COLORADO COURT OF APPEALS 2 East 14th Ave., Denver, CO 80203	
District Court Larimer County, Colorado Case Number: 2013CV31385 The Honorable Gregory M. Lammons	
Defendant/Appellant: City of Fort Collins, Colorado v. **Plaintiff/Appellee:** Colorado Oil & Gas Association	▲ **COURT USE ONLY** ▲
Attorneys for Colorado Concern, Denver Metro Chamber of Commerce, Colorado Competitive Council, Colorado Motor Carriers Association, and Colorado Farm Bureau: BROWNSTEIN HYATT FARBER SCHRECK, LLP Jason R. Dunn, #33011 410 Seventeenth Street, Suite 2200 Denver, CO 80202-4432 Phone: 303.223.1100 Emails: jdunn@bhfs.com	Case No.: 2014CA1991

AMICI CURIAE BRIEF OF COLORADO CONCERN, ET AL. 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 3316 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 Appellee Colorado Oil & Gas Association 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/ *Jason R. Dunn*

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Pursuant to C.A.R. 29, the entities listed below, through their undersigned counsel, conditionally file this *amici curiae* brief in support of Plaintiff/Appellee Colorado Oil and Gas Association ("COGA"), and state as follows:

INTERESTS OF *AMICI CURIAE*

The following five organizations seek leave to participate as *amici curiae*:

(i) **Colorado Concern** is an alliance of top executives with a common interest in enhancing and protecting Colorado's business climate. Founded in 1986 by a dozen committed business leaders, membership now includes more than 120 CEOs from for-profit, non-profit, civic, and higher education organizations across Colorado.

(ii) **Colorado Competitive Council** is a leading business voice for dozens of companies and trade associations, organized for the purpose of directly advocating for sound business policies in Colorado that encourage growth of key industry clusters and attract high-quality jobs to Colorado.

(iii) **Denver Metro Chamber of Commerce** is a leading voice for over 3,000 Denver-area businesses and their 300,000 employees, providing advocacy for nearly 150 years at the federal, state, and local levels and helping shape Colorado's economic and public policy landscape.

(iv) **Colorado Motor Carriers Association** represents over 650 companies and over 60,000 employees that are directly involved or affiliated with trucking within Colorado. CMCA

supports the interests of these trucking-related companies on a state, national, and local basis.

(v) **Colorado Farm Bureau** is a 25,000 member organization dedicated to helping family farmers and ranchers stay on their land and continue to produce food for Colorado, the nation, and the world. CFB provides its members with continuous representation at the local, state, and federal level to improve Colorado's economy, natural resources, environment, and social institutions.

INTRODUCTION

The *Amici Curiae* are five Colorado organizations representing a range of business, trade, and non-profit associations, as well as chambers of commerce, and family-owned farms. Each is committed to advancing sound public policy and a strong economy at the state and local level. Individually and collectively, they dedicate significant financial and human resources toward developing state law and policy that ensures a favorable economic climate for not only their individual members and their employees, but for the State of Colorado as a whole.

Among the *Amici Curiae's* shared values is the belief that our natural resources, including oil and gas, are a critical component of our State's economy. *Amici* believe that our natural gas and oil resources must be protected and regulated in such a way as to allow for their

efficient development while also guarding the environment and ensuring public safety. Given the ubiquitous nature of oil and gas resources across governmental boundaries, however, it is critical that such development be regulated uniformly so as to promote efficient, economical, and safe production.

The *Amici Curiae* submit this brief in support of COGA in order to address the City of Fort Collins' arguments in its Opening Brief (the "Opening Brief") that the five-year moratorium (the "Ban")[1] is not preempted and that the district court applied an erroneous test in determining that the Ban is preempted.

ARGUMENT

I. THE BAN IS IMPLIEDLY PREEMPTED.

A. The trial court correctly recognized the State's substantial interest in hydraulic fracturing operations found in the Commission's hydraulic fracturing rules.

