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| COLORADO COURT OF APPEALS<br>2 East 14th Ave., Denver, CO 80203 | |
| District Court Larimer County, Colorado<br>Case Number: 2013CV63<br>The Honorable Gregory M. Lammons | |
| **Appellant/Defendant:**<br><br>City of Fort Collins, Colorado<br><br>v.<br><br>**Appellee:**<br><br>Colorado Oil & Gas Association | ▲ **COURT USE ONLY** ▲ |
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**AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF ROYALTY OWNERS – COLORADO CHAPTER IN SUPPORT OF APPELLEE COLORADO OIL AND GAS ASSOCIATION**

## 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 3221 words (excluding the caption, table of contents, table of authorities, this certificate of compliance, certificate of service, signature block and any addendum).
☐ It does not exceed 30 pages.

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

☐ 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.

☑ For the party responding to the issue:

It contains, under a separate heading, a statement of whether the responding party agrees with the statements of Appellants concerning the applicable 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/ *Thomas Niebrugge*

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Pursuant to C.A.R. 29, the National Association of Royalty Owners – Colorado Chapter ("NARO"), through its undersigned counsel, conditionally files this *amicus curiae* brief in support of Plaintiff/Appellee Colorado Oil and Gas Association ("COGA"), and states as follows:

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

NARO adopts and incorporates by reference the statement of the issues presented for review in COGA's Answer Brief.

## STATEMENT OF THE CASE AND STANDARD OF REVIEW

NARO adopts and incorporates by reference the statement of the case and statement regarding the standard of review in COGA's Answer Brief.

## INTRODUCTION AND INTEREST OF *AMICUS CURIAE*

NARO seeks leave to participate as *amicus curiae*. Founded in 2003, NARO is one of the independent chapters of the National Association of Royalty Owners. NARO represents the interests of oil and gas royalty owners in Colorado and has approximately 500 members. NARO's members include farmers, ranchers, family trusts, widows, charitable organizations, churches, hospitals, and universities. The mission of NARO is to encourage and promote the exploration and

production of minerals in Colorado while preserving, protecting, advancing, and representing the interests and rights of mineral and royalty owners through education, advocacy, and assistance to its members, to government bodies, and to the public.

Oil and gas production in Colorado is primarily sourced from private lands, and royalties from oil and gas drilling constitute essential income to private landowners who have assigned their rights to drill and produce to an oil and gas operator.[1] For example, just in 2012, private Colorado landowners received approximately $614 million as a result of oil and gas activities.[2] Further, the oil and gas industry brings

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[1] Brian Lewandowski & Richard Wobbekind at 10, *Hydraulic Fracturing – The Economic Impact of a Statewide Fracking Ban in Colorado* (Mar. 2014), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB4QFjAA&url=http%3A%2F%2Fwww.oilandgasbmps.org%2Fdocs%2FCO90-Economic-Impact-Of-Fracking-Moratorium.pdf&ei=xc_8VNKWNcW9ggTI-YFI&usg=AFQjCNFfBn5LvQ8sMj2F13cd3ds6-LJi6g&sig2=8z03HlsWHZdSQr8jN35KVA.

[2] Brian Lewandowski & Richard Wobbekind at 1, *Assessment of Oil and Gas Industry – 2012 Industry Economic and Fiscal Contributions in Colorado* (July 2013), *available at* http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&ved=0CB8QFjAA&url=http%3A%2F%2Fwww.coga.org%2Fpdf_studies%2FUniversityofColorado_LeedsSchoolofBusiness_Oil%26NaturalGasI

investment to rural areas where high-wage jobs and industry are scarce,[3] and often, the royalty values of mineral rights in rural areas exceed the surface value of the property that sits above those minerals.

The property rights of individual landowners may be severely diminished by the bans and moratoria imposed by Colorado local governments, including the City of Fort Collins, on oil and gas operations and on hydraulic fracturing. Thus, long-term bans such as the one in Fort Collins threaten to severely disrupt the livelihood of the average NARO (national) member, who is over 60-years-old and receives less than $500 per month of royalty income as a supplement to their social security.

