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, *ET AL.*,

Respondents.

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

BRIEF FOR REASON FOUNDATION AS *AMICUS 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 THE *AMICUS CURIAE*[1]

Reason Foundation is a national, nonpartisan, and nonprofit public policy think tank, founded in 1978. Reason's mission is to advance a free society by developing, applying, and promoting libertarian principles and policies—including free markets, individual liberty, property rights, and the rule of law. Reason supports dynamic market-based public policies that allow and encourage individuals and voluntary institutions to flourish. Reason advances its mission by publishing *Reason* magazine, as well as commentary on its websites, www.reason.com and www.reason.tv, and by issuing policy research reports. To further Reason's commitment to "Free Minds and Free Markets," Reason selectively participates as amicus curiae in cases raising significant constitutional issues.

INTRODUCTION AND SUMMARY OF ARGUMENT

In *Penn Central Transp. Co. v. City of New York*,

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[1] Rule 37 Statement: All parties received timely notice of *amicus*'s intent to file this brief; the parties' letters granting blanket consent to *amicus* briefs have been lodged with the Clerk. No counsel for any party authored this brief in whole or in part, and no person or entity other than the *amicus* made a monetary contribution to fund its preparation or submission.

438 U.S. 104 (1978), this Court held that whether government regulation of property constitutes a compensable taking was to be determined using an *ad hoc*, multi-factor test. The Court noted that it "has been unable to develop any 'set formula' for determining when 'justice and fairness'" required that owners be compensated, and that the validity of regulations that impose losses upon property owners "depends largely 'upon the particular circumstances [in that] case.'" *Id.* at 124 (citations omitted) (brackets in original).

Penn Central also noted "several factors that have particular significance" in that inquiry; the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with investment-backed expectations," and the "character of the governmental action." *Id.*

Most germane here, the Court stated:

> "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, 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—here, the city tax block designated as the "landmark site." *Id.* at 130-31.

Crucially, *Penn Central* did not contest that the designated landmark site was the appropriate par-

cel for consideration. Thus, this Court had no occasion to analyze whether the undisputed "parcel as a whole" was, in fact, the relevant parcel for regulatory takings inquiry.

Although this Court has referred to "parcel as a whole" in several subsequent cases, it never has ruled upon how the relevant parcel in regulatory takings cases is to be determined with respect to the most fundamental of property rights—horizontal fee interests in land.

Amicus respectfully submits that (1) the "relevant parcel" inquiry is an integral part of the *Penn Central* adjudicatory process; (2) like other significant circumstances, "relevant parcel" is to be determined through fact-intensive *ad hoc* inquiry; and (3) the proper starting point for the analysis is due regard for facts of independent legal significance, such as ownership rights in deeded parcels under the established state law of property.

The selection of the proper relevant parcel sometimes is termed the "denominator problem," since the severity of the impact of a regulation on a claimant is measured using both the absolute amount of loss (the takings fraction numerator), and also the extent of the claimant's ownership that is appropriate to take into account (the takings fraction denominator).

The arbitrary rule proposed by Respondents would require that separately deeded parcels be combined for regulatory takings purposes if the parcels were contiguous and had common ownership, thus inflating the takings fraction denomina-

tor and diminishing the claimant's loss. The proffered rule would disregard important case-specific facts and circumstances, such as when the individual parcels were acquired, how they were used, and the intent of their common owner. Such a rigid rule would eliminate *ad hoc* inquiry into the relevant facts, the bedrock principle at the heart of *Penn Central* analysis.

The proposed formulation also would be remarkably under-inclusive. Unless it is Respondents' unstated premise that parcels that are *not* both under absolutely identical ownership *and* literal contiguousness should be treated as independent for regulatory takings purposes, courts still would be bereft of guidance as to the proper treatment of many—perhaps the substantial majority—of relevant parcel cases. While the carve-out advocated by Respondents would satisfy their immediate purposes, it would assist neither states and localities nor landowners by clarifying their legal rights and responsibilities.

Amicus further respectfully submits that this Court should base its relevant parcel jurisprudence on the presumption that parcels should be combined for regulatory takings purposes only if the relationship among them would constitute appropriations of use in one parcel for the benefit of another, independent of the identity of the respective parcel owners. For example, servient parcels might be appropriated to the use of a dominant parcel. In addition, a common owner might have acquired separately deeded parcels with the intent to develop them in accordance with an integrated scheme.

