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IN THE SUPREME COURT OF THE UNITED STATES

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JOSEPH P. MURR, ET AL., :

Petitioners : No. 15-214

v. :

WISCONSIN, ET AL., :

Respondents. :

- - - - - x

Washington, D.C.

Monday, March 20, 2017

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:03 a.m.

APPEARANCES:

JOHN M. GROEN, ESQ., Sacramento, Cal.; on behalf of the Petitioners.

MISHA TSEYTLIN, ESQ., Solicitor General, Madison, Wis.; on behalf of the Respondent Wisconsin.

RICHARD J. LAZARUS, ESQ., Cambridge, Mass.; on behalf of the Respondent St. Croix County.

ELIZABETH B. PRELOGAR, ESQ., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; for United States, as amicus curiae, supporting the Respondents.

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P R O C E E D I N G S

(10:03 a.m.)

CHIEF JUSTICE ROBERTS: We will hear argument first this morning in case 15-214, Murr v. Wisconsin.

Mr. Groen.

ORAL ARGUMENT OF JOHN M. GROEN

ON BEHALF OF THE PETITIONERS

MR. GROEN: Mr. Chief Justice, and may it please the Court:

The fundamental unfairness in this case is illustrated by one fact: If anyone else in the world, other than the Murr siblings, owned Lot E, that owner could sell or develop it. But the Murrs cannot.

JUSTICE KAGAN: Mr. Groen, may I ask --

JUSTICE KENNEDY: Let me ask you this question. It's a hypothetical. It's not this case. Suppose that three years from now lots such as these two lots in the same ownership become immensely more valuable than the two lots singly. Each lot singly would be worth a hundred thousand, but these lots where you can build a bigger home are worth \$500,000.

The county wants a fire -- fire station and it takes Lot E. What do they pay for it under your theory?

1 MR. GROEN: They should pay for --
2 compensation for the taking of Lot E. Any taking --

3 JUSTICE KENNEDY: Which is \$100,000. So
4 under your hypothetical, property owners stand to lose
5 \$300,000 under my hypothetical and your answer.

6 MR. GROEN: No, I don't think so. Under the
7 hypothetical --

8 JUSTICE KENNEDY: The hypothetical is
9 together, they are worth 500,000; singly, they're worth
10 a hundred thousand each.

11 What is the amount that the -- the county
12 has to pay to take Lot E for the fire station?

13 MR. GROEN: The analysis must begin with
14 defining the relevant parcel that's the subject of the
15 case analysis.

16 JUSTICE KENNEDY: And in your view, that's
17 Lot E only.

18 MR. GROEN: That's right.

19 JUSTICE KENNEDY: And they pay \$100,000
20 only. That's it.

21 MR. GROEN: The land owner would have the
22 burden of proving that there are additional damages that
23 they should be compensated for. But the presumption --

24 JUSTICE KENNEDY: You indicated there's no
25 severance damages. You're taking the entire parcel.

1 MR. GROEN: You're taking all of Lot E, and
2 they should be paid compensation for Lot E.

3 JUSTICE KENNEDY: That's right.

4 MR. GROEN: Whether that compensation is --

5 JUSTICE KENNEDY: That's \$100,000 that go
6 under your theory, land owners in the hypothetical that
7 I put up would lose money and the State would be --
8 would be getting the windfall.

9 MR. GROEN: If that hypothetical does not
10 include any integrated economic use between those two
11 parcels; that is correct. The compensation is
12 determined by the lot that is taken.

13 JUSTICE KENNEDY: But the integrated -- the
14 integrated use is determined by the market. Your --
15 your theory completely ignores market factors.

16 MR. GROEN: And that is exactly what the
17 government would argue is that the compensation must be
18 limited to the parcel that is taken. And in eminent
19 domain law, which is the -- the hypothetical that you're
20 providing, in eminent domain law, the presumption is
21 exactly that: Compensation is limited to the parcel
22 taken, unless that presumption can be overcome by the
23 landowner proving that the two parcels are actually --
24 yes, there's a unity of use between the two --

25 JUSTICE KENNEDY: Why isn't the value --

1 then why isn't that true here? Then why doesn't that
2 defeat your theory here?

3 MR. GROEN: It supports the theory. It's
4 the exact same principle, only in reverse. Rather than
5 the government limiting compensation to just the parcel
6 taken, here the government is saying we want to combine
7 the values of the two in order to find there's no
8 taking. But in both scenarios, you have to begin with
9 the presumption of determining what is the relevant
10 parcel that is subject to that analysis. In both
11 scenarios, either eminent domain or inverse
12 condemnation, you have to begin --

13 JUSTICE KAGAN: Mr. Groen --

14 MR. GROEN: -- with a single parcel.

15 JUSTICE KAGAN: -- can I ask just a
16 clarifying question about your argument? One of the
17 things that makes this case odd is that there are family
18 members all around. Both sellers are the same family
19 and the buyers are the -- but if I'm right, your
20 argument would extend in the exact same way to a
21 situation where you have two sellers who are completely
22 independent of each other. Mr. Jones and Ms. Smith have
23 nothing to do with each other. Another buyer comes in,
24 also has no relationship with Mr. Jones or Ms. Smith,
25 and that buyer would be able to make the exact same

1 argument that the Murr family is making in this case.

2 Am I right about your argument?

3 MR. GROEN: Well, I'm not sure which parcel
4 your -- your hypothetical is talking about.

5 JUSTICE KAGAN: You have --

6 MR. GROEN: But -- but -- but

7 JUSTICE KAGAN: -- two preexisting
8 substandard parcels. Somebody comes in, buys both, but
9 all the parties are independent of each other.

10 MR. GROEN: Each parcel. Right --

11 JUSTICE KAGAN: And now the person who has
12 bought these two standard -- substandard lots wants to
13 build on them, and your argument would be the exact
14 same.

15 MR. GROEN: That -- that's right. They're
16 each independent, discrete, and separate parcels. And
17 the grandfather clause that is attached with this
18 land-use ordinance would protect the development and
19 sale rights of each parcel independently.

20 JUSTICE SOTOMAYOR: So where does
21 regulatory -- a State's regulatory power come in?
22 This -- Justice Kagan put in a hypothetical to --
23 to this one owner owns two parcels or two different
24 people own two parcels, and they sell it to your one
25 owner. And the one owner knows the regulation says if

1 you have two contiguous land pieces, you can only
2 develop on one, if they're both below an acre or
3 whatever the rule is. Your rule would just do away with
4 your expectations as a buyer.

5 MR. GROEN: Well, no. The -- in that
6 situation, the fact that someone might know that there
7 -- there are regulations on properties does not change
8 the time of the taking. The taking occurs in 1975 when
9 the regulations redefined the property rights, and that
10 redefinition of the property rights does not insulate --

11 JUSTICE SOTOMAYOR: But the parents -- it
12 may have been a taking for the parents, but they never
13 charged it. The children when they took were subject to
14 the regulation, and they knew it.

15 MR. GROEN: And --

16 JUSTICE SOTOMAYOR: They could have said,
17 no, I don't want two contiguous ones, Dad and Mom. I'll
18 go buy the next-door lot from someone else.

19 MR. GROEN: And this Court in Palazzolo v.
20 Rhode Island ruled that the notice that the Murr
21 children may have had -- they actually didn't know, but
22 let's assume that they did know --

23 JUSTICE SOTOMAYOR: They should have known.

24 MR. GROEN: Let's assume that. Let's assume
25 that beyond should have; they actually knew.

1 Palazzolo stands for the proposition that
2 the -- that the -- the subsequent heir or a buyer does
3 not lose a takings claim. The State is not --

4 JUSTICE KAGAN: But that's a very --

5 MR. GROEN: -- absolved of liability.

6 JUSTICE KAGAN: That's a very different
7 situation. In Palazzolo, all we said was that if the
8 seller has a takings claim, it's not extinguished just
9 because the property is transferred; that the buyer
10 could have the exact same takings claim. But the Murr
11 children are not asking for the -- for the -- they do
12 not have the same takings claim as the Murr parents did;
13 isn't that right?

14 MR. GROEN: No, I think that's not right.
15 They have the exact same takings claim because we're
16 talking about Parcel E. And the rights that the
17 parents could --

18 JUSTICE KAGAN: The parents could develop on
19 Parcel E; the children can't.

20 MR. GROEN: The parents, if they had put it
21 in their own common ownership, which they did for a
22 period of time. Subsequent to 1975, there is a takings
23 claim there. It's the rights inherent in the property.
24 And in each of these -- in -- in all of these scenarios,
25 you have to go back to define --

1 JUSTICE KAGAN: The parents -- let me try
2 this again.

3 For the parents, the two properties were two
4 properties. It's only when the property becomes one
5 property that this takings claim arises.

6 MR. GROEN: The takings claim arises because
7 of the restrictions imposed by the government, not by
8 change in ownership or anything like that. The change
9 in ownership does not change the nature of the property
10 interest. That's the key part of Palazzolo, that if you
11 take away the -- the takings claim or redefine property
12 interests, you're actually changing or altering the
13 nature of property. And -- and that's where we come
14 back not to a takings analysis, but to defining the
15 relevant unit of property to apply the takings analysis.

16 JUSTICE KAGAN: But the --

17 CHIEF JUSTICE ROBERTS: Well, then --

18 JUSTICE KAGAN: The -- I'm sorry.

19 CHIEF JUSTICE ROBERTS: Please, follow up.

20 JUSTICE KAGAN: The -- the -- the regulation
21 here, the only thing that it affected for the Murr
22 parents and for the plumbing company was their ability
23 to sell to a buyer who wanted to combine these two lots.
24 That was the only thing that was affected; isn't that
25 right?

