No. 06-

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In light of federal law, which confers on the federal government "exclusive sovereignty" in the airspace of the United States, grants all citizens a public right of transit through "the navigable airspace," and defines the "navigable airspace" to include any airspace less than 500 feet above ground level that is needed to ensure safe takeoffs and landings of aircraft, the questions presented are:

1. Whether federal law precludes recognition under state law of private ownership of federally defined "navigable airspace" that is less than 500 feet above a landowner's property and that the landowner never used before it became part of the navigable airspace.

2. Whether zoning ordinances that merely restrict the use of property near a major airport, by limiting the height of structures in the navigable airspace, effect a *per se* regulatory taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982), particularly where (a) the ordinances authorize variances for structures that the FAA concludes do not pose hazards to aviation, and (b) half of respondent's property was subject to a pre-existing perpetual avigation easement for the passage of aircraft that has never been found to violate the nexus and proportionality requirements of *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), and *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994).

PARTIES TO THE PROCEEDING

All parties to the proceeding are identified in the caption.

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PETITION FOR WRIT OF CERTIORARI

Petitioners McCarran International Airport and Clark County respectfully seek a writ of certiorari to the Supreme Court of Nevada.

OPINIONS BELOW

The opinion of the Nevada Supreme Court is reported at 137 P.3d 1110 (Nev. 2006) (Pet. App. 1a-52a). The judgment of the Eighth Judicial District Court of the State of Nevada is unreported (Pet. App. 53a-56a).

JURISDICTION

The judgment of the Nevada Supreme Court was entered on July 13, 2006. On October 4, 2006, Justice Kennedy granted petitioners' timely application and extended the time for filing the petition to November 9, 2006. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment provides in part: "[N]or shall private property be taken for public use, without just compensation." The Fourteenth Amendment provides in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." Section 40103(a)(2) of Title 49 of the United States Code provides in part: "[a] citizen of the United States has a public right of transit through the navigable airspace" of the United States, and section 40102(a)(32) provides that "navigable airspace" "include[es] airspace needed to ensure safety in takeoff and landing of aircraft." These and other relevant laws are reproduced in full in Pet. App. 57a-107a.

STATEMENT OF THE CASE

The extraordinary decision of the Nevada Supreme Court in this case imperils the scheme of cooperative federalism that serves as the central cornerstone of the national aviation system. Decades ago, Congress placed all of the navigable airspace of the United States within the public domain, granted all citizens a right of transit through that airspace, and authorized the Federal Aviation Administration (FAA) to issue regulations that include airspace less than 500 feet above ground level within the navigable airspace when necessary to ensure safe takeoffs and landings. The FAA has, in turn, relied on local governments and local zoning laws to prevent hazards in this navigable airspace.

In this case, the Nevada Supreme Court held that, under state law, the owner of land near the nation's fifth busiest airport owns all of the airspace up to 500 feet above his undeveloped lots of desert scrub, even though much of this airspace is indisputably needed for safe takeoffs and landings and is thus part of the "navigable airspace" through which the public has a right of transit. This holding incorrectly resolved a critically important question that this Court has never addressed—*i.e.*, whether federal law bars recognition of state law-based ownership of navigable airspace that the owner of the underlying land has never previously used.

The Nevada court then continued its assault on the federal/state regulatory scheme by ruling that ordinances designed to prevent aviation hazards effect a "permanent physical occupation" of respondent's "privately-owned" portion of the navigable airspace. The court concluded that the ordinances were not subject to a regulatory takings analysis under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978), but instead gave rise to a *per se* taking under *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). The Nevada court reached this conclusion despite the facts that (1) the ordinances simply

regulate the use of land by setting height restrictions that, if exceeded, trigger an analysis by the FAA to determine whether a proposed structure would pose a hazard, (2) the ordinances permit variances when the FAA finds that a proposed structure poses no hazard to aviation, and (3) the County had previously approved two development proposals for the lots respondent owned. In a final *coup de grace*, the court held that the County's avigation easements over portions of respondent's property provided no defense to this *per se* taking claim because it viewed easements granted in exchange for development permits as uncompensated takings, without regard to whether they satisfy the nexus and proportionality tests this Court has established for assessing such exactions.

The Nevada court's erroneous decision conflicts with federal law governing the navigable airspace as well as the takings decisions of this and numerous other courts. If left undisturbed, moreover, this mistaken decision will significantly harm the national aviation system. A half dozen similar lawsuits are already pending, and petitioners conservatively estimate that, under the Nevada court's reasoning, they face potential *per se* takings liabilities in the *billions* of dollars. Any response they adopt to avoid or minimize this massive liability will have untoward ripple effects throughout the complex and interdependent air traffic system, increasing air travel costs to and from Las Vegas and adversely affecting air traffic not only at McCarran, but at other airports around the country. Moreover, the Nevada ruling could nullify benefits to air transportation that the federal government has funded at McCarran through improvement projects worth hundreds of millions of dollars. These grants were made in reliance upon Clark County's assurance that it would enact reasonable zoning laws to protect the nation's interest in safe air travel. Not only may the FAA be reluctant to continue its important airport improvement program where its investment is undercut by the

imposition of massive liability for compliance with the grant assurance, but such massive and unfair liabilities will chill cooperation by other local governments that cannot afford the costs of litigation or the risk that other courts will adopt Nevada's approach. Without such cooperation among FAA, airport operators, and local zoning authorities, the future of safe, efficient and unobstructed approach routes to the nation's airports is endangered. The petition should be granted, and the decision below reversed.

A. Federal Regulation Of Navigable Airspace.

Federal law has long established that "[t]he United States Government has exclusive sovereignty of airspace of the United States." 49 U.S.C. § 40103(a)(1) and historical notes. Further, Americans have a "public right of transit through the navigable airspace." *Id.* § 40103(a)(2). Navigable airspace is defined as "airspace above the minimum altitudes of flight prescribed by regulations . . . , including airspace needed to ensure safety in the taking off and landing of aircraft." *Id.* § 40102(a)(32) (previously codified as § 40102(a)(30)).