Unless a state or political subdivision could meet the burden of establishing facts that supervene the basic principle that separately deeded parcels have integrity as such, regulatory takings law should not disregard that separately deeded parcels are separate entities for legal purposes.

ARGUMENT

I. USE OF A *PER SE* RULE TO DETERMINE THE RELEVANT PARCEL IS CONTRARY TO *PENN CENTRAL*'S MANDATE FOR *AD HOC* AND FACT-BASED INQUIRY

A. The Preeminence of *Penn Central* and Fairness in Regulatory Takings Jurisprudence

Grand Central Terminal "is one of New York City's most famous buildings . . . and a magnificent example of the French beaux-arts style." *Penn Central*, 438 U.S. at 115. The New York City Landmarks Commission designated it a "landmark," meaning that the Commission had to approve exterior changes to structures on the landmark site. In 1968, Penn Central entered into a long-term lease agreement for the construction of a 55-story building above the terminal. Although it was uncontested that all other zoning and building requirements were met, the Commission denied the application on the grounds that the building would be "an aesthetic joke." *Id*. at 115–18.

The New York Court of Appeals, attributing much of Grand Central Terminal's value to its interactions with the vibrant commercial area that grew up around it, held there was no taking. *Penn Cent. Transp. Co. v. City of New York*, 366 N.E.2d 1271, 1275 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The court also attributed to the value of the historic site income generated by the plaintiffs' extensive real estate holdings in the area. 366 N.E.2d at 1276. This Court affirmed.

The leitmotif of *Penn Central* was its use of *ad hoc*, multifactor analysis. That analysis remains the "polestar" of this Court's regulatory takings jurisprudence. *Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring) ("Our polestar . . . remains the principles set forth in *Penn Central* itself and our other cases that govern partial regulatory takings.") Apart from "two relatively narrow categories" of physical and permanent takings, and also exactions, "regulatory . . . challenges are governed by the standards set forth in *Penn Central*." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005).

Of the three factors set forth in *Penn Central* as having "special significance", *Lingle*'s summary of its regulatory takings doctrine focuses upon "economic impact and the degree to which it interferes with legitimate property interests." *Id.* at 548. In explaining the animating principle underlying the Takings Clause, this Court "emphasized its role in 'bar[ring] 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.'" *Id.* at

537 (quoting *Armstrong v. United States,* 364 U.S. 40, 49 (1960)).

Indeed, *Penn Central*'s "no set formula language" might be "simply one way of expressing a pragmatic approach to decision making. Pragmatism is essentially particularist, essentially context-bound and holistic; each decision is an all-things-considered intuitive weighing. Pragmatism is indeed 'essentially' ad hoc." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1680 (1988).

In the seminal article on takings law, Professor Frank Michelman viewed compensation as "a response to the demands of fairness," and a "balancing test" as taking into account both societal well-being and losses to the property owner. Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1234–35 (1967).

"The Fifth Amendment expresses a principle of fairness and not a technical rule of procedure . . . ." *San Diego Gas & Elec. Co. v. City of San Diego*, 450 U.S. 621, 660 (1981) (Brennan, J., dissenting) (citations omitted).

Penn Central's analysis employed "essentially ad hoc, factual inquiries." 438 U.S. at 124. The Court added that "several factors that have particular significance" in that inquiry; the "economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has inter-

fered with investment-backed expectations," and also the "character of the governmental action." *Id*.

The "economic impact" and "investment-backed expectations" tests refer to *value*, while the Takings Clause protects *property*. U.S. CONST. amend. V. ("nor shall private property be taken for public use, without just compensation."). Although it is not self-evident why *Penn Central* integrated into its takings test the economic impact of a regulation upon the claimant, an economic effects test is helpful in assessing when fairness requires compensation.

The second test relates to "distinct investment-backed expectations." *Id*. In his opinion for the Court, Justice Brennan cited *Pennsylvania Coal Co. v. Mahon*, 60 U.S. 393 (1922) as "the leading case for the proposition that a state statute that substantially furthers important public policies may so frustrate distinct investment-backed expectations as to amount to a 'taking.'" *Penn Central*, 438 U.S. at 127. Justice Brennan also cited Professor Michelman, in whose article the phrase originated. *Id*. at 128 (citing Michelman, *Property, Utility, and Fairness*, 80 HARV. L. REV. at 1229–34 (asking whether a given regulation "can easily be seen to have practically deprived the claimant of some distinctly perceived, sharply crystallized, investment-backed expectation")). In placing emphasis on expectations, Professor Michelman was concerned with fairness and reliance.

