public trust principles limit Lear's ability to use state navigable waters and because the rights to fill and develop the marsh were not part of her land title. The Supreme Court recognizes that a landowner who has suffered a complete taking cannot be granted compensation "if the logical inquiry into the nature of the owner's estate shows that the proscribed use interests were never part of his title to begin with."

Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1019 (1992). Here, the ability to fill cove marsh is not part of Lear's title.

A. Lake Union is a navigable body of water.

Lake Union is "a large interstate lake which has been traditionally used for interstate navigation." R. at 4. Between 1803 and1965, Lear Island was used for agricultural purposes, as well as hunting and fishing, and produce from the farm was brought to the mainland by boat until the construction of a causeway in the early twentieth century. *Id*. at 5. The cove marsh on the Cordelia Lot includes "one acre of emergent cattail marsh in a cove that historically was open water and was historically used as a boat landing." *Id*.

i. *A navigable water is one that is or was susceptible to use in interstate commerce.*

While the U.S. Army Corps of Engineers found that the cove marsh was non-navigable, the Code of Federal Regulations states that "conclusive determinations of navigability can be made only by federal courts." 33 C.F.R. pt. 329.14. The CFR includes those waters that "are presently used, *or have been used in the past*, or *may be susceptible for use* to transport *interstate or foreign commerce*" within the definition of the "navigable waters of the United States." 33 C.F.R. pt. 329.4 (emphasis added). Additionally, "a waterbody that is navigable in its natural or improved state . . . retains its character as 'navigable in law' even though it is not presently used for commerce," and a determination that a waterway is navigable and durable "is not extinguished by later actions or events which impede or destroy navigable capacity." 33 C.F.R. pt. 329.9(a). Because Lake Union is an interstate lake and the cove marsh and Lake Union have been and are susceptible to use in interstate commerce, this Court recognizes the marsh and the lake as navigable-in-law. Additionally, the mere fact that Lear did not require a federal permit to fill the marsh does not excuse Lear from conforming with local wetlands protection laws. *See*

Issuance of Nationwide Permit for Single-Family Housing, 60 Fed. Reg. 38,650, 38,660 (July 27, 1995) ("NWP's do not obviate the need to obtain other Federal, State, or local permits, approvals, or authorizations required by law").

ii. *Navigability is determined at the time of statehood.*

Even if the lake is no longer considered navigable, the Supreme Court recognizes title to waterways navigable at the time of statehood that have been "passed to the state when it was admitted to the union." *United States v. Utah*, 283 U.S. 64, 75 (1931). Whether the lake is still navigable or used for interstate commerce does not matter, as the Lear family used it for navigation when New Union was granted statehood.

B. The equal footing doctrine and the public trust doctrine establish that title to all navigable waters within the state passed to New Union upon statehood.

New Union's control over the cove marsh is found in the equal footing and public trust doctrines: "The equal footing doctrine defines the United States' power to convey or retain land under navigable water prior to statehood and therefore describes the lands under navigable waters which a state acquires at statehood," while "the public trust doctrine defines a state's power over the land under navigable water that it acquired at statehood." James R. Rasband, *The Disregarded Common Parentage of the Equal Footing and Public Trust Doctrines*. 32 Land & Water L. Rev. 1 (1997).

i. *Under the equal footing doctrine, title to navigable waters passes to the state upon statehood.*

Under the equal footing doctrine, the original 13 colonies took title "to all their navigable waters and the soils under them" upon statehood, as did states "later admitted to the Union." *PPL Mont., LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (internal citations omitted). In *Phillips Petroleum*, the Supreme Court clarified that adoption of the "ebb and flow" rule supplemented, and did not overturn, prior Supreme Court decisions that applied public trust principles to

navigable but non-tidal waters. *Phillips Petroleum Co. v. Miss.*, 484 U.S. 469, 478-480 (1988) (emphasis added); *see also Barney v. Keokuk*, 94 U.S. 326 (1876) (finding that the public trust doctrine extended to navigable, non-tidal waters). Because the water in cove marsh is navigable, it passed to New Union upon statehood.

