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 Wisconsin

BRIEF OF THE STATES OF NEVADA, ALASKA, ARIZONA, ARKANSAS, KANSAS, OKLAHOMA, SOUTH CAROLINA, WEST VIRGINIA, AND WYOMING AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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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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INTEREST OF *AMICI CURIAE*

Nevada and other *Amici* States "enjoy[] a rich history of protecting private property owners against government takings." *McCarran Int'l Airport v. Sisolak*, 137 P.3d 1110, 1127 (Nev. 2006). Indeed, the first right memorialized by Nevada's Founders in the State's Declaration of Rights "is the protection of a landowner's inalienable rights to acquire, possess and protect private property." *Id*. at 1126 (citing NEV. CONST. art. I, § 1).

Consistent with Nevada's longstanding tradition, the State—acting through its Attorney General—is authorized by its citizens to commence, join, or participate in any suit necessary "to protect and secure the interest of the State …." NEV. REV. STAT. § 228.170.

Amici States' interest is at its apex here. The interpretation of the "parcel as a whole" rule adopted by the Court of Appeals of Wisconsin not only imperils the property rights of citizens *vis-à-vis* the States, but also endangers the property rights of the States as against the federal government.

SUMMARY OF ARGUMENT

At the time of the Founding, the dominant view was that property rights are not merely creations of the state, but natural rights that the state has a duty to protect. *See*, *e.g.*, JAMES W. ELY, JR., THE GUARDIAN OF EVERY OTHER RIGHT: A CONSTITUTIONAL HISTORY OF PROPERTY RIGHTS 41–43 (3d ed. 2008) (describing how property rights were "undoubtedly a paramount value for the framers of the Constitution"). At the Constitutional Convention in 1787, Alexander Hamilton stated that "one great obj[ect] of Gov[ernment] is the personal protection and security of property." MAX FARRAND, 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 534 (1937).

To help ensure that the newly established government would not trample upon property rights, the Founders adopted the Fifth Amendment to the United States Constitution, which provides, in relevant part, "nor shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

"The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960).

This Court has long recognized that excessive regulation of private property can unjustly burden landowners just as much as physical occupation or

condemnation. *Pa. Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922).

The Court of Appeals of Wisconsin and some other courts, (Pet. Cert. 17–19; Opp'n Cert. 21–22), have construed the "parcel as a whole" rule as requiring aggregation of separate, but contiguous, parcels under common ownership when assessing whether a regulatory taking has occurred.

This expansive interpretation of the "parcel as a whole" rule is at odds with the text and original meaning of the Takings Clause, and has no basis in this Court's precedents. It also creates significant perverse incentives for both landowners and regulators.

If allowed to stand, it would undermine the interests of state governments in multiple ways. It would leave their property vulnerable to large-scale uncompensated encroachment by the federal government. It is also likely to undermine the effectiveness of their land-use regulation policies. If regulators do not have to pay compensation to affected property owners in cases where the latter happen to possess contiguous lots, they will often have little incentive to fully consider the costs and benefits of proposed regulations, and prioritize those with the greatest likely beneficial impact.

Since before the Founding, individual parcels of land have served as the fundamental unit of American property law and have been at the heart of the enforcement of property rights. This Court has often acknowledged the central role that individual parcels play when deciding takings and just compensation cases. And for good reason. Parcels delineate the

tangible boundaries within which property rights exist and the physical space to which regulations extend. Aggregating contiguous parcels under common ownership into a single super-parcel will undermine traditional notions of property rights, have deleterious economic consequences, and encourage the undisciplined regulation of individuals' and states' property.

ARGUMENT

I. Aggregating Separate Parcels for Takings Analysis Has No Basis in Text, History, or Precedent.

A. The Wisconsin Rule Goes Against the Text and Original Meaning of the Takings Clause.

The text of the Takings Clause is simple. It forbids the "taking" of "private property" without "just compensation." U.S. CONST. amend. V. Nothing in the text indicates that the requirement of just compensation might be waived if the owner of the property at issue also happens to own other property nearby. What matters is whether property has been "taken," not whether the owner still has the use of the lot next door. Any other approach makes a hash of the text, and diverts the regulatory takings analysis from the actual effect of the regulatory action on the actual piece of property at issue, to focusing on the identity of the landowner and other property he or she may happen to own.

