No. 19-223

In The
Supreme Court of the United States

JANICE SMYTH,

Petitioner,

v.

CONSERVATION COMMISSION OF FALMOUTH, ET AL.,

Respondents.

On Petition for Writ of Certiorari to the Court of Appeals for the Commonwealth of Massachusetts

BRIEF OF MOUNTAIN STATES LEGAL FOUNDATION AND CATO INSTITUTE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

Petitioner frames the first of her questions presented as whether the loss of all developmental use of property and a 91.5% decline in its value is a sufficient "economic impact" to support a regulatory takings claim under *Penn Central*.

Amici address the question of whether the loss of all developmental use of property and a 91.5% decline in its value supports a regulatory takings claim, but propose that *Lucas*, rather than *Penn Central*, controls the inquiry.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

IDENTITY AND INTEREST OF AMICI CURIAE[1]

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest legal foundation organized under the laws of the State of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been involved in numerous cases seeking to protect Americans' property rights from unreasonable government interference.

The Cato Institute is a nonpartisan think tank dedicated to individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies promotes the principles of constitutionalism that are the foundation of liberty. To those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

Because the decision below presents an imminent threat to the constitutional principles for which *amici* stand, *amici* respectfully submit this brief in support of petitioner and urge the Court to grant the petition.

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[1] Pursuant to Supreme Court Rule 37.2(a), notice of intent to file this brief was timely received by counsel of record for all parties; all parties have consented to this filing. Further, no counsel for a party authored this brief in whole or in part, and no person or entity, other than *amici*, their members, or their counsel, funded its preparation or submission.

BACKGROUND AND INTRODUCTION

What does it mean for the government to "take" private property for public use? It obviously covers the paradigmatic example of using eminent domain to condemn and seize private land, as well as the permanent physical occupation of property. *See Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419, 426 (1982). These are certainly the types of activities James Madison and the other Framers had in mind while drafting what would become the Takings Clause. Not foreseeing the dramatic expansion of administrative law and local regulations that would occur over the course of the 20th Century, however, they had no conception of what has come to be known as regulatory takings, and so we are left with little direct guidance on how the Constitution applies to regulatory restrictions on property that go beyond the sort of anti-nuisance rules in existence in the late 18th Century. This Court and others have now spent nearly a century trying to tackle the regulatory takings question, coming up with a series of rules for different situations.

Janice Smyth owns an unimproved lot in Falmouth, Massachusetts. The property lies within a coastal subdivision known as Wild Harbour Estates, which contains approximately 174 lots, almost all of which have been developed. The lots adjacent to Mrs. Smyth's contain single-family residences. Mrs. Smyth's lot is zoned for residential use and is similar in size to surrounding developed lots.

Mrs. Smyth's parents purchased the subject lot in 1975 for $49,000 (more than $200,000 in 2019 dollars), intending to one day build a retirement home there. At the time of the purchase, the lot was fully developable for that purpose. The wetlands regulations at issue in this case were not enacted until 1989—nearly fifteen years later.

The Smyth family lot has been taxed by Falmouth as a "prime" building site for nearly forty years, and the Smyth family continued to make up-to-date payments on these premium-level taxes to ensure they could eventually develop the lot. Unfortunately, Mrs. Smyth's parents passed away before they could build their retirement home, and the lot passed to Mrs. Smyth. Soon after, she began to pursue plans to develop the lot with a three-bedroom dwelling, a state-of-the-art "de-nitrifying" septic system, a driveway, and landscaping consisting of native plants, all consistent with surrounding development. Between 2006 and 2012, Mrs. Smyth paid $70,000 to various professionals to prepare plans and applications.

Located in a coastal community, Mrs. Smyth's lot is located near several environmental features that have caused the Town of Falmouth to enact certain development restrictions. A salt marsh lies to the west of the subdivision and the mid-section of Mrs. Smyth's lot contains a non-eroding "coastal bank." This "coastal bank" separates lower areas of the property that are closer to the salt marsh and occasional storm surges from dry upland areas.

