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<tr><td>Supreme Court, State of Colorado
2 E. 14th Ave., Denver, CO 80203</td><td rowspan="3">▲ COURT USE ONLY ▲</td></tr>
<tr><td>Court of Appeals No. 2015CA1159
Opinion, J. Román; Concurring JJ. Lichtenstein, Freye

Boulder County District Court No. 2013CV31563
Honorable Judith J. LaBuda, Judge</td></tr>
<tr><td>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.</td></tr>
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<tr><td colspan="2">PETITION FOR CERTIORARI</td></tr>
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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(a) because it contains 3,678 words, which is less than the 3,800 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

TABLE OF CONTENTS

I. INTRODUCTION

The District Court opinion in this case received a great deal of publicity when it ruled that the City of Longmont, the owner of the Vance Brand Airport, had no power to regulate a private skydiving operation.[1] Longmont's city website currently reiterates the District Court's view that the City has no authority to regulate local airplane operations at its own airport. The Court of Appeals affirmation of the Trial Court in an unpublished decision perpetuates this belief, leading to confusion in Longmont and presumably airports throughout Colorado that have followed the case.

The District Court's opinion that Colorado airports are completely subservient to the Federal Aviation Administration ("FAA") under the doctrine of preemption directly contradicts this Court's ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, which endorsed the right of Colorado airport proprietors to impose limits on airplane operations, even to the extent of prohibiting passenger service at Centennial airport. However, neither the Appellate Court nor the District Court addressed *Centennial* or the numerous state and federal cases, and federal statutes, recognizing the "proprietor exception" to

[1] Since this case was filed, there have been at least a dozen Colorado newspaper articles published on the subject. Two such articles are included as Appendices 5 and 6.

FAA's jurisdiction over airplane operations, including noise. Petitioners respectfully stress the importance of this Court's granting *certiorari* to hear arguments on the scope of state authority, not only to alleviate the confusion the lower court opinion has engendered in Longmont, but to reassert the right of Colorado airport proprietors to regulate airplane operations at their own airports.

The lower court's misunderstanding concerning federal preemption led to a related error that Longmont's own noise ordinance had been supplanted by a federal noise matrix, and that systematic exceedances of the municipal ordinance were irrelevant to a determination of negligence *per se*. This Court should also grant *certiorari* on these issues.

II. ADVISORY LISTING OF ISSUES PRESENTED FOR REVIEW

A. Did the Court of Appeals' err in affirming the District Court's decision, which held that any state action involving airplane noise is preempted by federal law, which directly contradicts this Court's seminal preemption ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.* and leaves airport proprietors confused about their ability to regulate airplane operations at their own airports?

B. Did the Court of Appeals err by determining that Longmont's general noise ordinance, with its 55 decibel noise limit in neighborhoods adjacent to the Longmont airport, was supplanted by FAA's 65 decibel *metric* contained in Longmont's Airport Master Plan that was merely used to "*measure noise impacts*?"

C. Did the Court of Appeals err by not finding that systematic exceedances by Mile-Hi of the Longmont general noise ordinance constituted negligence *per se* as a matter of law?

III. OFFICIAL REPORTS BELOW

The Court of Appeals' decision, *Citizens for Quiet Skies, et al. v. Mile-Hi Skydiving Center, Inc.*, 15CA1159 (Colo.App. Dec 22, 2016), is included as Appendix 1.

The Order re: Bench Trial, dated May 21, 2015, is attached as Appendix 2 and can also be found at R. CF, pp. 2292-2304.

IV. GROUNDS FOR JURISDICTION

Jurisdiction for this petition is predicated on the Supreme Court's powers under Colo.Const. Article VI, §2, §3, C.R.S. § 13-4-108 and C.A.R. Rules 40, 49-56.

Both the District and Appellate Courts have decided this case "probably not in accord" with this Court's seminal ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) addressing an airport proprietor's authority to control operations at airports within Colorado. *See* C.A.R. 49(a)(2).

Review is sought for the Court of Appeals' June 23, 2016 decision below, *Citizens for Quiet Skies, et al. v. Mile-Hi Skydiving Center, Inc.*, 15CA1159 (Colo.App. Dec 22, 2016). A Petition for Rehearing was denied by the Court of Appeals on February 2, 2017. This petition is timely filed under C.A.R. 52(b)(3).