The original understanding of the Takings Clause fully accords with the text on this crucial issue. The Founders were committed to a natural law

interpretation of property rights and the Takings Clause, under which regulatory restrictions on the use and control of property qualify as compensable takings—except in unusual circumstances where the regulations prevented common-law nuisances or other similar threats to public health and safety. *See* Eric Claeys, *Takings, Regulations, and Natural Property Rights,* 88 CORNELL L. REV. 1549, 1561–65 (2003) (describing the Founding-era view); James W. Ely, Jr., *"Poor Relation" Once More: The Supreme Court and the Vanishing Rights of Property Owners*, 2005 CATO SUPREME COURT REVIEW 39, 40–41 (same). As James Madison, the "father of the Constitution" who also went on to author the Takings Clause, put it, "Government is instituted to protect property of every sort." James Madison, *Property* (1792), *in* THE FOUNDERS' CONSTITUTION 1:598 (Philip Kurland & Ralph Lerner eds., Univ. Chicago Press 1987).[1]

There is no reason to think that the Founding generation believed that the natural property rights protected by the Takings Clause could somehow be overridden or abridged in cases where the owner also has another lot adjacent to the one being taken. To the contrary, such an arbitrary limitation on property rights would severely undermine the purpose of the just compensation requirement of the Takings Clause: preventing the government from seizing property without paying for it.

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[1] On Madison's key role in drafting and enacting the Takings Clause, *see* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 77–78 (1998).

B. The Wisconsin Rule Goes Against Historical Practice and Early Court Decisions.

Unsurprisingly, there is little if any historical foundation for treating contiguous parcels under common ownership as a single super-parcel for takings purposes. Indeed, even when limited to a single parcel analyzed alone, the "parcel as a whole" rule has little historical grounding. *See* Steven J. Eagle, *The Parcel and Then Some: Unity of Ownership and the Parcel As A Whole*, 36 VT. L. REV. 549, 549–50 (2012) (discussing the "parcel as a whole" rule and arguing that it lacks foundation in traditional property law). As a leading academic defender of the rule has recognized, the "parcel as a whole" rule "is an invention of the United States Supreme Court." David A. Dana, *Why Do We Have the Parcel-as-a-Whole Rule?*, 39 VT. L. REV. 617, 624 (2015); *cf.* William W. Wade, Penn Central*'s Economic Failings Confounded Takings Jurisprudence*, 31 URB. LAW. 277, 278 (1999) ("The parcel-as-a-whole notion became a bedrock takings precedent with no precedent, justification, or empirical underpinnings."). That alone should give the Court pause before reflexively extending such an ahistorical principle into new territory.

The Anglo-American system of property law has been built upon the rule of treating separate parcels separately.[2] "A land parcel, in contrast to an

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[2] *See* James Charles Smith, *Some Preliminary Thoughts on the Law of Neighbors*, 39 GA. J. INT'L & COMP. L. 757, 758 (2011) ("A fundamental characteristic of real property law, one that is definitional in nature, is that its subject matter consists of land

ownership interest such as a fee simple estate, is not an abstraction. Each land parcel has a physical reality, and virtually all land parcels abut other parcels. Each parcel has one particular location, defined by its proximity to other pieces of property." Smith, *supra* note 2, at 758 (footnote omitted). Generally, metes and bounds set the perimeter of a parcel and delineate the physical boundary between the landowner's rights and the rights of others, including the government. *See id.* at 765; *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 331–32 (2002).

It is a basic truism of real estate law that every plot of land is different. This is one of the reasons why a breach of contract for the sale of land requires a remedy of specific performance, whereas most other breaches of contract require only money damages. "Land is intrinsically non-substitutable, as compared to $100 notes or shares or grains of rice. Each plot of land will have its own specific attributes, which mean that the plot is not, and can never be identical with another plot, even if it is part of a … development where all the [tracts] are similar." KATY BARNETT, ACCOUNTING FOR PROFIT FOR BREACH OF CONTRACT: THEORY AND PRACTICE 90 (2012).

The separateness of parcels is an inescapable principle in early American case law. From early on, courts emphasized the significance of separate parcels in eminent domain and condemnation proceedings.

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parcels"); *see also Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992) ("[T]he 'interest in land' that Lucas has pleaded (a fee simple interest) is an estate with a rich tradition of protection at common law ….").

The Supreme Court of Minnesota's early ruling in *Wilcox v. St. Paul & N. P. Railway Co.*, 29 N.W. 148 (Minn. 1886), is instructive. There, with the municipality's blessing, a railway company entered upon the street adjacent to two lots (lots 1 and 10) owned by Wilcox and constructed a railroad. *Id*. at 149. Wilcox sued and claimed damages for the two disturbed lots as well as eight other undisturbed lots (lots 2 through 9) comprising the rest of the block. *Id*.

Acknowledging that the right to compensation "exists only in respect to the tract or parcel of land a part of which is taken," the Minnesota Supreme Court held "in respect to city property, in fact unoccupied, but which appears to have been platted or divided into blocks and lots, nothing more being shown, the property should be treated as lots or blocks, intended for use as such, and not as one entire tract." *Id*. at 149–50. Mere continuity of the parcels was not enough to treat them as one large tract. *Id*. at 149. The court reasoned that the parcels were presumptively separate, and that presumption could only be overcome by demonstrating that the several parcels were put to the same use. *Id*. at 149–50.

