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IN THE SUPREME COURT

OF THE STATE OF NEVADA

COUNTY OF CLARK, a political subdivision of the State of Nevada, Appellant/Cross-Respondent, vs. TIEN FU HSU, LISA SU FAMILY TRUST, LISA SU TRUSTEE, PETER B. LIAO, WESTPARK, INC., LUCKY LAND COMPANY, LUCKY LAND COMPANY INVESTMENTS, LUCKY LAND COMPANY ENTERPRISES LIMITED PARTNERSHIP, AND WEST PARK COMPANY 1, Respondents/Cross-Appellants.	Case No. 38853 On Appeal from a Final Judgment in Inverse Condemnation of Real Property entered by the Eighth Judicial District Court

BRIEF OF THE AMERICAN PLANNING ASSOCIATION, NEVADA CHAPTER OF THE AMERICAN PLANNING ASSOCIATION, AND TAHOE REGIONAL PLANNING AGENCY AS AMICI CURIAE IN SUPPORT OF APPELLANT/CROSS-RESPONDENT

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INTEREST OF AMICI CURIAE

The American Planning Association (APA) is a nonprofit public interest and research organization, founded in 1978 exclusively for charitable, educational, literary, and scientific research purposes to advance the art and science of planning -- physical, economic and social -- at the local, regional, state, and national levels. APA's mission is to encourage planning that will contribute to public well-being by developing communities and environments that meet more effectively the needs of people and society. With 46 regional chapters, APA and its professional institute, the American Institute of Certified Planners, represent more than 30,000 practicing planners, officials, and citizens across the nation involved with urban and rural planning. Sixty-five percent of APA's members work for state and local government agencies. The Nevada Chapter of APA was formed in 1979 and currently has about 350 members. APA regularly files amicus briefs in takings cases to ensure that takings jurisprudence continues to allow for reasonable land-use planning in the public interest. A few of the cases in which APA has participated as amicus curiae include: *Agins v. Tiburon*, 447 U.S. 255 (1980), *Williamson County Reg'l Planning Comm'n v. Hamilton Bank*, 473 U.S. 172 (1985), *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304 (1987), *Yee v. City of Escondido*, 503 U.S. 519 (1992), *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), *Dolan v. City of Tigard*, 512 U.S. 374 (1994), *Suitum v. Tahoe Reg'l Planning Agency*, 520 U.S. 725 (1997), *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999), *Palazzolo v. Rhode Island*, 121 S. Ct. 2448 (2001), *Animas Valley Sand and Gravel, Inc. v. Board of County Comm'rs of the County of La Plata*, 38 P.3d 59 (Colo. 2001), and *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, No. 00-1167, *cert. granted*, 121 S. Ct. 2589 (2001) (oral argument heard Jan. 7, 2002).

The Tahoe Regional Planning Agency (TRPA) is a bi-state agency created by the States of Nevada and California, with the consent of Congress, under the Compact Clause

of the U.S. Constitution. The Tahoe Regional Planning Compact, Pub. L. No. 96-551, 94 Stat. 3233, Nev. Rev. Stat. 277.200 (1980), requires TRPA to set environmental thresholds and adopt a regional plan for protecting the unique beauty of the Lake Tahoe Basin, which includes portions of Washoe, Carson City, and Douglas Counties. To achieve the thresholds, TRPA regulates development in the Tahoe Basin, including limiting the height of structures. *See*, *e.g.*, TRPA Code of Ordinances, Chapter 22 (Height Standards). Due to its development controls, TRPA often litigates the appropriate boundaries of property owners' rights under the Takings Clause. *See, e.g., Tahoe-Sierra Preservation Council, Inc. v. TRPA*, *supra*; *Suitum v. TRPA*, 520 U.S. 725 (1997); *Kelly v. TRPA*, 109 Nev. 638, 855 P.2d 1027 (1993).

This case raises critical issues of national importance. The central question is whether the Takings Clause requires local officials to compensate owners whose land is subject to zoning that implements the minimum standards for air safety specified by the Federal Aviation Administration (FAA). The challenged zoning is substantially similar to the FAA's Model Zoning Ordinance used by airports across the country to secure federal funding. There can be little doubt that the ramifications of this case extend far beyond the County of Clark and the State of Nevada. Planners, municipalities, and owners of land near airports across the country will carefully scrutinize this Court's ruling. Adoption of the landowners' unprecedented takings theory would result in financially ruinous liability for countless municipalities that seek nothing more than to meet the FAA's air safety requirements. It also would severely chill planning for much-needed airport construction and expansion.

INTRODUCTION AND SUMMARY OF ARGUMENT

The zoning ordinances challenged in this case impose height restrictions. *See* Appellant's App., vol. 24, at 4843-56, 4858-74, Clark County Ordinance No. 728 and No. 1221, formerly codified at Chapter 29.50 of the Clark County Code, § 29.50.030 ("Airport

zone height limitations"). The zoning neither authorizes anyone to invade the airspace over the landowners' property, nor "reserves" the airspace for use by the public. *Id.* By its plain terms, the challenged zoning restricts the height of structures that pose a potential hazard to aviation, and does nothing more. *Id*.

As a mere restriction on land use, the challenged zoning should be analyzed under the standards for regulatory takings set forth in *Penn Central Transp. Co. v. New York City*, 438 U.S. 104 (1978), and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992). Under *Penn Central*, courts consider (1) the economic impact of the regulation; (2) whether it interferes with reasonable, investment-backed expectations; and (3) the character of the government action. *Penn Central,* 438 U.S. at 124. Under *Lucas*, a land-use restriction may effect a *per se* regulatory taking where it denies all economically viable use of the claimant's entire parcel. *Lucas*, 505 U.S. at 1015-19. Just last Term, the U.S. Supreme Court reaffirmed the applicability of *Penn Central* and *Lucas* to regulations that limit the use of land like the challenged zoning ordinances. *See Palazzolo v. Rhode Island*, 121 S. Ct. 2448, 2457 (2001). For many decades, there has been "no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits * * *." *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388 (1926) (citing *Welch v. Swasey*, 214 U.S. 91 (1909)).

