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 Wisconsin Court Of Appeals

BRIEF OF PROPERTY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

DAVID A. DANA
NORTHWESTERN PRITZKER SCHOOL OF LAW
375 East Chicago Ave.
Chicago, IL 60611
(312) 503-0240
d-dana@law.northwestern.edu

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

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BRIEF OF PROPERTY LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

The undersigned property law professors respectfully submit this brief as *amici curiae* in support of Respondents.[1]

INTEREST OF *AMICI CURIAE*

Amici have no personal stake in the outcome of this case; their interest is in assisting the parties and the Court in understanding property law and the law of Takings, insofar as that law and those rights are relevant to the questions presented in this case. Joining in this brief as *amici* are the following twelve law professors, whose research and teaching have focused on property law:

Gregory Alexander, A. Robert Knoll Professor of Law, Cornell Law School

Michael Barsa, Professor of Practice, Northwestern Pritzker School of Law

[1] Pursuant to Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to the preparation or submission of the brief. Pursuant to Rule 37.3(a), all appropriate parties have filed letters granting blanket consent to the filing of *amici curiae* briefs.

Michael Blumm, Jeffrey Bain Faculty Scholar and Professor of Law, Lewis & Clark Law School

Peter Byrne, John Hampton Baumgartner, Jr., Professor of Real Property Law, Georgetown University Law Center

Holly Doremus, James H. House and Hiram H. Hurd Professor of Environmental Regulation, University of California-Berkeley School of Law

Yxta Murray, Professor of Law, Loyola Law School – Los Angeles

Christopher Serkin, Professor of Law, Vanderbilt Law School

Nadav Shoked, Associate Professor, Northwestern Pritzker School of Law

Amy Sinden, Professor of Law, Temple University Beasley School of Law

Daniel Tarlock, Distinguished Professor of Law, Chicago-Kent College of Law

Laura Underkuffler, DuPratt White Professor of Law, Cornell Law School

Danaya Wright, Clarence J. TeSelle Professor of Law, University of Florida Levin College of Law

SUMMARY OF ARGUMENT

The question of the role of state law in defining the boundaries of property interests for purposes of federal Takings analysis has been raised by the petitioners and various *amici* in this case. Because federal Takings liability is premised on the federal Constitution, and serves a distinct federal constitutional objective of achieving fairness and justice, state property law definitions and corresponding boundaries cannot determine or even presumptively determine the relevant property interest for purposes of determining the denominator used in both the *Penn Central* and *Lucas* Takings analyses.

Past Supreme Court precedent is consistent with this view: state boundary lines have never been treated as determinative or presumptively determinative by this Court. On the contrary, this Court has treated state boundary lines as neither determinative nor presumptively so in cases such as *Penn Central*, *Keystone*, and *Palazzolo*. Contrary to the suggestion of some *amici*, moreover, there is no principled reason for giving more weight to horizontal state property boundaries between lots than there is to give weight to state law vertical boundaries of the sort at issue in *Keystone* and *Penn Central*.

The goals behind state lot lines and the purposes that animate the Fifth Amendment Takings Clause are not, in any way, inherently, connected. How much an owner's reasonable investment expectations were frustrated – the focus of Takings analysis – is relevant

to the level of burden on the owner and the justice of compensating or not compensating. State property definitions and corresponding boundary lines – and in particular, surface/horizontal lot lines – reflect historical practices serving technical, and administrative purposes that are unrelated to the purposes of protecting investment expectations or assuring justice and fairness. Indeed, blindly using state boundary lines to define the property for Takings purposes can lead to palpably unfair and unjust results, wherein some owners whose reasonable expectations were only minimally frustrated by government regulation would be much more likely to prevail in Takings litigation than owners whose reasonable expectations were very substantially frustrated.

Moreover, treating state lot lines as determinative or presumptively determinative would encourage manipulation on the part of owners that is not socially productive and that could lead to much more litigation and the payment of compensation in cases in which fairness and justice does not support such payment. Owners can easily change property lines by subdividing property and sometimes also by rebundling it. Given that factual reality, a holding that state lot lines are determinative or presumptively determinative would encourage gaming of the system, whereby investors choose to divide investments into smaller and more discrete parcels than they otherwise would. Owners would be incentivized in particular to establish any areas of possible future regulatory concern (such as wetlands) as a distinct legal parcel, even when such a

parcel is clearly part of a larger development project. Under a rule that gives determinative or even presumptively determinative weight to state boundary lines, an investor could manufacture a very strong *Lucas* 100% "total wipeout" claim for compensation even when the regulatory restriction at issue only modestly or minimally reduces the value of the investment project.

