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Why Nevada joined a Wisconsin property rights case

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The U.S. Supreme Court recently heard oral arguments in a rather obscure and complicated property case titled Murr v. Wisconsin, in which the Murr family claims the value of their waterfront property was drastically reduced by government regulations.

The Murrs argued the regulation essentially reduced the value of their property and the government should compensate them under the Fifth Amendment Takings Clause, which dictates that no private property may be "taken for public use, without just compensation."

Four Murr siblings own two adjacent waterfront lots on the St. Croix River in Wisconsin that their parents purchased in the 1960s. One has a cabin and one is vacant land. Since the purchase the zoning laws were changed to require larger lots, but existing ones were grandfathered.

But when the Murrs tried to sell one lot for $400,000, its appraised value, so they could improve the cabin, they were told the lots were merged and the vacant lot could not be sold separately, due to the land being a "parcel as a whole." The county offered to settle for $40,000.

So why would Nevada take the lead in filing a friend of the court brief for itself and eight other states on behalf of the Murrs to challenge Wisconsin zoning law?

Ilya Somin, a law professor at George Mason University and an adjunct scholar at the Cato Institute, said in a recent Washington Post commentary that he co-authored the brief on behalf of Nevada's attorney general and the other states because the outcome of this case will have a lasting and potentially damaging impact on states with large federal land holdings.

"This is a particular danger for Nevada and other western states, where the federal government has a massive presence and often seeks to restrict the use of state-owned lands that abut its own," Somin wrote.

The brief itself — signed by Somin, Nevada Attorney General Adam Laxalt and Nevada Solicitor General Lawrence VanDyke — argues: "Endorsing the Wisconsin Court of Appeals's broad interpretation of the 'parcel as a whole' rule will expand the federal government's regulatory control over state land and limit the circumstances in which just compensation might

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

The brief notes that in Nevada the Bureau of Land Management alone controls 47.5 million acres or about 63 percent of the state.

"Taken to its logical extreme, the federal government could enact a federal regulation, under some pretense, that barred all or most development on all property owned by Nevada in Lincoln County," the brief notes. "The federal government could argue that this regulation did not constitute a taking because, when all contiguous state-owned parcels in Clark, White Pine, and Nye Counties are aggregated, Nevada would still retain some beneficial use of its state land."

In a press release sent out when Nevada filed the brief on behalf of the nine states, Laxalt stated that "our nation's Founders wisely created the Fifth Amendment to protect property owners from uncompensated takings, and my Office will continue to defend Nevadan's rights — including their property rights — whenever the government oversteps its bounds. In Nevada, more than 80% of land is already owned by the federal government, and the new rule proposed in the Murr case would only increase its ability to take state and private land without just compensation. As our brief explains, this new rule places more burdens on property owners and could disrupt how property owners normally use their property in ways that benefit society. An unfavorable ruling in this case will impact not only the Murr family in Wisconsin, but other landowners across the country including here in Nevada."

The friend of the court brief concludes, "Should the 'parcel as a whole' rule be expanded to include contiguous parcels under common ownership, government officials will often have little reason to worry about paying compensation, and will therefore have incentives to ignore the harm caused by their regulations …"

After oral arguments Somin wrote that he fears the court might embrace some muddled complex balancing test that leave property rights in jeopardy, but there is a chance the court could split 4-4 opening the opportunity for a rehearing after Neil Gorsuch is confirmed, assuming he is.