No. 19-_____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Conflicting with *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), the Supreme Court of Nevada concluded that to prevail on a physical takings claim a property owner must show that a flood "effectually destroy[ed] or impair[ed] [the property's] usefulness."

The question presented is:

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?

PARTIES TO THE PROCEEDING

John and Melissa Fritz ("the Fritzes") were the plaintiffs-appellants below.

Washoe County, a political subdivision of the State of Nevada ("the County"), was the defendant-appellee below.

RELATED CASES

1. *Fritz v. Washoe County*, No. CV13-00756, Second Judicial District Court in and for Washoe County, Nevada (Mar. 19, 2015).

2. *Fritz v. Washoe County*, No. 67660, Nevada Supreme Court (Aug. 4, 2016).

3. *Fritz v. Washoe County*, No. CV13-00756, Second Judicial District Court in and for Washoe County, Nevada (Apr. 24, 2018).

4. *Fritz v. Washoe County*, No. 75693, Nevada Supreme Court (May 31, 2019).

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PETITION FOR A WRIT OF CERTIORARI

John and Melissa Fritz respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada.

OPINIONS BELOW

The May 31, 2019 opinion of the Supreme Court of Nevada (App. 1-7) is reported at 441 P.3d 1089.

JURISDICTION

The Supreme Court of Nevada entered judgment on a petition for *en banc* reconsideration on November 22, 2019. App. 41. On December 23, 2019, Justice Kagan granted Petitioners' application for an extension of time until March 23, 2020, to file this petition. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

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

The Due Process Clause of the Fourteenth Amendment provides, "nor shall any state deprive any person

of life, liberty, or property, without due process of law[.]" U.S. Const. amend. XIV.

INTRODUCTION

Physical occupations—as distinctly invasive public uses of private property—are treated by this Court differently than regulatory takings. Although the Court has consistently avoided adopting categorical rules in most takings cases,[1] it has also long-recognized that physical invasions are governed by more bright lines. *See Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("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.") (emphasis added) (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)).

One of the brightest of the bright line rules is that in cases of physical invasion, the loss of use, if any, is not a part of the takings equation, much less the dispositive factor. *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) is perhaps the most famous example. In that case, the Court concluded that even a *de minimis* physical occupation—the installation of a tiny cable television box on the roof of the

[1] *Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules.").

owner's apartment building—was a taking, even though the box in no way interfered with the owner's use of her roof or building (and indeed may actually have enhanced her use by providing cable service).

Here, however, the Nevada Supreme Court adopted a contradictory rule that unnecessarily blurred the well-established distinction between physical and regulatory taking, and takings and torts. It concluded that when private property is intentionally flooded by the government, the physical invasion of water must also be accompanied by "substantial injury" to the owner's economic use of the land. App. 5 ("For a taking by flood water to occur, there must be a physical invasion of flood waters resulting in substantial injury."). The Nevada court defined "substantial injury" very broadly, as destruction or impairment of a properties' usefulness. *Id*. ("For substantial injury to exist, the physical invasion must 'effectually destroy or impair [the property's] then usefulness.'") (quoting *Clark County v. Powers*, 611 P.2d 1072, 1075 n.3 (Nev. 1980)).

In effect, this ruling authorizes the public to use all or a portion of private property as a drainage and storage easement for storm and surface water as long as the owner may use the flooded property at some other time, or some other part of the property for some other purpose besides the County's intermittent flowage easement.

The Nevada Supreme Court's ruling wrongly conflates physical invasion takings with regulatory

takings, and conflicts with this Court's precedents and the decisions of other lower courts. This Court should review the judgment of the Nevada Supreme Court.

STATEMENT OF THE CASE

I. Facts

A. Before Development Of Two Upslope Subdivisions, Storm And Runoff Water Entered Whites Creek Downstream Of The Fritz Property

The Fritzes own property at 14400 Bihler Road in unincorporated Washoe County, on the south side of Reno, Nevada. App. 9. They purchased the property in 2001 and built their home, a garage, and shop. App. 11. Under Nevada law, fee simple ownership recognizes their right to exclude others from their land. *See* Nev. Const., art. 1, § 1 (acquiring, possessing and protecting property are inalienable rights); *S.O.C., Inv. v. Mirage Casino-Hotel*, 23 P.3d 243, 249 (Nev. 2001) (the right to own property is the right to exclude others from entering, using, or possessing it).