> The zoned-out apartment house owner no longer has the apartment investment he depended on, whereas the nearby land specula-

> tor who is unable to show that he has yet formed any specific plans for his vacant land still has a package of possibilities with its value, though lessened, still unspecified—which is what he had before. *Id. at 1234.*

In a quarter-century retrospective on *Penn Central*, Justice Brennan's judicial clerk who worked on the opinion observed that "[t]he concept of 'investment backed expectations' definitely came from Michelman's article." Transcript, *Looking Back on* Penn Central*: A Panel Discussion With the Supreme Court Litigators*, 15 FORDHAM ENVTL. L. REV. 287, 309 (2004) (remarks of David Carpenter, Esq.).

The example given in *Penn Central* for its third articulated test, "the character of the governmental action," was a "physical invasion by government, [as distinguished] from some public program adjusting the benefits and burdens of economic life to promote the common good." 438 U.S. at 124. Four years later, permanent physical invasions were removed from *Penn Central*'s ambit when they were deemed categorical takings in *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982).

Notably, fairness still appears to be at the heart of "character of the regulation" cases. A four-Justice plurality of this Court, in *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998), noted that the imposition of severely retroactive liability on a limited class of parties presents a case where "the nature of the governmental action . . . is quite unusual" and augurs in favor of a taking. *Id.* at 537.

"Targeting" a particular item of property or owner for adverse treatment also has been viewed as possessing a "character" supporting takings liability. In *American Pelagic Fishing Co. v. United States*, 49 Fed. Cl. 36 (2001), *rev'd on other grounds*, 379 F.3d 1363 (Fed. Cir. 2004), the Court of Federal Claims analyzed a statute imposing severe economic losses upon the owner of a single fishing vessel, as if that vessel were mentioned by name. "The character of the governmental action here, because that action, in both purpose and effect, was retroactive and targeted at plaintiff, supports the finding of a taking." 49 Fed. Cl. at 51.

Similarly, in *Lost Tree*

Village Corp. v. United States, 115 Fed. Cl. 219, 225 (Fed. Cl. 2014) *aff'd,* 787 F.3d 1111 (Fed. Cir. 2015), the Court of Federal Claims stated that "in applying the *Penn Central* factors, [it] determined that the character of the governmental action tended to favor Lost Tree because the Corps [of Engineers] treated Lost Tree more adversely than it would have treated another applicant . . ." *Id.* at 225 (citing *Lost Tree,* 100 Fed. Cl. 412, 438–39 (2011)).

B. The Crucial Role of the Relevant Parcel Determination

A decade after *Penn Central* was handed down, Chief Justice Rehnquist explained that "[t]he need to consider the effect of regulation on some identifiable segment of property makes all important the admittedly difficult task of defining the relevant parcel." *Keystone Bituminous Coal Ass'n v. DeBen-*

edictis, 480 U.S. 470, 514-15 (1987) (Rehnquist, C.J., dissenting). After quoting Chief Justice Rehnquist, the U.S. Court of Appeals for the Federal Circuit added that the relevant parcel issue

> is referred to as the denominator problem because, in comparing the value that has been taken from the property by the imposition with the value that remains in the property, "one of the critical questions is determining how to define the unit of property whose value is to furnish the denominator of the fraction."

Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1380 n.4 (Fed. Cir. 2000), *aff'd on reh'g*, 231 F.3d 1354 (Fed. Cir. 2000) (quoting *Keystone*, 480 U.S. at 497).

An important example of the crucial role of relevant parcel was in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992).

> Regrettably, the rhetorical force of our "deprivation of all economically feasible use" rule is greater than its precision, since the rule does not make clear the "property interest" against which the loss of value is to be measured. When, for example, a regulation requires a developer to leave 90% of a rural tract in its natural state, it is unclear whether we would analyze the situation as one in which the owner has been deprived of all economically beneficial use of the burdened portion of the tract, or as one in which the owner has suffered a mere diminution in

> value of the tract as a whole. . . . Unsurprisingly, this uncertainty regarding the composition of the denominator in our "deprivation" fraction has produced inconsistent pronouncements by the Court.

Id. at 1016 n.7 (comparing *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 414 (1922) ("law restricting subsurface extraction of coal held to effect a taking" and *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 497-502 (1987) ("nearly identical law held not to effect a taking")).