1 MR. GROEN: Well, the parents didn't seek to
2 combine these two lots or to sell to someone who wanted
3 to combine the two lots. The parents owned both
4 parcels. They had one in the plumbing company name.
5 They eventually put that in their own names as well in
6 1982, after the 1975 restrictions were in place. That
7 didn't merge the parcels. There's -- there hasn't been
8 a merger here. Merger is simply a term that describes
9 what happened, and that is, that the use restrictions
10 preclude the independent sale or development of Lot E.
11 That is the gravamen of the takings complaint.

12 JUSTICE GINSBURG: And we're told these
13 merger rules have a long history. Many States have
14 them. So why isn't that background State law that
15 would -- would apply?

16 MR. GROEN: There -- there are lots of -- of
17 land-use regulations of all types, including merger
18 provisions. We do not have a background provision here,
19 a background principle because you can't have a
20 background principle that applies to one person, but not
21 to another. If someone else owned Lot E, they can
22 develop it. So it's not a background principle to say
23 that -- that this only applies to the Murrs.

24 Same thing in the neighborhood. This is the
25 St. Croix Cove subdivision. There's over 40 developed

1 residential lots here. There's nothing about building a
2 home on this property that rises to the level of a
3 nuisance or something that takes the right to use the
4 property out of the title that -- that is that
5 property --

6 JUSTICE KENNEDY: Your answer to Justice
7 Ginsburg is that all of those other State regulations
8 are also invalid.

9 MR. GROEN: No. Those regulations are fine,
10 whatever they may be, and they come in all -- all types
11 of forms. The question here is what unit of property do
12 we utilize for determining the takings analysis?

13 CHIEF JUSTICE ROBERTS: I -- I --

14 MR. GROEN: Once you determine that, then
15 you determine, okay, under that merger law or whatever
16 land-use ordinance, does it reach a level of magnitude
17 of interference that there is a taking? And those would
18 have to be -- be analyzed on the merits of their own
19 situation.

20 CHIEF JUSTICE ROBERTS: I thought your
21 argument was that under State law, the properties were
22 not formally merged, that the merger was only, I think
23 as the Court put it, an effective merger.

24 MR. GROEN: That's exactly right. There --
25 there has been no formal merger. These remain separate

1 legal lots today. This -- this term "merger" has been
2 used very loosely, and all it really means is that the
3 Murrs' right to independently use and develop Lot E has
4 been destroyed.

5 JUSTICE ALITO: Do we know -- do we know
6 exactly --

7 MR. GROEN: They could actually still give
8 it away.

9 JUSTICE ALITO: I'm sorry.
10 Do we know exactly how Wisconsin and the
11 county define "common ownership"? For example, if one
12 lot is owned by an individual in that person's own name,
13 and then the adjacent lot is owned by a wholly-owned
14 corporation or LLC, is that considered to be common
15 ownership? Or if one lot is owned by, let's say, four
16 siblings and the other one is owned by only three of the
17 siblings, would that be common ownership?

18 MR. GROEN: Under the way Wisconsin has
19 applied common ownership, as long as they are not
20 informally the same name -- so here William and Dorothy
21 Murr, they fully owned their plumbing company, and so
22 they were technically in -- in different ownership and
23 that was enough to be in separate --

24 JUSTICE KENNEDY: Would it be enough if --

25 MR. GROEN: So --

1 JUSTICE KENNEDY: -- the husband owned one,
2 wife owned the other? That's different? They're
3 separate?

4 MR. GROEN: The way Wisconsin has been
5 applying it, it would -- it would encourage that kind of
6 manipulation and --

7 JUSTICE BREYER: What is the --

8 MR. GROEN: -- and bring in the incentives.

9 JUSTICE BREYER: I mean, I've not got beyond
10 Holmes. Holmes says that a regulatory taking violates
11 the Constitution unless it's compensated when it goes
12 too far.

13 MR. GROEN: Correct.

14 JUSTICE BREYER: All right. Now, what you
15 want us to do is to put some pretty clear lines in that
16 word "too far."

17 MR. GROEN: Well --

18 JUSTICE BREYER: My problem is, I can't
19 think of just what those lines should be, that -- that,
20 perhaps, there are many different circumstances in many
21 different factors.

22 For example, in your case, I imagined that
23 what the State was concerned about is they want to
24 preserve a lake. At the same time, people own some
25 property around that lake and they used to be able to

1 build houses. So here's what they say. You can build
2 one. One. And it doesn't matter if you have six lap
3 parcels not together or -- one. One is what you can
4 build because, after all, this Constitution is concerned
5 about, to paraphrase Justice Warren, protecting people,
6 not rocks.

7 And so we look at the people and say, how
8 does this affect them. And in this case, you have a
9 case, but there's some factors against you, and the --
10 the Federal Circuit and other opinions of ours have
11 avoided drawing clear lines.

12 And you see where I'm going. And I just
13 want your general response.

14 MR. GROEN: Yes. This case does not address
15 the merits of whether there's a taking. This case first
16 has to deal with the threshold question of what is the
17 relevant unit of property --

18 JUSTICE BREYER: And that's what I'm
19 objecting to.

20 MR. GROEN: -- and is it one parcel --

21 JUSTICE BREYER: Now, see that's -- now
22 you're not getting my question.

23 Because my question is: Why look for that?
24 Is it relevant? Yes. Is it determinative? No. If we
25 start making determinative rules, developers will take

1 500 acres. They'll break them down into 500 different
2 properties, State perhaps aiding in this, 500 different
3 ones; three of them will be just wetlands, and they'll
4 say, see, you took my three, when, actually, he started
5 out with 500, and it wasn't a big deal.

6 You -- you see the kind of problem? They're
7 written about in the briefs.

8 MR. GROEN: Well --

9 JUSTICE BREYER: I want your general
10 reaction.

11 MR. GROEN: Well, the general reaction is
12 you must begin with the approved legal lots of record
13 that have actually been approved and that have
14 attained -- because they are legal lots of record, they
15 have rights that's in dispute.

16 JUSTICE KAGAN: But, Mr. Groen, one of
17 the --

18 MR. GROEN: That's what Roth is all about.

19 JUSTICE KAGAN: One of the oddities of your
20 position is that you seem to be taking half of State
21 law. In other words, you're saying well, there are
22 these -- there are these lot lines, and everything has
23 to depend on the lot lines because they've been legally
24 approved. But there have been other things in this case
25 that have been legally approved too, and one of them is

1 this merger provision. And you seem to be saying:
2 Well, we look to State law for the lot lines, but then
3 we ignore State law for the question of when lots are
4 merged.

5 And why should we do that? If we're looking
6 to State law, let's look to State law, the whole ball of
7 wax. In other words, saying: Well, when I buy those
8 two lots, they're really not two lots anymore.
9 According to State law, they are one lot.

10 MR. GROEN: In defining property interests,
11 Roth and this Court in Lucas note 7 both recognized that
12 you look to the State law, not to the whole body of
13 State law, you look to the State law that governs the
14 creation that's the legal recognition of lots and the
15 protection of the property interest.

16 JUSTICE KAGAN: Well, I -- I think that
17 you're right, Mr. Groen. It's like the legal
18 recognition of property. But the legal recognition of
19 property has something to do with lot lines, and it also
20 has something to do with when lots are merged, when two
21 lots are merged into one. And why would we ignore that
22 question of merger?

23 MR. GROEN: There's two reasons. One, they
24 have not been merged. That -- and that's the point we
25 were discussing earlier. They have not been formally

1 merged.

2 And, two --

3 JUSTICE KAGAN: And what would it take to be
4 formally merged?

5 MR. GROEN: Elimination of lot lines.

6 JUSTICE KAGAN: Why?

7 MR. GROEN: And that has not happened.

8 JUSTICE KAGAN: Because if the Court --

9 MR. GROEN: Because if -- if they remain --

10 JUSTICE KAGAN: If the State can say we
11 don't have to eliminate lot lines. All we have to do is
12 to say the -- the lot lines don't have legal effect for
13 some purposes.

14 MR. GROEN: And it's only for the limited
15 purposes of precluding sale or development.

16 But more than that, your question comes
17 right back. It circles right back to Palazzolo, where
18 you really have to define property interests by the
19 rights that are already in place that secure benefits.
20 That's what Roth stands for. That's what Lucas footnote
21 7 stands for. And Palazzolo points out the principle
22 that you cannot then go forward and say: Oh, well, the
23 State has redefined this --

24 JUSTICE KAGAN: Well, again, I think --

25 MR. GROEN: -- so now you --

1 JUSTICE KAGAN: -- Palazzolo depends on the
2 buyers having the exact same takings claim as the
3 sellers, which it seems to me does not exist in this
4 case.

5 But let me ask you a different -- a
6 different way around the question, which is, whether you
7 think reasonable expectations matter at all in your
8 framework?

9 MR. GROEN: The reasonable expectations that
10 were addressed in Lucas footnote 7 are the expectations
11 that grow out of the traditional understandings of
12 property law. People understand when they buy a lot in
13 a subdivision that they are buying a -- a -- a lot that
14 has a right of use, that -- that has a deed, that has
15 geographic boundaries, and that's --

16 JUSTICE KAGAN: Okay.

17 MR. GROEN: -- what they are relying upon.

18 JUSTICE KAGAN: But here, if I'm buying
19 property in this area, I also know that there are these
20 rules about when you can develop on substandard lots and
21 how it is that contiguous lots are understood for
22 purposes of that development potential. So why aren't I
23 buying subject to those preexisting regulations? In
24 other words, this is not a regulation that just happened
25 to me when I was an owner. I'm buying subject to -- and

1 property is a bundle of sticks; we know that, right,
2 first year of law school. And I'm buying, you know,
3 certain metes and bounds, but I'm also buying into a
4 certain set of things about what I can and can't do on
5 the property. So why isn't that perfectly consistent
6 with my reasonable expectations? I'm supposed to know
7 the zoning regulations, and when I buy a house, when I
8 buy a piece of land, I'm buying subject to the
9 preexisting zoning regulations.

