WHAT IS THE RELEVANT PARCEL? CLARIFYING THE "PARCEL AS A WHOLE" STANDARD IN *MURR V. WISCONSIN*

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INTRODUCTION

"If there is a consensus today about regulatory takings law, it is that it is highly muddled."[1] Much of this "muddle" results from the Supreme Court's decision in *Penn Central Transportation Co. v. City of New York*,[2] which requires courts to analyze takings claims using a three-part, ad hoc test that measures the extent of the property owner's loss against the value of the "parcel as a whole."[3] In subsequent decisions, the Court has repeated the *Penn Central* rule but has provided minimal guidance for lower courts, furthering confusion in the realm of regulatory takings law.[4] Notably, the Court has failed to announce a rule for determining the "parcel as a whole."[5] As a result of this lack of clarity, lower courts have been "invited to engage in open-ended value judgments."[6]

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1. John E. Fee, *The Takings Clause as a Comparative Right*, 76 S. CAL. L. REV. 1003, 1006 (2003).
2. 438 U.S. 104 (1978).
3. *See* Brief of the Cato Institute and Owners' Counsel of America as Amici Curiae in Support of Petitioners at 6–12, Murr v. Wisconsin, 136 S. Ct. 890 (2016) (No. 15-214) [hereinafter Brief of the Cato Institute].
4. John D. Echeverria, *Making Sense of* Penn Central, 23 UCLA J. ENVTL. L. & POL'Y 171, 171–72 (2005).
5. *See, e.g.*, Lucas v. S.C. Coastal Council, 505 U.S. 1003 (1992); Palazzolo v. Rhode Island, 533 U.S. 606 (2001); Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency, 535 U.S. 302 (2002). These are examples of regulatory takings cases in which the Court considered the "parcel as a whole" but declined to elaborate a specific rule.
6. *See* Brief of the Cato Institute, *supra* note 3, at 9 (quoting J. Peter Byrne, *Ten Arguments for the Abolition of the Regulatory Takings Doctrine*, 22 ECOLOGY L.Q. 89, 104 (1995)).

With lower courts formulating their own tests, property owners have largely been unsuccessful in their challenges, losing approximately ninety percent of takings claims.[7] An example of these unsuccessful takings claimants is the case of Joseph, Donna, Michael, and Peggy Murr (collectively "the Murrs"), owners of two adjacent properties along the St. Croix River.[8] The Murrs have spent years combating local and state authorities in a quest to renovate their riverside cabin and sell their adjacent property, but the Wisconsin courts have consistently ruled against them.[9]

Despite their repeated failures, the Murrs have a chance to persuade the Court that *Penn Central*'s "parcel as a whole" concept needs further clarification for lower courts to implement it effectively. During the 2016-2017 term, the Court will decide whether, in a regulatory takings case, the "parcel as a whole" concept as described in *Penn Central* establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.[10]

This commentary will first set forth the factual and procedural history behind the Murrs' takings claim. Second, there will be a brief discussion of takings jurisprudence. Part III details the lower court's holding in the Murrs' takings claim. Part IV analyzes the claim to identify the party that should prevail. Finally, the commentary will conclude briefly with the expected outcome of the case.

I. FACTUAL AND PROCEDURAL HISTORY

The Murrs' parents purchased two parcels of land on the St. Croix River in 1960 and 1963—each parcel approximately one and one-quarter acre in area.[11] On the first lot (Lot F), the parents built a cabin near the river and transferred the title to their plumbing company.[12] Three years later, they purchased the second lot (Lot E), which has

7. F. Patrick Hubbard et al., *Do Owners Have a Fair Chance of Prevailing Under the Ad Hoc Regulatory Takings Test of* Penn Central Transportation Company*?*, 14 DUKE ENVTL. L. & POL'Y F. 121, 141 (2003).

8. Murr v. State, No. 2013AP2828, 2014 Wisc. App. LEXIS 1041, at *1 (Wis. Ct. App. 2014).

9. *See id.*; *see also* Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W.2d 837 (Wis. Ct. App. 2011).

