No. 06-658

IN THE
Supreme Court of the United States

MCCARRAN INTERNATIONAL AIRPORT AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA
Petitioners,

v.

STEVE SISOLAK,
Respondent.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Respondent Steve Sisolak purchased ten acres of land within one mile of petitioner McCarran International Airport. Pursuant to petitioners' subsequent decision to designate the airspace immediately above respondent's land a runway approach area and a critical departure zone for the takeoff and landing of commercial aircraft from expanded runways, petitioner Clark County enacted two ordinances severely restricting the allowable heights of buildings on respondent's property. The state supreme court ruled that the ordinances violate the state Constitution by taking private property rights that state law confers on the owner of land in the usable airspace immediately above the land.

The questions presented are:

1. Whether this Court has jurisdiction to review the question whether the county ordinances amount to an unconstitutional taking under the federal Constitution when the state supreme court separately held that the ordinances violate the state Constitution based on the state supreme court's ruling that the state Constitution is more protective of property rights than the federal Constitution and the state court's interpretation of state law conferring on a landowner proprietary rights in the usable airspace immediately above the surface.

2. Whether 49 U.S.C. § 40102(a)(32), by authorizing the Federal Aviation Administration (FAA) to define "navigable airspace," including "airspace needed to ensure safety in the takeoff and landing of aircraft,"and related regulations promulgated by the FAA, preclude a state from conferring as a matter of state law proprietary rights protected by its state constitution in the usable airspace immediately above privately-owned land.

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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BRIEF IN OPPOSITION

JURISDICTION

Jurisdiction is lacking under 28 U.S.C. § 1257(a) to consider petitioners' federal takings claim because the judgment of the Nevada Supreme Court rests on an adequate and independent state law ground.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the laws set forth in the petition, this case involves the meaning of the Nevada Constitution, Art. 1,

§§ 1, 8(6), and Nev. Rev. Stat. §§ 37.010(14), 342.105, 493.030, 493.040, 493.050(1)(a), all of which are reproduced at App., *infra*, at 1a-3a.

STATEMENT

1. During the 1980s, respondent Steve Sisolak purchased three adjacent parcels totaling approximately ten acres of land in the vicinity of petitioner McCarran International Airport, which is operated by petitioner Clark County in the State of Nevada.[1] At the time of purchase, respondent's property was zoned for commercial development as a hotel, casino, or apartment building. Although a county ordinance existing at that time placed respondent's property within the airport's "horizontal zone," respondent would have been allowed under that ordinance to construct buildings on the land at least 170 feet in height. Pet. App. 2a-3a, 10a-11a, 62a-77a; Trial Transcript 227-28 (Friday, Feb. 28, 2003).

During the 1990s, petitioners enacted two new ordinances in order to provide for an expansion and upgrade of existing runways at the airport necessary for increased flights by larger commercial aircraft. In 1990, the first new ordinance, Ordinance No. 1221, placed respondent's property in the "precision instrument runway approach zone," which imposed a 50:1 slope restriction, allowing only one foot of building above the airport's ground level for every 50 feet of distance from the end of the runway. As applied to respondent's property, which is higher in elevation than the airport, this new restriction resulted in a presumptive height limitation of 41 to 51 feet. In 1994, the second new ordinance, Ordinance No. 1599, placed respondent's property in the "departure critical area," which further increased the slope restriction to an 80:1 slope, resulting in presumptive

[1] Petitioners McCarran International Airport and Clark County, Nevada, are referred to jointly simply as "petitioners" for the purpose of this brief.

"height restrictions of 3 to 10 feet above ground level." Pet. App. 3a-4a, 78a-94a, 95a-106a.[2]

2. Respondent filed a complaint in state trial court alleging that the severe height limitations imposed by petitioners' newly-enacted ordinances amounted to an unconstitutional taking of private property under both the federal and Nevada constitutions. Respondent based his claim for just compensation on the central contention that the ordinances permitted a permanent physical invasion of usable airspace immediately above the surface of his land by the regular landing and take-off of commercial aircraft from the airport. Pet. App. 6a; NSC Rec. 1.[3]

Focusing on whether the usable airspace immediately above respondent's land had been selected by petitioners as the "actual appropriated flight pattern pathway for landings and takeoff," the district court initially denied respondent's motion for summary judgment. NSC Rec. 1477-78. The court concluded that there appeared to be genuine issues of fact concerning "whether or not Plaintiff has been injured in fact by a public use." *Id.* The court explained that further inquiry "regarding the nature of the flights over [respondent's] property" was necessary because "it is not clear that the County does not dispute Plaintiff's statement of the facts regarding the actual air traffic appropriation." *Id.*; Pet. App. 7a-8a.

Following respondent's submission of additional uncontradicted evidence establishing the nature and extent of airplane overflights permitted by petitioners' two

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[2] The height restrictions imposed by both ordinances are subject to variances and in March 2001 petitioners granted respondent a variance, denying his request to build to 70 feet, but allowing a development with a building as high as 66 feet. That variance lapsed after a passage of one year in the absence of development by respondent. Pet. App. 6a; see *id.* at 91a-92a, 102a-103a.

[3] "NSC Rec." refers to the record filed with the Nevada Supreme Court.

new ordinances, the trial court granted summary judgment in respondent's favor. Respondent's additional evidence included an official map depicting flight tracks over respondent's property, a deposition by an airport employee admitting that aircraft flew below 500 feet over respondent's land, and petitioners' formal acknowledgment in response to an interrogatory that flights were occurring over respondent's land below 500 feet. Pet. App. 7a-8a. Respondent's evidence before the court also included a video showing the takeoff and landing of aircraft over his land, which respondent asserted amounted to 100 planes per day below 500 feet; even petitioners' counsel admitted during trial that "[o]ne of these nice large airplanes, whether it be a 737 or larger that is landing, can appear like it is going to drop on your head and still be three or 400 feet above the ground." *Id.*; NSC Rec. 1586.