The district court, however, refused to evaluate the challenged height restrictions under *Penn Central* and *Lucas*. Instead, the court ruled that the zoning constitutes a *per se* physical-invasion taking under *Loretto v. Teleprompter Manhattan CATV Corp*., 458 U.S. 419 (1982). *Loretto* holds that a *per se* taking occurs where the government authorizes a permanent, physical occupation of property. *Id.* at 426-41. *Loretto*'s *per se* rule is "very narrow" (*id*. at 441) and is expressly tied to the unique injury that occurs where the government requires a permanent occupation of land. *Id*. at 426 (where a government-compelled invasion "reaches the extreme form of a permanent physical occupation, * * *

the 'character of the government action' not only is an important factor in resolving whether the action works a taking but also is determinative."); *accord*, *Yee v. City of Escondido*, 503 U.S. 519, 527 (1992) ("The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."). Because the challenged zoning does not require or authorize any occupation of the landowners' property, the district court plainly erred in applying *Loretto*'s *per se* rule.

But the district court's errors did not stop there. It failed to recognize that even where physical invasions occurs from government-authorized aircraft overflights, *Loretto* still has no application. Rather, allegations of takings by overflights are governed by *United States v. Causby*, 328 U.S. 256 (1946). In language that could not be clearer, the *Causby* Court held:

> Flights 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. Notwithstanding this exacting standard, the district court found a "*Causby*-type" physical-invasion *per se* taking (*see* Appellant's App., vol. 27, at 5565-66, slip op. at 11-12), even though there is no evidence that the airspace at issue ever will be used by a single plane.

To our knowledge, never before has a court found a physical-invasion taking by overflights where the record falls so short of the requisite showing under *Causby*. The ruling below conflicts not only with *Causby,* but also with rulings from the highest courts of states across the country. By applying *Causby* so casually, and by ignoring the standards that apply to restrictions on land use, the district court improperly blurred the longstanding distinction between physical-invasion takings and regulatory takings, a distinction reaffirmed just last year by the U.S. Supreme Court. *See Palazzolo*, 121 S. Ct. at 2457.

At bottom, this is a straightforward case. The landowners argue that the challenged zoning works a *per se* physical-invasion taking due to the mere possibility of an inadvertent overflight that might someday invade the airspace over their property. But their novel physical-invasion theory flies headlong into *Causby* and decades of other precedent. The County's height restrictions do not authorize a single invasion of the airspace, much less result in overflights "so low and so frequent" that they directly and immediately interfere with the use of the land.

The challenged height restrictions are typical of those used by airports across the country. As explained below, federal law requires these protections as a condition of federal funding for airport development projects. The height restrictions help to prevent catastrophic collisions in the event of an unplanned deviation from normal flight paths, thereby protecting both the flying public and people on the ground from death or injury. If the County's zoning is deemed to be a compensable taking, airport authorities and planners across the state of Nevada and throughout the country would be handcuffed by the threat of huge compensation awards and unable to protect the public from devastating tragedies. The end result would be massive liability for existing airport authorities that adhere to the FAA's minimum safety standards, as well as a sharp curtailment of airport construction and expansion, yet another devastating blow to the airline industry and the traveling public.

ARGUMENT

Section I of this brief shows that, even assuming *arguendo* that the challenged zoning somehow "authorizes" overflights, the landowners failed altogether to establish that any invasion of their airspace would meet the stringent *Causby* standard that applies to takings by overflight. Section II demonstrates that the *per se* rule of liability for permanent physical occupations articulated in *Loretto* and other non-overflight cases does not apply here. Section III explains why the landowners' takings claim fails under the

Lucas and *Penn Central* tests that apply to height restrictions like the challenged zoning. Finally, Section IV highlights the dramatic, national implications of this case.

I. Longstanding Precedent Governing Overflights Shows that the County's Zoning Does Not Constitute a Physical-Invasion Taking.

A. Under *Causby*, Aircraft Cause a Physical-Invasion Taking Only Where Actual Overflights Are So Low and So Frequent that They Directly and Immediately Interfere with Land Use.

Because the landowners and the district court take such liberties with it, we begin by once again quoting the U.S. Supreme Court test that governs allegations of a physical-invasion taking by aircraft overflights:

> Flights 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.

Causby, 328 U.S. at 266. *Causby* "remains unbowed today as the leading pronouncement in the field" of overflight takings. R. Meltz, et al., THE TAKINGS ISSUE: CONSTITUTIONAL LIMITS ON LAND USE CONTROL AND ENVIRONMENTAL REGULATION 338 (1999). Although the district court purported to find a "*Causby* type" taking (s*ee* Appellant's App., vol. 27, at 5565-66, slip op. at 11-12), it nowhere acknowledged the *Causby* "so low and so frequent" standard.

On the facts before it, the *Causby* Court had little difficulty in finding a taking. The military overflights at issue were so low and frequent that the landowners were forced to abandon the existing use of the land as a commercial chicken farm. *Causby*, 328 U.S. at 259. Four-motored bombers, fighters, and transports "frequently passed over [the] land and buildings in considerable numbers and rather close together." *Id*. They blew the leaves off the trees, the noise was "startling," and at night the glare brightly lit up the sky. *Id*. About 150 chickens were killed by flying into the walls of the barn from fright. *Id*. "The result was the destruction of the use of the property as a commercial chicken farm." *Id*.

Causby's exacting standard reflects a balance between the needs of modern aviation and the plight of property owners who suffer frequent, disruptively low overflights. The *Causby* Court observed that although common law ownership of land "extended to the periphery of the universe * * *, that doctrine has no place in the modern world." *Id*. at 260-61. The Court emphasized that air travel "is part of the modern environment of life, and the inconveniences which it causes are normally not compensable under the Fifth Amendment." *Id*. at 266. The Court recognized, however, that "[i]f, by reason of the frequency and altitude of the flights, [the owners] could not use this land for any purpose, their loss would be complete," and a compensable taking would occur. *Id*. at 261. To address the special concerns raised by air travel, the *Causby* test contains a unique blend of trespass, nuisance, and takings law. *See* Meltz, *supra*, at 338.