10 MR. GROEN: I understand the use of
11 reasonable expectations under the Penn Central for
12 determining whether there is a taking. But here,
13 we're -- we have to first determine what unit of
14 property is it. Is it Lot E, or is it Lot E and F
15 combined? And in that situation you have to look at the
16 creation of the property. Property is property. And it
17 doesn't change --

18 JUSTICE BREYER: But what about -- I -- of
19 course, property is property. But we are still dealing
20 with a provision of the Constitution that, in the
21 regulatory area, is designed to prevent takings that
22 hurt somebody unreasonably. It goes too far.

23 So why isn't what you want to look at one
24 more thing to look at? But we might look at others too.
25 We might look, for example, at whether the individual

1 who bought that property at the time he bought it knew
2 about this restriction. We might look at how, overall,
3 he has hurt in any related way. We might look, for
4 example, at the kind of need that was there, and we
5 might see two big questions.

6 I mean, one big question is -- though it's
7 awfully general -- is, is he being treated unfairly
8 either because we're forcing on him the whole cost or a
9 lot of the cost of something that benefits many, many
10 others, or because we are interfering with
11 investment-backed expectations.

12 I mean, as you read the cases it seems to me
13 there are a set of factors like that. And my problem
14 with your argument is it wants to take one and then
15 apply a kind of mechanical test.

16 MR. GROEN: No. It keeps coming back to
17 you -- the -- the task is to first define the unit of
18 property. The Murrs -- the Murr parents have two
19 separate distinct lots. Each is -- is a -- is a lawful
20 legal building site, and if owned by anyone else, it
21 remains a lawful legal building site.

22 Under the restriction enacted in 1975, it
23 went from two building sites to one building site.

24 JUSTICE SOTOMAYOR: May I --

25 MR. GROEN: That is what has been lost.

1 JUSTICE KAGAN: But --

2 JUSTICE SOTOMAYOR: May I ask a question? I
3 do think, as I'm reading all of the briefs in this case,
4 that the issue is how much weight should we be giving to
5 the State boundary lines, the State property lines.

6 You say as a denominator on the takings
7 claim, there -- it's fixed. You used the word
8 "presumption" in your brief, but you haven't explained
9 to me what overcomes the State boundary line -- property
10 lines, so I don't think the word "presumption" has any
11 meaning in your brief.

12 Others, like St. Croix and -- and the
13 government, and embedded in Justice Breyer's question,
14 thinks the denominator should be a more nuanced
15 calculation, although St. Croix, Wisconsin, and the
16 Solicitor General seem to have a different weight to
17 that.

18 So let's start with, is yours a fixed
19 presumption? Does anything ever overcome it?

20 MR. GROEN: Yes.

21 JUSTICE SOTOMAYOR: Or is it, under every
22 circumstance, the denominator?

23 MR. GROEN: In -- in -- you must begin with
24 the presumption of identifying the single parcel. And
25 nobody, as you point out --

1 JUSTICE SOTOMAYOR: What over --

2 MR. GROEN: -- no -- no parties --

3 JUSTICE SOTOMAYOR: -- comes that?

4 MR. GROEN: -- and so that --

5 JUSTICE SOTOMAYOR: What overcomes that?

6 MR. GROEN: -- presumption is overcome if
7 you have facts that are sufficient to show in fairness
8 and justice that the individual should bear the burden.
9 And an example, we can draw straight out of eminent
10 domain law. If you have a hotel owned by a person and
11 they own the parking lot next door, there are two
12 separate parcels, and the government is going to condemn
13 the parking lot. The parking lot is used with the hotel
14 as an integrated economic unit. The presumption in
15 eminent domain law is the same principle here.
16 Government is taking only the parking lot, and they will
17 argue we will only pay for the parking lot.

18 The burden then shifts to the property owner
19 to prove that the parking lot is an integrated part of
20 the operation of the hotel.

21 JUSTICE SOTOMAYOR: So what's the difference
22 between that and the factors that the other parties are
23 using that says look at how the property's been used
24 over time.

25 Here, the family has a house on one parcel,

1 a volleyball court and a barbecue storage area on
2 another. They use the other parcel -- house on one
3 side, the other parcel has access to the beach. The
4 house has not had an economic value to the children. It
5 was there. They're using it.

6 MR. GROEN: Right.

7 JUSTICE SOTOMAYOR: So what's the
8 difference --

9 MR. GROEN: I think you have a --

10 JUSTICE SOTOMAYOR: -- in terms of --

11 MR. GROEN: -- an inaccurate visual
12 understanding of what the parcel is. Lot E, and this
13 went up on summary judgment, is a vacant parcel.
14 There's nothing on Lot E. It is its own independent
15 parcel. The Murrs will sometimes walk across it or
16 maybe play volleyball on it, but it is not an integrated
17 economic unit as in the hotel parking lot and the hotel.

18 In that situation, you can overcome the
19 presumption, and that landowner in that situation will
20 argue that they should be paid compensation --

21 JUSTICE KENNEDY: So why isn't an integrated
22 unit because they had a barbecue? In other words, your
23 hypothetical --

24 MR. GROEN: They don't have a barbecue.

25 JUSTICE KENNEDY: Under your -- well,

1 whatever they have.

2 (Laughter.)

3 JUSTICE GINSBURG: Volley -- volleyball.

4 JUSTICE KENNEDY: Volleyball court.

5 Under your hypothetical, if the hotel was on
6 Lot F and the parking lot was Lot E, what would be the
7 fair value if the State took Lot E for a firehouse?

8 MR. GROEN: The --

9 JUSTICE KENNEDY: Figure out the fair value?
10 Don't you figure out the value of that on the market to
11 a buyer, not the loss to the seller because he's next
12 door? That has to be.

13 MR. GROEN: The -- the rule begins with
14 paying for the parking lot, and the burden is on the
15 landowner to show that they -- that person should get
16 additional compensation for the impact to the hotel.
17 That's where that comes from.

18 JUSTICE KENNEDY: That just can't be if
19 they're separate lots. That's not the law in any State
20 that I know.

21 MR. GROEN: That's the unity of -- of use
22 rule. That is in condemnation all the time. And --

23 JUSTICE KENNEDY: But that's -- that's when
24 there's a single parcel.

25 MR. GROEN: No. That's when they're two

1 separate parcels. It's the hotel and parking lot
2 example.

3 JUSTICE KENNEDY: Well, then, under your
4 view, the landowner wins either way.

5 MR. GROEN: It depends on --

6 JUSTICE KENNEDY: If the value is great, he
7 gets the double value. If the value is smaller, then he
8 can sell the lot.

9 MR. GROEN: There has to be in --

10 JUSTICE KENNEDY: In your example --

11 MR. GROEN: In that -- -- unity of use.

12 So, for example, if -- if the parking lot in
13 the hotel, they were just different parcels, and the --
14 the parking lot was serving some other property and the
15 government took that parking lot, there's no damages to
16 the -- to the parcel with the hotel. There -- and the
17 landowner would not be entitled to anything.

18 JUSTICE KENNEDY: Well, we won't --

19 MR. GROEN: It's the same principle here.

20 JUSTICE KENNEDY: But you're the one who's
21 insisting on divisible -- on -- on the lots being
22 treated separately, not --

23 MR. GROEN: I'm insisting on --

24 JUSTICE KENNEDY: -- not in my question.

25 MR. GROEN: -- the same presumption that you

1 begin the analysis by identifying the relevant parcel.
2 Here, that has to be Lot E. It was purchased
3 separately. It's a separate deed. It was purchased for
4 separate purposes, and it is the lot that is regulated.

5 JUSTICE GINSBURG: You say you would begin
6 the analysis. What more is there if you're saying we
7 isolate E and E now is of no value. It can't be sold;
8 it can't be built on. What is the consequence of saying
9 we isolate -- we identify Parcel E. Is it the same as
10 if the government physically took Parcel E?

11 MR. GROEN: It's -- it's not a physical
12 taking, but it may have the same practical effect.

13 JUSTICE GINSBURG: But that's a --

14 MR. GROEN: -- because the -- the value of
15 Lot E is diminished from \$410,000 to \$40,000. There's a
16 90 percent decrease in value. And --

17 JUSTICE GINSBURG: But there is some use
18 that can be made of this other --

19 MR. GROEN: Lot E cannot be developed on its
20 own. That ability has been taken away.

21 JUSTICE GINSBURG: Yes, but is it -- if
22 you -- the combined properties are sold --

23 MR. GROEN: But --

24 JUSTICE GINSBURG: -- it's going to be a
25 much bigger price tag --

1 MR. GROEN: But the --

2 JUSTICE GINSBURG: -- than if just F was
3 sold.

4 MR. GROEN: But the question is, the -- the
5 Murrs began with two building sites on separate
6 properties. That was taken away. The value that you're
7 talking about is the value that comes from being able to
8 build. Well, the Murrs already have a house on Lot F.
9 So when you say what is there -- the value afterwards,
10 the better methodology is how much would the Murrs or
11 someone who owned Lot F, with an existing house on
12 Lot F, pay to add land to it? How much would they pay
13 to add Lot E to their existing building site?

14 Now, what the --

15 JUSTICE BREYER: Let me give you -- let me
16 give you an example which might help me. Let's go back
17 to Holmes case. There's a hundred acres. There are 50
18 columns of coal to hold up the -- to hold up the
19 ceiling. That he says is okay. No compensation. But
20 wait. Suppose instead of one people -- one person
21 owning all 50 acres, suppose 50 people each own one
22 acre. And in some cases, the column runs through the
23 acre and some it doesn't. Does that make any
24 difference?

25 MR. GROEN: That hypothetical is not

1 analogous to this situation.