Although courts and commentators often speak of the "three-factor" *Penn Central* test, there is no way to evaluate those or other relevant considerations bearing upon a specific dispute without discerning the parcel to which they apply. Thus, relevant parcel should be regarded as a factor equal in importance to those conventionally enumerated. *See* Steven J. Eagle, *The Four-Factor* Penn Central *Regulatory Takings Test*, 118 PENN ST. L. REV. 601 (2014).

C. Litigants Seek Advantage Through Both "Conceptual Severance" *and* "Conceptual Agglomeration"

As the Supreme Judicial Court of Massachusetts observed: "Repeated admonitions to use the 'parcel as whole,' however, do little to define the contours of that whole parcel in any particular case." *Giovanella v. Conservation Comm'n of Ashland*, 857 N.E.2d 451, 456 (Mass. 2006).

The term "conceptual severance" was coined by

Professor Margaret Radin to describe the process of "delineating a property interest consisting of just what the government action has removed from the owner, and then asserting that that particular whole thing has been permanently taken." Margaret Jane Radin, *The Liberal Conception of Property: Cross Currents in the Jurisprudence of Takings*, 88 COLUM. L. REV. 1667, 1676 (1988).

However, describing the relevant parcel to obtain a litigation advantage is an activity that can be engaged in by government regulators as well as landowners. While "a taking can appear to emerge if the property is viewed too narrowly," it is just as true that "[t]he effect of a taking can obviously be disguised if the property at issue is too broadly defined." *Ciampitti v. United States*, 22 Cl. Ct. 310, 318-19 (1991). The process by which a government entity delineates an interest that is artificially large, for the purpose of diluting the impact of the regulation so as to reduce its severity and the likelihood that a court would find a regulatory taking, might be termed "conceptual agglomeration." Steven J. Eagle, REGULATORY TAKINGS, § 7-7 (5th ed. 2015).

A classic instance of conceptual agglomeration was the opinion below in *Penn Central* by the New York Court of Appeals. *Penn Central Transp. Co. v. City of New York*, 366 N.E.2d 1271 (N.Y. 1977), *aff'd*, 438 U.S. 104 (1978). The court stated that "plaintiffs' heavy real estate holdings in the Grand Central area, including hotels and office buildings, would lose considerable value and deprive plaintiffs of much income, were the terminal not in operation. Some of this income must, realistically, be imputed

to the terminal." *Id*. at 1276. This Court subsequently termed the New York court's view of relevant parcel "an extreme—and, we think, unsupportable—view of the relevant calculus." *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1016 n.7 (1992).

Another extreme example of agglomeration was the "unity of ownership" theory developed by the California Coastal Commission. CAL. COASTAL COMM'N, STAFF REPORT: REGULAR CALENDAR 82 (2010) available at http://documents.coastal.ca.gov/reports/2011/2/Th8a-s-2-2011.pdf. Under this theory, the Commission asserted that five large parcels, each zoned for a single residence, should be combined, so that only one house could be built in total. The asserted reason was that the contiguous but separately deeded parcels, although having no commonality of ownership, should be combined because the separate owners planned to develop a road to their remote area and to design their separate homes with some architectural harmony. The five ownership groups filed separate suits to enjoin the Commission. *See*, *e.g.*, *Mulryan Props., LLLP v. Cal. Coastal Comm'n*, No. BS133269 (Cal. Super. Ct. Oct. 21, 2011) (order consolidating the complaints into one proceeding). The application subsequently was remanded to the Commission, and approved with modifications on December 10, 2015. *See* http://documents.coastal.ca.gov/reports/2015/12/th17a-s-12-2015.pdf (video link to Commission's approval).

D. Relevant Parcel Factors

In determining the relevant parcel, the Federal

Circuit has taken "a flexible approach, designed to account for factual nuances." *Loveladies Harbor, Inc. v. United States*, 28 F.3d 1171, 1181 (Fed. Cir. 1994).

A cogent summary of relevant parcel factors is contained in a Court of Federal Claims opinion in *Lost Tree Village Corp. v. U.S.*, 100 Fed. Cl. 412 (Fed. Cl. 2011) *rev'd in part on other grounds,* 707 F.3d 1286 (Fed. Cir. 2013).