V. STATEMENT OF THE CASE

The Petitioners here, Citizens for Quiet Skies and six Longmont property owners ("Citizens"), brought this action to obtain injunctive relief to reduce the noise generated by a recreational skydiving company, Mile-Hi Skydiving Center, Inc. ("Mile-Hi"), operating out of the Vance Brand Municipal Airport ("LMO") in Longmont. Appx. 2 p. 2294, ¶8. Mile-Hi operates four planes, and additionally leases a fifth plane, and creates nuisance level noise from 7:00 AM until sunset all summer long. R. Tr. (4/13/15), 210:5-25; 213:4-18. On summer weekends, flights conducted by Mile-Hi take off from LMO every fifteen to twenty minutes. R. Ex. 2, p. 855; R. Tr. (4/13/15) 213:4-18. These aircraft then fly in a generally spiraling pattern, Appx. 2, p. 2298, ¶39; R. Ex. JJ, p. 682, while climbing heavily loaded for at least fifteen minutes to a "drop altitude" of 12,500 feet above ground level. R. Ex JJ, p. 680. When planes reach drop altitude, the planes temporarily

reduce propeller speed and release skydivers. R. Tr. (4/16/15), 1230:3-10. The planes then return to the airport for another trip.

Planes generally create the most noise while climbing. *Id.* at 982:13-16. Aircraft typically climb briefly while flying straight in one direction, and tend to fly away from the airport and the Petitioners' community. R. Tr. (4/13/15), 210:5-25. In contrast, Mile-Hi's flights create far more noise than any other aircraft operating from the airport because they typically climb rapidly three to six times higher (12,500 feet). R. Tr. (4/16/15), 1207:22. They also remain within a self-imposed confined area around the airport they call the "flight box," Appx. 2, p. 2296, ¶32, and frequently conduct repeated loops and multiple passes over the same properties on a single run. R. CF, p. 682. Mile-Hi conducts the majority of flights from LMO during periods of good weather when Petitioners are most likely to be outdoors on their properties. R. Ex. 2, pp. 855-56.

Following a five-day bench trial, the Trial Court ruled against the Petitioners on their claims for nuisance, negligence, and negligence *per se*. Appx. 2, p. 2302, ¶60. The Trial Court ruled that local governments are *prohibited* by federal law from regulating the noise of aircraft using municipal airports, without permission from the FAA. *Id.* at ¶¶ 37, 56, 60, 68, 69, 70, 72, 73.

The Court of Appeals upheld the District Court. The Appellate Court did not discuss *Centennial* or the proprietor's exemption. Instead, it affirmed based on the District Court's factual finding that Mile-Hi's noise was not sufficiently offensive. However, in doing so, the Appellate Court refused to apply the Longmont general noise ordinance (Longmont Municipal Code 10.20.110, the "LGNO") limit of 55 decibels because it ruled that the LGNO had been supplanted by Longmont's Airport Master Plan that contained FAA's 65 decibel *metric* used to measure noise impacts. *Compare* LGNO (Appendix 3) *with* Airport Master Plan (selected pages included as Appendix 4), at 2-32. Because it found the LGNO inapplicable, it also refused to determine if Mile-Hi was negligent *per se* for its systematic exceedances of the 55 decibel limit contained in the LGNO.

VI. ARGUMENT

A. The Court of Appeals' affirmance of the District Court's decision, which held that any state action involving airplane noise is preempted by the federal law, directly contradicts this Court's seminal preemption ruling in *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.* and leaves airport proprietors confused about their ability to regulate airplane operations at their own airports.

In *Arapahoe County Public Airport Authority v. Centennial Express Airlines, Inc.*, 956 P.2d 587 (Colo. 1998) (hereinafter "*Centennial*"), this Court

addressed the authority of airport proprietors under state law to manage the impacts of airplanes at Colorado airports. *Centennial* held that the Arapahoe County Public Airport Authority could significantly regulate airplane activity at its airport, even to the extent of banning an entire class of service. *Id.* at 596 ("[T]he Authority's ban on scheduled passenger service is a valid exercise of its proprietary powers that is not preempted by federal law.")

Centennial recognized and endorsed a broad interpretation of the "proprietor's exception" to FAA preemption, upholding a Colorado airport's ability to regulate noise:

> Federal courts have considered the scope of the proprietor's exception in two significant areas of airport management. The first, and most extensive, of these areas concerns an airport proprietor's ability to regulate airport noise. **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.** *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 635-36 n.14 …. (1973); *Santa Monica Airport Ass'n v. City of Santa Monica*, 659 F.2d 100, 104 (9th Cir. 1981); *British Airways Bd. v. Port Auth. of New York*, 558 F.2d 75, 84 (2d Cir. 1977).