10. Petitioners' Brief on the Merits at i, Murr v. Wisconsin, 136 S. Ct. 890 (2016) (No. 15-214) [hereinafter Petitioners' Brief].

11. *Murr*, 796 N.W.2d at 841.

12. *Id.*

remained vacant ever since.[13] In 1994 and 1995, respectively, the parents transferred Lot F and Lot E (collectively "the Lots") to the Murrs, with the second transfer bringing the Lots under the Murrs' common ownership.[14]

After flooding from the river damaged the cabin, the Murrs wanted to reconstruct the cabin on higher ground and requested six variances and two special exception permits from the St. Croix County Board of Adjustment ("Board").[15] Planning to sell Lot E to finance construction on Lot F, one of the variances sought the Board's approval to use Lot E and Lot F as separate building sites.[16] While the Lots were legally distinct properties, they were effectively merged under a 1976 St. Croix County ordinance ("Ordinance") that was enacted to comply with federal and state laws designating the St. Croix River as part of the National Wild and Scenic River System.[17] The Ordinance required that adjacent substandard lots in common ownership contain at least one acre of buildable area in order to be sold or developed as separate lots.[18] While the Murrs owned a total of 2.5 acres, the buildable area of Lot E is only 0.5 acres and the buildable area of Lot F is 0.48 acres.[19]

After a public hearing, the Board denied all eight variances and the Murrs sought certiorari review before the circuit court.[20] The circuit court affirmed the Board's denial of the Murrs' request to use Lot E and Lot F as separate building sites but reversed the Board on the remaining seven requests.[21] The Murrs appealed and the Board cross-appealed the circuit court's decision.[22] The Murrs argued that the Lots were exempt from the Ordinance because the Lots were not under common ownership when the Ordinance was enacted.[23] Rejecting the Murrs' interpretation of the Ordinance, a three-judge panel on the Wisconsin Court of Appeals upheld the Board's denial of all eight

13. *Id.*
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.* at 842.
18. *Id.*
19. *Id.* at 841.
20. *Id.*
21. *Id.*
22. *Id.* at 840.
23. *Id.* at 843.

requests.[24] The Wisconsin Supreme Court denied the Murrs request for an appeal.[25]

The Murrs decided to take a different approach and filed a new complaint in circuit court against the State of Wisconsin ("State") and St. Croix County ("County").[26] The Murrs alleged that the Ordinance resulted in a taking without just compensation under Section Thirteen of Article One of Wisconsin's Constitution because the Ordinance deprived the Murrs of "all, or practically all, of the use of Lot E."[27] The State and County separately moved for summary judgment, but essentially set forth the same four arguments.[28]

The circuit court granted summary judgment for the State and County,[29] but took an unusual approach. After concluding that the Murrs' claim was time barred, the circuit court nevertheless reached the merits of the takings challenge.[30] The circuit court determined that regulatory takings law required an analysis of the Ordinance's effect on the Murrs' property "as a whole" instead of each individual lot.[31] Noting that the Murrs could build a cabin located entirely on either lot or straddled across both of the Lots, as well as the fact that the combined properties retained significant value, the circuit court concluded that there was no compensable taking.[32]

On appeal, the Wisconsin Court of Appeals affirmed the circuit court by rejecting the Murrs' takings claim as a matter of law.[33] Without reaching the issue of whether the Murrs' claim was time barred, the Wisconsin Court of Appeals rejected the Murrs' argument that there was a genuine issue of material fact as to whether the contiguous Lots were used together such that they could be considered as one property for regulatory takings analysis.[34] Despite the existence of a statutory procedure for modifying the boundaries of real property lots, the Wisconsin Court of Appeals held that the Ordinance effectively merged the Murrs' Lots but did not deprive the Murrs of all or

