COLORADO COURT OF APPEALS
2 East 14th Avenue
Denver, CO 80203

Appeal from Larimer County District Court
The Honorable Gregory M. Lammons
Case No. 13CV31385

Appellant:
CITY OF FORT COLLINS, COLORADO

v.

Appellee:
COLORADO OIL AND GAS ASSOCIATION

Attorneys:

SULLIVAN GREEN SEAVY LLC
Barbara J. B. Green, Atty. Reg. #15022
John T. Sullivan, Atty. Reg. #17069
3223 Arapahoe Avenue, Suite 300
Boulder, Colorado 80303
Telephone Number: (303) 440-9101
Facsimile Number: (303) 443-3914
E-mail: barbara@sullivangreenseavy.com
john@sullivangreenseavy.com

Carrie M. Daggett, Atty. Reg. #23316
John R. Duval, Atty. Reg. #10185
Fort Collins City Attorney's Office
300 La Porte Avenue
P. O. Box 580
Fort Collins, CO 80522-0580
Telephone Number: (970) 221-6520
Facsimile Number: (970) 221-6327
Email: cdaggett@fcgov.com
jduval@fcgov.com

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Case Number: 2014CA001991

APPELLANT CITY OF FORT COLLINS' REPLY BRIEF

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).
It contains **5,574** words.

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

_X___For the party raising the issue:

The brief 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 (CF, p. #), not to an entire document, where the issue was raised and ruled on.

_____For the party responding to the issue:

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

By: s/ John T. Sullivan
John T. Sullivan, No. 17069

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Defendant-Appellant City of Fort Collins, Colorado (the "City" or “Fort Collins”) by and through its undersigned attorneys, Carrie M. Daggett and John R. Duval of the Fort Collins City Attorney's Office, and Barbara J. B. Green and John T. Sullivan of Sullivan Green Seavy LLC, submits its Reply Brief to the Court.

SUMMARY OF ARGUMENT

COGA is asking the Court of Appeals to rule that a citizen-initiated moratorium on hydraulic fracturing (“Moratorium”) enacted by Fort Collins is *facially* invalid by virtue of either implied preemption or operational conflict. Plaintiff’s argument necessitates an overhaul of the Colorado preemption doctrine, in effect since 1992, for evaluating local government enactments regulating land-use impacts of oil and gas activities. The consequence of COGA’s position is that any moratorium on any aspect of oil and gas development, of any length, under any circumstances, always would be invalid. Indeed, any local land-use, building code or fire code regulation on any aspect of oil and gas development would also be invalid. This directly contradicts clear, controlling precedent on this point.

Since COGA mounts a facial challenge to the Moratorium in this declaratory judgment action, COGA bears a heavy burden to show that the Moratorium is preempted. Legislative enactments are presumed to be valid, and the party

challenging them has the burden of proving the asserted invalidity beyond a reasonable doubt. COGA has not satisfied this burden, and instead, argues that the standard does not apply in preemption cases. Colorado law, however, does not draw this distinction.

COGA's first argument, contrary to established law, is that the Colorado Oil and Gas Conservation Act ("Act") impliedly preempts the Moratorium. State law impliedly preempts local government regulatory authority only if there is an implied legislative intent to occupy completely a given field leaving no room for local regulation whatsoever. *See Board of County Comm'rs of La Plata County v. Bowen/Edwards Assoc. Inc.*, 830 P.2d 1045, 1056-59 (Colo. 1992) ("*Bowen/Edwards*"). The Act manifests no legislative intent to impliedly preempt all aspects of local government land-use authority over oil and gas activities. *See Voss v. Lundvall Brothers, Inc.*, 830 P.2d 1061, 1066 (Colo. 1992) ("*Voss*"). COGA's implied preemption theory is disproved by its own admission that local governments have authority to regulate oil and gas; the state has not occupied the entire field if local governments can also exercise their land use authority. COGA's theory of implied preemption mistakenly turns on the nature of the local enactment, rather than the intent of the General Assembly, as the basis for implied preemption. Here, COGA equates the Moratorium with an absolute ban on oil and

gas development, even though it is temporary in nature, and reinterprets *Voss* as an implied preemption case, even though the Colorado Supreme Court in *Voss* expressly rejected the Court of Appeals' implied preemption ruling.