State property definitions and corresponding boundary lines – including lot lines – should not be determinative or presumptively determinative of the denominator used to calculate the diminution in value for purposes of the *Penn Central* and *Lucas* tests. To give them determinative or presumptively determinative weight would be contrary to precedent, inconsistent with the purposes of the Takings Clause, and likely to encourage socially unproductive gaming behavior in land markets.

ARGUMENT

A. Precedent Does Not Support Giving State Boundary Lines Determinative or Presumptively Determinative Weight

State law establishes all sorts of boundaries between different interests that can be held by different owners or by the same owner. Those boundaries can be vertical, as, for example, the boundary between a surface interest in land and sub-surface interest or the boundary between a surface interest and the

above-surface airspace. These boundaries can also be horizontal, as, for example, the boundary between two contiguous surface interests.

This Court's precedent treats these state boundary lines as neither determinative of the "property" that is at issue for Fifth Amendment Takings Clause purposes, nor as presumptively determinative. On the contrary, this Court has readily looked beyond state boundary lines in analyzing what property was at issue for Fifth Amendment purposes and how much that property's value has been diminished by regulation. As Professor Merrill has explained, the problem with "pure positivism" – an approach that would define as federal constitutional property for Takings Clause purposes whatever is defined as a property interest under state law – "is that it leads to the positivist trap, in the form of too much or too little property relative to social expectations or other normative commitments of the Justices about the kind of things that should be protected as property." Thomas Merrill, *The Landscape of Constitutional Property*, 86 U. VA. L. REV. 885, 950 (2000).

Two leading Takings cases – *Penn Central* and *Keystone* – implicate state law that establishes vertical boundaries and, in both cases, the boundaries play no role in the Court's understanding of the relevant property for Fifth Amendment purposes. In *Penn Central*, the Court refused to treat air rights as a separate property for Fifth Amendment purposes from the surface structure below even though New York law treated air rights as a distinct, alienable interest. In *Keystone*, this

Court refused to treat a sub-surface estate recognized under Pennsylvania law as a separate property for Fifth Amendment purposes.

As the Court explained in *Penn Central*:

> [T]he submission that appellants may establish a "taking" simply by showing that they have been denied the ability to exploit a property interest that they heretofore had believed was available for development is quite simply untenable. Were this the rule, this Court would have erred not only in upholding laws restricting the development of air rights, see *Welch v. Swasey*, *supra*, but also in approving those prohibiting both the subjacent, see *Goldblatt v. Hempstead*, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 (1962), and the lateral, see *Gorieb v. Fox*, 274 U.S. 603, 47 S.Ct. 675, 71 L.Ed. 1228 (1927), development of particular parcels. '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. In deciding whether a particular governmental action has effected a taking, this Court focuses rather both on the character of the action and on the nature and extent of the interference with rights in the parcel as a whole – here, the city tax block designated as the 'landmark site.'"

Penn Central Transp. Co. v. New York City, 438 U.S. 104, 130-131 (1978).

Building on *Penn Central*, the Court in *Keystone* explained that "[i]t is clear, however, that our takings jurisprudence forecloses reliance" on "legalistic distinctions within a bundle of property rights." *Keystone v. Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 499 (1987). As the Court elaborated: "For example, in *Penn Central*, the Court rejected the argument that the 'air rights' above the terminal constituted a separate segment of property for Takings Clause purposes. . . . in *Andrus v. Allard*, we viewed the right to sell property as just one element of the owner's property interest. . . . In neither case did the result turn on whether state law allowed the separate sale of the segment of property." *Id*. This Court in *Tahoe-Sierra* similarly suggested that the temporal boundaries created by state law did not define the relevant property at issue for Fifth Amendment purposes. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331 (2002).