The jury awarded respondent $6.5 million in just compensation for the taking of an easement through the usable airspace immediately above respondent's land, and the trial court added prejudgment interest, costs, and attorney's fees. The jury based its award on the jury instruction that it should determine just compensation by comparing the difference between the value of the property before and after the new, more severe height restrictions imposed by Ordinances 1221 and 1599. The evidence before the jury established that the "property's best use in the 'before condition' would be a hotel or timeshare with a height of approximately 110-180 feet," based on petitioners' concession that respondent could have obtained a variance to build to at least 170 feet; and the judge expressly instructed the jury, in determining the "after" value, to assume that petitioners would grant respondent a variance to construct as high as 66 feet. Pet. App. 10a-11a; NSC Rec. 3992-93 (jury instructions); Trial Transcript 227-28 (Friday, Feb. 28, 2003).

As a result, the jury award of just compensation was

based on the value of a navigation easement in the airspace as necessary for the takeoff and landing of aircraft traveling between 66 feet and 110-180 feet above respondent's land, or approximately 104 feet of airspace. Because respondent did not dispute that he would likely be able to obtain a variance from petitioners allowing a building as tall as 66 feet, respondent neither sought nor obtained a just compensation award based on the presumptive height restrictions applicable to his land, which allow no building greater than 3 to 10 feet above ground. Pet. App. 10a-11a.

3. The Nevada Supreme Court affirmed. Pet. App. 1a-37a.[4] The state court relied on state law in both assessing the extent of private property rights landowners in Nevada have in the usable airspace immediately above their land as well as the degree of constitutional protections that Nevadans enjoy under the Nevada Constitution from governmental interference with those property rights. *Id.*

Relying on several provisions of Nevada statutory law, including Nev. Rev. Stat. §§ 37.010(14), 493.030, 493.040, and 404.050(1)(a), the Court concluded "that Nevadans hold a property right in the useable airspace above their property up to 500 feet." Pet. App. 15a. The state court rejected petitioners' contention that federal law precluded state law recognition of any property rights in the immediate airspace above the surface of the land. Citing to *Griggs* v. *Allegheny County*, 369 U.S. 84, 88-89 (1962) and Federal Aviation Administration regulations, the state court noted that although federal regulations allow airplanes to "fly below 500 feet when necessary for takeoff

[4] While the case was on appeal, respondent sold the property to a third party. See Pet. App. 51a n.17. Based on the terms of that sale, which is consistent with Nevada law (see *Argier* v. *Nevada*, 114 Nev. 137, 952 P.2d 1390 (1998)), respondent retained the right to the proceeds of this lawsuit and the buyer purchased the land and airspace up to 66 feet.

and landing, this right does not divest the property owner of his protected property right to his usable airspace." Pet. App. 13a-14a. The court likewise rejected petitioners' contention that an avigation easement conveyed by respondent's predecessor in interest to petitioners, which applies to approximately half of respondent's property, precluded any claim that he could make to a property right in the usable airspace immediately above his property. *Id.* at 16a-17a. Construing the language of that easement, the court held that "it cannot be read to unconditionally transfer the airspace rights above Sisolak's property to the County." *Id.* at 16a.

The court next concluded that petitioners' ordinances amounted to an unconstitutional taking of respondent's property rights in the usable airspace immediately above his property because they "authorize the permanent physical invasion of his airspace." Pet. App. 23a. The court reasoned that the "ordinances exclude the owners from using their property and instead, allow aircraft to exclusively use the airspace as a critical departure area within an airport approach zone." *Id.* The court explained that respondent had presented "sufficient proof of a permanent physical invasion of his airspace" by introducing "evidence that airplanes fly lower than 500 feet above his property." *Id.; see id.* at 7a.

The court rejected petitioners' claim that the ordinances could not be characterized as permitting a permanent physical invasion because they do not themselves "direct the flight of aircraft in any way" and "the airplanes flying over [respondent's] property are not constantly occupying the airspace in a temporal sense." Pet. App. 25a-26a. The court explained that the "Ordinances grant airplanes permanent permission to traverse Sisolak's airspace" and the resulting invasion is "permanent because the right to fly through the airspace is preserved by the Ordinances and expected to continue into the future." *Id.* at 26a.

The court also discussed whether, as a matter of federal constitutional law, the constitutionality of the Ordinances was best analyzed under this Court's decision in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) or *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet. App. 23a-27a. While the majority asserted that *Loretto* was the proper analysis and the dissent contended it should be *Penn Central* (a contention the majority described as "not unreasonable"), the majority ultimately decided "given the difficulty in applying the federal takings jurisprudence" it would "take this opportunity to clarify what constitutes a regulatory per se taking under our State Constitution." Pet. App. 28a.

Addressing the distinct state constitutional issue, the state supreme court stressed at the outset both the settled notion "that a state may place stricter standards on its exercise of the takings power through its state constitution" and that there "is no corollary provision in the United States Constitution" to the very "first right established in the Nevada Constitution's declaration of rights" for "the protection of a landowner's inalienable rights to acquire, possess and protect private property." Pet. App. 28a, *citing* Nev. Const. art. I, § 1. Looking also to the text of Article 1, Section 8(6)'s provision in the Nevada Constitution that private property shall not be taken for public use "without just compensation having first been made, or secured," and the court's own precedent, the state court explained that the "Nevada Constitution contemplates expansive property rights in the context of takings claims through eminent domain." *Id.* at 28a.

The state supreme court then squarely held that "under the Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use * * * appropriates or permanently invades private property for public use without first paying just compensation." Pet. App. 29a. Applying that state constitutional standard to petitioners' ordinances

challenged in this case, the court held that because the ordinances "established a permanent physical invasion of the airspace above Sisolak's property, thereby appropriating the airspace for the County's use," their adoption "effectuated a per se taking of his property under the Nevada Constitution." *Id.* at 30a.

Finally, the state supreme court upheld the district court's award of attorney's fees and pre-judgment interest. Pet. App. 33a-36a. The court based its affirmance of the attorney's fee award on its construction of the meaning of a state statute, Nev. Rev. Stat. § 342.105(1), which imposes requirements on any state agency "which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655 * * * and which undertakes any project that results in the acquisition of real property * * *." Pet. App. 34a-35a. The state court reasoned that because petitioners received federal money for the airport and were therefore "subject" to the federal statute and respondent "is a property owner who was successful in his inverse condemnation action" he was entitled to attorney's fees under the Nevada law *Id.* at 35a-36a

ARGUMENT

The petition should be denied for precisely the same reason that the Court dismissed the writ as improvidently granted more than forty years ago in *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U.S. 487 (1965). Although the petition neglects to cite *Jankovich*, the case is on all fours with the instant matter, with the only exception being that it is even clearer in this case than it was in *Jankovich* that certiorari is unwarranted.