Id. at 595 (emphasis added).[2]

[2] Longmont is an "airport proprietor" here. *Id.* at 595, n.10 ("For purposes of applying the proprietor's exception, a proprietor has been defined as one possessing or controlling ownership, operation, promotion, and the ability to acquire necessary approach easements.").

Previously, in *Banner Advertising v. City of Boulder ex rel. State*, 868 P.2d 1077 (Colo. 1994), this Court stated:

> A limited exception to this overall federal preemption has been carved out for state and local governments who own airports. *See City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624 (1973), *Aircraft Owners and Pilots Ass'n v. Port Authority of New York*, 305 F.Supp. 93 (E.D.N.Y. 1969); *Midway Airlines v. County of Westchester*, 584 F.Supp. 436 (S.D.N.Y. 1984)."

Id. at 1083, n.6.

Centennial and *Banner* were followed by *Paredes v. Air-serv Corp.*, 251 P3d. 1239, 1247 (Colo.App. 2010), which recognized that Colorado courts have jurisdiction over tort actions arising out of the practices of individual airlines. ("As a general matter, a suit for damages arising from the negligent conduct of an airline does not impede the free market competition of air carriers…").

Despite this unbroken line of Colorado cases establishing the authority of a municipal airport, like Longmont's, to regulate airline conduct, including noise producing activities, the District Court embraced the idea that the City of Longmont could *never* impose any regulations on the skydiving planes that use its airport. In its final order, the Trial Court premised its decision on the view that local governments are *prohibited* by federal law from regulating the noise of aircraft which use local airports without permission from the FAA. Appx. 2, pp. 2292-2304, ¶¶37, 56, 60, 68, 69, 70, 72, 73. *See, e.g.*, Appx. 2, p. 2302, ¶60 ("A

local government or airport operator cannot prohibit an aircraft that is otherwise in compliance with FAA regulations from flying in order to decrease noise levels, as local government and airport operators, pursuant to federal regulations, have no authority to impose such restriction on aircraft operations.").

Longmont's attempts to control airplane activities are now in disarray. The District Court's restrictive view of state authority has essentially frozen all attempts by Longmont to regulate local skydiving airplanes, no matter how injurious to its citizens or their private property.

For instance, the day after the District Court's ruling, the local newspaper regurgitated the Court's finding that Longmont cannot control its own local airplane operations:

> "A central question has been dividing the Longmont and surrounding community for the last five or six years – who can control noise in the sky?
>
> Boulder District Judge Judith LaBuda answered that question Thursday afternoon, telling a group of Longmont and Boulder County residents in a ruling that they should take their problem with Mile-Hi Skydiving planes flying over their homes up with the Federal Aviation Administration and not with the local authorities."

Karen Antonacci, *Longmont airplane noise lawsuit over but questions remain*, Longmont Times Call, May 23, 2015, at p. 1 (included as Appendix 5). The article

concludes by stating that only by petitioning the FAA could "...the City...attempt to restrict Mile-Hi's flights in any way...." *Id.* at pp. 1-2.[3]

Significantly**,** the City of Longmont *currently* informs the public through its website that it has no authority to restrict airplane activities:

> Federal law preempts the legal authority of the City relating to aircraft over flights. To the extent that complaints about aircraft noise relate to flights leaving from or coming to the Airport, the City does not have any legal authority to control the flight paths of such aircraft, or the timing of their passage above the City. Nor does the City have the authority to deny access to any type or class of aircraft operating at the airport.

City of Longmont "Frequently Asked Questions," www.longmontColorado.gov/departments/departments-a-d/airport/frequently-asked-questions (last visited Feb. 24, 2017), included as Appendix 8. This last sentence directly conflicts with this Court's *Centennial* decision, which, as noted earlier, upheld an airport proprietor's authority to prohibit passenger service.

