No. 15-214

In The Supreme Court of the United States

JOSEPH P. MURR, et al.,

Petitioners,

v.

STATE OF WISCONSIN and ST. CROIX COUNTY,

Respondents.

On Writ Of Certiorari To The Court Of Appeals Of The State Of Wisconsin

BRIEF OF *AMICI CURIAE* SOUTHEASTERN LEGAL FOUNDATION AND THE BEACON CENTER 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?

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INTEREST OF *AMICI CURIAE*[1]

Southeastern Legal Foundation (SLF), founded in 1976, is a national non-profit, public interest law firm and policy center that advocates constitutional individual liberties, limited government, and free enterprise in the courts of law and public opinion. In particular, SLF advocates for the protection of private property interests from unconstitutional governmental takings. This aspect of its advocacy is reflected in SLF's filing of *amicus* briefs in support of property holders in cases such as *Suitum v. Tahoe Regional Planning Authority*, 520 U.S. 725 (1997); *Dolan v. City of Tigard*, 512 U.S. 374 (1994); and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

The Beacon Center of Tennessee is a non-profit, nonpartisan, and independent Section 501(c)(3) organization dedicated to providing free market solutions for free people in Tennessee. The Beacon Center's vision includes limited government and the robust protection of property rights for individuals through policy and litigation. The Beacon Center believes that an individual should not suffer a taking of their property absent a meaningful and a well

[1] All parties have consented to the filing of this brief by blanket or individual letter. See Sup. Ct. R. 37.3(a). No counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, its members, and its counsel has made monetary contribution to the preparation or submission of this brief. See Sup. Ct. R. 37.6.

outlined eminent domain process. The Beacon Center is interested in seeing that more clarity and substantive protection of property rights be brought to the jurisprudence of eminent domain, particularly vis a vis regulatory takings.

SUMMARY OF ARGUMENT

This Court should reverse the decision of the Wisconsin Court of Appeals and remand this case for further proceedings. That court's aggregation of two contiguous lots that have otherwise been treated separately is neither fair nor a just treatment of the property owner because it totally deprives the owners of the economic value of one of those lots.

This Court should take the opportunity presented by this case to devise a test for evaluating future attempts to aggregate property. That test should start with a presumption against the proposed aggregation, then turn to the facts regarding the owner's expectations and use of the properties at issue.

ARGUMENT

I. Introduction.

St. Croix County's de facto aggregation of two independent parcels of land solely because those parcels are contiguous and owned by the same persons results in a taking and thus, violates the Fifth

Amendment of the U.S. Constitution. Petitioners, the Murrs, own two adjacent lots (Lot E and Lot F) on Wisconsin's Lake St. Croix in the St. Croix Cove Subdivision. The lots have been in their family for more than 50 years. In 1960, the Murrs' parents purchased Lot F, and, shortly thereafter, placed title in the name of the family's plumbing business and built a three-bedroom recreational cabin on it. Three years later, the Murrs' parents bought Lot E for investment purposes and placed title in their own names. In the mid-90s, title to both Lot E and Lot F was transferred to the Murrs.[2]

While title to both parcels ultimately devolved to the Murr children, the purposes to which they put the lots has not changed since their parents first bought the lots in the 1960s.[3] The recreational cabin built as a family summer getaway still remains on Lot F and Lot E remains vacant. After holding Lot E as an investment property for over 50 years, the Murrs would now like to sell it and use any profit to upgrade the existing recreational cabin on Lot F to ensure that

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[2] Both parcels are held in fee simple. Cf. *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) (Fee simple is "an estate with a rich tradition of protection at common law.").

[3] Use is relevant because a grandfather clause in the regulation allows for building on a site that is too small for the regulations so long as the "lot is in separate ownership from abutting lands." See St. Croix County Code of Ordinances, Land Use & Development, Subch. III.V, Lower St. Croix Riverway Overlay Dist. § 17.36, I.4.a.1 (J.A. at 77). The Murrs' lots are contiguous.

future generations of Murr children have summers full of memories at Lake St. Croix. Unfortunately, a 1975 local ordinance forecloses them from using, selling or developing Lot E separately from Lot F.

In 1975, St. Croix County adopted regulations that restrict development to parcels that have a "net project area" of at least one acre.[4] When the portions of Lot E deemed unusable by the ordinance are deducted, the parcel is too small to build on.