NARO therefore submits this brief in support of COGA and for the narrow purpose of addressing those portions of the Opening Brief (the "Opening Brief") filed by the City of Fort Collins (the "City") that erroneously argue that the five-year moratorium (the "Ordinance") should be treated differently than an outright ban and that set forth the

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ndustry_EconomicStudy2012.pdf&ei=htb8VIjaFIGFNv_WgaAG&usg=AFQjCNGV5TXdK3RlFuV9_jbKX1Uw9YXpSA&sig2=f6TDfc_dl6_c7bh_xk-r7g&bvm=bv.87611401,d.eXY.

[3] *Id.*

incorrect test for determining whether a home-rule city's ban is preempted by state law.

## ARGUMENT

### I. THE ORDINANCE IS THE EQUIVALENT OF A BAN.

The City spends much of its Opening Brief arguing that the district court erred in determining that the Ordinance is a ban. *E.g.*, Opening Br. at 13, 18. The City argues that the district court's conclusion that the Ordinance is the same as a ban "ignores the fact that moratoria are tools used to temporarily stay a particular land use activity, as opposed to permanently banning such an activity." *Id.* at 13. NARO does not disagree with the notion that moratoria can be useful land use tools incidental to local land use authority. NARO does, however, dispute that the City may entirely prohibit—even "temporarily"—an activity in which the state has a dominant interest and which the state expressly permits. *See infra* § II.

The City's contention that the Ordinance is not a ban is contradicted by the plain language of the Ordinance, which prohibits "hydraulic fracturing and the storage of its waste products within the City of Fort Collins or on lands under its jurisdiction for a period of five

years, *without exemption or exception*." R. CF, pp. 6, 120 (emphasis added). Thus, for five years, oil and gas operators are *completely banned* from hydraulically fracturing or storing hydraulic fracturing waste products in the City. Indeed, the City even relies on a case in which this Court referred to a moratorium as "a temporary *ban*." *Deighton v. City Council of Colo. Springs*, 902 P.2d 426, 428 (Colo. App. 1994) (emphasis added) (quoting Webster's Third New International Dictionary 1469).

Recognizing that "[a] moratorium ordinance and a permanent ordinance can both be preempted," the district court relied on cases in which courts applied state preemption principles to a moratorium:

> Although no Colorado appellate court has published an opinion analyzing preemption in regards to a moratorium, the analysis does not differ from that of a permanent ordinance. *See e.g., City of Claremont v. Kruse*, 177 Cal. App. 4th 1153, 1168, (2009) (using the well-settled "principles governing state statutory preemption" to determine whether Claremont's moratorium on marijuana dispensaries was preempted); *see also Plaza Joint Venture v. City of Atl. City,* 174 N.J. Super. 231, 237-39 (App. Div. 1980) (in determining the validity of Atlantic City's moratorium on apartment conversion, the court used New Jersey's traditional preemption analysis, including determining if "the local regulation conflicts with the state statutes"); *City of Buford v. Georgia Power Co.*, 276 Ga. 590, 590 (2003) (in determining whether Buford's moratorium on

> construction of electric substations the court used Georgia's standard express/implied preemption analysis).

R. CF, p. 498; *see also Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. P'ship*, 684 A.2d 888, 893–94 (Md. Ct. Spec. App. 1996) (holding that moratorium was impliedly preempted by state environmental laws), *cert. denied*, 690 A.2d 523 (Md. 1997).

The various moratorium cases that the City cites to support its argument that a moratorium is different than a ban are inapposite in the preemption context. For example, in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302 (2002), the United States Supreme Court addressed the question of whether two moratoria constituted a *per se* taking of the petitioners' property without just compensation. The Court analyzed the moratoria in that case under the Takings Clause of the United States Constitution. *Id.* at 306. Similarly, in *Williams v. Central City*, the issue presented was "whether Central City's interim moratorium on development in its gaming district resulted in a compensable temporary taking of [the plaintiff's] real property." 907 P.2d 701, 702 (Colo. App. 1995). That case had nothing to do with preemption, and as the district court noted

below, the *Williams* court did not even determine whether the moratorium was valid. R. CF, p. 498 n.3. Finally, neither *Droste v. Board of County Commissioners*, 159 P.3d 601 (Colo. 2007) nor *Deighton v. City Council of Colo. Springs*, 902 P.2d 426 (Colo. App. 1995) are relevant because the plaintiffs in those cases did not allege that the moratoria at issue were preempted.