In the alternative, COGA argues that the Moratorium is facially invalid because it creates a *per se* operational conflict with state oil and gas laws. To advance this theory, COGA urges this Court to disregard the test articulated in *Voss*, *Bowen/Edwards*, and every subsequent Court of Appeals decision analyzing conflict preemption under the Act and instead adopt a new test for operational conflict. COGA's proposed test – whether the local regulation prohibits conduct that the state allows – has never been used to analyze a local government enactment that applies to oil and gas. The proper operational conflict test for oil and gas is whether "the effectuation of the local interest materially impedes or destroys the state interest." *Bowen/Edwards*, 830 P.2d at 1059; *Voss*, 830 P.2d at 1068-69. COGA's "prohibits/allows test" is based on a series of cases analyzing home rule regulations against state statutes that have nothing to do with oil and gas. Courts have never even hinted that the oil and gas operational conflict test is anything other than "materially impedes or destroys the state interest" when it comes to a home rule municipality.

Plaintiff urges this Court to carve out special exceptions from existing jurisprudence. Although this is a case of first impression, there is no need to go to those lengths to resolve this case. There is ample relevant authority to guide how courts should evaluate the interplay of the Act and any local government legislative enactment, be it a moratorium or regulation. When the appropriate analysis is applied, COGA has not met its burden of proof to show that the Moratorium is invalid on its face.

I. COGA's Burden of Proof and Standard of Review.

As a legislative enactment, the Moratorium is presumed valid, and COGA has the burden of proving its invalidity beyond a reasonable doubt. *Best v. La Plata Planning Commission,* 701 P.2d 91, 95 (Colo. App. 1984) (County PUD regulations are consistent with state enabling legislation); *Moore v. City of Boulder*, 20 Colo. App. 248, 252, 484 P.2d 134, 136 (1971) (local zoning law controls over state law). COGA argues that this burden of proof standard only applies to constitutional challenges and not to a preemption analysis. Answer Brief at 8-9. As *Best* and *Moore* confirm, this standard also applies *outside* the context of constitutional challenges. Furthermore, no court has ever carved out an exception to the burden of proof for challenges based on preemption theories. The law

remains that a party challenging the validity of a legislative enactment for any reason must prove the asserted invalidity beyond a reasonable doubt.

Moreover, the wisdom of the Moratorium is not for the court to decide. When considering a legal challenge to a legislative act, the Supreme Court has stated: "[w]e are not concerned with the wisdom or the lack of wisdom of such legislative decisions, it not being our function to approve or disapprove of the wisdom or desirability of legislative acts. Nor can we substitute our judgment for that of the legislative body charged with the duty and responsibility of zoning." *Frankel v. City and County of Denver*, 147 Colo. 373, 381, 363 P.2d 1063, 1067 (1961).

II. There Is No Implied Preemption of Local Government Land Use Authority.

A. *Voss* does not hold that the Colorado General Assembly occupies the field of oil and gas regulation.

COGA admits that "local governments have a role in the regulation of oil and gas and hydraulic fracturing operations." Answer Brief at 5. Despite this admission, COGA argues that the Moratorium is impliedly preempted under *Voss* and subsequent Colorado Supreme Court decisions. Since implied preemption means that the state legislature has occupied the entire field of oil and gas regulation leaving no room for local regulation, local governments cannot both

"have a role in the regulation of oil and gas" and be impliedly preempted from carrying out that role. COGA's argument and analysis are flawed.

COGA and the district court reinterpret *Voss* to conclude that the Moratorium is impliedly preempted, but *Voss* holds just the opposite. *Voss* rejected a lower court holding that Greeley's ban on hydraulic fracturing was impliedly preempted and that "there is no room whatever for local land-use control" under the Act. *Voss*, 830 P.2d at 1069. The Supreme Court explained that "we must analyze Greeley's total ban on drilling against the state regulatory scheme to determine if the Greeley ordinances *conflict* with the state's interest . . ." 830 P.2d at 1066 (emphasis added). If the Act impliedly preempted Greeley's ordinances, there would have been no need to analyze whether they conflicted with the state's interest because implied preemption means that the state intends in the Act to completely occupy the field of regulating oil and gas development and operations to the exclusion of local government regulation. *See Bowen/Edwards*, 830 P.2d at 1058. The Supreme Court confirmed that "[t]he state's interest in uniform regulation of these and similar matters . . . does not militate in favor of an implied legislative intent to preempt all aspects of a county's statutory authority to regulate land use within its jurisdiction merely because the land is an actual or potential source of oil and gas development and operations." *Voss*, 830 P.2d 1068 (quoting