Development restrictions have taken the form of the Falmouth Wetlands Protection Bylaw, which limits development on lots deemed to contain, or be

near, environmental resources. Rules implementing the Bylaw created: (1) a 100-foot "no disturbance zone" extending inland from the salt marsh; and (2) a separate 50-foot "no disturbance zone" extending inland from certain coastal banks. The 1998 rules, in place when Mrs. Smyth first acquired an interest in the lot, applied only to "eroding" coastal banks, "not just any coastal bank." They also contained a "flexibility" provision allowing the Commission to waive the no-disturbance zone.

Falmouth revised the wetland regulations in 2008, eliminating the "flexibility" provision and applying the "no disturbance zone" to all coastal banks. These changes meant that no permissible building area existed on Mrs. Smyth's lot except 115 square feet in the northeast corner, an area too small to develop.

In 2012, Mrs. Smyth filed an application with the Commission to construct a single-family residence. Her application included a request for variances from the Town's "no disturbance zones" that would allow her to use her land for a home like those on similar lots. Despite Mrs. Smyth's agreeing to reduce the size of her home, making it about one-half the size of neighboring homes, Falmouth decided that it would strictly apply its "no disturbance zones," and denied her permit application and variance requests. The denial meant the property could not be used for anything except (maybe) a "playground," "park," or neighbor's yard. An appraiser testified that the result was a decline in the lot's value from $700,000 (as a buildable lot) to $60,000—a 91.5% reduction in value.

Mrs. Smyth sued the Commission and Town in state court, alleging in part that the denial of her

permit and variance requests amounted to a regulatory taking under the U.S. Constitution. The trial court denied Falmouth's motion for summary judgment, holding that disputed factual issues about Mrs. Smyth's "investment-backed expectations" and her economic losses as a result of the permit denial could only be determined by a jury. After reviewing the case, the jury found that a taking had occurred and awarded Mrs. Smyth $640,000 in damages—the difference in assessed value of her lot as developable versus not developable. Falmouth moved for judgment notwithstanding the verdict but was denied.

On appeal, the Massachusetts Appeals Court held that the trial court should have granted the Town's motion for judgment notwithstanding the verdict and found that the permit and variance denial did not constitute a taking. Applying *Penn Central*, it held that Falmouth's prohibition on building a home, and the resulting 91.5% decline in Mrs. Smyth's property value was not a sufficient "economic impact" to support a taking. According to the court, since Mrs. Smyth's lot could *possibly* still be used "as a park or a playground" and because it may still be attractive to neighboring landowners to purchase as a "privacy" buffer, the property retained too much value to justify a takings claim. In rejecting Mrs. Smyth's claim of "investment-backed expectations," the court focused on the "lack of any financial investment toward development of the property, whether by the plaintiff or her parents, at any time over more than thirty years, including a substantial period within which it could have been built upon." Finally, the Massachusetts Appeals Court held that the third *Penn Central* factor, the "character of the

governmental action," weighed against a taking because the permit denial was not "like a physical invasion" and derived from reasonable wetlands regulations designed to mitigate perceived harm. The Massachusetts Supreme Judicial Court declined to take up Mrs. Smyth's petition for further review.

This case presents this Court with an important opportunity to clarify and recalibrate its regulatory takings jurisprudence. In particular, the parties have asked for clarification of the rule set forth in *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978).

SUMMARY OF ARGUMENT

While *Penn Central* has been called the "polestar" of American regulatory takings jurisprudence, *see Palazzolo v. Rhode Island*, 533 U.S. 606, 633 (2001) (O'Connor, J., concurring), this Court has issued several decisions subsequent to *Penn Central* that provide more detailed insight on how to apply the Takings Clause in different factual circumstances. Most relevant here, *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), set forth the rule for "total" or "categorical" regulatory takings, as contrasted with *Penn Central*'s rule for "partial" regulatory takings. This case is best understood not as a partial taking, as the court below treated it, but as a total taking under *Lucas*.