The City's position that the moratorium is not a ban elevates form over substance. Under the City's logic, it could institute every five years another "five-year moratorium" on hydraulic fracturing, thereby prohibiting hydraulic fracturing indefinitely and avoiding preemption challenges simply by claiming that each five-year ban was temporary because of its "moratorium" label. The Ordinance absolutely prohibits, "without exemption or exception," hydraulic fracturing and, therefore, is a ban that the district court properly analyzed under Colorado preemption principles.

In an effort to salvage the Ordinance, the City also contends that the purpose of the supposed "temporary" ban is to allow for further studies of the impacts of hydraulic fracturing and for citizen input and debate. Opening Br. at 9, 17. Despite assertions by the City and

various *Amici Curiae* in support of the City to the contrary, recent research demonstrates that hydraulic fracturing is safe and environmentally benign. *See, e.g.*, Thomas H. Darrah et al., *Noble Gases Identify the Mechanisms of Fugitive Gas Contamination in Drinking-Water Wells Overlying the Marcellus and Barnett Shales*, 111 PROC. NAT'L ACAD. SCI. 14076 (2014) (determining that hydraulic fracturing does not cause contamination; rather, in isolated instances, faulty well completion can result in contamination); *Major Class of Fracking Chemicals No More Toxic Than Common Household Substances*, UNIV. OF COLO. BOULDER (Nov. 12, 2014), http://www.colorado.edu/news/releases/2014/11/12/major-class-fracking-chemicals-no-more-toxic-common-household-substances ("The results showed that the chemicals found in the [hydraulic fracturing] fluid samples were also commonly found in everyday products, from toothpaste to laxatives to detergent to ice cream.") (citing E. Michael Thurman et al., *Analysis of Hydraulic Fracturing Flowback and Produced Waters Using Accurate Mass: Identification of Ethoxylated Surfactants*, 86 Analytical Chemistry 9653 (2014)).

Yet the results of these scientific studies will never satisfy those who categorically oppose hydraulic fracturing. Fortunately the Court need not seek to resolve this scientific debate, as the issues presented on appeal concern whether the district court properly applied *Voss*, *Webb*, and other Colorado cases that invalidated home-rule bans *as a matter of law*. *See infra* § II.

The City's desire to find evidence and garner support for a ban that is already in place ignores the Commission's existing regulatory scheme and, from NARO's perspective, fails to consider the costs imposed on mineral interest owners who are asked to sit idly by while their private property rights are rendered worthless. Indeed, as set forth below, all the impacts that the City and *Amici Curiae* address are already comprehensively regulated. *See infra* § II.A.

## II. THE ORDINANCE IS PREEMPTED UNDER STATE LAW.

### A. The district court properly found that the Ordinance is impliedly preempted.

Because the district court properly treated the Ordinance as a ban for purposes of the preemption analysis, the district court also correctly invalidated the Ordinance under *Voss v. Lundvall Bros.*, 830 P.2d 1061 (Colo. 1992) and its progeny. R. CF, p. 499–502. The Colorado

Supreme Court in *Voss* addressed the City of Greeley's adoption of an ordinance that banned the drilling of any oil and gas well within the city limits. *Voss,* 830 P.2d. at 1063. The court analyzed four factors in determining whether Greeley's ban was preempted: (1) whether there is a need for statewide uniformity of regulation; (2) whether the municipal regulation has an extraterritorial impact; (3) whether the subject matter is one traditionally governed by state or local government; and (4) whether the Colorado Constitution specifically commits the particular matter to state or local regulation. *Id.* at 1067. After examining those factors, the court determined that state law preempted Greeley's ban on oil and gas drilling:

> We conclude that the state's interest in efficient oil and gas development and production throughout the state, as manifested in the Oil and Gas Conservation Act, is *sufficiently dominant* to override a home-rule city's imposition of a total ban on the drilling of any oil, gas, or hydrocarbon wells within the city limits.

*Id.* at 1068 (emphasis added).

Although the court in *Voss* did not expressly state on which preemption grounds it invalidated Greeley's ban, the Colorado Supreme Court clarified in 2009 that Greeley's ban was impliedly preempted.

