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

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

In a regulatory takings 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?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

REGULATIONS

OTHER AUTHORITIES

TABLE OF AUTHORITIES – Continued

AMICUS CURIAE BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

Pursuant to Supreme Court Rule 37.3(a), Mountain States Legal Foundation ("MSLF") respectfully submits this amicus curiae brief, on behalf of itself and its members, in support of Petitioners.[1]

IDENTITY AND INTEREST OF AMICUS CURIAE

MSLF is a non-profit, public interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts those issues vital to the defense and preservation of individual liberties, the right to own and use property, limited and ethical government, and the free enterprise system. MSLF has members who reside, own property, and work in all 50 states.

Since its creation in 1977, MSLF and its attorneys have defended individual liberties and have been active in ligation opposing governmental actions that result in takings of private property. *See*, *e.g.*,

[1] The parties have consented to the filing of this amicus curiae brief. *See* Supreme Court Rule 37.3(a). Pursuant to Supreme Court Rule 37.6, the undersigned affirms that no counsel for a party authored this brief in whole or in part, and no person or entity other than MSLF, its members, or its counsel, made a monetary contribution specifically for the preparation or submission of this brief.

Brandt v. United States, 710 F.3d 1369 (Fed. Cir. 2013) (represented Plaintiff); *Laguna Gatuna, Inc. v. United States*, 50 Fed. Cl. 336 (Fed. Cl. 2001) (represented Plaintiff); *Mountain States Legal Found. v. Hodel*, 799 F.2d 1423 (10th Cir. 1986) (Plaintiff); *Horne v. Department of Agric.*, ___ U.S. ___, 135 S.Ct. 2419 (2015) (amicus curiae); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (amicus curiae); *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992) (amicus curiae). Moreover, the issue to be resolved in this case vis-à-vis the "parcel as a whole" concept described in *Penn Central Transportation Company v. City of New York*, 438 U.S. 104, 130-31 (1978) will affect property owners across the country, including MSLF's members who own private property. Accordingly, MSLF respectfully submits this amicus curiae brief in support of Petitioners.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

Petitioners ("Murrs") are four siblings who collectively own two parcels of property on the St. Croix River in Troy, Wisconsin. *Murr v. Wisconsin*, 359 Wis.2d 675, 2014 WL 7271581 at *1 (2014) ("*Murr II*"). The two properties are known as Lots E and F. In 1960, the Murrs' parents purchased Lot F. *Id.* The Murrs' parents built a cabin on Lot F and transferred title to Lot F to the family plumbing business. *Id.* Three years later, in 1963, the Murrs' parents

purchased Lot E as an investment property. *Id.* The Murrs' parents planned to develop Lot E separately or sell it to a third party in the future. *Id.*

Lots E and F are contiguous lots, each consisting of approximately 1.25 acres. *Murr v. St. Croix Bd. of Adjustment*, 796 N.W.2d 837, 841 (Wis. App. 2011) ("*Murr I*"). Both Lots E and F are "moderately level at the top and at the river, but are bisected by a steep 130 foot bluff. . . ." *Id.* In 1994, title to Lot F was transferred from the family plumbing business to the Murrs as a gift. *Murr II*, 2014 WL 7271581 at *1. Then, in 1995, title to Lot E was transferred from the Murrs' parents to the Murrs, also as a gift. *Id.*

Years later, the Murrs sought to sell Lot E to pay for improvements to the cabin on Lot F. *Id.* Only then did the Murrs become aware of St. Croix County Code of Ordinances, Land Use and Dev., subch. III.I, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a ("Ordinance"), which prevents the Murrs from selling or developing Lot E on its own. *Id.*; *see also* Petitioner's Appendix D-1. Specifically, the Ordinance, which is based on Wis. Admin. Code § NR 118.08(4), requires that individual lots have a minimum "net project area" of one acre. *Murr II*, 2014 WL 7271581 at *1. Although Lots E and F are both larger than an acre, under the provisions of the Ordinance, Lots E and F have net project areas of .48 and .50 acres. *Murr I*, 796 N.W.2d at 841. Thus, under the Ordinance, Lots E and F are considered substandard. *See id.* at 842.

The Ordinance includes a "grandfather clause," which allows owners of substandard lots to exercise their property rights and avoid complying with the Ordinance so long as:

> 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 acre or 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.