> The relevant-parcel analysis focuses on, among other things, "the owner's actual and projected use of the property." *Forest Props., Inc. v. United States,* 177 F.3d 1360, 1365 (Fed.Cir.1999); *see also Norman v. United States,* 429 F.3d 1081, 1091 (Fed. Cir. 2005); *Loveladies Harbor,* 28 F.3d at 1181; *Whitney Benefits, Inc. v. United States,* 926 F.2d 1169, 1172 (Fed. Cir. 1991); *Florida Rock Indus., Inc. v. United States,* 791 F.2d 893, 904 (Fed. Cir. 1986). Relevant takings precedent has yielded a number of factors that bear on the inquiry, including: (1) the degree of contiguity between property interests, (2) the dates of acquisition of property interests, (3) the extent to which a parcel has been treated as a single income-producing unit, (4) the extent to which a common development scheme applied to the parcel, and (5) the extent to which the regulated lands enhance the value of the remaining lands. *See Palm Beach Isles,* 208 F.3d at 1381. The court previously also stated that a sixth factor, "(6) the extent [to which] any earlier development had reached completion and closure" was also a

> relevant consideration in the relevant-parcel analysis. *Lost Tree,* 92 Fed. Cl. [711] at 718 [(2010)].
>
> 100 Fed. Cl. at 428.

Even within the narrow context of contiguous parcels with the same owner, questions arise in even such basic contexts as the separation of parcels by roads. *See*, *e.g.*, *Palm Beach Isles Assocs. v. United States*, 208 F.3d 1374, 1381, *aff'd on rehearing*, 231 F.3d 1354 (Fed. Cir. 2000) (severing fifty acres from larger 261-acre parcel across road in part because property was physically remote); *Coeur D'Alene v. Simpson*, 136 P.3d 310, 320 (Idaho 2006) (finding presence of road not determinative, but "one factor to consider"). Questions about common owners arise, as well, not limited to largely overlapping ownerships. *See*, *e.g.*, *Hersey v. Lonrho, Inc.*, 807 A.2d 1009, 1016 (Conn. App. 2002) ("Although the defendant and its subsidiary companies have overlapping boards of directors, that alone is insufficient to establish the parent's domination or control of the subsidiary . . . .")

A helpful, practical analysis of relevant parcel problems is contained in Dwight Merriam, *Rules for the Relevant Parcel*, 25 U. HAW. L. REV. 353 (2003).

II. RELEVANT PARCEL ANALYSIS SHOULD BE GROUNDED IN RELATIONSHIPS AMONG PARCELS

A. *Penn Central*'s "Parcel as a Whole" Formulation Was Responsive to the Facts

Presented and Not Intended to Privilege Expansive Views of the Relevant Parcel

"Parcel as a whole," as used in *Penn Central*, 438 U.S. 130–31, is an incompletely described concept, since it appeared in a context where the identity of the relevant parcel was not disputed.

This Court has on other occasions employed takings formulations based on case-specific facts, and also has subsequently repeated them without further analysis. In *Sanguinetti v. United States*, 264 U.S. 146 (1924), for instance, the Court stated that an enforceable liability against the Government for flooding would require an "actual, permanent invasion of the land." *Id.* at 148. Much later, in *Arkansas Game & Fish Comm'n v. United States*, 133 S. Ct. 511 (2012), the Government asserted that damages resulting from severe, recurrent flooding were not compensable, since there was no "permanent" invasion. In rejecting this view, the Court explained that "no distinction between permanent and temporary flooding was material to the result in *Sanguinetti*." Rather, the Court there had summarized the facts in earlier cases. *Id.* at 520. The Court added:

> [W]e recall Chief Justice Marshall's sage observation that "general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision."

Id. (quoting *Cohens v. Virginia*, 6 Wheat. 264, 399 (1821)).

Just as this Court in *Sanguinetti* developed a formulation based upon the factual permanence of flooding in that and previous cases, it developed in *Penn Central* the formulation "parcel as a whole" upon uncontested facts, with the relevant parcel not at issue:

> "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, this Court focuses . . . on the nature and extent of the interference with rights in the parcel as a whole—here, the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130–31.

The railroad's counsel at oral argument acquiesced in the factual predicate that the "landmark site," Grand Central Terminal, was the "parcel," and the air rights above the terminal constituted the "segment." *Id*. at 130. Counsel's failure to stress the separate nature of the air rights was strategic, since in 1978 he deemed the concept of air rights to be novel and "sort of mysterious." *See* Transcript, *Looking Back on* Penn Central, 15 FORDHAM ENVTL. L. REV. at 306 (remarks of Daniel Gribbon, Esq.). Thus, the Court's opinion made only glancing reference to the prior acquisition of the air rights that would be utilized for the rejected office build-

ing by UGP Properties, Inc. *Penn Central*, 438 U.S. at 141.

