No. 19-1175

In The
# Supreme Court of the United States

JOHN AND MELISSA FRITZ,

*Petitioners,*

v.

WASHOE COUNTY, NEVADA,

*Respondent.*

**On Petition for a Writ of Certiorari to the Nevada Supreme Court**

## BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONERS

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## QUESTION PRESENTED

To constitute a taking under the Fifth and Fourteenth Amendments, must a physical invasion also destroy or substantially impair an owner's economically beneficial uses of property?

## Table of Contents

## Table of Authorities

**Page(s)**

**Cases**

**Rule**



**Other Authorities**

## INTEREST OF AMICUS

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation submits this brief amicus curiae in support of Petitioners John and Melissa Fritz.[1]

Pacific Legal Foundation (PLF) was founded over 45 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF has participated in numerous cases before this Court both as counsel for parties and as amicus curiae. PLF attorneys litigate matters affecting the public interest at all levels of state and federal courts and represent the views of thousands of supporters nationwide who believe in limited government and private property rights. PLF attorneys participated as lead counsel in *Knick v. Twp. of Scott, Pennsylvania*, 139 S. Ct. 2162 (2019); *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017); *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595 (2013); *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001); *Suitum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997); *and Nollan v. California Coastal Commission*, 483 U.S. 825 (1987), and participated as amicus curiae in *Marvin M. Brandt Revocable Tr. v. United States*, 572 U.S. 93 (2014); *Arkansas Game & Fish Comm'n v. United States*, 568 U.S. 23 (2012); *Lingle v. Chevron U.S.A., Inc.*, 544 U.S. 528 (2005), and *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999);

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[1] All parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of Amici Curiae's intention to file this brief. No counsel for any party authored this brief in whole or in part and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to this brief's preparation or submission.

and other cases. Because of its history and experience with regard to issues affecting private property, PLF believes that its perspective will aid this Court in considering Mr. and Mrs. Fritz's petition.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The Fritzes' petition for a writ of certiorari raises an important question concerning the protections provided by the Takings Clause of the Fifth Amendment of the U.S. Constitution. Specifically, it asks whether a property owner who is subjected to an actual physical invasion of property by government-induced flooding must show that the invasion deprived the owner of "all economically beneficial use" before the government will be obligated to pay just compensation for a taking. App. 36.

The answer is no: "when there has been a physical appropriation, 'we do not ask . . . whether it deprives the owner of all economically valuable use' of the item taken." *Horne v. Dep't of Agric.*, 576 U.S. 350, 135 S. Ct. 2419, 2429 (2015) (quoting *Tahoe–Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 323 (2002)). Instead, this Court has consistently held that when the government causes a physical invasion of private property, it has a "categorical duty" to compensate the owner for the full extent of the taking. *Arkansas Game & Fish Comm'n*, 568 U.S. at 31 (quoting *Tahoe–Sierra Pres. Council*, 535 U.S. at 322). This duty arises whenever the government invades private property—it is not contingent upon the degree to which the physical invasion interferes with the owner's ability to use unaffected portions of the property. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419,

435 (1982) (requiring compensation where the government required property owner to install a small cable box on the property).

In the decision below, however, the Nevada Supreme Court held that that a physical invasion of private property will not constitute a compensable taking without a showing that the invasion resulted in "substantial injury," which the court wrongly defined as a deprivation or impairment of all economically beneficial use of the land. App. 5, 36. Based on that conclusion, the Nevada court held that Washoe County was not obligated to compensate the Fritzes for having taken a flowage easement over their property simply because the Fritzes were able to make use of their home while the property was flooded. App. 5. That conclusion is premised on a fundamental misunderstanding of takings law and conflicts with this Court's many precedents holding that government-induced flooding constitutes a substantial injury, *e.g.*, *Pumpelly v. Green Bay Co.*, 80 U.S. 166, 177–78 (1872), and that the Fifth Amendment requires compensation to the extent of the taking—even if the invasion is temporary, intermittent, or results in minimal damages. *Arkansas Game & Fish Comm'n*, 568 U.S. at 31, 38; *Loretto*, 458 U.S. at 435.