Congress has authorized the FAA to regulate the use and scope of navigable airspace. 49 U.S.C. § 40103(b). Pursuant to that delegation, the FAA has established that navigable airspace in uncongested areas begins at an altitude of 500 feet above ground level. 14 C.F.R. § 91.119. However, as mandated by federal statute, navigable airspace begins at lower levels "when necessary for takeoff or landing." *Id.*

Before starting any construction near an airport, a project sponsor must give the FAA notice, whereupon the agency determines whether the construction will pose a hazard to navigable airspace. 49 U.S.C. § 44718; 14 C.F.R. §§ 77.1, 77.11. An object is deemed an obstruction if it exceeds certain absolute height thresholds, or if it would encroach on a defined set of imaginary surfaces that emanate from an airport and its runways. 14 C.F.R. §§ 77.23, 77.25. The FAA may conduct an aeronautical study, including nonadversarial

factfinding hearings, to determine if the penetrating structure is a hazard to aviation. *Id.* §§ 77.35, 77.43. The FAA can and often does find that proposed structures are not hazards.

Furthermore, recipients of federal aviation-related grants are required by statute to enter into binding grant assurances in which they commit to ensure that airspace is cleared of present and future hazards. 49 U.S.C. § 47107(a)(9); 14 C.F.R. § 77.3(a). Airport grant recipients must also commit to adopt "zoning laws . . . to the extent reasonable to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations." 49 U.S.C. § 47107(a)(10). They must also certify that they will comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act ("Uniform Act"), which provides for attorney's fees in successful takings claims under the Tucker Act, 28 U.S.C. § 1491, or the Little Tucker Act, 28 U.S.C. § 1346(a)(2). See 42 U.S.C. §§ 4654(c), 4655(a)(2).

In the past 10 years, the FAA issued over $155 million in grants for new runways and related improvements at McCarran in reliance upon such assurances. Virtually every public commercial airport in the country receives such grants and is bound by such assurances.[1] Thus, although the federal government has sovereignty over all navigable airspace, including space below 500 feet where necessary for takeoffs and landings, federal regulation of such airspace relies in substantial part on the efforts of state and local authorities to protect aircraft and persons and property on the ground.

B. Role Of State And Local Authorities In Protecting Navigable Airspace.

Since 1928, local jurisdictions have enacted ordinances and zoning regulations to restrict the height of structures in order to promote air safety. 2 Kenneth H. Young, *Anderson's*

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[1] *See* FAA, Grant Histories (June 12, 2006), *available at* http://www.faa.gov/airports_airtraffic/airports/aip/grant_histories/.

American Law of Zoning § 12.38 (4th ed. 1996). More than half of the States, including Nevada, have authorized their political subdivisions to issue regulations in order to protect airspace near airports. *Id.*; see Nev. Rev. Stat. § 497.040.

To facilitate enactment of suitable local zoning laws and compliance with the grant assurance that reasonable steps be taken to obviate obstacles to navigable airspace, FAA issued *A Model Zoning Ordinance to Limit Height of Objects Around Airports*. FAA, Advisory Circular 150/5190-4A (Dec. 14, 1987). In establishing height restrictions near an airport, the model ordinance employs imaginary surfaces akin to those set forth in the FAA regulation defining navigable airspace hazards, 14 C.F.R. § 77.25, prohibits construction of structures that would constitute a hazard, and provides that variances should only be granted when accompanied by an FAA determination that the construction would not impede or imperil "the operation of air navigation facilities and the safe, efficient use of navigable airspace." FAA Advisory Circular 150/5190-4A, app. 1, §§ IV, VII.4. Numerous local governments, including Clark County, have adopted zoning ordinances that substantially mirror the FAA Model Ordinance. See, *e.g.*, Clark County Ordinance 1221 (Pet. App. 78a-94a).

C. McCarran Airport And Respondent's Property.

When it was first built, the airport was far from substantial development. It remained relatively isolated for most of the next six decades, and was able to add additional runways as recently as 1997. Over the past decade, however, new development has encroached upon McCarran. The airport occupies nearly 2800 acres, and today borders the Las Vegas "Strip." Clark County Dep't of Aviation, *Comprehensive Annual Financial Report for the Year Ended June 30, 2005*, at 3 (2005). McCarran is the nation's fifth largest in terms of total passengers, handling 44 million travelers in 2005. Airports Council Int'l, Traffic Statistics, *at* http://www.aci-na.org/asp/traffic.asp?art=215 (last visited Nov. 8, 2006).

Respondent owns three parcels of land comprising ten vacant acres. The property lies about one mile directly south of the end of one of McCarran's two north-south runways, and thus has been in the path of arriving and departing aircraft since that runway was built in 1947. Pet. App. 2a & n.3; AA vol. 15, at 3261-62, 3306, 3317 ("AA" refers to the appellants' appendix filed below with the Nevada Supreme Court). Respondent purchased the first parcel in 1983 and the other two in 1986. Pet. App. 2a n.3. The year before he bought the latter parcels, his predecessor-in-interest, R&D Odyssey Racetrack, conveyed to Clark County a perpetual avigation easement over these parcels, which comprise half the total property. AA vol. 1, at 117-18. The easement expressly authorizes aircraft overflights. Pet. App. 5a.

Several zoning ordinances govern the height of structures on the property. When respondent purchased the lots, Ordinance 728 permitted development up to 150 feet above the airport elevation, or 80 to 90 feet above the lots, which are at a higher elevation than McCarran. Pet. App. 3a. This ordinance permitted (and the County routinely granted) variances for taller structures if the FAA issued a "no hazard" determination. *Id.* In 1990, the County adopted Ordinance 1221 to protect the approach zone for the anticipated expansion of McCarran's north-south runways. *Id.* at 78a-94a. This ordinance permitted structures on the property up to 41 to 51 feet high; if developers wanted to build higher, they could seek a "no hazard" determination from FAA and a variance from the County. *Id.* at 4a. In 1994, the County enacted Ordinance 1599, which limited structures in the Aircraft Departure Critical Area. *Id.* at 95a-107a. Respondent's property was thereby presumptively limited to structures with a maximum height of three to ten feet above ground level. *Id.* at 4a-5a. Ordinance 1599 also provides for higher structures through a variance procedure if the FAA makes a "no hazard" finding. *Id.*

Although the property remains undeveloped, the County has previously authorized two projects for the site. In 1985, it approved a go cart facility which was to include 15-foot light poles and a 2800 square foot building. AA vol. 2, at 422-25; *id.*, vol. 3, at 607. In 2001, the County approved a four-story, 600-room hotel/casino resort. Pet. App. 5a-6a. The plan, submitted by a potential purchaser of the land, included a 33,050 square foot casino, retail areas, restaurants, bars, lounges, an indoor pool, parking structures, and maintenance areas. AA vol. 2, at 427. The developer requested approval of a 70-foot structure, "but not less than 66 feet on the ground of hardship and detrimental to the highest and best use of subject property." *Id.*, vol. 2, at 431. The FAA determined that a 66-foot structure would pose no hazard to air navigation, Pet. App. 5a-6a, but expressed no opinion about whether a taller building would pose a hazard. See AA vol. 2, at 433-34. The County granted a variance with its final approval up to 66 feet, but the variance and the approval automatically lapsed when construction did not begin within a year. Pet. App. 5a-6a. Respondent has never been denied a zoning variance for any of the parcels at issue.