Nineteenth and early twentieth century court decisions found that "the weight of authority supports the Minnesota view, which seems to be, in substance, that regularly platted, unoccupied lots are presumed to be, until shown to the contrary, separate tracts, and must be dealt with as such in eminent domain proceedings." *In re Queen Anne Boulevard*, 137 P. 435, 442 (Wash. 1913); *see also Evansville & R.R. Co. v. Charlton*, 33 N.E. 129, 131–32 (Ind. App. 1893) (rejecting rule that owner of "several different lots …

[having] no connection therewith, except in so far as they are contiguous to the lots which do abut on the street, … is entitled to recover damages for the depreciation in value of" the merely contiguous lots); *Or. R. & Nav. Co. v. Taffe*, 134 P. 1024, 1028 (Or. 1913) ("It is held that the subdivision of land into lots makes every lot prima facie a separate and distinct tract, and, if the owner claims damages to all or more than the lot taken, he must produce evidence to overcome this presumption."); *N.Y. Mun. Ry. Corp. v. Weber*, 166 N.Y.S. 542, 545 (N.Y. App. Div. 1917), *modified on other grounds*, 123 N.E. 68 (1919) ("Where land not devoted to any special use had been divided into blocks and lots upon a map by the owner of a plot … the property should prima facie be treated as lots and blocks in ascertaining damage, and not as an entire tract ….").

C. The Wisconsin Rule Goes Against this Court's Precedents.

1. *Sharp v. United States*

A survey of the legal landscape reveals that this Court's case law reflects the early state court decisions and the historical practice of presumptively respecting the separate division of parcels. In *Sharp v. United States*, 191 U.S. 341, 341–42 (1903), the federal government initiated a condemnation action against one of Sharp's three farms, known respectively as the "Gibbons," the "Dunham," and the "White" farms. The target of the action, the Gibbons farm, consisted of 41.75 acres purchased in 1891. *Id*. at 352. The Dunham and White farms were each 80 acres and purchased in 1880 and 1899, respectively. *Id*.

This Court noted that the three contiguous tracts came under common ownership "by three separate titles at three distinct times …." *Id*. Even though adjoined, the "tracts of land were absolutely separate and independent farms, having no necessary relation with each other, and the farming on each had been conducted separately, and each farm had its own house and outbuildings." *Id*. at 353.

Despite their distinctiveness, Sharp sought to recover condemnation damages to the Dunham and White farms as a result of the government's taking of the Gibbons farm. *Id*. at 350–51. This Court rejected Sharp's effort. Adopting the reasoning of the court of appeals, this Court explained that, while it may sometimes be difficult to identify "what is a distinct and independent tract," courts analyzing the scope of a taking should focus on "the character of the holding, and the distinction between the residue of a tract whose integrity is destroyed by the taking, and what are merely other parcels or holdings of the same owner …." *Id*. at 354. This Court concluded that Sharp was only entitled to damages by virtue of his ownership of the Gibbons farm because it was "the tract invaded …. His ownership of other lands [was] without legal significance." *Id*. at 355.

Tract "integrity," and whether there has been an "invasion," can only be evaluated with reference to the metes and bounds that establish the physical borders of a single parcel. Identifying the "parcel as a whole" is equivalent to determining the "distinct and independent tract" from which a part is taken. And this Court instructed that the "distinct and independent tract" is to be assessed without reference

to "other parcels or holdings of the same owner …." *Id*. at 354.

The *Sharp* Court provided multiple examples to illuminate the principle. "If A own a single house in a block in a city and the government proposes to take it, is it liable to the owner of the house adjoining for a depreciation in its value by reason of the taking of the house of A for the purposes proposed?" *Id*. at 355. This Court answered negatively because, under the Constitution, no portion of the conjoining property was taken. *Id*. at 355–56. Likewise,

> If again, the government seek to take the property of A, consisting of a single house in a city, and he has also acquired, through a separate title and at a different time, houses adjoining, would the government be liable to A for the damage sustained by that other property on account of the use the government proposes to make of the property taken? Or again, if A purchase a block of vacant lots in a city from one source and at one time and erect a row of buildings thereon, and one building the government seeks to take, would the government be liable for the damages sustained by the other houses by reason of the uses to which it would put the building taken?

Id. at 356.

The Court cited *Lincoln v. Commonwealth*, 41 N.E. 489 (Mass. 1895) and *Wellington v. Boston & M.R.R.*, 41 N.E. 652 (Mass. 1895) as sources of possible answers to these questions. *Sharp*, 191 U.S. at 356.

Lincoln held "[t]he lot from which a part is taken is considered as one whole …." 41 N.E. at 491. Thus, divided parcels of land, even if contiguous, are regarded as distinct unless they are used as one for practical purposes. *Id.* at 492. *Wellington* agreed that parcels will be treated as separate and distinct when they are actually divided by (amongst other things) "recorded paper lines" and there is no evidence that they are used together or held out for sale as one parcel. 41 N.E. at 652.

