COURT OF APPEALS, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	DATE FILED: February 6, 2015 7:34 PM FILING ID: 2EC843461E00B CASE NUMBER: 2014CA1991
District Court, Larimer County, Colorado The Honorable Gregory M. Lammons 201 La Porte Avenue, Suite 100 Fort Collins, Colorado 80521 **Case Number**: 2013CV31385	**▲ COURT USE ONLY ▲**
Appellant: CITY OF FORT COLLINS, COLORADO v. **Appellee:** COLORADO OIL & GAS ASSOCIATION	Case Number: 2014CA1991
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BRIEF OF CITIZENS FOR A HEALTHY FORT COLLINS, SIERRA CLUB, AND EARTHWORKS AS *AMICUS CURIAE* IN SUPPORT OF THE APPELLANT CITY OF FORT COLLINS

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g).

Choose one:

☑It contains 9,474 words.

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☑For the party raising the issue:

It contains under a separate heading (1) a concise statement of the applicable standard of appellate review with citation to authority; and (2) a citation to the precise location in the record (R._____, p.___), not to an entire document, where the issue was raised and ruled on.

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It contains, under a separate heading, a statement of whether such party agrees with the opponent's statements concerning the standard of review and preservation for appeal, and if not, why not.

☑I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 and C.A.R. 32.

/s/ Kevin J. Lynch
Kevin J. Lynch

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Citizens for a Healthy Fort Collins, Sierra Club, and Earthworks (collectively "Measure Proponents") respectfully submit this brief as *amicus curiae* in support of the Appellant, the City of Fort Collins ("the City"), request reversal of the lower court decision granting summary judgment in favor of the Appellee, the Colorado Oil and Gas Association ("COGA").

STATEMENT OF THE ISSUES

1. The district court erred in conflating Ballot Measure 2A, the Fort Collins Public Health, Safety and Wellness Act ("the Moratorium") **,** with a complete ban on all oil and gas activities in Fort Collins and finding it preempted on that basis.
2. The district court erred in determining hydraulic fracturing ("fracking") in Fort Collins was an area of mixed state and local concern, when COGA failed to present enough evidence to make such a determination possible.
3. The district court erred by failing to apply the correct standard for operational conflict preemption: whether the local law materially impedes or destroys the state interest.

4. The district court erred when it found the Moratorium to be impliedly preempted by the Colorado Oil and Gas Conservation Act, C.R.S. § 34-60-101 et seq. (2014) ("the Act"), ignoring legislative enactments and case law making clear the State does not intend to occupy the field of oil and gas production.

STATEMENT OF THE CASE

I. NATURE OF THE CASE

Oil and gas production is, by nature, a boom and bust industry. Throughout the recent boom in Colorado, which has been driven by a new technique commonly referred to as "fracking," industrial scale oil and gas operations have encroached heavily on residential, urban, and suburban areas. As a result, and like never before, large populations of Coloradoans have been compelled to deal with the immediate and seemingly irreparable impacts associated with a dramatic increase in industrial traffic, pollution, and safety risks. Further, citizens are increasingly concerned about other harms associated with fracking including impacts to health, safety, and

welfare, as well as a substantial decrease in property values and their standard of living. Unable to keep up with the boom cycle and hamstrung with conflicting directives, state government has simply failed to protect communities from these industrial processes. In response, the citizens of Fort Collins have turned to local democratic processes to address and mitigate their legitimate concerns.

Citizens for a Healthy Fort Collins, the local group that formed to advocate for greater protections from fracking, initiated a ballot measure calling for a temporary time-out on fracking in hopes of maintaining the status quo while much needed studies are completed addressing both the known and perceived harms fracking poses to the health and environment. R.CF,p.120. Once these studies are completed, the City will be able to develop and implement local regulations necessary to protect the health, safety, and welfare of its residents. In November 2013, the citizens of Fort Collins approved the Moratorium by popular vote demonstrating a city-wide concern over these issues. R.CF,p.182.

Unhappy with the lawful assertion by Fort Collins residents of their right to protect their community, COGA challenged Fort Collins' Moratorium, along with three other similar citizen-initiated actions like it in Longmont, Broomfield and Lafayette. This Court must now decide whether the citizens of Fort Collins have the right to insist on a cautious and deliberate approach to oil and gas development within their community, or whether industry must be allowed to rush ahead with industrial development, regardless of the impacts.

II. COURSE OF PROCEEDINGS

On December 3, 2013 COGA brought suit against the City in the Larimer County district court seeking a declaratory judgment that the Moratorium was preempted by the Act and a permanent injunction invalidating the Moratorium. R.CF,pp.3-9. COGA and the City filed cross-motions for summary judgment. R.CF,pp.108-09;267-68. Ultimately, the district court granted summary judgment in favor of COGA, without conducting any evidentiary proceedings (including discovery) or a trial. R.CF,p.503.

Measure Proponents moved to intervene on behalf of the City on February 13, 2014, before either party had moved for summary judgment. R.CF, pp.38-48. The motion was denied on March 27, 2014. R.CF,pp.212-13. Measure Proponents appealed the denial of intervention. R.CF,p.202-07. The intervention appeal is still ongoing in this court at case number 2014CA780. Judges have been assigned and an opinion is pending. COGA has acknowledged that if Measure Proponents are granted intervention, "the case would be remanded to the district court for further proceedings, in which [Measure Proponents], COGA, and the City would all participate." COGA Response to Motion to Intervene, Case No. 2014CA1991 filed December 5, 2014. Measure Proponents have filed this *amicus* brief in order to ensure that the voice of the citizens who initiated and passed the Moratorium would be heard in this important appeal.

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III. DISPOSITION OF THE DISTRICT COURT

On August 7, 2014, the district court granted COGA's motion for summary judgment for declaratory relief on the basis that the Moratorium is preempted by the Act and, in so doing, denied the City of Fort Collins' cross-motion for summary judgment. R.CF,pp.495-503. This decision was determined to be a final, appealable order. R.CF,p.595.

IV. STATEMENT OF THE FACTS

Fracking is a well completion technique used after drilling a well, and before oil and gas flows up the well for production. R.CF,pp.159,180. Fracking is not required to complete a well, but rather is one way to prepare a well for production. Addendum 371 (The Dictionary for the Oil and Gas Industry (Univ. of Texas Ext., 1st ed. 2005)). COGA never presented evidence that fracking was the **only** completion method available in Fort Collins.

Fracking is an industrial process. R.CF,p.244,292. The potential harms associated with fracking include:

- Increased health risks, R.CF,p.64;
- Decreased property values, R.CF,p.51;
- Damage to the environment, R.CF,p.51; and
- Increased safety hazards and nuisances, R.CF,p.160.