Arguably, the Appellate Court *did* slightly limit the District Court's decision. In footnote 9, the Appellate Court states that "To the extent the trial court relied on defendant's compliance with federal regulatory standards in making its [nuisance] determination, such reliance was in error." Appx. 1, p. 9 at n.9. This

[3] Ironically, even the FAA does not consider its authority as broad as does the District Court. *See* selected deposition testimony of Yancy O'Barr, TRACON Air Traffic Manager, included as Appx. 7 ("Q: Does the FAA permit local airports to create noise abatement procedures? A: Yeah.").

understated rejection of part the District Court's nuisance determination has been insufficient to diminish the impact of the Trial Court's severe curtailing of state authority. The footnote contains no reference to the airport proprietor exception. Moreover, by designating the opinion as "unpublished," few communities will even see footnote 9 to analyze whether the Appellate Court put any limits on the District Court's decidedly restrictive view of state authority to address airport noise.

The Court of Appeals decision left intact the District Court's finding that local airports have no authority to regulate their own airplane traffic. It overlooks *Centennial's* underlying premise that an airport proprietor should be allowed to restrict airplane operations because the airport is vulnerable to suit by neighbors for nuisance level noise in neighborhoods adjacent to the airport. *Centennial*, 956 P.2d at 595. Significantly, it has done nothing to alleviate the confusion of Longmont concerning the extent of its authority over airplanes that use its airport. *See, e.g.*, Appx. 8. The Trial Court's decision has undoubtedly impacted other Colorado airport proprietors that have been monitoring this high profile case.

This Court has granted *certiorari* when an Appellate Court upheld a Trial Court's pronouncement of new substantive law where "no well-defined policy emerged" from the prior decisions. In *Mile-High Fence Co. v. Radovich*, 489 P.2d

308 (Colo. 1971), this Court granted *certiorari* when both the District Court and Appellate Court deviated from established law. In *Radovich*, a Court of Appeals judge "agreed with the substantive result reached in the [Court of Appeals] opinion, [but] felt it confused the state of the law…." *Id*. at 310. The Court granted *certiorari* because "Colorado law on this question is unclear at this point in time." *Id*.

As in *Radovich*, this Court should grant *certiorari* to address confusion existing in Longmont and presumably at airports across Colorado concerning their authority to regulate airplane operations, specifically for noise, in light of the District and Appellate Court decisions which leave the impression, in conflict with *Centennial*, that Colorado defers entirely to the FAA for airplane regulation.

The Court should also grant *certiorari* to reaffirm the important principle that lower courts are to follow the decisions of this Court.

B. The Court of Appeals erred by determining that Longmont's general noise ordinance, with its 55 decibel noise limit in neighborhoods adjacent to the Longmont airport, was supplanted by FAA's 65 decibel *metric* contained in Longmont's Airport Master Plan used to "*measure noise impacts*."

Should this Court determine to alleviate the confusion engendered by the Courts below as to the authority of Colorado proprietors to regulate airline activity, it should also accept *certiorari* on two closely related issues, including the error

made by the Trial Court, and affirmed by the Court of Appeals, that the LGNO was not meant to apply to airplane noise over Citizens' neighborhood.

Interpretation of a local ordinance is a question of law subject to *de novo* review. *Wells v. Lodge Props., Inc.*, 976 P.2d 321, 325 (Colo.App. 1998). The LGNO prohibits daytime noise over fifty-five decibels (55 decibel) in residential areas. Appx. 3 at section B. The Appellate Court found the LGNO inapplicable to airplane noise because airport noise was not "explicitly list[ed]" and because there exists an exception for "*activities to the extent they are approved and limited by the city*." Appx. 3 at section (D)(5)(ii) (emphasis added). The Appellate Court found such approval when the City approved an "Airport Master Plan" that itself contained *no* noise limits:

> By approving the Airport Master Plan and submitting it to the Federal Aviation Administration (FAA) for receipt of federal funds, we conclude that the City of Longmont approved airport activities that emit up to sixty-five decibels of noise. Therefore, based on its plain language, 10.20.110 exempted aircraft and airport activities.

Appx.1, p. 5, ¶11.

The Appellate Court should not have interpreted the LGNO as being supplanted by the Airport Master Plan. For one, this Plan was never introduced into evidence at trial, so neither the Trial or Appellate Courts should have considered it. *See Wilson v. U.S. Fidelity & Guaranty Co.*, 633 P.2d 493, 497

(Colo.App.1981) ("the trial court must base its factual determinations only upon matters admitted into evidence during the trial."); *Fraser v. Colorado Bd. of Parole*, 931 P. 2d 560, 563 (Colo. App. 1996) ("As a general rule, we may only consider documents contained in the record").

Moreover, the 65 decibel limit referenced in the Airport Master Plan was used by the FAA as a "way to measure noise impacts," Appx. 4, p. 2-32, not as an actual noise limit. Thus it strains credulity to say that the plain meaning of the Longmont ordinance, which contains several exceptions but none for aircraft noise, excludes aircraft noise as a matter of law.