ii. *Under the public trust doctrine, navigable water is held by the state for the protection of public use.*

Under public trust doctrine, states hold the title to navigable waters "in trust for the people of the State" for their right to use the waters for navigation, commerce, and fishing, "freed from the obstruction or interference of private parties." *Ill. C. R. Co. v. Ill.*, 146 U.S. 387, 452 (1892). In 2012, the Supreme Court observed that, according to the court's precedent, each state's "absolute right to all their navigable waters and the soils under them [is] subject only to the rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Mont.*, 132 S. Ct. at 1227 (internal citations omitted). Accordingly, New Union holds the navigable waters in Lake Union and the cove marsh for the use of the people of New Union.

C. The congressional land grant to Cornelius Lear does not enable Lear to interfere with the navigable water above her land grant.

In 2012, the Supreme Court observed that each state's "absolute right to all their navigable waters and the soils under them [is] subject only to the rights surrendered and powers granted by the Constitution to the Federal Government." *PPL Mont.*, 132 S. Ct. at 1227 (citing *Martin v. Lessee of Waddell*, 41 U.S. 367, 410 (1842)). The Court held that the state's title to these lands was restricted only by Congress's power "to control such waters for purposes of navigation in interstate and foreign commerce. *Id*. at 1228 (collecting cases observing that only Congress's commerce power supersedes a state's title to underwater land under the equal footing doctrine and public trust doctrines). Beyond the power of the federal government to protect navigation in interstate commerce, the federal government "retains any title vested in it before

statehood *not then navigable*." *Id*. (emphasis added). Thus, states gained absolute title to lands under navigable waters, except for those ceded to Congress for the purpose of advancing or protecting interstate commerce.

i. *Congress's grant to soils under navigable water only gave Cornelius Lear a right to prevent the abridgement of his right to navigation.*

The Supreme Court has long recognized that a state's public trust rights to lands underwater is "held subject to the paramount right of navigation," which is regulated by the United States under the commerce power. *Shively v. Bowlby*, 152 U.S. 1, 24 (1894).

On several occasions, the Supreme Court has interpreted Congress's power to grant the soils under navigable waters. After analyzing the effect of public trust principles on navigable waters in several states and territories, the Supreme Court recognized that Congress often disposes of the public lands above the high water mark "to encourage settlement of the country." *Id*. at 49. Congress acts upon a theory that "navigable waters and the soils under them" are to remain in public control, as they are "chiefly valuable for the public purposes of commerce, navigation, and fishery" and "shall not be granted away during the period of territorial government." *Id*. at 49-50. Accordingly, prior to a territory achieving statehood, Congress does not grant these lands "piecemeal to individuals as private property" except to secure these purposes. *Id*. at 50. Thus, to the extent that Congress did include lands underwater in Cornelius Lear's 1803 land grant, the grant only gave Lear a negative right to prevent an abridgement of his right to commerce, navigation, and fishery. It did not give him a positive right to fill the land. *See Claridge,* 125 N.H. at 752 (owner may be barred from filling wetlands without compensation because landfilling would deprive adjacent coastal habitats and marine fisheries of ecological support).

ii. *To the extent that Congress's land grant gave Cornelius Lear the right to build upon the water, it did not give him a right to build in a manner that restricted navigation.*

Even if the congressional land grant does give Lear a right to build on the water surface, he can only do so in a way that does not impair navigation. The grant only gives fee simple absolute title to "all lands under water" within 300 feet of the island's shoreline. R. at 4-5. It does not give a right to build upon the surface of the water in a way that restricts the water's navigability. While constructing a pier or installing a lighthouse may not completely impair a water's navigability, filling an area of water defeats its navigability entirely.

While there is a dearth of case law determining the exact rights of owners of land under water, various courts have acknowledged that the owner of lands under water do not have an absolute right to develop the water surface as they please. In certain jurisdictions, they do not have the right to fill public waters when filling the water will adversely affect the waters. *See In re Appeal of Broad & Gales Creek Community Assoc.*, 300 N.C. 267, 279 (1980) (In North Carolina, the police power "may be exercised to restrict an applicant's right to dredge and fill in estuarine waters which belong to the public when the waters or adjacent private property will be adversely affected").