The general topography of the area is a west-to-east slope from Mount Rose and the Lake Tahoe basin in the west, to the beginnings of the Great Basin to the east. Whites Creek No. 4—an ephemeral stream that flows after rain and snow runoff ("Whites Creek")—passes through the Fritz property. Before development of two nearby subdivisions, surface and storm water from Mount Rose Highway (State Route 431) and

nearby upslope parcels flowed into Whites Creek downstream from the Fritz property. App. 19.

B. The County Flooded The Fritz Property To Benefit Neighboring Subdivisions

Two subdivisions—Lancer Estates (231 homes) and Monte Rosa (64 homes)—were built upslope of the Fritz property. App. 12. Although construction of Lancer Estates began in the 1980s, development of Monte Rosa was not completed until 2007. App. 13.

During development of Lancer Estates in the mid-1990s, the County told the developers to divert all water above 10 cubic feet per second ("cfs") flowing from Mount Rose Highway, which runs along the southerly edge of Lancer Estates and Monte Rosa, through Lancer Estates and into Whites Creek upstream of the Fritz property. App. 15. The development of these two subdivisions also increased stormwater runoff into Whites Creek as compared to pre-development conditions by virtue of new impervious surfaces such as rooftops, streets, and driveways. App. 16.

Consequently, the increased water from Mount Rose Highway and the stormwater runoff from Lancer Estates and Monte Rosa were diverted into Whites Creek upslope and upstream from the Fritz property. In 1994, the County commissioned a study of the hydrology of the Whites Creek area that identified the Fritz property to be in a "problem area" for flooding. App. 15.

After a severe flood in 2005 during which Whites Creek overflowed onto and flooded their property, the Fritzes became concerned and began to take measures to try and prevent flooding of the buildings and on the property, such as building a boulder berm and grading the property. App. 12 and 35.

II. Proceedings Below

A. The Fritzes Sued For A Federal Taking

The Fritzes brought suit against the County in April 2013 in Nevada state court for the taking of their private property for public use without just compensation in violation of the Takings Clause of the Fifth Amendment to the United States Constitution.[2]

The court concluded that even though the County took numerous actions that modified the natural course of drainage of surface waters of Lancer Estates, Monte Rosa, and Mount Rose Highway, that its actions did not constitute substantial involvement in the development of private lands for which the County could be held liable for a taking and an inverse condemnation claim for compensation. App. 26. The court

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[2] *See* Third Amended Verified Complaint (App. 81). The Fritzes raised their federal takings claims in the Second Judicial District Court in Washoe County, Nevada, pursuant to the exhaustion requirement then in effect under *Williamson County Regional Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), which was overruled by this Court in *Knick v. Township of Scott*, 139 S. Ct. 2162, 2164 (2019).

granted summary judgment in favor of the County. App. 3.

B. The Nevada Supreme Court Held The County Could Be Liable For A Taking

The Nevada Supreme Court reversed. *See Fritz v. Washoe Cty.*, 376 P.3d 794, 796 (Nev. 2016) (App. 3). The court held that the County's approval of subdivision plats and acceptance of dedications—even if those actions occurred prior to the Fritzes' ownership—was "substantial government involvement" supporting takings liability. *Id.* at 797 (App. 3).[3]

The court also set out the elements of a takings claim: "Nevada caselaw has not clearly and comprehensively set forth the elements of inverse condemnation, but we do so now." The court clarified that inverse condemnation requires a property owner to demonstrate: (1) a taking; (2) of real or personal interest in private property; (3) for public use; (4) without just

[3] The court concluded that physical involvement by government is not necessary and held, "when a private party and a government entity act in concert, government responsibility for any resulting damage to other private property may be established by demonstrating that the government entity was substantially involved 'in the development of private lands for public use which unreasonably injure[d] the property of others.'" *Id.* at 796-97 (quoting *Powers*, 611 P.2d at 1077). While "mere planning" alone isn't enough, here although there was no involvement by the County in construction, it did more than mere planning. *Fritz*, 376 P.3d at 798 ("We have not limited the range of actions that constitute substantial involvement to physical engagement in private activities.").

compensation being paid; (5) that is proximately caused by a governmental entity; and (6) that has not instituted formal proceedings. *Id.* at 796. The court remanded the case for application of that standard.