Palazzolo is also highly instructive. Petitioner Anthony Palazzolo owned what this Court described as a waterfront "parcel" or "property" of land in the town of Westerly, Rhode Island. The Court repeatedly referred to the entire contiguous area of land owned by the petitioner as "the property," as a singular property. That "property" was first purchased as three separate lots under state law, then subdivided into eighty lots, of which seventy-four remained at the time the petitioner sought to develop the wetland portions of the area consisting of seventy-four lots. *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001). This Court held that because the

petitioner without question derived economic value from the upland portion of the property, which, again, consisted of seventy-four lots under state boundary rules, the court below had not erred in finding that petitioner's property has not been 100% diminished in value and thus did not implicate the test annunciated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). If this Court had treated each lot as a "property" for Fifth Amendment purposes, it presumably would have found that there had been a 100% diminution in value.[2]

The facts of *Palazzolo* itself underscore why, in general, state boundary lines between lots should not determine the contours of the property at issue for Fifth Amendment purposes. The number of lots in a given area is not, contrary to the suggestion of some *amici*, an immutable fact. There were seventy-four lots in the physically contiguous area owned by the petitioner in *Palazzolo* because the landowner decided to subdivide the property into eighty lots and then to sell six of them. The owner presumably could have chosen a different number of lots to carve out of the land area

[2] It is true that the Court in *Palazzolo* declined to address petitioner's argument that the wetlands portion of his property should be treated as distinct from the uplands portion. The argument was made for the first time before this Court and therefore was deemed waived. *Palazzolo*, 533 U.S. at 631. The petitioner in *Pallazolo* did not attempt to argue that the denominator for the purpose of Takings analysis should be defined based on lot lines in the briefing in the Rhode Island courts. The history of briefing in *Palazzolo* confirms lot lines in contiguous land holdings are generally understood as technicalities rather than as demarcating meaningfully separate, distinct investments in land.

– say ten or twenty or forty lots instead of eighty. But the "property" owned by the petitioner in any sense that should be meaningful for the Fifth Amendment would have been the same however many lots the owner had decided to create as part of the subdivision process. State boundary lines between lots are not the product of natural law or even necessarily a considered state or local legislative decision; instead as in *Palazzolo*, and as discussed more below, they may be in substance the product of the decision making of the owner of the physical area of land in question.

There is simply no principled basis for treating horizontal boundary lines created by state law as having any greater weight in defining Fifth Amendment property than vertical boundary lines created by state law. If horizontal state lot lines were treated as determinative or presumptively so, it logically would be impossible not to apply the same reasoning elsewhere and thus to unravel the principle articulated in *Penn Central* and *Keystone.* The result would be the unravelling of the parcel-as-a-whole rule, a rule that prevents plaintiffs from "defining the property interest taken in terms of the very regulation being challenged," *Tahoe-Sierra*, 535 U.S. at 331. *See also* David A. Dana, *Why Do We Have A Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617 (2015) (arguing that the principal alternative to the parcel-as a-whole rule in Takings cases – an approach that treats the property as solely the area affected by regulatory restriction – could open a broad range of ordinary economic regulation to, in effect, heightened scrutiny). The principle enunciated in

Penn Central and *Keystone* – that the definition of property for Fifth Amendment purposes cannot be driven by "legalistic" state categories that were not created and implemented with Fifth Amendment values and purposes in mind – is as applicable to horizontal boundary lines as much as it is to vertical ones.

B. Giving State Boundary Lines Determinative or Presumptively Determinative Weight Would Not Promote the Fifth Amendment's Goal of Assuring Fairness and Justice

"Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 413 (1922). The Fifth Amendment Takings Clause is intended to assure fairness and justice – and, in particular, to ensure that excessive burdens are not imposed on property owners without compensation while at the same time allowing many uncompensated burdens so that government can "go on." The purpose of the Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation "is to prevent the government from 'forcing some people alone to bear burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Palazzolo v. Rhode Island*, 533 U.S. 606, 618 (2001) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

Because the Takings Clause is concerned with the fairness (or lack thereof) of the imposition of particular burdens without compensation, one highly relevant factor is the magnitude of the burdens imposed on an owner in any given case. This Court generally has not looked to the dollar amount of the burden imposed by regulatory change as relevant to the burden for Takings Clause purposes, presumably because that would move Takings analysis away from the textual focus of the Takings Clause on "property" (as opposed to simply money) and toward an open-ended substantive due process analysis that could encompass a wide range of ordinary economic regulation. *See Eastern Enterprises v. Apfel*, 524 U.S. 498, 541 (1998) (explaining that limiting the Takings Clause to cases involving government action "to destroy, or take, a specific property interest" serves to prevent the expansion of "an already difficult and uncertain rule to a vast category of cases not deemed, in our law, to implicate the Takings Clause.") (Kennedy, J., concurring). Instead, in Takings cases, the focus has been on the diminution in value of the property at issue due to regulatory change. Diminution in value figures prominently in the *Penn Central* test, and is decisive as to whether the *Penn Central* or *Lucas* tests apply. Diminution in value is surely part of these tests because it captures in some fashion the burden imposed on the owner. *See Penn Central*, 438 U.S. at 124 ("The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations").