24. *Id.* at 844–45.
25. Murr v. St. Croix Cty. Bd. of Adjustment, 803 N.W.2d 849 (Wis. 2011).
26. Murr v. State, No. 2013AP2828, 2014 Wisc. App. LEXIS 1041, at *1 (Wis. Ct. App. 2014).
27. *Id.* at *5–6.
28. *Id.* at *6–7.
29. *Id.* at *7.
30. *Id.*
31. *Id.*
32. *Id.* at *7–8.
33. *Id.* at *8.
34. *Id.* at *14–15.

substantially all practical use of the combined property.[35] Once again, the Wisconsin Supreme Court denied further review.[36]

On August 14, 2015, the Murrs filed a petition for a writ of certiorari to the Supreme Court.[37] On January 15, 2016, the Supreme Court granted certiorari to determine whether in a regulatory takings case the "parcel as a whole" concept establishes a rule that two legally distinct but commonly owned contiguous parcels must be combined for takings analysis purposes.[38]

II. LEGAL BACKGROUND

A. Fifth Amendment Takings Clause & Penn Central

The Fifth Amendment's Takings Clause states that "private property [shall not] be taken for public use, without just compensation."[39] The Takings Clause largely "operates as a conditional limitation, permitting the government to do what it wants so long as it pays the charge."[40] This right to just compensation for takings of private property has been incorporated through the Fourteenth Amendment to apply to the states.[41]

Until the Supreme Court decided *Pennsylvania Coal Co. v. Mahon*,[42] the Court had interpreted the government's conditional requirement to only provide just compensation to physical invasions or appropriations of land.[43] *Mahon* extended the conditional requirement by holding that a government restriction of the owner's use of land may qualify for just compensation under the Takings Clause.[44] Recognizing that the government cannot reasonably pay for every change in law that might diminish property values, Justice Holmes established the

35. *Id.* at *1.
36. Murr v. State, 862 N.W.2d 899 (Wis. 2015).
37. Petitioners' Brief, *supra* note 10, at 1.
38. *Murr*, 2014 Wis. App. LEXIS 1041 (Wis. App. 2014), *cert. granted,* Murr v. Wisconsin, 136 S. Ct. 890 (2016).
39. U.S. CONST. amend. V.
40. Kelo v. City of New London, Conn., 545 U.S. 469, 487 n.19 (2005) (quoting E. Enters. v. Apfel, 524 U.S. 498, 545 (1998) (Kennedy, J., concurring in judgment and dissenting in part)).
41. *See* Chi., Burlington & Quincy R.R. Co. v. City of Chicago, 166 U.S. 226 (1897).
42. 260 U.S. 393 (1922).
43. Keith Woffinden, Comment, *The Parcel as a Whole: A Presumptive Structural Approach for Determining When the Government Has Gone Too Far*, 2008 BYU L. REV. 623, 626 (2008).
44. *Mahon*, 260 U.S. at 415–17.

general rule that property may be regulated, yet regulation that goes "too far" will constitute a taking.[45]

Over half a century after Justice Holmes announced the "too far" rule for takings, the Court established a three-part ad hoc test to determine if a regulation has gone "too far" in *Penn Central Transportation Co. v. New York City*.[46] Under the ad hoc test, the Court must assess (1) the "economic impact of the regulation," (2) "the extent to which the regulation has interfered with distinct investment-backed expectations," and (3) the "character of the government action."[47] Additionally, *Penn Central* established the general principle that courts must consider the "parcel as a whole" to determine whether the government's action results in a taking.[48] In rejecting the appellants' claim that a New York City law effected a taking because the law deprived the appellants of the "air rights" above the existing property, the Court noted:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, [the] 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*. . . .[49]

The Court held that New York City's landmark law did not effect a taking of the appellant's "air rights" because it determined that the city tax block was the relevant parcel.[50] However, the Court failed to explain how it determined that the city tax block was "the parcel as a whole."[51]

While most takings claims are subject to *Penn Central*'s ad hoc test, the Court has recognized two types of per se takings.[52] One type of per se taking was recognized in *Loretto v. Teleprompter Manhattan CATV Corp.*,[53] where the Court held that a permanent physical occupation of private property is a per se taking even if the government's action only

45. *Id.* at 415–16.
46. 438 U.S. 104, 124–28 (1978).
47. Woffiden, *supra* note 43, at 627 (quoting *Penn Cent.*, 438 U.S. at 124).
48. *Penn Cent.*, 438 U.S. at 130–31.
49. *Id.* (emphasis added).
50. *Id.*
51. *See id.* at 1030–39.
52. *See* Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1015 (1992).
53. 458 U.S. 419 (1982).

has a minimal economic impact on the owner.[54] This type of per se taking is not relevant to *Murr*. The second type of per se taking is discussed below.