Petitioners seek review of two legal issues. Pet. i. First, they ask (Pet. 22-26) this Court to review the question whether a federal constitutional takings challenge to local ordinances restricting the heights of buildings on private

property in the immediate vicinity of an airport for the purpose of allowing commercial aircraft to fly regularly below 500 feet during takeoff and landing should be determined based on this Court's rulings in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), *United States* v. *Causby*, 328 U.S. 256 (1946) or *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978).[5] Second, they ask (Pet. 11-14) this Court to consider their legal argument that Congress, by authorizing the Federal Aviation Administration (FAA) to define "navigable airspace" in 49 U.S.C. § 40102(a)(32), including the airspace necessary for taking off and landing, preempted the States from creating in landowners private property rights as a matter of state law in that usable airspace immediately above their land.

The first proffered legal issue is jurisdictionally barred for the same reason that this Court dismissed the writ as improvidently granted in *Jankovich*. Here, as in *Jankovich*, the state supreme court rested its judgment that an unconstitutional taking of private property had occurred on an adequate and independent state ground: the Nevada Constitution. The Nevada court did so expressly and deliberately, and only after specifically directing the parties to submit post-argument briefs on the independent application of the Nevada Constitution to respondent's takings claim.

While no similar threshold jurisdictional bar applies to petitioners' second issue, review is not warranted for an even more basic reason. There is simply no merit to the argument. And, here again, *Jankovich* controls. Seeking to

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[5] The petition alternatively poses the federal taking issue in terms of this Court's decisions in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994), but that alternative phrasing suffers from the same jurisdictional obstacle as the *Loretto* vs. *Penn Central* issue that is the petition's primary focus: the state court's independent reliance on state law is adequate to support its judgment. See pages 10-19 & n.6, *infra*.

persuade the Court in *Jankovich* to retain jurisdiction, the petitioner in that case made the exact same argument advanced by petitioners here: a contention that federal law precluded state recognition of proprietary interests protected by a state constitution in the usable airspace immediately above private land. The *Jankovich* Court rejected the argument, concluding that "there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation." 379 U.S. at 494, *quoting* Memorandum of U.S. as Amicus Curiae, 2 n.2. Federal law is the same today as it was when *Jankovich* was decided, no court has held to the contrary, and the petition, accordingly, should be denied.

I. This Court Lacks Jurisdiction to Consider Petitioners' Proffered Federal Constitutional Taking Issue Because the State Court Rested Its Judgment on Adequate and Independent State Law Grounds

1. It is well settled that "[t]his Court will not review a question of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991); see *Lee* v. *Kemna*, 534 U.S. 362, 375 (2002); *Lambrix* v. *Singletary*, 520 U.S.518, 522 (1997); *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 210 (1935) *Klinger* v. *Missouri*, 13 Wall. (80 U.S.) 257, 263 (1872). While it is sometimes uncertain whether a state court in fact rested its judgment on adequate and independent state grounds, *Michigan* v. *Long,* 463 U.S. 1032 (1983), "[i]f the state court decision indicates clearly and expressly that it is alternatively based on bona fide separate, adequate, and independent grounds, [this Court], of course, will not undertake to review the decision." *Id.* at 1041.

Here, the Nevada Supreme Court did just that, clearly

and expressly bottoming its ruling in state law in two distinct respects. The court first looked to state law in determining what property rights respondent had in the first instance in the usable airspace immediately above his land. And, second, the court then ultimately chose to rely on state, not federal, constitutional law, in concluding that petitioners' ordinances amounted to an unconstitutional taking of respondent's property rights.

As described above (page 5, *supra*), the state court looked to provisions of Nevada statutory law in concluding that Nevadans, such as respondent, "hold a property right in the useable airspace above their property up to 500 feet" and that such property rights of the surface owner extend to interference by planes flying below 500 feet with the owner's "current or *future use* of the property." Pet. App. 15a. (emphasis added). The court accordingly, rejected, as a matter of state law, petitioners' contention that a landowner's property rights extended only to existing uses of his land.

The court similarly relied on state law in rejecting petitioners' reliance on an avigation easement conveyed by respondent's predecessor in interest to petitioners. Relying on the language of the easement as set forth in a Nevada law (see Pet. App. 5a n.6, *quoting* Clark County, Nev. Code § 30.08.030 (2005)) and the state court's own precedent for construing the scope of governmental easements (see Pet. App. 16a, *quoting S.O.C., Inc.* v. *The Mirage Casino-Hotel*, 117 Nev. 403, 409, 23 P.3d 243, 247 (2001)), the state court held that "[t]he easement in this case does not contain any height restriction terms but is simply an overflight easement exacted by the County to preclude liability for aircraft noise." Pet. App. 16a. "[I]t cannot be read to unconditionally transfer the airspace rights above Sisolak's property to the County." *Id.* The court, therefore, treated the meaning of the easement's language as a matter of state law. There was no federal law dimension to that ruling capable of raising a distinct

federal law issue.[6]

No less clear are the independence and adequacy of the state supreme court's ultimate reliance on state constitutional law for its ruling that petitioners' ordinances amount to an unconstitutional taking of private property. To be sure, the court did discuss whether, as a matter of federal constitutional law, the constitutionality of the Ordinances would best be analyzed under this Court's decision in *Loretto* or *Penn Central.* Pet. App. 23a-27a. But, while the majority concluded that *Loretto* provided the more appropriate analytical framework, the majority ultimately decided that the very "difficulty in applying the federal takings jurisprudence" was the reason why it should "take this opportunity to clarify what constitutes a regulatory per se taking under our State Constitution." Pet. App. 28a.[7] Only after concluding that "under the