*See Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718 (Colo. 2009). In *Colorado Mining Ass'n*, the court held that Summit County's ban on the use of certain chemicals in mining operations was impliedly preempted by Colorado's Mined Land Reclamation Act. *Id.* at 721. The court expressly relied on *Voss* in reaching that conclusion, stating that, in *Voss*, the "state interest manifested in the state act was 'sufficiently dominant' to override [Greeley's] local ordinance" and that "[s]ufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." *Id.* at 724 (citing *Voss*, 830 P.2d at 1068).

Here, the district court properly relied on *Voss* and *Colorado Mining Ass'n* in determining that the Ordinance is impliedly preempted by the Colorado Oil and Gas Conservation Act (the "Act") and the regulations of the Colorado Oil and Gas Conservation Commission (the "Commission"). As recently reaffirmed by *Colorado Mining Ass'n,* and as the district court found, the state still has a "sufficiently dominant interest" in the efficient and equitable production of oil and gas that preempts local measures that are inimical to this state interest.

As was the case in 1992 when *Voss* was decided, the declared purposes of the Act are to, among other things: "[f]oster the . . .

development, production, and utilization of the natural resources of oil and gas in the state of Colorado . . . ; [p]rotect the public and private interests against waste in the production and utilization of oil and gas; [and] [s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers in a common source or pool of oil and gas to the end that each such owner and producer in a common pool or source of supply of oil and gas may obtain a just and equitable share of production therefrom." Colo. Rev. Stat. § 34-60-102(1)(a); *cf. Voss*, 830 P.2d at 1065 (citing Colo. Rev. Stat. § 34-60-102(1) (1984)). Further, as the *Voss* court recognized, the Act vests the Commission with the authority to "enforce the provisions of this article, and has the power to make and enforce rules, regulations, and orders pursuant to this article, and to do whatever may reasonably be necessary to carry out the provisions of this article." Colo. Rev. Stat. § 34-60-105(1); *cf. Voss*, 830 P.2d at 1065 (citing Colo. Rev. Stat. § 34-60-105(1) (1984)).

Pursuant to the authority delegated to it by the Act, the Commission regulates oil and gas wells by imposing certain requirements on the design of wells and requiring that wells be tested to ensure that they can withstand hydraulic fracturing. 2 Colo. Code

Regs. § 404–1:317. The Commission requires that operators design wells in such a way that hydraulic fracturing fluids are confined and to report and file certain documents summarizing the fracturing treatment. *Id.* §§ 404–1:205, 1:308, 1:341. The Commission's regulations also impose setback requirements, protect the environment and public water supplies, and address noise and aesthetic impacts. *Id.* §§ 404–1:317, 1:319, 1:604, 1:801–05.

Accordingly, the district court properly applied the four-factor *Voss* test, finding that: "the state requires uniformity in the regulation of oil and gas development; municipal regulation would have a negative extraterritorial impact; and though the Colorado Constitution does not commit the field of oil and gas development to the state or localities, the field has traditionally been an area of state control." R. CF, p. 501 (citing *Voss*, 830 P.2d at 1067–68).[4]

[4] The City contends that the district court erred in finding that the Ordinance is impliedly preempted because the Act does not prevent local governments from enacting land use regulations applicable to oil and gas development. Opening Br. at 21–26. This argument misses the point. NARO does not dispute that the Act permits local regulation of *some* oil and gas activities or that temporary delays incidental to permitting and local land use authority are acceptable. But local governments may not *ban all* oil and gas development in contravention

Finally, the only differences between the Greeley ban in *Voss* and the five-year ban at issue here is that the Ordinance bans hydraulic fracturing as opposed to all oil and gas drilling and that the Ordinance expires after five years. R. CF, p. 501. However, as the district court found, those distinctions do not alter the fact that the City's moratorium contravenes the state's significant interest in efficient and equitable oil and gas development and production. *Colo. Mining Ass'n*, 199 P.3d at 724; *Voss*, 830 P.2d at 1068. The Ordinance is therefore impliedly preempted.

### B. The district court properly found that the Ordinance is preempted on the basis that it forbids what state law authorizes.