But if the burden imposed on the owner is what drives the use of diminution of value as part of Fifth Amendment Takings tests, then the components used as part of the diminution in value calculation should also be ones that make sense in terms of the overriding purpose of approximating the burden on the owner. In particular, the denominator – the property – should be assessed in a way that comports with the burden-approximation purpose of diminution in value. An investor bears a greater burden – all else being equal – when a large percentage of what it reasonably conceived of and treated as a distinct investment is reduced in value as compared to when there is a small percentage reduction.

The formal boundary lines between lots under state law, however, tell us nothing about the burden on the property owner and hence are unsuitable as determinants or presumptive determinants of what constitutes "the property" for Fifth Amendment purposes in a given case. When calculating the denominator for purposes of the diminution in value, it may be quite reasonable for a court to consider a fifty-acre area that a developer purchased to build townhomes for sale and hence regarded as a distinct investment as "the property" for purposes of calculating the diminution in value. But the fifty-acre townhome development area could be purchased by the developer or later reconfigured onto one or ten or fifty or a hundred lots. Lot lines can be configured and reconfigured in many ways at the behest of subdivision developers. The investment in any meaningful sense would be the same regardless

of the number of lots, and so too, presumably, would the burden imposed by any particular regulatory restriction. In and of themselves, state law boundaries are uninstructive about the scope of a distinct investment as reasonably conceived by an investor and the corresponding extent to which a burden has been imposed upon the investor. Accordingly, lower courts have held that a contiguous land area under common ownership – an area an investor generally would regard as a single investment because of physical unity – presumptively constitutes a single investment and hence a single property for Fifth Amendment purposes. *See, e.g.*, *Giovanella v. Conservation Commission of Ashland*, 857 N.E.2d 451, 457-458 (Mass. 2006) (reviewing the cases holding that contiguous properties constitute a single property).

Indeed, treating state lot lines as determinative or presumptively determinative of the "property" for Fifth Amendment purposes could result in compensation for less burdened owners and no compensation for more burdened owners. Consider two cases – (1) an investor who buys a ten-acre lot near a river and (2) an investor who buys two contiguous five-acre lots near a river. Imagine that new regulatory restrictions regarding wetlands are enacted that prevent the owner of the ten-acre lot from building on nine of the ten acres, whereas new regulatory restrictions regarding wetlands prevent the owner of the contiguous five-acre lots from building on one of the five-acre lots but allows building on the entirety of the other five-acre lot. In a regime where lot lines are determinative or

presumptively determinative of what constitutes a Fifth Amendment property, the owner of the two five-acre lots has a much stronger claim for a *Lucas*-style Taking of the property *qua* a single five-acre lot than does the owner of the ten-acre lot even though the owner of the ten-acre lot was actually burdened with a more extensive development restriction.

State boundary lines are surely drawn for a variety of reasons, but nowhere, we believe, are they drawn by state or local legislative bodies, planning commissions or subdivision developers themselves with the ideas of fairness and justice in mind that are at the heart of the Fifth Amendment Takings Clause. State lot lines are not intended to capture the line between assets and resources that are or can be privately owned and those that are publicly owned and/or subject to special public claims. State boundary lines are not drawn to approximate or limit the scope of distinct investments by a particular investor in land. Nor do such lines necessarily correlate in any fashion with the burden of regulatory restrictions on land development. They are "legalistic distinctions," *Keystone*, 480 U.S. at 499, that should not determine when a Taking has or has not occurred.

C. Giving State Boundary Lines Determinative or Presumptively Determinative Weight Would Encourage Socially Unproductive Gaming On the Part of Investors

Takings law – as does all law – helps shape private conduct. In particular, we might anticipate that, as rational economic actors, land developers will try to maximize their ability to demand and recover compensation from the government should regulatory restrictions be adopted that would limit their development plans in particular investments. Even if not all investors in land are driven by profit maximization goals, surely many, and many of the largest, are.