[1] As discussed below, the five-year moratorium prohibits hydraulic fracturing and the storage of its waste products within Fort Collins "without exemption or exception." R. CF, pp. 6, 120. Because the ordinance unequivocally precludes hydraulic fracturing operations, it is properly characterized as a ban.

While *Amici* acknowledge, as the trial court did, that the City does indeed have a legitimate interest in hydraulic fracturing operations, *Amici* strongly disagree that the State's interests are not "sufficiently dominant" so as to impliedly preempt the Ban. *Voss v. Lundvall Bros.*, 830 P.2d 1061, 1068 (Colo. 1992); *accord Colo. Mining Ass'n v. Bd. of Cnty. Comm'rs*, 199 P.3d 718, 724 (Colo. 1999) ("*Sufficient dominancy* is one of the several grounds for *implied state preemption* of a local ordinance.") (emphasis added); *see also infra* § I.C. To the contrary, *Amici* write to call attention to the State's substantial interest in the uniform regulation of oil and gas operations and hydraulic fracturing.

As the trial court correctly noted, Colorado courts have long recognized the State's interests in oil and gas development, which includes the process of hydraulic fracturing. *See* R. CF, pp. 499–500. "There is no question that the Oil and Gas Conservation Act evidences a *significant* interest on the part of the state in the efficient and fair development, production and utilization of oil and gas resources . . . ." *Voss*, 830 P.2d at 1065–66 (emphasis added); *see also Bd. of Cnty. Comm'rs v. Bowen/Edwards*, 830 P.2d 1045, 1048–49, 1058 (Colo.

1992). The Colorado Supreme Court's finding of a significant state interest is binding upon this Court as a matter of law, and to find otherwise would implicitly overrule the high court's decisions in *Voss* and its progeny, which lower courts may not do. *See People v. Novotny*, 2014 CO 18, ¶ 26.

As the trial court correctly noted, the interests discussed in *Voss* and its progeny derive from the statutory framework found in the Colorado Oil and Gas Conservation Act (the "Act"), wherein the General Assembly expressed the will of the people to foster the responsible, balanced development, production, and utilization of oil and gas in the state, protect against waste, and to safeguard coequal and correlative rights of owners and producers. *See* R. CF, p. 499 (citing (C.R.S. § 34-60-101, *et seq*.).)

Likewise, the trial court correctly acknowledged that those decisions apply to the technical aspects of the oil and gas production process, including hydraulic fracturing. R. CF, p. 503; *see also Bowen/Edwards*, 830 P.2d at 1058 (stating that the Act created a "unitary source of regulatory authority at the state level of government

over the technical aspects of oil and gas development and production [that] serves to prevent waste and protect the correlative rights of common-source owners and producers to a fair share of production profits"). The State effectuates and protects that interest through its delegation of authority to the Oil and Gas Conservation Commission (the "COGCC" or "Commission"), where a multitude of hydraulic fracturing-related rules have been adopted. Indeed, the Commission's regulations use the term "hydraulic fracturing" at least 41 times, and a "major reason" that the Commission adopted new regulations and amendments was "to address concerns regarding hydraulic fracturing." 2 Colo. Code Regs. § 404-1:Appendix I.

B. The State's interests also lie in the economic impacts of the oil and gas industry and protecting against the negative consequences of hydraulic fracturing bans.

Beyond the interests outlined in the Act and the COGCC's regulations, the State has a more fundamental interest in protecting and adequately regulating the oil and gas industry and the hydraulic fracturing process that stems from the industry's central role in

Colorado's economy. Two recent academic studies provide further insight.

First, in 2013, the Business Research Division of the Leeds School of Business at the University of Colorado studied the scope and impact of the oil and gas industry in Colorado.[2] The report, which is attached here as Exhibit A, demonstrates that the oil and gas industry – and now hydraulic fracturing specifically – drives a significant portion of the State's economy, employs the largest private sector workforce in the State, generates significant tax revenue for local governments, and provides significant funding of public education through property taxes. Some of the report's key findings about the industry include:

- 29,300 direct drilling, extraction and support jobs;
- 22,000 additional supply chain jobs;

[2] Brian Lewandowski & Richard Wobbekind, *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%26NaturalGasIndustry_EconomicStudy2012.pdf&ei=htb8VIjaFIGFNv_WgaAG&usg=AFQjCNGV5TXdK3RlFuV9_jbKX1Uw9YXpSA&sig2=f6TDfc_dl6_c7bh_xk-r7g&bvm=bv.87611401,d.eXY.