Additionally, fracking creates planning and zoning issues because of the potential impacts to adjacent properties. R.CF,p.244.

COGA presented very little evidence upon which the district court could decide the preemption issue, only listing five facts as undisputed. R.CF.,p.180-83. After providing a brief description of fracking, COGA asserted that fracking had been used on many wells in Colorado. *Id.* COGA further described the process through which the citizens of Fort Collins adopted the Moratorium, over the objections of the City Council. *Id.* COGA did not present any evidence demonstrating what the state interest is in the case. Nor did COGA present any evidence regarding the local interest. COGA did not present any evidence that it or one of its members had applied for a permit to drill in Fort Collins or had any concrete plans to conduct fracking operations during the period of the Moratorium. R.CF,p.245.

The City did introduce evidence on several key factual issues. The City authorized retention of a consultant to identify what further studies are necessary to determine the impacts of fracking on property values and human health. R.CF.,pp.243-44. The City submitted a list of on-going studies regarding fracking's impacts. R.CF.,pp.244,296-97. The City introduced evidence regarding local zoning and planning issues that need to be addressed

in the future regarding oil and gas development. R.CF.,pp.245-46. The City introduced evidence that no entity has informed the City of plans to use fracking within the City limits. R.CF.,p.246. Finally, the City introduced evidence regarding the unique quality of life that is provided in Fort Collins as a result of careful planning and development. R.CF.,pp.246-47.

The following factual issues are relevant to the issues presented in this case, yet the district court failed to receive evidence on any of them:[1]

1. How much oil and gas could be produced in Fort Collins, compared to statewide production?
2. Is there any urgent need for oil and gas to be produced using fracking within Fort Collins, particularly within the next five years?
3. What is the expected cost of production in Fort Collins using fracking, what price for oil and gas would be required to support that production, and can oil and gas be profitably produced in Fort Collins during the period of the Moratorium?

[1] Measure Proponents have attached a sample of evidence presented in a similar case as the addendum to this case, in order that this Court may understand the types of evidence that was precluded by the rush to summary judgment in this case, particularly evidence regarding the local impacts to fracking and alternatives to fracking.

4. What alternative methods might be used in Fort Collins in order to enable production of oil and gas without using fracking to complete the wells? Addendum 159-78.
5. What have other jurisdictions done to regulate fracking? How long have other jurisdictions, such as New York, spent considering whether fracking can be done safely? Addendum 192-93. [New York State Department of Health Completes Review of High-volume Hydraulic Fracturing, http://www.dec.ny.gov/press/100055.html, For Release: Wednesday, December 17, 2014.]
6. How has the oil and gas industry changed since the Colorado Supreme Court last considered preemption in the oil and gas context? Does the industry still require even spacing of wells to access a pooled resource, or has the development of horizontal drilling, multiple well pads, and high-volume fracking made such considerations obsolete?
7. What do existing studies show about the impacts that fracking has on health, safety, the environment, and property values, even if further study is needed to better understand those issues? Addendum 181-364.

8. Is Prospect Energy a member of COGA?[2]

STANDARD OF REVIEW

On a motion for summary judgment, the moving party has the burden of establishing the absence of disputed material facts; any doubts as to the existence of such facts must be resolved against the moving party. *Cung La v. State Farm Auto. Ins. Co.*, 830 P.2d 1007, 1019 (Colo. 1992). A party against whom summary judgment is sought is entitled to the benefit of all favorable inferences that may be drawn from the undisputed facts. *Kaiser Found. Health Plan of Colorado v. Sharp*, 741 P.2d 714, 718 (Colo. 1987).

Review of an order granting summary judgment is reviewed *de novo*. *Rocky Mt. Festivals, Inc. v. Parsons Corp.*, 242 P.3d 1067, 1074 (Colo. 2010). The issue of whether the Moratorium is a complete ban on all oil and gas development was raised at R.CF,p.247, and ruled on at R.CF,p.501.The issue of whether this matter is of local, state, or mixed concern was raised at R.CF,p.262 and ruled on at R.CF,pp.500-01. The issue of whether the

[2] COGA did not present an affidavit from itself or from Prospect Energy to prove that Prospect is a COGA member, nor did COGA assert this as a fact in its Statement of Undisputed Facts. The only mention of Prospect being a COGA member came in COGA's reply brief when it simply asserted so, without any evidence. R.CF,p.444. Thus, COGA has not proven standing.

Moratorium operationally conflicts with the state interest was raised at R.CF,p.260 and ruled on at R.CF,p.502. The issue of whether the Act impliedly preempts the Moratorium was raised at R.CF,p.254 and ruled on at R.CF,p.501.

LEGAL BACKGROUND

Preemption presents mixed questions of law and fact. *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 238-39 (Colo. 1984). As such, a preemption question should be analyzed on a case-by-case basis, taking into account the facts and circumstances of each case. *City of Commerce City v. State*, 40 P.3d 1273, 1282 (Colo. 2002).

Moratoria are vital land use tools for local governments. *Droste v. Board of County Comm'rs of the Cnty. of Pitkin*, 159 P.3d 601, 606 (Colo. 2007). Indeed, Colorado courts have upheld moratoria against a preemption challenge. *Id.*

To begin a preemption analysis, the court must first determine if the matter is of local, state, or mixed concern. *City & Cnty. of Denver v. State*, 788 P.2d 764, 764 (Colo. 1990). If it is a matter of local concern, a local regulation supersedes the state statute. *Id*. If the matter is of mixed concern, the local regulation is only preempted if, in operation, it "materially impedes or destroys" the state interest. *Bd. of Cnty. Comm'rs, La Plata Cnty. v.*

Bowen/Edwards Assocs., Inc., 830 P.2d 1045, 1059 (Colo. 1992). This determination can only be made on a fully developed factual record. *Id.* at 1060; *Denver v. State*, 788 P.2d at 764, 767-68; *Webb v. City of Blackhawk*, 295 P.3d 480, 486 (Colo. 2013).

Implied preemption only occurs when there is a demonstrated "legislative intent to completely occupy a given field by reason of a dominant state interest." *Bowen/Edwards*, 830 P.2d at 1048. The Colorado Supreme Court has repeatedly found no implied preemption in oil and gas cases. *Id.*; *Voss v. Lundvall Bros. Inc.*, 830 P.2d 1061, 1068 (Colo. 1992).