D. Proceedings And Rulings Below.

Shortly after the approval of the hotel/casino resort for the property, respondent sued McCarran and the County in state court, advancing two types of claims. First, he argued that, under the United States and Nevada constitutions, the County had inversely condemned his property by virtue of the zoning laws and the passage of aircraft in the airspace above his property. Second, he argued that the noise, dust, fumes, fuel, and vibrations from overflights also devalued his property. Pet. App. 6a. These latter claims were dismissed with prejudice by stipulation. *Id.* at 9a.

On summary judgment, the district court concluded that the zoning laws effected a *per se* taking of respondent's property. Pet. App. 8a. The court rejected McCarran's arguments that respondent did not own all airspace up to 500 feet above his

land, that the flights were not so frequent or so low as to deprive him of an existing use of his land, that the zoning did not require acquiescence in a physical invasion of his property, and that respondent's claims were unripe because he had never been denied a variance. *Id*. at 8a-9a.

At the trial held to determine the compensation due, the court instructed the jury to base its loss calculation on the area above 66 feet, the height of the development that had recently been granted a variance. Pet. App. 11a. The jury returned a verdict in respondent's favor for $6,500,000. *Id*. The district court entered judgment in that amount, and awarded $107,730.68 in costs, $1,950,000 in attorney's fees under the federal Uniform Act, and $8,000,000 in interest, for a total award of $16,617,730.68. *Id*..

A divided Nevada Supreme Court affirmed. Less than two years earlier, the court had reversed a similar district court ruling in favor of numerous landowners near McCarran, *County of Clark* v. *Hsu*, No. 38853 (Nev. Sept. 30, 2004), but the majority in the present case held that respondent had suffered a *per se* taking. The majority here concluded that, under state law, respondent owned the first 500 feet of airspace above his land. It based this 500-foot boundary on FAA regulations, which define the minimum safe altitude for flight and place all airspace above that threshold "in the public domain." Pet. App. 13a & n.20. Although it recognized that the regulations define the minimum safe altitude for flight to extend below 500 feet when "necessary for takeoff or landing," *id.* at 13a, the majority did not explain why this part of the regulation did not limit respondent's ownership of unused airspace over his land, which lies in the path of arriving and departing aircraft. The majority also held that petitioner's avigation easement provided no defense to respondent's suit. It deemed an easement obtained as a condition of approval of the go-cart facility to be an uncompensated taking under *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987), without considering

whether the easement satisfied *Nollan*'s nexus test. Pet. Ap. 161-17a.

The majority held that Ordinances 1221 and 1599 effect a "*Loretto*-type" *per se* regulatory taking under the federal constitution. Pet. App. 17a-21a. The majority deemed the suit ripe on the theory that overflights below 500 feet constitute a permanent physical occupation of respondent's "privately-owned" airspace, and thus give rise to a categorical right to compensation. *Id.* at 21a. According to the majority, respondent could establish such a *per se* taking even though he had disavowed any claim that overflights interfered with the existing use of his property under *United States* v. *Causby*, 328 U.S. 256 (1946), and *Griggs* v. *Allegheny County*, 369 U.S. 84 (1962). Pet. App. 22a-23a. Although these cases establish when overflights effect a physical invasion of underlying land, the majority deemed them irrelevant to any claim of a permanent physical occupation under *Loretto*, because neither *Causby* nor *Griggs* involved ordinances regulating the use of land. *Id*. at 23a.

The majority also purported to rest its ruling on the Nevada Constitution. Other than noting that the state constitution expressly recognizes the right to acquire, possess and protect property and typically requires compensation be paid before a taking, the majority identified no difference in the protection afforded property under the state and federal constitutions. Instead, it held that a *per se* taking occurs under Nevada's constitution when an agency appropriates or permanently invades private property for public use without first paying just compensation. Pet. App. 28a-29a. It then reiterated its conclusion that the ordinances effected a permanent physical occupation of respondent's airspace – a conclusion it derived exclusively from this Court's cases and from interpretations of the federal constitution by other state courts. *Id*. at 23a-27a. It also affirmed the award of attorney's fees under the federal Uniform Act. *Id.* at 33a-36a.

Justice Becker dissented. She noted that the court's holding that the state constitution provides greater protections against takings than the federal constitution "contradicts over a century of precedent." Pet. App. 39a. She observed that, "other than general statements that the County Ordinances violated the Federal and State Constitutions, Sisolak never provided any analysis to support an argument that the Nevada Constitution provides more expansive rights under eminent domain." *Id.* She maintained that the case should have been decided under *Penn Central Transportation Co.* v. *City of New York*, 438 U.S. 104 (1978). Pet App. 40a. Justice Maupin likewise dissented. In his view, it was not "necessary to deviate from federal takings jurisprudence," and the *Penn Central* analysis should have been applied. *Id.* at 52a.

REASONS FOR GRANTING THE PETITION

The decision below conflicts with federal law and the decisions of this and other courts, and has grave implications for the efficiency and safety of the nation's air transport system. In ruling that an owner of a vacant lot owns navigable airspace less than 500 feet above his land, the Nevada court ignored Congress's decision to grant the public a right of transit through navigable airspace needed to take off and land safely at airports. Federal law forecloses recognition of the state law ownership right for which respondent was compensated in this case. Moreover, the court below misapplied this Court's airport takings decisions, which recognize compensable takings only where overflights fundamentally interfere with a preexisting use *of the land*—a claim respondent expressly waived.

In addition, the finding of a permanent physical invasion of respondent's property badly misconstrues this Court's takings jurisprudence in a manner that will undermine the ability of local governments to use zoning laws to prevent hazards to aviation. This Court's cases make clear that ordinances that merely restrict the use of property are subject to an ad hoc

analysis that takes into account whether respondent had any reasonable, investment-backed expectation that he could commercially exploit navigable airspace next to a major airport. Further, in disregarding a valid avigation easement that should have precluded any claimed taking as to one-half of respondent's property, the decision below conflicts with decisions of this Court and the applicable federal circuit.

