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

PETITIONERS' BRIEF ON THE MERITS

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QUESTION PRESENTED

In a regulatory taking case, does the "parcel as a whole" concept as described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978), establish a rule that two legally distinct, but commonly owned contiguous parcels, must be combined for takings analysis purposes?

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OPINIONS BELOW

The decision below of the Court of Appeals of Wisconsin is unpublished and its disposition is reported at 359 Wis. 2d 675, 2014 WL 7271581 (Dec. 23, 2014). The opinion is reproduced in the Petition Appendix (Pet. App.) at A-1.

The decision of the Circuit Court of St. Croix County is unreported and is reproduced in the Pet. App. at B-1.

The order of the Wisconsin Supreme Court denying a Petition For Review was issued April 16, 2015, and is reproduced in the Pet. App. at C-1.

JURISDICTION

The date of the decision being reviewed is December 23, 2014. The Wisconsin Supreme Court denied further review on April, 16, 2015. On June 30, 2015, this Court entered an order extending the time for filing a petition for writ of certiorari to and including August 14, 2015. The petition was filed on August 14, 2015, and granted on January 15, 2015.

Jurisdiction is conferred under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND ORDINANCE AT ISSUE

The Fifth Amendment of the United States Constitution provides: "[N]or shall private property be taken for public use, without just compensation."

Section 1 of the Fourteenth Amendment to the United States Constitution provides: "[N]or shall any state deprive any person of life, liberty or property, without due process of law."

The ordinance at issue is St. Croix County Code of Ordinances, Land Use and Development, Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a. It is reproduced verbatim, in relevant part, in the Pet. App. at D-1. This ordinance is based on Wis. Admin. Code § NR 118.08(4).

STATEMENT OF THE CASE

This is an inverse condemnation case for the uncompensated taking of "Lot E." The subject parcel is a waterfront lot on the St. Croix River in the Town of Troy, Wisconsin. In this area, the river widens and is referred to as Lake St. Croix. The lake is a beautiful and popular recreation area, and features numerous homes along its shores. Joint Appendix (JA) 87. Minneapolis/St. Paul is nearby, with the intensely developed area beginning about five miles west of the parcel. JA 45.

The lake includes a large cove with over 40 waterfront residential parcels, known as the St. Croix

Cove Subdivision. JA 6. Lot E is part of this larger neighborhood of recreation and year-round homes. JA 51. This is a desirable neighborhood with many high value newer homes and waterfront parcels that are especially valuable and highly desired by purchasers. JA 52. Lot E is one of the waterfront lots that remains vacant and undeveloped. JA 89.

The Petitioners are Donna Murr, Joseph Murr, Michael Murr, and Peggy Heaver (collectively, the Murrs). They are siblings, and the owners of Lot E. JA 6.

A. Factual Background

1. Acquisition and Ownership of the Subject Parcel

The Murrs' story begins in 1960 when their parents purchased a parcel adjacent to Lot E. That other parcel is referred to as "Lot F." JA 6.

The Murrs' father was a plumber and he ran his own business, William Murr Plumbing, Inc. Presumably for tax reasons, he was advised to place title to the newly purchased Lot F in the name of the business entity, which he did. JA 6. Soon after purchasing Lot F, the Murrs' parents built a three bedroom recreational cabin consisting of approximately 950 square feet. JA 6. And so began a family legacy of enjoying many summers and weekends at the lake.

Recognizing the long-term potential of the area, the Murrs' parents decided in 1963 to purchase a second parcel, the above-mentioned Lot E. Lot E is immediately adjacent to Lot F. There is no dispute that they bought this adjacent Lot E for investment purposes. Pet. App. at A-3; JA 89. When the

investment ripened, they planned to either develop it themselves or sell it to a third party. Lot E has remained vacant and undeveloped to this day. JA 89.

Title to Lot E was in the Murrs' parents own names, rather than the plumbing company. Accordingly, while the Murrs' parents owned both Lot E and Lot F, the title was technically not in common ownership.

In 1994, the parents transferred title to Lot F (the cabin parcel) from the plumbing company to their six children. This was a gift to all of them; a way to keep the family legacy intact. JA 6, 20, 24 . A year later, in a separate conveyance in 1995, investment Lot E was transferred to the children. *Id*. Subsequently, two of the children quitclaimed their interests to their four siblings. *Id*. These four siblings are the current owners and the parties to this action.

Because of these conveyances from the parents to their children, the formal title to Lots E and F became placed in the same ownership, that is, both parcels are owned by the four siblings together.

2. Application of the Ordinance Precludes the Right to Sell or Develop Lot E

In 2004, the Murr family began exploring the possibility of upgrading the cabin, including elevating it to diminish the threat of flood. They planned to sell investment Lot E, and use the proceeds from the sale to fund their project. JA 7. However, when they spoke to County planning officials, they learned that because they owned both parcels, they could not sell Lot E without also selling Lot F. JA 8, 92. Under new

zoning regulations, the two parcels would be treated as one parcel.