The Murrs sought a variance arguing that because the owners of Lot E and Lot F differed when the ordinance went into effect, the grandfather clause applies. The County denied the Murrs the variance and after exhausting their administrative remedies, the Murrs turned to the courts and brought the current takings claim.

This case thus presents the question: Is the basis for a regulatory takings claim – the relevant parcel – Lot E alone or Lots E and F together? In *Penn Central Transportation Company v. City of New York*, 438 U.S. 104 (1978), this Court directed the takings inquiry to the "parcel as a whole." *Id*. at 130-31. The "parcel as a whole" principle applies here as it does in

[4] The St. Croix County Code of Ordinances also provides, "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." St. Croix County Code of Ordinances § 17.36, I.4.a.2 (J.A. at 77). Lot E does not have one acre of net project area as defined by the County, so it cannot be sold or developed separately from Lot F.

all takings analyses; however, in *Penn Central*, the Court addressed an attempt to "divide a single parcel into discrete segments" not to aggregate separate pieces of property. *Id*. at 130. Thus, more generally, this case raises the question *Penn Central* does not answer: Whether and to what extent separate properties may be aggregated to form a "parcel as a whole" for takings purposes.

This case presents the Court with an opportunity to guide property owners and governmental bodies through the Scylla and Charybdis straits of takings law. In 1978, this Court instructed all involved that "[i]n deciding whether a particular governmental action has effected a taking, this Court focuses . . . both on the character of the action and on the nature and extent of the interference with rights in the *parcel as a whole*. . . ." *Penn Central*, 438 U.S. at 130-31 (emphasis added). Since then, courts have faced substantial difficulty when identifying the "parcel as a whole" in takings cases, in part because of the difficulty of putting the property taken and the regulatory burden in a specific factual context. See generally, John E. Fee, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. Chi. L. Rev. 1535 (1994).

There is another aspect to the difficulty, as well. Both sides of the equation have moral hazard associated with them. If the parcel at issue is defined too broadly, as the Wisconsin Court of Appeals has done here, the likelihood of a taking disappears. Conversely if the parcel is defined too narrowly, or just as

broadly as the regulatory burden, a taking will more easily be found. See, e.g., *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991); Fee, 61 U. Chi. L. Rev. at 1537. The moral hazard arises because regulators have an incentive to push for broad definitions of the relevant parcel, while property owners have an incentive to advocate for narrow ones.

Amici write separately to demonstrate that defining the Murrs' property interest to include both Lots E and F is neither fair nor just. Contiguity, common ownership (at present), or both, are not sufficient to overcome facts that show the Murrs' interest in those properties was separate. *Amici* will propose consideration of other factors that, taken together, provide a workable multi-factor test for identifying circumstances in which separate properties can be aggregated for takings purposes. Then, they will show that the Murrs should prevail when the test is applied.

II. This Court should adopt a multi-factor test for identifying the relevant parcel in a takings case.

A. All parties will benefit from clarifying how to define the relevant parcel against which the loss of value is to be measured for takings analysis purposes.

While the Court has addressed regulatory takings, it has not clearly mapped out the way to "make clear the 'property interest' against which the loss of value is to be measured." *Lucas*, 505 U.S. at 1016 n.7.

Indeed, "[d]etermining the relevant parcel is not only an essential ingredient of the *Lucas* test, but . . . has proven one of the most difficult challenges in takings law." Fee, 61 U. Chi. L. Rev. at 1536; see also *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497 (1987) ("Because our test for regulatory taking requires us to compare the value that has been taken from the property with the value that remains in the property, one of the critical questions in determining how to define the unit of property 'whose value is to furnish the denominator of the fraction.' "). Accordingly, while this Court's decisions provide general guidance, they do not answer the question posed in this case.

In pertinent part, the Fifth Amendment to the Constitution of the United States provides, "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V. The Takings Clause is applicable to the States through the Fourteenth Amendment. *Chicago B. & Q. R. Co. v. Chicago*, 166 U.S. 226 (1897). Where regulatory burdens are involved, the point of the Takings Clause is to preclude the "[g]overnment from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

Because the Takings Clause protects interests of private property owners, analysis of regulatory takings claims should begin by identifying and protecting the property owner's interest. Even with that starting point, the government is entitled to regulate

the use of private property without every such regulation giving rise to compensation. As the Court has explained: "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). Accordingly, "[t]he general rule at least is, that while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Id.* at 415.