Bowen/Edwards). The phrase "implied preemption" does not appear in *Voss*, except to describe the court's holding in *Bowen/Edwards* that there is none. *Id.* [1]

Colorado is committed to local control of land use decision-making. *C & M Sand and Gravel v. Bd. of County Comm'rs of Boulder*, 673 P.2d 1013, 1016 (Colo. App. 1983). Consistent with that commitment, the General Assembly intends that oil and gas development is to be subject to a multi-level regulatory and permitting system involving both state agencies and local government and local legislation is not impliedly preempted.

B. The fact that the Moratorium was enacted by a home rule city does not change the implied preemption analysis.

COGA's discussion of home rule jurisprudence also misses the boat. COGA argues that moratoria may only be used for land use issues that are matters of purely local concern and that a home rule city's plenary power *must yield to conflicting state regulations in all other matters* (emphasis added). Answer Brief at 13. This is simply not true, and Plaintiff offers no case law to support this contention. Even if regulation of oil and gas is a matter of mixed concern, rather

[1] Even the American Petroleum Institute ("API"), COGA's ally, agrees in its *amicus* brief that there is no implied preemption and that the operational conflicts test is the correct preemption test to use when evaluating Fort Collins' Moratorium. API Brief at 14, 17. But API then misstates what the operational conflicts test requires the trial court to consider under *Voss* and *Bowen/Edwards* for reasons that are not adequately explained in API's brief. API Brief at 17.

than a matter of purely local concern, the Act does not impliedly preempt home rule municipalities from enacting land use legislation. Quoting *Bowen/Edwards*, *Voss* recognizes that: "The state's interest in oil and gas activities is not so patently dominant over a county's interest in land-use control, nor are the interests of both the state and the county so irreconcilably in conflict, as to eliminate by necessary implication the prospect for the harmonious application of both regulatory schemes." 830 P.2d 1068. If the state's interest is not patently dominant over a county's interest in oil and gas, it follows that the state's interest is also not patently dominant over a home rule city's interest, particularly since a home rule city's authority is grounded in the Colorado Constitution rather than Colorado statutes. COGA's argument leads to an absurd outcome where the Act could impliedly preempt legislation enacted by a home rule municipality, but not legislation enacted by statutory municipalities or counties.

C. *Summit County* does not modify *Voss*.

COGA criticizes the City's failure to cite or discuss *Colorado Mining Association v. Bd. of County Comm'rs of Summit County*, 199 P.3d 718 (Colo. 2009) ("*Summit County*") in its Opening Brief. Fort Collins did not discuss *Summit County* because it does not apply to this case. *Summit County* interprets and applies the Colorado Mined Land Reclamation Act, a completely different set of statutes

from those in the Act that were at issue in *Voss*. For this reason alone, it is baseless to argue that *Summit County* somehow modifies *Voss's* holding that there is no implied preemption of a home rule city's land use authority over various aspects of oil and gas operations. In fact, *Summit County* states: "[a]s shown by *Voss* . . . local ban ordinances that *conflict* with state statutes in an overlapping field of regulation are subject to preemption." 199 P.3d 724 (emphasis added). If the Supreme Court had intended in *Summit County* to re-characterize *Voss* as an implied preemption case, it would not have referred to conflict preemption.

D. The Moratorium is not the equivalent of the total ban in *Voss.*

COGA also argues that the Moratorium is impliedly preempted because it is the same as the ban in *Voss*. Plaintiff is wrong on two counts. First, as discussed above, the Act does not impliedly preempt local government oil and gas regulations. And second, the Moratorium is not the same as Greeley's ban. On pages 14-20 of its Opening Brief, the City discusses the legal and factual reasons why the Moratorium is not the same as the total ban in *Voss*. To begin with, the Moratorium applies only to hydraulic fracturing and the storage of waste disposal, whereas Greeley banned *all* oil and gas development. COGA's argument, which the district court adopted, further ignores a key distinction between a ban and a moratorium, *i.e.* the temporal aspect. A ban lasts forever while a moratorium does

not. This is the distinction that the U.S. Supreme Court found dispositive in *Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*, 535 U.S. 302, 337-39, (2002) ("*Tahoe-Sierra"*).