In the words of Donna Murr, the family was "flabbergasted" to learn that regulations precluded separate use, development, and sale of Lot E. JA 93. Tax assessments had always been for two separate parcels, each assessed as individual residential, buildable sites. JA 6. There had been no procedure formally merging the two parcels. Nevertheless, they learned that zoning regulations adopted in 1975 treated the two parcels as one, and disallowed separate use or sale of Lot E.

Development or sale of Lot E was precluded by the 1975 regulations that required a "net project area" of at least one acre. Lot E is approximately 1.25 acres in overall size (JA 6), but the ordinance requires subtracting areas for slope preservation zones, floodplains, road rights-of-way, and wetlands, thereby yielding a net project area of 0.5 acres for development of Lot E. JA 26. While a half acre is plenty large enough for a house site, it is not large enough under the ordinance. Because the ordinance requires a minimum "net project area" of one acre, the parcel no longer meets the zoning requirements.

In short, when Lot E was created in 1959, and purchased in 1963, it was of sufficient size, width, and zoning to allow development of a single family house. Indeed, that is the use allowed for all the parcels within the St. Croix Cove Subdivision. However, because of the restrictions that came into place in 1975, the 1.25 acre parcel was defined as "substandard."

3. The "Grandfather Clause" Provided No Relief

When zoning regulations are changed, it is common to include a "grandfather clause" allowing the use of legal lots of record that pre-date the new regulations. The St. Croix County ordinance has just such a provision. Under the ordinance, a grandfather clause provides that any lot created prior to January 1, 1976, may still be developed as a legal building site even though it is considered substandard under the new regulations. Unfortunately, it was determined that this grandfather clause does not apply to the Murrs.

Although Lot E was a pre-existing and recorded lot of record, the protection of the grandfather clause only applies if the lot "is in separate ownership from abutting lands."[1] The ordinance states in relevant part:

> Lots of record in the Register Of Deeds office on January 1, 1976 or on the date of the enactment of an amendment to this subchapter that makes the lot substandard, which do not meet the requirements of this subchapter, may be allowed as building sites provided that the following criteria are met:
>
> (a) 1. The lot is in *separate ownership from abutting lands*, or
>
> 2. The lot by itself or in combination with an adjacent lot or lots under common ownership in an existing subdivision has at least one

[1] St. Croix County Code of Ordinances § 17.36, I.4.a.1 (Pet. App. at D-1).

> acre of net project area. *Adjacent substandard lots in common ownership may only be sold or developed as separate lots if each of the lots has at least one acre of net project area.*

JA 77 (St. Croix County Code of Ordinances § 17.36, I.4.a.1) (italics added).

Of course, the Murr siblings own the abutting parcel, Lot F. Accordingly, although Lot E was a pre-existing lot of record, recorded on July 27, 1959 (JA 82), the grandfather clause would not provide relief.

Had anyone else owned Lot E, the grandfather clause would apply and that owner would be allowed to sell or build independent of Lot F. Despite being defined by the zoning restrictions as substandard, Lot E could still be sold or developed if it was owned by *anyone other than the Murr siblings*. But the Murrs are precluded from selling Lot E to anyone else, unless they sell both Lot E and Lot F together.[2]

The Murrs do not want to sell the cabin. They enjoy their family legacy and they want to improve the cabin and use it for many more years. JA 93. What they want is to sell Lot E, as they always believed they could.

B. Procedural Background

The Murrs sought relief from the ordinance by seeking a variance to allow the use or sale of Lot E as a separate building site. In support of their variance request, they argued that on January 1, 1976, the lots were still in separate ownership (split between the

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[2] *Id.* § 17.36, I.4.a.2 (Pet. App. at D-1).

plumbing company and the Murrs' parents), and therefore the grandfather clause should apply. The County Board of Adjustment rejected that interpretation of the ordinance and denied the variance. JA 8. The Murrs sought judicial review, but the variance denial was upheld. *Id*.

Having exhausted their administrative remedies, and after receipt of a final decision denying relief, the Murrs filed a complaint alleging an uncompensated taking of vacant Lot E. They contend that without the ability to separately sell or develop the lot, there is either a categorical taking under *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (denial of all economically viable use), or a taking under the multi-factor analysis of *Penn Central*.

C. The Wisconsin Court Rejects the Murrs' Taking Claim by Defining the Relevant Parcel as Including Both Lots E and F

The Murrs allege a taking of only Lot E. In considering a taking claim, a court must evaluate the magnitude of government interference with the property interest alleged to be taken. But in order to measure the extent of government interference with private rights, a unit of property must be determined to be the "denominator" in that calculation. *See generally Keystone Bituminous Coal Association v. DeBenedictus*, 480 U.S. 470, 497 (1987) ("one of the critical questions is determining how to define the unit of property" to be used as the denominator in that fraction). In other words, what is the relevant parcel for the government interference to be measured against?