SUMMARY OF THE ARGUMENT

A moratorium on one completion process, fracking, is fundamentally different from a ban on all oil and gas development. A moratorium is a temporary time-out rather than a permanent ban. The Moratorium was enacted to evaluate the effects of fracking and give the City an opportunity to pass any necessary regulations protective of human health and the environment. Furthermore, the moratorium does not prohibit all oil and gas development, but rather only one completion process. The district court's reliance on *Voss* to determine that the Moratorium is preempted by the Act

was inappropriate because *Voss* expressly applies only to total bans on all oil and gas development.

The local interests in allowing sufficient time to study the issue and develop meaningful regulations outweigh any state interest in ensuring fracking occurs immediately in Fort Collins. Here, the district court failed to weigh the state interest against the local interests in determining whether the matter was one of state, local, or mixed concern. COGA failed to present, and the court did not consider, sufficient evidence to fully assess the scope of the state and local interests in this matter. Without this evidence, the district court was unable to weigh the state and local interests to determine which should be given effect, as required by Colorado preemption precedent.

Even if the court had properly determined that the case presented a mixed state/local issue, the operational effect of the Moratorium can be harmonized with the Act. The proper test for operational conflict is whether the local regulation "materially impedes or destroys" the state interest. The local regulation and the state interest must be harmonized if possible. When the state interest is properly construed, as reflected in recent amendments to the Act, to be balanced production that protects health, safety, and welfare,

then the Moratorium actually supports that interest, rather than materially impeding or destroying it.

Finally, there is no implied preemption in this case as there is no evidence of a legislative intent to occupy the entire field of oil and gas. The Colorado Supreme Court has consistently hat the Act does not impliedly preempt the entire field of oil and gas. The subsequent legislative enactments to the Act make it clear the State does not wholly occupy the field of oil and gas.

ARGUMENT

I. THE MORATORIUM IS NOT A TOTAL BAN AND THEREFORE IS NOT PREEMPTED

The Moratorium is a temporary land use technique designed to maintain the status quo until conclusive studies addressing the potential harms of one oil and gas completion technique can be completed. The Moratorium is fundamentally different from the permanent total ban on all oil and gas production in *Voss*.

A. A Moratorium on One Completion Method Is Not the Same as a Permanent Ban on All Oil and Gas Production.

The Moratorium involves only one completion method, and is a temporary, traditional land use technique. First, the Moratorium prohibits

fracking—a single method of completion. Second, moratoria are a valid exercise of a local government's land use authority, used to preserve the *status quo* while developing appropriate regulations to address emerging issues.

i. The Moratorium Concerns Only Fracking, Not All Oil and Gas Development

Fracking is not the only way that oil and gas can be recovered. The district court conflated the Moratorium with a ban on all oil and gas activities without considering evidence differentiating the two.

The district court and COGA treat the Moratorium as a ban on all oil and gas production because it allegedly "impedes the state's interest in oil and gas development and production." R.CF,p.501. This conclusion is based on the erroneous assumption that fracking is necessary to produce oil and gas. The district court found that the Moratorium "effectively eliminates the possibility of oil and gas development" because fracking "is used in 'virtually all oil and gas wells' in Colorado." *Id.* By the district court's logic, at a time when most lighting used incandescent lightbulbs, a ban on such bulbs would be a *de facto* ban on all lighting, even if alternatives lightbulbs existed.

If the district court had conducted an evidentiary hearing, Measure Proponents would have presented evidence of alternative methods to take the place of fracking. Addendum 175-177,183-91.

ii. Moratoria, Which Are Temporary In Effect, Are Traditionally Accepted Land Use Techniques

The district court further erred by conflating a temporary moratorium with a permanent ban. This false equivalency led the district court to ignore Colorado and federal case law recognizing the distinction between a permanent ban and a moratorium.

Moratoria are a valid exercise of a local government's land use authority, providing a temporary timeout to discover all relevant facts and concerns. Colorado courts recognize the difference between a moratorium and a ban. Namely, a moratorium is not permanent, but a "suspension of activity; a temporary ban on the use or production of something." *Deighton v. City Council*, 902 P.2d 426, 427 (Colo. App. 1994). For example, a moratorium of 10 months on development based on the Land Use Act, C.R.S. §§ 29-20-101 to 107, was upheld as a valid use of the counties' authority in *Droste*. *Droste*, 159 P.3d at 606. *Droste* held that the county had the authority to adopt an ordinance preventing the county from processing land use applications

pending adoption of a master plan. The Moratorium is analogous because the City has the authority to regulate oil and gas operations in the city. *Bowen/Edwards*, 830 P.2d at 1059-60. Further, it took the state of New York six years to examine the environmental impacts of fracking before ultimately deciding to ban the practice, even though the evidence was inconclusive. Addendum 192-93. If New York needed six years to study the issue and still could not determine whether fracking could be conducted safely anywhere in the state, then it is reasonable for the citizens of Fort Collins to adopt a shorter moratorium to await further study and address the issue in their community.

The Colorado Legislature included a statement that nothing in the Act affects existing land use authority of local governmental entities, and it anticipated that local governments could issue land use permits that included conditions affecting oil and gas operations. *Town of Frederick v. North American Resources Co.*, 60 P.3d 758, 763 (Colo. App. 2002); C.R.S. § 34-60-106 (2014). Entire permitting processes, as well as injunctive relief authorized by ordinance that prohibited drilling of oil and gas wells within municipal limits, are not preempted because of operational conflicts with the Act **although the town's process may delay drilling**. *Frederick*, 60 P.3d at 766 (emphasis added). The Moratorium represents the citizens' vote to temporarily hold the

issuance of such City permits, until the City can determine if it needs to modify its regulations based on the results of ongoing studies on the impacts to health and property from the highly controversial practice of fracking.

The purpose of a moratorium, unlike a ban, is to provide time to allow the planning and implementation process, including citizen input, public debate and consideration of all issues and points of view. Garvin & Leitner, *Drafting Interim Development Ordinances: Creating Time to Plan*, 48 Land Use Law & Zoning Digest 3 (June 1996). The fundamental purpose of a moratorium and a ban are different. A moratorium allows the current status to be preserved, placing no party or interest at a disadvantage while evaluating all the issues and facts. Conversely, a ban permanently prohibits an activity, with no further consideration of any facts or issues.