2 JUSTICE BREYER: I don't care if it's
3 analogous or not analogous. I'm trying to get my
4 thinking clearer, and oddly enough --

5 MR. GROEN: Same --

6 JUSTICE BREYER: -- different things make my
7 thinking clearer, and --

8 MR. GROEN: You have --

9 JUSTICE BREYER: -- this may be one of them.

10 (Laughter.)

11 MR. GROEN: The analysis has to begin by
12 defining the parcel of property that is regulated.

13 JUSTICE BREYER: Your opinion -- in your
14 opinion, if, in the Holmes case, instead of one person
15 owning the whole 50 acres as one lot, there would have
16 been 50 people who each owned an acre. Now, it looks
17 the same, you know, the columns are in the same place,
18 et cetera, and you're saying that does make a
19 difference.

20 MR. GROEN: If someone --

21 JUSTICE BREYER: Yes or no?

22 MR. GROEN: It does make a difference. And
23 the key is to look at the parcel of property that is
24 owned by an individual and is that property being taken
25 away.

1 JUSTICE KAGAN: So the usual way --

2 MR. GROEN: There's two questions here.

3 JUSTICE KAGAN: The usual way, Mr. Groen, or
4 at least a frequent way in which this comes up is a
5 developer buys a hundred acres of land, and that land is
6 split up into 100 one-acre parcels. And let's say 15,
7 one-five, percent of them are on wetlands and can't be
8 built on. It makes an enormous difference whether we're
9 going to say that those 15 percent are independent lots,
10 because if they are, then the developer comes in and
11 says you have to pay me for all of that. But if they're
12 not, the developer is out of luck because it's only 15
13 percent of the whole. Isn't that right?

14 MR. GROEN: The beginning part of your
15 analysis says the developer subdivided. The developer
16 cannot subdivide without government approval. And when
17 there's a subdivision that is created under the laws of
18 that State, then rights attach.

19 JUSTICE KAGAN: Yes. Well, the subdivision
20 has occurred with government approval, and the merger
21 provision has occurred with government approval, saying
22 that this shouldn't be understood in the case of
23 substandard lots as independent.

24 MR. GROEN: The merger provision is like the
25 wetlands provision: Both restrict use. And then the

1 question, then, once you've identified the relevant
2 parcel in your hypothetical, the -- the -- the question
3 is, is there a taking of that 15 percent.

4 The burden would be on the government to
5 show that that 15 percent of the lots is actually part
6 of an integrated economic unit as a whole, and then you
7 proceed under a takings analysis. But in both
8 situations, you must first define the relevant parcel.

9 Unless there are further questions, I'd like
10 to reserve the remainder of my time for rebuttal.

11 CHIEF JUSTICE ROBERTS: Thank you, counsel.
12 Mr. Tseytlin.

13 ORAL ARGUMENT OF MISHA TSEYTLIN

14 ON BEHALF OF THE RESPONDENT WISCONSIN

15 MR. TSEYTLIN: Mr. Chief Justice, and may it
16 please the Court:

17 I would like to begin, Mr. Chief Justice, by
18 answering your question, or the point that you made.

19 The lots here have merged for all relevant
20 purposes under State law. It is true that the lot line
21 between Lot E and Lot F still exists, but that has
22 absolutely no continuing legal relevance under State
23 law.

24 CHIEF JUSTICE ROBERTS: Your -- your point
25 is -- raises my exact concern. You said "for all

1 relevant purposes." The -- the question is what
2 purposes are relevant? And it seems to me that what
3 purposes are relevant is analysis under the Takings
4 Clause.

5 And we all know the -- the issue, I think,
6 that Justice Breyer brought up. Let's say you have
7 three -- three acres of wetlands and you own a hundred
8 acres. You say, well, my property is these three acres
9 and you've taken it all. The law is you don't get --
10 Mr. Groen doesn't get to define property interests that
11 way because it's gaming the system by saying this is
12 what it is.

13 Now, another one of my colleagues pointed
14 out, there are two halves of the State law here: Half
15 of it is the lot line, half of it is the merger. And
16 you want to say, well, for takings purposes, all we look
17 at is -- is the merger. And it seems to me that that's
18 just the flip side of what the landowner can't do. You
19 can't sort of preempt the takings analysis by saying
20 we're only going to look at this aspect under which, of
21 course, we win. Just like the property owner says we're
22 only going to look at these three -- three acres under
23 which, of course, we win.

24 MR. TSEYTLIN: No, Your Honor. I want to be
25 even more specific. What I meant by "all relevant

1 purposes," I mean for all purposes under State law.

2 If tomorrow someone went to the county
3 register and deeds and deleted the lot line between
4 Lot E and F, there is not a single right that the Murrs
5 have under State law that they would lose, and there's
6 not a single right they would gain.

7 CHIEF JUSTICE ROBERTS: Well, but the --

8 MR. TSEYTLIN: The key point is --

9 CHIEF JUSTICE ROBERTS: But the key point is
10 they didn't do that. Nobody did that. And I'm looking
11 at page G -- 3 of the appendix to the County's brief,
12 and that's the basis on which the analysis was done.
13 And it says they did not decide whether lots have been
14 formally merged. And it's language that is used
15 throughout. These were effectively merged.

16 Well, I mean, on the other side of it, they
17 can argue, well, we effectively drew lines around these
18 three acres. And it seems to me that -- that there's a
19 confusion between the definition of "property" and the
20 question of whether or not there's a takings. And if
21 you start analyzing with the takings factors and the way
22 there's property, that muddles the whole analysis.

23 MR. TSEYTLIN: Well, Your Honor, let me
24 explain the State's methodology. And I think in doing
25 that, I think I'll be able to answer your question more

1 clearly.

2 The test to identify the relevant parcel in
3 the State's submission should be one straightforward
4 question: Is the land lot at issue completely separate
5 from any other land under State law? And there, you
6 look at all of State law. And where the State law --
7 lot line has no meaning for anyone, it has -- it does
8 not give any rights, which is the case here.

9 JUSTICE ALITO: So if lots are contiguous,
10 that's the end of the question for you; right?

11 MR. TSEYTLIN: Not at all, Your Honor. Our
12 test is if two lots have a link, a legal link under
13 State law, then they are one parcel. If they have no
14 legal link under State law, then they are completely
15 separate.

16 JUSTICE KENNEDY: But are you -- you're
17 talking just about State law. It seems to me that your
18 position is as wooden and as vulnerable a criticism
19 as -- as the Petitioner's. You say, whatever State
20 law -- basically you're saying, whatever State law does,
21 that defines the property. But you have to look at the
22 reasonable investment-backed expectations of the owner.

23 MR. TSEYTLIN: Right, Your Honor. And I
24 want to clarify that what we're talking about here is
25 just the threshold question. And after the threshold

1 question is determined, the reasonable expectations
2 will, in the vast majority of cases, be analyzed as part
3 of the Penn Central analysis. The approach urged by the
4 Federal government, the county, and in the rebuttal --

5 JUSTICE KENNEDY: But the reasonable
6 investment-backed expectation was based on the fact that
7 you had a lot-line rule which you've now changed. So
8 you say that the State law can change reasonable
9 investment-backed expectations.

10 MR. TSEYTLIN: Your Honor, I want to be
11 clear. When you're doing the second step, the hard work
12 of the takings analysis, the existence -- the
13 preexistence of the lot lines, what the
14 investment-backed expectations were can all be taken
15 into account. The problem with the approach urged by
16 the county, the Federal government, and my friends in
17 saying it's a reasonable presumption is you basically
18 have Penn Central squared. I --

19 JUSTICE ALITO: Well, let me give you this
20 example. A -- it's not that far from this case. A
21 plumber and his wife buy a small lot, but it's a lot on
22 which you can build houses at that time, and they build
23 a modest house.

24 MR. TSEYTLIN: Uh-huh.

25 JUSTICE ALITO: And they say, you know,

1 we're going to -- there's a lot next door, let's buy
2 that; we can use it as a yard for our children when
3 they're growing up. And then after they're grown, we
4 can sell it, and we'll have some money for retirement.
5 And that's a buildable lot at that time.

6 And then this new regulation is adopted and
7 now the side lot can't be sold at all. And they say:
8 Well, look, you've taken away this valuable asset we
9 were going to use for our retirement.

10 And the answer is: Well, no, because you
11 could -- you could sell your whole property, and
12 somebody who wants to build a big house could build on
13 that property.

14 And they say: Well, that's fine, but we
15 like our little house. We'd like to stay in our little
16 house.

17 Now, what is fair about that situation?

18 MR. TSEYTLIN: Your Honor, I want to
19 clarify. I believe that in your hypothetical, when you
20 had two lots that were preexisting and owned by the same
21 person and then they were involuntarily merged by
22 government action, the analysis would, in fact, be on
23 each lot separately. It is completely different --

24 JUSTICE ALITO: What do you mean by they
25 were "involuntarily merged by government action"?

1 MR. TSEYTLIN: That is, there was a -- they
2 had two lots.

3 JUSTICE ALITO: Right.

4 MR. TSEYTLIN: Same person had two lots.

5 JUSTICE ALITO: Right.

6 MR. TSEYTLIN: They were each completely
7 independent under State law. A new State law comes in
8 and says those are merged. That is a completely
9 different analysis, and I would agree with Your Honor's
10 premise that --

11 JUSTICE ALITO: That wouldn't fall under
12 your regulation?

13 JUSTICE KENNEDY: Yeah. Well, isn't that
14 this case?

15 MR. TSEYTLIN: No, Your Honor. The -- the
16 fundamental difference in this case is that the merger
17 happened by voluntary action of the plaintiffs. And
18 what the plaintiffs did when they acquired two
19 contiguous substandard lots is --

20 JUSTICE KENNEDY: But it's by voluntary
21 action as defined by State law. The State law takes
22 that voluntary action. And it's the State law that
23 makes the consequence, and that's the consequence we're
24 talking about.