By exposing petitioners to massive takings liabilities, the decision below will have significant and deleterious ripple effects that threaten the safety and efficiency of the national air transportation system. The Nevada court's transparent attempt to evade certiorari review by purporting to invent, for the first time, an independent state takings jurisprudence poses no obstacle to review of its erroneous and harmful decision. The Nevada court's decision rests on a fundamental mistake concerning the scope of the *federally-defined* navigable airspace. Moreover, the state law takings theory the Nevada court announced does not justify recovery of attorneys' fees under the federal Uniform Act, and thus cannot provide an independent basis for the judgment in this case. Accordingly, the Court should grant the petition and reverse the decision below in order to protect federal law and the vital national interests implicated by the ruling below.

I. RECOGNITION UNDER STATE LAW OF PRIVATE OWNERSHIP OF THE NAVIGABLE AIRSPACE NEEDED FOR SAFE TAKEOFFS AND LANDINGS RAISES A VITALLY IMPORTANT QUESTION OF FEDERAL LAW.

A. Federal Law Precludes Recognition Under State Law Of Private Ownership Of Federally Defined Navigable Airspace.

The decision below rests on the untenable premise that private citizens can own navigable airspace needed to ensure safe takeoffs and landings even when they made no use of that airspace before it became part of the navigable airspace.

Sixty years ago, this Court recognized Congress's authority to place airspace needed for safe navigation in the public domain. *Causby*, 328 U.S. at 261. Building on the common right of passage on navigable waters, Congress gave the United States "exclusive sovereignty" over the nation's airspace, and granted all citizens a "public right of transit" through the "navigable airspace." 49 U.S.C. § 40103(a). The Federal Aviation Act (the Act) authorizes the FAA to define the "navigable airspace," including any "airspace needed to ensure safety in the takeoff and landing of aircraft." *Id.* § 40102(a)(32). The FAA must exercise this and its other authorities in light of the Act's "highest priority," which is "maintaining safety." *Id*. § 40101(a)(1).

This safety rationale forms the basis for the regulations establishing the minimum safe altitudes for flight, which in turn demarcate the "navigable airspace" through which the public has a right of transit. To effectuate the statutory mandate that the safety of takeoffs or landings be ensured, the FAA created exceptions to the 500-foot threshold when lower altitudes are "necessary for takeoff and landing." 14 C.F.R. § 91.119. Thus, while "navigable airspace" typically begins at 500 feet above the ground, that is explicitly not the case in airport approach zones.

Federal law defines navigable airspace below 500 feet in a flexible and context-specific fashion. The FAA requires notice of proposed construction that could affect "safety in air commerce" or "the efficient use and preservation of the navigable airspace and of airport traffic capacity at public-use airports." 49 U.S.C. § 44718(a). Upon receipt of such notice, the FAA evaluates a proposal and decides whether it will create a hazard to air traffic. See generally 14 C.F.R. pt. 77. Although these determinations do not compel any particular action by local zoning boards, see, *e.g.*, *Aircraft Owners & Pilots Ass'n* v. *FAA*, 600 F.2d 965, 966-67 (D.C. Cir. 1979), they determine whether a structure will invade the "navigable airspace." See 14 C.F.R. § 91.119 and Part 77, Subpart C.

The decision below cannot be reconciled with this federal law. Although the Nevada Supreme Court mentions that, under FAA regulations, the 500-foot threshold does not apply in takeoff and landing zones, Pet. App. 13a & n.20, it ignores the implications of that rule. Instead, the court used the 500-foot threshold to mark the boundary of a state law-based ownership right in all superadjacent airspace, without explaining how such ownership can be reconciled with federal regulations that define the navigable airspace to include airspace below 500 feet when necessary to ensure safe takeoff and landing. The imposition of a 500-foot wall around airports, justified not by any diminution in property value or by any preexisting use of the airspace, but instead justified purely by purported private ownership of airspace, is flatly inconsistent with federal regulations that, pursuant to an express delegation from Congress, define the navigable airspace that is needed to ensure safe air travel and through which the public has a right of transit. Federal law thus precludes recognition under state law of private ownership of airspace the FAA deems necessary for takeoff and landing, even if that airspace falls below 500 feet, where, as here, the landowner made no prior use of the airspace before it became part of the navigable airspace.

B. Recognition Under State Law Of Private Ownership Of Navigable Airspace Has Profound And Detrimental Implications For The National Air Transportation System.

Contrary to the Nevada court's assertion, Pet. App. 30a n.88, recognition of private ownership of the navigable airspace surrounding McCarran has major ramifications. The Las Vegas region has experienced explosive growth—all of it long after the airport was built (and much of it, ironically, fueled by the tourism the airport facilitates). Petitioners conservatively estimate that the cost of purchasing the navigable airspace around McCarran could exceed $10 *billion*. Any response to this staggering potential liability

would have untoward effects on a host of users and beneficiaries of the national air transportation system.

Even assuming that repeal of the ordinances would enable petitioners to avoid future takings liabilities,[2] such a response would allow landowners to build structures approaching the height of the Washington Monument immediately next to the airport. The construction of just one such building in the glide path of either set of McCarran's runways would effectively close the airport to commercial aircraft.[3] Repeal of the ordinances would thus leave McCarran's continued operation at the mercy of private developers. A major airport requiring significant investments for improvements and maintenance simply cannot operate under such uncertainty.

On the other hand, it is not at all clear that petitioners could raise the enormous amount of money necessary to purchase all of the "privately-owned" navigable airspace required for McCarran's current operations. And, even if petitioners could pay for all such airspace, doing so would entail equally unacceptable consequences. In order to cover the estimated $10 billion cost of such airspace, petitioners would have to raise McCarran's landing fees by the equivalent of $43 per passenger.[4] Such a huge increase would make McCarran's landings fees 70% higher than the most expensive landing

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[2] Because it affirmed a judgment measuring damages from the effective date of the Ordinances, it is not clear whether the Nevada court would permit post-repeal suits based on claims that landowners suffered *per se* takings from the Ordinances' effective date until their date of repeal.

[3] If planes cannot descend below 500 feet until they are over airport grounds, the FAA-prescribed glide angle would force them to land so far down McCarran's runways that commercial aircraft could not stop safely. Due to cross-winds, moreover, McCarran must have both sets of runways available in order to support regularly scheduled commercial service.

[4] Federal grant assurances require airports to be as "self-sustaining as possible," which compels airports to look to airport resources to make up budget shortfalls. 49 U.S.C. § 47107(a)(13)(A). As a result, virtually all airport costs are borne by airport users in one form or another.

fees in the nation. This, in turn, would have a devastating impact on the airport and the region it serves.