In *Griggs v. County of Allegheny*, 369 U.S. 84 (1962), the U.S. Supreme Court again applied the *Causby* test to find a taking where "regular and almost continuous daily flights, often several minutes apart" flew so low over the claimant's home that the noise was "unbearable," comparable to the noise from a riveting machine or steam hammer, making it impossible to converse or sleep, rattling windows, causing plaster to fall from the walls and ceilings, and impairing the health of those in the house. *Id*. at 86-87. Under the *Causby* standard, it was clear that the airport glide paths resulted in actual overflights so low and so frequent as to directly and immediately interfere with the use of the claimant's home.

The *Causby* standard -- "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land" -- is a demanding test. In the words of one prominent takings treatise, "almost all successful overflight/takings cases involve * * * planes flying over *regularly* at less than 1,000 (usually less than 500) feet." Meltz, *supra*, at 342 (emphasis added). Moreover, "the stringent *Causby* 'direct and immediate interference' standard must always be satisfied." *Id*. As stated by the U.S. Court of

Federal Claims -- the court with jurisdiction over most takings claims against the United States -- a claimant alleging a physical-invasion taking by aircraft must show "that those flights were of such frequency that they substantially interfered with the use and enjoyment of the underlying land." *Persyn v. United States*, 34 Fed. Cl. 187, 196 (1995).

B. The County's Implementation of the FAA's Safety Standards Cannot Possibly Satisfy the *Causby* Test.

In both *Causby* and *Griggs*, the Court found a taking due to actual overflights that severely interfered with the existing surface use of the land: the chicken farm in *Causby* and the home in *Griggs*. In contrast, the landowners in the case at bar do not argue that the challenged height restrictions interfere in any way with the existing surface use of their land. Their claim is based entirely on a speculative, future use of the volume of air above their land based on the alleged proposed construction of a forty-story casino, a use that is inconsistent with the pre-existing, generally applicable zoning that applies to the land. For this reason alone, no taking has occurred under *Causby*.

To fully understand the practical significance of the landowners' physical-invasion theory, as well as the inapplicability of *Causby* to the challenged zoning, it is helpful to explain the relationship between the County's zoning and the FAA's Obstruction Standards.

The property at issue is not under an approach zone used for take-offs and landings. Rather, it falls in the "transition zone" defined by the transitional surface described in Part 77 of the FAA rules. *See* 14 C.F.R. § 77.25(e). The transition zone is adjacent to, and outside of, the actual approach zone. *Id.* These transition zones provide a buffer to the actual approach zone by extending outward and upward at a slope of 7 to 1 from the sides of the approach zone for 5000 feet. *Id*. The height limitations on structures within transition zones provide an extra margin of safety in the highly unlikely event that an

engine failure or other unplanned circumstance causes a deviation from the normal flightpath.

The FAA rules require that it be notified when anyone proposes to build or alter specified structures near an airport. *Id.* at § 77.13. The regulations specify several categories of structures as "obstructions," including any structure that penetrates the transitional surface or any other surface defined in § 77.25. *Id*. at § 77.23(a)(5). The FAA then conducts aeronautical studies to determine whether any structure deemed to be an obstruction constitutes an actual hazard to aviation. *Id*. at §§ 77.31-.39. A determination that an obstruction constitutes an air hazard, however, has no enforceable legal effect. *See Aircraft Owners and Pilots Ass'n v. FAA*, 600 F.2d 965, 967 (D.C. Cir. 1979) ("The FAA is not empowered to prohibit or limit proposed construction it deems dangerous to air navigation."). Instead, the Congress has left the enforcement of these protections to state and local governments. *See, e.g., Commonwealth v. Rogers*, 634 A.2d 245, 250 (Pa. Super. Ct. 1993).

State and local enforcement of the FAA's safety standards and hazard determinations often is a foregone conclusion because federal law requires such enforcement to qualify for federal funding for airport development projects. *See* 49 U.S.C. § 47107(a)(9) (requiring "appropriate action * * * mitigating existing, and preventing future, airport hazards" as a condition of federal funding). In the same vein, federal law also requires municipalities that receive federal funding to adopt appropriate, reasonable zoning laws "to restrict the use of land next to or near the airport to uses that are compatible with normal airport operations * * *." *Id*. at § 47107(a)(10).[1]

[1] These requirements were originally set forth in the Airport and Airway Improvement Act of 1982, P.L. 97-248, as amended. In 1994, this law was repealed and its provisions codified without substantive change at Title 49, U.S.C. *See* Codification of Certain U.S. Transportation Laws at 49 U.S.C., Pub. L. No. 103-272, 108 Stat. 745 (1994).

To help municipalities comply with these requirements, the FAA has prepared a model zoning ordinance that contains height restrictions that implement the Part 77 standards. *See* FAA Advisory Circular 150/5190-4A (1987) ("A Model Ordinance to Limit Height of Objects Around Airports") (available at www.faa.gov/arp/pdf/5190-4a.pdf). The Model Ordinance explains that because the FAA itself cannot regulate air hazards, "[t]he enactment of this proposed model zoning ordinance will permit the local authorities to control the erection of hazards to air navigation and thus protect the community's investment in the airport." *Id*. at Par. 5(h)(i). The Model Ordinance includes height restrictions that implement all of the Part 77 Standards, including those for transition zones. *Id*. at Appendix 1, Section IV, Par. 8 ("Transitional Zones"). The zoning ordinances challenged in this case are substantially similar to the FAA's Model Zoning Ordinance. *Compare id*. *with* Clark County Ordinance 1221, formerly codified at § 29.50.030 (B) (Airport zone height limitations, Transition Zones, Appellant's App., vol. 24, at 4858-74).

The foregoing provides two independent reasons why the challenged zoning does not effect a taking under *Causby*. First, the zoning imposes only height restrictions, and does not authorize any invasion of the airspace over the land at issue. Second, any unplanned or emergency invasion of the transition zone cannot possibly meet the *Causby* so-low-and-so-frequent standard so as to constitute a compensable taking. Indeed, such invasions might never occur at all. In the instant case, amici are informed that there is no evidence that any plane ever will actually invade the airspace over the landowners' land. Even if invasions of transition zones were a certainty, they do not occur with sufficient frequency to work a taking under *Causby*.