Ordinance § 17.36, I.4.a (emphasis added). Because the Murrs own both Lots E and F, and because Lots E and F are contiguous, the Ordinance arbitrarily prohibits the Murrs from separately developing and/or selling their two parcels of property. Yet, if anyone else owned Lot E, he or she would be entitled to develop or sell Lot E independent from Lot F.

II. PROCEDURAL BACKGROUND.

The Murrs first sought variances from the Ordinance from the St. Croix County Board of Adjustment that would, *inter alia*, allow the Murrs to "sell or use two contiguous substandard lots in common ownership as separate building sites." *Murr I*, 796 N.W.2d at 841. The St. Croix County Board of Adjustment denied the Murrs' variance request and the denial

was upheld by the Wisconsin Court of Appeals. *Id*. at 840, 846.

After exhausting administrative and judicial remedies regarding the denial of their variance request, the Murrs initiated the instant action alleging an uncompensated taking of Lot E in violation of the Wisconsin and U.S. Constitutions. *Murr II*, 2014 WL 7271581 at *2. The Murrs argued below that "the Ordinance deprived them of all, or substantially all, beneficial use of their property." *Id.* at *3. Although the Murrs alleged only that Lot E was taken, the trial court considered the value of Lots E and F together. *Id.* at * 4. The Wisconsin Court of Appeals ultimately upheld the ruling of the trial court, agreeing that it was bound to consider Lots E and F as a single parcel of property, because the two lots are commonly owned and contiguous. *Id.* at *4-5. The Wisconsin Court of Appeals reached its conclusion, in part, based on its reading of the "parcel as a whole" concept, explained by this Court in *Penn Central*. *See id* at *14. Thereafter, the Wisconsin Supreme Court denied the Murrs' petition for review. *Murr v. Wisconsin*, 862 N.W.2d 899 (2015).

On August 14, 2015, the Murrs filed their petition for writ of certiorari to this Court, which was granted on January 15, 2016. As is demonstrated below, the decision of the Wisconsin Court of Appeals, that the "parcel as a whole" concept from *Penn Central* requires courts to aggregate legally distinct, commonly owned, contiguous properties for a regulatory takings analysis, is neither required by this

Court's takings jurisprudence nor compelled by the Constitution.

SUMMARY OF ARGUMENT

In *Penn Central*, this Court announced that in performing a regulatory takings analysis, courts should consider individual parcels of property as a whole, instead of considering individual property rights in isolation. There, this Court was unwilling to unbundle the property at issue into individual sticks, *i.e.*, divide a single parcel of private property into separate rights. 438 U.S. at 130-31. Specifically, the petitioner in *Penn Central* alleged a taking of its rights to the airspace above Grand Central Station. *Id.* at 136-37. This Court declined to separate the airspace rights from petitioner's other remaining rights in the fee property on which Grand Central Station is located. *Id.* at 138.

Nearly forty years later, lower courts are still grappling with the meaning of *Penn Central*. Courts continue to struggle with defining the denominator against which to perform a regulatory takings analysis. This Court has offered some guidance, by deeming any blanket rule requiring aggregation of a property owner's multiple properties as "extreme" and "unsupportable." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992). Despite this Court's apparent rejection of an approach that would require aggregation of legally distinct, commonly

owned, contiguous properties in regulatory takings cases, the lower courts require more specific guidance.

The "parcel as a whole" concept as described by *Penn Central* does not create a rule that legally distinct, commonly owned, contiguous properties must be aggregated in regulatory takings analyses. Such an approach is contrary to the regulatory takings doctrine itself, which has been repeatedly described as an "ad hoc, factual" inquiry. *Lucas*, 505 U.S. at 1015 (citing *Penn Central*, 438 U.S. at 124); *see also Brown v. Legal Found. of Washington*, 538 U.S. 216, 233 (2003).

Moreover, the strict aggregation rule as announced by the Wisconsin Court of Appeals, which will often, if not always, work to the detriment of landowners, defies the Fifth and Fourteenth Amendment's protections of private property. In light of the judiciary's duty to protect private property, this Court should expressly reject the decision below, which wrongly held that *Penn Central* requires courts to aggregate legally distinct, commonly owned, contiguous properties for takings analyses.