Colorado courts also recognize that a moratorium is not permanent. Rather, it is "a suspension of activity; a *temporary* ban on the use or production of something." *Deighton v. City of Colorado Springs*, 902 P.2d 426, 428 (Colo. App. 1994) (emphasis added). "Moratoria which function as interim development controls merely suspend the use to which the property may be put while land use control studies are conducted." *Williams v. City of Central*, 907 P.2d 701, 706 (Colo. App. 1996) (citation omitted). The delay from a moratorium is not the same as a total ban. *See Tahoe-Sierra*, 535 U.S. at 331-32.

Even COGA recognizes the difference between a temporary moratorium and a permanent ban. COGA informed the district court that this case is the "only litigation in Colorado in which the party has raised a preemption challenge to a moratorium on hydraulic fracturing," and that it is "precedent-setting litigation which will determine the legality of moratoria on hydraulic fracturing in Colorado." CF, p. 388. If the Moratorium is the same as a permanent ban on all oil and gas development, and the law is well-settled that bans are preempted, COGA contradicts itself by asserting the contrary in its Answer Brief.

Although the distinction between bans and moratoria typically has been raised in the context of a takings claim, the temporary duration of a moratorium, as opposed to the permanent nature of a ban, is critical to understanding its impact on the state interest, especially when the operational conflict test is applied. In the operational conflict preemption analysis that the district court should have performed here, the temporary nature of the Moratorium must be considered because the duration of the Moratorium is necessary in determining whether it materially impedes or destroys the state's interest under the facts and circumstances of this case. *See* Part III, infra.

E. Moratoria cases from other jurisdictions do not change the implied preemption doctrine for oil and gas in Colorado.

COGA selectively cites cases from other jurisdictions in support of its theory that moratoria are impliedly preempted. These cases have nothing to do with oil and gas regulations, and each of them stands only for the proposition that a local moratorium is invalid if it applies to a field of regulation completely occupied by the state. For example, in *Georgia Power Company*, a city's moratorium on construction of substations was invalidated because Georgia gives *exclusive* power to the state public service commission to regulate electric facilities. *City of Buford v. Georgia Power Company,* 581 S.E.2d 16, 17-18 (Ga. 2003). In *Mayor & City Council of Baltimore v. New Pulaski Co. Ltd. P'ship,* 684 A.2d 888, 893-94

(Md.Ct.Spec. App. 1996), the court invalidated a city's moratorium on incinerators because it "stripped the State of its *exclusive* authority over county plans and the relevant permitting process." (emphasis added). In *Town of E. Greenwich v. O'Neil*, 617 A.2d 104, 110 (R.I. 1992), the court invalidated a town's moratorium because it "invaded a field that the state has intentionally occupied." Finally, a city's moratorium on conversion of rental units to condominiums was invalid because the legislature "occupies the field" of condominium regulation. *Plaza Joint Venture v. City of Atlantic City*, 174 N.J. Super. 231, 237 (1980). These cases are not relevant to the issues before this Court.

A case on which the district court did rely, but which COGA does not cite or discuss in its Answer Brief, is *City of Claremont v. Kruse*, 177 Cal. App. 4th 1153 (2009) ("*Kruse")*. The district court cited *Kruse* for "using well settled principles governing state statutory preemption to determine whether Claremont's moratorium on marijuana dispensaries was preempted." CF, p. 498. But *Kruse* actually ruled that because the California legislature had *not* completely occupied the field of marijuana regulation, the city's moratorium was *not* impliedly preempted by state law. 177 Cal. App. 4th at 1176.[2]

[2] COGA also disregards cases in Texas, Oklahoma, New Mexico, and New York that reject implied preemption arguments when municipal and county authority over oil and gas development is at issue. *See Unger v. State of Texas*, 629 S.W.2d

As discussed above, Colorado oil and gas preemption cases are based on the well-settled principle that the General Assembly has no intent to completely occupy the field of oil and gas regulation. *See Bowen/Edwards*, 830 P.2d at 1058-59. The type of local land use measure enacted to regulate oil and gas development has nothing to do with legislative intent. Colorado law is clear: the Act does not evince an implied intent to occupy the entire field to the exclusion of all local regulatory authority, whether the land use measure is a ban, moratorium, or land use code. Because the field of oil and gas regulation is not completely occupied by the state, the Moratorium is not impliedly preempted.