The Wisconsin court recognized that defining the relevant parcel was central to analyzing the taking claim. The Murrs argued that the relevant parcel for takings analysis purposes is investment Lot E, and only Lot E. They did not claim a taking of Lot F. In contrast, the government defendants argued that for purposes of analyzing the extent of government interference with Lot E, the relevant parcel was Lot E *combined with* Lot F.

The Wisconsin appellate court ruled that because the two lots are contiguous, and happen to be owned by the same people, this Court's "parcel as a whole" rule from *Penn Central* requires combining the two parcels for takings analysis. As stated below:

> "[T]he United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel . . . ." Instead, to determine whether a particular government action has accomplished a taking, courts are to focus "'both on the character of the action and on the nature and extent of the interference with rights in the **parcel as a whole** . . . .'" (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 130-31 (1978)).

Pet. App. at A-10 ¶ 18 (quoting *Zealy v. City of Waukesha*, 201 Wis. 2d 365, 375-76, 548 N.W.2d 528 (1996) (emphasis added).

From the Murrs' perspective, Lots E and F are two separate parcels, created as legally separate lots, taxed separately, and purchased separately. The lots were never developed together, and were purchased for completely different reasons. Nevertheless, because

the Murrs own both parcels, the Wisconsin court ruled that these two parcels combined were the Murrs' "parcel as a whole." This conclusion was driven by the contiguous ownership.

> There is no dispute that the Murrs own contiguous property. Regardless of how that property is subdivided, **contiguousness is the key fact** . . . .

Pet. App. at A-10 ¶ 19 (emphasis added). The court repeated again that this Court "has never endorsed a test that 'segments' a contiguous property to determine the relevant parcel." Accordingly, the court below concluded by proclaiming

> a well-established **rule** that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein.

Pet. App. at A-11 ¶ 20 (emphasis added).

Given this analysis of *Penn Central*, the Wisconsin court found there was no taking because, *combined with Lot F*, the Murrs still had one building site.

> With the analysis properly focused on the Murrs' property as a whole, it is evident they have failed to establish a compensable taking, as a matter of law. There is no dispute that their property suffices as a single, buildable lot under the ordinance. Thus, the circuit court properly observed the Murrs can continue to use their property for residential purposes.

Pet. App. at A-12 ¶ 22. Based on this rationale, the court below concluded as a matter of law that the Murrs have not alleged a compensable taking. *Id.*

SUMMARY OF ARGUMENT

In establishing the "parcel as a whole" rule, *Penn Central* focused on the single parcel, the Grand Central Terminal. The Court rejected the theory that the Terminal parcel should be segmented into discrete interests, *i.e.*, the air rights, and found a taking of the air rights alone. The decision thus rejected the "segmentation" theory offered by the railroad company, and instead ruled that the takings analysis focuses on the parcel as a whole.

Nor did the Court in *Penn Central* measure the extent of interference with the Terminal parcel by aggregating the company's other real estate holdings into the equation. Although the company owned substantial properties that were directly benefitted by operation of the Terminal, "aggregation" of those parcels into the takings equation was not accepted. The Court subsequently stated that such aggregation of parcels is an extreme and unsupportable approach to the takings analysis.

This Court's takings jurisprudence thus rejects both extremes, neither segmentation nor aggregation of parcels has garnered support. Rather, the Court has preferred the middle ground where the parcel as a whole is defined as the entire fee estate for the single parcel. This standard rule should be applied to the Murrs' single parcel, Lot E, for determining whether the extent of interference with that parcel is a compensable taking.

The standard presumption derived from *Penn Central* is that the magnitude of government interference in a takings claim should be measured against the fee title of the single parcel alleged to be taken. This presumption is grounded in *Penn Central* and long established principles of property law. It is also consistent with normal understandings in the real world. Moreover, as a presumption, the flexibility is maintained for a party to demonstrate that, in the particular case, fairness and justice are better achieved by segmentation or aggregation of parcels. But the burden of proof should be on the party asserting either of those more extreme positions.

Under the facts of this case, there is no reason to deviate from *Penn Central*. Although the Murrs own two parcels that happen to be adjacent, those parcels were purchased at different times, for different purposes, and have never been considered as a single economic unit or jointly developed. Absent the effect of the challenged ordinance, the Murrs' rights in Lot E are separate and distinct from Lot F. Their alleged taking should focus on the fee interest of the single parcel, just as this Court held in *Penn Central*.