The U.S. Supreme Court has also recognized that moratoria are not complete bans, e.g. they are not necessarily the complete loss of economic value that would work a "taking." *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Reg'l Planning Agency*, 535 U.S. 302, 337-38 (2002). *Tahoe-Sierra* held that a 32-month moratorium on all development pending development of a regional plan was not a taking *per se*. *Id*. at 341-43. The Court explained that "moratoria … are widely used among land-use planners to preserve the status

quo while formulating a more permanent development strategy." *Id.* at 337. Treating a moratorium as the equivalent of a ban would ignore key issues such as "the good faith of the planners, the reasonable expectations of landowners, or the actual impact of the moratorium on property values." *Id.* at 338. The same reasoning applies to this case in the preemption context. A moratorium should not be preempted where it is based on a good faith effort by the City and its citizens to address a controversial issue encroaching on their community, particularly where the moratorium has not been shown to have any concrete effects on the state interest.

B. The Moratorium Was an Intentional, Good Faith Effort to Protect Citizens' Health, Safety, and Welfare.

The citizens of Fort Collins chose to put this Moratorium in place to allow the City to evaluate the effects of fracking on their health, safety, welfare, and property. In fact, the stated purpose of the Moratorium was to "protect property, property values, public health, safety and welfare [by allowing time] to study the impacts of the process on the citizens of the City of Fort Collins." R.CF,p.340.

The City presented evidence of studies by the National Science Foundation, the Environmental Protection Agency, and the Colorado

Department of Public Health and Environment on the effects of fracking, which will be available between 2016 and 2019. R.CF,p.296; R.CF,p.63. Because the agencies have not yet completed these studies, the long-term effects of fracking are uncertain. The drafter of Ballot Measure 2A explained that Citizens for a Healthy Fort Collins relied on these studies in choosing the length of 5 years for the Moratorium. R.CF,p.63. The citizens' intent was not to ban oil and gas production within the City, nor to prohibit fracking indefinitely. Instead, the Moratorium preserves the status quo while studies are conducted and analyzed, and allows the City time to determine how to regulate an industrial activity.

C. The District Court Ignored the Language in *Voss* Limiting Its Decision to Complete Bans on All Oil and Gas Activity.

The application of *Voss* to this case is error because the difference between the scope of the Moratorium and the total ban in *Voss* is significant. The Colorado Supreme Court limited its decision in *Voss* to a consideration of a total ban because that case involved an ordinance that prohibited any drilling for oil and gas within the city limits. *Voss*, 830 P.2d at 1062. *Voss* expressly restricted the scope of the decision to "whether Greeley's *total ban* was preempted." *Id.* at 1063 n.2. The *Voss* court noted that it did not consider

an amendment to the municipal code limiting the ban to industrial zones because the parties did not raise the issue, nor was the issue decided at trial. *Id.* The court went on to note that any determination of the effect of a less-than-total ban would "require[] an adequately developed factual record." *Id.* Because the Moratorium is not a ban on all oil and gas development, this Court must consider the unique facts and circumstances surrounding this case. *Bowen/Edwards*, 830 P.2d at 1059-60; *Denver v. State*, 788 P.2d at 767-68; *Webb*, 295 P.3d at 486.

II. THE LOCAL INTEREST IN ALLOWING SUFFICIENT TIME TO DEVELOP FRACKING REGULATIONS OUTWEIGHS ANY STATE INTEREST IN FRACKING IMMEDIATELY OCCURING IN FORT COLLINS.

The district court made three critical errors in deciding whether this case presents a matter of state, mixed, or local concern. First, the court failed to weigh the state interest against the local interest, instead focusing only on the state interest. Second, the court did not consider sufficient evidence to determine what the state and local interests were in this case, because COGA failed to introduce it. Finally, the district court failed to consider whether the citizens' constitutional inalienable rights to protect their health, safety, and welfare mean that state law cannot preempt a moratorium designed to protect those interests.

A. The District Court Failed to Weigh the State Interest Against the Local Interests to Determine if the Matter Was of Local, Mixed, or State Concern.

A preemption analysis begins with determining whether the matter is one of local, mixed, or state concern. *Denver v. State*, 788 P.2d at 767. If the matter is one of local concern, then "the home rule provision supersedes the conflicting state provision." *Id.* In *Denver v. State*, the court specifically noted that it has "not developed a particular test which could resolve in every case the issue of whether a particular matter is 'local,' 'state,' or 'mixed.'" *Id.* Instead, a court makes "these determinations on an ad hoc basis, taking into consideration the facts of each case" and "the relative interests of the state and the home rule municipality in regulating the matter at issue." *Id.* at 767-68; *City of Northglenn v. Ibarra*, 62 P.3d 151, 155 (Colo. 2003). This analysis must be conducted anew as time, circumstances, and technology change, even if the issue has been decided previously in another case. *Commerce City*, 40 P.3d at 1282.

The *Denver v. State* decision outlined four factors that are useful, but not exclusive, in determining the state interest. The court assessed the state interest in uniformity, extraterritorial impacts, traditional governance, and specific commitment in the Constitution. *Denver v. State*, 788 P.2d at 768.

Importantly, the court went on to weigh the state interest against the local interest. For example, the court found the Home Rule Amendment to the Colorado Constitution and testimony by the mayor were relevant for establishing the local interest in a municipal employee residency restriction. *Id.* at 771. The court also weighed testimony from the mayor discussing local interests in increasing the investment of city tax dollars, in having employees readily available in the event of an emergency, and in promoting more attentive, compassionate, and diligent employee work. *Id.*

In *Voss*, the Colorado Supreme Court evaluated only the state interest factors without addressing local interest in the matter. *Voss*, 830 P.2d at 1066. However, the *Voss* court never said courts should look only at the state interest or that local interests were irrelevant. Thus, the balancing of state and local interests done by the court in *Denver v. State* should be applied to this case.

In this case, the district court never weighed the state and local interests against each other, and never made a determination of whether the matter was one of state, local, or mixed concern. Instead, the court simply asserted that the four factor analysis from *Voss* remains applicable. R.CF.,p501. The court gave no consideration to dramatic changes in technology and

circumstances since *Voss* was decided in 1992, and also failed to weigh the state interest against the local interest in this case. Because the court did not conduct an ad hoc assessment based on the facts of this case, summary judgment was inappropriate.

B. There Are Insufficient Facts to Determine That The Moratorium on Fracking Is Not a Matter of Local Concern.

The lack of evidence regarding both the state and local interest in the Moratorium prevented the district court from properly conducting a preemption analysis. COGA failed to introduce any evidence showing that the state has an interest in ensuring that fracking occurs in Fort Collins during the period of the moratorium. The City presented evidence on the need for further study, R.CF.,pp.244,296-97, yet the district court failed to even acknowledge that evidence. R.CF.,pp.495-96. Measure Proponents were precluded from introducing their own evidence on the state and local interests, even though they were allowed to do so in a separate case. Addendum 1-9,55-69,159-178. Consequently, the district court's grant of summary judgment was premature because it did not consider adequate evidence.