- $3.8 billion in employee income;
- Average annual wages of over $100,000 (approximately double the state average);
- $614 million in royalty payments to private land owners; and
- $1 billion in severance and property taxes, public royalties, and public leases.

The study concludes with this insightful paragraph:

> While our study illustrated the market contributions of the oil and gas industry, there are many potentially positive and potentially negative nonmarket economic impacts related to the oil and gas industry (e.g., locally sourced energy, air quality, substitution, water usage, etc.). While environmental and societal impacts of this extraction industry are currently being fiercely debated, **the economic contributions of the industry should be present in the discussions calling for drilling moratoriums, understanding that in Colorado, the industry impacts thousands of jobs and billions in wages, funds state and local government (including schools), and makes purchases from every industry**.[3]

Second, in 2014, the Leeds School conducted a follow-up study, which is attached here as Exhibit B, examining the potential impact of a statewide hydraulic fracturing ban.[4] Notably, the report assumes a

[3] *Id.* at 22 (emphasis added).

[4] Brian Lewandowski & Richard Wobbekind, *Hydraulic Fracturing – The Economic Impact of a Statewide Hydraulic fracturing Ban in Colorado* (Mar. 2014), *available at*: http://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&

95% reduction in new and existing production from a hydraulic fracturing ban, resulting in:

- a loss of over 68,000 jobs in first five years following the ban;
- long-term job losses of 93,000;
- annual average drop in state GDP of $8 billion;
- $567 million drop in government revenue over the first five years, declining $985 million by 2040;
- reduced household spending, which would impact everything from construction to retail spending; and
- significant negative impacts to virtually all job sectors.

The 2014 study unequivocally demonstrates that a ban on hydraulic fracturing would have a profound impact on Colorado, its economy, its public resources, and its citizens. Thus, the interest of the State – and *Amici* as business groups dedicated to a sound economy – is perhaps at its zenith in this case.

Moreover, while the ban at issue here is municipal rather than statewide, the lessons of the 2014 study remain applicable here:

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ved=0CB4QFjAA&url=http%3A%2F%2Fwww.oilandgasbmps.org%2Fdocs%2FCO90-Economic-Impact-Of-Hydraulic fracturing-Moratorium.pdf&ei=xc_8VNKWNcW9ggTI-YFI&usg=AFQjCNFfBn5LvQ8sMj2F13cd3ds6-LJi6g&sig2=8z03HlsWHZdSQr8jN35KVA.

allowing municipalities across the State to create a patchwork of bans, moratoriums, and individualized regulations contrary to the State's interests would surely wreak havoc on the industry, drive inefficiency and waste, reduce investment from producers, and ultimately have a negative impact on the State as a whole. *See Colo. Mining Ass'n*, 199 P.3d at 731 ("A patchwork of county-level bans on certain mining extraction methods would inhibit what the General Assembly has recognized as a necessary activity and would impede the orderly development of Colorado's mineral resources.").

C. The district court properly applied Voss to the Ban in finding that the Ban is impliedly preempted.

The City attempts to minimize the State's interest in oil and gas development and production and argues that the trial court erred by applying the Colorado Supreme Court's analysis in *Voss* to invalidate the Ban. *E.g.*, Opening Br. at 13, 21. But *Voss* is dispositive here and is binding on this Court. The *Voss* court addressed a City of Greeley ordinance that banned the drilling of any oil and gas well within the city. *Voss,* 830 P.2d. at 1063. In determining whether Greeley's ban was preempted, the court used a four-factor test: (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.