ARGUMENT

I

PENN CENTRAL DOES NOT ESTABLISH A RULE THAT TWO LEGALLY DISTINCT, BUT COMMONLY OWNED CONTIGUOUS PARCELS, MUST BE COMBINED FOR TAKINGS ANALYSIS PURPOSES

A. *Penn Central* Counsels Against Segmentation of Property Interests

The Wisconsin court below states a "rule" that contiguous parcels that happen to be owned by the same person shall be combined for purposes of considering whether regulatory action has resulted in a taking. The lower court proclaims that requiring such "aggregation" of adjacent parcels was established by the "parcel as a whole" ruling in *Penn Central*. But *Penn Central* was not an aggregation case. It did not involve combining two distinct parcels. Rather, *Penn Central* was a segmentation case. It involved a single parcel, the Grand Central Terminal, and the Court refused to segment the air rights from the parcel as a whole. The single parcel, *with all of its property interests that comprise the fee title*, including the air rights, was the relevant parcel to consider in evaluating the impact of the New York City regulations.

The same approach should be used in considering the taking of the Murrs' Lot E. They own fee title to Lot E, and they allege that this parcel as a whole has been taken. As will be shown, nothing in this Court's

decisions supports the notion that the taking of Lot E can be avoided by combining that lot with a separate, adjoining lot from which the Murrs already derive some economic use. Such a view rests on a superficial reading of *Penn Central* and significantly misinterprets the "parcel as a whole" concept.

In *Penn Central*, the company wanted to build an office tower in the air space above the historic Grand Central Terminal. The permit application was denied, prompting a takings claim of the right to develop the empty air space above the Terminal. The company's theory was that the air space itself was a valuable stick in the bundle of its property rights that comprised the Terminal parcel. Relying on *United States v. Causby*, 328 U.S. 256 (1946),[3] the company sought to segment the air rights from its bundle of rights, and claim that this particular interest had been taken. As framed by the Court:

> They [appellants] first observe that the airspace above the Terminal is a valuable property interest, citing *United States v. Causby*, supra. They urge that the

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[3] The company's theory in *Penn Central* to isolate the air rights was based on a fundamental misapplication of *Causby*. The taking in *Causby* was not of air rights, but was the parcel as a whole, *i.e.*, *the chicken ranch itself*. The flight of airplanes skimming the surface, but not touching it, completely destroyed the plaintiff's commercial chicken farm. This destruction of the farm was the key fact. *Causby*, 328 U.S. at 261. The taking in *Causby* was not based on segmenting the air rights, but was based on the magnitude of interference with the parcel as a whole. *Penn Central*, 438 U.S. at 135 ("Causby was a case of invasion of airspace that destroyed the use of the farm beneath"). The point is that neither *Causby* nor *Penn Central* allowed segmentation of the fee title into narrow property interests.

> Landmarks Law has deprived them of their "air rights" above the Terminal and that, irrespective of the value of the remainder of their parcel, the city has "taken" their right to this superadjacent airspace, thus entitling them to "just compensation" measured by the value of these air rights.

Penn Central, 438 U.S. at 130.

This Court was not willing to segment the fee title of a single parcel into separate property interests.

> "Taking" jurisprudence does not divide a **single parcel** into discrete segments, and attempt to determine whether rights in a particular segment have been entirely abrogated.

438 U.S. at 130 (emphasis added). Rather than dividing a single parcel into segments, the Court explained that it focuses on interference with "rights in the parcel as a whole." *Id*.

In considering the whole parcel, rather than just the air rights, the Court explained that "the New York City law does not interfere in any way with the present uses of the Terminal." *Id*. at 136. Indeed, the company did not even contest that "the parcel of land occupied by Grand Central Terminal must, in its present state, be regarded as capable of earning a reasonable return." *Id*. at 129 & n.26.

Penn Central's ruling is clear and limited. The plain language, quoted above, does nothing more than reject the company's attempt to divide a single parcel into separate strands of property interests, and then consider whether the particular strand has been taken.

The company's theory for segmenting its air rights from the rest of the Terminal parcel was rejected.

But the Court's rejection of the segmentation theory does not imply support for the very different theory that commonly owned parcels must be aggregated for takings analysis—the theory adopted by the Wisconsin court. Not surprisingly, the Wisconsin court provides no analysis of *Penn Central* to support its assertion of the rule. It simply refers to the phrase "parcel as a whole." But as used in *Penn Central*, this phrase expressly refers to the entire fee interest of the single parcel, the Grand Central Terminal.

Of course, the Murrs do not seek to segment their fee title as the property owner did in *Penn Central*. They ask that the entire Lot E be reviewed as the relevant unit of property.

B. The Wisconsin Rule Is an Extreme Approach That Is Contrary to *Penn Central*

When, as here, a property owner alleges a taking of an interest in a discrete and lawfully created parcel, there are two extremes for resolving the denominator question. First, one can propose segmenting the single parcel into narrow property interests (such as air rights) to find the relevant unit of property for takings analysis. If allowed, segmentation increases the likelihood of a taking because it is easier to show that a narrower unit of property has lost all economically beneficial use. The other extreme is to begin with the full title of the single parcel, but add other parcels to the equation (such as the Murrs' separate Lot F) prior to engaging in the takings inquiry. If allowed, aggregation decreases the likelihood of a taking

because the magnitude of the interference is measured against a larger property interest, thereby diluting the economic impact of the government action.