There is no legitimate reason to treat differently the aggregation of parcels for purposes of computing just compensation from the aggregation of parcels for purposes of identifying a taking in the first instance. Indeed, the Wisconsin Court of Appeals offered none. Pet. App. A-11–12. There is no historical or equitable basis to place the burden on a landowner to rebut the presumption of parcel distinctiveness to obtain compensation (*Sharp* and *Wilcox*) without placing the same burden on the regulator to avoid a taking and the payment of just compensation.

2. *Penn Central*

Sharp's emphasis on the need to identify the appropriate parcel was not directly cited in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104 (1978). Yet the borders of Penn Central's "parcel" were a crucial implicit factor in the Court's application of the newly announced "parcel as a whole" rule. The Court described the Grand Central Terminal property as being bounded to the north by the Pan-American Building, to the east by the Commodore Hotel, to the west by Vanderbilt Avenue, and to the South by 42nd Street. *Id.* at 115. Notably, Penn

Central owned the neighboring Commodore Hotel and Pan-American Building. *Id*.

Throughout the opinion, the word "parcel" was coextensive with the entire terminal as described. *See, e.g., id*. at 129 ("They accept for present purposes both that *the parcel of land* occupied by Grand Central Terminal must, in its present state ...") (emphasis added); *id*. ("They also do not dispute that the restrictions imposed on *its parcel* are appropriate means ...") (emphasis added); *id*. at 130 ("irrespective of the value of the remainder of *their parcel*, the city has 'taken' their right to this superadjacent airspace") (emphasis added); *id*. at 135 ("the Landmarks Law neither exploits *appellants' parcel* for city purposes nor arises from any entrepreneurial operations .... [it] permit[s] appellants to use the remainder of *the parcel* in a gainful fashion") (emphases added); *id*. at 136 (describing "use of the parcel" "as a railroad terminal containing office space and concessions").

Superficially, the Court may have appeared to give the "parcel as a whole" a wider definition. It stated that the "parcel as a whole" consisted of "the city tax block designated as the 'landmark site.'" *Id*. at 130–31. But the definition of "landmark site" under the applicable ordinance was akin to the test historically used in the *Sharp* and *Wilcox* cases. The ordinance provided that a "landmark site" was "[a]n improvement parcel or part thereof on which is situated a landmark and any abutting improvement parcel or part thereof *used as and constituting part of the premises* on which the landmark is situated ...." *Id*. at 111 n.10 (emphasis added). In other words, the ordinance (like this historical practice) would allow aggregation of

contiguous parcels for one "landmark site" if they were put to the same use.[3]

There was no suggestion in *Penn Central* that the Commodore Hotel or the Pan-American Building were, or should have been, aggregated in the takings analysis simply because they were contiguous parcels under common ownership.[4] *Penn Central* does not support the proposition, adopted by the Wisconsin Court of Appeals, that "contiguousness is the key factor" or that there is "a well-established rule that contiguous property under common ownership is considered as a

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[3] The D.C. Circuit adopted a similar interpretation of *Penn Central,* when it ruled that "[a]bove all, the parcel should be functionally coherent. In other words, *more should unite the property than common ownership by the claimant*." *Dist. Intown Props. Ltd. P'ship v. District of Columbia*, 198 F.3d 874, 880 (D.C. Cir. 1999) (emphasis added).

[4] Concurring in part and concurring in the judgment in *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725, 747–49 (1997), Justice Scalia addressed the claim that Penn Central's ability to transfer development rights to its other properties was considered on the takings side of the equation under the auspices of assessing the "the impact of the regulation." He expressed skepticism that the separate parcels were actually aggregated. *See id*. at 749 ("The relevant land, *it could be said*, was the aggregation of the owners' parcels subject to the regulation (or at least the contiguous parcels); and the use of that land, as a whole had not been diminished.") (emphasis added). But that was the only plausible explanation to avoid overruling that portion of *Penn Central*. *Id*. Justice Scalia was not "supporting" the aggregation of parcels. *Contra* Opp'n Cert. 18–19. In his opinion for the Court in *Lucas*, Justice Scalia characterized *Penn Central*'s framework as extreme and unsupportable. 505 U.S. at 1016 n.7. To the extent *Penn Central* did aggregate contiguous parcels or condone aggregation without a finding of fully unified usage, it should be overruled.

whole regardless of the number of parcels contained therein." Pet. App. A-11.

Penn Central did note that "[t]aking 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 (internal quotation marks omitted). But this Court did not hold the opposite. It did not condone the aggregation of discrete parcels into a single segment to determine whether rights have been entirely abrogated.

Penn Central did not repudiate the longstanding rule that contiguous parcels are considered separately unless it is shown that they are put to a common use. The Court ruled that no taking occurred because Penn Central could still extract beneficial use from the landmark site terminal parcel despite the loss of the superadjacent airspace, *not* because Penn Central could still extract beneficial use from *other* adjacent properties. *Id*. at 136–38.