Amicus urges this Court to grant the Fritzes' petition to resolve the conflicts created by the Nevada Supreme Court and to reaffirm the principle that the Fifth Amendment obligates the government to pay just compensation for a physical invasion of private property by the government to the full extent of the taking. A rule that relieves the government of this obligation whenever a physical invasion leaves the

property owner with some residual use of the property would turn the Fifth Amendment on its head by effectively authorizing the very type of physical taking that this Court has always held to be compensable.

## REASONS WHY THE PETITION SHOULD BE GRANTED

### I

### THE DECISION BELOW CONFLICTS WITH THIS COURT'S PHYSICAL TAKINGS DECISIONS

This Court has repeatedly held that a physical invasion of private property by the government, even if temporary in duration, will give rise to a compensable taking. *See, e.g., Arkansas Game & Fish Comm'n*, 568 U.S. at 31, 38; *Tahoe–Sierra Pres. Council*, 535 U.S. at 322. Because this rule is categorical, *id.*, there is no need for the court to consider the economic impact on the owner when determining liability. *Horne*, 135 S. Ct. at 2429; *Tahoe–Sierra Pres. Council*, 535 U.S. at 323. Instead, the physical taking rule holds that the government has a "categorical duty" to compensate the owner for the full extent of a physical invasion. *Id.* In the decision below, however, the Nevada Supreme Court adopted a contrary rule of federal takings law that excused the government of its duty to compensate the Fritzes for having taken a flowage easement simply because the government's actions—which subjected only a portion of the property to intermittent flooding—left the owners with some economically viable use of non-flooded portions of the property. App. 5. That conflict alone warrants review. But there is more.

The rule adopted by the Nevada court also warrants review because it undermines the rationale supporting this Court's physical taking rule. This Court has explained that its categorical treatment of physical takings arises from the nature of property: a physical invasion does not just place limits on an owner's interests—it destroys the right to exclude others, which is one of the most essential attributes of ownership. *Kaiser Aetna v. United States*, 444 U.S. 164, 176, 179–80 (1979); *see also Lingle*, 544 U.S. at 539 (A physical invasion will always effect a taking because it eviscerates the owner's right to exclude others from entering upon and using his or her property which is "perhaps the most fundamental of all property interests."); *Loretto*, 458 U.S. at 435 ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights."); *Hendler v. United States*, 952 F.2d 1364, 1374 (Fed. Cir. 1991) ("In the bundle of rights we call property, one of the most valued is the right to sole and exclusive possession—the right to exclude strangers, or for that matter friends, but especially the Government.").

The right to exclude is so central to all of the rights inherent in property, that this Court has concluded that a physical invasion "effectively destroys" all rights therein, including "the rights to possess, use and dispose of it." *Loretto*, 458 U.S. at 435 (quoting *United States v. General Motors Corp.*, 323 U.S. 373, 378 (1945)). Thus, while the extent of interference caused by the invasion remains relevant when measuring the amount of compensation owed, *Loretto*,

458 U.S. at 437–38,[2] the destruction of the right to exclude is, without more, a constitutional injury for which compensation must be paid. *Kaiser Aetna*, 444 U.S. at 180 (finding a taking where government action in question would result in "actual physical invasion" rather than in economic devaluation).