ARGUMENT

I. THE "PARCEL AS A WHOLE" CONCEPT IN *PENN CENTRAL* DOES NOT COMPEL CREATION OF A STRICT RULE REQUIRING COURTS TO AGGREGATE LEGALLY DISTINCT, COMMONLY OWNED, CONTIGUOUS PROPERTIES IN A REGULATORY TAKINGS ANALYSIS.

In *Penn Central*, the owner of fee property, upon which Grand Central Station in New York City is located, sought a variance from a historic preservation ordinance ("Landmark Law"), which prevented the owner from constructing an office building atop Grand Central Station. 438 U.S. at 113-18. After New York City designated Grand Central Station as a "landmark" governed by the Landmark Law, the fee owner sought permission to construct one of two different additions – either a 55-story office building, or a 53-story office building. *Id.* at 116-17. Both of the fee owner's proposed additions were denied. *Id.* at 117-18.

The fee owner challenged the denial of its request to construct the office building above Grand Central Station. *Id.* at 119. Based upon its misunderstanding of *United States v. Causby*, 328 U.S. 256, 261-62 (1946), the fee owner argued before this Court that the airspace located above Grand Central Station was a discrete property interest. *Penn Central*, 438 U.S. at 130. Thus, it was the fee owner's argument that since the Landmark Law prevented it from utilizing the airspace above the station, *i.e.*, by denying its

application to construct an office building, the Landmark Law effectuated a taking of its property interest in the airspace above the station. In response to that argument, this Court explained that:

> "Takings" 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 the rights in the parcel as a whole. . . .

Id. at 130-31 (emphasis added).[2] This Court thus held that the Landmark Law did not effect a taking; however, the Court's holding and the "parcel as a whole" concept is inapplicable to the instant action.

The Wisconsin Court of Appeals incorrectly extended the "parcel as a whole" concept beyond reason and to the detriment of the Murrs. Unlike the plaintiff in *Penn Central*, the Murrs did not allege a taking of a discrete property interest within their fee interest. Instead, the Murrs initiated the instant action vis-à-vis their full, fee title interest in Lot E. *Murr II*, 2014 WL 7271581 at * 2 ("The Murrs alleged

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[2] However, the three dissenting Justices in *Penn Central* described the Landmark Law as violating the Fifth Amendment "[i]n a very literal sense." 438 U.S. at 142 (Rehnquist, J., dissenting).

that the Ordinance . . . deprived them of 'all, or practically all, of the use of Lot E because the lot cannot be sold or developed as a separate lot.' "). The Wisconsin Court of Appeals wrongly aggregated Lots E and F together, thereby doubling the size of the denominator, against which it performed its takings analysis. *See Lucas*, 505 U.S. at 1016 n.7 (Describing a situation "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 takings claimant's other holdings in the vicinity" as "extreme" and "unsupportable."); *Bowles v. United States*, 31 Fed. Cl. 37, 41 n.4 (1994) (property owner who owned multiple contiguous lots in a subdivision was allowed to bring a takings claim for a single lot on which he was precluded from building a single family home).

Indeed, defying logic, the Wisconsin Court of Appeals twisted *Penn Central*'s clear language regarding a "single parcel," 438 U.S. at 130, into a strict rule "that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein." *Murr II*, 2014 WL 7271581 at * 5. Then, under its false assumption that it must consider the value of Lots E and F together, the court found that a taking had not occurred because if the Murrs razed their existing cabin on Lot F they could build a new residence "located entirely on Lot E, entirely on Lot F, or it could straddle both

lots." *Murr II*, 2014 WL 7271581 at * 5.[3] Contrary to the decision of the Wisconsin Court of Appeals, this interpretation is neither required nor sanctioned by *Penn Central*. Essentially, the aggregation rule announced by the Wisconsin Court of Appeals requires the Murrs to cede their right to use Lots E and F independent of each other to St. Croix County.

Moreover, the analysis endorsed by this Court in *Penn Central* was merely that regulatory takings analyses are "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124. This imprecise definition of regulatory takings analyses counsels against reading *Penn Central* as creating a strict aggregation rule. Based upon the foregoing, this Court should affirmatively reject application of a strict aggregation rule in regulatory takings analyses and reverse the judgment of the Wisconsin Court of Appeals.

