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, District III

BRIEF OF *AMICUS CURIAE* CENTER FOR CONSTITUTIONAL JURISPRUDENCE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

This Court's regulatory takings jurisprudence has been conceptually flawed since the decision in *Penn Central Trans. Co. v. City of New York*, 438 U.S. 104 (1978), allowed the government to prohibit, by regulation, non-harmful uses of private property if the public benefit to be gained exceeded the purported investment-backed expectations of the property owner. That permitted governments to do the very thing the Takings Clause was designed to prevent, namely, put the entire cost of a public benefit on the back of a single property owner.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), did not remedy that conceptual problem, but merely carved out a small, "deprived of all economic benefit" safe harbor from its operation. As a result, the inquiry into how large a percentage of one's property is effected by a regulation, which should be irrelevant to the question whether a taking has occurred, became even more significant.

The patent injustice at issue in this case exposes *Penn Central*'s conceptual flaw, so the question presented is as follows:

1. Because the lower court's ruling treating two legally-distinct parcels as a "parcel as a whole" exposes the conceptual, anti-property rights flaw in *Penn Central*, should *Penn Central* be overruled or, at the very least, confined to its specific holding rejecting conceptual severance of a single legal parcel when assessing whether a regulatory taking has occurred, rather than extending that holding to require aggregation of neighboring parcels?

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INTEREST OF AMICUS CURIAE[1]

The Center for Constitutional Jurisprudence was established in 1999 as the public interest law arm of the Claremont Institute, the mission of which is to restore the principles of the American Founding to their rightful and preeminent authority in our national life. Those principles include the idea, articulated in the Declaration of Independence and codified in the Takings Clause of the Fifth Amendment, that governments are instituted to protect the inalienable rights of citizens, including the right to acquire and use property. In addition to providing counsel for parties at all levels of state and federal courts, the Center has represented parties or participated as amicus curiae before this Court in several cases of constitutional significance addressing the Constitution's protection of property rights, including *Koontz v. St. Johns River Water Management District*, 133 S. Ct. 2586 (2013); *Sackett v. Environmental Protection Agency*, 132 S. Ct. 1367 (2012); and *Kelo v. City of New London, Conn.*, 125 S. Ct. 2655 (2005).

SUMMARY OF ARGUMENT

Petitioners are correct in their contention that, for purposes of determining whether a regulation has impaired a significant enough percentage of a parcel of

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[1] Pursuant to this Court's Rule 37.3, this amicus brief is filed with the consent of the parties. Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief, and no person other than Amicus Curiae, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

real property, *Penn Central* does not require, and implicitly forbids, aggregation of adjoining parcels that happen to come into common ownership.

Moreover, the conceptual flaws in *Penn Central*'s analysis that this case exposes warrant reconsideration of *Penn Central* itself. The Court's rejection of conceptual severance in its regulatory takings analysis has produced a nonsensical differential treatment of parcels of land that are identical but for the provenance of the land's ownership. Even more fundamentally, the Court's focus on the "parcel as a whole" is (or should be) irrelevant to the question whether a taking has occurred at all.

Absent reconsideration and reform of the *Penn Central* balancing test, conduct that the Takings Clause was designed to forbid will continue unabated, with governments at all levels "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).

ARGUMENT

I. *Penn Central* Involved Conceptual Severance of a Single Parcel, Not Aggregation of Adjoining Parcels, and Should Not Be Extended to Include Aggregation.

Amicus agrees with Petitioner that in *Penn Central*, this Court addressed only the issue whether, for purposes of the regulatory takings analysis it adopted, a single parcel could be segmented into discreet property interests—what the academic literature has described as "conceptual severance." *See, e.g.*, Margaret Jane Radin, "The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings," 88

Colum. L. Rev. 1667, 1676 (1988). *Penn Central* did not endorse, but instead implicitly rejected, the distinct issue involved here, namely, whether adjoining parcels that happen to come into a single ownership must be aggregated for purposes of defining the denominator in the *Penn Central* balancing test.

Moreover, as described in Part II below, even that limited holding is conceptually flawed in ways that severely undermine the fundamental right to property protected by the Takings Clause. As a result, the holding should certainly not be extended to cases involving the aggregation of separately-owned parcels of real property. Indeed, because the patent injustice at issue in this case even purports to find solace in *Penn Central*, the holding in *Penn Central* should itself be revisited.

II. *Penn Central*'s Focus on the Parcel as a Whole Was Conceptually Flawed, and the Flaws Have Only Become More Manifest With Subsequent Cases.

A. *Penn Central*'s rejection of conceptual severance yields discriminatory treatment in regulatory takings challenges.

Without citation, this Court in *Penn Central* noted 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. "In deciding whether a particular governmental action has effected a taking," the majority added, "this Court focuses rather both on the character of the action *and on the nature and extent of the interference with rights in the parcel as a whole*." *Id.* at 130-31 (emphasis added).

