Finding the Denominator in Regulatory Takings Cases: A Preview of *Murr v. Wisconsin*

By Christopher M. Kieser

Note from the Editor:

This article discusses *Murr v. Wisconsin*, a regulatory takings case that the Supreme Court will hear in its upcoming term. The article summarizes the background of the case, presents the parties' arguments, and posits possible outcomes at the high court and the implications of each.

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Introduction

Next Term, the Supreme Court will take up an important property rights case that has been nearly forty years in the making. At issue in *Murr v. Wisconsin*[1] is whether governments may treat two contiguous, commonly owned but legally distinct parcels of land as a single parcel for the purposes of regulatory takings liability. The answer to this "relevant parcel" question is often outcome determinative in regulatory takings cases.[2] But the Supreme Court has provided only very limited guidance on this question, and lower courts have split over whether to apply a presumption that contiguous parcels should be treated as a single parcel. The *Murr* case will bring that question squarely before the Court this fall. The result will have a significant impact on the scope of regulatory takings liability and owners' ability to make reasonable use of private property.

I. Factual and Legal Background

The Murr siblings—Joseph, Michael, Donna, and Peggy—own two contiguous parcels of land along the St. Croix River in St. Croix County, Wisconsin.[3] Their parents originally bought each lot separately, the first in 1960 and the second in 1963.[4] The Murr parents built a cabin on the first lot and then transferred title to their family-owned plumbing company.[5] They purchased the second lot as an investment property, and it has remained vacant ever since.[6] In the intervening years, both lots passed into the siblings' ownership—the first in 1994 and the second in 1995.[7]

The transfer of the two adjacent lots to common ownership activated a decades-old St. Croix County ordinance requiring that the two separate parcels be treated as one parcel.[8] Because the Murr siblings own both lots, the Ordinance prohibits them from developing or even selling the second parcel.[9] About a decade after the transfer, the siblings wanted to protect their cabin from repeated flooding and build it on higher ground.[10] In connection with that effort, they unsuccessfully sought a variance from the

1 The Supreme Court granted certiorari on January 15, 2016. 136 S. Ct. 890 (2016).

2 See discussion infra at text accompanying nn. 18-22.

3 Murr v. Wisconsin, 359 Wis. 2d 675, 2014 WL 7271581, ¶¶ 3-6 (Dec. 23, 2014), *available at* http://www.scotusblog.com/wp-content/uploads/2015/11/DisplayDocument.pdf.

4 *Id.* at ¶ 4.

5 Murr v. St. Croix Cnty. Bd. of Adjustment, 796 N.W.2d 837, 841 (Wis. Ct. App. 2011).

6 *Murr*, 2014 WL 7271581, at ¶ 4.

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

8 *Murr*, 2014 WL 7271581, at ¶ 6.

9 *Id.*

10 *Id.* at ¶ 7.

Ordinance that would have allowed them to either sell the second lot or use it as a separate building site.[11] Denial of the variance application left no doubt that the second lot could not legally be developed or sold. Because application of the Ordinance denied all use of or value in their second lot, the Murr siblings sued St. Croix County for a regulatory taking.[12] They sought compensation for the deprivation of their rights to build on, sell, or do anything with the second parcel.

The Supreme Court has explained that the Fifth Amendment's Takings Clause[13] applies not only when government directly condemns property through eminent domain, but also when a government regulation goes "too far" in restricting the use of property.[14] In most instances, such claims are evaluated under the multi-factor test articulated in *Penn Central Transportation Co. v. City of New York*,[15] which principally considers the economic impact of a regulation, the extent to which it has interfered with realistic "investment-backed expectations," and the "character of the government action."[16] While *Penn Central* recognized that some regulations harm property rights so much as to warrant compensation, property owners who rely on the multi-factor test face an uphill battle when they challenge regulatory takings in the federal courts.[17]

However, when a property owner is required "to sacrifice all economically beneficial uses in the name of the common good . . . he has suffered a taking."[18] Such a denial of use is a categorical *Lucas*-style regulatory taking; the *Penn Central* factors are irrelevant and the property owner is entitled to compensation if she is denied all economically viable use of land.[19] But courts cannot apply *Lucas* or *Penn Central* without first determining which property has been affected—in other words, what should be the "denominator" in the analysis.[20] For example, a regulation that prohibits the use of one particular acre would deny all economically viable use of a parcel that contains only that one acre, but restrict only 10 percent of a ten acre plot containing the regulated acre. That is why "[t]he first and perhaps most important issue in any regulatory takings claim . . . is identifying the portion of property that should be used for the analysis."[21]