If the landowners' radical physical-invasion theory were adopted, it plausibly could be applied not only to all transition-zone property, but also property subject to *any* of the FAA Part 77 Obstruction Standards. Height restrictions in so-called horizontal and

conical zones, for example, extend for miles around an airport. 14 C.F.R. § 77.25 (a) & (b). Like the transition zones, the height restrictions for the horizontal and conical zones help to avoid catastrophic collisions in the event of an unplanned deviation from the flightpath. On the landowners' theory, any height restriction over property that might someday be invaded by an inadvertent overflight constitutes a taking, regardless of how infrequent the overflight. No court has ever adopted this radical theory, and nothing in *Causby* warrants this dramatic expansion of takings liability.

C. Courts Across the Country Have Uniformly Rejected the Landowners' "Reservation" Theory.

The landowners try to shoehorn the County's height restrictions into a physical-invasion theory by relying on deposition testimony of William Dunlay. *See* Appellant's App., vol. 23, at 4734-35. Mr. Dunlay acknowledged that a portion of the airspace over the landowners' property is part of the transition zone, and he observed that a plane might someday need to deviate from its normal flight path and use the airspace over this land. *See id.* at 4805-07. But Mr. Dunlay explained that it is unclear how frequently, if ever, a plane might need to invade that space:

> "Q. And [overflights in transition zones] may happen twice in a month or it may never happen in a year; is that correct? You just don't know?
>
> A. Don't know, uh-huh.
>
> Q. And is there any way, in your mind, of knowing when that actual transition zone surface is used by an airplane?
>
> A. Not really, no.

Id.

Despite the landowners' heavy reliance on this testimony, it is thoroughly unremarkable, for it adds nothing to what is already known about the purpose and effect of transition zones. It simply recognizes the reality that transition zones provide an extra

margin of safety in case of an unplanned deviation from the normal flightpath, deviations that rarely occur. Nevertheless, the landowners argue that any height restriction imposed to help avoid air collisions in transition zones "reserves" and thus takes the airspace, no matter how infrequent the invasion, and no matter how low the risk of actual overflight.

Federal and state courts across the country uniformly have rejected the landowners' radical theory. For example, in *Village of Willoughby Hills v. Corrigan*, 278 N.E.2d 658 (Ohio 1972), the Supreme Court of Ohio rejected an identical takings challenge brought by owners of land in a transition zone subject to a 70-foot height restriction. An intermediate appeals court had held that the ordinance imposing the transition zone height restriction, in effect, "provides what amounts to an air easement for approaching and leaving aircraft * * *." *Id*. at 662 n.7. The Ohio Supreme Court reversed, ruling that the challenge failed because "there was no claim of frequent low flights over plaintiff's land as was involved in [*Causby* and *Griggs*]." *Id*. at 663.

In *Fitzgarrald v. City of Iowa City*, 492 N.W.2d 659 (Iowa 1992), the Supreme Court of Iowa rejected a takings challenge to land-use and height restrictions on property used for a mobile home park within an approach zone of the Iowa City Municipal Airport. As in the instant case, the ordinance in *Fitzgarrald* largely mirrored the restrictions contained in the FAA's Part 77 obstruction standards. Ruling that "an avigation easement may be required when flights are so low and so frequent as to amount to a taking of property," *id*. at 663, the court rejected the landowners' physical-invasion claim because the record was "devoid of any evidence showing either the frequency or approximate altitudes of planes flying over plaintiffs' lands" and failed to show that any actual overflight reduced the land's value. *Id*. at 664-65.

In *Harris v. City of Wichita*, 862 F. Supp. 287 (D. Kan. 1994), landowners alleged that land-use restrictions on property within certain airport overlay districts (AODs) for McConnell Air Force Base effected a taking. *Id*. at 289-90. Although aircraft flew

directly over the claimants' land, the claimants did not challenge those overflights, only the use restrictions. *Id*. at 289. As in the case at bar, the restrictions in *Harris* allowed the claimants to continue the existing use of their land, but they prohibited the claimants from pursuing their plans for commercial uses. *Id*. at 290. And like the landowners here, the claimants in *Harris* argued that the land-use restrictions constituted a physical invasion of their land under *Loretto* by creating an easement. *Id*. at 291. The *Harris* court emphatically rejected this physical-invasion theory:

> Plaintiffs argue that the AOD restrictions actually create an easement over their property for military aircraft to use and an easement on their land for safer airplane crashes. The court disagrees. Although military and other aircraft fly over plaintiffs' property in approach and take-off, it is not the AOD regulations that permit this. Furthermore, the AOD restrictions do not permit airplane crashes on plaintiffs' property. Rather, they restrict land uses so that in the event of such a crash, the impact is felt by as few people as possible.

Id. at 291. Myriad other rulings are in accord.[2]

The landowners would have this Court ignore the *Causby* standard -- "so low and so frequent as to be a direct and immediate interference" -- and hold that a height restriction combined with the mere risk of an overflight, however remote, constitutes an

[2] *E.g.*, *Garamella v. City of Bridgeport*, 63 F. Supp. 2d 198, 202 (D. Conn. 1999) (physical-invasion taking from overflights occurs "[w]here the frequency and altitude of the flights prevent the property owner from using the land for any purpose"); *Persyn*, 34 Fed. Cl. at 207 (no taking where the claimants failed to "establish that aircraft flew directly over the subject parcels, or the altitude or number of such aircraft, and interference with the use and enjoyment of those parcels"); *Powell v. United States*, 1 Cl. Ct. 669, 674 (1983) (no taking because military aircraft overflights were not "sufficiently frequent or sufficiently noisy to cause substantial interference with the use and enjoyment" of the land); *Moore v. United States*, 185 F. Supp. 399, 400 (N.D. Tex. 1960) (no taking absent evidence of "physical invasion of plaintiffs' property by a sufficient number of aircraft as to interfere with the use and enjoyment thereof"); *Richmond, Fredericksburg, & Potomac R.R. Co. v. Metropolitan Wash. Airports Auth.*, 468 S.E.2d 90, 97 (Va. 1996) (no taking, notwithstanding 23,000 annual overflights, due to lack of evidence on "the types of aircraft using the runway, the height at which they passed over the property, or the frequency of landings"); *Harrell's Candy Kitchen, Inc. v. Sarasota-Manatee Airport Authority*, 111 So. 2d 439 (Fla. 1959) (height restrictions in airport zoning did not effect a taking); *Claassen v. City and County of Denver*, 30 P.3d 710, 712-13 (Colo. Ct. App. 2001) (absent an actual physical invasion into the airspace above the claimant's property but below the navigable airspace, there is no physical taking).

automatic taking. Even if it were certain that a plane would invade a transition zone on occasion, the invasions would come nowhere near meeting the *Causby* standard for takings by overflights. This Court should decline the landowners' radical invitation.