VII. THE CORDELIA PLOT HAS NOT BEEN COMPLETELY DEPRIVED OF ECONOMIC VALUE BECAUSE THE FEDERAL AND LOCAL RESTRICTIONS SHOULD NOT BE COMBINED FOR A TAKINGS ANALYSIS

Lear asks this Court to rule on a novel constitutional issue: whether federal and local regulations can be combined for takings clause purposes. This Court should decline the invitation—following *Ashwander*'s "last resort rule"—and instead decide the case on non-constitutional grounds. But even if this Court reaches this question, it should reject the analogy between joint tortfeasors and overlapping regulators and hold that it is *not* appropriate to

combine federal and local regulations when evaluating a *Lucas* takings claim for a complete deprivation of economic value.

A. This Court should follow the "last resort rule" and decline to reach the novel constitutional question whether federal and local regulations can be combined in a *Lucas* takings claim

Whether the combined effect of federal and local regulations can constitute a "complete deprivation of economic value" is a "novel" question in takings law. R. at 11. Therefore, this Court should resolve the case on non-constitutional grounds. It is "a well-established principle governing the prudent exercise of [the Supreme 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 v. U.S.*, 134 S.Ct. 2077, 2087 (2014) (internal quotation marks omitted). This rule applies even more strongly to federal courts of appeal, whose primary function is to resolve disputes rather than settle the law. Instead of venturing into uncharted territory in takings law jurisprudence, this Court should resolve the case on either of two "other ground[s]": dismissal of Lear's takings claim as unripe (issue II) or preclusion of Lear's takings claim by public trust principles (issue VI). Applying the last resort rule is especially important in this instance because the constitutional question Lear asks this Court to resolve is "novel," and there is no takings law precedent to provide guidance.

B. The regulations in question are distinguishable from and not analogous to joint tortfeasors liable for an indivisible injury

In order to justify combining federal and local regulations, the district court relies on a mistaken analogy with joint and several liability in tort law. R. at 11 ("this situation is not unlike the case of a joint tort, where neither actor acting alone causes a harm, but both actors acting together cause a harm."). This Court should reject that analogy. In fact, there are two important

differences between joint tortfeasors and overlapping regulators: (1) joint tortfeasors act negligently; and (2) the harm caused by overlapping regulators is not indivisible.

i. *Unlike concurrent tortfeasors, neither Brittain County nor FWS acted negligently*

A central justification for holding concurrent tortfeasors jointly and severally liable is that joint tortfeasors have acted negligently. Therefore, it is fair to hold them liable for the harm their negligent conduct causes. Overlapping regulators such as Brittain County and FWS, in contrast, have not acted negligently, making the analogy inappropriate. *See* Jan G. Laitos and Teresa H. Abel, *The Role of Causation When Determining the Proper Defendant in a Takings Lawsuit*, 20 Wm. & Mary Bill of Rts. J. 1181, 1201 (2012) ("The issue in such cases is not whether the government committed the action, but whether, as a matter of [proximate] causation, the government should be held responsible for the consequences of that action.").

ii. *Unlike concurrent tortfeasors, the alleged taking of Lear's property would not be an indivisible harm*

The district court incorrectly states that "accepting FSW's and Brittain County's arguments would mean that a property owner deprived of all economic use of their property would be denied recourse, as the federal government and local government each claim that their own regulations, by itself, leaves some developable portion." That is false. Even if it is the case that the FWS and Brittain County regulations, in combination, deprive Lear of the entirety of the economic value of her property (which Brittain County maintains is not the case), Lear would not be "denied recourse" if this Court declined to combine the two sets of regulations. Instead,

Lear could pursue a "partial takings claim" under *Pennsylvania Central*.[5] Therefore, the alleged harm of the taking of Lear's property is not "indivisible," and the analogy is inapposite.

Conclusion

For the foregoing reasons, this Court should find the ESA constitutional as applied to the Karner Blue Butterfly, but should reject Lear's takings claims against FWS and Brittain County.

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[5] Lear has declined to do that here. R. at 2.