C. On Remand, The Trial Court Found No Taking As A Matter Of Law Because The Flooding Did Not Prohibit The Fritzes From Using Their Land

On remand, the trial court bifurcated the case into liability and damages phases. App. 44. Following a bench trial on liability, the court concluded that even though rain and runoff water flooded the Fritz property, because the County has not taken *all* of their land as a flood channel (the Fritzes could use their land for other purposes), the County could not be liable for a taking as a matter of law. App. 8.

The District Court concluded that the Fritzes proved their property was flooded in 2005 and 2017, and suffered from pooling of water in 2014. App. 36. John Fritz testified he did not know that the diversion of water was causing the flooding on the property until he discovered the "NDOT letter" in 2010. App. 17. The NDOT letter was authored by the Nevada Department of Transportation's District Engineer on June 13, 1996, and revealed that the County directed the developers of Lancer Estates to transfer all water in excess of 10 cfs from Mount Rose Highway into Whites Creek. App. 15. A 1990 letter from the engineering firm that designed Lancer Estates also revealed that the County

and the developers knew that development of the subdivision would increase runoff, which would not be retained on site but would be directly discharged into Whites Creek through the Fritz property. App. 14, 47. The trial court determined that the Lancer Estates storm drainage system was designed to carry out the directive from the County to divert water in excess of 10 cfs from Mount Rose Highway through Lancer Estates and into Whites Creek. App. 16. The court also determined that the County's expert did not dispute that water was, in fact, diverted from Mount Rose Highway as described in the NDOT letter. App. 16.

In analyzing the 2005 flood, the court concluded that water ran through the Fritz property, reached their shop, and resulted in several inches of water, dirt, and alluvial soil in the garage, which damaged the Fritzes' personal property. App. 17. Regarding the 2017 flood, the court found that an historic amount of water and snow melt caused Whites Creek to overflow and flood the Fritz property. App. 18. The court found that the 2017 flood resulted in erosion and channeling on the graded portion of their property away from the structures, which constitutes approximately one-half of their parcel. App. 37.

The court concluded that no taking occurred because the Fritzes had not been denied of the "economically beneficial use [of their property] due to the flooding." App. 36. It held that because the flooding occurred on the part of the property not occupied by the house, shop, and garage, that their property was not destroyed or impaired such that there was substantial

injury. App. 37. The court entered judgment in favor of the County as a matter of law. App. 38.

D. The Nevada Supreme Court Affirmed: No Taking Unless A Physical Occupation Also Results In A "Significant" Loss Of Use

The Nevada Supreme Court affirmed. App. 1-7. The court held that "whether a taking has occurred is a question of law that this court reviews de novo." App. 5. Relying on *Buzz Stew, LLC v. City of N. Las Vegas*, 341 P.3d 646, 650 (Nev. 2015), the court concluded that "[f]or a taking by flood water to occur, there must be a physical invasion of flood waters resulting in substantial injury." App. 5. "For substantial injury to exist, the physical invasion must 'effectually destroy or impair [the property's] usefulness.'" App. 5 (quoting *Powers*, 611 P.3d at 650). Temporary flooding is subject to the same requirement as permanent flooding. App. 5.

The court affirmed the "no taking" judgment because the Fritzes "only" suffered flooding three times. App. 6 ("Since the Fritzes bought the property, it has only flooded three times and none of those times resulted in substantial damage sufficient to destroy or impair the property's usefulness."). The court held the facts could not support a taking because the Fritzes had not shown that they could not continue to make use of their property, and they did not prove they were completely deprived of their property rights:

> Only once did the flooding invade the garage that John used for storage or his personal property, and he has continued to use the building for that same purpose since. The flooding has merely resulted in erosion and channeling in a graded area of the property away from the house, shop, and garage. Further, the Fritzes have been able to lease the property out to various tenants since they have owned the property, generating just over $160,000 in revenue. The Fritzes moved back onto the property in 2015 and continue to reside there today. Thus, the district court was correct in concluding that the flooding did not result in substantial injury to the Fritzes.