[6] For this reason, petitioners err in positing (Pet. i, 26-28) that this case presents an opportunity for this Court to consider the validity of the Nevada Supreme Court's discussion of the nexus and proportionality requirements for zoning exactions applied in *Nollan* v. *California Coastal Comm'n*, 483 U.S. 825 (1987) and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). The state court never even mentioned *Dolan* and, in light of the state court's threshold ruling interpreting the avigation easement previously conveyed to petitioners as pertaining only to noise as a matter of state law, the court's subsequent discussion of *Nollan* was at most dictum that had no bearing on the judgment in the case. Pet. App. 16a. Notably, the court's distinction between avigation easements that merely address noise and avigation "clearance" easements that address height limitations on the construction of buildings is a longstanding distinction in aviation law (see, *e.g.*, Melillo v. City of New Haven, 249 Conn. 138, 144 n.11, 732 A.2d 133, 139 n.11 (1999)), and is similarly reflected in federal regulations and acquisition policies See, *e.g.*, 32 C.F.R. §§ 644.23(a)(2)(v) (Air Force); 32 C.F.R. §§ 644.103, 644.114 (Army). No doubt for this reason, even in dissent, Justice Maupin noted below his "vigorous agreement with the majority's conclusion that the perpetual avigation easement conveyed to the County by Mr. Sisolak's predecessor did not abrogate his property interest in the airspace over the subject parcels." Pet. App. 52a n.21.

[7] The majority even expressly acknowledged that the dissent's view that *Penn Central* provided the better framework was "not

Nevada Constitution, a per se regulatory taking occurs when a public agency seeking to acquire property for a public use * * * appropriates or permanently invades private property for public use without first paying just compensation" (Pet. App. 29a), did the state court hold that petitioners' ordinances "established a permanent physical invasion of the airspace above Sisolak's property, thereby appropriating the airspace for the County's use" and therefore "their adoption effectuated a per se taking of his property under the Nevada Constitution." *Id.* at 30a.

2. Nor was there anything remotely incidental or ambiguous about the state supreme court's reliance on state statutory and constitutional law. Respondent raised the separate state constitutional law issue throughout the litigation, beginning with the complaint. NSC Rec. 1, 2 (Complaint ¶ 3). And, although the trial court did not distinguish between the state and federal constitutional claims, the Nevada Supreme Court plainly did, both carefully and deliberately.

Following oral argument, the state supreme court specifically directed the parties to address whether the state constitution could provide an independent and adequate state law ground for its judgment. The court ordered the parties, wholly apart from whether there was a taking under federal constitutional law, to address separately the question "whether there was a taking in this case under *** the Nevada Constitution." Order Directing Supplemental Briefs, 1-2 (Nev. Sup. Ct. June 7, 2005). The order even added that "[s]hould counsel argue the Nevada Constitution applies independently from the holdings of *Loretto* or *Lucas*, counsel shall suggest the state law rule and the basis for it." *Id.* at 2 (footnote omitted). Both parties, accordingly, filed briefs addressing the distinct state constitutional law issues,[8] which is also why the

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unreasonable." Pet. App. 28a.

[8] While petitioners chose to address the issue only in two short

majority later took sharp issue with a dissenting justice's suggestion "that the parties did not litigate whether there was a taking under our State Constitution." Pet. App. 28a n.80.

3. In light of the Nevada Supreme Court's clear and unambiguous reliance on Nevada statutory and constitutional law, this Court should deny the petition for the same reason that it dismissed the writ as improvidently granted in *Jankovich* v. *Indiana Toll Road Comm'n,* 379 U.S. 487 (1965), more than forty years ago. At issue in *Jankovich* was the constitutionality of a municipal airport zoning ordinance that imposed on undeveloped property a restriction on the height of buildings to allow for the landing and takeoff of aircraft based on a 40:1 slope restriction (as compared to the much more limiting 80:1 slope restriction applicable to respondent's property). *Id.* at 488. The Indiana Supreme Court ruled that the restriction on future building violated the Indiana Constitution and the Due Process Clause of the Fourteenth Amendment. *Id.* at 489-90. Like the Nevada Supreme Court below, the Indiana court concluded that the airport zoning ordinance was not just a mere regulation of building height but an effort by a municipality '"to take and appropriate to its own use the ordinarily usable airspace of property adjacent to the Gary Airport.'" *Id.* at 493 (emphasis omitted), *quoting* 244 Ind. 574, 582, 193 N.E. 2d 237, 241 (1963). In dismissing the writ, this Court noted both that the Indiana Supreme Court, like the Nevada Supreme Court below, found the source of property rights in state law, and that the Indiana court, again like the Nevada Supreme Court below, relied on state constitutional law. *Id.* at 491-93.

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paragraphs (see Appellants' Supplemental Brief, 13-14 (filed June 16, 2005), respondent submitted 17 pages of analysis, demonstrating the independent force of the Nevada Constitution based on its distinct language as well as excerpts from the 1863 debates surrounding its adoption. See Respondent Steve Sisolak's Supplemental Brief (filed June 28, 2005).

Indeed, the only meaningful distinction between this case and *Jankovich* is that in the latter, unlike in this case, the state supreme court was far less clear that its ruling was separately based on state constitutional law. *Id.* The Indiana Supreme Court "did not analyze separately the effect of the two provisions but considered them together" (*id.* at 490), requiring this Court to parse carefully the state court's reasoning in deciding whether the state court intended to present the state constitutional issue as a separate ground for its ruling. Here, by contrast, there is no similar ambiguity, making this an even far stronger case than *Jankovich* for concluding that the Court lacks jurisdiction to consider the federal constitutional issue.

II. Neither the Nevada Supreme Court's Allowance of an Attorney's Fee Award Nor Its Rejection of Petitioners' Federal Preemption Claim Resurrects this Court's Jurisdiction to Consider the Federal Taking Issue

Not only does the petition fail to cite even once to *Jankovich*, but it addresses the state law jurisdictional defect only in its final few paragraphs. See Pet. 29-30. Petitioners suggest two different ways to circumvent the jurisdictional barrier: (1) a claim that the state supreme court, notwithstanding its clear intent to the contrary, unwittingly rested a fraction of its judgment on federal constitutional takings law by providing for an attorney's fee award; and (2) a claim that a federal takings issue is presented because the state court rejected petitioners' claim that federal aviation law precluded state law recognition of private property rights in the usable airspace immediately above respondent's property. Both of petitioners' proposed jurisdictional end-runs fail.

1. Notably, in seeking to base jurisdiction on an attorney's fee award, the petition never questions that the Nevada Supreme Court intended to rest its takings judgment on an independent and adequate state ground.