With respect to the first factor, the court found that it "weighs heavily in favor of state preemption of Greeley's total ban on drilling within city limits." *Id.* The court noted that the "state's interest in the efficient and fair development and production of oil and gas resources in the state, including the location and spacing of individual wells, militates against a home-rule city's total ban on drilling within the city limits." *Id.*

The court held as to the second factor that the "extraterritorial effect of the Greeley ordinances also weighs in favor of the state's interest in effective and fair development and production." *Id.* The court reasoned that "[l]imiting production to only one portion of a pool outside the city limits can result in an increased production cost, with

the result that the total drilling operation may be economically unfeasible." *Id.* at 1067–68.

As to the third factor, "[t]he regulation of oil and gas development and production has traditionally been a matter of state rather than local control." *Id.* at 1068. Finally, the court held that "the Colorado Constitution neither commits the development and production of oil and gas resources to state regulation nor relegates land-use control exclusively to local governments." *Id.*

The court then invalidated Greeley's ban, concluding:

> 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. (emphasis added).

Despite invalidating Greeley's ban under the "sufficient dominancy" test, the *Voss* court was not clear as to whether Greeley's ban was impliedly preempted. *See id.* However, the Colorado Supreme Court quelled any confusion in *Colorado Mining Ass'n* regarding whether Greeley's ban was impliedly preempted. In *Colorado Mining*

Ass'n, after heavily citing to and relying on *Voss*, the court stated, "Sufficient dominancy is one of the several grounds for implied state preemption of a local ordinance." 199 P.3d at 724.[5]

The trial court in this case also relied on *Voss*, noting that the Act has not materially changed since *Voss* was decided in 1992. R. CF, p. 501. The court therefore properly applied the four-factor test from *Voss* and properly found that the Ban is impliedly preempted:

> [T]he 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).

Notably, the City does not, and indeed cannot, attempt to argue that *Voss* is inapplicable due to changes in the Act or changes in the State's interest in the efficient and equitable production of oil and gas. Instead, the City argues that *Voss* is inapplicable and that the Ban is not impliedly preempted because the five-year moratorium is not

[5] Not only does the City not discuss the Colorado Supreme Court's decision in *Colorado Mining Ass'n*, it fails to even *mention* that case. *See generally* Opening Br.

equivalent to a ban. This argument fails. The Ban prohibits hydraulic fracturing in the City "*without exemption or exception*." R. CF, pp. 6, 120 (emphasis added). Operators who seek to conduct hydraulic fracturing operations in Fort Collins at this time are prohibited from doing so by the five-year moratorium. Thus, hydraulic fracturing activity is *banned*. Oxford Dictionary 69 (1998) (defining "ban" as to "forbid; prohibit"). The fact that the Ban is called a "moratorium" does not make it any less of a *prohibition* on hydraulic fracturing. *See id.* at 531 (defining "moratorium" as "a temporary *prohibition*") (emphasis added).

Further, even assuming that a moratorium is not precisely the same as a ban, *Voss* is still applicable because, as the trial court found, state preemption principles apply to moratoria in the same way that those preemption principles apply to total bans. R. CF, p. 498 (noting that the state preemption analysis with respect to a moratorium "does not differ from that of a permanent ordinance" and that "[a] moratorium ordinance and a permanent ordinance can both be preempted") (citing cases where courts applied "well-settled," "traditional," and "standard"

preemption principles to moratoria). Accordingly, the trial court correctly concluded that the Ban is impliedly preempted under *Voss* and *Colorado Mining Ass'n*.

II. THE TRIAL COURT PROPERLY CONCLUDED THAT THE BAN IMPERMISSIBLY CONFLICTS WITH STATE LAW.

In addition to finding that the Ban is impliedly preempted, the trial court concluded that the Ban also fails under the applicable operational conflict test. R. CF, p. 502–03. The City contends that the trial court applied the improper conflict test and that the court should have strictly applied the *Bowen/Edwards* conflict test. *E.g.*, Opening Br. at 27. Again, however, the trial court properly relied on Colorado Supreme Court precedent in determining that the Ban conflicts with State law and is therefore preempted.[6]