B. Lucas & Subsequent Takings Clause Case Law

In *Lucas v. South Carolina Coastal Council*,[55] the Court established a second category of per se takings, called "total takings."[56] Writing for the majority, Justice Scalia held that a governmental action that deprives an owner's property "of all economically beneficial use" constitutes a taking "unless the proscribed use interests were not part of the title to begin with."[57] While "all economically beneficial use" seems to imply a one hundred percent loss of use, the Court left open the possibility that the loss of use need not be exactly one hundred percent.[58]

In footnote seven ("*Lucas Footnote Seven*"), the majority recognized that the total takings rule was difficult to apply by stating that "the rule does not make clear the 'property interest' against which the loss of value is to be measured."[59] Fortunately, the majority provided guidance in two key ways.[60] First, the majority rejected the view adopted by the New York Court of Appeals in *Penn Central* where the court examined the diminution in the parcel's value "in light of total value of the takings claimant's other holdings in the vicinity."[61] Additionally, the majority indicated that the relevant parcel can be impacted by the owner's reasonable expectations.[62] The majority's determination of the relevant parcel mirrors the second prong of *Penn Central*'s ad hoc test, which considers if the deprivation runs contrary to reasonable, investment-backed expectations.[63] While the majority recognized that state property law shape the expectations of land owners, the Court did not resolve the "parcel as a whole" question

54. *Id.* at 434–35.
55. 505 U.S. 1003 (1992).
56. *Id.* at 1027.
57. *Id.*
58. *Id.* at 1016–17 n.7.
59. *Id.*
60. *See* Woffiden, *supra* note 43, at 631.
61. *Lucas*, 505 U.S. at 1016–17 n.7 (citing Penn Cent. Transp. Co. v. City of New York, 366 N.E.2d 1271, 1276–77 (NY Ct. App. 1977), *aff'd*, 438 U.S. 104 (1978)).
62. *Id.*
63. *Compare id.*, *with* Penn Cent. Transp. Co. v City of New York, 438 U.S. 104, 124 (1978) (the second prong of the ad hoc test requires courts to consider "the extent to which the regulation has interfered with distinct investment-backed expectations").

because the property owner's fee simple interest had been deprived of all economic value of the lots he owned in the area.[64]

A decade after deciding *Lucas*, the Court in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*[65] relied on the "parcel as a whole" concept to decide a total takings challenge against a construction moratorium for areas surrounding Lake Tahoe.[66] Property owners claimed the moratorium effected a total taking because their land was deprived of all economic use for the duration of the moratorium.[67] The Court rejected the property owners' argument because dividing the property interest up into temporal segments "ignor[ed] *Penn Central*'s admonition that in regulatory takings cases we must focus on 'the parcel as a whole.'"[68] The *Tahoe-Sierra* decision provided further guidance to lower courts by stating that an interest in real property, and therefore the relevant parcel, is defined by geographical and temporal dimensions.[69]

III. HOLDING

In a per curiam opinion, the Wisconsin Court of Appeals affirmed the circuit court's grant of summary judgment, holding that the Murrs failed to allege a taking as a matter of law because the Ordinance did not deprive the Murrs of all or substantially all of the practical use of their property.[70] The Wisconsin Court of Appeals determined the Murrs' claim was governed by *Zealy v. City of Waukesha*,[71] state law precedent that applied *Penn Central*'s parcel as a whole concept.[72] *Zealy* rejected a property owner's argument that the city effected a total taking through regulations that precluded residential development on over eighty percent of the owner's property because the property owner retained over two acres zoned for economically beneficial use.[73] In holding that no compensable taking occurred, *Zealy* noted that "the United States Supreme Court has never endorsed a test that 'segments' a contiguous property to determine the relevant