Penn Central rejected both extremes and opted for a middle ground under which a **single parcel** is neither segmented into narrow property interests, nor aggregated with other holdings.

It must be remembered that the New York Court of Appeals in *Penn Central* embraced an aggregative approach similar to that adopted by the Wisconsin court below. That is, the New York court considered the diminution in value of the Terminal in light of the total value of Penn Central's "heavy real estate holdings in the Grand Central area." *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333, 366 N.E.2d 1271, 1276 (1977).

It is clear that the railroad company owned numerous properties in the midtown Manhattan area, including properties adjacent to the Terminal. In 1969, the Landmarks Preservation Law was amended to allow transfers of development rights "from a landmark parcel to property across the street or across a street intersection." *Penn Central*, 438 U.S. at 114. These amendments were enacted specifically for the owners of the Grand Central Terminal. *Id*. Of course, the receiving parcels must be "in the same ownership" as the landmark parcel. *Id*. Significantly, among its holdings, there were at least eight parcels owned by Penn Central that were eligible to receive development rights because they were contiguous as being across the street or intersection from the Terminal. *Id*. at 115.

In considering whether there was a taking, the New York court stated that some of the income from the railroad company's common ownership parcels had to be "imputed to the Terminal." 42 N.Y.2d at 333. The New York court rationalized that the Terminal "acts, in effect, as a magnet for Penn Central's other, more profitable, enterprises." *Id.* at 334. The New York court summarized:

> In none of their analyses do they include the benefits provided to Penn Central's varied real estate holdings by the terminal's operation. These real, albeit indirect, benefits alone might suffice to provide Penn Central with a reasonable return.

Id. at 336.

This Court in *Penn Central* acknowledged the New York court's aggregative approach. 438 U.S. at 121-22. But it did not follow that reasoning. It refused to consider the company's other real estate holdings in the takings evaluation and instead focused the takings analysis on the single parcel, the Terminal itself. *Id.* at 130, 136-38.

In *Lucas*, this Court underscored its rejection of the New York court's aggregative approach. The Court stated:

> For an extreme—and, we think, unsupportable—view of the relevant calculus, see *Penn Central Transportation Co. v. New York City*, 42 N.Y.2d 324, 333-334, 366 N.E.2d 1271, 1276-1277 (1977), aff'd, 428 U.S. 104, 57 L. Ed. 2d 631, 98 S. Ct. 2646 (1978), where the state court examined the diminution in a particular parcel's value

> produced by a municipal ordinance in light of total value of the taking claimant's other holdings in the vicinity.

Lucas, 505 U.S. at 1016 n.7.[4]

In summary, this Court has already rejected both of the extreme approaches for the denominator (segmentation and aggregation) when faced with a taking of a single parcel. The Court's takings jurisprudence prefers the middle ground, where takings tests are applied to the entire single parcel, nothing more, and nothing less.

There is accordingly no support in either the law or the facts of *Penn Central* for the Wisconsin court's conclusion that the Court established a rule that commonly owned contiguous parcels must be combined for consideration under the Takings Clause. The Wisconsin court's application of *Penn Central* is simply wrong.

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[4] In footnote 7, the Court provided an example of the circumstances where the relevant denominator remains uncertain. "When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in value of the tract as a whole." *Lucas*, 505 U.S. at 1016 n.7. This hypothetical differs from *Penn Central* because it does not involve the isolation of a particular strand of the fee title and, accordingly, remains an open question.

II

AS WITH *PENN CENTRAL*, SUBSEQUENT DECISIONS OF THIS COURT DO NOT SUPPORT WISCONSIN'S AGGREGATION RULE

Subsequent decisions reaffirm the moderate ruling of *Penn Central*, that a single parcel will neither be segmented into various strands, nor aggregated with other commonly owned parcels for takings analysis purposes. None of this Court's cases endorse anything like the Wisconsin rule.

For example, *Andrus v. Allard*, 444 U.S. 51 (1979), is consistent with *Penn Central* and does not extend its holding. There, federal statutes prohibited selling artifacts that contained bald eagle feathers. While the right to sell one's property is a significant strand in the bundle of rights, restrictions on that strand did not result in a taking of the artifact as a whole. *Id*. at 65-66 ("destruction of one 'strand' of the bundle is not a taking") (citing *Penn Central,* 438 U.S. at 130-31). In other words, the whole parcel in *Andrus* was the discrete item itself—the eagle feather artifact. The *Andrus* Court did not ask whether the claimant owned other artifacts which it had to combine to decide if a taking occurred.

Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987), is another example where the Court rejected an attempt to segment a parcel of property into narrow slices.[5] The claimants there

[5] *Kaiser Aetna v. United States*, 444 U.S. 164 (1979), is not inconsistent with *Keystone Coal*. In *Kaiser Aetna*, the Court addressed a takings claim of "one of the most essential sticks in (continued...)

"sought to narrowly define certain segments of their property" and assert a taking of that segment. 480 U.S. at 496. The coal company argued that the Subsidence Act "entirely destroys the value of their unique support estate." *Id.* at 500. But the Court found this strategy no different than the attempt to carve out the air rights in *Penn Central*. *Id.* at 500. The Court proceeded to explain that the support estate is always owned by either the owner of the surface estate, or the owner of the mineral estate. By itself, the support estate has no practical value.

> Thus, in practical terms, the support estate has value only insofar as it protects or enhances the value of the estate with which it is associated. Its value is merely a part of the entire bundle of rights possessed by the owner of either the coal or the surface.

Id. at 501. As with the continued profitable use of the Grand Central Terminal, so too the coal companies "retain the right to mine virtually all of the coal in their mineral estates" and "may continue to mine coal

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[5] (...continued)
the bundle of rights that are commonly characterized as property—the right to exclude others." *Id.* at 176. *Kaiser Aetna* is in the category of physical invasion cases, similar to *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The government action in *Kaiser Aetna* was to "create a public right of access" (444 U.S. at 178), the result being an "actual physical invasion of the privately owned marina." *Id.* at 180; *see also Loretto*, 458 U.S. at 433 ("*Kaiser Aetna* reemphasizes that a physical invasion is a government intrusion of an unusually serious character"). Accordingly, *Kaiser Aetna* is consistent with *Loretto*, and neither case undermines *Penn Central's* "parcel as a whole" rule in the non-physical invasion context.

profitably even if they may not destroy or damage surface structures at will in the process." *Id.*

Keystone Coal provides another example where the Court was not persuaded to divide property into narrow interests and find a taking of that interest where there remained extensive and profitable use of the subject property as a whole.

Perhaps the most significant case (post-*Penn Central*) is *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002). But again, this decision does not extend, or retreat, from *Penn Central*.

In *Tahoe-Sierra*, petitioners argued to "sever a 32-month segment from the remainder of each landowner's fee simple estate, and then ask whether that segment has been taken in its entirety by the moratoria." 535 U.S. at 331. But such carving up of the fee simple estate into temporal segments was, yet again, too extreme. The Court responded:

> [D]efining the property interest taken in terms of the very regulation being challenged is circular. With property so divided, every delay would become a total ban; the moratorium and normal permit process alike would constitute categorical takings.

Id. The Court cited back to *Penn Central*, instructing again that the takings analysis must focus on the parcel as a whole, and not be carved into temporal segments. *Id.*

However, once again, the Court did not consider aggregating any discrete parcels in the takings analysis. In fact, it effectively rejected the idea,

elaborating on the "parcel as a whole" concept as follows:

> An interest in real property is defined by the metes and bounds that describe its geographic dimensions and the term of years that describes the temporal aspect of the owner's interest. See Restatement of Property §§ 7-9 (1936). Both dimensions must be viewed in its entirety. Hence, a permanent deprivation of the owner's use of the entire area is a taking of "the parcel as a whole" . . . .

Tahoe-Sierra, 535 U.S. at 331-32. The "parcel as a whole" is defined in part by the geographic dimensions of the parcel. The *Penn Central* and *Tahoe-Sierra* Courts applied the same principle—that a single geographically defined parcel is to be considered as it is, neither sliced apart nor added to other parcels.

In summary, this Court's post-*Penn Central* jurisprudence is consistent with the principle established in *Penn Central*: that the *entire fee title of a single parcel* is the parcel as a whole—the relevant takings unit. Nothing endorses combining the fee title of a single parcel with the fee title of an adjoining single parcel.

Applying these rather unremarkable principles, the parcel as a whole for the Murrs is their entire Lot E. The parcel as a whole is not a geographic portion of Lot E, or a temporal slice of Lot E, or air rights, or riparian rights, or some other discrete interest that is part of the fee estate. Rather, it is Lot E, with all of the rights that comprise the fee title. In this case, that is the proper denominator in the takings equation

because that is the Murrs' parcel as a whole. *Penn Central*, 438 U.S. at 130; *Tahoe-Sierra*, 535 U.S. at 327, 331-32.