The Appellate Court refused to consider Citizens' arguments concerning the inapplicability of the Airport Master Plan, finding that "plaintiffs did not challenge the trial court's finding [on this issue] in their opening brief." Appx. 1, p. 5, n.4. However, the broad issue of whether the LGNO applied to airport noise was thoroughly briefed. Opening Brief (included as Appendix 9), pp. 15-17. The first mention of the Airport Master Plan appeared in Mile-Hi's Answer Brief to rebut Citizens' claim that the LGNO was applicable to airport noise. It was only conceivable that Citizens would address this new argument in their Reply. Reply Brief (included as Appendix 10), p. 10 ("Mile-Hi raises three additional arguments,

which were not part of the Court's rationale: (i) the Airport Master Plan somehow repealed the ordinance …"). Thus, it was unfair of the Appellate Court to rely on this document for upholding the Trial Court while refusing to consider Citizen's arguments concerning its applicability. The determination by the Appellate Court that the Airport Master Plan substituted for the LGNO should be reviewed on *certiorari*.

C. The Court of Appeals erred by not finding that systematic exceedances of the Longmont general noise ordinance (LGNO) demonstrate negligence *per se* as a matter of law.

Another closely related issue for which the Court should grant *certiorari* is whether exceedances of the LGNO demonstrate negligence *per se* as a matter of law. In order to prevail on negligence *per se*, a plaintiff must demonstrate that a "defendant violate[d] a statute adopted for the public's safety and the violation proximately cause[d] the plaintiff's injury." *Scott v. Matlack, Inc.*¸39 P.3d 1160, 1166 (Colo. 2002). The LGNO sets a daytime noise limit of 55 decibels, as do similar noise standards adopted by Boulder County and the State of Colorado. R. CF, p. 2025 (referring to Boulder County Ordinance 1.01.050 and C.R.S. §25-12-103). The Trial Court found that FAA standards preempted all state authority, which rendered inapplicable Longmont's noise limits:

> The City is prohibited by federal law from imposing limitations on aircraft operations for the purposes of controlling noise without FAA approval. Therefore the Court finds the Longmont Code § 10.20.100 and 10.20.110 were not intended to protect against the type of injuries Plaintiffs alleged to have suffered. Because the Longmont Code § 10.20.100 and 10.20.110 cannot be applied to regulate aviation noise, the Longmont Code does not apply to Mile-Hi's skydiving operations. The Court accordingly denies Plaintiffs' negligence per se claim.

Appx. 2, p. 12, ¶69.

As previously discussed, the Court of Appeals determined that the LGNO had been supplanted by an FAA 65 decibel noise matrix contained in the Airport Master Plan. Appx. 1, pp. 4-5, ¶¶10-11. It never considered whether the LGNO had been violated.

The systematic violations of the LGNO should have been considered by the Trial Court. Defense witness Tim Barth, the airport manager at the time of trial, took noise measurements in multiple locations in Longmont. R. Tr. (4/16/15), 888:14-20; 890:2-8. *See also* R. Ex. F, pp. 63-66. In all of Mr. Barth's readings, the Mile-Hi Twin Otter airplane was *never* measured at less than 60 decibels. R. Tr. (4/16/15), 977:6-24; R. Ex. F, pp. 63-66. Petitioners' noise expert also took measurements that showed exceedances of the LGNO limit over Petitioners' homes. R. Tr. (4/14/15), 585:16-21 ("when [Mile-Hi aircraft] was flying overhead, it was exceeding 55").

In summary, the Longmont community established in the LGNO its own noise standards as to what constitutes unreasonable noise. The Trial Court refused to countenance such local control based on its mistaken view that the FAA had preempted all regulation of noise. *See* Section A, *supra*. The Court of Appeals later found the LGNO to have been supplanted. *See* Section B, *supra*. Should this Court ultimately conclude that the Courts below erred, it should determine as a matter of law that exceedances of the LGNO demonstrate negligence *per se*, or remand the matter for a determination of this unexamined issue by the Trial Court.

VII. CONCLUSION

WHEREFORE, Citizens respectfully request this Court grant their petition for *certiorari* on the issues requested.

Dated this 2nd 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 2nd day of March, 2017, the foregoing Petition for Certiorari, with appendices, was emailed to counsel, 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.