App. 6.

The court denied both the Fritzes' motion for rehearing, and their motion for *en banc* reconsideration. App. 40, 41.

REASONS FOR GRANTING THE PETITION

I. Requiring Physical Invasion Claimants To Also Prove Substantial Loss Of Use Is Inconsistent With This Court's Takings Rules

A. Nevada's Substantial Loss-of-Use Requirement Conflicts With *Loretto*'s "Incontestable" Compensation Rule

When private property is pressed into public service, the Fifth and Fourteenth Amendments require a state or local government to provide just

compensation. The overarching purpose of the takings doctrine is to "bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). Here, the Nevada court has given the County a perpetual flowage easement—allowing use of the Fritz property to prevent flooding on Mount Rose Highway, Lancer Estates, and Monte Rosa—for free.

By contrast, this Court has treated physical invasions as a distinct species of public use of private property and has long-recognized that even temporary occupations are governed by a categorical rule, not the *ad hoc* tests applicable to most takings cases. *Compare Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 322 (2002) ("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.") (citing *United States v. Pewee Coal Co.*, 341 U.S. 114, 115 (1951)), *with Arkansas Game and Fish Comm'n v. United States*, 568 U.S. 23, 31 (2012) ("In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules.").

The brightest line of these invariable rules is that an uncompensated physical invasion of private property is *mala in se* and does not require proof of a resultant loss of use of the property invaded, much less a "substantial" interference. Yes, the compensation owed for a relatively minor invasion may be

correspondingly minor, but that is a question of valuation, not of takings liability.

The Nevada Supreme Court, however, set the bar higher, and introduced a contradictory rule that when private property is physically occupied, the invasion must also be accompanied by "substantial injury" to the owner's economic uses of the land. App. 5 ("For a taking by flood water to occur, there must be a physical invasion of flood waters resulting in substantial injury."). The Nevada court defined "substantial injury" as destruction or impairment of a properties' usefulness. *Id*. ("For substantial injury to exist, the physical invasion must 'effectually destroy or impair [the property's] usefulness.' ") (quoting *Powers*, 611 P.2d at 1075 n.3). This ruling authorizes the public to use all or a portion of the Fritz property as a drainage and storage easement for storm and surface water, as long as they may continue to use some other part of the property for some other purpose at some other time.

Nevada's rule conflicts with the best example of this Court's categorical rule that all physical invasions are takings, *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There, the Court was presented with a physical invasion of the most trivial kind: a regulation which mandated that Ms. Loretto and other private property owners allow installation of a television cable "slightly less than one-half inch in diameter and of approximately 30 feet in length," "directional taps," and "two large silver boxes" (about "18" x 12" x 6" " on their apartment buildings. *Id*. at 422, 438

n.16. The Court held that the *de minimis* physical invasion was a taking:

> Teleprompter's cable installation on appellant's building constitutes a taking under the traditional test. The installation involved a direct physical attachment of plates, boxes, wires, bolts, and screws to the building, completely occupying space immediately above and upon the roof and along the building's exterior wall.

Id. at 438 (footnote omitted).

The Court agreed that the installation served the public interest, but held that the question of whether it triggered the Fifth Amendment's requirement for compensation was a separate issue.[4] The Court rejected the dissent's argument that "a taking of about one-eighth of a cubic foot of space is not of constitutional significance." *Id*. at 438 n.16. Instead, the Court held that the magnitude of the invasion is "not critical: whether the installation is a taking does not depend on whether the volume of space it occupies is bigger than a breadbox." *Id*. The Court reaffirmed "[t]he traditional rule" that a physical invasion is a taking without regard to the magnitude or other effects of the invasion. The Court held that even small invasions are "qualitatively more severe than a regulation of the use of

[4] "We conclude that a permanent physical occupation authorized by government is a taking without regard to the public interests that it may serve. Our constitutional history confirms the rule, recent cases do not question it, and the purposes of the Takings Clause compel its retention." *Id*. at 426.

property" because "the owner may have no control over the timing, extent, or nature of the invasion." *Id.* at 436.