25 MR. TSEYTLIN: Well, Your Honor, I think the

1 questions that Justice Kagan was asking clarified this
2 point. That is to say, if you want to, in this case,
3 talk about what this regulation did in 1976, is it put a
4 conditional stair restriction on the parents who owned
5 Lot E.

6 JUSTICE ALITO: And that's a very fine
7 argument, except for the fact that it's completely
8 contrary to the reasoning in Palazzolo. Justice
9 Kennedy's opinion in Palazzolo rejects that. And the
10 debate between Justice O'Connor in concurrence and
11 Justice Scalia in concurrence is about exactly that.
12 And you don't even cite Palazzolo in your brief, do you?

13 MR. TSEYTLIN: That is not correct. At
14 pages 41 through 43, we discuss why this is not a
15 Palazzolo-type claim. A Palazzolo-type claim, as
16 Justice Kagan's questions indicated, would be that
17 something happened in 1976 that was unreasonable. And
18 by "unreasonable," I mean that it took property without
19 just compensation. So there would have to be a look
20 back to 1976 to see if the relevant takings test fails.

21 And it wouldn't fail here, because what
22 happened in 1976? The parents owned Lot E only. The --
23 and their interest to Lot E was protected by the
24 grandfather clause. The only additional restriction
25 upon the parents that was placed in 1976 by the State

1 was a conditional sale restriction. That is, you can do
2 anything with the lot you want. You can sell to whoever
3 you want. The only thing you can't do practically is
4 sell it to someone who only wants to buy it if they also
5 own a lot next door and also is substandard. That is a
6 conditional sale restriction, a very minor restriction.
7 And as we pointed out in pages 41 through 43 of our
8 brief, they have not brought that kind of claim, which
9 takes them out of the world of Palazzolo.

10 JUSTICE ALITO: Now, which --

11 MR. TSEYTLIN: Go ahead.

12 JUSTICE ALITO: If -- if one lot is owned by
13 a wholly owned corporation or an LLC and the other is
14 owned by the owner in the owner's own name, are they
15 considered to be under common ownership under Wisconsin
16 law?

17 MR. TSEYTLIN: No, Your Honor.

18 JUSTICE ALITO: No.

19 MR. TSEYTLIN: Unless you can pierce the
20 corporate veil, which is obviously a very high standard.

21 JUSTICE ALITO: What -- what about --

22 JUSTICE KENNEDY: -- the same with
23 husband -- husband owns one lot, wife owns the other;
24 they're different?

25 MR. TSEYTLIN: The State hasn't taken a

1 final position on that. My understanding is the county,
2 which is the first-line enforcer of this, would
3 interpret it that way.

4 JUSTICE KENNEDY: Would interpret it what
5 way?

6 MR. TSEYTLIN: Interpret it that if they're
7 not literally the same person, even if it's husband and
8 wife, even if it's two people and one of them owns one
9 and one of them owns the other, and it's not the same
10 two people and they were --

11 JUSTICE GINSBURG: May I correct you --

12 CHIEF JUSTICE ROBERTS: I'm sorry. I didn't
13 hear the end of your sentence.

14 MR. TSEYTLIN: That is my understanding of
15 the county's interpretation.

16 CHIEF JUSTICE ROBERTS: Well, what is? That
17 it -- that it's still treated separately?

18 MR. TSEYTLIN: That if two owns the exact --

19 CHIEF JUSTICE ROBERTS: Well, that makes it
20 seem we're talking about it in justice and fairness.
21 That seems to make it seem a little quirky that these
22 owners are not entitled to treat them separately, while
23 if they -- they just happen to record them in -- in
24 separate names that they would be a entirely different
25 situation.

1 MR. TSEYTLIN: Well, let me explain what the
2 State is trying to achieve in this law. It wants to
3 ultimately phase out substandard lots in the long term.
4 It does not want to interfere with any current
5 investment-backed expectations. So what it says is
6 we're going to have a slow phaseout and it's going to be
7 only triggered by the situation where people end up
8 taking the lots in common ownership. And that will
9 happen in the long term.

10 Most people in this area bring lots into
11 common ownership on purpose. And why would they do
12 that? Because if --

13 CHIEF JUSTICE ROBERTS: Well, they won't
14 after today, I mean -- or if you win.

15 (Laughter.)

16 CHIEF JUSTICE ROBERTS: You'll be -- you'll
17 be smart enough to say: Okay. Husband, you own F; I
18 will own E. And by the way, you're my successor in
19 interest under E, and I'm your successor in interest
20 under F. And -- and then we'll be fine.

21 MR. TSEYTLIN: Well --

22 CHIEF JUSTICE ROBERTS: Does it really --
23 does the whole takings issue really turn on that?

24 MR. TSEYTLIN: Yes, Your Honor. Let me tell
25 you why we do think it'll be effective. Because most

1 people bring these lots under common ownership
2 purposefully. And the reason they do that is they want
3 to build a single house up on a bluff, a bigger house.
4 So the reason -- and we think that that will happen over
5 time. It's already happened with eight property owners
6 in this area. So while it is a slow phaseout of lots,
7 it is a perfectly sensible regime. It balances, on one
8 hand, the desire to protect investment settle -- back --

9 CHIEF JUSTICE ROBERTS: Well, I would
10 suppose that in my hypothetical, the husband owner on
11 one side and the wife owner on the other side, they can
12 build a common house on the two lots, can't they?

13 MR. TSEYTLIN: The -- the merger of the two
14 lots are bringing into common ownership makes it easier
15 to apply -- comply with other regulatory restrictions on
16 the area about minimum lot size and things of that sort.
17 If you don't bring them into common ownership, then
18 you're -- you're left with the nonconforming structure
19 that's on your nonconforming lot.

20 JUSTICE KENNEDY: May -- may I have one
21 question? It's a background question.

22 Suppose these people had Lots E and F
23 merged. Then they bought G and H. Can they still build
24 one house, just one?

25 MR. TSEYTLIN: It would depend on the size

1 of G and H, how much net project area. Right now,
2 there's --

3 JUSTICE KENNEDY: Well, suppose -- suppose
4 they're just like these lots.

5 MR. TSEYTLIN: Well, Your Honor, so right
6 now, it's about .9 --

7 JUSTICE KENNEDY: If they have E and F, then
8 they buy G and H, can they build only one house, or two?

9 MR. TSEYTLIN: Right, Your Honor, just --
10 just let me have two seconds. I think I can answer the
11 question.

12 Right now, it's .98 net project area. If
13 Lot G is more than .2 net project area, they can build
14 one house. And then the new lot gets the new net
15 project area. So, basically, in order to have two
16 buildable lots, you have to add up to more than two
17 acres of net project area.

18 JUSTICE KAGAN: General --

19 CHIEF JUSTICE ROBERTS: It makes no
20 difference under your approach that the two lots were
21 taxed separately, does it?

22 MR. TSEYTLIN: No, Your Honor. I --

23 CHIEF JUSTICE ROBERTS: So that doesn't make
24 it. It makes no difference under your approach that
25 there were lot lines separating the two lots; right?

1 MR. TSEYTLIN: That's right, Your Honor.

2 CHIEF JUSTICE ROBERTS: Are there other
3 aspects in which the two lots are treated separately
4 that make no difference under your approach?

5 MR. TSEYTLIN: So with regard to the tax
6 assessor, that was an -- that was an error that the tax
7 assessor made. In fact, that fact milked it strongly in
8 favor of the -- the rule that we urge. Because in our
9 rule, you look at only State law and you look at whether
10 the lots are actually separate under State law.

11 Under the all things considered approach --

12 CHIEF JUSTICE ROBERTS: Are these lots
13 actually separate under State law?

14 MR. TSEYTLIN: There is no legal situation
15 in which the lot line between Lot E and Lot F makes any
16 difference right now, none.

17 CHIEF JUSTICE ROBERTS: So -- so that's not
18 quite an answer. Are they legally separate under State
19 law? They're still shown on the plat as separate lots,
20 correct?

21 MR. TSEYTLIN: That -- that's correct, Your
22 Honor.

23 CHIEF JUSTICE ROBERTS: So to what extent is
24 it wrong for me to understand that the only -- the only
25 sense in which the merger doctrine that you're talking

1 about applies is with respect to a takings claim?

2 MR. TSEYTLIN: No, Your Honor. They -- it's
3 with regard to every possible use or sale of these lots.
4 Any development, any sale, anything else a person in the
5 real world would want to do, there would be no
6 difference. There's not a single action that someone
7 could take that they couldn't take if the lot line was
8 deleted. It makes no difference. The -- the lot line
9 between Lot E and Lot F as it currently stands --

10 CHIEF JUSTICE ROBERTS: And then so there's
11 no reason -- under State law, there is a procedure to
12 eliminate the lot lines, and you're saying that that
13 procedure is irrelevant in this case?

14 MR. TSEYTLIN: Given the specific facts of
15 this case it would be completely irrelevant. No one
16 would go through that process because it would not add
17 or subtract any single right to the Murrs if they --

18 JUSTICE KAGAN: General --

19 MR. TSEYTLIN: -- deleted that lot line.

20 JUSTICE KAGAN: May I ask a question. The
21 difference between you and the other folks on that side
22 of the room is that they want to look at reasonable
23 expectations, and State law, in part, defines those
24 reasonable expectations, but they're allowing for the
25 idea that other things might come in as well, and you're

1 saying it's all and only State law.

2 Now, I'm pretty sympathetic to the idea that
3 preexisting State law really does influence quite a bit
4 your expectations about what property you own and what
5 you can do with it. But still, what's the harm of doing
6 what the government and the county want rather than what
7 you want in terms of saying the analysis should be a
8 little bit more fluent, fluid, sure, State law matters,
9 but maybe other the things matter too in a particular
10 situation.