64. *Lucas*, 505 U.S.. at 1016–17 n.7.
65. 535 U.S. 302 (2002).
66. *Id.* at 330–32.
67. *Id.* at 320.
68. *Id.* at 331 (quoting *Penn Cent.*, 438 U.S. at 130–31).
69. *Id.* at 331–32 (citing RESTATEMENT (FIRST) OF PROP. §§ 7–9 (1936)).
70. Murr v. State, No. 2013AP2828, 2014 Wisc. App. LEXIS 1041, at *2 (Wis. Ct. App. 2014).
71. 201 Wis. 2d 365 (Wis. 1996).
72. *Murr*, 2014 Wisc. App. LEXIS 1041 at *11–14 (citing *Zealy*, 201 Wis. 2d at 372).
73. *See Zealy*, 201 Wis. 2d. at 376–80.

parcel."[74] The Wisconsin Court of Appeals interpreted *Zealy* as setting forth "a well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[75]

In applying *Zealy* to reach the holding that the Ordinance had not effected a compensable taking, the Wisconsin Court of Appeals defined the "parcel as a whole" as the combination of Lots E and F.[76] The court noted that the Ordinance permitted the Murrs to build a new residence that "could be located entirely on Lot E, entirely on Lot F, or it could straddle both lots."[77] Because the Murrs retained the ability to use the combined property as a residential property, the Ordinance did not effect a taking that deprived the Murrs of "all or substantially all" of the practical use or value of their property.[78] Furthermore, the Wisconsin Court of Appeals rejected the Murrs' alternative claim of a partial taking under the ad hoc inquiry.[79]

IV. ARGUMENTS

A. The Murrs' Arguments

The Murrs argue that the relevant parcel is Lot E for analyzing the effect of the Ordinance either as a per se taking under *Lucas* or a taking based on *Penn Central*'s ad hoc test.[80] The Murrs contend that Supreme Court precedent "focuses on the single parcel that comprises the entire fee simple interest."[81]

This argument primarily lies in the hints offered by *Lucas Footnote Seven*, where the Supreme Court rejected an approach to determining the relevant parcel that aggregates parcels held by the owner within the vicinity.[82] *Lucas* hinted that determining the relevant parcel relates to "how the owner's reasonable expectations have been shaped by the State's law of property. . . ."[83] Furthermore, *Lucas* elaborated that the "State's law of property" relevant to the inquiry depends on the degree

74. *Id.* at 375–76.
75. *Murr*, 2014 Wisc. App. LEXIS 1041, at *13.
76. *See id.* at *10–15.
77. *Id.* at *15.
78. *Id.* at *21.
79. *Id.* at *16–17.
80. Petitioners' Reply Brief on the Merits at 2, Murr v. Wisconsin, 136 S. Ct. 890 (2016) (No. 15-214) [hereinafter Petitioners' Reply Brief].
81. *Id.*
82. *Id.* at 3.
83. *Id.* at 5.

of legal recognition and protection accorded by the State's law "to the particular interest in land with respect to which the takings claimant alleges and diminution in value."[84] *Lucas* avoided the difficult issue of setting forth a clear "parcel as a whole" rule because the "particular interest in land" pled by the takings claimant was a fee simple interest.[85] Like the takings claimant in *Lucas*, the Murrs assert a taking of a fee simple interest.[86]

Another argument advanced by the Murrs is that Lot E and Lot F have not been legally joined but presently remain as separate, single, and discrete parcels.[87] This argument attacks the effect of the Ordinance by claiming that the Ordinance does not eliminate lot lines because Wisconsin has a statutory procedure in place for altering lot lines.[88] The statutory procedure requires a recorded survey to modify the boundaries of any lot, but no recorded survey of Lot E had actually taken place.[89] Not only were the Lots created as legally separate parcels, the Lots were taxed separately until the Wisconsin Court of Appeals decided the Murrs' initial lawsuit against the Board.[90]