Notably absent from the analysis was whether the physical occupation resulted in any actual damage or interfered with Loretto's uses of the five-story building. There was no allegation (or proof) that the installation of the cable equipment resulted in any loss of Loretto's use of the roof or her building, and indeed a good argument could have been made that cable television service to Loretto's tenants actually enhanced her uses and the value of her building. *See id*. at 437 n.15 (noting the dissent's argument that the regulation "likely increases both the building's resale value and its attractiveness on the rental market"). Instead, the Court viewed the invasion itself as the constitutional wrong, and presumed that the equipment installation deprived Loretto of her uses to the extent of the invasion, even though she was free to use the rest of her property without interference:

> Second, the permanent physical occupation of property forever denies the owner any power to control the use of the property; he not only cannot exclude others, but can make no nonpossessory use of the property. Although deprivation of the right to use and obtain a profit from property is not, in every case, independently sufficient to establish a taking, it is clearly relevant. Finally, even though the owner may retain the bare legal right to dispose of the occupied space by transfer or sale, the permanent occupation of that space by a

> stranger will ordinarily empty the right of any value, since the purchaser will also be unable to make any use of the property.

Id. (citing *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979)). *See also YMCA v. United States*, 395 U.S. 85, 92 (1969) ("Ordinarily, of course, government occupation of private property deprives the private owner of his use of the property, and it is this deprivation for which the Constitution requires compensation"); *Pumpelly v. Green Bay & Mississippi Canal Co*., 80 U.S. (13 Wall.) 166, 167 (1871) (erection of a dam across a river by a canal company raised the level of a lake, flooding Pumpelly's property; the Court concluded that where property is invaded by water, the flood effectually destroys or impairs its usefulness, and a taking occurs); *United States v. Cress*, 243 U.S. 316, 328 (1917) (even where a property is only affected by intermittent floodwaters, a taking may still occur). The Nevada court's "loss-of-use" requirement also conflicts with *United States v. Dickinson*, 331 U.S. 745 (1947), in which the Court held a taking had occurred even though the owner was not deprived of all economic uses and had reclaimed most of the land after the initial flood. *Id.* at 751 ("no use to which Dickinson could subsequently put the property by his reclamation efforts changed the fact that the land was taken when it was taken and an obligation to pay for it then arose").

The Court reaffirmed this bright line rule in *Lingle v. Chevron U.S.A. Inc*., 544 U.S. 528 (2005), where it concluded, "physical takings require compensation because of the unique burden they impose: A

permanent physical invasion, *however minimal the economic cost it entails*, eviscerates the owner's right to exclude others from entering and using her property—perhaps the most fundamental of all property interests." *Id*. at 539 (emphasis added) (citing *Dolan v. City of Tigard*, 512 U.S. 374, 384 (1994); *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 831-32 (1987); *Loretto*, 458 U.S. at 433; *Kaiser Aetna v. United States*, 444 U.S. 164, 176 (1979)). *See also Arkansas Game*, 568 U.S. at 39 (listing factors relevant in temporary occupation cases, such as the government's intent, the foreseeability of the invasion, the owner's reasonable investment-backed expectations (such as whether the property had been flooded before) and the length of time the property was occupied). In short, a physical invasion itself triggers an "incontestable" claim for compensation, which the courts have "never den[ied]."[5]

By contrast, the Nevada court's rule devalues the right to exclude as the most essential stick in the property bundle. *Cf. Kirby Forest Indus., Inc. v. United*

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[5] *Loretto*, 458 U.S. at 427 n.5 (citing Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 Harv. L. Rev. 1165, 1184 (1967) ("At one time it was commonly held that, in the absence of explicit expropriation, a compensable 'taking' could occur only through physical encroachment and occupation. The modern significance of physical occupation is that courts, while they sometimes do hold nontrespassory injuries compensable, never deny compensation for a physical takeover. The one incontestable case for compensation (short of formal expropriation) seems to occur when the government deliberately brings it about that its agents, or the public at large, 'regularly' use, or 'permanently' occupy, space or a thing which theretofore was understood to be under private ownership.")).