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[3] Yet, the proper question in a regulatory takings analysis is: "'What has been taken?' not 'What has been retained?'" Richard A. Epstein, *Takings Private Property And The Power Of Eminent Domain* 61-62 (Harvard Univ. Press 1985); *Washington Legal Found. v. Legal Found. of Washington*, 271 F.3d 835, 846-47 (9th Cir. 2001) ("Resolving a Fifth Amendment takings claim requires a fact specific inquiry into *what has been taken* and what compensation is due.") (emphasis added).

II. AGGREGATING FEE PROPERTY FOR A TAKINGS ANALYSIS IS ABHORRENT TO THE CONSTITUTION.

A. It Is The Duty Of The Judiciary To Protect Private Property.

Protection of private property is essential to liberty and a free society. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Envtl. Protection*, 560 U.S. 702, 734 (2010) (Kennedy, J., concurring) ("[T]he right to own and hold property is necessary to the exercise and preservation of freedom."); *Lynch v. Household Finance Corp.*, 405 U.S. 538, 552 (1972) ("[A] fundamental interdependence exists between the personal right to liberty and the personal right in property."); *see Wilkinson v. Leland*, 27 U.S. 627, 657 (1829) ("The fundamental maxims of a free government seem to require, that the rights of personal liberty and private property should be held sacred."). For example, in 1897, this Court declared:

> Due protection of the rights of property has been regarded as a vital principle of republican institutions. "Next in degree to the right of personal liberty" . . . "is that of enjoying private property without undue interference or molestation." . . . The requirement that the property shall not be taken for public use without just compensation is but "an affirmance of a great doctrine established by the common law for the protection of private property. It is founded in natural equity, and is laid down as a principle of universal law. *Indeed, in a free government, almost all other*

> *rights would become worthless if the government possessed an uncontrollable power over the private fortune of every citizen*."

Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 235-36 (1897) (citations and quotations omitted) (emphasis added).

To guarantee the protection of private property, the Framers separated the government's powers into three co-equal branches, and intended for the judiciary to be the ultimate protector of property and liberty. *United States v. Lee*, 106 U.S. 196, 218-20 (1882) (acknowledging the judiciary must enforce the guarantees of the Fifth Amendment); Clint Bolick, *David's Hammer: The Case for an Activist Judiciary* 35-47 (2007). For example, Alexander Hamilton explained that it is the duty of the judiciary "to declare all acts contrary to the manifest tenor of the Constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing." *The Federalist Papers*, Federalist No. 85, 466 (Hamilton) (Clinton Rossiter ed., 1961); *accord Marbury v. Madison*, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is" and to declare that a law "repugnant to the [C]onstitution, is void.").

Only if the judiciary fulfills its duty will property and liberty be secure. *See* Bernard H. Siegan, *Property and Freedom: The Constitution, the Courts, and Land-Use Regulation* 47-74 (1997) ("*Property and Freedom*"); Mark L. Pollot, *Grand Theft and Petit*

Larceny: Property Rights in America 56-66 (1993). Despite its duty to protect private property rights, the Wisconsin Court of Appeals wrongly extended the "parcel as a whole" concept to the detriment of private property owners, thereby extinguishing the Murrs' private property interests in contravention of the Fifth and Fourteenth Amendments to the U.S. Constitution.

B. There Is No Constitutional Basis For A Rule Requiring Aggregation In A Takings Analysis.

Because property is of the utmost importance, the Fifth and Fourteenth Amendments to the U.S. Constitution expressly prohibit the government from taking private property for public use without just compensation. U.S. Const. amends. V, XIV; *Olson v. United States*, 292 U.S. 246, 255 (1934) ("It is the property and not the cost of it that is safeguarded by state and Federal Constitutions"). The Constitution protects private property, regardless of the amount of property owned by an individual. *See Calder v. Bull*, 3 Dall. 386, 388 (1798) ("[A] law that takes property from A and gives it to B . . . is against all reason and justice. . . ."); *Eastern Enterprises v. Apfel*, 524 U.S. 498, 523 (1998) (plurality opinion) (holding the same for personal property). To carry out the intent of the Framers and remain faithful to the Constitution, courts must ensure that private property rights are protected from government abuse. Therefore, even if *Penn Central* required aggregation of legally distinct,

contiguous, commonly owned properties for takings analyses, it is the duty of this Court to disavow such a rule because it runs afoul of the Constitution.