D. The Landowners' Cases Are Easily Distinguished and Fail to Support Their Novel "Reservation" Theory.

In their submissions to date, the landowners have failed to cite a single case holding that a physical-invasion taking occurred based on the mere risk of an inadvertent overflight. For instance, in *Sneed v. County of Riverside*, 32 Cal. Rptr. 318 (Dist. Ct. App. 1963) -- the overflight case that receives the most attention in the landowners' summary judgment motion -- the plaintiff alleged that "large numbers of aircraft take off and land, [and] fly at low altitudes over plaintiff's property pursuant to instructions from the employees of defendant County." *Id*. at 320. The court found a taking but expressly distinguished the airport ordinance before it from traditional height restrictions that involve no invasion or trespass. *Id*. Nothing in *Sneed* suggests that a physical-invasion taking occurs based on the mere risk on an occasional, inadvertent invasion of airspace.

Like *Sneed*, most of the other cases cited by the landowners involve property directly in the approach zone or glide path and thus address actual physical intrusions of airspace by continuous overflights.[3] Another case cited by the landowners resulted in total

[3] *E.g.*, *Town of East Haven v. Eastern Airlines*, 331 F. Supp. 16 (D. Conn. 1971) (finding a taking where planes passed over land several times a day at low altitudes; no taking where land was subject to only occasional overflights); *McShane v. City of Faribault*, 292 N.W.2d 253, 255 (Minn. 1980) (finding a taking based on zoning of "land lying just beyond airport runways" to be used for approaches); *Indiana Toll Road Comm'n v. Jankovich*, 193 N.E.2d 237, 238 (Ind. 1963) (finding a taking of a road in the "inner area approach zone" of a runway.); *Roark v. City of Caldwell*, 394 P.2d 641, 642 (Idaho 1964) (finding a taking based on zoning for take-off and landing approaches that limited portions of the claimant's land to agriculture uses); *Jackson Mun. Airport Auth. v. Evans*, 191 So. 2d 126, 128-29 (Miss. 1966) (finding a taking where city ordered a landowner to remove trees that "constitute[d] a serious obstruction to aircraft landing and taking off" within the approach zone); *Hageman v. Board of Trustees of Wayne Township*, 251 N.E.2d 507, 512 (Ohio Ct. App. 1969) (invalidating airport zoning for a corridor used in take-offs and landings); *Ackerman v. Seattle*, 348 P.2d 664, 668 (Wash. 1960) (finding a taking based on "continuing and frequent low flights over the appellants land").

loss of value,[4] and thus is easily distinguished from the case at bar where the landowners may continue to make economically viable use of their land. In two other cases cited by the landowners, the height restrictions at issue did not cause a taking, but the ordinances were struck down for procedural or substantive due process violations irrelevant to the instant case.[5] Other cases relied on by the landowners involve condemnation proceedings to determine the value of an avigation easement for actual, regular overflights of land under approach zones.[6] None of these cases suggests that a court may find a physical-invasion taking based on the mere possibility that an occasional, inadvertent overflight might occur.

Because they can draw no support from overflight cases, the landowners argue by analogy, suggesting that the county's height restrictions be viewed as similar to a runaway

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[4] *See Yara Eng'g Corp. v. City of Newark*, 40 A.2d 559 (N.J. 1945) (finding a taking where an airport ordinance restricted all development of salt marsh and left it with only nominal value.).

[5] *Peacock v. County of Sacramento*, 77 Cal. Rptr. 391, 403 (Ct. App. 1969) (height restriction was "reasonable up to a point in time," but effected a taking in conjunction with "cumulative effect with the other county enactments" and an 11-year planning process which acted to "freeze development of any meaningful kind."); *Kissinger v. City of Los Angeles*, 327 P.2d 10, 15-16 (Cal. Ct. App. 1958) (spot downzoning was struck down as "arbitrary, discriminatory * * * and without due process of law" because it was enacted as an emergency ordinance without public hearings, property was treated differently than other property within the flight path, and the "inference [was] clear that the true purpose…was to prevent the improvement of the subject property in order that it might be acquired at a lesser price for airport purposes.").

[6] *United States v. 48.10 Acres of Land*, 144 F. Supp. 258 (S.D.N.Y. 1956) (condemnation of easements for glide path needed for landings and take-offs); *United States v. 4.43 Acres of Land*, 137 F. Supp. 567 (N.D. Tex. 1956) (same); *Minkowitz v. City of West Memphis*, 406 S.W.2d 887, 888 (Ark. 1966) (condemnation proceeding for a "clear zone approach or avigation easement" on land "directly north" of the runway); *Dolezal v. City of Cedar Rapids*, 209 N.W.2d 84, 87 (Iowa 1973) (condemnation of a "clear zone approach" for the glide zone and the right to install and maintain obstruction lights); *Bowling Green-Warren Co. Airport Bd. v. Long*, 364 S.W.2d 167, 171 (Ky. Ct. App. 1963) (condemnation for airport approach zones, including the "right to a certain use of the air space"); *Kupster Realty Corp. v. State of New York*, 404 N.Y.S.2d 225 (N.Y. Ct. Cl. 1978) (condemnation proceeding in which landowners claim consequential damages from the noise caused by overflights within the condemned easements).

truck ramp or a permanent government reservation of a table at a private restaurant. These analogies fail, however, because unlike those situations, the County has not invaded private property to build a structure (as in the truck ramp hypothetical) nor authorized the invasion of property (as in the restaurant analogy).