States, 467 U.S. 1 (1984) (recordation of lis pendens after the filing of an eminent domain lawsuit was not a taking because it did not restrict other uses of the land); *Katzin v. United States*, 908 F.3d 1350, 1362-63 (Fed. Cir. 2018) (government asserting it, and not the plaintiff, owned land was not a physical taking, and did not interfere with the owner's other uses of the land), *cert. denied*, 140 S. Ct. 43 (2019).

Finally, *Loretto* focused on the "relatively few problems of proof" the traditional bright line takings rule entails, and concluded by noting that evidence about the extent of the invasion (in other words, the loss of the owner's use resulting from the invasion) was a matter of the just compensation owed, not whether there had been a taking. *Loretto*, 458 U.S. at 441 ("The issue of the amount of compensation that is due, on which we express no opinion, is a matter for the state courts to consider on remand.") (footnote omitted); *id.* at 437 ("Once the fact of occupation is shown, of course, a court should consider the extent of the occupation as one relevant factor in determining the compensation due.").[6]

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[6] Requiring an owner whose property is flooded by the intermittent drainage of storm waters in a desert environment to also prove that her property has lost "significant" use is an impossible standard. First, in deserts such as Nevada, years may pass without significant rain, but when they do occur they can be extremely destructive, such as the 2017 flood of the Fritz property. *See* App. 18. Second, property subject to intermittent or less-than-total flooding will always have some usefulness when not flooded, or on the parts not underwater. That is why this Court has rejected a distinction between permanent and temporary physical invasion takings. *See Arkansas Game*, 568 U.S. at 38 (government-induced

B. Nevada's Rule Conflates Physical Takings With Regulatory Takings

The Nevada Supreme Court's loss-of-use requirement wrongly conflates physical invasion takings with regulatory takings, and thus also conflicts with this Court's rulings which make a clear analytical distinction between the two.

This Court has repeatedly emphasized the difference between analysis of takings that result from a physical occupation, and those in which the owner alleges a taking by virtue of a restrictive regulation. *See*, *e.g.*, *Lingle*, 544 U.S. at 537 ("The paradigmatic taking requiring just compensation is a direct government appropriation or physical invasion of private property. . . . Beginning with [*Pennsylvania Coal Co. v.*] *Mahon*, [260 U.S. 393 (1922),] however, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster—and that such 'regulatory takings' may be compensable under the Fifth Amendment.") (citations omitted). In the latter cases, the Court focuses on the extent of the loss of use which the regulation imposes on the owner. For example, in cases where a regulation results in a deprivation of "*all* economically beneficial uses" of property, this Court applies a categorical rule of compensation. *See Lucas v. South Carolina Coastal Comm'n*, 505 U.S. 1003, 1019 (1992). In cases where

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flooding, even if temporary in duration, gains no automatic exemption from application of the takings clause). It is also why partial or temporary flowage easements are compensable.

the regulation results in a dramatic (but not total) restriction on use, the Court applies an *ad hoc* multifactor test to measure whether compensation is required. *See Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978). The *Lingle* Court reemphasized the distinction between these regulatory takings and physical *Loretto*-type invasion takings. *See Lingle*, 544 U.S. at 538 ("Our precedents stake out two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of her property—however minor—it must provide just compensation.") (citing *Loretto*, 458 U.S. at 438). The physical invasion rule has never considered the loss of use, if any, resulting from the occupation as a factor, much less the determinative factor as held by the Nevada Supreme Court.

By requiring the Fritzes to prove that flooding destroyed or substantially impaired their property's uses, the Nevada court in effect imported the *Lucas* and *Penn Central* use tests into the separate world of physical occupations.[7] The Nevada rule conflicts with both of these cases, because the use test is applied only in regulatory takings cases. *See Lucas*, 505 U.S. at 1019 (deprivation of all use is a regulatory taking); *Penn Central*, 438 U.S. at 136 ("the New York City law does

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[7] *See* App. 5 ("For a taking by flood water to occur, there must be a physical invasion of flood waters resulting in substantial injury. For substantial injury to exist, the physical invasion must 'effectually destroy or impair [the property's] usefulness.' ") (citations omitted).

not interfere in any way with the present uses of the Terminal").