This Court's wartime seizure cases help to illustrate the irrelevance of the economic impact inquiry to physical takings liability. In *General Motors,* this Court held that the government was required to pay short-term rental value for taking a portion of a building that had been leased by an automobile parts company for a period of one year. 323 U.S. at 375. The fact that the owner retained possession and use of the unoccupied portion of the property did not defeat the takings claim. *Id*. Instead, this Court reasoned that, although the owner retained valuable rights in the property, those rights were irreparably harmed by the government's occupation because, once the property was fully restored to the owner, the owner's rights were more limited and circumscribed than they were before the intrusion. *Id.* at 378. The Takings Clause, therefore, required just compensation. *Id.*; *see also Kaiser Aetna*, 444 U.S. at 180 ("[E]ven if the Government physically invades only an easement in property, it must nonetheless pay just compensation."); *Tahoe–Sierra*, 535 U.S. at 322 ("When the government physically takes possession of an interest in property for some public purpose, it has a categorical duty to compensate the former owner,

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[2] *See also*, *e.g.*, *Skip Kirchdorfer, Inc. v. United States,* 6 F.3d 1573, 1582–83 (Fed. Cir. 1993) (duration of a taking is only relevant to the question of how much compensation is due); *Hendler,* 952 F.2d at 1376 (duration of a physical invasion is not relevant to the question whether a taking has occurred).

regardless of whether the interest that is taken constitutes an entire parcel or merely a part thereof."); *Casitas Mun. Water Dist. v. United States*, 543 F.3d 1276, 1292 (Fed. Cir. 2008) (Compensation is required even when the government "only partially impair[s]" ownership and possession of property, "in the physical taking jurisprudence *any* impairment is sufficient.").

Similarly, in *United States v. Pewee Coal Co.,* the federal government "possessed and operated" the property of a coal mining company for five-and-a-half months in order to prevent a nationwide miners' strike in the middle of World War II. 341 U.S. 114, 115 (1951). The Court unanimously agreed that the government's temporary seizure was a taking, with no regard to the fact that the property and all of its use was restored to the owner in full. *Id.* (plurality); *id.* at 119 (Reed, J., concurring); *id.* at 121–22 (Burton, J., dissenting). Reference to the limited nature of the government's interference with the owner's rights was considered only in the context of the amount of compensation due to the plaintiff. *See, e.g., id.* at 117 (plurality). Other wartime seizure cases confirm the principle that even a temporary interference with an owner's rights will constitute a categorical taking. *See Kimball Laundry Co. v. United States,* 338 U.S. 1, 3–4, 7, 16 (1949) (government commandeered laundry plant for less than four years, was required to pay rental value for occupied period of time plus depreciation and value of lost trade routes); *United States v. Petty Motor Co.,* 327 U.S. 372, 374, 380–81 (1946) (government compensated leaseholders for the temporary taking of their leaseholds for a period of over two-and-a-half years); *Int'l Paper Co. v. United States,* 282 U.S. 399, 407–08 (1931) (government order authorizing a third party to draw the whole of a river's

water flow for a period of ten months effected a physical taking of a paper mill's water rights requiring just compensation).

Among the best-known physical invasion cases is *United States v. Causby*, in which this Court concluded that the noise and glare from military overflights effected a physical taking when they caused a farmer's chickens to panic and die. 328 U.S. 256 (1946). In that case, the government was issued a one-year lease with an option for annual renewals to use an airport for military purposes. *Id.* at 258–59. The term of the lease was for a total of five years (1942–1947), or until six months after the end of World War II, whichever was earlier. *Id.* Operation of the airport resulted in the frequent overflight of Causby's home and chicken farm. *Id.* at 259. The noise and glare caused by heavy, four-engine bombers, transports, and squadrons of fighters so interfered with chicken farming that this Court held that the government had physically taken an easement for which just compensation was due. *Id.* at 268. The fact that the government's flyover of Causby's property was of limited duration and did not totally exclude the owner from his property or from making alternative uses did not deter this Court from concluding that a compensable taking had occurred. *Id.*

*Causby* explained that, when evaluating a physical taking claim, "it is the character of the invasion, not the amount of damage resulting from it, so long as the damage is substantial, that determines the question whether it is a taking." *Id.* The "substantial damage" inquiry, however, does not authorize the courts to make a liability determination by balancing the degree of economic injury against the physical

invasion. Instead, it asks the very different question whether a physical invasion is sufficiently intrusive to "warrant a finding that a servitude has been imposed." *Portsmouth Harbor Land & Hotel Co. v. United States*, 260 U.S. 327, 329–30 (1922).