The Murr siblings' case highlights the importance of the relevant parcel analysis. The Wisconsin Court of Appeals held that the Murrs had not suffered a taking because of the "well-established rule that contiguous property under common ownership is considered as a whole regardless of the number of parcels contained therein."[22] Since the Murrs own adjacent lots, one of which has a cabin on it, that categorical rule made their *Lucas* claim impossible. However, were the parcels considered separately—as they were purchased and intended to be used—the siblings could claim a denial of all economically viable use of the second lot. Therefore, the siblings' case is the textbook example of the relevant parcel analysis determining the outcome of an entire regulatory takings case.

II. Advent of "Parcel as a Whole"

The Wisconsin Court of Appeals applied a categorical rule that commonly owned, adjacent parcels of land are to be treated as a single parcel for the purposes of regulatory takings liability. Like many other courts that have reached this conclusion, the Wisconsin court traced the origins of the "aggregation" rule to *Penn Central*.[23] But the parties in that case did not argue for such a rule, the *Penn Central* Court did not purport to establish it, and no subsequent Supreme Court decision has endorsed it. Despite that, the "parcel as a whole" concept has become ubiquitous in potential parcel aggregation cases, significantly limiting the application of the *Lucas* per se takings rule.

In *Penn Central*, the owners of the historic Grand Central terminal in New York City argued that the city's designation of the terminal as a landmark effected a regulatory taking of the property.[24] The landmark designation prevented the Penn Central Transportation Company from expanding the historic terminal above its existing height, and so the company argued that its air rights above the terminal had been taken by the regulation.[25] It contended that there should be no legal distinction between cases involving "several rights in the same piece of land" and those concerning "one right in several 'pieces' (acres) of land."[26] The city responded to that precise argument in its brief, arguing that

11 *Id.* (citing *Murr*, 796 N.W.2d at 846 (affirming the denial of variance request)).

12 *Id.* at ¶ 8.

13 The Takings Clause of the Fifth Amendment provides: "nor shall private property be taken for public use, without just compensation." U.S. Const. amend. V.

14 Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

15 438 U.S. 104 (1978).

16 *Id.* at 124

17 Despite this, *Penn Central* is actually an effective tool for property rights litigators. Because it is a multi-factor test, property owners often can clear the summary judgment hurdle and obtain either a favorable settlement or a jury verdict in their favor. At the appellate level, however, *Penn Central* claims rarely succeed. An analysis of 162 cases citing *Penn Central* in the First, Ninth, and Federal Circuits through December 31, 2011, revealed only four instances where the appellate court held a regulation to constitute a taking under the multi-factor test. *See* Adam R. Pomeroy, Penn Central *After 35 Years: A Three Part Balancing Test or a One Strike Rule?*, 22 Fed. Circuit B.J. 677, 692 (2013). Even considering only cases that reached the merits of a property owner's regulatory takings claim, plaintiffs prevailed in only four out of 41 cases. *Id.*

18 Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992).

19 *See* Lingle v. Chevron USA Inc., 544 U.S. 528, 538 (2005).

20 *See* John E. Fee, Comment, *Unearthing the Denominator in Regulatory Taking Claims*, 61 U. Chi. L. Rev. 1535, 1535-36 (1994) ("What the Court [in *Lucas*] did not decide, however, is how to determine the relevant parcel of land that is subject to the regulatory taking inquiry.").

21 David Spohr, Note, *Florida's Takings Law: A Bark Worse Than Its Bite*, 16 Va. Envtl. L.J. 313, 345 (1997).

22 *Murr*, 2014 WL 7271581, at ¶ 5 (citing R.W. Docks & Slips v. State, 628 N.W.2d 781, 789-90 (Wis. 2001)).

23 *Id.* at ¶¶ 4-5; *see also* Zealy v. City of Waukesha, 548 N.W.2d 528, 532-33 (Wis. 1996) (relied upon in *Murr*).

