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Why Several Western States Are Watching This Important Property Rights Case

Supreme Court will hear oral arguments Monday in Murr v. Wisconsin, which tests the rules for when governments must pay compensation for regulatory takings.

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A dispute between a Wisconsin family and their local government could set an important precedent for how the federal government must compensate states when taking land.

The case, *Murr v. Wisconsin*, goes before the U.S. Supreme Court on Monday for oral arguments. The Murr family owns two adjacent plots of land along the banks of the St. Croix River in western Wisconsin, and wants to sell one of the parcels (with an estimated value of $400,000, the family claims) to pay for maintenance on the recreational cabin that sits on the other parcel. The county government, acting under the terms of a 1975 state law, prohibited the family from selling the second parcel and declared the two parcels are effectively a single parcel—a regulatory ruling that the Murr family claims has reduced the value of their land by as much as 90 percent.

(For more on the details and background of the case, check out my previous reporting here.)

The whole thing seems very narrow and technical—it's almost so provincial that it makes you wonder why the Supreme Court is involved at all—but the key detail is not the fight over whether the Murr's own one 2.5 acre parcel of land or two 1.25 acre parcels of land. No, the real question here is whether the state government has to compensate them for the loss of value.

Usually, this is fairly clear cut. The U.S. Constitution says governments must compensate property owners when land is taken for public purposes. In this case, though, the land wasn't necessarily taken, but rather the use of the land was significantly restricted by state regulations regarding where structures can be built relative to waterways, and by the separate decision to merge the two parcels into one without the Murr's consent.

The case before the Supreme Court will deal mostly with the question of whether the simple fact of having two adjacent parcels owned by the same person can allow the government to reduce

the value of those parcels without having to pay compensation—something the government would not be able to do if the two parcels had different owners.

"However you come down on the question of whether there is a taking in [the Murr's] case or not, the answer shouldn't depend on the fact that the owners of one lot also happen to own the lot next door," said Ilya Somin, a professor of law at George Mason University, during a forum on the *Murr* case hosted Friday by the Cato Institute, a libertarian think tank. Somin has called the case "by far the most important property rights case to come before the Supreme Court this term, and probably the most important in at least two or three years, if not longer."

It's the question of compensation that has attracted the interest of several states that are not directly involved in the dispute. Eight western states, led by Nevada, filed amicus briefs with the Supreme Court in support of the Murr's claim. If the state can combine the Murr's parcels of land and not have to compensate the family for the lost value, those states argue, then similar reasoning could leave states vulnerable to large-scale uncompensated encroachment by the federal government.

"If regulators do not have to pay compensation to affected property owners in cases where the latter happen to possess contiguous lots, they will often have little incentive to fully consider the costs and benefits of proposed regulations, and prioritize those with the greatest likely beneficial impact," they argue. "Aggregating contiguous parcels under common ownership into a single super-parcel will undermine traditional notions of property rights, have deleterious economic consequences, and encourage the undisciplined regulation of individuals' and states' property."

The states are not concerned with whether Wisconsin should have to compensate the Murr family for the reduced value of their property, but rather with the way in which the government executed the merger of the two parcels. If governments are allowed to do that—to decide that two adjacent parcels of land with the same owner can be treated as a single parcel under the law—then it creates several perverse incentives for individuals, states, and the federal government.

At the Cato forum on Friday, Somin, who authored the amicus brief on behalf of those several western states, outlined some of those potential perverse incentives:

- If property owners know that contiguous parcels can be merged together by governments, without compensation, they will have an incentive to NOT get common ownership. That creates other problems with efficiency, as property owners find ways to get around it, such as by creating other parties for a transaction purely to avoid legal problems.
- It would make it harder to collect parcels of land for a large building project, either public or private.
- States will have incentives to redefine parcels to avoid liabilities under the constitution's takings clause, and regulators will be able to undermine property values without having to worry about paying compensation

- Many state governments own contiguous lots and large bodies of water near areas owned by the federal government (military bases, national parks, etc). Takings rules apply to land taken by the federal government from state government, but if you can say contiguous lots are merged, then the federal government would be able to impose severe restrictions on state land and wouldn't have to pay consequences.

The last point is the one that most concerns the states that are watching the Murr case closely. If the federal government is able to merge state-owned parcels and reduce access to them or otherwise regulate them to the point where they become unusable, the feds would normally have to compensate the state for the loss of access to its land. Depending on the outcome of the Murr case, that might change.