F. The General Assembly has not enacted legislation implying an intent to occupy the entire field of oil and gas regulation since *Voss* and *Bowen/Edwards* were decided.

As noted on pages 23-25 of the City's Opening Brief, the General Assembly amended the Act in 2007, 15 years after *Voss* and *Bowen/Edwards* were decided. The General Assembly reemphasized that the *Bowen/Edwards* line of cases

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811, 812 (Tex.App. Fort Worth 1982) (municipalities in Texas have authority to regulate drilling for and production of oil and gas within their corporate limits); *K & L Oil Co. v. Oklahoma City*, 14 F.Supp. 492, 493 (W.D.Okl. 1936) (power of cities to use zoning, and drilling of oil wells can be prohibited in certain areas.); *Swepi, LP v. Mora County*, No. CIV 14-0035 JB/SCY, (D.N.M., 01/19/2015) (there is room for concurrent regulation and state law does not preempt the entire oil-and-gas field.); *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (3d Dept. 2013) (municipal zoning ordinances that effect a ban on drilling do not conflict with the policies of the state's Oil, Gas and Solution Mining Law.)

rejecting implied preemption continues to be the law in Colorado by including express language in two separate provisions of the Act. House Bill 07-1341, concerning the conservation of wildlife habitat in connection with oil and gas development, provides that "[t]he general assembly hereby declares *that 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 (emphasis added). This language was codified in C.R.S. § 34-60-128(4) and C.R.S. § 34-60-127(4)(c).

Even earlier, the legislature expressly confirmed local government authority over oil and gas. In 1997, the General Assembly amended the Act to generally prohibit local governments from charging a tax or fee to conduct inspections or monitoring of oil and gas operations. However, it made a specific exception for local government fees charged "for inspection and monitoring for road damage and compliance with local fire codes, land use permit conditions, and local building codes." C.R.S. § 34-60-106(15); House Bill 96-1045; 1996 Colo. Laws 346, Ch. 88. This exception would not have been necessary if the legislature intended to completely occupy the field of oil and gas regulation. There is no basis to infer any greater limitations on local authority not expressly imposed.

In this case, the district court specifically held that a home rule city is not permitted "to enact an ordinance in an area of mixed state and local concern . . ." CF, p. 498. This ruling contradicts the intent of the General Assembly and the *Bowen/Edwards* and *Voss* line of cases, and should be reversed.

III. The Correct Preemption Analysis Is the Operational Conflict Test in *Voss* and *Bowen/Edwards*.

A. There is no separate home rule test to determine operational conflict between local government and state oil and gas regulations.

Rather than relying on the traditional operational conflict test for oil and gas, COGA argues that home rule city legislation is preempted by operational conflict if it "authorizes what state statute forbids, or forbids what state statute authorizes." Answer Brief at 22. This is *not* the correct test in the context of oil and gas regulation. Only where "the effectuation of the local regulatory interest materially impedes or destroys the state interest" is the local enactment preempted by operational conflict. *Voss*, 830 P.2d 1068-69; *Bowen/Edwards*, 830 P.2d 1059-60. Courts have never even hinted that the oil and gas operational conflict test for home rule municipalities is anything other than whether the local enactment "materially impedes or destroys the state interest."

None of the home rule cases listed by COGA justifies creating a new operational conflict test just for home rule cities regulating oil and gas. In fact,

COGA omits from the list the case that actually uses the operational conflict test to evaluate a home rule city enactment covering oil and gas. In *Voss*, the court ruled that "Greeley's *total ban on drilling* within the city limits *substantially impedes the interest of the state* in fostering the efficient development and production of oil and gas resources." *Voss*, 830 P.2d 1068 (emphasis added). Of course, we do not have a total and permanent ban on all drilling within the City of Fort Collins in this case, but *Voss* makes clear that the proper operational conflict test is whether the local enactment materially impedes or destroys the state interest. Courts have not created a separate test for enactments of home rule municipalities.