3. *Keystone Bituminous Coal Ass'n v. DeBenedictis*

The separate consideration of individual parcels continued in *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), where the Court denied a facial challenge to Pennsylvania's Subsidence Act, in part because there was no evidence of a taking with respect to distinct and identifiable parcels or coalmines. This Court emphasized that "petitioners have not even pointed to *a single mine* that can no longer be mined for profit." *Id*. at 496 (emphasis added).

Instead, petitioners claimed a taking of 27 million tons of coal spread out over 13 different mines operated by various companies. *Id*. Petitioners "never claimed that their mining operations, or *even any specific mines*, have been unprofitable since the Subsidence Act was passed." *Id*. (emphasis added). There was no evidence that "any specific location" was unprofitable. *Id*. "The 27 million tons of coal do not constitute a separate segment of property for takings law purposes." *Id*. at 498.

This Court distinguished *Keystone* from *Mahon* on the grounds that Justice Holmes' mention of "certain coal" in *Mahon* referred to evidence in the record that six identifiable collieries in the City of Scranton were inoperable due to the regulation. *Id*. at 498–99. In contrast, the *Keystone* Court determined that there was no basis to treat only the coal affected by the regulations "as a separate parcel of property." *Id*. at 498.

Keystone confirms that takings must be analyzed within the context of "single," "specific," "separate segments of property"—*i.e.* individual parcels of land.

4. *Lucas v. South Carolina Coastal Council*

This Court in *Lucas* specifically declined to resolve the apparent uncertainty surrounding the property interest against which a taking is measured. But even so, it did reaffirm the importance of the background principles of American property law. *See* 505 U.S. at 1016, 1026–29 & nn.7, 15. Relying on tradition and original understanding, Justice Scalia correctly hypothesized that the answer to the takings

denominator conundrum might reside in how states "accord[] legal recognition and protection to the particular interest in land with respect to which the takings claimant alleges a diminution in (or elimination of) value." *Id*. at 1016 n.7.

Justice Scalia's prediction stemmed from "the historical compact recorded in the Takings Clause that has become part of our constitutional culture." *Id*. at 1028. Parcel title was the centerpiece of that culture. "[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 1027 (emphasis added). An inquiry must be made into the nature of the property owner's estate to ascertain the interests inherent in the property "title to begin with." *Id*. The Court did not need to delve into additional nuances because there was no serious debate that Lucas's two beachfront parcels held in fee simple were interests in land "with a rich tradition of protection at common law …." *Id*. at 1016 n.7, 1020.

Lucas also resolves whether aggregation of parcels pursuant to "merger" laws has any constitutional significance for takings purposes. It does not. *Lucas* pronounced that newly enacted legislation or decrees cannot prohibit all economically beneficial use of land without compensation; any such limitation "must inhere in the title itself, in the restrictions that background principles of the State's law of property and nuisance already place upon land ownership." *Id*. at 1029.

Lucas therefore reinforces that background principles of property law must be taken into account for takings purposes. And there is a longstanding history of protecting the property rights associated with the title to individual—not aggregated—parcels.

5. *Palazzolo v. Rhode Island*

After *Lucas*, *Palazzolo v. Rhode Island* reinforced the rule that a subsequent merger ordinance cannot evade a taking by attempting to alter the boundaries of a parcel, which are a fundamental part of the title. *See* 533 U.S. 606, 626–30 (2001) (affirming that the Constitution protects common law property rights, and that states cannot strip an owner of constitutional protections through positive enactments). And to the extent there was any doubt whether a landowner's acquisition of property after enactment of a merger ordinance changed the analysis, *Palazzolo* answered that question in the negative. *See id*. at 627–28 (post-enactment transfer of title does not absolve a taking).

In *Palazzolo*, this Court once again recognized the confusion (and the Court's discomfort) surrounding the interpretation of the "parcel as a whole" in the denominator of the takings fraction. *Id.* at 631. And again, the Court did not definitively resolve the controversy. But it did emphasize that the government could not usurp traditional common law rights without paying compensation, even if the statute authorizing such regulation was enacted after the owner acquired the parcel in question. *Id*. at 627–30.

After the landowner in *Palazzolo* subdivided his three adjoining parcels into separate lots and sold some of them, he asserted that a wetlands regulation

effectuated a taking over the entirety of all of the parcels. *Id*. at 613–14, 631–32. Because it was undisputed that one of the parcels retained $200,000 in development value, the Court agreed that no taking occurred. *Id*. at 631–32. The Court refused the landowner's belated attempt to treat the value-retaining parcel separately from the other parcels because he himself had initially chosen to litigate the case as if they were a single unit. *Id*. at 631–32 ("Petitioner did not press the argument in the state courts, and the issue was not presented in the petition for certiorari. The case comes to us on the premise that petitioner's entire parcel serves as the basis for his takings claim, and, so framed, the total deprivation argument fails."). The Court hinted at a different outcome if the landowner had appropriately litigated each parcel separately. *See id*. at 631–32.