Now, for the first time, this Court is considering a case where the determination of the horizontal fee parcel of land to which regulatory takings analysis is to be applied *is* contested. In undertaking this inquiry, it is well to begin with Professor Joseph Singer's reminder that "[y]et time and again, the Court has reaffirmed its view that we are better off eschewing 'any set formula' for defining a regulatory taking and that we should 'resist the temptation to adopt *per se* rules.'" Joseph William Singer, *Justifying Regulatory Takings*, 41 OHIO N.U.L. REV. 601, 603 (2015) (quoting *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 326 (2002)).

Amicus respectfully urges this Court to undertake the necessary analysis using no set terminology that privileges either the landowner or the government. Whereas "parcel as a whole" implies that landowners are trying to sever the property against which the effects of regulation are to be measured, "relevant parcel" correctly indicates that the task of a court is to determine what the appropriate unit of property is.

In *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*, 535 U.S. 302, 328 (2002), this Court reviewed its regulatory takings jurisprudence, and added that "[i]ndeed, we still resist the temptation to adopt *per se* rules in our cases involving partial regulatory takings, preferring to examine 'a number of factors' rather than a simple 'mathematically precise' formula." *Id.* at

326. The Court quoted Justice O'Connor's concurrence in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001):

> "Penn Central does not supply mathematically precise variables, but instead provides important guideposts that lead to the ultimate determination whether just compensation is required. . . . The temptation to adopt what amount to per se rules in either direction must be resisted. The Takings Clause requires careful examination and weighing of all the relevant circumstances in this context."

Tahoe-Sierra, 535 U.S. at 326 n.23 (*quoting Palazzolo*, 533 U.S. at 634, 636 (O'Connor, J., concurring)).

As succinctly recapitulated by the Court of Federal Claims, "[q]uite simply, there are very few *per se* rules in regulatory takings cases." *Lost Tree Village Corp. v. United States*, 100 Fed. Cl. 412, 430 n.28 (2011).

B. The Deeded Parcel and Other Criteria

Amicus respectfully urges that this Court not adopt a *per se* test that would conclusively presume that contiguous lands under common ownership constitute the relevant parcel for regulatory takings purposes.

While *Penn Central* analysis requires an ad hoc and fact-intensive inquiry, there are objective indicia that should be given significant weight. The

most important of those is the integrity of the separately deeded parcel. Indeed, while "the parcel as a whole" as used in *Penn Central*, 438 U.S. at 130–31, seems to warn against severance, it is also implicitly ("*the* parcel") consistent with an admonition not to go beyond the parcel's bounds.

The individual parcel served as this Court's implicit baseline in *Concrete Pipe & Prods. of Cal., Inc. v. Constr. Laborers Pension Trust*, 508 U.S. 602 (1993). "To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is *all, or only a portion of, the parcel in question*." *Id*. at 644 (emphasis added).

In some instances, of course, an owner will use separately deeded parcels as one economic unit, or acquire and maintain them to further a unitary purpose. "Deeded parcel" is not a *per se* test precluding a finding that the "relevant parcel" should not include other holdings. Rather, it is a default rule that might be overcome in the course of an ad hoc fact-based *Penn Central* inquiry.

Other objective criteria that should inform "relevant parcel" jurisprudence are the standards of "independent economic viability" and the "commercial unit." Under the "independent economic viability" approach, a taking occurs when "any horizontally definable parcel, containing at least one economically viable use independent of the immediately surrounding land segments, loses all economic use due to government regulation." John E. Fee, Comment, *Unearthing the Denominator in Regulatory Takings Claims*, 61 U. CHI. L. REV. 1535, 1538

(1994). This test allows for the gathering of appraisals and other evidence by the takings claimant and the government in an attempt to provide that the proffered relevant interest did or did not possess freestanding economic value. Use of this test would permit the claimant flexibility in describing the unit of property that was subject to a regulatory taking, but it could not be merely a subjective or idiosyncratic construct.