Penn Central's ad-hoc balancing approach is inapt here. The fact that the Court is being asked to determine whether the elimination of 91.5% of property value is sufficient to support a takings claim is illustrative. The property is the only remaining undeveloped lot in a residential neighborhood and has

always been taxed and assessed as suitable for development as a residential lot.

Mrs. Smyth inherited the property from her parents, who had planned to build a retirement home. She and her husband planned to build a home of their own, but the Conservation Commission refused to allow any development whatsoever. Not only can Mrs. Smyth not enjoy the home her husband had designed for them to live in, but now the once valuable property's only remaining use to a potential purchaser would be as a buffer for one of the lot's neighbors or as a "playground" (and it is unclear whether the wetlands regulation at issue would even allow that level of "disruption" to the lot's "natural" state).

In cases where regulations have banned any development of a property, a categorical taking has occurred. *See Lucas*, 505 U.S. at 1014. To hold that retaining the bare value of undeveloped (and undevelopable) land is enough to frustrate a takings claim is absurd. Such a rule destroys the concept of a regulatory taking because property will almost always retain at least some marginal value to someone. Such a rule effectively renders *Penn Central* a nullity; its test applies *only* when diminution of value is partial.

ARGUMENT

REASONS FOR GRANTING THE PETITION

I. LOWER COURTS HAVE MISAPPLIED THIS COURT'S REGULATORY TAKINGS JURISPRUDENCE TO DEPRIVE PROPERTY OWNERS OF JUST COMPENSATION

"When the owner of real property has been called upon to sacrifice all economically beneficial uses in the name of the common good, that is to leave his property economically idle, he has suffered a taking." *Lucas*, 505 U.S. at 1019.

The reason this Petition is before the Court today is because the Massachusetts Appeals Court has decided that practically no taking short of physical appropriation or full seizure of title requires just compensation under the Fifth Amendment. The Conservation Commission's arbitrary decision to forbid the construction of a single-family residence on the only undeveloped lot in a single-family residential community destroyed $640,000 of Janice Smyth's property's resale value. But the Commission also stole from Mrs. Smyth the opportunity of designing and building her dream home on the land given to her by her late parents, where she hoped to live and eventually enjoy her retirement. This was made possible because the Massachusetts Appeals Court, like many courts, has badly misconstrued this Court's regulatory takings precedents to effectively nullify the entire doctrine outside the most extreme fringe cases.

Mrs. Smyth's case is unfortunately not an isolated occurrence. Property owners are regularly denied the just compensation due to them under the Constitution because of errors in reasoning similar to those present below, and this Court must take the opportunity presented here to reverse this concerning trend.

Examples of this alarming trend include a case in which Mark Miskowiec was denied any compensation when local regulations prevented him from building a home on his property, with the court holding that the property remained economically viable because Mr. Miskowiec could have used the property for "lake access" or "general open space[] uses." *Miskowiec v. City of Oak Grove*, No. A04-82, 2004 WL 2521209 at *5 (Minn. Ct. App. Nov. 9, 2004). Roberta Gove was also denied any compensation for the injury she suffered when the town of Chatham, Massachusetts passed a bylaw prohibiting the construction of all new residential buildings in the area and denied her a building permit, destroying roughly 93% of the property's assessed value. *Gove v. Zoning Bd. Of Appeals of Chatham*, 831 N.E.2d 865, 869, 872–73 (Mass. 2005). John Barth lost more than 97% of his property's value when the city prohibited him from rebuilding the home that had once stood on the lot. *Barth v. City of Peabody*, No. 15-13794, 2018 WL 1567606 at *2 (D. Mass. Mar. 30, 2018). The list goes on. All these people were grievously harmed by regulations that stopped the productive or enjoyable use of their property, and by courts' applying a flawed interpretation of this Court's precedent without recognizing the absurdity of the results.

In a political climate where governments are increasingly relying on regulatory measures that

usurp effective control over private property while allowing owners to retain at least nominal title, *see* John Mangin, *The New Exclusionary Zoning*, 25 STAN. L. & POL'Y REV. 91, 100 (2014), it is more vital than ever that this Court vigorously enforce the protections provided by the Takings Clause.