24 *Penn Central*, 438 U.S. 104.

25 *See* Brief of Appellant at 9, *Penn Central*, 438 U.S. 104.

26 *Id.* at 26 n.23.

the airspace-taking theory was "based on the improper assumption that the landmark parcel *consists of two distinct properties*, the Terminal and the air rights above the Terminal."[27]

The Court applied its newly minted multi-factor test and held that the owners of Grand Central Terminal had not suffered a compensable taking by virtue of the city's designation of the terminal as a landmark.[28] In the process, it stated that takings law "does not divide a *single parcel into discrete segments* and attempt to determine whether rights in a particular segment have been entirely abrogated."[29] And so Penn Central could not divide out the air rights from the remainder of the parcel and assert what amounted to a *Lucas* takings claim as to that portion of the property.[30]

Another case often cited to support the "parcel as a whole" rule is *Tahoe-Sierra Preservation Council v. Tahoe Regional Planning Agency*.[31] The property owners in *Tahoe-Sierra* argued that they had been denied all economically viable use of their parcels after the Tahoe Regional Planning Agency imposed a temporary[32] development moratorium.[33] A majority of the Supreme Court refused to apply *Lucas*,[34] reasoning that to apply it would approve the same splitting of one parcel that the Court had rejected in *Penn Central*.[35] Because a fee interest in property also includes "the term of years that describes the temporal aspect of the owner's interest," the Court held that denial of all economic use for just a period of time is not a categorical taking.[36] Like in *Penn Central*, the *Tahoe-Sierra* Court simply rejected the division of one property to facilitate a *Lucas* taking. As in *Penn Central*, the focus was on the single parcel in its entirety, but did not purport to suggest any rule for aggregating two separate parcels in the takings analysis.[37]

Nevertheless, many lower courts have cited *Penn Central* for the proposition that commonly owned contiguous parcels should be aggregated. Some, like the D.C. Circuit, have applied something akin to a presumption of aggregation, while considering factors such as "the degree of contiguity, the dates of acquisition, the extent to which the parcel has been treated as a single unit, and the extent to which the restricted lots benefit the unregulated lot."[38] Others, like the Federal Circuit, have applied a multi-factor test and refused to aggregate adjacent parcels.[39] Still others, like the Wisconsin courts, view *Penn Central* as having created an absolute aggregation rule.[40] These three approaches have created a significant conflict amongst the federal and state courts and ultimately led to the Supreme Court granting certiorari in the Murrs' case.

III. Parties' Arguments

Against this background, the Murrs contend that *Penn Central* and *Tahoe-Sierra* support a presumption against aggregation of separate parcels. The siblings point out that both cases recognize that the base unit of property is the single parcel;[41] for example, *Tahoe-Sierra* focuses on "the metes and bounds that describe [a property's] geographic dimensions" when defining the "parcel as a whole."[42] As such, the Murrs ask the Court to hold that "a distinct and geographically defined parcel of land is presumed to be the takings unit."[43] Under the proposed presumption, "[a]ny party seeking to segment lesser interests or aggregate other parcels must prove that the facts warrant such unorthodox treatment."[44]

The Murrs importantly note that such a presumption would at once be consistent with the Supreme Court's often-expressed concern for avoiding bright-line rules and also possess "a degree of predictability that is consistent with fundamental understandings of property law."[45] A unanimous Supreme Court recently noted that, "[i]n view of the nearly infinite variety of ways in which government actions or regulations can affect property interests,

27 Brief of Appellee at 36, *Penn Central*, 438 U.S. 104 (emphasis added).

28 *Penn Central*, 438 U.S. at 138.

29 *Id.* at 130 (emphasis added).

30 *See* Concrete Pipe & Prods. of Cal., Inc. v. Const. Laborers Pension Trust for S. Cal., 508 U.S. 602, 644 (1993) (describing *Penn Central*'s holding as "that a claimant's parcel of property could not first be divided into what was taken and what was left for the purpose of demonstrating the taking of the former to be complete and hence compensable").

31 535 U.S. 302 (2002).