The gravamen of petitioners' argument is instead that the state court failed to do so because it neglected to appreciate that one incidental aspect of its judgment – the attorney's fee award – must be deemed to rest on federal constitutional grounds because it includes "fees and costs awarded under the federal Uniform [Relocation Assistance and Real Property Acquisition Policies] Act." See Pet. 30. Petitioners, therefore, seek to use the attorney's fee portion of the judgment to create jurisdiction over the takings portion of the judgment, notwithstanding the state court's clear intent to rest its ruling and judgment on its reading of the state constitution.

In no event should such a jurisdictional bootstrap be deemed sufficient, but petitioners' reasoning is in all events flawed. Petitioners' mistake lies in their incorrectly assuming that the attorney's fee award was based on a ruling that the ordinances violated the federal constitution rather than the state constitution.

Missing from the petition is any reference to the Nevada *state law* statutory provision upon which the attorney's fee award was in fact based. The state court did not base the attorney's fee award in the first instance simply on federal law. The attorney's fee award was instead based on state law, specifically, Nev. Rev. Stat. § 342.105, which provides that any agency of the state "which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto, and which undertakes any project that results in the acquisition of real property" shall provide displaced persons with specified assistance. In particular, the state must "provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements." *Id.* Both the Nevada Supreme Court and the trial court applied this

provision of Nevada statutory law in concluding that an attorney's fee award was appropriate. See Pet. App. 34a-35a; NSC Rec. 4851-52. Both those courts, moreover, rejected petitioners' arguments that the state law did not apply in this case either because respondent was not a "displaced person" or because there were insufficient federal monies to trigger the state law's requirements. *Id.*

Now, for the first time, petitioners present an argument never once raised below when petitioners contested the applicability of Nev. Rev. Stat. § 342.105 on other grounds. They now argue that the Nevada fee-shifting provision applies only if the state court concludes that the taking occurred as a matter of federal constitutional law and has no applicability if the state court concludes that the taking occurred as a matter of state constitutional law and therefore the judgment must be deemed to rest on a holding of a violation of federal constitutional law. Whether petitioners are correct on the merits itself presents, however, a state law issue: the meaning of the Nevada statutory phrases "which undertakes any project that results in the acquisition of real property" and "provide relocation assistance and make relocation payments." Petitioners' argument is a state law argument: that the Nevada legislature must have intended to trigger the payment requirements of the Uniform Relocation Act only if the "acquisition of real property" was mandated by the federal takings clause rather than by Nevada's own Constitution.

The short answer to petitioners' argument is that the Nevada Supreme Court otherwise made quite clear that it sought to rest its judgment in this case independently on state constitutional law and petitioners never raised before that court the state law claim of statutory construction that it now raises before this Court, which is that Nevada statutory law does not allow for the attorney's fee to be based on an "acquisition of real property" mandated by

state constitutional law.[9] Petitioners did not raise this issue when directly asked by the state court to brief the Nevada constitutional issue, including its ability to apply "independently" of federal law. Nor did they raise the issue in any subsequent rehearing petition filed with the state supreme court after the issuance of its judgment. Whatever the reason for petitioners' failure to raise this state law argument until its petition before this Court, there is plainly no jurisdiction in this Court now to address it.

2. Petitioners' second suggested basis for finding jurisdiction to consider the federal taking issue is no more persuasive. The petition alternatively argues that the Court can reach the federal question whether the challenged Ordinances should be analyzed under *Loretto* or *Penn Central* because the Nevada Supreme Court rejected, as a threshold matter, petitioners' claim that federal law preempted any state law recognition of property rights in the usable airspace immediately above privately owned land. According to petitioners (Pet. 29), this presents "an error of federal, not state law."[10]

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[9] The opposing argument, completely consistent with the state statute's language, is that once the receipt of federal monies renders a state agency "subject" to the federal Relocation Act, the state law does not further require that the "acquisition of real property" be compelled by the federal takings clause rather than, as here, by the Nevada Constitution.

[10] Petitioners also appear to suggest (Pet. 29), albeit cryptically, that the state court affirmatively relied on federal law for the *creation* of a property right by "rel[ying] on FAA regulations to determine the scope of [respondent's] ownership right." That is certainly not true. The lower court considered the meaning of federal regulations only to the extent necessary to reject petitioners' preemption claim that federal law "divest[ed] the property owner of his protected right to his usable airspace" (Pet. App. 13a-14a). The court did not purport to find the source of that property right in federal law any more than this Court did in *Causby*, cited by the court below. In *Causby*, as here, the Court ruled that federal law did not *preclude* state law recognition of property rights, not that federal law *created* that property right in the first instance. The Nevada Supreme Court's opinion makes clear that

Petitioners are mistaken. While petitioners are right that the question whether federal law preempts state property law does present a distinct question of federal law, they are wrong in their contention that such a threshold question of federal law would provide a basis for the Court's addressing the separate federal takings question whether the Ordinances should be analyzed under *Loretto* or *Penn Central.* Whether this Court should grant review to consider petitioners' proffered federal preemption issue depends on whether that distinct issue, standing alone, warrants review. For the reasons set forth below, however, it most certainly does not.

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the court looked to state statutory law and state constitutional law as the affirmative source of a landowner's property rights and simply rejected petitioners' preemption of state property law defense. See Pet. App. 14a-15a, citing Nev. Rev. Stat §§ 37.010(14), 493.030, 493.040, 493.050(1)(a). The state court's holding in this respect is entirely consistent with the way the case was argued before that court. Petitioners argued that "[t]he federal navigation servitude imposed on airspace nationwide * * * precluded [respondent's] takings claim as a matter of law." Appellants' Opening Br. 14; see *id.* at 14-16. Respondent never suggested that federal law instead created a property right, but instead correctly argued below that "[t]he usable airspace above land is a recognized component of property ownership in Nevada" (Appellee's Answering Br. 15; see *id.* at 15-17) and refuted petitioners' contention that federal law precluded such state property law by demonstrating that "[t]he right of airplanes to utilize public airspace does not destroy the right of landowners to compensation when their super-adjacent airspace is used regularly as a government designated airport runway approach right of way." *Id.* at 17; see *id.* at 17-20.