6. *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*

Finally, the Court addressed a sort of converse of parcel aggregation—temporal parcel disaggregation—in *Tahoe-Sierra Preservation Council, Inc.*, 535 U.S. at 331. In that case, the Court rejected a *per se* takings claim stemming from two moratoria that precluded development for two years and eight months, respectively. *Id*. at 306–07, 341–42. The Court indicated that a *per se* taking could not be established by "conceptually severing" the 32-month time period that development was prohibited from each landowners' fee simple estate to assert that the moratoria were actionable takings during the time

period in which development was forbidden. *Id*. at 318, 330–31.

Importantly, the Court held "[a]n 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." *Id*. at 331–32 (citing RESTATEMENT OF PROPERTY §§ 7–9 (1936)). Consequently, this Court concluded that there is a taking of the "parcel as a whole" when the landowner is deprived of the entire area defined by the metes and bounds. *See id*. at 332 ("Hence, a permanent deprivation of the owner's use of the entire area is a taking of 'the parcel as a whole' ….").

The Court postulated that some of the landowners might have been able to prove a taking had they "challenged the application of the moratoria to their *individual parcels*, instead of making a facial challenge …." *Id*. at 334 (emphasis added). Thus, *Tahoe-Sierra* is a strong reminder that individual parcels are considered as the "parcel as a whole" for takings purposes.

* * *

This Court's precedents from *Sharp* through *Tahoe-Sierra* demonstrate that the individual parcel has been the basic unit of both American property law and this Court's Fifth Amendment analysis. Not a single one of these decisions—or any other decision of this Court—requires or even permits the aggregation of individual contiguous parcels simply based upon common ownership when identifying the property interest against which a regulation is measured.

This Court should not follow the Wisconsin Court of Appeals in cavalierly bulldozing the boundaries that have long been established by the parceling system. Parcels are the physical and tangible embodiment of the property rights of individuals and states. A weakening of individual property rights under the cloak of the "parcel as a whole" will inevitably erode the rights the Fifth Amendment was enacted to protect.

II. Aggregating Separate Parcels for Takings Purposes Creates Perverse Incentives and Inhibits Socially Beneficial Use of Property Rights.

In addition to history and precedent, there are substantial economic and practical reasons to reject the categorical aggregation of multiple contiguous parcels under common ownership into a unified "parcel as a whole." The application of the "parcel as whole" rule should be strictly limited to minimize the dangers it creates. *Cf.* William W. Wade, *Sources of Regulatory Takings Economic Confusion Subsequent to* Penn Central, 41 ENVTL. L. REP. NEWS & ANALYSIS 10936, 10938 (2011) ("*Penn Central*'s sensible 'parcel-as-a-whole' language has created a quagmire of economic confusion.").

This Court has sensibly considered economic implications in cases involving the "parcel as a whole" rule. *See*, *e.g.*, *Tahoe-Sierra Pres. Council, Inc.*, 535 U.S. at 339–42. Specifically, the Court has analyzed whether a rule would "foster[] inefficient and ill-conceived growth," "create a perverse system of incentives," or serve to disadvantage particular landowners or interest groups. *Id.* at 339–42; *see also Lucas*, 505 U.S. at 1019 n.8 ("[O]ur prior takings cases

evince an abiding concern for the productive use of, and economic investment in, land ….”). Aggregating commonly owned contiguous parcels together as part of a unitary “parcel as a whole” goes against these economic considerations.

Blanket aggregation of contiguous parcels with overlapping ownership fosters inefficient and ill-conceived growth. Society benefits from efficient, cooperative use of contiguous parcels. *See* Eagle, *supra*, at 551. Often, joint exploitation of contiguous parcels creates economic value that could not be realized if each were utilized separately. But a broad interpretation of the “parcel as a whole” rule “punishes the very cooperation that engenders social value.” *Id*. It creates a variety of dangerous perverse incentives.

For example, to avoid the risk of uncompensated takings, prospective land purchasers may forego assembling large holdings that could otherwise be put to more productive use. Alternatively, careful buyers will structure purchases of contiguous parcels so that each parcel is owned by a different individual or entity. The forced use of multiple ownership configurations will increase transaction costs and hinder the productive use of land. In some cases, excessive division of property rights can seriously inhibit beneficial land assembly. *See generally* MICHAEL HELLER, THE GRIDLOCK ECONOMY: HOW TOO MUCH OWNERSHIP WRECKS MARKETS, STIFLES INNOVATION, AND COSTS LIVES (2010). Alternatively, potential developers might decide not to purchase contiguous property at all. This too could easily inhibit productive development.