32 As Chief Justice Rehnquist noted in his dissent, the "temporary" moratorium on development "lasted almost six years." *Id.* at 345-46 (Rehnquist, C.J., dissenting). That is longer than the two years the regulation in *Lucas* was in effect before the law changed. *Id.* at 346.

33 *Id.* at 306 (majority opinion).

34 The Court's refusal to apply *Lucas* ended the case, as the property owners did not pursue their *Penn Central* argument past the district court. *Id.* at 317.

35 *Id.* at 330-31.

36 *Id.*

37 Some other cases are generally thought to support the parcel as a whole rule, but none support aggregation of two separate parcels. *See, e.g.*, Keystone Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 498 (1987) ("There is no basis for treating the less than 2% of petitioners' coal as a separate parcel of property."); Andrus v. Allard, 444 U.S. 51, 65-66 (1979) (regulation preventing sale of certain artifacts was not a taking because courts must take the aggregate of the "bundle" of property rights into account). Nor do the cases cited by the United States in *Penn Central* support an aggregation rule. *See* Goldblatt v. Town of Hempstead, 369 U.S. 590, 594 (1962) (holding that prohibition of excavation below the water table was not an unconstitutional taking); Hudson Cnty. Water Co. v. McCarter, 209 U.S. 349, 355 (1908) ("[T]he police power may limit the height of buildings in a city, without compensation. To that extent it cuts down what otherwise would be the rights of property. But if it should attempt to limit the height so far as to make an ordinary building lot wholly useless, the rights of property would prevail over the other public interest, and the police power would fail."). These cases support the results in *Penn Central* and *Tahoe-Sierra*, but not the aggregation of separate parcels for the purposes of takings analysis.

38 District Intown Props. Ltd. v. District of Columbia, 198 F.3d 874, 880 (D.C. Cir. 1999).

39 *See* Lost Tree Village Corp. v. United States, 707 F.3d 1286, 1293-94 (Fed. Cir. 2013); Palm Beach Isles Assocs. v. United States, 208 F.3d 1374, 1381 (Fed. Cir. 2000).

40 *See R.W. Docks & Slips*, 628 N.W.2d at 789-90.

41 Brief for Petitioner at 24, *Murr*, 136 S. Ct. 890.

42 *Tahoe-Sierra*, 535 U.S. at 331.

43 Brief for Petitioner at 24, *Murr*, 136 S. Ct. 890.

44 *Id.*

45 *Id.* at 25.

the Court has recognized few invariable rules in this area."[46] But some predictability is necessary to give both property owners and governments a baseline. The Murrs' baseline is the state-drawn lot lines. This places the emphasis on objective factors and requires the government to come forward with a persuasive reason why two legally-distinct parcels should be treated as one.

Further, the Murrs argue that presuming the primacy of the parcel as the denominator in regulatory takings cases is consistent with the traditional understanding of American property law.[47] The fee simple parcel "is an estate with a rich tradition of protection at common law,"[48] not an unusual device used to create takings liability. The particular parcels in this case were created by Wisconsin law in 1959 and were owned by distinct owners until 1995.[49] As separate fee simple parcels, the Murrs argue that they have always had the right to possess, use, and convey both the investment lot and the cabin lot irrespective of the two lots' common ownership.

Finally, the Murrs emphasize that the presumption should stand according to the command that government cannot force "some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[50] They argue that the particular facts of this case weigh against aggregation. Particularly, the two parcels were never treated as one economic unit; they were acquired at different times for different purposes, and they were always used consistently with those separate purposes.[51]

In response, Wisconsin[52] relies heavily on the Supreme Court's typical deference to state property law. It contends that *Lucas* instructs that the relevant parcel should be defined by the property owner's "objectively reasonable expectations" as defined by state law.[53] Wisconsin notes that state law, not the Constitution, creates property rights.[54] Thus, it argues that deference to a state's choice of lot lines—in this case, the St. Croix County Ordinance—is strongly favored by Supreme Court precedent.[55] Wisconsin says this is particularly true because the "creation, alteration and significance of lot lines is entirely a function of the law of the State where the land is located."[56]

In Wisconsin's view, if the Supreme Court considers the objectively reasonable expectations of the Murr siblings consistent with *Lucas*, the two contiguous parcels must be treated as one. Wisconsin says the Murr siblings were "charged with knowledge" that the Ordinance would come into effect if they brought the two parcels into common ownership.[57] Thus, when they brought the parcels into common ownership in 1995, they took title to just one parcel consisting of the two lots together.[58] Since the siblings were presumed to have known about the Ordinance, they could have no reasonable expectation that the two parcels would remain separate.