III. Review is Not Warranted of Petitioners' Contention that Federal Law Preempts the Nevada Supreme Court's Recognition as a Matter of State Law of Respondent's Property Rights in the Usable Airspace Immediately Above His Land and Their Protection by the Nevada Constitution

The second legal issue that petitioners contend warrants this Court's review is their claim that federal law preempts state law recognition of property rights in the usable airspace immediately above privately-owned land, including respondent's ten-acre parcel. They argue (Pet. 2, 16) that this is a "critically important question that this Court has never addressed" and that the airspace immediately above respondent's land is "is by definition within the navigable airspace and consequently the public domain, because it is situated in an area that is essential to ensure the safe takeoff and landing of aircraft." Petitioners' primary authorities in support of their contention are 49 U.S.C. § 40102(a)(32), which authorizes the FAA to define the "navigable airspace," including "airspace needed to ensure safety in the takeoff and landing of aircraft," and 14 C.F.R. § 91.119, in which the FAA created an exception to the regularly-applicable lower boundary for aircraft when lower altitudes are "necessary for landing and takeoff." See Pet. 13.

1. Unlike the federal taking issue, this federal preemption claim is not jurisdictionally barred. It simply lacks any possible merit, which is why one can find no support for petitioners' claim in any decision of any court, in the language of the relevant federal aviation statute, or in any assertion of legal authority made by the FAA, which is the federal agency charged by Congress for implementing that statute.

Petitioners are even wrong in their threshold assertion that this Court has never addressed the issue. Left

unmentioned by the petition is that the petitioner in *Jankovich* raised the precise same legal issue more than forty years ago in an identical effort to circumvent the jurisdictional bar presented by the Indiana Supreme Court's resting its ruling of unconstitutionality on state constitutional law. The *Jankovich* petitioner, just like the petitioners in this case, argued that the presence of this threshold question of federal law, meant that the state supreme court's reliance on state constitutional law could not be considered an "adequate" basis to support its judgment of a state constitutional taking.

Indeed, the *Jankovich* petitioner made essentially the same argument advanced by petitioners in this case more than four decades later. Jankovich argued that state supreme court reliance on state constitutional law could not possibly provide an adequate and independent state law ground precluding Supreme Court review because such a ruling would, in effect, be preempted because "[t]he federal scheme which the Federal Airport Act embodies is based on the necessity of recourse to airport zoning as a governmental means of regulating land use adjacent to airports for the purpose of maintaining unobstructed aerial approaches. The total nullification of airport zoning worked by the decision below is wholly incompatible with the federal scheme." Brief for Petitioner, 53-54, in *Jankovich* v. *Indiana Toll Road Comm'n*.

The Solicitor General, in turn, filed an amicus brief in *Jankovich* that took direct issue with the *Jankovich* petitioner's argument concerning the preemptive effect of federal aviation law on state law recognition of property rights in the usable airspace immediately above privately-owned land and the related adequacy of the state court judgment. See Memorandum for the United States as Amicus Curiae, 2 n.2, *in Jankovich* v. *Indiana Toll Road Comm'n*. The Solicitor General advised this Court that "[t]here is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning

power or defeats any State law right to compensation." *Id.*

In subsequently dismissing the writ as improvidently granted, the Court embraced the position of the U.S. by quoting its brief *verbatim* in concluding that "'there is no basis for a contention that federal law removes State law restrictions on the exercise of the zoning power or defeats any State law right to compensation'" *Id.* at 494, *quoting* U.S. Amicus Memorandum, 2 n.2.[11] Describing the preemption claim as "insubstantial," the Court held "that the decision of the Supreme Court of Indiana in this case is compatible with the congressional policy embodied in the Federal Airport Act." *Id.* at 494-95 & n.2

2. Nothing that has happened since *Jankovich* suggests a different result now. The relevant federal statutory language and FAA regulations are no different today than they were then. *Compare* 49 U.S.C. § 40102(a)(32) (2006) *and* 14 C.F.R. § 91.119 (2006) *with* 72 Stat. 739, 49 U.S.C. § 1301(24) (*quoted in Griggs*, 369 U.S. at 88) *and* 14 C.F.R. § 60.17 (1965) (*quoted in Griggs*, 369 U.S. at 88n.1). Federal law in no manner limits the authority of states to recognize property rights in the usable airspace immediately above privately owned land and then to

[11] This Court's ruling in this respect accords entirely with its earlier decision in *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). In *Griggs*, the Court rejected the extreme notion that the meaning of the federal statutory definition of navigable airspace is that landowners cannot have private property rights in airspace below 500 feet that airplanes need for takeoff and landing: "But as we said in the *Causby* case, the use of land presupposes the use of some airspace above it. Otherwise no home could be built, no tree planted, no fence constructed, no chimney erected * * *." *Id.* at 88-89. Further acknowledging that "[w]ithout the 'approach areas,' an airport is indeed not operable," the Court reasoned that an airport operator must therefore "acquire some private property" and that the airport in *Griggs* "by constitutional standards * * * did not acquire enough." *Id.* at 90. The *Griggs* Court, accordingly, flatly rejected any notion of federal preemption of state property law by making clear that any taking resulting from airport operation is a taking by "the local authority" and not by the "federal government." *Id.* at 89.

protect those rights through their own state constitutions.

For instance, the Airport and Airway Improvement Act of 1982, Pub L. 97-248, 96 Stat. 324, 671 (1982), makes the removal of hazards to the takeoff and landing of aircraft a condition of federal funding of airports, but then expressly provides that zoning laws should be used to achieve that end only "to the extent reasonable" and that federal funds can be properly expended for "the acquisition of land or interests therein or easements through or other interests in airspace." Sections 511(a)(4), (a)(5), 513(a)(2), 96 Stat. 687-88, 689. FAA regulations are, not surprisingly, to similar effect. A firm condition of the receipt of federal aid to airports for new airports, existing airports, new runways, and improvements of existing runways is that "the sponsor must own, acquire, or agree to acquire an adequate property interest in runway clear zones." 14 C.F.R. §§ 151.11(a)-(d). FAA regulations further provide that, to demonstrate an adequate runway clear zone, "an airport operator or owner is considered to have an adequate property interest if it has an easement * * * giving it enough control to rid the clear zone of all obstructions * * * and to prevent the construction of future obstructions * * * * " (*Id.* § 151.9(c)). Finally, while FAA regulations do expressly acknowledge the possibility that a local government may choose to try to utilize land use regulation instead of easement acquisition to guard against land uses that create aviation hazards, the agency also expressly acknowledges that such regulations may not be an adequate substitute for navigation easement acquisition because height limitations could be considered "unreasonable in view of current and future foreseeable use of the property" and therefore not "a reasonable exercise of the police power." 14 C.F.R. § 151.11(f). The FAA treats the question as exclusively one of state law and, accordingly, seeks assurances from the airport operator or owner in the form of a "legal opinion" regarding the reasonableness of such height restrictions.