The present issue, whether a rule of aggregation is required in regulatory takings cases, has been raised in both legal opinions and scholarship. *See*, *e.g.*, *Lucas*, 505 U.S. at 1016 n.7 ("Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured."); *id.* ("Unsurprisingly, this uncertainty regarding the composition of the denominator in our 'deprivation' fraction has produced inconsistent pronouncements by the Court.") (citations omitted); John E. Fee, *The Takings Clause As A Comparative Right*, 76 S. Cal. L. Rev. 1003, 1030 (2003) ("Whether a person is deemed to have lost all economically viable use of his or her land depends on the relevant parcel of land that is used as the basis for comparison."); Marc R. Lisker, *Regulatory Takings And The Denominator Problem*, 27 Rutgers L. J. 663, 666 (1996) ("The key issue in making the takings determination . . . is defining the appropriate unit of property against which to conduct the . . . takings inquiry.").

The foregoing demonstrates the importance of the Court's decision in this case. In defining the denominator in regulatory takings analyses, this Court must ensure that the intent of the Framers is carried out while remaining faithful to the Constitution's protections of private property. Likewise, a

solution should be easy to understand and apply. Common sense supports the proposition that discrete fee property interests do not change based solely on happenstance, such as common ownership. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 331-32 (2002) ("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.) (citing Restatement of Property §§ 7-9 (1936)); *Lucas*, 505 U.S. at 1027 ("[O]ur 'takings' jurisprudence . . . has traditionally been guided by the understandings of our citizens regarding the content of, and the State's power over, the 'bundle of rights' that they acquire when they obtain title to property."); *id*. at 1029 ("Any limitation so severe [as to prohibit all economically beneficial use of land] cannot be newly legislated or decreed (without compensation), but must inhere in the title itself. . . ."); Steven J. Eagle, *The Parcel And Then Some: United Of Ownership And The Parcel As A Whole*, 36 Vt. L. Rev. 549, 570 (2012) ("Each legal parcel is a separate parcel for takings analysis, unless and until the facts indicate otherwise."). Thus, in determining the denominator in a regulatory takings analysis, courts should always begin with the assumption that the denominator in the takings equation is an individual parcel of property. To do otherwise undermines the sanctity of private property and disturbs a property owner's reliance upon his or her distinct fee properties. *See* Bernard H. Siegan, *Property and Freedom*, *supra*, at 5-9 (Demonstrating

that a major purpose of securing property rights is "to maintain a viable economy upon which general welfare depends.").

Moreover, the Fifth and Fourteenth Amendments' guarantees should not be subject to such a great degree of manipulation. Individual parcels of property should each be subject to the same constitutional protections, regardless of ownership. *See*, *e.g.*, Eagle, *The Parcel And Then Some*, 36 Vt. L. Rev. at 570 ("Large landowners are disadvantaged in their constitutional rights compared to small landowners for no apparent constitutional reason other than to find some limit to the regulatory takings doctrine."). Transforming the "parcel as a whole" concept from *Penn Central* into a strict aggregation rule will lead to attempts by government to manipulate regulations to avoid paying property owners just compensation. *See*, *e.g.*, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980) ("[A] state, by *ipse dixit*, may not transform private property into public property without compensation, even for the limited duration of the deposit in court. This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power."). It could also encourage manipulation by landowners to protect their private property interests. Eagle, *The Parcel And Then Some*, 36 Vt. L. Rev. at 566 ("[M]anipulation of 'parcel as a whole' is a game that either side can play. If owners can engage in 'conceptual severance,' then regulators can engage

in 'conceptual agglomeration.'" (footnote omitted)). Neither outcome is a logical result of the protection afforded private property by the Constitution. To avoid this type of manipulation and to ensure that courts adequately protect private property, this Court should reject the Wisconsin Court of Appeals' erroneous interpretation of the "parcel as a whole" concept.