A more apt analogy would be a setback requirement on lots adjacent to a busy, government-built street imposed to reduce fatalities in case a car accidentally swerves off the road. It is indisputable that reasonable setback requirements are not takings. *See, e.g., Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 498 (1987) (reasonable setback requirements are not compensable) (citing *Gorieb v. Fox*, 274 U.S. 603 (1927) (upholding setback requirement)). Setback requirements that enhance traffic safety do not "reserve" or otherwise take private property, but simply provide a margin of safety in case a vehicle is forced to veer off from the normal flow of traffic onto the land. In the same way, the County's height restrictions do not reserve or otherwise take the landowners' airspace for public use, but instead simply reduce air hazards in case a plane is forced to deviate from the normal flight path.

The landowners' physical-invasion theory is particularly disturbing in light of the tragic events of September 11. Suppose New York City were to impose a height restriction that prohibits new skyscrapers on the World Trade Center site due to the risk of another terrorist attack, but allowed other economically viable uses of the land. No reasonable person would view this as a municipal "reservation" of air rights. But on the landowners' theory, if the purpose of a height restriction is to remove obstacles from potential flight paths, the restriction is a compensable taking regardless of how frequently an actual invasion occurs (if at all), and regardless of whether the restriction denies economically viable use of the land. Nothing in takings jurisprudence warrants this absurd result.

II. The County's Zoning Does Not Amount to a *Per Se* Taking under *Loretto* and Other Physical-Invasion Cases.

As described above, a well-developed and nuanced body of overflight takings law rules out the possibility of a taking on the undisputed facts of this case. Not surprisingly, the landowners avoid extensive discussion of the *Causby* standard and argue instead that the mere risk of rare overflights should be viewed as a permanent, physical occupation of land and thus a *per se* taking under *Loretto*.

Their reliance on *Loretto* is misplaced for two reasons. First, nothing in the County's zoning authorizes a physical invasion of their land. Absent such government compulsion, no *Loretto* taking occurs. *See Loretto,* 458 U.S. at 440 (distinguishing cases in which the government does not require a physical occupation); *accord, Yee*, 503 U.S. at 527 (rejecting a *Loretto* challenge to rent control absent evidence of a compelled permanent occupation: "The government effects a physical taking only where it *requires* the landowner to submit to the physical occupation of his land."); *Federal Communications Comm'n v. Florida Power Corp*., 480 U.S. 245, 252 (1987) (rejecting a *Loretto* challenge to federal controls on fees paid by cable television operators for use of utility poles absent evidence of a compelled permanent occupation: "This element of required acquiescence is at the heart of the concept of occupation [under *Loretto*'s *per se* rule]).

Second, and more fundamentally, the landowners' argument misses the entire point of *Causby* and *Griggs* on the one hand, and *Loretto* on the other: there is a fundamental difference between overflights and actual trespass on land by permanent physical occupations.

This distinction derives from the very roots of physical-invasion takings cases in the common law of trespass.[7] The law of trespass on land is absolute: any intentional trespass on land is actionable, regardless of the extent of the invasion or the quantum of damages. *See* RESTATEMENT (SECOND) OF TORTS, § 166. The law of trespass of airspace is far more forgiving, holding a private individual liable for trespass of airspace only when a flight (1) enters into the immediate reaches of the airspace next to the land; and (2) interferes substantially with the owner's use and enjoyment of the land. *See id.* at § 159.

This is the precise distinction drawn in *Causby* and *Griggs*, and it is a distinction drawn from practical necessity. In the words of *Causby*, "[c]ommon sense revolts at the idea" that every invasion of airspace constitutes a taking. 328 U.S. at 260. "To recognize such private claims" the Court held, "would clog these highways, seriously interfere with their control and development in the public interest." *Id*. at 261.[8] Thus, the Court held "[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; *accord, Brown v. United States*, 73 F.3d 1100,1104 (Fed. Cir. 1996) ("unlike a government invasion of the surface land itself, an invasion of airspace above surface land does not *per se* constitute a taking.")

While the Court in *Causby* and subsequent cases has described overflights as "in the same category as invasions of the surface," 328 U.S. at 265, this does not mean that any invasion of airspace is a *per se* taking. To the contrary, *Loretto* makes absolutely clear that most invasions and occupations are not subject to its *per se* rule. 458 U.S. at 435 n.12 ("not every physical invasion is a taking."). Under *Loretto*, there is "a distinction between

[7] For example, the first sentence of the U.S. Supreme Court's first physical-invasion takings case, *Pumpelly v. Green Bay*, 80 U.S. (13 Wall.) 166 (1872), states: "This is an action of trespass on the case * * *."

[8] *Cf. Richards v. Washington Terminal Co*., 233 U.S 546, 555 (1914) (rejecting absolute takings liability for the invasions of soot and smoke by railroads because of fear that such suits "bring the operation of railroads to a standstill.").

a permanent physical occupation, a physical invasion short of an occupation, and a regulation that merely restricts the use of property." *Id*. at 430.

Physical invasions short of permanent physical occupations are "subject to a more complex balancing process to determine whether they are a taking." *Id*. at 435 n.12.[9] Examples abound. In flood cases such as *Sanguinetti v. United States,* 264 U.S. 146 (1924), the Court ruled that "to create an enforceable liability against the government it is at least necessary that the overflow be the direct result of the structure, and constitute an actual, permanent invasion of the land amounting to an appropriation of and not merely an injury to the property." *Id*. at 149. In cases involving invasions of soot and smoke from railroads, the rule from *Richards v. Washington Terminal Co*., 233 U.S 546 (1914), is that such invasions are not takings unless the invasion is "direct and peculiar and substantial." *Id*. at 557.

The universal conclusion of courts addressing airplane overflights is that invasions of airspace constitute takings only where they are both low and frequent. No court to our knowledge (except the district court in this case) has extended the *Loretto per se* rule to cover potential, sporadic overflights. This court should decline the landowners' invitation to be the first high court in the country to adopt such an extreme and unworkable rule.[10]

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[9] *See also Loretto*, 458 U.S. at 433 ("in cases of physical invasion short of permanent appropriation, the fact that the government itself commits an invasion from which it directly benefits is one relevant factor in determining whether a taking has occurred." (citing *Penn Central*)); *United States v. Cress*, 243 U.S. 316, 328 (1917) ("it is the character of the invasion * * * that determines the question whether there is a taking.").