Id.[12]

3. For this reason, it is not surprising that the decision of the Nevada Supreme Court that federal law does not preclude state law recognition of property rights in the usable airspace immediately above privately owned land does not conflict with any decision of this Court or indeed of any other court, let alone any federal circuit courts or other state supreme courts. In none of the cases cited by petitioners (Pet. 20-21) was the issue even raised whether a state could recognize some property interests below 500 feet in the airspace immediately above land.

For instance, petitioners' support for their claim (Pet. 21) that the decision below conflicts with decisions of the Federal Circuit relies on two cases: *Air Pegasus of D.C., Inc.* v. *U.S.*, 424 F.3d 1206 (2005) and *Palm Beach Isles Associates* v. *U.S.*, 208 F.3d 1374 (2000), *overruled on other grounds*, *Bass Enters. Prod. Co.* v. *U.S.*, 381 F.3d 1360 (2004). Neither remotely supports petitioners' claim.

In *Air Pegasus,* the court rejected a claim by an operator

[12] An official FAA guidance document, Advisory Circular 150/5190-4A "A Model Zoning Ordinance to Limit Heights of Objects Around Airports" (12/14/87), reproduced in the record below (NSC Rec . 4718) and cited by petitioners (Pet. 6), makes even clearer the FAA's position that federal law does not preempt state property law in this respect: "Any height limitations imposed by a zoning ordinance must be 'reasonable,' meaning that the height limitations prescribed should not be so low at any point as to constitute a taking of property without compensation under *local law*" (¶ 5d). NSC Rec. 4721 (emphasis added). All other FAA guidance is in accord. See, *e.g.*, FAA Discussion Paper on Zoning for Airports (9/8/87) (reproduced at NSC Rec. 4738) ("As zoning law is individual to each state the state statutes must be referred to, to determine the extent of zoning authority"); FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, I-2 (2005) ("While the FAA can provide assistance and funding to encourage compatible land development around airports, it has no regulatory authority for controlling land uses to protect airport capacity."); *id.* at VII-6 ("Traditional zoning techniques will not suffice in all cases to control land use around airports" and the related need for "[t]aking into account specific state statute limits").

of a commercial helicopter business that he had a property right to continue to use the navigable airspace. But, in reaching that result, the court stressed that it was "not consider[ing] the extent to which Air Pegasus, as a lessee of the South Capitol Street property, has the right to use non-navigable airspace immediately above its leasehold." 424 F.3d at 1217. And the court quoted this Court's decision in *Causby* regarding that "'it is obvious that if the landowner is to have full enjoyment of the land, he must have exclusive control of the immediate reaches of the enveloping atmosphere. Otherwise buildings could not be erected * * *.'" *Id., quoting Causby*, 328 U.S. at 264. The Federal Circuit's decision in *Palm Beach Isles*, however, is even further afield. The taking issue in that case did not even involve airspace at all, but only the federal government's longstanding navigation servitude in navigable *waters* of the United States. 381 F.3d at 1384.

The other cases cited by petitioners are equally unsupportive. They at most stand for the proposition that state courts have held that circumstances exist when height limitations do not constitute a taking as a matter of federal constitutional law. Those rulings, however, are wholly inapposite to the distinct question whether federal law preempts states from deciding *as a matter of state law* to recognize property rights in the usable airspace immediately above privately-owned land and to protect those rights as a matter of state constitutional law. In none of those cases did the court dispute that state law could provide *more* protection of private property rights. Nor did any of those courts ever intimate that federal aviation law precluded state law from doing so. See, *e.g.*, *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 239 (Tex. 2002) ("we assume, without deciding, that the federal and state constitutions provide the same protections from overflight effects"). In no event, therefore, can these decisions support petitioners' claim that there exists a conflict in the lower courts necessitating this Court's review of petitioners' federal preemption

issue.

IV. Petitioners Mischaracterize the Nevada Supreme Court's Ruling and Exaggerate Its Importance

Petitioners argue that review is warranted because the "staggering potential liability" created by the state court's decision "will have significant and deleterious ripple effects that threaten the safety and efficiency of the national air transportation system." Pet. 12, 14. At least as depicted by the petition, the "devastating impact on the airport and the region at large" of "liabilities in the billions of dollars," would seem likely to render the City of Las Vegas into a virtual ghost town. Pet. 3, 14, 16.

The Court, however, need not worry. The decision of the Nevada Supreme Court has not placed either the nation's air transportation system or the City of Las Vegas at risk. The state court's ruling is far more limited than petitioners suggest and the court squarely rejected petitioners' specter of massive liability.

1. While "*per se*" in name, the state court's application of its state constitutional law takings test is noticeably limited in its actual reach. The judgment affirmed by the court compensated respondent for a taking of airspace only above 66 feet, even though Ordinance 1599 imposed a presumptive height limitation of 3 to 10 feet. The court assumed that respondent would be able to obtain a variance to build up to 66 feet because petitioners had granted such a variance in the past (see page 3 n.2, *supra*). The court also made clear that "[l]ike most property rights, the use of the airspace and subadjacent land may be the subject of valid zoning and related regulations which do not give rise to a takings claim." Pet. App. 15a n.25. The court carefully explained that the height restrictions at issue here ran afoul of the state constitution because they were more than "use restrictions"; their central purpose

was to allow for the "permanent physical invasion of the airspace" immediately above respondent's land by commercial aircraft, "thereby appropriating the airspace for the County's use." *Id.* at 30a.[13]