In response to the Murr siblings' reliance on the 1959 lot lines and their arguments distinguishing *Penn Central* and *Tahoe-Sierra* as segmentation cases, Wisconsin says the precise nature of those cases is irrelevant. What matters are the reasonable expectations created by state law.[59] That is why Wisconsin dismisses any concern that its position would lead to an absolute rule of aggregation of adjacent parcels. As the state argues, "where aggregation of contiguous, commonly owned property is contrary to 'reasonable expectations,' as 'shaped' by state law, such aggregation would indeed be inappropriate."[60] In Wisconsin's view, the outcome of the case does not turn on the application of any presumptions—against aggregation or otherwise. Instead, the state argues that the two lots should be treated as one because that was an objectively reasonable view of state property law at the time the lots came into common ownership.[61]

Finally, Wisconsin argues that even if the Court finds that some sort of multi-factor analysis is necessary, it should prevail. Tracking its reasonable expectations argument summarized above, the state first contends that the siblings could not have had any expectations of being able to develop the second lot, in light of the Ordinance.[62] The state further notes that the lots are contiguous, that the dates of acquisition are close enough in time that this factor should not help the Murrs, *and* that the Murr siblings have in fact treated the lots as one parcel because they have placed things like a propane tank and a volleyball court on the second parcel as part of its use as a family gathering place.[63] Wisconsin contends these considerations should support aggregation in the event the Supreme Court finds them relevant.

In reply, the Murrs strongly dispute Wisconsin's version of the *Lucas* "reasonable expectations as shaped by state law" standard. While Wisconsin presses the idea that the Ordinance

46 Ark. Game & Fish Comm'n v. United States, 133 S. Ct. 511, 518 (2012).

47 Brief for Petitioner at 27-29, *Murr*, 136 S. Ct. 890.

48 *Lucas*, 505 U.S. at 1016 n.7.

49 Brief for Petitioner at 28-29, *Murr*, 136 S. Ct. 890.

50 Armstrong v. United States, 364 U.S. 40, 49 (1960).

51 Brief for Petitioner at 30, *Murr*, 136 S. Ct. 890.

52 Both the State of Wisconsin and St. Croix County are Respondents in the case, but I focus here on the State of Wisconsin's brief for reasons of clarity, brevity, and avoidance of repetition.

53 Brief for Respondent State of Wisconsin at 27-37, *Murr*, 136 S. Ct. 890.

54 *Id.* at 30 (citing Bd. of Regents v. Roth, 408 U.S. 564, 577 (1972)).

55 *Id.* at 31.

56 *Id.* at 33 (citing Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co., 429 U.S. 363, 378-81 (1977)).

57 *Id.* at 37-38.

58 *Id.*

59 *Id.* at 39-40.

60 *Id.* at 40.

61 The state actually posits an opposing hypothetical, arguing that under the Murrs' theory, enterprising property owners could obtain a windfall from state governments by voluntarily triggering a merger provision and then pressing a regulatory takings claim. *Id.* at 43. While it could be the case that some sophisticated investors might try this, it seems unlikely that average property owners like the Murr siblings would voluntarily invest in a takings lawsuit.

62 *Id.* at 44.

63 *Id.* at 45-47.

purporting to merge the two parcels is part of the relevant law that shapes property owners' expectations, the Murr siblings contend that the state misreads *Lucas*.[64] Instead, the relevant part of state law is "whether and to what degree the State's law has accorded legal recognition and protection to *the particular interest in land* with respect to which the takings claimant alleges a diminution in (or elimination of) value."[65] In *Lucas* itself, the "interest in land" at stake was the fee simple, "an estate with a rich tradition of protection at common law."[66] The Murrs contend that because the same is true here, the state law the Court should refer to is the original boundary lines that created the parcels in 1959 and define the nature of the fee simple estates.[67]

The Murrs also reject any characterization of the Ordinance as a "merger ordinance," precisely because it did not and could not alter those 1959 property lines.[68] To do that, a new certified survey map would have had to be created under the procedure established by Wisconsin law.[69] Because the Ordinance effected no recorded change to the survey map, the Murrs contend that it is merely a zoning measure that prohibits certain land use (in this case the development or sale of the second Murr lot).[70] In support of this, the siblings note that their parents actually owned both parcels between 1982 and 1994 before conveying the cabin parcel to the siblings and retaining the investment parcel.[71] If the lots had actually been merged, the parcels could not have been sold separately at that point.