11 MR. TSEYTLIN: Because what you get with any
12 of their approaches is Penn Central squared. That is to
13 say, you have a complex multifactor analysis, basically
14 an all-things-considered analysis at step one, just to
15 figure out the parcel. And then, in the vast majority
16 of cases, you then do a complex multifactor analysis and
17 you -- which is going to look at a lot of the same
18 factors.

19 I think one area of agreement among the
20 parties and amicus briefs in this case is this is --
21 area of law is incredibly complicated. It's difficult
22 to make your way through the weeds. It --

23 JUSTICE ALITO: Would it matter to you if it
24 were not possible to build a house that bridged the two
25 lots? Suppose one was at the bottom -- one lot is at

1 the bottom of a cliff and the other is at the top of a
2 cliff. Would that matter to you?

3 MR. TSEYTLIN: In defining what the relevant
4 parcel is it would not. It would matter quite a bit in
5 doing the hard work of doing the Penn Central analysis,
6 and that's one of the key points I'd like to
7 reemphasize.

8 We believe -- may I finish my sentence?

9 CHIEF JUSTICE ROBERTS: Sure.

10 MR. TSEYTLIN: We believe that most of the
11 work under takings law should be done at that second
12 step, usually Penn Central.

13 We believe the first step, the parcel
14 question, should be determined in a straightforward way
15 so the Court can move on to doing the hard work of Penn
16 Central.

17 Thank you, Your Honors.

18 CHIEF JUSTICE ROBERTS: Thank you, counsel.

19 Mr. Lazarus.

20 ORAL ARGUMENT OF RICHARD J. LAZARUS

21 ON BEHALF OF THE RESPONDENT ST. CROIX COUNTY

22 MR. LAZARUS: Mr. Chief Justice, and may it
23 please the Court:

24 Just like cities and counties in at least 33
25 States have done for decades, for more than 40 years,

1 St. Croix County has excluded from its grandfather
2 clause for preexisting lots commonly owned substandard
3 adjacent lots. During all those decades, no court at
4 any time in any jurisdiction in the United States has
5 held that exclusion amounts to a taking and for good
6 reason: It's fair and it's just. And the same
7 reason --

8 CHIEF JUSTICE ROBERTS: Well, that's -- and
9 it gets to the questions I was asking early, fairness
10 and justness.

11 But the -- and if -- actually the -- the
12 point is -- last made by -- by your friend, there are
13 two different questions. What is property and whether
14 there's been a taking. And I thought the question of
15 fairness and justice is justice is applied to the second
16 question. I didn't think it was applied to defining
17 what the property was because then you really do get, as
18 he said, Penn Central squared.

19 You're looking at fairness and justice. How
20 should we define this property? Well, fairness and
21 justice for what purpose? Well, for the Takings Clause.
22 And then once you define it, then you say well, it's
23 fairness and justice for whether there's been a taking.

24 It seems to me that you're just kind of
25 teeing up the definition of property to give you the

1 right answer under the Takings Clause.

2 MR. LAZARUS: Your Honor, in -- in this
3 case, in Valley, there is some circularity here, but let
4 me tell you why there is some circularity here.

5 And that is because they're making and
6 taking the challenge to a very odd -- a very odd topic,
7 and that is the absence of an exclusion. And -- and the
8 reason why there's no exclusion for these kinds of
9 substandard commonly adjacent lots is precisely because
10 government has determined over decades that, in this
11 situation, the economic impact isn't so great. There
12 isn't so hardship.

13 So the premise of the -- of these ordinances
14 is the absence of hardship. And since the purpose of
15 the Penn Central analysis or the Lucas analysis for
16 economic impact is to identify when the hardship really
17 is so great to justify the payment of just compensation,
18 it's not surprising that the very teachings of these
19 ordinances is directly relevant to how you evaluate the
20 property.

21 JUSTICE ALITO: How can you say that the
22 impact is not -- is categorically not great? If some --
23 somebody buys a lot next to that person's house with the
24 expectation of selling it at some point in the future to
25 meet real needs that come up then, and then the -- a

1 regulation is adopted that says well, sorry, you can't
2 sell it, that there's no hardship there?

3 MR. LAZARUS: The -- the hardship -- the
4 question though is how do you define the extent of the
5 hardship. And what you want -- what you need to look at
6 under the Penn Central analysis is what the economic
7 impact is, and to define the parcel part of that is
8 to -- to identify what the impact is.

9 In -- for instance, in this case, the
10 economic impact on the Murrs, right, has to take into
11 account the shared value of the two because the fact is,
12 if you look to what -- there is no general issue of
13 material fact with the lower courts on this question.
14 The value of the two parcels together for one house is
15 \$698,000. The value of two houses separate, with a
16 house on each, is \$771,000.

17 JUSTICE ALITO: Well, that's fine except
18 that, in order to realize the value of the two lots put
19 together, they would have to move away.

20 MR. LAZARUS: Right. But -- and -- and
21 the -- and they --

22 JUSTICE ALITO: Now, they think that's
23 irrelevant.

24 MR. LAZARUS: The takings inquiry is what
25 the economic impact is on them. It shouldn't be a

1 different test depending upon their particular
2 subjective preferences, then someone else's subjective
3 preferences. The -- the fact is --

4 JUSTICE ALITO: I thought the -- I thought
5 that what you're saying is we have to look at what's
6 fair and just, and now you say, well, we disregard the
7 situation of -- of the particular people who are
8 involved.

9 MR. LAZARUS: Well, no. You're looking
10 at -- it's several things. You're looking at first what
11 the economic impact is. Define the parcel in a way
12 which actually evaluates the real impact. Not a
13 fictional impact, but the real impact. The real impact
14 here is very little.

15 You're also taking account the -- the State
16 law. You're looking at the law at the time to figure
17 out what the reasonable expectations are of people.
18 You're taking that into account as well.

19 The other thing you're taking into account,
20 Your Honor, is the point you mentioned before.
21 Contiguousness by itself wouldn't be enough. We aren't
22 arguing that. One thing you look at is the State law
23 for expectations.

24 You also look at the physical and geographic
25 characteristics of the property; in other words, to find

1 out whether there was any real potential here for unity
2 of use and integrative use. For instance, in this case,
3 if Lot E and F were different and you had one up above
4 and one down below, that might well be a harder case to
5 suggest that there was that kind of unity of use,
6 integrated.

7 And you look at those three things, because
8 what you're trying to look for to evaluate the parcel is
9 you're trying to see what the real burden is that people
10 are suffering in the case.

11 You know, it's a remarkable finding that
12 there's such a little difference in value between one
13 house on two and two houses each on one. And the -- and
14 the reason for that, there's actually a formal term in
15 economics for it. It's called the complementarity
16 principle. You don't need to know that term. It's just
17 common sense.

18 There's some kinds of property, land is one
19 of them, that can create value joined that doesn't exist
20 when separate. The most extreme example are shoes. No
21 one would pay very much for just a right shoe or a left
22 shoe, but they pay a fair amount for the two shoes
23 together. Land is not an extreme example like shoes,
24 but the same phenomenon exists --

25 CHIEF JUSTICE ROBERTS: It seems to me

1 you're -- you're trying to figure out then what the land
2 interest is. And usually there's a regular way to do
3 that, which is you go down to the county office and you
4 look at what the -- the lines are between your property
5 and somebody else's or your lot and a different lot.
6 You don't look to whether one is below and one is above,
7 or that, and it seems to me that gets into a very
8 complicated situation when for Federal takings purposes
9 you're redefining what State law says property is.

10 MR. LAZARUS: What -- what you're doing --
11 what you're doing, Your Honor, is you're trying to
12 determine the economic impact. There's no question
13 State law defines what you own, but the question of
14 whether it's a taking -- it's a question of Federal
15 constitutional law, and the economic impact inquiry has
16 to see to what extent there really is this incredibly
17 disproportionate burden they're facing or not.

18 In -- in the Penn -- in the Penn -- oh
19 sorry. In the Penn Central case, in the Keystone
20 Bituminous case, every one of those cases State law
21 defined as separate property interests, things can be
22 bought and sold, the air rights can be bought and sold,
23 the support estate can be bought and sold, real estate
24 can be bought and sold under State law. There are
25 distinct property rights under State law, and the Court

1 nonethless, as a matter of Federal constitutional law,
2 joined them together because the Court wanted to find
3 out whether, in fact, there was that kind of economic
4 burden. And they even did it in cases involving lot
5 lines.

6 JUSTICE BREYER: Well, what about adding
7 here when I look to see the reasonableness of the
8 regulation. I mean, suppose in Holmes' case, the
9 regulation had said you have to leave columns of a
10 thousand feet of coal. But every expert said, or
11 everyone who knew about it, said you don't need more
12 than 50 feet.

13 MR. LAZARUS: Well, certainly it's true, the
14 ultimate analysis, you pay attention to reasonableness.
15 You -- you pay attention to whether the government --
16 you don't get to accept the government saying it doesn't
17 automatically qualify --

18 JUSTICE BREYER: Does that fit in your
19 three?

20 MR. LAZARUS: Absolutely, Your Honor. It
21 fits under Penn Central. And in this case -- in this
22 case, this is really the easy case. It's almost a sui
23 generis case because the -- the State law at issue was
24 one which -- which is premised on the notion that under
25 this circumstance you actually don't face such a great

1 hardship. That's exactly why they don't get the
2 exemption.

3 This isn't -- they are not challenging
4 restriction. They're actually challenging not getting
5 exemption which someone else is getting. And the reason
6 they're not getting that exemption is they don't have
7 the same hardship that other people have.

8 The -- the owner of the isolated lot,
9 substandard lot, asks for some kind of exemption. They
10 face the prospect of a complete economic wipeout. But
11 the owner of two substandard adjacent lots, they don't.
12 That person, like the Murrs, they have development
13 options.