McCarran is the nation's largest origination and destination airport – *i.e.*, an airport that serves not as a hub, but as the ultimate destination for travelers. Because most travelers to McCarran are vacationers, service to the airport is very price-sensitive. Thus, carriers, particularly those that specialize in low-fare travel, cannot readily pass increased costs on to their customers. In fact, Southwest Airlines has already threatened to curtail service if McCarran increases fees as a result of any judgments it incurs in takings lawsuits. Richard N. Velotta, *Lawsuits could prompt cuts at airport*, Las Vegas Sun, May 28, 2003, at C1. Because "'two customers on each flight represent our entire profit,'" Southwest expects its McCarran flights would operate at a loss if landing fees merely doubled, and that it would have to curtail service. *Id.* Southwest is a leading "low-cost" carrier at McCarran, and a reduction in its substantial service to Las Vegas would reduce price competition, lead to increased fares, and ultimately reduce the number of travelers to a city where nearly half of all visitors arrive by plane. McCarran Int'l Airport, Current Projects, *at* http://www.mccarran.com/04_05_CurProjects.asp (last visited Nov. 8, 2006); see Tony Cook, *High price for low buildings*, Las Vegas Sun, July 25, 2006, at A1. A decrease in the number of passenger flights would force petitioners to raise landing fees even higher, which would lead to a vicious cost-spiral as fewer flights are forced to pay for the navigable airspace around the airport.

Even if increased fees did not cause a decline in passengers, the huge expense of purchasing that airspace would prevent petitioners from building Ivanpah, a new supplemental airport 45 miles from Las Vegas that is projected to open in 2017. McCarran itself is expected to reach full capacity as early as 2012. Without Ivanpah, petitioners cannot meet future passenger demand, to the detriment of the Las Vegas region. See *Ivanpah Airport Plans Need To Get Off The Runway*, In

Business Las Vegas, Oct. 20 - Oct. 26, 2006 (delays in the construction of the new airport "could prove disastrous with a new boom happening"). And, because airports operating at peak capacity inevitably spawn delays, petitioners' inability to build Ivanpah will inconvenience travelers to and from Las Vegas in future years, and add strains on the highly complex and interdependent air traffic system. See FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1 (2005), *available at* www.faa.gov/about/office_org/headquarters_offices/aep/planning_toolkit/media/III.B.pdf. ("what happens at an individual airport may affect other airports within the system"); *American Airlines, Inc.* v. *Town of Hempstead*, 272 F. Supp. 226, 233 (E.D.N.Y. 1967) ("Every . . . take-off and landing is a moving part in a vast complex of regional aircraft traffic control"), *aff'd*, 398 F.2d 369 (2d Cir. 1968).

To mitigate these problems, petitioners may be forced to purchase less than all of the navigable airspace needed to maintain current operations. For example, petitioners might choose not to purchase certain navigable airspace necessary to ensure the safe departure of aircraft capable of flying to international destinations, or even the east coast. This could allow petitioners to avoid a meaningful portion of the overall takings liability that the decision in this case will otherwise impose. But the takings "savings" would come at significant operational costs, both at McCarran and elsewhere.

Without this navigable airspace, many planes currently used to provide service to Las Vegas would be unable to take off fully loaded with all of the fuel necessary to make certain long-distance flights, especially in the hotter summer months. If airlines cannot operate such long-distance flights safely or economically out of McCarran, more long-distance travelers would have to switch planes elsewhere in order to reach the city. This would have ripple effects in hubs where Las Vegas-bound or -returning passengers would have to change planes, and where more flights would be necessary to meet

passenger demand to and from Las Vegas. It would also exacerbate congestion at McCarran, as more flights would be needed to carry the number of passengers that currently arrive and depart via fully-loaded aircraft. This, in turn, has implications for the federal government's management and operation of the complex Air Traffic Control system and for airlines and customers at affected hubs. Finally, it would undermine the significant federal investment ($155 million over the past 10 years) made to expand McCarran's capacity in terms of numbers and size of aircraft.

In short, the massive takings liability the Nevada courts have imposed on a major national airport will inescapably and severely undermine the fundamental goals of the Federal Aviation Act, which seeks to maintain the highest degree of safety in air travel, and to promote "the availability of a variety of adequate, economic, efficient, and low-priced services." 49 U.S.C. § 40101(a)(4). To paraphrase John Donne, no airport is an island unto itself. The reality is that "[l]ocal planning for airport growth cannot be accomplished without consideration of national, state and regional needs." FAA, *Land Use Compatibility and Airports: A Guide for Effective Land Use Planning*, V-1. Recognition of private ownership of the navigable airspace outside McCarran will place an enormous strain on one of the largest cogs in this highly complex and interdependent system, and that strain will inescapably burden this vital network as a whole – through sharply increased costs, severely reduced capacity, increased congestion, or (most likely) some combination of these untoward problems. This Court should therefore grant the petition to forestall these deleterious impacts.

C. Recognition Under State Law Of Private Ownership Of The Navigable Airspace Conflicts With The Decisions Of This And Other Courts.

The decision below conflicts with the decisions of this Court and those of other state courts, which have recognized that navigable airspace, including that necessary for takeoff

and landing, is in the public domain, and have found takings only in extreme circumstances wholly missing here.

The Nevada Supreme Court believed that, in *Causby*, 328 U.S. at 263-64, this Court recognized that landowners own all of the useable space above their property. It likewise read *Griggs*, 369 U.S. at 89-90, as establishing that, "although airplanes may fly below 500 feet when necessary for takeoff and landing, this right does not divest the property owner of his protected property right to his usable airspace." Pet. App. 13a-14a. These readings of *Causby* and *Griggs* are fundamentally mistaken. In fact, respondent stipulated to the dismissal of any *Causby/Griggs*-type takings claim, and for good reason: these cases recognize takings only where low and frequent overflights egregiously interfere with pre-existing uses of the land itself.

Causby made clear that takings claims based on overflights should not normally prevail "in the modern world. . . . Common sense revolts at the idea." 328 U.S. at 261. The Court adopted Congress' view that "[t]he air is a public highway," *id.*, and specifically distinguished the case before it from claims, like this one, involving mere overflights. "To recognize such private claims to the airspace would clog these highways, seriously interfere with their control and development in the public interest, and transfer into private ownership that to which only the public has a just claim." *Id.*

The Court found a taking on the facts before it, however, because the low and frequent overflights destroyed Causby's chicken farm. "The superadjacent airspace at this low altitude is so close to the land that continuous invasions of it *affect the use of the surface of the land itself*." *Id.* at 265 (emphasis added). Thus, the Court did not recognize a taking based on an invasion of any airspace below 500 feet, or even the invasion of airspace that a landowner might someday seek to develop. Rather, it held that "[f]lights over private land are not a taking, unless they are so low and so frequent as to be a

direct and immediate interference with the enjoyment and use of the *land*." *Id.* at 266 (emphasis added).

