Supreme Court, State of Colorado 2 E. 14th Ave., Denver, CO 80203	
Court of Appeals No. 2015CA1159 Opinion, J. Román; Concurring JJ. Lichtenstein, Freye Boulder County District Court No. 2013CV31563 Honorable Judith J. LaBuda, Judge	▲ COURT USE ONLY ▲
CITIZENS FOR QUIET SKIES, KIMBERLY GIBBS, TIMOTHY LIM, SUZANNE WEBEL, JOHN BEHRENS, CARLA BEHRENS, and RICHARD DAUER, Plaintiffs/Appellants/Petitioners. **v.** MILE-HI SKYDIVING CENTER, INC., Defendant/Appellee/Respondent.	
Attorneys for Petitioners: Randall M. Weiner, #23871 Annmarie Cording, #42524 Law Offices of Randall M. Weiner, P.C. 3100 Arapahoe Avenue, Suite 202 Boulder, Colorado 80303 Phone Number: 303-440-3321 Fax Number: 866-816-5197 randall@randallweiner.com annmarie@randallweiner.com	Case Number: 2017SC154
REPLY IN SUPPORT OF PETITION FOR CERTIORARI	

Petitioners respectfully submit their Reply in support of their Petition for

Certiorari, responding to the Brief in Opposition to Petition for Writ of Certiorari ("Opposition") of Respondent Mile-Hi Skydiving Center, Inc. ("Mile-Hi"), as follows:

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules.

Specifically, I certify that:

The brief complies with C.A.R. 32.

The brief complies with C.A.R. 53(d) because it contains 1,281 words, which is less than the 3,150 word limit.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 32 and C.A.R. 53.

//s// Randall M. Weiner
Randall M. Weiner, #23871

I. CONTRARY TO THE LOWER COURT RULINGS, AND MILE-HI'S IMPLICATION TO THE CONTRARY, THIS COURT'S *CENTENNIAL* DECISION IS STILL CONTROLLING LAW THAT LOCAL AIRPORT AUTHORITIES HAVE PROPRIETARY POWERS EXCEPTED FROM FEDERAL PREEMPTION.

Mile-Hi admits that "there is no question that this case has received a lot of publicity and attention in the Longmont community," Opposition at 3, and does not dispute the proposition of law that local airport authorities have proprietary powers to regulate aircraft noise.

Mile-Hi argues, rather, that there is no important reason for granting *certiorari* because, after this Court's decision in *Arapahoe Cnty. Pub. Airport Auth. v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) ("*Centennial*"), the Tenth Circuit purportedly found to the contrary. Opposition at 14-15. This is greatly misleading and does not refute the importance of this case or the need for this Court to address it.

The Tenth Circuit decision did not hold that local airports have no proprietary powers to regulate aircraft as Mile-Hi implies,[1] but rather only that preemption in that case was justified because the FAA found that the Centennial authority exercised its proprietary powers unreasonably. *See id*. at 1224. Here, the

[1] *Arapahoe Cnty. Pub. Airport Auth. v. FAA*, 242 F.3d 1213 (10th Cir. 2001) ("The preemption provision does not, however, prevent a state or political subdivision of a state from carrying out its 'proprietary powers…'").

District Court's decision conflicts with both *Centennial* and the Tenth Circuit decision by denying that such local proprietary powers even *exist* in the first place.

In that sense, this case is significant because it allows this Court to reaffirm that local airport authorities *do* have proprietary powers, as *Centennial* held, even *after* the Tenth Circuit ruling, a proposition that Longmont and others apparently believe is in doubt after the District Court's decision here. Further, the Court has special and important reasons here to affirm that state district courts must follow its decisions, to the fullest extent not barred by outright federal preemption.

II. PETITIONERS' APPENDICES, ATTACHED TO THE PETITION FOR *CERTIORARI*, WERE RELEVANT AND PROPER FOR THIS COURT IN DETERMINING WHETHER THERE ARE "SPECIAL AND IMPORTANT" REASONS FOR HEARING THIS CASE.

Mile-Hi cites to no authority stating appendices to a *certiorari* petition must be part of the record. A petition for writ of *certiorari* must include an appendix containing a copy of the Court of Appeals' opinion and the text of any pertinent statute or ordinance, and the Rule does not specify that these or any other appendices must be part of the record. C.A.R. 53(a)(6).