Webb and the other cases listed by COGA are not relevant to potential conflicts between local and state oil and gas regulation. In *Ryals*, Englewood wanted to prohibit felony sex offenders from living in the city, a regulatory matter of mixed state and local concern. *Ryals v. City of Englewood*, 962 F.Supp. 2d 1236, 1249 (D. Colo. 2013). Fort Collins is not attempting to ban anything. *Webb* involves an attempt by Black Hawk to ban bicycles from traveling on city streets in disregard of a state statute expressly allowing local governments to prohibit bicycles, but only when a suitable alternative bike path was available. *Webb v. City of Black Hawk*, 295 P.3d 480, 482 (Colo. 2013). Fort Collins is not attempting to disregard statutory limitations or mandates imposed by the state. In *Ibarra* the

court concluded that "the General Assembly has implied an intent to preempt the regulation of adjudicated delinquent children living in foster care homes." *City of Northglenn v. Ibarra*, 62 P.3d 153, 163 (Colo. 2003). Here, the General Assembly has not implied any intent to preempt regulation of oil and gas. In *Commerce City*, the cities claimed that statutes governing automated vehicle identification systems unconstitutionally infringed on home-rule powers. *Commerce City v. State*, 40 P.3d 1273, 1276 (Colo. 2002). In contrast, the City of Fort Collins is not claiming that state oil and gas laws infringe on its home rule status. Most notably, the court in *National Advertising Co. v. Dep't of Highways*, 751 P.2d 632 (Colo. 1988), also cited by Plaintiff, actually contradicts Plaintiff's argument. The court in *National Advertising* actually *applies* the "materially impede or destroys" test when considering whether a home rule city could control outdoor advertising contrary to Colorado Department of Highways requirements. There, the court held that signs allowed by municipality "would materially impede if not destroy any prospect of achieving" state goals. *National Advertising*, 751 P.2d at 636. When the Colorado Supreme Court adopted the operational conflict test for oil and gas in *Bowen/Edwards*, it expressly cited *National Advertising*. The court's citation should put an end to any argument that a different operational conflict test applies to home rule cities like Fort Collins.

The Court of Appeals also has expressly rejected the use of an operational conflict test other than materially impedes/destroys for oil and gas cases. In *Bd. of County Comm'rs of La Plata County v. Colorado Oil and Gas Conservation Commission*, 81 P.3d 1119, 1125 (Colo. App. 2003) ("*La Plata County*"), the Colorado Court of Appeals struck down a Commission rule that would have preempted any conflicting local regulation. The court held that the words "any conflicting" have a much broader meaning than "operationally conflicting." The only conflict that preempts local oil and gas regulations is an "operational conflict" described in *Bowen/Edwards* (and *Voss*.) *La Plata County*, 81 P.3d at 1125. In the face of all of this precedent, COGA has not provided a good reason why its broader "prohibits/allows test" should be adopted now.

B. COGA and the district court did not analyze the Moratorium under the correct operational conflict test.

COGA is seeking a declaration that the Moratorium is "unlawful and invalid because the Oil and Gas Conservation Act and Commission's regulations/rules preempt the local regulation." CF, p. 9. Plaintiff's claim does not rest on application of the Moratorium to any person, or under a particular set of facts; COGA is raising a purely facial challenge. *See Department of Transp. v. City of Idaho Springs*, 192 P.3d 490, 495 (Colo. App. 2008). Thus, COGA must show that the Moratorium would cause an operational conflict with state oil and gas laws

under any and all circumstances. *See California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 588-89 (1986). *See also Board of County Comm'rs of Gunnison County v. BDS International, LLC*, 159 P.3d 773, 778-79 (Colo. App. 2006) ("*BDS*"). It has not done so. Moreover, "[w]ithin the posture of a facial challenge, identification of a possible set of requirements or conditions not preempted by federal [or state] law is sufficient to rebuff a challenge to [. . .] local regulations." *Granite Rock*, 480 U.S. at 588. The City has shown that there are several possible scenarios under which the Moratorium would not materially impede the state's interest that are sufficient to "rebuff" COGA's facial challenge. City's Opening Brief at pages 29-40.