Griggs reaffirmed this holding. It found a taking where an airport constructed a new runway so close to petitioner's preexisting home that aircraft taking off routinely passed within 30 feet of the home, rendering it essentially uninhabitable. 369 U.S. at 87-89. Thus, like *Causby*, *Griggs* did not recognize an ownership right in all superadjacent airspace below 500 feet, or in all potentially usable superadjacent airspace. Instead, *Griggs*, like *Causby*, found a taking only where overflights destroyed the preexisting use of the land.

Here, by contrast, overflights do not destroy any preexisting use of respondent's property. Indeed, that property was vacant when respondent acquired it 40 years after the airport was built. Moreover, the fact that the County approved two commercial uses of the property demonstrates that overflights do not prevent "enjoyment and use of the land" itself. *Causby*, 328 U.S. at 266. The decision of the Nevada court thus conflicts with *Causby* and *Griggs*. It ignores this Court's recognition that navigable airspace is in the public domain, and this Court's requirement that, in overflight cases, a taking is established only if flights are so low and frequent that they significantly impair the use of the subjacent land itself.

The ruling below also conflicts with the decisions of numerous State courts. In *Cheyenne Airport Board* v. *Rogers*, the Wyoming Supreme Court held that zoning restrictions on the height of objects near an airport were not a taking, even where they compelled the destruction of a tree that had grown beyond approved limits. 707 P.2d 717, 732 (Wyo. 1985). On the contrary, it was the object on the ground that was responsible for the encroachment *on the sovereign airspace*, and the zoning ordinance did not take plaintiff's property by protecting the airspace against incursions by "activities on the surface." *Id.* at 725. Florida and Illinois courts have reached the same conclusion. See *Harrell's Candy Kitchen, Inc.* v.

Sarasota-Manatee Airport Auth., 111 So. 2d 439, 444 (Fla. 1959) (no taking where building height limited to 27.64 feet); *La Salle Nat'l Bank* v. *Cook County*, 340 N.E.2d 79, 89 (Ill. App. Ct. 1975) (rejecting takings challenge to height restrictions near airport). Similarly, the Ohio Supreme Court held that a takings claim does not lie simply because it would be "physically *possible*" to build into navigable airspace; where owners did not previously make use of airspace above their land and it was not reasonably foreseeable that they would do so, they had no compensable property interest in such airspace. *Village of Willoughby Hills* v. *Corrigan*, 278 N.E.2d 658, 664-65 (Ohio 1972). And the Texas Supreme Court rejected a takings claim brought by an owner of a vacant lot, holding that the mere invasion of airspace above property does not constitute a *per se* taking. *City of Austin* v. *Travis County Landfill Co.*, 73 S.W.3d 234, 242 (Tex. 2002). The Texas Supreme Court explained that a landowner "has no right to exclude overflights above its property, because airspace is part of the public domain." *Id.*

The decision of the Nevada Supreme Court also conflicts with decisions of the Federal Circuit, which has likewise recognized that "[p]rivate property interests simply do not, as a general matter, exist in the navigable airspace of the United States," *Air Pegasus of D.C., Inc.* v. *United States*, 424 F.3d 1206, 1219 (Fed. Cir. 2005), and that navigable servitudes constitute a "'pre-existing limitation upon the landowner's title.'" *Palm Beach Isles Assocs.* v. *United States*, 208 F.3d 1374, 1384 (Fed. Cir.), (quoting *Lucas* v. *South Carolina Coastal Comm'n*, 505 U.S. 1003, 1028-29 (1992)), *aff'd on reh'g*, 231 F.3d 1345 (Fed. Cir. 2000), *overruled on other grounds*, *Bass Enters. Prod. Co.* v. *United States*, 381 F.3d 1360 (Fed. Cir. 2004).

* * * *

The Nevada Supreme Court's conclusion that respondent owns navigable airspace above his land is plainly erroneous, conflicts with the decisions of this Court and the decisions of

other state and federal courts, and will have significant and deleterious effects on the national air transportation system. This Court should grant the petition and reverse that decision.

II. THE NEVADA SUPREME COURT'S FINDING OF A *PER SE* REGULATORY TAKING IS ERRONEOUS AND CONFLICTS WITH THE DECISIONS OF THIS AND OTHER COURTS.

Having improperly recognized private ownership of the navigable airspace, the Nevada Supreme Court compounded its error by ruling that local ordinances that merely restrict the use of property in order to protect such airspace from potential hazards effect a *per se* taking. That ruling plainly conflicts with the decisions of this Court and raises important questions of federal law. Similarly, the Nevada court's conclusion that petitioners' avigation easement provided no defense to such a takings claim is flatly inconsistent with this Court's decisions, and conflicts with a Ninth Circuit decision.

A. The Nevada Court's Conclusion That Use Restrictions Constitute A *Per Se* Taking Conflicts With The Decisions Of This Court.

The conclusion of the Nevada Supreme Court that the ordinances at issue in this case constituted *per se* takings is directly at odds with this Court's precedents, particularly *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) and *Penn Central* itself. This Court has explained that there are only "two categories of regulatory action that generally will be deemed *per se* takings." *Lingle* v. *Chevron U.S.A. Inc.*, 544 U.S. 528, 538 (2005). The first is where "government requires an owner to suffer a permanent physical invasion of her property." *Id.* (citing *Loretto*). The second is where regulations "completely deprive an owner of '*all* economically beneficial us[e]' of her property." *Id.* (alteration in original) (quoting *Lucas* v. *South Carolina Coastal Council*, 505 U.S. 1003, 1019 (1992)). "Outside of these two relatively narrow categories (and the special context

of land-use exactions . . .) regulatory takings challenges are governed by the standards set forth in *Penn Central*." *Id.*

The ordinances at issue here are plainly restrictions on the *use* of property subject to *Penn Central*'s ad hoc takings analysis. They limit the height of structures, and thus govern the manner in which property may be used. This is confirmed by the variance procedures, which respondent's predecessor-in-interest and a would-be purchaser used to gain approval for proposed structures on the property above the specified height limits following FAA determinations that these structures would not pose hazards to air safety. Indeed, the Nevada Supreme Court itself recognized that "this case does involve ordinances affecting use of property. Pet. App. 23a.