[6] The City's argument that the *Bowen/Edwards* conflict test applies is misplaced because that operational conflict test is only applicable in cases involving a *specific* regulation—as opposed to a complete ban like in this case. *Compare Town of Frederick v. N. Am. Res. Co.*, 60 P.3d 758, 760 (Colo. App. 2002) (using the *Bowen/Edwards* test to invalidate town ordinances imposing "setbacks, noise mitigation, visual impact and aesthetics regulation"), *with Webb v. City of Black Hawk*, 2013 CO 9, ¶ 44 (ordinance forbidding bicycling without providing a suitable alternate route failed the conflict test because the state statute

As set forth in *Webb v. City of Black Hawk*, which was decided only two years ago, whether a home-rule ordinance conflicts with State law depends on "whether the home-rule city's ordinance authorizes what state statute forbids, or forbids what state statute authorizes." *Webb*, ¶ 43 (citing *Commerce City v. State*, 40 P.3d 1273, 1284 (Colo. 2002)). The trial court in this case applied that test. R. CF, p. 503. The court noted that the Act expressly authorizes the Commission to regulate the "chemical treatment of wells." R. CF, p. 502 (citing C.R.S. § 106(2)(b)). Hydraulic fracturing, as the court found, involves the use of "*chemical additives*" to extract oil and gas. R. CF, p. 502 (emphasis in original) (citing R. CF, p. 120).[7] The court also noted that "the Commission has promulgated elaborate rules designed so that the process of hydraulic fracturing is used in accordance with the purposes of the Act." R. CF, p. 502 (citing R. CF, p. 161). The court therefore concluded: "[The City] cannot impose a total ban on hydraulic fracturing

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authorizes such a prohibition only when an alternate route is established).

[7] Notably, the record at page 120 is the City's own resolution proposing the Ban.

while the Act authorizes its use. The five-year ban . . . 'forbids what state statute authorizes.'" R.CF, p. 503 (quoting *Webb*, ¶ 43). Accordingly, the trial court properly found that the Ban and the Act are mutually exclusive because the City's ban forbids what State law allows.

The City also complains that it should have been afforded the opportunity to present further evidence so that the trial court could apply the *Bowen/Edwards* conflict test. *E.g.*, Opening Br. at 29. As set forth immediately above, however, the *Bowen/Edwards* conflict test and the need for a factual record only apply where a *particular* regulation is at issue. *Supra* II n.3. The reason that courts require a factual inquiry when there is anything less than a total ban is so that they can determine whether the ordinance at issue conflicts with any applicable statute or regulations. However, in instances like this one where the home-rule ordinance is a complete prohibition, courts can determine as a matter of law, based on the language of the statute or regulation, whether the statute or regulation authorizes what the ordinance prohibits. Thus, there was no reason for the trial court to

examine the "particular facts" of this case on an "ad-hoc basis" because the five-year moratorium is a total ban. Opening Br. at 29 (quoting *Bowen/Edwards*, 830 P.2d at 1060).

Accordingly, absent this Court finding that the Act and the Commission's regulations do not authorize hydraulic fracturing, the trial court's finding that no further factual development was necessary and that the State law preempts the City's ban could only be correct. This Court should make a similar ruling under its *de novo* review.

CONCLUSION

The *Amici Curiae* respectfully request that the Court reject the City's arguments and affirm the decision of the trial court.

Dated this 13th day of March, 2015

BROWNSTEIN HYATT FARBER SCHRECK, LLP

By: *s/Jason R. Dunn*
Jason R. Dunn, #33011

ATTORNEYS FOR *AMICI CURIE COLORADO CONCERN, ET AL.*

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 COLORADO CONCERN, ET AL. 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:

Barbara J.B. Green
John T. Sullivan
Sullivan Green Seavy, LLC
3223 Arapaho Avenue, #300
Boulder, CO 80303

John R. Duval
Fort Collins City Attorney's Office
300 La Porte Avenue
P. O. Box 580
Fort Collins,CO 80522-0580

Mark Mathews
Wayne Forman
Michael Hoke
Justin Cohen
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Ste 2200
Denver, CO 80202

/s/ Paulette M. Chesson
Paulette M. Chesson, Paralegal

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