II. THIS CASE SHOULD BE ANALYZED AS A TOTAL TAKING UNDER *LUCAS*

This case was decided below on *Penn Central* grounds, and that is the way Mrs. Smyth has understandably chosen to frame her petition here. Accordingly, this Court has been asked only to clarify the *Penn Central* standard. The state courts' decision to analyze the case as a partial taking under *Penn Central*, however, was mistaken. In reality, Mrs. Smyth suffered exactly the sort of total deprivation of her property's economically viable use that this Court determined constitutes a total taking under *Lucas*, and it is under that decision's framework that the present controversy should be analyzed.

A. Total Takings Under *Lucas*.

In *Lucas*, this Court held that a local environmental regulation, similar to the one at issue here, which caused the total loss of any economically viable use of an individual's real property, constituted a categorical taking requiring compensation under the Fifth Amendment. 505 U.S. at 1031–32. Because the regulation at issue operated effectively as a condemnation of the property, the ad-hoc balancing test set forth in *Penn Central* was unnecessary, and the case could be disposed of in much the same way it would have been had the government physically appropriated the entire property.

David H. Lucas purchased two residential lots of beachfront property on one of the barrier islands off the South Carolina coast for $975,000. *Id.* at 1006–08. He intended to build two single-family homes on the lots. *Id.* at 1007. Two years later, the South Carolina legislature passed a land use law "which had the direct effect of barring petitioner from erecting any permanent habitable structures on his two parcels." *Id.* Lucas challenged the law as a regulatory taking for which he received no compensation, and a state trial court agreed, awarding Lucas $1.2 million in just compensation. *Id.* at 1009. The state supreme court reversed, holding that, under the *Penn Central* framework, the state's asserted interests outweighed those of Mr. Lucas. *Lucas v. South Carolina Coastal Council*, 404 S.E. 2d 895, 901–02 (S.C. 1991).

The South Carolina Supreme Court rejected Lucas's argument that, "if a regulation operates to deprive a landowner of 'all economically viable use' of his property, it has worked a 'taking' for which compensation is due, regardless of any other consideration," holding that the government's interest in protecting the environment outweighed Lucas's interest in using his property. *Id.* at 898. The court then likened Lucas's desire to construct a single-family home on his land to a nuisance causing "serious public harm." *Id.* at 900.

This Court reversed, taking the opportunity to declare that when government regulations proscribe all or nearly all development of an unimproved parcel of land, a total, categorical taking has occurred, obviating the need to engage in any of the ad-hoc balancing of interests called for in *Penn Central*. *Lucas*, 505 U.S. at 1015–18. Explaining that

"regulations that leave the owner of land without economically beneficial or productive options for its use—typically, as here, by requiring land to be left substantially in its natural state—carry with them a heightened risk that private property is being pressed into some form of public service under the guise of mitigating serious public harm," this Court refused to play *Penn Central*'s policy-weighing game. *Id.* at 1018. "'[F]or what is the land but the profits thereof[?]'" *Id.* at 1017 (quoting 1 E. COKE, INSTITUTES, ch. 1, § 1 (1st Am. ed. 1812)). The right to exclude may be the most prominent of the bundle of sticks that make up property, but it is far from the only one; that Lucas retained bare title to an unimproved lot didn't change the fact that, under most circumstances, *the entire point* of owning land is to improve it.

Another important point about *Lucas* that often goes unmentioned is that the Court's use of the concept of "value" does not exclusively refer to the sale price (such a view would create a virtually impossible-to-meet standard in regulatory takings cases, as can be seen in the decision below), but "has always been inexorably tied to the ability to improve or develop property." *See* J. David Breemer, *Of Nominal Value: The Impact of Tahoe-Sierra on Lucas and the Fundamental Right to Use Private Property*, 33 ENVTL. L. REP. 10331, 10335 (2003). The *Lucas* Court repeatedly emphasized the importance of landowners' ability to improve their property, *see* 505 U.S. at 1031, 1025 n.12, and understood that "value" is "shorthand for the presence or absence of uses in land, i.e., when value means the value that arises from the ability to build, farm, grow, or harvest timber." Breemer, 33 ENVTL. L. REP. at 10335.