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i. The District Court Failed to Consider Evidence of the State Interest.

Courts should determine the state interest on an ad hoc basis considering the totality of the circumstances of each case. *Denver v. State*, 788 P.2d at 767-68. Here, the district court determined the state interest by examining the circumstances as they existed in 1992 in *Voss*. R.CF,p.501. The district court could not have examined the circumstances as they existed 2014, however, because COGA presented no evidence of the state interest in this case.

Circumstances surrounding oil and gas production have changed dramatically since 1992. For example, the court in *Voss* relied on the fact that oil and gas production is closely tied to well location for the finding of waste and uneven production. *Voss*, 830 P.2d at 1067. However, the district court in both two similar fracking preemption cases noted, "[w]ith today's technology, which makes horizontal drilling possible, well location and spacing are no longer as important as they were in 1992." R.CF,p.477,554. Additionally, oil and gas production in 1992 did not involve horizontal drilling combined with fracking. This combination has significantly increased local impacts.

Second, the district court failed to consider evidence of the minimal impact the Moratorium has on the state interest. No evidence was presented on the amount of the amount of oil and gas ultimately recoverable from Fort Collins. If the court determined the amount recoverable to be insignificant, especially in comparison to the total recoverable amount in Colorado, the impact on the state interest would be *de mininmis*. *Denver v. State*, 788 P.2d at 769 (finding that Denver employing 0.7% of the total workforce in the state to be *de minimis*). This minimal impact is even smaller when examining the effect of a moratorium rather than a ban. Any limitation caused by the Moratorium is only temporary.

Further, COGA presented no evidence of any plans or intent to frack in Fort Collins within the five-year duration of the Moratorium. To the contrary, the City presented evidence that no permits have been applied for with the COGCC. R.CF,p.245. Thus, there is no evidence of any state interest in production in Fort Collins since COGA never proved production would occur absent the Moratorium.

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ii. The District Court Failed to Consider the Local Interest in the Fracking Moratorium.

More troubling that the inadequate evidence regarding the state interest, the court failed entirely to consider evidence of the local interest in this case. Without this evidence, it was impossible for the court to weigh even the minimal state interest against the unknown local interest.

The moratorium affords the City a chance to evaluate the harms fracking poses to its citizens. Importantly, the drafters of the Moratorium determined the length of the Moratorium based on the availability of future information regarding the impacts fracking has on communities. The Moratorium states, "[R]epresentatives from the State of Colorado have publically stated that they will be conducting a health impact assessment to assess the risks posed by hydraulic fracturing and unconventional oil and gas development." R.CF,p.120. The City provided evidence of those ongoing studies, R.CF.,p.296, but the district court never even mentioned such evidence.

Potential impacts of fracking vary widely. Evidence of potential harms from fracking include water contamination and economic impacts caused by baseline water testing, lost property value, and chemical clean up. R.CF,p.51.

Fracking may also increase problems associated with noise, light, pollution, traffic, roads, infrastructure, and emergency response costs to local governments. R.CF,p.412-19. To fully understand the potential local impacts of fracking, the district court needs to consider:

- Health Risks: increased chemical exposure through air and water pollution causing serious health consequences;
- Safety Hazards: traffic involved in increased use, storage and transportation of fracking fluids and risks of explosions;
- Economic Considerations: decreased market value of property near fracking sites and negative impacts on local economies; and
- Environmental Damage: destruction of natural areas and wildlife habitat.

Addendum 1-9,55-69,159-178,181-364. In light of the potential local impacts, the district court's finding that this matter was mixed concern was error. At a minimum the court should have weighed the local and state interests in this case. Weighing the significant local interest against the minimal state interest, the district court should have determined that regulating fracking in Fort Collins was a matter of local concern.

C. The Moratorium Protects Citizens' Inalienable Rights.

Citizens have certain natural, essential and inalienable rights. Fort Collins determined that the Moratorium was necessary to protect against the potential dangers of fracking. Because the Moratorium is an exercise of citizens' inalienable rights, neither the state legislature nor the Act may preempt the Moratorium.

The Colorado Constitution unambiguously protects citizens' inherent and natural rights to their lives, safety, property, liberty, and happiness and allows citizens to protect these rights. The Inalienable Rights provision of the Colorado Constitution states:

> "All persons have certain natural, essential and inalienable rights, among which may be reckoned the right of enjoying and defending their **lives** and **liberties**; of acquiring, possessing and protecting **property**; and of seeking and obtaining their **safety** and **happiness**."

COLO. CONST. art. II, § 3 (emphasis added). Thus, the Colorado Constitution allows citizens to protect themselves and their property from activities that threaten their inalienable rights. In fact, the Moratorium is a citizen-initiated measure passed by the citizens of Fort Collins, who reasonably acted to "protect property, property values, public health, safety and welfare by placing a five year moratorium on

the use of hydraulic fracturing . . . in order to study the impacts of the process." R.CF,p.120.

Neither the state legislature nor the Act can take away citizens' inalienable rights. If fracking is determined to endanger citizens' inalienable rights, not only would it favor local control, citizens' inalienable rights would supersede any state statute, including the Act. If a court finds a state statute preempts an action protecting inalienable rights, the court is effectively denying citizens these inalienable rights. Only by ignoring the inalienable rights of citizens could the district court find that the Act preempts the Moratorium.

A moratorium on fracking is reasonably necessary to protect citizens' inalienable rights. In fact, Fort Collins is not alone in taking action to protect themselves from the potential harms of fracking. Other Colorado localities have also placed bans or moratoria on fracking (Boulder, Boulder County, Broomfield, Lafayette, and Fort Collins). Additionally, the state of New York placed a moratorium on fracking **across the entire state** because of concerns regarding the health and safety of the activity and recently, New York banned fracking. Appendicies192-93.

Although application of the inalienable rights provision to this context is novel, the courts have an obligation to state what the law is and how it applies to the facts of this case. Previous preemption cases relied upon by the district court, including *Voss*, *Summit County*, and *Bowen/Edwards*, did not address the inalienable rights provision. The reason for this is simple: the parties there did not present the argument. However, the Moratorium specifically cites the inalienable rights provision of the Colorado Constitution as authority, R.CF.p.120, and this Court should declare what the provision means in this case. Essentially, was it reasonable for the citizens of Fort Collins to conclude that a moratorium on fracking is necessary to protect their inalienable rights? In Pennsylvania, the state Supreme Court found that a similarly broad constitutional provision, which had not previously been applied by the courts, prohibited the state legislature from preempting local regulations on fracking. *Robinson Twp., Washington Cnty. v. Commonwealth*, 83 A.3d 901, 946-50 (Pa. 2013).