If this Court were to suggest or hold that state boundary lines are determinative or presumptively determinative of property definitions for Fifth Amendment Takings purposes, then land developers and even ordinary owners would have a strong incentive to configure and reconfigure their land holdings into smaller lots so that they could demand compensation whenever a regulatory restriction blocked development on a single lot. A subdivision developer of an area near wetlands, for example, might choose to carve out several separate lots that contained only wetlands so that, if a Clean Water Act Section 404 permit to fill the wetlands were denied, the developer could argue that he had lost 100% of the value of several properties and was entitled to compensation under the *Lucas* test. Because possible regulation is often in the air – under scientific and political debate – regarding environmentally sensitive areas for years before it is actually promulgated

and implemented, investors could anticipate portions of their land holdings that might be subject to future regulation and configure them into very small lots under state law so that regulators would be deterred from ever acting to protect the environmentally sensitive areas and, if regulators did act, the investors would be well-positioned to argue that they were entitled to compensation under the *Lucas* test.

Wisconsin law itself suggests how easily a subdivision developer may be able to determine the number and configuration of lots. Wisconsin law clearly anticipates that the developer – the subdivider, in the parlance of the statute – will submit its version of the platting for review and approval. Wis. Stat. Section 236.11. The approval need not be given by a local legislative body but rather can be delegated to "a planning committee or commission of the approving governing body." Wis. Stat. Section 236.10. Wis. Stat. Section 236.40 also allows an individual subdivision owner or lot owner to seek replatting or alteration of plat lines. Although public notice and court approval is required for replatting, there are no statutory restrictions on what a court in its discretion may approve except for areas currently dedicated to the public.

In *Lucas*, Justice Stevens expressed concern about gaming actions involving lot lines on the part of landowners, suggesting that "investors will manipulate the relevant property interests, giving the Court's [*Lucas*] ruling [regarding 100% diminutions in value] sweeping effect." But that has not happened to any widely noted extent, in large part one might suppose because

courts have not treated state boundary lines as determinative or presumptively determinative of what constitutes a property for Fifth Amendment purposes and hence have not rewarded and encouraged manipulation on the part of investors. A holding by this Court that gave state boundary lines determinative or presumptively determinative effect would facilitate the manipulation of the sort described by Justice Stevens.

In sum, treating state boundary lines as determinative or presumptively would encourage investors in and owners of land to convert many situations that would be analyzed under the *Penn Central* ad hoc balancing, less than 100% diminution in value framework into situations analyzed under the *Lucas*, presumptive Taking, 100% diminution in value framework. It would expand the scope of the *Lucas* test beyond the quite limited swath of cases which this Court has explained was its intended scope. *Lucas*, 505 U.S. at 1018 ("And the *functional* basis for permitting the government, by regulation, to affect property values without compensation – that 'Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law,' . . . does not apply to the relatively rare situations where the government has deprived a landowner of all economically beneficial uses"); *Tahoe-Sierra*, 535 U.S. at 1438 (explaining that "our holding [in *Lucas*] was limited to 'the extraordinary circumstance when *no* productive or economically beneficial use of land is permitted.'").

Elevating the role of state law boundaries in defining Fifth Amendment property could vastly expand the compensation guarantee under the Fifth Amendment to the point that, with respect to some kinds of socially valuable land regulation, government could hardly go on. Effective land use regulation that fairly balances public and private needs and objectives would be undermined by according state boundary lines determinative or presumptively determinative weight with regard to what constitutes "property" for purposes of the Fifth Amendment. *See Tahoe-Sierra*, 535 U.S. at 339-341 (explaining that a rule that held temporary moratoria to be Takings would discourage regulators' attempts to address environmental problems in a way that treated landowners evenhandedly).

CONCLUSION

In sum, state boundary lines between lots do not and should not define or presumptively define the contours of the "property" for purposes of the Fifth Amendment Takings Clause. The decision of the Wisconsin Court of Appeals should be affirmed.

Respectfully submitted,

DAVID A. DANA
Counsel of Record
NORTHWESTERN PRITZKER SCHOOL OF LAW
357 East Chicago Ave.
Chicago, IL 60611
(312) 503-0240
d-dana@law.northwestern.edu