Notably however, this Court has pointed out the way in which a regulatory taking would go "too far." In *Penn Central*, it identified three criteria: (1) the character of the government's action; (2) the economic impact of the regulation on the property owner; and (3) the extent to which the regulation interferes with the owner's investment-backed expectations. 438 U.S. at 124.

In 1992, this Court went further and reversed the decision of the South Carolina Supreme Court holding that the application of South Carolina's Beachfront Management Act did not effect a taking of Davis Lucas's interest in two residential, beachfront lots. *Lucas*, 505 U.S. 1003. It explained that a regulatory taking occurs when a regulatory imposition deprives property of its economically viable use, the property owner has distinct investment-backed expectations, and the owner's interest, as defined by state law, is not within the state's regulatory power under the common law nuisance doctrine. *Id*. Again, though, the denominator of the takings inquiry

remained undefined. *Id*. 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.").

Significantly, this Court pointed out that when, as here, a regulation "denies an owner economically viable use of his land," a taking occurs. *Id*. at 1016 (quoting *Agins v. City of Tiburon*, 447 U.S. 255, 260 (1980)). It observed that "regulations that leave the owner of land without economically beneficial or productive options for its use – *typically, as here, by requiring land to be left substantially in its natural state* – carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm." *Id*. at 1018 (emphasis added). And, to the extent that such regulatory idling can be sustained, the Court advised South Carolina that, on remand, it would have to "identify background principles of nuisance and property law that prohibit the uses [Lucas] now intends in the circumstances in which the property is presently found." *Id*. at 1031.

Measured against these general standards, the Murrs should be seen to have stated a prima facie case of a taking of Lot E. One would expect that a lot like it, held in fee simple, could be sold, used, or developed, but the regulations bar it. Instead, as Justice Scalia noted in *Lucas*, the regulations require the land to be "left substantially in its natural state." 505 U.S. at 1018. The effect is to frustrate the Murrs'

"investment-backed expectations." *Penn Central*, 438 U.S. at 124.

On remand, the Murrs should be deemed to have stated a takings claim. The parties should address the propriety of aggregating Lots E and F using the factors identified below. For its part, the County should be required to defend its enforced idling of Lot E in its natural state by "identify[ing] background principles of nuisance and property law that prohibit the uses [the Murrs] now intend[ ] in the circumstances in which the property presently is found." *Lucas*, 505 U.S. at 1031.

B. This Court should follow the lead of the Federal Circuit and the Court of Federal Claims in devising a workable and fair multi-factor test for identifying the relevant parcel.

In several cases, the Federal Circuit Court of Appeals and the Court of Federal Claims have taken flexible approaches, applying identified factors that should be considered when a governmental body seeks to aggregate properties to its benefit. Those cases lead the way toward a multi-factor test that is workable and fair.

For example, in *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412 (2011), the court explained that "takings precedent has yielded a number of factors that bear on the inquiry" of defining the relevant parcel. *Id*. at 428. Specifically, the court

identified the following factors as ones that any court should consider:

> (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands.

Id. (citing *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000). In addition, the *Lost Tree* court identified a sixth factor: "the extent [to which] any earlier development had reached completion and closure." *Id*. (citing *Lost Tree Village Corp. v. United States*, 92 Fed. Cl. 711, 718 (2010) (denying summary judgment on relevant parcel)).

In *Palm Beach Isles Associates v. United States*, 208 F.3d 1374 (Fed. Cir. 2000), the Court of Appeals for the Federal Circuit reversed a decision of the Court of Federal Claims, reasoning, in part, that the lower court improperly calculated the denominator of the claimed taking. The Palm Beach Isles development started with the purchase of 311.7 acres of property split by a road. In 1961, 261 acres on one side of the road were sold. The question for takings purposes was whether the denominator was the original 311-acre purchase or the remaining 50.7

acres that Palm Beach Isles was barred from developing by the ordinance.