Should this Court determine to grant *certiorari* on one or more of the issues presented, it will be limited to review of the record when making its determination of the issue(s) on review. *See Loomis v. Seely*, 677 P.2d 400, 401 (Colo.App. 1983). However, Petitioners have found no similar restriction on this Court's

consideration of a *certiorari* petition. In fact, C.A.R. 49 provides "Considerations Governing Review on *Certiorari*" and there is no requirement that these considerations must come exclusively from record support. *See, e.g.*, Rule 49(a) ("special and important reasons therefore"); Rule 49(a)(1) (this Court may consider a new "question of substance"); 49(a)(2) (same); 49(a)(3) (this Court may consider whether when there is "decision in conflict" with other jurisdictions); 49(a)(4) (this Court may consider whether the Court of Appeals "so far departed from the accepted and usual course of judicial proceedings…."). Given the nature of the Rule 49 considerations, the record by itself may frequently not provide all the reasons for a grant of *certiorari*. *See id*. (these factors do not "fully measur[e] the Supreme Court's discretion…"). Further, indications about the practical effect of a court's decision, and interpretation by others such as municipalities, could *not*, by their very nature, come into existence *before* a record, and a ruling upon it, have been issued. Mile-Hi's position would restrict an important function of the State's highest court, i.e., to consider the practical effect of lower court decisions in determining whether to hear cases before it.[2]

[2] Notably, this Court commonly considers extra-record materials submitted by *amici* about the effects and practical effects of its own potential decisions when they "would be helpful to the court." C.A.R. 29(b).

III. PETITIONERS' HAVE NOT MISSTATED THE LOWER COURTS' HOLDINGS; RATHER, MILE-HI MISSTATED THE LOWER COURT RULINGS AS RECOGNIZING, RATHER THAN REPUDIATING, AIRPORT PROPRIETARY POWERS.

Unfortunately, much of Mile-Hi's Opposition engages in personal attacks on Petitioners that are unfounded.[3] In that vein, for example, Mile-Hi argues that Petitioners "misstated" the fact that the District Court held that "Colorado airports are completely subservient to the Federal Aviation Administration ("FAA") under the doctrine of preemption." Opposition at 5. To the contrary, this is precisely what the District Court determined:

- "...[L]ocal government and airport operators, pursuant to federal regulations, have no authority to impose [noise] restrictions on aircraft operations." Appx. 2 to Petition for *Certiorari*, p. 2, ¶60.

- "The City is prohibited by federal law from imposing limitation on aircraft operations for the purposes of controlling noise without FAA approval." *Id*. at p. 12, ¶69.

[3] The Opposition at 4-5 contains two paragraphs of unsubstantiated allegations that Petitioners missed deadlines, failed to adhere to appellate rules, or made misrepresentations. Mile-Hi threatens to seek "fees and costs on appeal. Opposition at 5. Tellingly, Mile-Hi never raised the issue of fees in its briefs to the Court of Appeals, a prerequisite to obtaining such fees. C.A.R. 28(b) and 39.1; *see also In re Newell*, 192 P.3d 529 (Colo. App. 2008).

Of course, it is these District Court statements, as upheld by the Court of Appeals in an unpublished decision, that directly conflict with the *Centennial* decision.[4]

Rather, it is Mile-Hi that has misstated a material fact by stating that the Court of Appeals "clarified that the City of Longmont exercised its authority as the *airport proprietor* by approving the Airport Master Plan and adopting the federal noise regulation for airplane noise of 65 dB." Opposition at 11 (emphasis added). One would search the lower court rulings in vain for any reference to the "airport proprietor" exception to FAA authority. Had the Court of Appeals addressed the "airport proprietor" exception, Longmont's, and presumably other airports' attempts to control airplane activities, including those that generate noise, would not now be in disarray.

WHEREFORE, Citizens respectfully request this Court grant their petition for *certiorari* on each of the issues requested.[5]

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[4] *Centennial*, 956 P.2d at 595 ("These cases hold that because they may be held liable for excessive noise, airport proprietors may restrict aircraft operations to accommodate permissible noise levels under the proprietor's exception.").

[5] Mile-Hi also threatens to seek fees for a "frivolous Petition for Writ of *Certiorari*," Opposition at 5, but provides no basis for doing so and never prays to this Court for such relief, apparently hoping to evade a ruling by this Court on this issue and go back to the District Court to request it. The Court should reject this tactic.

Dated this 23rd day of March, 2017.

Respectfully Submitted,
LAW OFFICES OF RANDALL M. WEINER, P.C.

s/ Randall M. Weiner
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CERTIFICATE OF SERVICE

I certify that on this this 23rd day of March, 2017, the foregoing Reply in Support of Petition for *Certiorari* was sent via ICCES, as follows:

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This document was filed electronically pursuant to C.A.R. 30. The original signed pleading is on file and available for inspection at the Law Offices of Randall M. Weiner, P.C.