Similarly, the "commercial unit" test derives its name and significance from an analogous provision of the Uniform Commercial Code. As defined in the U.C.C., "commercial unit"

> Means such a unit of goods as by commercial usage is a single whole for purposes of sale and division of which materially impairs its character or value on the market or in use. A commercial unit may be a single article (as a machine) or a set of articles (as a suite of furniture, or an assortment of sizes) or a quantity (as a bale, gross, or carload) or any other unit treated in use or in the relevant market as a single whole.

UNIFORM COMMERCIAL CODE § 2-105(6)).

The "commercial unit" test would permit a landowner to proffer as the relevant parcel for takings purposes any parcel of land of a type regularly purchased and sold in the locality. Thus, while the owner's Takings Clause rights would be protected, the owner could not designate a bundle of rights that is custom-tailored to minimize the denominator of the takings fraction. *See* Steven J. Eagle, REGULATORY TAKINGS, at § 7-7.

C. Relevant Parcel and Appropriation to Use

In *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), this Court reconceptualized land use regulations that deprived owners of all economically beneficial use. It changed the focus from harm prevention or benefit conferral to a focus on whether the severe limitation "inhere[d] 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.

With respect to determination of the relevant parcel, a similar reconceptualization would focus primarily on whether background principles of property law impose servitudes on some land for the benefit of other land. In some situations, a parcel of land could be subject to a quasi servitude when another parcel under common ownership is dependent upon it for access or some other necessary service. When the servient parcel is sold, the dominant parcel retained by the owner is benefitted by the now-ripened servitude. *See*, *e.g.*, *Van Sandt v. Royster*, 83 P.2d 698, 701-03 (Kan. 1938) (upholding in equity an easement by reservation for a sewer line benefiting an uphill owner, as implied by prior existing use).

Thus, common law property and equity establish relationships of land to land, without any need to focus on the identity of the individuals involved. *See* Steven J. Eagle, *The Parcel and Then Some*, 36 VT. L. REV. 549, 559 (2012).

As in other aspects of *Penn Central* ad hoc anal-

ysis, while background principles of property law provide a significant starting point, they are not conclusive. Three of the six factors for identifying the relevant parcel identified in *Lost Tree*, 100 Fed. Cl. at 428, largely bear upon the relationship among tracts of land. They are factors (1) degree of contiguity; (3) joint use in producing income; and (5) the extent to which some parcels enhance the value of others. *See supra*, at 427-28.

The U.S. Court of Appeals for the District of Columbia Circuit used similar reasoning in *District Intown Properties Ltd. P'ship v. District of Columbia*, 198 F.3d 874 (D.C. Cir. 1999), when it ruled in a regulatory takings case that the relevant parcel included both an apartment building designated as an historic landmark, and separately deeded lots in front of it that had served as a lawn, and that the owner wanted to repurpose for townhouses. The court declared that, "[a]bove all, the parcel should be functionally coherent. In other words, *more should unite the property than common ownership by the claimant*. Thus, a court must also consider how both the property-owner and the government treat (and have treated) the property. *Id.* at 880 (emphasis added).

In the present case, Respondents concede that Petitioners inherited one lot that their parents initially acquired in 1960, and which always has been used exclusively for a family cabin. The contiguous lot Petitioners inherited was acquired by their parents in 1963, and has always remained vacant. Brief in Opposition to Petition for Writ of Certiorari at 4. The state appellate court flatly held that, "[r]egardless of how that property is subdivided,

contiguousness is the key fact." *Murr v. State*, 859 N.W.2d 628 (Wis. App. 2014) *review denied,* 862 N.W.2d 899 (Wis. 2015), *cert. granted,* 136 S. Ct. 890 (2016). Of the six factors enumerated in *Lost Tree*, 100 Fed. Cl. at 428, the only one present here is contiguity.

While *Penn Central*'s "parcel as a whole" formulation often has been repeated, this Court never has analyzed the relevant parcel concept with respect to its most basic application—a horizontal division of a fee interest in land.

CONCLUSION

Neither the common law of property, nor the application of *Penn Central* ad hoc takings principles, justify an arbitrary, irrebuttable presumption that common ownership of contiguous separately deeded parcels should be treated as one parcel for regulatory takings purposes.

Furthermore, the manifold unsettled issues involving the determination of the relevant parcel in regulatory takings cases cries out for guidance from this Court. *Amicus* respectfully urges that respect for separate legal interests embodied in separately deeded parcels be a significant, albeit not conclusive, consideration.

Respectfully submitted,

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