The private sector has a variety of effective mechanisms for overcoming potential "holdout" problems that inhibit effective land assembly. *See* ILYA SOMIN, THE GRASPING HAND: *KELO V. CITY OF NEW LONDON* AND THE LIMITS OF EMINENT DOMAIN 90–99 (2015) (describing and analyzing several such strategies). But they require flexible property rights, and the ability to freely purchase separate tracts in order to make them part of a common project. *Id.* "Unless some reason exists why the Takings Clause should be concerned with deterring citizens from owning too much property at once, the quantity of property an owner holds should have nothing to do with whether a regulation of one part of an owner's property is a taking of that part." Eagle, *supra*, at 564.

In addition to inhibiting beneficial assembly projects, the aggregation of parcels for takings purposes creates a perverse incentive to divide property when it is inefficient to do so. Again, landowners may excessively divide their parcels into separate ownership structures to limit exposure to governmental takings. The subdivision of land for the purpose of avoiding uncompensated takings creates potentially serious economic inefficiencies. In some cases, land that might be more effectively managed under a single common owner might be divided into multiple lots with different owners, so as to ensure that each would get compensation in the event of a regulatory imposition by the state.

Such perverse incentives can arise even under a more sensible, narrower interpretation of the "parcel as a whole" rule. The only way to completely eliminate them would be to either abolish the rule or give

government a virtual blank check to take property without compensation. But the risk is greatly exacerbated if the "parcel as a whole" rule is expanded to include all contiguous parcels under common ownership. That is likely to lead to far more assembly problems and inefficient division of property than a rule limited to individual parcels, as traditionally understood.

By contrast, the risk of harmful strategic behavior is minimized if the Court enforces the traditional approach of considering each parcel separately. At the very least, there should be a strong presumption against any aggregation, satisfiable, if at all, only in cases where the two lots are fully integrated with each other, and used for essentially the same purpose. *See Sharp*, 191 U.S. at 353–55; *St. Paul & N. P. Ry. Co.*, 29 N.W. at 149–50; *cf. Dist. Intown Props. Ltd. P'ship*, 198 F.3d at 880 (lots must be "functionally coherent" and "more should unite the property than common ownership by the claimant").

Lastly, aggregating contiguous parcels disadvantages certain types of landowners, particularly small businesses. Small businesses often suffer disproportionate burdens from governmental regulation,[5] and it is not unusual for them to own

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[5] Robert C. Bird & Elizabeth Brown, *Interactive Regulation*, 13 U. PA. J. BUS. L. 837, 838 (2011) ("Small businesses continue to suffer disproportionately from the cost of regulations."); Joseph A. Castelluccio III, *Sarbanes-Oxley and Small Business: Section 404 and the Case for A Small Business Exemption*, 71 BROOK. L. REV. 429, 444 (2005) ("In the case of small businesses, the relative costs of compliance with federal regulations can be disproportionately high, both in terms of dollars and manpower.").

contiguous parcels for complementary, but different, uses. For example, it is common for a restaurant or a store to use one lot as a place of business, and a contiguous lot for parking, or as a storage facility. The broad interpretation of the "parcel as a whole" advanced by the Wisconsin Court of Appeals will have a disparate effect on small businesses, more often regulating them out of beneficial use of certain parcels while, on the whole, denying that compensation is required.

III. Aggregating Separate Parcels for a Takings Analysis Harms *Amici* States.

States are both regulators and property owners. Approving the aggregation of contiguous parcels based upon nothing more than common ownership threatens the States' property, which—like the property of individual citizens—is subject to a growing thicket of federal regulations. States face the same risks from the federal government that citizens face from their own states. If states—like the federal government—can avoid effectuating a taking by aggregating parcels without regard for common usage, state and local legislators or bureaucrats may be tempted to adopt undisciplined and unfocused regulations to the detriment of landowners and society.

A. Expanding the "Parcel as a Whole" Rule Would Dangerously Increase the Federal Government's Power to Seize the Property of the States Without Compensation.

As originally understood at the Founding, the federal government did not have the power to take

property within the States. *See* William Baude, *Rethinking the Federal Eminent Domain Power*, 122 YALE L.J. 1738, 1741 (2013). Its eminent domain power was thought to be limited to the District of Columbia and federal territories. *Id*. at 1742.

Notwithstanding this original understanding, the federal government has exercised the power to take state property since this Court in 1875 ruled that such authority is inherent in our constitutional system. *See Kohl v. United States*, 91 U.S. 367 (1875). The rise of the modern regulatory state has increased the frequency of such federal intrusion onto state property. *See*, *e.g.*, *Ark. Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2013) (addressing a situation where the federal government may have taken large quantities of state-owned land by repeatedly flooding it).

In the event of an intergovernmental taking, the Fifth Amendment requires the federal government to pay just compensation to the States in the same manner that compensation must be paid to private citizens. *United States v. Carmack*, 329 U.S. 230, 242 (1946) ("when the Federal Government thus takes for a federal public use the independently held and controlled property of a state or of a local subdivision, the Federal Government recognizes its obligation to pay just compensation for it"); *see also United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984) ("the same principles of just compensation presumptively apply to both private and public condemnees").