Additionally, the Murrs argued that the chain of title supported their claim that Lot E and Lot F were legally distinct parcels.[91] Specifically, the Murrs' parents brought Lot E and Lot F under common ownership by transferring the title of Lot F from their plumbing company to their personal names in 1982.[92] Because the parents transferred Lot F to the Murrs in 1994 without transferring Lot E, the Murrs argue that Lots E and F did not legally become a single parcel as the result of common ownership.[93] The Murrs further support their claim by contending that Wisconsin's property regulations, specifically the Ordinance, does not define the relevant parcel.[94]

84. *Id.*
85. Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1016–17 n.7 (1992).
86. Petitioners' Reply Brief, *supra* note 80, at 6.
87. *Id.* at 7.
88. *Id.* (citing Wis. Stat. § 236 (2015)).
89. *Id.* at 7–9.
90. *See* Petitioners' Brief, *supra* note 10, at 9; *see also* Brief for Respondent State of Wisconsin at 40–41, Murr v. Wisconsin, 136 S. Ct. 890 (2016) (No. 15-214).
91. Petitioners' Reply Brief, *supra* note 80, at 10–11.
92. *Id.* at 10.
93. *Id.* at 10–11.
94. *See id.* at 11–16.

B. St. Croix County & Wisconsin's Arguments

The County and State both view the "parcel as a whole" as the merger of Lot E and Lot F and contend that the Murrs took title to a single merged parcel in 1995 under state law and takings law.[95] To identify the merged property as the relevant parcel, the State and County rely on *Lucas Footnote Seven*.[96] Because Supreme Court precedent has routinely defined "property" protected by the Takings Clause in the context of state law, the State claims that this approach is the correct way to identify the relevant parcel.[97]

The State notes that evaluating takings claims with respect to the owner's reasonable expectations in light of state property law is particularly useful for evaluating land lots because regulations with respect to lot lines are within the realm of state law.[98] For example, states have the ability to set forth the manner in which lot lines are drawn, altered, and merged.[99] Not only would this approach respect state sovereignty, it would provide an objective test for determining the relevant parcel based on ex ante state law.[100] This objective test, the State claims, would deter manipulative behavior by both states and property owners.[101]

When applied to the Murrs' takings claim, the State argues that Lot E and Lot F constitute a "parcel as a whole" because the Murrs had an objectively reasonable expectation to take title to a single merged parcel in 1995 in the context of the State and County's property laws.[102] Because the Ordinance was in place for nearly twenty years before the Murrs took ownerships of the Lots, the Murrs had adequate notice that the 1995 transfer would effectively merge Lot E and Lot F.[103] Under this approach, the Wisconsin Court of Appeals correctly applied *Zealy*

95. Brief for Respondent St. Croix County at 25, *Murr*, 136 S. Ct. 890 (No. 15-214); Brief for Respondent State of Wisconsin, *supra* note 90, at 1.

96. *See* Brief for Respondent St. Croix County, *supra* note 95, at 28; *see also* Brief for Respondent State of Wisconsin, *supra* note 90, at 23 (stating that the relevant parcel may depend on the owner's reasonable expectations in light of the State's law of property).

97. Brief for Respondent State of Wisconsin, *supra* note 90, at 29–30.

98. *Id.* at 24.

99. *Id.* at 33–34.

100. *Id.* at 35–36.

101. *Id.* at 36–37 (contending, for example, that under an objective standard, an unexpected change in a state's property law without a grandfather clause to protect owners' expectations under ex ante state law would give rise to a takings challenge against the state's change).

102. *Id.* at 37–38.