Because the citizens of Fort Collins enacted the Moratorium to protect their inalienable rights, neither the state legislature nor the Act may preempt it. The citizens of Fort Collins reasonably determined that the Moratorium was necessary to protect their inalienable rights. Therefore, this Court should

remand to the district court with instructions on how to apply the inalienable rights provision to this case.

III. THE MORATORIUM'S OPERATIONAL EFFECT DOES NOT CONFLICT WITH THE ACT

The Moratorium can be read in harmony with the Act. In operation, the Moratorium does not materially impede or destroy the state interest. Therefore, this Court should reverse the district court's finding of operational conflict.

A. The Court Must Determine if the Local Regulation Materially Impedes or Destroys the State Interest.

If a court determines an issue to be a matter of mixed concern, the state statute preempts a local regulation only if its operational effect would conflict with state statute. *Bowen/Edwards*, 830 P.2d at 1056. This determination "must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Id.* at 1060.

i. *Bowen/Edwards* Set the Standard for Operational Conflict Analysis.

The standard for determining operational conflict is when "effectuation of the local interest would **materially impede or destroy** the state interest." *Id.* at 1059. In the oil and gas context, if a home rule municipality enacts

regulations that do not frustrate –and can be harmonized with–the stated goals of the Act, "the city's regulations should be given effect." *Voss*, 830 P.2d at 1068. Absent a direct conflict with the state statute, courts must attempt to harmonize the state and local law to the extent possible. *Droste*, 159 P.3d at 607. As such, every conflicting local regulation is not preempted, only those materially impeding or destroying the state interest. *Bd. of Cnty. Comm'rs of La Plata Cnty. v. Colo. Oil & Gas Conservation Comm'n*, 81 P.3d 1119, 1123 (Colo. 2003).

In this case, the district court erred by deviating from the *Bowen/Edwards* standard. The district court stated the Moratorium "conflicts with the [Act] because it prohibits what the Act expressly authorizes the Commission to permit." R.CF,p.502. The district court stretches language from *Webb* and *Summit County* to suggest a local government cannot forbid what a state statute fails to mention. The "cannot prohibit what state statute authorizes" test is inappropriate in the fracking context because the state statute does not mention fracking, nor explicitly authorize it. This case is distinguishable from *Webb* and *Summit County*, where the relevant state statute expressly addressed the activities in question. In *Webb*, the state statute authorized municipalities to prohibit bicycles from traveling on city

roads if the city provided an alternate route. *Webb*, 295 P.3d at 485. There, the city did not comply with this explicit requirement. *Id*. Here, the Act does not even mention fracking, let alone limit the circumstances of its prohibition. Likewise, *Summit County* found the local ordinance to be a reclamation standard where the state gave the Mined Land Reclamation Board explicit authority to regulate reclamation standards. *Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs of Summit Cnty.*, 199 P.3d 718, 734 (Colo. 2009). Here, the Act gives no explicit authority to the COGCC to regulate fracking.

In the oil and gas context, the burden lies with the plaintiff to show that "**no possible construction**" where the local regulations may be harmonized with the state regulatory scheme. *Bd. of Cnty. Comm'rs of Gunnison Cnty. v. BDS Int'l,* 159 P.3d 773, 779 (Colo. 2006) (emphasis added). In *BDS*, the court further stated, "we will construe the County Regulations, if possible, so as to harmonize them with the applicable state statute or regulations." *Id.* There, the court relied on *Bowen/Edwards* and *Frederick* in rejecting plaintiff's proposition that if a state regulation concerns a particular aspect of oil and gas operations, then any county regulations in that area are automatically invalid. *Id.*

In order to demonstrate an operational conflict, COGA would have to present evidence showing the state has an interest in producing oil and gas from Fort Collins within the next five years. However, COGA did not present any evidence of such state interest. There is nothing to support the argument that the Moratorium's operational effect—a five-year timeout on fracking to allow the City of Fort Collins to determine the best way to ensure the health, safety, and welfare of its citizens through regulation—could conflict with the state interest.

Any suggestion that the state interest is in the immediate production of the maximum possible amount of oil and gas runs contrary to the interests outlined in the Act. Specifically, the Act requires responsible and balanced production consistent with the protection of public health, safety, welfare, and environmental and wildlife resources. C.R.S. §34-60-102(1)(A)(I) (2014). Additionally, the Moratorium does not eliminate "the possibility of oil and gas development within the city," as the district court concluded. R.CR,p.501. To the contrary, the Act is concerned about the amount of oil and gas **ultimately recoverable**, not the amount immediately recoverable. C.R.S. §34-60-103(13)(b). It does not follow that the Moratorium substantially impedes oil and gas production because those resources are still ultimately accessible.

ii. The Moratorium Imposes No Technical Conditions on Fracking.

The Moratorium does not impose any technical conditions preempted by the Act. COGA's argument that *Bowen/Edwards* "explicitly recognized that the imposition of technical conditions on the drilling and pumping of wells . . . necessarily conflicts with the state statutory and regulatory scheme" goes too far and misstates the law. R.CF,p.187. Bowen/Edwards does not stand for the proposition that all technical regulations are *per se* preempted. In fact, *Bowen/Edwards* clarified that to the extent that the operational conflict of technical conditions "might exist," "[a]ny determination that there exists an operational conflict between the county regulations and the state statute . . . must be resolved on an ad-hoc basis under a fully developed evidentiary record." *Bowen/Edwards*, 830 P.2d at 1060 (emphasis added).

iii. COGA Has Failed to Prove Operational Conflict Beyond a Reasonable Doubt.

COGA failed to show, beyond a reasonable doubt, no circumstances where the Moratorium can be applied in a permissible manner, therefore their facial challenge must fail. The home rule Amendment grants home rule cities the "right of self-government in both local and municipal matters," and such local ordinances "shall supersede within the territorial limits . . . any law of the

state in conflict therewith." COLO. CONST. art. XX, § 6. Whether a state statute preempts a home rule city's regulation is a constitutional question. *Voss*, 830 P.2d at 1061; *Summit County*, 199 P.3d at 723. In assessing the constitutionality of a statute there are two kinds of challenges, "facial" and "as applied." *Sanger v. Dennis*, 148 P.3d 404, 410-11 (Colo. App. 2006).