Endorsing the Wisconsin Court of Appeals's broad interpretation of the "parcel as a whole" rule will expand the federal government's regulatory control over state land and limit the circumstances in which

just compensation might be paid. States often own thousands of acres of contiguous parcels and the federal government could avoid a taking simply by aggregating large swaths of a state as part of the takings denominator. Under such a calculation, few if any federal regulations of state property—regardless how onerous—would be ruled compensable takings.

This is particularly troubling in western states where the federal government owns large tracts of land, and often seeks to restrict contiguous property owned by the States. In Nevada, for example, the federal Bureau of Land Management already controls approximately 47.5 million acres, or about sixty-three percent of Nevada's total land area.[6] Taken to its logical extreme, the federal government could enact a federal regulation, under some pretense, that barred all or most development on all property owned by Nevada in Lincoln County. The federal government could argue that this regulation did not constitute a taking because, when all contiguous state-owned parcels in Clark, White Pine, and Nye Counties are aggregated, Nevada would still retain some beneficial use of its state land.

If the federal government can so easily avoid paying just compensation, it will be able to wield its powerful regulatory authority with even greater force to coerce and punish resisting states. *See* Michael H. Schill, *Intergovernmental Takings and Just Compensation: A Question of Federalism*, 137 U. PA. L. REV. 829, 861–62

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[6] U.S. Department of the Interior, Bureau of Land Management, Nevada (last visited April 2016), *available at* http://www.blm.gov/nv/st/en.html.

(1989). The requirement of just compensation serves as a check on the federal government's taking power. *Id*. at 861–62. Diluting that check by condoning the aggregation of state-owned parcels would give the federal government expansive power to seize control of state-owned land, without paying compensation.

B. Aggregating Commonly Owned Contiguous Parcels Would Negatively Affect State Regulatory Policies.

Reducing the circumstances in which the States and the federal government must pay just compensation will lead to worse regulatory policies at all levels of government. "Forcing governments to internalize the costs that their regulations impose on landowners, will strengthen incentives to adopt only those regulations whose benefits are likely to exceed their costs." Ilya Somin, *Two Steps Forward For the "Poor Relation" of Constitutional Law:* Koontz, Arkansas Game & Fish, *and the Future of the Takings Clause*, 2012–13 Cato Sup. Ct. Rev. 215, 234 (hereinafter Somin, "*Two Steps Forward*"). Requiring compensation imposes tighter discipline on regulatory efforts and incentivizes officials to focus regulatory efforts on those policies that produce the greatest benefits relative to their potential costs. *Id*.

This Court's previous decisions requiring compensation for land-use exactions have had precisely the kind of beneficial disciplining effect that economic theory predicts. A 2001 analysis of a survey of land-use planners in California found that 74 percent of California city planners and 81 percent of county planners agreed with the statement that "'[t]he nexus and rough proportionality standards established by the

[Supreme Court's] *Nollan* and *Dolan* decisions, when followed carefully, simply amount to good land use planning practice.'" Ann E. Carlson & Daniel Pollak, *Takings on the Ground: How the Supreme Court's Takings Jurisprudence Affects Local Land Use Decisions,* 35 U.C. DAVIS L. REV. 103, 142 (2001) (quoting appendix).[7] This positive response to the decisions may have arisen because planners support their tendency "to favor a comprehensive, long-range approach to planning that avoids ad hoc decision-making" and incentivizes careful consideration of relevant tradeoffs. *Id*.

Such regulatory discipline is particularly important in the field of environmental regulation, where state and local governments often face difficult tradeoffs where it is essential to carefully weigh competing interests and fully consider relevant costs and benefits. *See* Jonathan H. Adler, *Money or Nothing: The Adverse Environmental Consequences of Uncompensated Regulatory Takings*, 49 B.C. L. REV. 301 (2008); James W. Ely, Jr., *Property Rights and Environmental Regulation: The Case for Compensation*, 28 HARV. J.L. & PUB. POL'Y 51 (2004).

Should the "parcel as a whole" rule be expanded to include contiguous parcels under common ownership, government officials will often have little reason to worry about paying compensation, and will therefore have incentives to ignore the harm caused by their regulations, except perhaps in situations where the

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[7] The study analyzed the effects of this Court's decisions in *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987) and *Dolan v. City of Tigard*, 512 U.S. 374, 392 (1994).

victims have great political clout. Somin, *Two Steps Forward,* at 223. Society does not benefit when governments are indifferent to the costs of the regulations they enact. *Id*.

Far from inhibiting beneficial regulation, confining the "parcel as a whole" rule to individual parcels can actually enhance its efficiency.

CONCLUSION

Based upon the foregoing, *Amici* States respectfully request that this Court reverse the lower court's ruling.

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