II. Nevada Added To The Growing Lower Court Blurring Of Tort Liability And Takings

In addition to its inconsistency with this Court's physical takings rule, the Nevada rule also adds to the growing lower court conflation of tort liability and takings. Generally speaking, liability for trespass in tort requires proof of damages. *See*, *e.g.*, *Gerlach Live Stock Co. v. Laxalt*, 284 P. 310, 311 (Nev. 1930) (trespass allows recovery for "all loss actually sustained"); *Lyle v. Waddle*, 188 S.W.2d 770, 773 (Tex. 1945) (to be "actionable," a trespass must cause damage); Restatement (Second) of Torts § 217, comment c (1965) (no liability unless trespass is accompanied by actual damage to property, or deprives the owner of its use for a substantial period of time); Cal. Civ. Jury Inst. 2000 (2017) (to be liable in trespass, the plaintiff must prove she was "actually harmed," and that the defendant's entry "was a substantial factor in causing . . . [the] harm.").

In contrast to Nevada, some courts correctly view physical invasions such as the Fritzes suffered through the takings lens. For example, in *Corsello v. Verizon New York, Inc.*, 967 N.E.2d 1177 (N.Y. 2012), the New York Court of Appeals confirmed the physical takings rule, and held it applicable even where the occupation was supposedly temporary. In that case, the court affirmed the trial court's refusal to dismiss a takings claim for compensation. *Corsello* asserted a *Loretto*

claim after Verizon attached a cellular telephone transmission box to his apartment building. *See id*. at 1179 ("Plaintiffs claim, in substance, that Verizon is using their building as a substitute for a telephone pole, without paying plaintiffs for the privilege."). The trial court agreed this stated a claim for a taking—without any mention of an allegation of a loss of use—and the Court of Appeals agreed. *Id*. at 1181. The court rejected Verizon's argument that the "temporary" nature of the installation (Verizon argued that it offered to remove the cellular equipment) meant the claim was in tort for trespass, not taking:

> Verizon's argument here—that inverse condemnation is normally available only when an entity has chosen to exercise its eminent domain power—in effect invites us to reject the more modern understanding of inverse condemnation, and to return to the time when that term described an option that might be given to a trespasser, either to vacate the property or to condemn it. We reject the invitation. Such a limitation on the rights of property owners would be not only inconsistent with modern authorities, but also unfair. It would invite an entity having the power of eminent domain to occupy property without risking more than damages for a temporary trespass, and to decide at a later date whether to acquire the property or abandon it. We agree with the Appellate Division in Tuffley that a "continuous, permanent trespass" may be converted into a "de facto taking."

Id. *See also Long v. South Dakota*, 904 N.W.2d 502 (S.D. 2017) (government-caused flood was a taking, not a trespass).

This Court's absence from the field, however, has permitted other courts such as Nevada's to have free rein to blur the line between physical invasion takings and torts, untethered from the Fifth Amendment's foundational principles. For example, in *St. Bernard Parish Gov't v. United States*, 887 F.3d 1354 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 796 (2019), the Federal Circuit held that Hurricane Katrina flooding was a tort, not a taking. *Id*. at 1360 ("While the theory that the government failed to maintain or modify a government-constructed project may state a tort claim, it does not state a takings claim."). *See also Letica Land Co., LLC v. Anaconda-Deer Lodge Cty*., 435 P.3d 634 (Mont. 2019) (when government occupied property under its mistaken claim to own it, it was not a physical taking, but a tort; the court applied the same reasoning as the Federal Circuit in *Katzin*, 908 F.3d at 1363, which rejected takings liability for the Government acting like the property's owner, even though it was not); *Williams v. Moulton Niguel Water Dist*., 232 Cal. Rptr. 3d 356 (Cal. App. 2018) (allegation of physical invasion damage to copper pipes by government's addition of chemicals sounded in tort, not takings); *Ada County Highway Dist. v. Brooke View*, 395 P.3d 357 (Idaho 2017) (construction damage caused by the Highway District to property adjacent to—but not part of—a road project for which it took property by eminent domain was not covered in the condemnation case, but