The district court found that, even if the Ordinance is not impliedly preempted, the Ordinance is still invalid because it conflicts with the application of the Act and the Commission's comprehensive regulations regarding hydraulic fracturing. R. CF, p. 502. In matters of mixed state and local concern, "[t]he test to determine whether a

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of the state's "sufficiently dominant interest" in the area. *See* R. CF, p. 501 (finding that the City's five-year ban effectively eliminates the possibility of oil and gas development within the City because hydraulic fracturing is used in "virtually all oil and gas wells" in Colorado).

conflict exists is whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Webb v. City of Black Hawk*, 2013 CO 9, ¶ 43 (citing *Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002)).

On the one hand, both the Act and the Commission expressly authorize and regulate hydraulic fracturing, a completion method which uses water and chemicals to extract oil and gas. Colo. Rev. Stat. § 34-60-106(2)(b) ("The commission has the authority to regulate . . . chemical treatment of wells"); *see also* 2 Colo. Code Regs. §§ 404–1:100 (defining "hydraulic fracturing additive," "hydraulic fracturing fluid," and "hydraulic fracturing treatment"), 205 (access to chemical inventory records), 205A (hydraulic fracturing chemical disclosure), 305 (oil and gas location assessment notice must include the "COGCC's information sheet on hydraulic fracturing treatments except where hydraulic fracturing treatments are not going to be applied to the well in question"), 317B (public water protection system includes during "completion"), 805 (requiring operators to control dust caused by their operations, including specific controls when "handling sand used in hydraulic fracturing operations"). The Ordinance, on the other hand,

bans hydraulic fracturing. Accordingly, the Ordinance is preempted under the *Webb* conflict test.

The City contends that the district court erred by failing to apply the conflict test from *Board of County Commissioners v. Bowen/Edwards Associates, Inc.*, 830 P.2d 1045 (Colo. 1992). Opening Br. at 29–30. The City argues that the five-year ban can be "harmonized" with the Act and the Commission's regulations (*id.* at 27–29), which as set forth above authorize and regulate hydraulic fracturing. The City is incorrect. The *Bowen/Edwards* conflict test is only applicable in cases involving a *particular* regulation and does not apply in cases, such as this one, involving a *total ban*. *See Bowen/Edwards*, 830 P.2d at 1050 (upholding certain "documentation requirements and performance standards, as well as other regulatory requirements"); *see also Bd. of Cnty. Comm'rs v. BDS Int'l, LLC*, 159 P.3d 773 (Colo. App. 2006) (trial court did not err in applying *Bowen/Edwards* to find preempted specific regulations imposing financial requirements and access to records); *Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 760 (Colo. App. 2002) (use of *Bowen/Edwards* test was appropriate to invalidate town ordinances imposing "setbacks,

noise mitigation, visual impact and aesthetics regulation"). Nonetheless, even if *Bowen/Edwards* applied in this case, the Ordinance would still be invalid because there is no way to "harmonize" the City's rank prohibition on hydraulic fracturing with the Act and the Commission's regulations regulating hydraulic fracturing.

NARO has long respected both the state's and local regulators' interest in different aspects of mineral development, but when it comes to regulating technical down-hole exploration techniques, NARO adamantly believes that the Commission is the appropriate entity to regulate and to protect mineral owners' real property rights.

## CONCLUSION

For the foregoing reasons, the Court should affirm the district court's decision granting summary judgment in favor of COGA.

Dated this 13th day of March, 2015

LINDQUIST & VENNUM LLP

By: *s/Thomas Niebrugge*
Thomas W. Niebrugge, #8418

*ATTORNEYS FOR AMICUS CURIAE NATIONAL ASSOCIATION OF ROYALTY OWNERS – COLORADO CHAPTER*

## CERTIFICATE OF SERVICE

I certify that on March 13, 2015, I electronically filed a true and correct copy of the foregoing **AMICUS CURIAE BRIEF OF NATIONAL ASSOCIATION OF ROYALTY OWNERS – COLORADO CHAPTER IN SUPPORT OF APPELLEE COLORADO OIL AND GAS ASSOCIATION** with the Clerk of Court via the Colorado ICCES program which will send notification of such filing and service upon the following counsel of record:

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