B. Application of *Lucas* to This Case

Lucas dealt with a factual scenario very similar to the one here. Mrs. Smyth has been denied the opportunity to build a home on an undeveloped lot she owns within a coastal residential subdivision by local environmental regulations. Both Mrs. Smyth and Mr. Lucas acquired their properties with the good-faith intention of constructing single-family homes as would have been allowed under rules in place at the time of acquisition, but were later informed that they were forbidden from building on the lots.[2]

The most important point of similarity is that, contrary to what some lower courts have indicated, the taking that the *Lucas* Court held was "total" was Lucas's loss of the right to reasonably enjoy his property. While the Court assumed total loss because that was the unchallenged finding of the lower court in that case and did not inquire further as to whether such a loss actually occurred, it is important to note that the development restriction at issue in *Lucas* was considered a total taking despite the fact that Lucas's property retained not insignificant value even in an undevelopable state. *See* Calvert G. Chipchase, *From Grand Central to the Sierras: What Do We Do With*

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[2] The Falmouth Wetlands Protection Bylaw preventing Mrs. Smyth from developing her property was passed in 1998, prior to Mrs. Smyth inheriting it, but was only amended to arguably encompass Mrs. Smyth's property within its "no disturbance zone" in 2008. When Mrs. Smyth's parents first acquired the property in 1975, no local wetlands regulations were in effect. In any event, the fact that the Wetlands Protection Bylaw pre-dates Mrs. Smyth's acquisition of her property does not negate her reasonable investment-backed expectations. *See Palazzolo*, 533 U.S. at 627.

Investment-Backed Expectations in Partial Regulatory Takings?, 23 VA. ENVTL. L.J. 43, 46 n.17 (2004); *Lucas*, 505 U.S. at 1009, 1038, 1044 (Blackmun, J., dissenting). Justice Blackmun noted that the monetary value of Lucas's property may have exceeded one million dollars, that Lucas retained title, and that Lucas retained the right to exclude others and use the empty lot to "picnic, swim, camp in a tent or live on the property in a moveable trailer." *Lucas*, 505 U.S. at 1044 (Blackmun, J., dissenting).

This is why the Massachusetts Appeals Court's decision doesn't make sense. That court's holding that, because Mrs. Smyth's property retained some marginal value as an empty lot that could be used "as a park or a playground"—but would the bylaw preventing Mrs. Smyth from building her home even allow the construction of playground equipment?—she had not suffered a sufficient economic impact to support a claim for just compensation, cannot be squared with *Lucas*. In *Lucas*, the Court stated that a typical way in which a regulation may "leave the owner of land without economically beneficial or productive options for its use" is "by requiring land to be left substantially in its natural state." *Id.* at 1018. And, against the objections of Justices Blackmun and Stevens, the *Lucas* majority implicitly rejected the argument that the ability to sell the land as open space for some subset of the land's developable value defeated Lucas's takings claim. *See* Breemer, 33 ENVTL. L. REP. at 10332. All real property retains some marginal value regardless of the restrictions placed upon it, and, as implicitly recognized in *Lucas*, the retention of that marginal value should not throw a case into ad-hoc *Penn Central* territory, let alone

frustrate a takings claim altogether. The reasoning applied by the court below would render the total/partial takings distinction a nullity, making a mess of what little coherence the courts have managed to develop around this issue.

The Court needs to establish that a regulation proscribing practically all development of a given property not only constitutes a compensable taking, but constitutes a categorical, total taking under *Lucas* that does not require courts to engage in the sort of ad-hoc balancing inquiry called for in *Penn Central*.

CONCLUSION

For the foregoing reasons, this Court should grant the Petition.

Respectfully submitted,

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