The court nevertheless concluded that the ordinances effected a *per se* taking within the meaning of *Loretto*. A *Loretto*-type taking, however, requires a *permanent physical occupation* of land compelled by a regulation, not restrictions on land use. Absent such a compelled invasion (or its functional equivalent), ordinances that simply restrict use of property cannot effect a *per se Loretto*-type regulatory taking.

Loretto makes clear that a *per se* regulatory taking based on a physical invasion requires a permanent physical invasion of land or real estate. It traced the origins of this category of *per se* takings to *Pumpelly* v. *Green Bay Co.*, 80 U.S. (13 Wall) 166 (1872), and the Court's conclusion that, "'where *real estate* is actually invaded by superinduced water,'" a taking occurs. *Loretto*, 458 U.S. at 427 (emphasis added) (quoting *Pumpelly*, 80 U.S. at 181). *Loretto* explained that later cases characterized *Pumpelly* "as involving 'a physical invasion of the *real estate* of the private owner,'" *id.* at 428 (emphasis added) (quoting *Northern Transp. Co.* v. *Chicago*, 99 U.S. 635, 642 (1879)), and "clearly establish that permanent occupations of *land* . . . are takings." *Id.* at 430 (emphasis added).

Loretto cited *Causby* and *Griggs* as cases that "confirm the distinction between a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id.* It noted that, in *Causby*, the Court found a taking because low and frequent overflights imposed a loss on the landowner "'as complete as if the United States had entered upon *the surface of the land* and taken exclusive possession of it.'" *Id.* (emphasis added) (quoting *Causby*, 328 U.S. at 261). Such overflights caused an "'intrusion so immediate and direct as to subtract from the owner's full enjoyment of the *property* and . . . limit[ed] his exploitation of *it*.'" *Id.* at 431 (emphasis added) (quoting *Causby*, 328 U.S. at 265, 265-66). Thus, a central element of a *Loretto*-type *per se* taking is a permanent physical invasion of land or an invasion of superadjacent airspace so severe that it is effectively an invasion of the land itself.

The decision below squarely conflicts with *Loretto*. The fact that respondent waived any *Causby/Griggs* claim prevented him from establishing a central element of a *per se* taking under *Loretto*: a physical invasion of land (or its functional equivalent). Thus, even if zoning laws that merely prevent air traffic hazards could be viewed as compelling (within the meaning of *Loretto*) a *Causby/Griggs*-type physical invasion of land, there was no such invasion here.

Loretto also confirms that local regulations that permit third-parties temporarily to invade or occupy property do not constitute *per se* takings. *Loretto* explained that the Court had not found *per se* takings where the federal government claimed a navigable servitude that permitted members of the public to enter a privately-owned marina, or where California compelled a shopping center to permit advocacy speech on its premises. *Id.* at 433-34 (discussing *Kaiser Aetna* v. *United States*, 444 U.S. 164 (1979) and *PruneYard Shopping Ctr.* v. *Robins*, 447 U.S. 74 (1980)). *Loretto* stressed that while a physical invasion "is a government intrusion of an usually

serious character," it is not a *per se* taking if the invasion is temporary, rather than permanent.

The invasions of the airspace above respondent's property are temporary under *Loretto* and its reading of *Kaiser* and *PruneYard*. The fact that the ordinances grant "permanent permission" for such temporary invasions, Pet. App. 26a, is irrelevant. It is the physical occupation itself, not the laws permitting or compelling that occupation, that must be permanent. Indeed, the ordinances are no more permanent than the servitude imposed in *Kaiser*, or the constitutional mandates that compelled access in *PruneYard*.

Finally, in *Penn Central*, this Court flatly rejected the very type of *per se* taking claim that the Nevada court recognized. Under the Landmarks Law at issue in *Penn Central*, the property owner was denied the ability to use "air rights" to construct a building above Grand Central Terminal. In language directly applicable here, the Court explained that a claim that property owners "may establish a 'taking' simply by showing that they have been denied the ability to exploit a property interest ["air rights"] that they heretofore had believed was available for development [wa]s quite simply untenable." *Penn Cent.*, 438 U.S. at 130.

The conflict with this Court's decisions is extremely important. As noted above, the FAA relies on local land use restrictions to prevent air traffic hazards and thereby promote air safety. Indeed, recipients of federal aviation-related grants are obligated to ensure that airspace is clear of all present and future hazards, 49 U.S.C. § 47107(a)(9); 14 C.F.R. § 77.3(a), and the ordinances at issue here closely mirror the FAA Model Ordinance. The Nevada Supreme Court's conclusion that these ordinances effect *per se* takings seriously undermines this pillar of the air safety system.

First, the many untoward consequences of recognizing private ownership of the navigable airspace around McCarran are compounded by the Nevada court's *per se* takings

analysis. Under a *Penn Central* analysis, many of the "owners" of this navigable airspace would have great difficulty establishing that the ordinances caused any taking at all. For example, absent an FAA "no hazard" determination, structures in takeoff and landing zones cannot readily obtain insurance, see *Air Line Pilots Ass'n Int'l* v. *Department of Transp., FAA*, 446 F.2d 236, 241 (5th Cir. 1971)—a fact that would seriously impede any showing of a *reasonable* investment-backed expectation by "owners" that they could commercially exploit this "property." Moreover, under a *Penn Central* analysis, petitioners could, consistent with FAA rulings, use the variance procedure to avoid or mitigate takings liability. By precluding such inquiries, the *per se* takings ruling greatly increases petitioners' financial exposure, which in turn forces petitioners to respond with measures that will inescapably affect and impair the nationwide air traffic system.

Second, a decision to allow the Nevada Supreme Court's decision to stand could lead other state courts to employ the same mistaken *per se* analysis to identical or comparable ordinances around the nation. Given the fundamentally important role local zoning restrictions play in ensuring air safety, the issue of whether such ordinances cause *per se* takings should not be allowed to "percolate" in the state court systems. The decision in this case is clearly erroneous, conflicts with *Loretto*, and (if left undisturbed) will impair and disrupt the national air safety system. The Court should grant review now, to prevent impairments or disruptions from similarly misguided state court decisions.

B. The Nevada Supreme Court's Refusal To Give Effect To A Valid Avigation Easement Conflicts With This Court's Precedents And With A Decision Of The Ninth Circuit.