[10] *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), provides no support for the landowners' argument that *Loretto*'s *per se* rule applies to this case. *Nollan* involved a straightforward application of *Loretto*, holding that where the government requires a landowner to permit beachfront property to be continuously traversed by strangers, there is a permanent physical occupation "even though no particular individual is permitted to station himself permanently upon the premises." 483 U.S. at 832. *Nollan* is clearly distinguishable from the case at bar. First, *Nollan* involved actual invasions onto the land, an evisceration of the right to exclude that is qualitatively more complete than potential invasions of airspace above reasonable height restrictions. Second, in contrast to the continual access demanded by the government in *Nollan*, the regulations at issue here do not authorize anyone to invade the airspace above landowner's property, *ever.* Indeed,

III. The County's Zoning Does Not Effect a Regulatory Taking under *Lucas* or *Penn Central*.

The County's zoning is properly analyzed under the cases that govern regulatory takings challenges to restrictions on land use. To date, the landowners have made no effort to contend that the challenged zoning amounts to a regulatory taking. Nor could they reasonably do so.

Under *Lucas*, a *per se* regulatory taking may occur where regulation denies a landowner all economically viable use of the claimant's entire parcel. *Lucas*, 505 U.S. at 1015-19; *accord*, *Palazzolo*, 121 S. Ct. at 2464-65 (no *per se* taking occurs under *Lucas* unless regulation leaves land valueless or with only nominal value). It is undisputed that the challenged zoning does not interfere with the landowners' ability to continue to pursue their current economically viable uses of the land, or any other use consistent with the county's height restrictions. Amici are informed that the landowners continue to earn substantial revenue from their operation of a trailer park, lounge, and billboard operation. Thus, there is no *per se* taking under *Lucas*.

Importantly, the landowners should not be permitted to segment their property into discrete portions in an attempt to show a denial of all use of the airspace over their property. In assessing economic impact, takings jurisprudence requires consideration of not just the affected airspace, but the landowners' entire parcel. *E.g. Fitzgarrald*, 492 N.W.2d at 665-66 (no taking where airport zoning ordinance did not deny the landowners economically viable use of the surface of their land despite reduction in market value);

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there is no evidence that the landowner's airspace in fact will be invaded. Again, there is a qualitative difference between the authorized, continuous access to a popular stretch of California beachfront demanded in *Nollan*, and the mere potential for unauthorized sporadic invasions of airspace. Moreover, *Nollan* cites neither *Causby* nor *Griggs*, and the Court gave absolutely no indication that it was intending to change the long-established rules laid out in *Causby* and applied by courts throughout the country in addressing overflight takings claims. It is putting it mildly to say that reading *Nollan* to overrule the overflight-specific test laid out in *Causby* would be an extravagant and completely unwarranted leap. More so today than 55 years ago, "common sense revolts" at the landowners' proposed rule. 328 U.S. at 260.

Cheyenne Airport Bd. v. Rogers, 707 P.2d 717, 731 (Wyo. 1985) (in assessing the economic impact of airport zoning, the court must look to "the impact of the regulation on the plot as a whole").

The U.S. Supreme Court expressly articulated this "parcel-as-a-whole" rule more than twenty years ago in *Penn Central*, where New York City applied historic preservation laws to deny the owners of Grand Central Terminal permission to build an office building atop the Terminal. The Court rejected the owners' argument that takings analysis should focus solely on the air rights above the Terminal, stating:

> "Taking" jurisprudence does not divide a single parcel into discrete segments and attempt to determine whether rights in a particular segment have been entirely abrogated. In deciding whether a particular governmental action has effected a taking, this Court focuses rather * * * on the nature and extent of the interference with rights in the parcel as a whole -- here, the city tax block designated as the "landmark site."

Penn Central, 438 U.S. at 130-31. Because the owners could still operate Grand Central Terminal and the surrounding contiguous properties that they owned, the challenged regulation did not deny them all economically viable use of their entire parcel, and the Court rejected the takings claim. *Id*. at 136-38; a*ccord*, *Concrete Pipe & Prods. of Cal., Inc. v. Construction Laborers Pension Trust for S. Cal.*, 508 U.S. 602, 643-44 (1993) ("To the extent that any portion of property is taken, that portion is always taken in its entirety; the relevant question, however, is whether the property taken is all, or only a portion of, the parcel in question."); *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 500 (1987) (*Penn Central* precludes reliance on "legalistic distinctions" to segment property rights in takings cases). Virtually all courts that have addressed the issue have followed *Penn Central, Keystone*, and other binding precedent to hold that the relevant parcel for takings analysis consists of the claimant's entire contiguous property, not just the affected portion.[11]

[11] *E.g., District Intown Props. Ltd. P'ship v. District of Columbia,* 198 F.3d 874, 881 (D.C. Cir. 1999) (relevant parcel includes both the affected and unaffected portions of the

Where, as here, height restrictions or other land-use controls do not deny all economically viable use of the claimant's entire parcel, they are analyzed under a multi-factor test set forth in *Penn Central*, which requires courts to examine (1) the economic impact of the regulation; (2) whether it interferes with the landowner's distinct, investment-backed expectations; and (3) the character of the challenged government action. *Penn Central*, 438 U.S. at 124. Again, the landowners have not argued that the challenged zoning amounts to a regulatory taking under *Penn Central*. Nor could they.