A plaintiff must establish that the regulation is impermissible. A "facial" challenge is one that seeks to render a regulation "utterly inoperative" by requiring the plaintiff to establish beyond a reasonable doubt that "**no set of circumstances**" exists in which the regulation can be applied in a permissible manner. *Sanger,* 148 P.3d at 411 (emphasis added); *People v. Vasquez,* 84 P.3d 1019, 1021 (Colo. 2004). This is a high bar and courts traditionally disfavor facial challenges. *Independence Inst. v. Coffman*, 209 P.3d 1130, 1136 (Colo. App. 2008). COGA sought to invalidate the Moratorium as a "facial" challenge only. R.CF,p.179.

The district court did not mention or apply the reasonable doubt standard requiring COGA to meet their burden by showing no set of circumstances where the Moratorium could be harmonized with the Act. The district court assumed the state interest in uniform regulation and that the mere existence of the Moratorium harms the state interest set by the Act.

R.CF,p.498-503. That is not sufficient for summary judgment. *Mt. Emmons Mining Co.*, 690 P.2d at 241. There, the court was dealing with a local ordinance requiring mining companies to get water permits from the town. *Id.* at 234. The Colorado Supreme Court recognized this involved "mixed questions of law and fact," and reversed the court of appeals' judgment for the mining company and remanded for findings of fact. *Id*. at 234. "There are unresolved factual questions relating to the existence, nature, and extent of any injury that [the plaintiffs] might conceivably sustain under [the] permit." *Id*. at 241. As the *Mt. Emmons* court held, the "**mere existence of the ordinance**" was not enough on which to base summary judgment. *Id*. (emphasis added).

B. The State Interest Includes the Protection of Public Health, Safety, and Welfare.

The State Legislature set the state interest in oil and gas production through the Act, yet the district court disregarded significant portions of the Act. To clarify, the Act's purpose is:

> (1) (a) It is declared to be in the public interest to:
> (I) Foster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state of Colorado **in a manner consistent with protection of public health, safety, and welfare, including protection of the environment and wildlife resources;** . . . ..

C.R.S. § 34-60-102(1)(a)(I)(2014) (emphasis added).

> (b) . . . It is the intent and purpose of this article to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, **consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources,** . . . ..

C.R.S. § 34-60-102(1)(b)(2014) (emphasis added).

The Legislature's amendments in 1994, 1996, and 2007 mandated provisions that emphasized the protection of health, safety, and welfare, and underscore **and** protect local governments' land use authority. 1994 Colo. Sess. Laws, ch. 317, § 1; 1996 Colo. Sess. Laws, ch. 88, § 1; 2007 Colo. Sess. Laws, ch. 320, § 1. Specifically, the 2007 amendments placed emphasis on promoting health, welfare and safety by changing the (1) public interest to foster the "responsible, balanced development" of oil and gas and (2) development be performed in a manner "consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources." 2007 Colo. Sess. Laws, ch. 320, § 2 and 3.

The district court largely ignored these critical amendments to the Act.[3] The court never mentioned the state interest in protecting health, safety, and welfare during its operational conflict analysis. R.CF.,p.502-03. Instead, the only operational conflict that the court cited was with Prospect Energy's interest in fracking, *id.*, which surely cannot be equated with the state interest in this case.

C. Examining the Correct State Interest, There Is No Operational Conflict Because the Moratorium and the Act Can Be Harmonized.

The Moratorium does not (1) impede nor destroy the state's interest in oil and gas production; (2) cause waste; (3) affect the correlative rights of owners; and does (4) protect public health, safety and welfare, consistent with the purpose of the Act. Because the Moratorium is consistent with the state's interests set forth by the Act, harmonization is possible between the Moratorium and the Act.

First, the Moratorium does not impede nor destroy the state's interest in oil and gas production. The state interest is in oil and gas **production**, not one specific method of production. C.R.S. § 34-60-102(1)(a)(I). Fracking is a

[3] The court only mentioned protecting wildlife but not health, safety, or the environment. R.CF,p.499.

well completion technique that occurs after drilling a well, and before oil and gas flows up the well for capture. R.CF,pp.159,180. The Moratorium does not prevent all oil and gas production within the City, but only prohibits fracking for a five-year period to determine the best way to protect the health, safety, and welfare of citizens. R.CF,p.81. Had the district court granted the Measure Proponents' intervention, Measure Proponents would have introduced evidence showing, but not limited to: (1) the uncertainty regarding the safety of fracking; (2) the effect fracking operations have on property values; (3) the burden fracking places on municipal resources; (4) negative effects fracking has on recreation; (5) effective alternatives to fracking that have greatly reduced health and safety risks; and (6) the *de minimis* amount of oil and gas beneath Fort Collins. However, the district court relied on COGA's assertion that fracking is used in "virtually all" oil and gas wells in Colorado to erroneously conclude that the state interest is in fracking, not production, health or safety. R.CF,p.502.

The district court improperly concluded that hydraulic fracturing is a chemical treatment process, even though they are distinct processes. R.CF,p.502. Fracking, is not synonymous with "chemical treatment" nor with "shooting." Rather, fracking is "an operation in which a specially blended

liquid is pumped down a well and into a formation under pressure high enough to cause the formation to crack open, forming passages through which oil can flow into the wellbore." Addendum 371. In contrast, "chemical treatment" includes a variety of processes where the chemical causes the action, but it does not include fracking. Addendum 367. Also, "shooting" is the process of exploding nitroglycerine or other high explosives in a hole to shatter the rock and increase the flow of oil. Addendum 367. The district court overlooked these simple distinctions when it attempted to describe a complicated industry without taking evidence from any experts in the field.

Second, the Moratorium does not cause waste. The statutory definition of "waste" is an action that reduces the amount of oil and gas ultimately recoverable from a pool, not the amount immediately recoverable. C.R.S. §34-60-103(13)(b). A five-year timeout on fracking within Fort Collins does not affect the amount of oil and gas that is ultimately recoverable from beneath the City. Further, changes in technology and the source of oil and gas have lessened, perhaps even removed, any state interest in uniform spacing of wells to facilitate production that was the overriding concern in *Voss*. The 1992 *Voss* court was concerned with resources from "subterranean pools," finding "oil and gas production is closely tied to well location." *Voss*, 830 P.2d

at 1067. The district court here did not consider evidence showing these concerns no longer apply due to the development of horizontal drilling and the nature of the reservoirs beneath Fort Collins, which are not "pools" but rather tight formations. R.CF, pp.477, 554. Thus, uniformity as conceived of by the *Voss* court is no longer a concern in the modern oil and gas industry.