Dissenting, then-Justice Rehnquist (joined by Chief Justice Burger and Justice Stevens), described the *Penn Central* majority's "rule that a taking occurs only where the property owner is denied all reasonable return on his property" as posing "difficult conceptual and legal problems." 438 U.S. at 150 n.13 (Rehnquist, J., dissenting). Indeed it did. One such problem arises when determining how to "define the particular property unit that should be examined." *Id.* By rejecting the idea of conceptual severance, the *Penn Central* holding produces the oddity that identical properties, subject to the same regulatory imposition, are treated differently in Takings Clause challenges merely because of the historical pedigree of the properties' titles.

By way of example, suppose there were two 5-acre parcels of land adjoining the main north-south boulevard in City X, each extending 400 feet east from the boulevard. The owner of the first parcel, Owner A, subdivides his parcel east to west into two, 2.5-acre lots, and sells the west lot fronting the boulevard to Owner B, keeping the east lot for himself. The owner of the second five-acre parcel, Owner C, keeps his five-acre parcel intact. City X thereafter decides, for aesthetic reasons, to create a swath of open space along the boulevard by prohibiting all development within 200 feet of the boulevard. Owners B and C both lose development rights on 2.5 acres of land, and both file inverse condemnation actions. But under the *Penn Central* rule, only owner B will likely succeed with his claim, because the regulation has interfered with his property rights in 100% of his "parcel as a whole." The extent of interference with Owner C's property rights, on the other hand, is only 50% (even though it is the identical 2.5-acre restriction), and therefore likely not

a substantial enough interference with his "parcel as a whole" to qualify as a taking. Such a disparity is nonsensical.

Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992), did not remedy that conceptual problem, but merely carved out from its operation the small, "denie[d] all economically beneficial or productive use of the land" safe harbor that the above hypothetical illustrates, treating it as a categorical taking akin to a physical occupation. *Id.* at 1015. And even that safe harbor was relegated to little more than anomaly by this Court's subsequent decision in *Tahoe-Sierra Preservation Council v. Tahoe Reg'l Planning Agency*, 535 U.S. 302 (2002), which, in adding a temporal component to the "parcel as a whole" equation, ensured that almost no regulatory interference with property rights would be treated as a categorical taking. *See id.* at 324 n.18 (describing *Lucas* has having "carved out a narrow exception to the rules governing regulatory takings for the 'extraordinary circumstance' of a permanent deprivation of all beneficial use"); *see also, e.g.*, Andrew S. Gold, "The Diminishing Equivalence Between Regulatory Takings and Physical Takings," 107 Dick. L. Rev. 571, 576-77 (2003) (describing the result in *Tahoe-Sierra* as "indicat[ing] that the *Lucas* per se taking rule will almost never be directly on point in regulatory takings cases"); *cf.* Richard A. Epstein, "The Seven Deadly Sins of Takings Law: The Dissents in *Lucas v. South Carolina Coastal Council*, 26 Loy. L.A. L. Rev. 955, 955 (1993) (describing the *Lucas* holding as applying only "to the tiny, and soon to be extinct, class of total regulatory takings"),

B. The percentage of a parcel affected by a regulation is (or should be) irrelevant to the question of whether the regulation constitutes a taking.

The other conceptual problem with *Penn Central* is even worse. In truth, the percentage of one's property that is necessary for a regulation to qualify as a taking—whether it be all of the property's economic use (*Lucas*) or the owner's significant, investment-backed expectations (*Penn Central*)—should be immaterial to the takings analysis. As Professor Richard Epstein has correctly noted, "the ratio between retained and taken property, is irrelevant" to whether a taking has even occurred or to the amount of compensation that must paid for a regulatory taking. Richard A. Epstein, "*Lucas v. South Carolina Coastal Council*: A Tangled Web of Expectations," 45 Stan. L. Rev. 1369, 1376 (1993).

A regulation that affects even the entire property is not a taking if it prevents nuisance, because no one has a right to use his property in ways that cause harm to another's lawful rights. *Sic utere tuo ut alienum non laedas.* William Blackstone, 1 Commentaries § 306; *see also Camfield v. United States*, 167 U.S. 518, 522 (1897) ("His right to erect what he pleases upon his own land will not justify him in maintaining a nuisance"); *Mugler v. Kansas*, 123 U.S. 623, 668-69 (1887) ("A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit"); Steven J. Eagle, "The Four-Factor *Penn Central* Regulatory Takings Test," 118 Penn St.

L. Rev. 601, 617 (2014) ("Because landowners do not have a property right in maintaining a nuisance or other condition inimical to the public health, safety, or welfare, even a large loss resulting from termination of such activity is not compensable").

Conversely, a regulation that affects even a small portion of the parcel *is (or should be) a taking* if it restricts non-nuisance private use in order to derive a benefit for the public. As this Court has long recognized, the Fifth Amendment "bar[s] 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,* 364 U.S. at 49; *see also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 416 (1922) (Holmes, J.) ("We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change").