The government argued that the denominator was 311 acres because all of the land was bought in the same transaction, and that "PBIA should not be allowed to sever the part that is subject to regulation from the part that is not." *Id*. at 1380. The developer noted that the two parcels were not part of a "common development scheme." *Id*. It explained that the two pieces of property "are separated by a road, they are different types of property, subject to different zoning, and PBIA . . . never planned to develop the entire property as a unit." *Id.*

The Federal Circuit rejected the argument that the entire 1968 purchase of some 311 acres should be considered as the takings denominator just because it was all purchased together. The court explained: "Combining the two tracts for purposes of the regulatory takings analysis involved here, simply because at one time they were under common ownership, or because one of the tracts sold for a substantial price, cannot be justified." *Id*. at 1381. It went on:

> In this case, PBIA never planned to develop the parcels as a single unit. Furthermore, PBIA bought the land in 1956 and sold the 261 acres in 1968, both events occurring before the environmental considerations contained in the Clean Water Act came into play, beginning in 1972. It is inappropriate to consider those transactions to have occurred in the context of the substance of a regulatory

> structure that was not in place at the relevant times.

Id. (internal footnote omitted).

In *Ciampitti v. United States*, the Court of Federal Claims explained that "[f]actors such as the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, the extent to which the protected lands enhance the value of remaining lands, and no doubt many others would enter the calculus." 22 Cl. Ct. at 318. At issue in *Ciampitti*, were 14 of 45 acres purchased in multiple transactions that the government considered or treated as undevelopable wetlands. *Id*. at 318-20. The property owner sued, alleging a taking of that segment of the 45 acres and arguing that the relevant parcel consisted only of the 14 acres.

Applying the various factors the court enunciated, it ultimately rejected Ciampitti's contention that the "parcel as a whole" was limited to only those lots for which a federal permit was unsuccessfully sought. *Id*. Instead, the court aggregated the properties that composed the 45 acre purchase. *Id*. at 320. In doing so, the court explained that "the most persuasive consideration is that Ciampitti treated all of Purchase 7, which encompasses virtually all the lots at issue, as a single parcel for purposes of purchase and financing." *Id*. The court concluded, "It would be inappropriate to allow him now to sever the connection he forged when it assists in making a legal argument." *Id*.

In *Ciampitti*, the court thus demonstrates an awareness of the way in which defining the property taken affects the takings analysis. *Id*. at 318-19. By declining Ciampitti's invitation to sever his unitary purpose, the court essentially blocked a game-playing effort.

The multi-factor nature of the test proposed is consistent with this Court's approach and should not be a stumbling block. This Court has acknowledged that its takings analysis is one of several "essentially ad hoc, factual inquiries." *Penn Central*, 438 U.S. at 124; see also *Arkansas Game & Fish Comm'n v. United States*, ___ U.S. ___, 133 S. Ct. 511, 518 (2012) ("[N]o magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. 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."). Identifying facts that distinguish proper attempts to aggregate properties from improper ones will be of assistance to the lower courts when they confront these fact-bound regulatory takings claims.

Before embarking on that factual inquiry, courts should determine whether a claimant has stated a prima facie takings claim, starting with a presumption in favor of the property owner. After all, the Fifth Amendment says that private property shall not be taken without just compensation. Courts should then identify the parcel that has been taken. At that point, the government gets an opportunity to identify the

"background principles of nuisance and property law," *Lucas*, 505 U.S. at 1031, that might support its regulatory imposition.

III. The facts show that it is neither fair nor just to aggregate the Murrs' two lots.

In *Armstrong*, this Court grounded the takings analysis on "fairness and justice." 364 U.S. at 49. The fundamental question is whether the Murrs are being required to bear a burden on their own that should be shared generally.

Measured against the *Lost Tree* factors, the Murrs correctly identify Lot E as the subject of the taking. The attempt of the Wisconsin Court of Appeals to aggregate Lots E and F on the basis of contiguity alone should be rejected. Instead, analysis should focus on the absence of any common use or development scheme. Cf. *Penn Central*, 438 U.S. at 124 (considering the owner's "investment-backed expectations").

More particularly, the Murrs acquired the lots at different times for different purposes. Those purposes remained constant; Lot E is still undeveloped. The Murrs purchased Lot E for investment purposes more than a decade before the regulations made it impossible to build on it, so the Murrs have lost the value of their investment in Lot E.

Significantly, the Murrs have not treated the properties as separate only for the purpose of making

a takings claim. Thus, they are unlike Ciampitti, who purchased and financed the property involved in one transaction. Conversely, the Murrs alleged that the County has consistently assessed the properties as separate for tax purposes. J.A. at 6. Thus, it appears that the County is attempting to game the system. To the extent that equity controls, the Murrs should be permitted to state their case.

CONCLUSION

For the reasons stated in the Petition for Certiorari and this *amicus* brief, this Court should reverse the decision of the Wisconsin Court of Appeals.

Respectfully submitted,

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