III. A STRICT AGGREGATION RULE WOULD CREATE A MYRIAD OF PROBLEMS.

Another potential problem with the imposition of a blanket aggregation rule in regulatory takings cases arises in the context of split estates. For example, many states recognize mineral estates as an estate independent from the surface estate. *See*, *e.g.*, *Slaaten v. Cliff's Drilling Co.*, 748 F.2d 1275, 1277 (8th Cir. 1984) ("Once the mineral and surface rights have been separated, two estates exist, which are as distinct as if they contained two parcels of land." (citing *Bilby v. Wire*, 77 N.W.2d 882, 889 (N.D. 1956)); *Atlantic Refining Co. v. Noel*, 443 S.W.2d 35, 40 (Tex. 1968) (same); *Jilek v. Chicago, Wilmington & Franklin Coal Co.*, 47 N.E.2d 96, 98 (Ill. 1943) (same); *Johnson v. Gray*, 410 P.2d 948, 950 (N.M. 1966) (same); *Smith v. Glen Alden Coal Co.*, 32 A.2d 227, 234-35 (Pa. 1943) (recognizing three estates: the surface estate, the mineral estate, and the support estate). It is axiomatic that each individual estate is protected from takings without just compensation by the guarantees of the Fifth and Fourteenth Amendments. *Pennsylvania Coal Co. v. Mahon*, 260 U.S.

393, 414 (1922) (Recognizing that the Constitution protects the "very valuable [mineral] estate."); *Miller Bros. v. Dep't of Natural Res.*, 513 N.W.2d 217, 220 (Mich. App. 1994) (recognizing the state and federal constitutions protect individual oil and gas estates).

In the context of split estates, application of a strict aggregation rule would almost always harm the property owner. For example, if a property owner owns both the mineral estate and the surface estate in the same property, and the government enacts a regulation that destroys one of the two estates, should the property owner recover nothing? *See Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 517 (1987) (Rehnquist, C.J., dissenting) ("The [*Penn Central*] Court gave no guidance on how one is to distinguish a 'discrete segment' from a 'single parcel.'"). It would appear that application of the strict aggregation rule would preclude the property owner from recovering just compensation, merely because one of the property owner's two separate estates might retain some use or value. Such an outcome cannot have been intended by the Framers who believed:

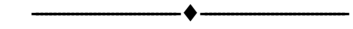
> [T]he right of acquiring and possessing property and having it protected, is one of the natural, inherent, and unalienable rights of man. Men have a sense of property: Property is necessary to their subsistence, and correspondent to their natural wants and desires;

> its security was one of the objects, that induced them to unite in society.

VanHorne's Lesse v. Dorrance, 2 Dall. 304, 310 (1795).

Finally, the blanket imposition of the aggregation rule also implicates equal protection and due process concerns. *See*, *e.g.*, Steven J. Eagle, *Penn Central And Its Reluctant Muftis*, 66 Baylor L. Rev. 1, 21 (2014) ("The Court has continued to invoke *Armstrong*'s dicta in a way that blurs the distinction between the Equal Protection and Due Process Clauses and the Takings Clause." (citing *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 536-37 (2005))); Fee, *The Takings Clause As A Comparative Right*, 76 S. Cal. L. Rev. at 1053 ("[T]he ideal of formal equality . . . governs the implementation of other constitutional provisions, such as the Equal Protection Clause. Our society has long recognized that a law is more just if it binds everyone in a society equally."). Plainly, the Constitution prohibits the government from taking private property without paying the property owner just compensation. Treating a property owner differently based solely on whether he or she owns multiple properties (or multiple estates in the same property), is not what the Framers envisioned in drafting the Constitution. *See* Siegan, *Property and Freedom*, *supra*, at 29 ("With respect to property, the Constitution imposes on government the universal command that 'Thou shalt not steal.' Theft is wrong whether committed by one person or the majority of persons.").

Furthermore, conditioning constitutional guarantees based upon the amount of property an individual owns is impermissible. *See Koontz v. St. Johns River Water Mgmt. Dist.*, ___ U.S. ___, 133 S.Ct. 2586, 2595 (2013) ("We have often concluded that denials of governmental benefits were impermissible under the unconstitutional conditions doctrine." (citing *Perry v. Sindermann*, 408 U.S. 593, 597 (1972); *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974))). Therefore, a property owner's entitlement to just compensation for property taken by the government cannot be conditioned on whether or not the owner owns multiple properties and whether or not the other properties are contiguous to the property that has been taken. Indeed, the Constitution requires protection of private property regardless of ownership. Therefore, this Court should formally renounce the strict aggregation rule created by the Wisconsin Court of Appeals.



CONCLUSION

For the foregoing reasons, this Court should reject the Wisconsin Court of Appeals' reading of *Penn Central* and disavow a strict rule requiring that two legally distinct, commonly owned, contiguous parcels must be aggregated for takings analysis purposes.

DATED: April 18, 2016

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