There is "no serious difference of opinion in respect of the validity of laws and regulations fixing the height of buildings within reasonable limits * * *." *Village of Euclid*, 272 U.S. at 388. The authority to restrict the height of buildings is one of the most common powers granted to municipalities. The first section of the Standard State Zoning Enabling Act of 1924 ("SZEA"), which has served as the model for zoning enabling laws in all 50 states, provides: "For the purpose of promoting health, safety, morals, or the general welfare of the community, the legislative body of cities and incorporated villages is hereby empowered to regulate and restrict the height, number of stories, and size of buildings and other structures * * *." SZEA, Sec. 1, *quoted in* J. Juergensmeyer & T. Roberts, LAND USE PLANNING AND CONTROL LAW 46 (1998). It would be ironic indeed if the Takings Clause were read to require compensation for height restrictions imposed to

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owner's parcel); *Tabb Lakes, Ltd. v. United States*, 10 F.3d 796, 802 (Fed. Cir. 1993) ("[T]he quantum of land to be considered is not each *individual* lot containing wetlands or even the combined area of wetlands. If that were true, the Corps' protection of wetlands via a permit system would, *ipso facto*, constitute a taking in every case where it exercises its statutory authority. [*Penn Central*] negates that view * * *."); *City of Annapolis v. Waterman*, 745 A.2d 1000, 1022 (Md. 2000) ("[T]he property to be assessed for economically viable use is, as we have said, the entire tract of land."); *K & K Constr., Inc. v. Department of Natural Res.*, 575 N.W.2d 531, 537 (Mich. 1998) ("[C]ontiguity and common ownership create a common thread tying these three parcels together for the purpose of the takings analysis"), *cert. denied*, 525 U.S. 819 (1998); *Zealy v. City of Waukesha*, 548 N.W.2d 528 (Wis. 1996) (relevant parcel included about 8.2 acres zoned as wetlands and 2.1 acres of contiguous property zoned for residential and commercial development).

enhance air safety, even though identical height restrictions are not compensable takings under longstanding precedent if imposed to enhance aesthetics or preserve historic structures.

Moreover, amici are informed that the landowners bought the property after imposition of the challenged zoning, and thus there was no interference with any reasonable, investment-backed expectations. *E.g.*, *Cheyenne Airport Bd.*, 707 P.2d at 732 (because the landowners acquired the land after the airport zoning ordinance had been in effect, it is "unlikely that [they] have suffered loss of 'distinct, investment-backed expectations'") (quoting *Penn Central*); *Fitzgarrald*, 492 N.W.2d at 665 ("Absent some physical invasion, however, a taking does not occur until there has been a substantial interference with investment-backed expectations."). Although *Palazzolo* holds that post-enactment acquisition of land is not always dispositive in regulatory takings cases (121 S. Ct. at 2462-64), it is clear that post-enactment acquisition remains highly relevant to landowner expectations under *Penn Central*. *See id.* at 2465-67 (O'Connor, J., concurring); *id*. at 2471 n.6 (Stevens, J., concurring in part and dissenting in part); *id*. at 2477 n.3 (Ginsburg, J., joined by Souter & Breyer, JJ., dissenting); *id*. at 2477-78 (Breyer, J., dissenting); *Ruckelshaus v. Monsanto Co*., 467 U.S. 986, 1006-07 (1984) (lack of interference with expectations defeated a portion of a takings challenge to federal pesticide law).

Nor have the landowners shown the kind of severe economic loss sufficient to establish a regulatory taking under *Penn Central*. Because the land at issue retains significant value and may continue to be put to economically viable use, no regulatory taking has occurred. *E.g. District Intown Props. Ltd. P'ship v. District of Columbia,* 198 F.3d 874, 883 (D.C. Cir. 1999) (A "claimant must put forth striking evidence of economic effects to prevail under the [*Penn Central*] ad hoc inquiry."); *Animas Valley Sand & Gravel v. Board of County Comm'rs*, 38 P.3d 59, 67 (Colo. 2001) (a non-*per se* taking

under *Penn Central* occurs only where regulation leaves a landowner with "a value slightly greater than de minimis").

Finally, the character of the government action weighs heavily against a finding of a taking. The challenged air safety protections advance "the highest of public interests -- the prevention of death and injury." *First English Evangelical Lutheran Church v. County of Los Angeles*, 258 Cal. Rptr. 893, 904 (Ct. App. 1989).

In short, every factor in the *Penn Central* inquiry weighs against a finding of a taking.

IV. A Ruling for the Landowners Would Have Devastating Consequences for Air Safety and Municipal Budgets Throughout Nevada and Across the Country.

The national implications of this case cannot be emphasized too strongly. In recent decades, air traffic has experienced rapid growth. Airline deregulation in 1978 resulted in a near doubling of traffic at U.S. airports by 1989.[12] Because most major airports were designed decades ago and did not adequately anticipate future growth, they require significant expansion to keep up with increased demands. The consolidation of air traffic into hub airports also necessitates the construction of new runways at many airports.[13] In the face of these and other pressing problems in the aftermath of September 11, the aviation industry and the general public can ill-afford an unprecedented, wholly unjustified expansion of takings liability as it relates to zoning that implements FAA minimum safety standards.

In the wake of the landowners' $22 million judgment awarded by the district court, numerous other landowners are pursuing similar claims against the County, many seeking compensation in excess of several million dollars. Every landowner whose property is

[12] *See* Steven H. Magee, *Protecting Land Around Airports: Avoiding Regulatory Takings Claims by Comprehensive Planning and Zoning*, 62 J. AIR L. & COM. 243, 243 & n.1 (1996) (citing sources).

[13] *Id*. at 243-44.

transected by a transition zone would have a valid takings claim under the district court's ruling. Any landowner covered by a horizontal or conical zone, which extend for miles beyond airports, could file a claim under the same theory, arguing that because an unplanned deviation might result in the invasion of the airspace above the property, compensation is due. There is little doubt that affirmance of the district court's ruling would wreak havoc on municipal budgets across the state.

And make no mistake, the impact of this case extends far beyond the County of Clark and the State of Nevada. The County's zoning is typical of those used at airports across the country. Municipalities and owners of land near airports across the country are watching this case. In view of the enormous stakes involved, amici urge this Court to reject the landowners' radical physical-invasion theory, adhere to *Causby* and progeny, and reverse the ruling below. Public safety, the public fisc, and the sound development of takings jurisprudence hang in the balance.

CONCLUSION

The judgment below should be vacated and the trial court directed to enter summary judgment for Appellant County of Clark.

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RESPECTFULLY SUBMITTED this 18th day of March, 2002.

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CERTIFICATE OF COMPLIANCE

I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular N.R.A.P. 28(e), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript of appendix where the matter relief on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

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