This Court's flooding cases establish that when the government causes water to overflow private property, even if the flooding is only temporary, it appropriates a flowage easement over the land and its actions therefore constitute a taking for which compensation is due. *Pumpelly*, 80 U.S. at 181 ("[W]here real estate is actually invaded by superinduced additions of water, earth, sand, or other material, . . . so as to effectually destroy or impair its usefulness, it is a taking."); *United States v. Virginia Elec. & Power Co.,* 365 U.S. 624, 627 (1961); *see also* Jeremy Paul, *The Hidden Structure of Takings Law,* 64 S. Cal. L. Rev 1393, 1470 (1991) (flooding that infringes on private property is a classic example of government action that is appropriative in nature). This rule applies even where the flooding is temporary, intermittent, and/or abated. *See, e.g.*, *Arkansas Game & Fish*, 568 U.S. at 34; *United States v. Dickinson*, 331 U.S. 745, 750–51 (1947) (flooding for a limited period of years effected a taking); *United States v. Cress*, 243 U.S. 316, 328 (1917) (intermittent flooding resulted in a taking); *United States v. Lynah,* 188 U.S. 445, 470 (1903) (flooding resulted in a taking despite the fact that the floods could be abated and land reclaimed). The physical takings rule, therefore, enforces the foundational principle that the government must compensate a landowner to the extent that it actually invades private property, thereby exercising dominion over the landowner's rights and inflicting irreparable harm thereto.

*Pumpelly*, 80 U.S. at 177–78; *Olson v. United States*, 292 U.S. 246, 255 (1934) (the purpose of the just compensation requirement is to put the claimant "in as good a position pecuniarily as if his property had not been taken").

## II

## THE DECISION BELOW RELIED ON AN INAPPLICABLE FACTOR FROM THE REGULATORY TAKINGS TEST TO DISMISS THE PHYSICAL TAKINGS CLAIM

The reason why the decision below creates so many conflicts with this Court's physical takings precedents is because the Nevada court relied on an inquiry that is only applicable to determine liability in a regulatory taking case. Specifically, in addressing the question whether the flooding resulted in substantial damage to the Fritzes' property, *see Pumpelly*, 80 U.S. at 181; *Cress*, 243 U.S. at 328, the Nevada court held that Washoe County is not required to compensate the Fritzes for taking a flowage easement unless the flooding left them with no economically beneficial use of the non-flooded portion of their property. App. 5. That conclusion constitutes an obvious error that has severe consequences to the Fritzes, who have suffered an uncompensated physical invasion by the government, and all property owners in Nevada. *Horne*, 135 S. Ct. at 2427–28 (reversing a Ninth Circuit decision that had relied on a regulatory takings factor to reject a physical taking claim).

As stated above, the question whether an owner retains any economically beneficial use of his property is not part of the liability determination in a physical takings test. *Loretto*, 458 U.S. at 435. Instead, that

inquiry is part of this Court's multi-factorial regulatory takings test, which asks whether a regulatory restriction on the use of property "goes too far," *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922), by balancing the character of the government action against the owner's expectations and the actual impact to property value and use. *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). Accordingly, this Court has admonished that "[i]t is 'inappropriate to treat cases involving physical takings as controlling precedents for the evaluation of a claim that there has been a "regulatory taking," and vice versa.'" *Tahoe–Sierra Preservation Council*, 535 U.S. at 323; *Brown v. Legal Foundation of Washington*, 538 U.S. 216, 233 (2003) ("Our jurisprudence involving condemnations and physical takings is as old as the Republic and, for the most part, involves the straightforward application of *per se* rules. Our regulatory takings jurisprudence, in contrast, is of more recent vintage and is characterized by 'essentially ad hoc, factual inquiries . . . . '") (quoting *Penn Central*, 438 U.S. at 124); *see also First English Evangelical Lutheran Church of Glendale v. Cty. of Los Angeles, Cal.*, 482 U.S. 304, 329 (1987) (Supreme Court cases "make it clear" that regulatory and physical takings are "very different" in several respects) (Stevens, J., dissenting); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 517 (1987) ("No one, however, would find any need to employ these analytical tools [the *Penn Central* factors] where the government has physically taken an identifiable segment of property.") (Rehnquist, J., dissenting).