103. Brief for Respondent St. Croix County, *supra* note 95, at 34–35; Brief for Respondent State of Wisconsin, *supra* note 90, at 44.

to the Murrs' request to segment their merged property into two separate parcels for evaluating their takings claim.[104]

If the Supreme Court determines that a multi-factor approach is better than the State's approach to determining the relevant parcel, the State argues that the merged property is still the relevant parcel.[105] The State claims that the Murrs had no "economic expectations" as a matter of law to treat Lot E separately from Lot F and that there is no evidence in support of any subjective expectations set forth by the Murrs.[106] Additionally, the State disagrees with the Murrs' contention that the separate acquisition dates of the Lots merit treating the Lots as separate parcels.[107] The State further argues that the Murrs have in fact treated Lot E and Lot F as a single unit, citing evidence that "vacant" Lot E contains a propane tank, volleyball court, and access to the same stretch of beach.[108] Alternative arguments include the claim being time barred and the Murrs failure to exhaust their administrative remedies.[109]

V. ANALYSIS

The Court should hold for the Murrs and rule that Lot E is the relevant parcel to analyze whether the Ordinance effected a taking that requires just compensation. First, the Wisconsin Court of Appeals made a crucial factual error by stating that the 1995 transfer of Lot E brought the Lots under common ownership for the first time. Second, *Penn Central*'s "parcel as a whole" concept should not be interpreted to require courts to analyze takings claims by aggregating commonly owned but legally distinct properties.

A. Error by the Wisconsin Court of Appeals

The Wisconsin Court of Appeals made a crucial factual error that underlies their rulings against the Murrs. Specifically, during the Murrs' first appeal, the Wisconsin Court of Appeals implied that the 1995 transfer of Lot E brought the Lots under common ownership for the

104. Brief for Respondent St. Croix County, *supra* note 95, at 39; Brief for Respondent State of Wisconsin, *supra* note 90, at 38.

105. Brief for Respondent State of Wisconsin, *supra* note 90, at 43–44.

106. *Id.* at 44–45.

107. *Id.* at 45–46.

108. *Id.* at 46–47.

109. Murr v. State, No. 2013AP2828, 2014 Wisc. App. LEXIS 1041, at *6–7 (Wis. Ct. App. 2014).

first time, resulting in a merger.[110] The Wisconsin Court of Appeals confirmed this implication in the Murrs' second appeal.[111] Both the County and the State note that the Murrs' parents had owned Lots E and F in their personal names from 1982 until 1994, when Lot F alone was transferred to the Murrs.[112] Accordingly, the parents' 1982 transfer of Lot F from their plumbing company to their personal names brought the Lots under common ownership and within the scope of the Ordinance.[113] Theoretically, the Murrs' parents should not have been allowed to separately transfer the Lots to the Murrs.[114]

Given that the State and the County define the relevant parcel based on the property owner's reasonable expectations of the state property law, the facts do not support their claim that the Murrs had an objectively reasonable expectation that the 1995 transfer of Lot E would result in the Murrs taking title to a single merged parcel.[115] Ironically, the County accuses the Murrs of "pick[ing] and choos[ing] among relevant state laws that define the scope of their property rights."[116] In fact, the County and the State are engaging in such behavior by deciding to prohibit the Murrs from selling or developing Lot E under the Ordinance, while arguing at the same time that the 1982 transfer is irrelevant to the case at hand.[117] Regardless of the merits of the County's accusation, the fact that the Murrs' parents were able to transfer Lot E and Lot F separately to the Murrs seemingly gives rise to the reasonable belief that the Murrs could do the same.[118]

B. Penn Central Does Not Require Aggregation of Commonly Owned Properties

In addition to the factual error underpinning the Wisconsin Court of Appeals' decision, *Penn Central*'s "parcel as a whole" concept does not require that courts analyze a takings claim by aggregating commonly owned, contiguous properties that are legally distinct from

110. *See* Murr v. St. Croix Cty. Bd. of Adjustment, 796 N.W. 2d 837, 841–44 (Wis. Ct. App. 2011).

111. *Murr*, 2014 Wisc. App. LEXIS 1041, at *3.

112. Brief for Respondent St. Croix County, *supra* note 95, at 12 n.5; Brief for Respondent State of Wisconsin, *supra* note 90, at 18 n.9.

113. Petitioners' Reply Brief, *supra* note 80, at 10.

114. *Id.* at 10–11.