Third, the Moratorium does not affect the correlative rights of owners and producers. COGA did not present any current evidence that the Moratorium affects correlative rights. Considering the nature of the resources available to oil and gas producers, in tight formations as opposed to pools, it is clear the circumstances surrounding oil and gas production have changed since 1992. *Voss*, 830 P.2d at 1067 (discussing how "an irregular drilling pattern can impact on the correlative rights" of owners and producers).

Fourth, the Moratorium serves to protect the public health, safety, and welfare of citizens. The state interest, stated in the Act, is to "permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste, **consistent with the protection of public health, safety, and welfare, including protection of the environment.**" C.R.S. §34-60-102 (emphasis added).

The Moratorium affords the City time to address the uncertain dangers that fracking poses to public health, safety, welfare, and the environment. Specifically, scientific evidence shows significant threats posed by fracking, demonstrating that we do not yet know the full extent of fracking's impact. Addendum 183. For one, fracking poses threats to groundwater, surface water, and air quality. *Id*. at 190-92. Two, disposal of fracking water has induced earthquakes. *Id*. at 192. Three, agencies have not completed long-term health studies regarding fracking's effects on human health outcomes. *Id.* at 206. Finally, the negative impacts of the boom-bust cycle of the oil and gas industry on local municipal resources have an effect on the citizens and local communities. *Id.* at 205-06. Certainly, both the state and local governments should be concerned with the potential significant impacts fracking has on its citizens. The Moratorium can thus be harmonized with the state interest in this case.

IV. IMPLIED PREEMPTION CANNOT BE FOUND BECAUSE THEIR IS NO EVIDENCE OF A LEGISLATIVE INTENT TO OCCUPY THE ENTIRE FIELD.

The state interest in oil and gas production does not outweigh the local interest in regulating fracking. Nothing in the Act demonstrates a legislative intent to occupy the entire field of oil and gas development, and Colorado

courts have consistently held that the Act does not occupy the entire field of oil and gas regulation. As such, the district court erred in finding that the Act impliedly preempts the Moratorium. This Court should reverse that ruling.

A. The Colorado Supreme Court Has Consistently Held that the Act Does Not Impliedly Preempt Local Regulation of Oil and Gas.

The Act does not impliedly preempt local regulation of the entire field of oil and gas regulation. *Bowen/Edwards* outlined the legal standard for an implied preemption analysis by stating, "preemption may be inferred if the state statute impliedly evinces a **legislative intent** to completely occupy a given field by reason of a dominant state interest." *Bowen/Edwards*, 830 P.2d at 1048 (emphasis added). The court explained it could only infer a legislative intent to preempt local control from language used and the whole purpose and scope of the legislative scheme. *Id.* at 1057. *Bowen/Edwards* reversed a lower court finding that language in the Act—authorizing the COGCC to promulgate rules and regulations—established implied preemption. *Id.* at 1058. Instead, the court held that language in the Act did not establish implied preemption of a local government's authority to enact local land-use regulations for oil and gas operations. *Id*.

The district court erred in using a "substantially impedes" test, supposedly derived from *Voss*, to determine implied preemption. R.CF,p.501. The *Voss* court did not rely upon implied preemption, but rather determined whether the local ordinance conflicted with the state interest. *Voss*, 830 P.2d at 1065. The *Voss* court explicitly found there was nothing in the Act that established a legislative intent to "impliedly preempt all aspects of a local government's land-use authority over land that might be subject to oil and gas development and operations within the boundaries of a local government." *Id.* at 1065. Thus, although the *Voss* court did state that Greeley's total ban on drilling "substantially impedes" the state interest, this was for determining operational conflict and not implied preemption. *Id.* at 1068. Therefore, the district court's reliance on *Voss* for deriving a "substantially impedes" test for implied preemption was in error.

Subsequent preemption cases have only confirmed that the Act does not implied preempt all local regulation of oil and gas. In *Frederick*, the court held the savings language in the 1996 amendments support the conclusion that the legislature did not intend to preempt all local regulation of oil and gas operations. Frederick, 60 P.3d at 763. *Frederick* further determined that

amendments to the Act plainly avoided giving any preemptive effect. *Id*. at 758.

B. Subsequent Legislative Enactments Make It Clear the State Does Not Occupy the Field of Oil and Gas, Thus the Moratorium Is Not Impliedly Preempted by the Act.

None of the amendments to the Act since the 1992 *Bowen/Edwards* and *Voss* decisions demonstrate legislative intent to preempt all local regulation of oil and gas activities. In fact, legislative amendments contain specific provisions that protect local land use authority. The 1994 amendments explicitly preserved the existing land use authority of local governments. 1994 Colo. Sess. Laws, ch. 317, § 1. In 1996, further amendments underscored the power of local governments to require and ensure compliance with land use permit conditions. 1996 Colo. Sess. Laws, ch. 88, § 1. In 2007, amendments enlarged the local government authority savings provision stating: "nothing in this act shall establish, alter, impair, or negate the authority of local governments to regulate land use related to oil and gas operations." 2007 Colo. Sess. Laws, ch. 320, § 1.

COGA argues that implied preemption of all local regulation of oil and gas is reflected in the COGCC's "comprehensive regulatory structure." R.CF,p.188. Just as in *Bowen/Edwards*, where the State enacted regulation in

the same area as the Act, this Court cannot infer implied preemption. Instead, looking at the language of Act and the "whole purpose and scope of the legislative scheme" shows there is no legislative intent to impliedly preempt the entire field of oil and gas. *Bowen/Edwards*, 830 P. 2d at 1058. In fact, the specific language of the Act itself expressly emphasizes no legislative intent to "negate the authority of local governments to regulate land use related to oil and gas production." C.R.S. §34-60-102.

Absent a legislative intent to preempt local control, the Court cannot find implied preemption. Here, there is no language in the Act nor amendments thereto supporting the district court's finding of implied preemption.

CONCLUSION

Measure Proponents request this Court to vacate the district court's decision and remand with instructions to either dismiss COGA's case entirely, because a moratorium is not the same as a total ban, or at minimum to conduct an evidentiary hearing necessary to decide the preemption issues in this case.

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DATED this 6th day of February, 2015.

Respectfully submitted,

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This document was filed electronically pursuant to C.A.R. 25(e). The original signed document is on file with the University of Denver Environmental Law Clinic.

CERTIFICATE OF SERVICE

I hereby certify that on this February 6, 2015 a true and correct copy of the above and foregoing **BRIEF OF CITIZENS FOR A HEALTHY FORT COLLINS, SIERRA CLUB, AND EARTHWORKS AS AMICUS CURIAE IN SUPPORT OF THE APPELLANT CITY OF FORT COLLINS** was served via the Integrated Colorado Courts E-Filing System (ICCES), on:

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