The different tests for physical and regulatory takings follow from the "longstanding distinction

between acquisitions of property for public use, on the one hand, and regulations prohibiting private uses on the other." *Tahoe–Sierra Pres. Council*, 535 U.S. at 323. While the government has some leeway to regulate an owner's use of property for the public interest before it "goes too far," this Court has long recognized that physical intrusions by government are, by their very nature, "of an unusually serious character." *Loretto*, 458 U.S. at 423, 426; *see also First English,* 482 U.S. at 329 ("[V]irtually all physical invasions are deemed takings.") (Stevens, J., dissenting). For that reason, the physical invasion by government of an interest in property triggers a categorical duty to compensate to the extent of the taking. *Tahoe–Sierra*, 535 U.S. at 322; *Yee v. City of Escondido*, 503 U.S. 519, 522–23 (1992) (compensation "generally required" for physical occupations, but regulatory takings cases must consider other factors such as purpose and economic impact).

The Nevada court's terse decision offered no explanation why it relied on a regulatory takings analysis to affirm dismissal of the Fritzes' physical taking claim. That is because there is no justification for diluting the physical invasion test. No case outside the decision below has held that residual use will defeat a takings claim where property has in fact been physically invaded by the government. That rationale would overrule *General Motors*, *Causby*, and *Cress*, in which the government invasion disturbed only a portion of the owner's existing use of the property. Instead, each case applied the physical takings rule to find that the government had a duty to compensate the owner for the invasion. Indeed, *Cress* directly refuted such a proposition by holding that the physical

takings rule applies even "[i]f any substantial enjoyment of the land still remains." 243 U.S. at 328.

## III

## THE DECISION BELOW PERMITS THE GOVERNMENT TO TAKE A FLOWAGE EASEMENT, THUS DESTROYING THE OWNER'S RIGHT TO EXCLUDE, WITHOUT PAYING JUST COMPENSATION

This Court's interest in substantial justice militates in favor of review. By adopting a rule that focuses on the economic impact of intermittent flooding, rather than the invasion itself, the Nevada Supreme Court upheld an uncompensated physical appropriation of private property. Even though Washoe County's actions resulted in only three floods to date, the Fritzes' rights are permanently diminished because the government's actions appropriated a flowage easement over their property. The Fritzes have no power to exclude the government from invading their land, and further, have no control over the timing, extent, or nature of the invasion. *See Loretto*, 458 U.S. at 436. This is a severe violation of their property rights for which they are owed compensation. *See id.*; *Pumpelly,* 80 U.S. at 177–78. The Nevada court should not be allowed to adopt a rule that turns the Takings Clause into an "instrument of oppression rather than protection to individual rights." *Pumpelly*, 80 U.S. at 179.

Rather than backslide from the historic protections established by this Court's physical takings decisions, this Court should confirm them. This Court should grant review to correct Nevada's fundamental misunderstanding of the Court's physical takings

jurisprudence, and thus provide relief to the Fritzes and to all other property owners in the state who otherwise may now be subjected to repeated physical invasions without compensation.

## CONCLUSION

For the foregoing reasons, this Court should grant the Fritzes' petition in order to reverse the creation of a rule which belittles the significance of the right to exclude others from property.

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Respectfully submitted,

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