III

THIS COURT SHOULD CONFIRM THE PRESUMPTION THAT THE FEE TITLE TO EACH SINGLE PARCEL IS THE DENOMINATOR FOR THE TAKINGS ANALYSIS

A. The Presumption Provides Guidance and Consistency While Preserving Flexibility

Penn Central and *Tahoe-Sierra* have grounded the "parcel as a whole" concept in the single parcel. Those cases underscore that this Court looks to the single parcel as the relevant unit for measuring the extent of government interference. Accordingly, neither segmentation of the estate, nor aggregation of other parcels, should be the standard. Rather, measuring the extent of interference against the single parcel is the most reasonable position. Here, the Court should explicitly recognize and confirm that a distinct and geographically defined parcel of land is presumed to be the takings unit. Any party seeking to segment lesser interests or aggregate other parcels must prove that the facts warrant such unorthodox treatment.

The Murrs acknowledge that the facts of cases will vary, and that hard and fast rules can work an injustice. As Justice Ginsburg wrote for the Court in *Arkansas Game and Fish Commission v. United States*, __ U.S. __, 133 S. Ct. 511, 518 (2012):

> In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

The presumption is consistent with this concern of avoiding "invariable rules," while also providing a degree of predictability that is consistent with fundamental understandings of property law. Accordingly, a presumption strikes the appropriate balance, giving direction to lower courts while preserving the ability for landowners or government to argue, in the particular case, that the facts and circumstances warrant some degree of segmentation or aggregation.

For example, *Hodel v. Irving,* 481 U.S. 704 (1987), illustrates that even this Court's resistance to segmentation is not an ironclad rule. In that case, the Court determined that a taking may be found where there is complete abolition of the right to descent and devise of property. *Id*. at 716. "[T]he right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times." *Id*.

Of course, a taking of the right to pass on property necessarily was a segmentation of a discrete interest that is otherwise part of the fee title. The *Hodel* decision therefore prompted Justice Scalia to remark "in finding a taking today our decision effectively limits *Allard* to its facts." *Id*. at 719 (Scalia, J., concurring). Not surprisingly, Justice Brennan also filed a concurrence stating that the particular circumstances of *Hodel* "make this case the unusual one." *Id*. at 718 (Brennan, J., concurring).

The apparent tension between *Hodel v. Irving* and *Andrus v. Allard* is resolved with the recognition that there will be circumstances where segmentation of a particular property interest yields the fair and just result. *Hodel v. Irving* is one of those cases. In other words, the particular facts in *Hodel* were sufficient to overcome the standard presumption that the fee interest will not be segmented. Similarly, in an appropriate case, the presumption not to aggregate separate parcels might be overcome. But the burden to show that either segmentation or aggregation of parcels applies, should be placed on the party making that assertion.

A presumption provides the flexibility required when fairness and justice demand a different result. In any takings case, fairness and justice must be the ultimate guide and objective.

> The Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."

Arkansas Game and Fish, 133 S. Ct. at 518 (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)). This principle is "fundamental in our Takings Clause jurisprudence." *Id.* By confirming the presumption, the ability is preserved for parties and courts to respond to unique facts that may demonstrate that the presumption should be overcome in the interest of fairness and justice.

B. Applying The Presumption In This Case Is Consistent with Traditional Understandings of Property Law

This is a case where a family purchased two separate pieces of property. Like the typical family, the Murrs certainly understood what they were buying in 1960 and 1963. They knew that they had purchased two separate residential parcels, and each was a separate fee interest. They knew that each parcel could be managed, conveyed, mortgaged, leased, or developed, independent of each other. Those are the *normal rights that any American family would understand they receive* when they buy a residential lot.

The reaction of Donna Murr and her family when they learned that the zoning restrictions prevented them from selling Lot E was that "we were quite flabbergasted." JA 93 (Donna Murr dep. at 21). Most Americans would probably react the same way. Why? Because people understand the basic unfairness of what happened to the Murrs. People rely on their title to property. People are making important decisions, and major investments, when they buy property. They necessarily rely on the rights that come with each separate parcel. Just as the Murrs' parents' purchase of Lot E was separate and independent of their prior purchase of Lot F, so should they be able to sell Lot E independently and separately from Lot F. This concept of fungible real estate is well ingrained in the mindset of American property owners.

Of course, this common understanding is well grounded in the law. An estate in fee simple is "an estate with a rich tradition of protection at common law." *Lucas*, 505 U.S. at 1016 n.7. Lot E became a

discrete and separate estate when its geographic boundaries were established in 1959, pursuant to a Certified Survey Map, as required under Wisconsin Statutes Section 236.34. This is consistent with the oft-quoted principle from *Board of Regents v. Roth*, 408 U.S. 564 (1972):

> [P]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law—rules or understandings that *secure certain benefits* and that *support claims of entitlement to those benefits*.

Id. at 577 (italics added).

Lot E was created pursuant to the laws and procedures of Wisconsin and, with that creation, certain benefits were secured to the Murrs. As owners of the fee title, they secured the right to possess, to exclude, to use the property, and to convey it to others. *United States v. General Motors*, 323 U.S. 373, 378 (1944). These ownership attributes were applicable to Lot E independent of whether or not the Murrs owned any other parcel.