The Nevada Supreme Court also erred by refusing to give effect to petitioners' perpetual avigation easement, reasoning that "an uncompensated easement as a condition to

development is improper and cannot be used by the County as a defense to the taking of a landowner's airspace without compensation." Pet. App. 16a. Quoting selectively from *Nollan* v. *California Coastal Commission*, 483 U.S. 825 (1987), the Nevada court stated that "'to obtain easements of access across private property the State must proceed through its eminent domain power,' because 'requiring uncompensated conveyance of [an] easement outright would violate the Fourteenth Amendment.'" Pet. App. 16a-17a (alteration in original) (quoting *Nollan*, 483 U.S. at 832, 834). In fact, the Nevada court's disposition of petitioners' easement defense is flatly inconsistent with *Nollan*.

In *Nollan*, this Court did not hold that States must acquire easements through eminent domain. Although it observed that the agency in that case might not be able, as a matter of California law, to acquire easements except through eminent domain, *Nollan*, 483 U.S. at 841-42, this Court held that, as a matter of federal constitutional law, States can require that easements "be conveyed as a condition for issuing a land-use permit." *Id.* at 834. Such an easement must "serve[] the same governmental purpose as the development ban," *id.* at 837, and must be roughly proportional to the impact of the development permitted. See *Dolan* v. *City of Tigard*, 512 U.S. 374 (1994). If these conditions are met, the easement is not an "uncompensated" taking at all. The Nevada Supreme Court's conclusion that *Nollan* flatly barred petitioners from obtaining an easement from respondent's predecessor-in-interest, without regard to the nexus and proportionality standards, is a complete perversion of *Nollan*'s rationale.

This erroneous refusal to give effect to petitioners' avigation easement compounds the many untoward effects of its mistaken recognition of private ownership rights in the navigable airspace around McCarran. As the court noted, "similar avigation easements are recorded against property throughout Clark County as a condition of building permits." Pet. App. 16a. By eliminating these easements as defenses to

takings claims by other landowners, the Nevada court significantly increased petitioners' potential liability, which, as noted above, will force petitioners to respond with measures that will affect the nationwide system.

Finally, the Nevada court's disposition of the avigation easement conflicts with the Ninth Circuit's ruling that a landowner cannot bring a takings claim based on a physical occupation where his predecessor-in-interest had granted an easement in order to obtain a development permit. In *Daniel* v. *County of Santa Barbara*, 288 F.3d 375, 383 (9th Cir. 2002), the Ninth Circuit concluded that, in such circumstances, the successor-in-interest has not been deprived of any property for which compensation is due. If the easement fails the *Nollan/Dolan* nexus and proportionality standards, the resulting taking occurred when the easement was granted. "'A landowner who purchased land after an alleged taking cannot avail himself of the Just Compensation Clause because he has suffered no injury.'" *Id.* (quoting *Carson Harbor Village Ltd.* v. *City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994)). In such a situation, the property for which the successor seeks compensation was not part of the property he purchased, because it was appropriated from the prior owner.

Under the Ninth Circuit's reasoning, the avigation easement was a valid defense to respondent's taking claim. Half of his land was subject to the easement when he bought it. Thus, even assuming that his predecessor owned all airspace up to 500 feet above the land, the right to the airspace encompassed by the easement was taken from the predecessor as a condition of the development permit, and was not conveyed to respondent when he purchased the land.

The Nevada court's reasoning in this case cannot be reconciled with the reasoning in *Daniel*. This split of decisional authority between a state supreme court and a federal circuit encompassing that state provides yet another reason to grant the petition.

III. THE DECISION IN THIS CASE DOES NOT REST ON AN ADEQUATE AND INDEPENDENT STATE LAW GROUND.

Tacitly recognizing the impropriety of its analysis, the majority purported to ground its *per se* taking conclusion in the state constitution. *Id.* This aspect of the court's decision, however, does not shield its analytical errors from review. This part of the decision is not "adequate to support the judgment." *Coleman* v. *Thompson*, 501 U.S. 722, 729 (1991).

To begin with, the Nevada court's conclusion that respondent owned the navigable airspace above his land does not rest on an independent and adequate state law ground. The court relied on FAA regulations to determine the scope of this ownership right. The court's clear misunderstanding concerning the scope of the "navigable airspace" rests entirely on an error of federal, not state, law, and that error was indispensable to the judgment in this case.

Moreover, even if the court had based ownership of the navigable airspace entirely on state law, this would still raise a federal question. Federal law expressly grants a public right of transit through all navigable airspace. Recognition under state law of private ownership of this airspace, therefore, raises a question of federal supremacy. Thus, even assuming there is any fair or substantial support for the conclusion that a *per se* taking can be found under Nevada's constitution where none can be found under the federal constitution,[5] the

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[5] In the rare situations where state courts have purported to rely on state law to evade review, this Court has properly looked behind the ruling to determine whether the purported non-federal grounds for decision are "without any fair or substantial support." *Ward* v. *Board of County Comm'rs*, 253 U.S. 17, 22-23 (1920); *see also NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 456-57 (1958); *Bouie* v. *City of Columbia*, 378 U.S. 347, 361-62 (1964); *Bush* v. *Gore*, 531 U.S. 98, 115 (2000) (Rehnquist, C.J., concurring).

Nevada court's invocation of the state constitution poses no obstacle to review of the first question presented.

Nor does the majority's *ipse dixit* concerning the state constitution pose a barrier to review of the second question presented. The judgment entered in this case inescapably rests on the court's finding of a *per se* taking under the federal constitution. That judgment includes over $2 million in fees and costs awarded under the federal Uniform Act. That act permits awards of attorneys fees to successful plaintiffs in takings actions brought under two federal statutes, see 42 U.S.C. § 4654(c), both of which permit claims "founded either upon the Constitution, or any Act of Congress or any regulation of an executive department." 28 U.S.C. §§ 1346(a)(2), 1491. Whatever the propriety of applying the Uniform Act to state agencies that effectuate takings,[6] the Act authorizes fee awards only for a takings claim founded upon federal law. Thus, the judgment awarding over $2 million in attorneys fees in this case must rest on the Nevada court's erroneous finding of a *per se* taking under the federal constitution. Accordingly, this aspect of the decision is plainly subject to review by this Court. For the reasons already stated, the decision warrants review and reversal.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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[6] *See, e.g., West Va. Dep't of Transp.* v. *Dodson Mobile Homes Sales & Servs., Inc.*, 624 S.E.2d 468, 472-73 (W. Va. 2005); *Wolfson* v. *City of St. Paul*, 558 N.W.2d 781, 783 (Minn. Ct. App. 1997).

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