115. Brief for Respondent St. Croix County, *supra* note 95, at 22; Brief for Respondent State of Wisconsin, *supra* note 90, at 25.

116. Brief for Respondent St. Croix County, *supra* note 95, at 32.

117. *Id.* at 12 n.5.

118. Petitioners' Reply Brief, *supra* note 80, at 13–14.

one another. In *Penn Central*, a company alleged that a New York City law effected a taking of its property interest in the airspace above Grand Central Terminal.[119] In denying the takings claim, the Court stated that "'[t]akings' jurisprudence does not divide a single parcel into discrete segments" but rather focuses on both "the character of the action and on the nature and extent of the interference with the rights in the parcel as a whole."[120] The New York City law did not effect a taking because the property owner attempted to "segment" the airspace from the rest of the fee property.[121]

The Wisconsin Court of Appeals correctly stated that the parcel must be viewed as a whole, but misinterpreted *Penn Central* by aggregating the Murrs' contiguous, commonly owned properties and analyzing the Murrs' takings claim as an attempt to segment a single parcel.[122] *Penn Central* can better be understood as standing for the principle that property owners cannot claim a compensable taking for a segmented portion of their property.[123] While *Penn Central* may have caused confusion by defining the "parcel as a whole" as "the city tax block designated as the 'landmark site,'" the Court did not suggest that the properties comprising the tax block were aggregated simply because they were contiguous parcels under common ownership.[124] In contrast, *Penn Central*'s language emphasizes the relevant parcel is a "single parcel" rather than the aggregation of parcels.[125]

CONCLUSION

Only eight Justices will decide *Murr*, as arguments were heard on the same day the confirmation hearings began for Neil Gorsuch.[126] Gorsuch's absence, a judge commonly compared to the late Justice Scalia, likely weighs in favor of the State and the County. Assuming Gorsuch shares Scalia's embracement of the per se rule for total

119. Penn Cent. Transp. Co. v City of New York, 438 U.S. 104, 119 (1978).

120. *Id.* at 130–131.

121. Amicus Curiae Brief of Mountain States Legal Foundation in Support of Petitioners at 9, Murr v. Wisconsin, 136 S. Ct. 890 (2016) (No. 15-214).

122. *Id.* at 9–10.

123. *See* Amicus Curiae Brief of Nevada, et al. as Amici Curiae in Support of Petitioners at 15, *Murr*, 136 S. Ct. 890 (No. 15-214).

124. *Id.* at 13–14.

125. *Id.* at 10.

126. *Compare* J. David Breemer, *Supreme Court schedules oral argument in* Murr *for March 20, 2017*, PAC. LEGAL FOUND.: LIBERTY BLOG (Feb. 3, 2017), http://blog.pacificlegal.org/supreme-court-schedules-oral-argument-murr-case-march-20-2017/, *with* Seung Min Kim, *Gorsuch confirmation hearing set for March 20*, POLITICO (Feb. 16, 2017), http://www.politico.com/story/2017/02/gorsuch-confirmation-hearing-set-for-march-20-235084.

takings, the State and the County will benefit from his absence because the Murrs' success depends on the Court embracing the per se rule.[127] Additionally, Justice Kennedy's opinions in takings clause cases indicate that he might be more receptive to the State's and the County's position than the rest of the conservative wing of the Court.[128] Regardless if the Court rules in favor of the Murrs or the State and the County, *Murr v. Wisconsin* provides the Court a crucial opportunity to clarify the rule for determining the "parcel as a whole."

127. *See* Richard Wolf, *'Scalia Index' shines light on possible Trump Supreme Court Pick*, USA TODAY (Jan. 30, 2017), http://www.usatoday.com/story/news/politics/2017/01/30/supreme-court-trump-scalia-pryor-gorsuch/97057474.

128. *See e.g.*, Kelo v. City of New London, Conn., 545 U.S. 469, 490–93 (2005) (Kennedy, J., concurring); Lucas v. S. C. Coastal Council, 505 U.S. 1003, 1032–36 (1992) (Kennedy, J., concurring).