In fact, treating benefit-grabbing regulations that fall short of a complete deprivation as subject only to the *Penn Central* balancing test turns the Takings Clause on its head. That test balances the property owner's investment-backed expectations against the public purpose to be served by the regulation, and holds that no taking occurs (and hence no compensation is due) whenever the regulation serves "a substantial public purpose." *Penn Central*, 438 U.S. at 127. The Takings Clause, which was designed to prevent the majority from benefiting itself at the expense of individual property owners, requires just the opposite result. Indeed, the greater the benefit to the public, the greater the temptation of a government responsive to majority rule to avoid the costs by "forcing

some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong,* 364 U.S. at 49; *see also* Richard Epstein, "Nuisance Law: Corrective Justice and Its Utilitarian Constraints," 8 The Journal of Legal Studies 49, 63 (Jan. 1979) (describing the "problem of tyranny by the majority" in the Takings context).

III. Neither the Nuisance Cases Nor the "Average Reciprocity of Advantage" Cases Exempt the Government from Paying Just Compensation to the Murrs.

Eliminating the conceptually-flawed *Penn Central* balancing test would not mean that compensation must be paid to every property owner whose property suffers a diminution in value as the result of some government regulation. As noted above, regulations designed to prevent nuisance would not, in most circumstances, qualify as a taking at all.[2]

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[2] A likely exception would be regulations aimed at preventing nuisance-like harms that operate against some properties but not other properties that produce the identical harms. The property at issue in *Tahoe-Sierra* is a good example. The argument there was that a development moratorium was necessary to prevent the increase in impervious coverage of land in the Lake Tahoe basin that was causing harmful runoff into the lake and threating its pristine beauty. But the landowner plaintiffs in the case sought to do nothing more with their property than other property owners had already done, namely, build vacation homes. The "nuisance" to the Lake was therefore not their's alone, but only the result of the cumulative impact on the lake caused by all development in the basin. A development ban that operated only against them (rather than one that limited the amount of impervious development on all land in the basin to the scientifically sustainable level, even to the point of requiring *undevelopment*) must therefore be viewed as grabbing a benefit (in the form of excess development) for the majority of the property

That was the significance of at least two of the three cases on which the majority in *Penn Central* relied (albeit contrary to the majority's characterization of those cases). There was no "taking" in *Hadacheck v. Sebastian*, 239 U.S. 394 (1915), because the regulation at issue in that case prohibited a brickyard from operating in a residential area where the dust from its operations caused a nuisance. Nor was there a taking in *Miller v. Schoene*, 276 U.S. 272 (1928), which involved a Virginia statute requiring the destruction of cedar trees that were infected with a communicable plant disease known as cedar rust and therefore "declared to be a public nuisance." *Id.* at 277.[3]

Nor would eliminating *Penn Central*'s balancing test undermine the "average reciprocity of advantage" exception to regulatory takings. *See, e.g.*, *Pennsylvania Coal*, 260 U.S. at 415. On the contrary, eliminating the *Penn Central* balancing test would restore the "average reciprocity of advantage" exception to its

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owners in the basin at the expense of those few effected by the ban.

[3] The third case, *Goldblatt v. Hempstead*, 369 U.S. 590 (1962), which involved a prohibition on sand and gravel excavation below the water table line, can also be viewed as preventing a nuisance rather than grabbing a public benefit, even if, as the Court claimed, it was "arguably not a common-law nuisance." *Id.* at 593. That was how the dissent viewed the case, *Penn Central*, 438 U.S. at 145 (Rehnquist, J., dissenting), and by referencing the statement in *Mugler* that "A prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit," *Goldblatt*, 369 U.S. at 593 (quoting *Mugler*, 123 U.S. at 668-69), the majority arguably did as well.

original purpose and reconcile it with the original purpose of the Takings Clause itself. As this Court noted in *Monongahela Navigation Co. v. United States*, 148 U.S. 312, 325 (1893), the average reciprocity of advantage "prevents the public from loading upon one individual more than his just share of the burdens of government, and says that when he surrenders to the public something more and different from that which is exacted from other members of the public, a full and just equivalent shall be returned to him."

But neither the nuisance exception nor the average reciprocity exception apply to St. Croix County's restriction of development on the Murrs' property. No one has asserted that the Murrs would be causing a nuisance should they develop their parcel in the same manner as nearly all other parcels in the vicinity have been developed.[4] And the peculiar way in which the grandfather provision of the regulation at issue excludes the Murrs from its benefits eliminates the County's ability to rely on the average reciprocity of advantage doctrine. Quite simply, there is no "reciprocity" for the Murrs, but great advantage for everyone else. If the rest of the owners in the neighborhood have a "strong public desire to improve the public condition" of the area by keeping the Murrs' property vacant, they cannot "achiev[e] the desire by a shorter cut

[4] And even if development of the Murrs' parcel could be viewed as a nuisance because, when added to the development that has already occurred in the area, the cumulative effect might be harmful—something that has not been asserted by the government—the discriminatory treatment of the Murr's parcel vis-à-vis other parcels in the vicinity should still give rise to a regulatory taking, for the reasons described in note 2, *supra*.

than the constitutional way of paying for" it. *Pennsylvania Coal,* 260 U.S. at 416.

CONCLUSION

The decision of the Wisconsin Supreme Court rejecting the Murrs' regulatory takings claim based on an expansion of the conceptually-flawed holding in *Penn Central* should be reversed, and *Penn Central* should itself be revisited in order to restore the full measure of protection of private property rights intended by the Takings Clause.

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