14 In addition, they have the opportunity, as I
15 said before, to created value, value that doesn't exist
16 separate. And in this case, the value of joining the
17 property together, the reason why this property -- which
18 is beautiful property, stunningly beautiful, St. Croix
19 River, at the bend of the river. The reason why it's so
20 valuable is two things: River frontage and privacy.
21 That's the touchstone of value here.

22 Lot F is only 58 feet wide at the bottom,
23 the distance between the two columns in this room, and
24 right next to a public area. Lot E has a hundred feet,
25 twice that, of river frontage. And off to the west,

1 more privacy. When you add those two lots together, the
2 value of this luxury lot at the bend of the river is so
3 great, it actually almost overcomes the loss of value of
4 not having the second home on the lot.

5 JUSTICE SOTOMAYOR: I'm sorry. I've had a
6 problem with the appraisal figures, and it may be a step
7 I'm missing.

8 Why would anybody pay \$400,000 for a lot
9 they can't build on?

10 MR. LAZARUS: Because --

11 JUSTICE SOTOMAYOR: The two values -- your
12 example said the two lots put together are less
13 valuable, or more valuable?

14 MR. LAZARUS: Just a little less valuable.

15 JUSTICE SOTOMAYOR: Yeah. I know there's
16 only a ten percent difference. But as I understood the
17 appraisal figures, and are now using estimates, each lot
18 was worth about 350 and 400,000 separately, for a value
19 of 750. Together they were valued at 680. So they
20 weren't -- you didn't double the price --

21 MR. LAZARUS: No. But what you do -- if --
22 you didn't lose very much. By not being able to build a
23 second home, the value doesn't sort of halve. Instead,
24 the value goes only by -- down by nine percent. And the
25 reason is that the combined lot is this luxury lot.

1 This is a high-end area --

2 JUSTICE SOTOMAYOR: I understand why the
3 combination, but why would anybody buy the lot you can't
4 develop on?

5 MR. LAZARUS: Well, the question is not
6 the -- what the value of Lot E as a unit that you can't
7 develop or -- or build on. The question is what the
8 value of Lot E is to the Murrs, who also own Lot F,
9 because that's how you define what the burden is to
10 them. And the burden to them -- if -- if someone only
11 owned Lot E, then the hardship exemption would apply and
12 they could build. That's exactly the distinction that
13 the ordinance draws between the two.

14 JUSTICE BREYER: Is this right? Just say
15 yes or no, and if it's wrong, I'll figure it out later.

16 (Laughter.)

17 JUSTICE BREYER: Are you saying -- look, of
18 course you look at the lines that the State draws, but
19 that isn't determinative because you want to know the
20 total impact on the person, which may get you to look at
21 nearby property or other things. You want to know how
22 reasonable this regulation that affects it is; you want
23 to know whether he knew when he bought it, and perhaps
24 there are others.

25 Is that basically what you're saying?

1 You're not denying that you look at the State's lines.
2 It's just that they are not determinative?

3 MR. LAZARUS: Mr. Chief Justice, may I
4 answer the question?

5 CHIEF JUSTICE ROBERTS: He wanted one word.

6 MR. LAZARUS: Yes.

7 (Laughter.)

8 MR. LAZARUS: Yes. Yes.

9 CHIEF JUSTICE ROBERTS: Thank you, Counsel.
10 Ms. Prelogar.

11 ORAL ARGUMENT OF ELIZABETH B. PRELOGAR

12 FOR UNITED STATES, AS AMICUS CURIAE,

13 SUPPORTING THE RESPONDENTS

14 MS. PRELOGAR: Mr. Chief Justice, and may it
15 please the Court:

16 I'd like to begin with your question,
17 Mr. Chief Justice, about why it wouldn't be sensible to
18 just look at lot lines here as the starting point for
19 defining the parcel as a whole.

20 And as Justice Breyer just noted, we think
21 the lot lines are certainly relevant, especially insofar
22 as they might shape reasonable expectations about how
23 property owners expect to use their property and what
24 they expect to remain separate and distinct. But we
25 urge this Court not to adopt a presumption or a bright

1 line rule that focuses on lot lines in isolation. And
2 we really see two principal problems with that, one of
3 which is practical, and the other is legal.

4 CHIEF JUSTICE ROBERTS: Well -- I'm sorry.
5 Go ahead.

6 MS. PRELOGAR: Turning to the practical
7 point first, especially when you're looking at
8 contiguous commonly-owned property, which is the
9 situation the Court is confronting here. We think that
10 lot lines will frequently not be an accurate indicator
11 of how that claimant is being burdened by the particular
12 regulation, and that's because when you have those
13 contiguous commonly-owned lots, there's a physical unity
14 that frequently opens up the potential for linked use,
15 linked development, a direct reciprocity of advantage,
16 and shared value.

17 And so when thinking about how to address
18 the parcel as a whole issue, where the whole purpose,
19 the whole point is to get a feel for how the regulation
20 is actually impacting this claimant, focusing on lot
21 lines would exclude relevant considerations about the
22 on-the-ground economic realities.

23 CHIEF JUSTICE ROBERTS: So that's -- I just
24 don't know how that works with -- with property. Not
25 asking whether there's a takings, but asking whether

1 there's property.

2 You say it -- it depends on spacial,
3 functional, and what's the third thing?

4 MS. PRELOGAR: Temporal.

5 CHIEF JUSTICE ROBERTS: Temporal
6 considerations.

7 Now, you usually don't say that when you're
8 asking about property. You say, I owned Lot E or I own
9 Lot F, and here it is on the map; that's what I own.
10 You don't sit down and say: Well, but with spacial
11 considerations I own this much of it, and when temporal
12 considerations, add this, and functional that.

13 It seems to me that those concerns are
14 pertinent at considering whether there's a taking of the
15 property. But when it comes to what the property is,
16 that's a whole different question, and you don't get
17 into spacial, you get into what the plat looks like in
18 the county office.

19 MS. PRELOGAR: I think it's absolutely the
20 case that for terms -- in terms of defining what's a
21 protected property interest, at the outset you look to
22 State law, you look to lot lines, and no one's
23 contesting here that there's a protected property
24 interest. But we think that this relevant parcel
25 determination does come into the second part of the

1 inquiry in terms of whether there's been a taking.

2 It's about how do you get a feel for the --
3 the relevant unit of property that's at issue to
4 determine how this regulation is actually affecting this
5 claimant, and so we would put those considerations on
6 the taking side of the line.

7 This Court has always shown a preference in
8 deciding, as Justice Breyer said, and -- and Justice
9 Holmes' famous formulation whether a regulation goes too
10 far, the Court's always shown a preference for being
11 able to engage in that kind of contextual analysis that
12 focuses on all of the relevant facts and circumstances.

13 JUSTICE SOTOMAYOR: The problem I have with
14 your test, which has the -- the three components, is I
15 don't actually see anywhere in there any weight given to
16 the State property lines.

17 MS. PRELOGAR: Well --

18 JUSTICE SOTOMAYOR: You don't explicitly
19 list it among those three items. You don't tell us how
20 you're weighing it or not weighing it, what presumptions
21 you're giving it or not. So where does it fit in to
22 your -- your -- your three factors?

23 MS. PRELOGAR: We think that it frequently
24 goes to the functional considerations because it shapes
25 expectations about how land can properly be used,

1 whether it's an entirely separate and distinct issue.

2 So we do think that there's a role for State law to
3 play. And here we think, actually, that's one of the --

4 JUSTICE SOTOMAYOR: If we think there should
5 be more of a role, where would you put it? St. Croix
6 puts it on the second prong. Where would you end up
7 putting it, and why do you disagree with how they use
8 it?

9 MS. PRELOGAR: I think it's very important
10 not to adopt any kind of presumption or bright line rule
11 for the relevant parcel. And so I also would put it on
12 the second prong of conducting the Penn Central
13 analysis.

14 But the reason for that is because the
15 relevant parcel that the threshold definitional question
16 is going to provide the touchstone that contextualizes
17 the whole rest of the takings inquiry. And if the Court
18 were to artificially narrow it and look only at lot
19 lines, or to presumptive weight to those lot lines, then
20 that's going to be the focal point for measuring
21 economic impact for looking at investment-backed
22 expectations.

23 JUSTICE ALITO: Suppose you have lots that
24 are not contiguous but they're very close to each other.
25 Now, under your flexible approach with all these

1 different dimensions, are they ruled out as a single
2 parcel?

3 MS. PRELOGAR: I think it would be very
4 difficult to say that those kinds of noncontiguous
5 properties function as an integrated economic unit. So
6 I think it would be the rare case where it would be
7 appropriate to aggregate those property interests. But
8 I think that it is important to keep in mind that there
9 are so many different ways that property interests
10 arise, that it is important to have a flexible, nuanced
11 approach here.

12 And Justice Alito, I would just point to the
13 example we raised about the large developer who acquires
14 a large tract, maybe a thousand acres of property, and
15 subdivides it into hundreds --

16 JUSTICE ALITO: That can easily be taken
17 care of by making the rule look to the -- the lots as
18 defined at the time of the acquisition rather than
19 something that was done prior to -- prior to the time
20 when -- when a rule would be -- would be applied. But,
21 you know, it's fine to say that there are all these
22 dimensions and they should be nuanced and who can be
23 opposed to something that's nuanced. But what are we
24 looking for? What are we looking for? We're looking at
25 all these dimensions to determine what? Could you just

1 say as precisely as you can what we would -- we should
2 be looking for in defining what is the property that is
3 taken using all of the different dimensions that are
4 relevant in your view?