As a result, the Murrs contend that the use restrictions in the Ordinance cannot define their property interests for the purposes of a takings claim. Instead, the proper place to look for background principles of state property law is "to antecedent understandings outside of the challenged regulations."[72] The Supreme Court confirmed this in *Palazzolo v. Rhode Island*, explicitly rejecting the argument that "by prospective legislation the State can shape and define property rights and reasonable investment-backed expectations, and subsequent owners cannot claim any injury from lost value."[73] The fact that property owners took title with notice of the regulation does not extinguish liability; "future generations, too, have a right to challenge unreasonable limitations on the use and value of land."[74] Under these principles, the Murr siblings say they should have the same right to challenge the limitations at issue that their parents would have had in 1975.

IV. Conclusion and Potential Implications

After years of uncertainty, the Supreme Court will finally throw its hat in the ring and attempt to answer the "relevant parcel" question this fall. As with most cases, *Murr* presents a specific factual situation that may not be all that common. But the Court at least seems likely to offer the lower courts important guidance on when, if ever, aggregation of contiguous, commonly owned parcels for takings purposes is appropriate. This answer will shape how property owners and local governments deal with each other and how those governments choose to apply zoning ordinances when all use of one adjoining parcel would be eliminated.

The Court is likely to address whether the existence of the St. Croix County Ordinance stripped the Murr siblings of any reasonable expectations of developing or selling the investment parcel. Under Wisconsin's argument, the presence of the Ordinance means the siblings never could have had such expectations. But the Murrs counter with the strong tradition of protection afforded to the fee simple estate and the fact that the two parcels have never been merged under the proper state procedures. Which of these the Court accepts will determine the scope of the "background principles" of state property law relevant to the parcel question.

If the Court agrees with the Murrs that the state lot lines that determine the fee simple interests in the two parcels are the relevant background principles, then it must decide whether to establish the presumption that the Murrs seek. The presumption—that separate legal parcels should be treated separately for takings purposes—should follow from *Lucas*' recognition that the fee simple is "an estate with a rich tradition of protection at common law"[75] and *Tahoe-Sierra*'s observation that the parcel as a whole is defined by "the metes and bounds that describe [a property's] geographic dimensions."[76] The Murrs believe they have the right facts to win if such a presumption is applied in this case, with the long separate ownership and differing purposes of the two parcels.

The recent Roberts Court's preference for narrow, fact-specific decisions means that the extent of the eventual holding in this case—whether adopting a presumption in favor of the fee simple interest or not—is uncertain. But it offers property owners a chance to breathe some much-needed life into regulatory takings law by expanding the situations in which courts can apply *Lucas*' categorical rule instead of *Penn Central*'s multi-factor test. A victory for the Murrs would mean that government agencies would have to think twice before applying land-use ordinances in a way that would deny all use of one adjoining parcel. And it would re-establish the primacy of the lot lines as shown on survey maps, providing objective boundaries of property interests. In short, property owners and government agencies will be watching closely when the Supreme Court issues its decision in this case early next year.

64 Reply brief at 5-6, *Murr*, 136 S. Ct. 890.

65 *Id.* at 6 (quoting *Lucas*, 505 U.S. at 1016 n.7).

66 *Lucas*, 505 U.S. at 1016 n.7.

67 Reply brief at 6, *Murr*, 136 S. Ct. 890.

68 *Id.* at 7.

69 *See id.* at 8 (describing the procedure).

70 *Id.* at 8-9.

71 *Id.* at 10.

72 *Id.* at 12.

73 533 U.S. 606, 626 (2001).

74 *Id.* at 626-27.

75 *Lucas*, 505 U.S. at 1016 n.7.

76 *Tahoe-Sierra*, 535 U.S. at 331.