The state's interest in oil and gas development is expressed in the Act. As COGA points out on page 25 of its Answer Brief, the state's interest includes "the responsible, balanced development, production, and utilization of the natural resources of oil and gas . . . 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). Likewise, it is the "intent and purpose of the [Act] 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 protection of public health, safety, and welfare, including protection of the environment and wildlife

resources," and subject to "the enforcement and protection of the co-equal and correlative rights of the owners and producers of a common source of oil and gas, so that each common owner and producer may obtain a just and equitable share of production therefrom." *Id.* at 102(1)(b). Note that none of these statements mentions a state interest in hydraulic fracturing. In fact, the state's interest as it relates to oil and gas pools producing up to their "maximum efficient rate of production," is to be "consistent with protection of public health, safety, and welfare." *Id.* This is in harmony and not in conflict with the express purpose of the Moratorium---"to fully study the impacts of the [the fracking] process on property values and human health." CF, p. 341.

The Moratorium's only possible effect on these state interests is to temporarily delay hydraulic fracturing from occurring within the City's jurisdiction during a five year period from 2013-2018. COGA does not provide evidence showing how this delay *materially impedes* the state's interest. The Moratorium would not prevent the Commission from carrying out its duties and responsibilities to regulate rates of production, prevent waste, or protect correlative rights. During the course of the Moratorium, any operator could apply to and receive approval from the Commission for permission to drill under the rules that take all of these interests into account. Once the Commission issues a permit to drill, the operator

could also obtain approval from the City and begin to conduct oil and gas exploration and development activities without running afoul of the Moratorium. Only the actual conduct of hydraulic fracturing would be delayed until the end of the Moratorium period. Finally, the Moratorium furthers the state's interest in protection of public health, safety, and welfare by creating a time out to study the localized public health effects of hydraulic fracturing. *See BDS,* 159 P.3d at 781 (regulatory provision that promotes or furthers state's interest not facially invalid).

COGA argues that the City could conduct studies without a moratorium in place. That is true. However, if the City approves an oil and gas operation before the studies are completed, the operator will be subject to existing City requirements in effect at the time it submits its application. This is the case whether the City decides, based on studies, that more stringent requirements are necessary to protect public health and property values, or that less stringent requirements are warranted. The Moratorium is designed to prevent this result.

COGA further claims that it would be futile for any person to attempt to conduct hydraulic fracturing in Fort Collins. Answer Brief at 17. Yet even after the trial court enjoined enforcement of the Moratorium, neither Prospect Energy nor any other person has sought to conduct hydraulic fracturing or oil and gas

development of any kind on lands subject to the Moratorium.[3] Thus, the Moratorium has had no impact on the state's interest in oil and gas development during the time that it has been in effect, nor is there any evidence that hydraulic fracturing in Fort Collins is important to the state's interests.

C. The record is not sufficiently developed to support a ruling of *per se* operational conflict.

As pointed out on pages 33-38 of the City's Opening Brief, the unproven allegations of COGA's complaint are insufficient to prove an operational conflict exists. And, because COGA has not met its burden of demonstrating that the Moratorium is invalid in all of its applications to potential oil and gas operations within Fort Collins, the district court incorrectly ruled that the Moratorium was preempted due to operational conflict.

The district court never analyzed whether the Moratorium "materially impedes or destroys the state's interest" as *Voss* and *Bowen/Edwards* require. Instead, the district court pointed to a "conflict" with the Commission's "authority to regulate 'shooting and chemical treatment of wells' along with a host of other means the Commission uses to comprehensively regulate the development and production of oil and gas wells in Colorado." CF, p. 502. This Court has previously

[3] The COGCC website shows that as of today's date the Commission has not issued any APDs in the Fort Collins field.
https://cogcc.state.co.us/COGIS/DrillingPermits.asp

rejected the contention that an operational conflict exists when a state regulation and a local regulation both concern a particular aspect of oil and gas operations (i.e., there is no "same subject matter test" to determine an operational conflict). *See BDS*, 159 P.3d at 779. Had the district court applied the correct test, it would have analyzed whether the Moratorium "materially impedes or destroys" the Commission's authority to regulate oil and gas, not whether the state "comprehensively regulates" oil and gas.