Noticeably absent from the petition is any citation to the record in support of petitioners' unilateral assertion (Pet. 14) that the decision below will "conservatively" result in billions of dollars in liability to them. Even more important, the state court rejected those claims. The court found that the impact of its ruling on petitioners would be limited both because they could trade public property for private property needed for airport operations and because "[o]nly a limited number of property owners are affected by the most onerous restrictions in Ordinances 1221 and 1599, while the remaining property is already owned by McCarran Airport or the University of Nevada, Las Vegas." Pet. App. 30a n.88.[14]

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[13] The petition also ignores the obvious extent of the significant interference with the airspace immediately above respondent's land indisputably contemplated by petitioners' ordinances. Petitioners did not designate respondent's property a "runway approach area" and "critical departure zone" and impose correspondingly severe height limitations for no reason. Petitioners' intent is to improve and expand the existing runways in order to allow increased commercial air traffic, including the takeoff and landing of aircraft immediately over respondent's land at what petitioners acknowledge is already the nation's "fifth largest airport" (Pet. 5). According to petitioner McCarran Airport's own website, the number of landings at the airport has been dramatically increasing. Landings increased 20 percent between 1996 and 2001, and 35 percent between 1996 and 2005. See http://cms.mccarran.com/dsweb/Get/Document-27400/1996-2001%20Landings%20by%20Airlines.pdf. As of October 2006, landings had increased by an additional 3 percent since just last year. See http://cms.mccarran.com/dsweb/Get/Document-1510/Total%20Landings%20by%20Airline%20July%20-%20December%202006.pdf.

[14] Petitioners' dire claims of looming financial disaster also lie in sharp contrast to their recent Comprehensive Financial Report for the Airport for 2005, which in the aftermath of their district court loss in this case describes the inevitable uncertainty in then-pending inverse condemnation litigation, predicts the possibility of "multi-million dollar" settlements, and reassuringly provides that "it is the opinion

2. The nation's air transport system will also clearly survive the Nevada Supreme Court's opinion. Nevada is hardly the first state to have a court conclude that height limitations imposed in order to allow for aircraft takeoff and landing can amount to a taking of private property requiring the payment of just compensation. Others courts have reached similar conclusions in the past without calamitous results to air transportation in the succeeding decades. See, *e.g.*, *McShane* v. *Faribault*, 292 N.W.2d 253 (Minn. 1980); *Hageman* v. *Board of Trustees*, 20 Ohio App. 2d 12, 251 N.E. 2d 507 (Ohio Ct. App. 1969); *Roark* v. *City of Caldwell*, 87 Idaho 557, 394 P. 2d 641 (1964).

Indeed, here again, more than forty years ago the petitioner in *Jankovich* offered the same doomsday scenario in the aftermath of the Indiana Supreme Court's decision that petitioners now advance in the wake of the decision of the Nevada Supreme Court below. The *Jankovich* petitioner predicted that "the inevitable consequence" of the Indiana Supreme Court's decision would be the imposition of liability that would be "financially prohibitive," "price[] airports out of existence in Indiana," and "thus cripple[]" the national transportation system. See Brief for Petitioner 55, *in Jankovich* v. *Indiana Toll Road Comm'n*. The *Jankovich* petitioner's prophecy, however, was not realized. The nation's air transportation system and the State of Indiana are doing well. There is no plausible basis for supposing that petitioners' exaggerated rhetoric has any more credibility today than did the *Jankovich* petitioner 's in 1965.

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of Counsel that resolution of these matters will not have a material adverse effect on the future financial condition of the Airport." See Clark County Dept. of Aviation, Comprehensive Annual Financial Report, 51 (2005) (reproduced at http://cms.mccarran.com /dsweb /Get/Document-101847/Comprehensicve%20Annual%20Financial %20Report%20June%2030,%202005.pdf).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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APPENDIX

NEVADA CONSTITUTION

Nevada Constitution, Art. 1

Section. 1. Inalienable rights. All men are by Nature free and equal and have certain inalienable rights among which are those of enjoying and defending life and liberty; Acquiring, Possessing and Protecting property and pursuing and obtaining safety and happiness

Section 8. Rights of accused in criminal prosecutions; jeopardy; rights of victims of crime; due process of law; eminent domain.

* * * * *

6. Private property shall not be taken for public use without just compensation having been first made, or secured, except in cases of war, riot, fire, or great public peril, in which case compensation shall be afterward made

NEVADA STATUTES

Nev. Rev. Stat. § 37.010. Public Purposes for which right of eminent domain may be exercised.

* * * * *

(14) Aviation. Airports, facilities for air navigation and aerial rights-of-way.

Nev. Rev. Stat. § 342.105. Compliance with federal law required; adoption of regulations by Director of Department of Transportation.

1. Any department, agency, instrumentality or political subdivision of this State, or any other public or private entity, which is subject to the provisions of the federal Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970, 42 U.S.C. §§ 4601-4655, and the regulations adopted pursuant thereto, and which undertakes any project that results in the acquisition of real property or in a person being displaced from his home, business or farm, shall provide relocation assistance and make relocation payments to each displaced person and perform such other acts and follow such procedures and practices as are necessary to comply with those federal requirements.

2. The Director of The Department of Transportation shall review the federal act and all amendments and regulations adopted pursuant thereto and adopt such regulations as he finds are necessary to enable the State of Nevada to comply with those federal requirements.

Nev. Rev. Stat. § 493.030. Sovereignty in space.

Sovereignty in the space above the lands and waters of this state is declared to rest in the state, except where granted to and assumed by the United States pursuant to a constitutional grant from the people of the state.

Nev. Rev. Stat. § 493.040. Ownership of space.

The ownership of the space above the lands and waters of this state is declared to be vested in the several owners of the surface beneath, subject to the right of flight described in Nev. Rev. Stat. § 493.050.

Nev. Rev. Stat. § 493.050. Lawfulness of flight and landing; liability for forced landing.

1. Flight in aircraft over the lands and waters of this state is lawful:

(a) Unless at such a low altitude as to interfere with the then existing use to which the land or water, or the space over the land or water, is put by the owner.

(b) Unless so conducted as to be imminently dangerous to persons or property lawfully on the land or water beneath.

2. The landing of an aircraft on the lands or waters of another, without his consent, is unlawful, except in the case of a forced landing. For damages caused by a forced landing, the owner, lessee or operator of the aircraft is liable as provided in Nev. Rev. Stat. § 493.060.