should be addressed as a tort); *In re Willis Ave. Bridge Replacement*, 111 N.Y.S.3d 595 (N.Y. App. Div. 2019) (government-caused flood analyzed as tort, not a taking); *City of Daphne v. Fannon*, ___ So.3d ___, 2019 WL 6649355 (Ala., Dec. 20, 2019) (no takings liability for government-caused flood because it was not reasonably foreseeable). Further percolation in the lower courts will not frame the issue better, and waiting for a future case will only allow the harm which the Fritzes are suffering to fester and be experienced by other property owners. This Court's guidance is needed to clarify the line between torts and takings.

III. This Is A Good Vehicle

Nearly 150 years ago, this Court recognized that government-authorized permanent flooding in the public interest requires compensation because the flooded land has been "absolutely" converted "to the uses of the public" and its value to the owner "entirely." *Pumpelly*, 80 U.S. (13 Wall.) at 178-79 (citing *Gardner v. Vill. of Newburgh*, 2 Johns. Ch. 162 (N.Y. Ch. 1816)). More recently, the Court held that temporary takings are not a "blanket exception" to takings, and there is "no solid grounding in precedent for setting flooding apart from all other government intrusions on property." *Arkansas Game*, 568 U.S. at 36. This case is an effective vehicle to reaffirm these principles, for several reasons.

First, the Fritzes raised their federal takings claim in their complaint, *see* App. 81, and pressed their

federal claims in the courts below. *See* App. 20 (raising their federal claims in the trial court); App. 43, 63 (raising the federal claim in the Nevada Supreme Court in the appeal, and when seeking reconsideration *en banc*). This Court's "traditional rule" permits a grant of certiorari where the question presented has been "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992); *see also* Stephen M. Shapiro *et al*., Supreme Court Practice 464-65 (10th ed. 2014).

Second, the Nevada Supreme Court held as a matter of law that a physical occupation by flooding in which the County was substantially involved could not be a taking absent proof that the flooding also resulted in the substantial loss of use of the plaintiffs' property. App. 5. Although the Nevada court did not expressly base its holding on federal law, it necessarily rejected the Fritzes' federal claims. The court's rejection of the Fritzes' federal constitutional arguments was necessary to the determination of the case, and the Nevada Supreme Court could not have reached its decision without rejecting *Loretto* and the other controlling authorities. Thus, the Nevada court's ruling is not an independent and adequate state ground immune from this Court's review. *See Michigan v. Long*, 463 U.S. 1032, 1041 (1983). And even if the ruling solely established the takings standards under Nevada law, state law cannot go below the Fifth and Fourteenth Amendment takings "floor" established by this Court's precedents by grafting additional requirements onto the physical occupation rule. *See* Maureen Brady,

Property's Ceiling: State Courts and the Expansion of Takings Clause Property, 102 Va. L. Rev. 1167, 1190 (2016).

Third, the Nevada court found that the Fritz property was flooded by the stormwater from upslope developments that was diverted across the Fritz property. There are no unresolved factual disputes to cloud this Court's clarification of the governing law. The Nevada Supreme Court's earlier ruling that the County could be liable for a taking as the result of its substantial involvement in the development of upstream properties cleared the way for a ruling on the discrete question presented here. *See Fritz*, 376 P.3d at 796. Had the Nevada court also applied the correct takings standard to the facts, the result would have been different. The facts showed multiple floods caused by the installation of permanent infrastructure that diverted water across their property. Thus, the only thing standing between a ruling on the merits of the Fritzes' federal takings claim is the Nevada Supreme Court's ruling that it could not succeed as a matter of law because the Fritzes had not shown a substantial loss of use of their property.

CONCLUSION

In *Arkansas Game*, this Court held that "[t]here is thus no solid grounding in precedent for setting flooding apart from all other government intrusions on property." 568 U.S. at 36. The Nevada Supreme Court,

however, did this very thing by imposing additional requirements in physical occupation cases beyond what this Court requires.

The Court should review the judgment of the Nevada Supreme Court and clarify this important issue.

Respectfully submitted,

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