5 MS. PRELOGAR: I think the clearest
6 articulation I have is to say that you should be looking
7 for what in the interest of fairness and justice is an
8 accurate way to measure economic impact. And that's the
9 point of the relevant parcel determination. It's
10 focused specifically on the economic impact prong of the
11 equation.

12 JUSTICE ALITO: And is it the economic
13 impact on these particular owners or on some category of
14 hypothetical owners?

15 MS. PRELOGAR: It's always been an
16 individualized inquiry focused on these particular
17 owners. And I think that the facts of this case well
18 illustrate the point that when you're conducting that
19 kind of evaluation, it's often the case, as -- as
20 Mr. Lazarus said, that you're going to have a shared
21 value, a reciprocal value that --

22 JUSTICE ALITO: But what if a lot -- but
23 what if a lot was -- was preserved? What if it was
24 bought for the purpose of selling it at some point in
25 the future and/or it was preserved for that purpose so

1 that nothing was built on it so that it could readily be
2 sold?

3 MS. PRELOGAR: I think that those kinds of
4 reasonable investment-backed expectations have a role to
5 play, but I don't think that they can be dispositive.
6 Because, again, the point of the relevant parcel
7 determination is to accurately gauge economic impact.
8 But I do think that it's important --

9 JUSTICE ALITO: Well, why wouldn't they be
10 determinative? I thought you said it was we look to
11 legitimate expectations. There, their expectations are
12 completely frustrated.

13 MS. PRELOGAR: It's certainly the case that
14 anytime anyone's alleging a regulatory taking, the
15 premise of the claim is that they're being prevented
16 from doing something with their property that they
17 wanted to do with it. We think that that's not
18 sufficient to alone define the relevant parcel because
19 it might be the case, as it is here, that there's
20 actually not much of an economic impact at all.

21 And if that's the case, then this isn't the
22 kind of regulation that is requiring someone to shoulder
23 a burden that in the interest of fairness and justice
24 should be --

25 JUSTICE ALITO: Well, that comes back to

1 my -- but -- but you're saying that they have to move.
2 They can't afford to build a big house here, which is
3 what everybody wants. They don't want these little
4 modest houses anymore. They want McMansions. They --
5 they have to move. That's what you're saying.

6 MS. PRELOGAR: But to the extent that a
7 court were to conclude that that is an undue
8 interference with their investment-backed expectations
9 or that the character of that government action is
10 actually unjust and anomalous, then I think that this
11 Court's precedent already builds in sufficient
12 protection for those kinds of interest without trying to
13 rely solely on expectations to identify the relevant
14 parcel.

15 JUSTICE KENNEDY: I -- but I thought
16 reasonable investment-backed expectations were
17 objective. You're now making them subjective.

18 MS. PRELOGAR: Oh, no. To be clear, Justice
19 Kennedy, we do think that it has to be an objective
20 inquiry. And I understood Justice Alito to be focusing
21 on a fact pattern where the property was acquired before
22 the relevant regulatory restriction was enacted and
23 thereby frustrated the expectations.

24 Here, we think it's actually a critical fact
25 that Petitioners voluntarily brought this land under

1 common ownership and so triggered the application of the
2 merger provision decades after the relevant regulatory
3 restriction was in place. And that does weaken the idea
4 that there were any objectively reasonable
5 expectations --

6 JUSTICE SOTOMAYOR: Well, I actually think
7 they did it -- the parents did it after the ordinance's,
8 from my timeline, creation. The ordinance was passed in
9 1976. And in 1982, the parents took the property under
10 common ownership from the Atlantic Plumbing Company.

11 MS. PRELOGAR: That's correct. So that
12 there --

13 JUSTICE SOTOMAYOR: So neither the parents
14 or the children, if they had been paying attention to
15 the regulatory scheme, had a reasonable expectation that
16 the ordinance wouldn't affect them.

17 MS. PRELOGAR: That's exactly correct. We
18 think that the timing here of the relevant transfers of
19 property reinforces the idea that it's proper to view
20 these two parcels together as an integrated whole.

21 And the other facts that I would add to that
22 are the spatial ones, the fact that these are contiguous
23 commonly owned tracts with possibilities for linked
24 development and linked uses that creates that direct
25 shared value that is borne out by the valuation evidence

1 in this case. Because it is significant here that if
2 you view these lots together as an effectively merged
3 parcel, as they are under State law, then the value is
4 only 10 percent less than the value of two separate lots
5 with two separate building sites. And --

6 CHIEF JUSTICE ROBERTS: But by saying
7 "effectively merged," you mean not really merged?

8 MS. PRELOGAR: Absolutely. We're not
9 suggesting that the lot lines have been erased here.
10 And so we do think that those lot lines continue to have
11 a role to play.

12 CHIEF JUSTICE ROBERTS: Except with respect
13 to takings.

14 MS. PRELOGAR: No. We think that they do
15 have a role to play with respect to takings, but that
16 it's also important to conduct the same kind of
17 contextual analysis that's been the hallmark of this
18 Court's regulatory takings jurisprudence.

19 CHIEF JUSTICE ROBERTS: Thank you, counsel.

20 Mr. Groen, you have four minutes remaining.

21 REBUTTAL ARGUMENT OF JOHN M. GROEN

22 ON BEHALF OF THE PETITIONERS

23 MR. GROEN: Thank you.

24 Beginning with the multifactor nuanced
25 approach, the reason why that kind of approach to

1 defining the property interest -- remember, the first
2 issue, you have to define the property interest that is
3 the subject of the takings -- of the takings claim. The
4 reason is because the whole real estate industry, from
5 mortgage lenders to property owners to title insurance
6 companies, all rely upon the geographic boundaries. And
7 it's exactly as was suggested --

8 JUSTICE SOTOMAYOR: With the regulations
9 that affect those boundaries.

10 MR. GROEN: I'm sorry?

11 JUSTICE SOTOMAYOR: With the regulations
12 that affect those boundaries. Whether it's a title
13 company or anyone else --

14 MR. GROEN: But we --

15 JUSTICE SOTOMAYOR: -- they look at what the
16 paper talks about as a property line and what
17 regulations do with respect to that line.

18 MR. GROEN: And when the regulations
19 redefine and impose a new definition, the reliance that
20 previously existed is undermined. And that is the
21 gravamen of the takings claim. It is not a redefinition
22 that absolves liability.

23 JUSTICE SOTOMAYOR: So what do we do --

24 MR. GROEN: It's a redefinition --

25 JUSTICE SOTOMAYOR: -- with the fact as I see

1 it that these properties were bought separately, one by
2 the parents, the other by their company, and that post
3 regulations, knowing exactly what they were doing -- and
4 you say they didn't, but that has to do with their
5 choice, because you buy everything subject to
6 regulation. You may not choose to look at it, but
7 you -- you should. Ignorance of the law is not a
8 defense anywhere. I don't know why it should be in the
9 regulatory context.

10 But putting that aside, they took the title
11 to the property in their own names post regulation.

12 MR. GROEN: Yes, they did. This is a normal
13 American family who understands when you buy property
14 and you have a deed and it's zoned for residential use
15 in a subdivision, you get to use it. And you get to
16 pass it on to your kids.

17 JUSTICE SOTOMAYOR: But you get to use
18 everything you own with -- subject to regulatory
19 requirements.

20 MR. GROEN: That's right.

21 JUSTICE SOTOMAYOR: I buy a piece of
22 property 10 years ago or 20 years ago, and I didn't know
23 I had to put a sprinkler system in. Today, if you want
24 to do any kind of renovation, you got to put one in.

25 MR. GROEN: But --

1 JUSTICE SOTOMAYOR: There's lots of
2 regulations that you didn't buy expecting --

3 MR. GROEN: That's right.

4 JUSTICE SOTOMAYOR: -- but they do affect
5 you.

6 MR. GROEN: But the Murrs bought two
7 separate parcels that comprised two separate building
8 lots, and that has now --

9 JUSTICE SOTOMAYOR: They --

10 MR. GROEN: -- been taken --

11 JUSTICE SOTOMAYOR: They --

12 MR. GROEN: -- away from them.

13 JUSTICE SOTOMAYOR: They didn't buy them.

14 MR. GROEN: That --

15 JUSTICE SOTOMAYOR: They got them in 1982
16 subject to knowing that they could only develop on one.

17 MR. GROEN: Well, that circles right back to
18 the Palazzolo argument that we discussed earlier.

19 The other issue I'd like to address is this
20 reliance that -- that I -- that we're just talking about
21 with subdivisions and deeds, that is a system that all
22 of this country relies upon. And if we're going to
23 undermine that, that is a serious step in taking away
24 rights and property that people traditionally understand
25 and use in their daily lives. That's the protection

1 that's talked about in Roth v. Board of Regents.

2 The second thing is this valuation question.
3 And couple of points on that. All the discussion about,
4 well, the property is valuable because it's waterfront,
5 all of that discussion goes to the merits of the takings
6 claim; in other words, how much economic impact is
7 there? The first step is to define the relevant unit of
8 property for analysis. And that step is looking at the
9 deeds and the -- the geographic boundaries of Lot E.
10 That is the presumption.

11 When you turn to the valuation question, the
12 notion that Lot -- the combined Lot E-F has value
13 because it's waterfront, that is ignoring the
14 fundamental aspects that the valuation in a residential
15 lot is because you can build on it. And that is what
16 has been taken from the Murrs. They previously had two
17 building sites; now they have one.

18 The valuation that the county discusses, the
19 value is not attributed to Lot E, because Lot F has the
20 building site. So, really, the county is getting a
21 windfall by suggesting that, oh, well, you can have this
22 bigger, better lot, and that will enable you to -- to
23 recover from the compensation. That goes to -- to the
24 question on -- we have of how do you -- how do you
25 determine the amount of damages?

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Thank you very much.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

The case is submitted.

(Whereupon, at 11:15 a.m., the case in the
above-entitled matter was submitted.)

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