The Murrs did not rely on a unilateral expectation that Lot E was independent of Lot F. They had a legitimate claim of entitlement to the separateness of Lot E because it was created and approved by government as an independent parcel. Once created as such, a purchaser is entitled to rely on that status.

> It is a purpose of the ancient institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined.

Roth, 408 U.S. at 577. Of course, in addition to the purchaser, mortgage banks, and title companies, the entire real estate industry rely on the independence of separate fee titles.

Here, well established concepts of property law weigh heavily in favor of the Murrs. They had every reason to understand that Lot E was separate and distinct from Lot F. Their takings claim should be evaluated with the same understanding.

Confirming a presumption that each single parcel should be the denominator for takings analysis meets the expectations of typical people such as the Murrs. Such expectations are grounded in long established principles of property law and this Court's decisions in *Penn Central* and *Tahoe-Sierra*.

C. Fairness and Justice Further Support a Determination That the Murrs' Lot E Should Be the Relevant Parcel in This Case

Penn Central and *Tahoe-Sierra* provide the jurisprudential underpinning for the presumption. Its application here is also consistent with fairness and justice. In this case, there is no factual basis for overcoming the presumption and combining the Murrs' separate parcels into one.

Absent clarity from this Court, the United States Courts of Appeals have at times determined the relevant parcel on a case-by-case analysis of facts. *See*, *e.g.*, *Palm Beach Isles Associates v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000); *Loveladies Harbor v. United States*, 28 F.3d 1171 (Fed. Cir. 1994); *Forest Properties, Inc. v. United States*, 177 F.3d 1360, 1365 (Fed. Cir. 1999) (two tracks were treated from the

outset as a "single integrated project"). But a factual review confirms that combining Lot F with Lot E for takings analysis is not warranted.

In *Palm Beach Isles*, the federal government argued that two parcels should be treated as one because they were purchased together in one transaction. 208 F.3d at 1380. The landowner countered that the two parcels were never planned to be developed as a single unit. *Id.* In contrast, the Murrs purchased Lot F and Lot E in completely distinct transactions. Those transactions were separated by three years.

Similarly, the Murrs never treated their two parcels as a single economic unit. Rather, the parcels were acquired at different times for very different purposes. Lot F was acquired to be the site of a family recreation cabin. It was developed by the Murrs for that purpose, and continues to be used for that purpose.

Completely independent from the cabin property, Lot E was purchased as an investment. It was held vacant, and the plan was to simply let the investment grow in value until some future time. The Murrs never applied for permits for a joint development or otherwise used or developed the properties in any fashion that would blur the property lines.

The facts here are simple. These are two separate and distinct parcels, and the history of the Murrs' purchase, use, and plans for the parcels do not warrant overriding the usual presumption of separateness to combine the parcels into one for purposes of the Takings Clause.

The Wisconsin court ignored these facts and relied on a single fact—the Murrs happen to own contiguous parcels. But reliance on that fact alone is arbitrary and discriminates against the Murrs.

In this case, the discriminatory impact of using contiguous common ownership as a determining fact is revealed by the operation of the grandfather clause. Grandfather clauses are mechanisms for achieving fairness to property owners, and they also benefit government. They allow government to enact new regulations to respond to changing circumstances without disrupting previously approved uses and sites.

But in St. Croix County, the fairness that is sought for other property owners by the grandfather clause is denied to the Murrs. Why? Because they happen to own the property next door. Lot E would be grandfathered as a separate building site for *any other owner*. For example, if the Murrs' parents had given Lot E to William Murr's best friend, the grandfather clause would protect Lot E as a pre-existing legal building site. But that same protection does not extend to the Murr siblings.

Anyone else in the world could own Lot E and use it as a buildable site. But the Murr siblings, as the owners of property next door, cannot. That is arbitrary.

At bottom, the facts of the Murrs purchase, use, and plans for Lot E are completely independent from Lot F. There is, therefore, no reason to depart from the presumption that the proper takings unit is the title to Lot E. Indeed, combining the lots for takings analysis purposes is not only unwarranted—it is discriminatory and undermines the basic concept of

fairness and justice that is the foundation of the Takings Clause. *Armstrong v. United States*, 364 U.S. at 49.

CONCLUSION

The Murrs are a typical family with normal understandings of real property. They purchased Lot E as an independent residential parcel, a separate fee estate. They allege that governmental interference with that parcel, depriving them of the separate right to independently sell or develop that parcel, amounts to a taking for which compensation should be paid. The Court is urged to hold that when evaluating a claim for the taking of a single parcel, *Penn Central* establishes a presumption that the relevant parcel to measure the degree of interference is the single parcel. In this case, there is no persuasive reason to overcome that presumption. Accordingly, the relevant parcel is Lot E.

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Respectfully submitted,

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