Based on its improper conclusion that the Moratorium equates to a ban and its failure to apply the correct test, the district court never considered that the Moratorium was limited in duration, the extent of the state's interest in oil and gas development in Fort Collins, and whether the state's interest would be "materially impeded or destroyed" during that duration. Such an evaluation would have considered, among other facts, the fact that exploration and drilling activities prior to the hydraulic fracturing phase are not affected by the Moratorium, and that no permits to drill in the Fort Collins' field have been applied for or approved by the Commission during the course of the Moratorium. Without a fully-developed evidentiary record on these and other issues, the district court had no information about whether the "effectuation of the local interest" (*i.e.*, a time-out to evaluate the impacts of hydraulic fracturing) has any effect, material or otherwise, on the

state's interest. Therefore, this Court should reverse the district court's ruling granting summary judgment to COGA.

CONCLUSION

In this facial challenge, COGA is asking the Court to create a blanket, *per se* rule for local government moratoria that is contrary to the well-settled preemption doctrine for oil and gas. If adopted, this *per se* rule would invalidate every local government moratorium that applies to oil and gas operations, whether or not the moratorium would materially impede or destroy the state's interest. The preemption doctrine, if applied correctly, does not result in such automatic and cavalier usurpation of local government land use authority.

Fort Collins respectfully requests that this Court reverse the district court's August 7, 2014 Order and enter judgment in favor of the City of Fort Collins.

Dated this 3rd day of April, 2015.

SULLIVAN GREEN SEAVY LLC

By: /s/ John T. Sullivan
Barbara J. B. Green, No. 15022
John T. Sullivan, No. 17069

CITY OF FORT COLLINS

By: /s/ John R. Duval
Carrie M. Daggett, No. 23316, City Attorney
John R. Duval, No. 10185, Deputy City Attorney

ATTORNEYS FOR DEFENDANT CITY OF FORT COLLINS

CERTIFICATE OF SERVICE

I do hereby certify that on this 3rd day of April, 2015, a true and correct copy of the foregoing pleading was served electronically via ICCES or e-mail to the following persons:

Mark J. Mathews (mmathews@bhfs.com)
Wayne F. Forman (wforman@bhfs.com)
Michal D. Hoke (mhoke@bhfs.com)
Justin L. Cohen (jcohen@bhfs.com)
BROWNSTEIN HYATT FARBER SCHRECK, LLP
410 Seventeenth Street, Suite 2200
Denver, Colorado 80202-4437

Amicus Curiae Citizens for a Healthy Fort Collins, Sierra Club, and Earthwork
Kevin Lynch (klynch@law.du.edu)
Brad Bartlett (bbartlett@law.du.edu)
Environmental Law Clinic
University of Denver Sturm College of Law
2255 E. Evans Avenue, Suite 335
Denver, CO 80208

Amicus Curiae City of Boulder
Thomas A. Carr (carrt@bouldercolorado.gov)
Office of the City Attorney
P.O. Box 791
Boulder, CO 80306

Amicus Curiae County of Boulder
Jeffrey P. Robbins (robbins@grn-law.com)
Goldman, Robbins & Nicholson P.C.
P.O. Box 2270
Durango, CO 81302

Amicus Curiae Colorado Municipal League
Geoffrey T. Wilson (gwilson@cml.org)
1144 Sherman Street
Denver, CO 80203-2207

Amicus Curiae Congressman Jared Polis
Courtney J. Krause (Courtneyjkrause@gmail.com)
1212 Elm Street
Denver, CO 80220

Amicus Curiae Conservation Colorado
Michael Freeman (mfreeman@earthjustice.org)
Earthjustice
633 17th Street, Suite 1600
Denver, Colorado 80202-3625

Amicus Curiae Northwest Colorado Council of Governments
Torie Jarvis (qqwater@nwccog.org)
PO Box 2308
Silverthorne, CO 80498

Amicus Curiae National Association of Royalty Owners – Colorado Chapter:
Thomas W. Niebrugge (tniebrugge@lindquist.com)
Lindquist & Vennum LLP
600 17th St., Suite 1800 South
Denver, Colorado 80202

Amicus Curiae American Petroleum Institute
Richard C. Kaufman (rkaufman@rcalaw.com)
Allison P. Altaras (aaltaras@rcalaw.com)
Ryley Carlock & Applewhite
1700 Lincoln Street, Suite 3500
Denver, Colorado 80203

Amicus Curiae Colorado Concern, Denver Metro Chamber of Commerce, Colorado Competitive Council, Colorado Motor Carriers Association, and Colorado Farm Bureau
Jason R. Dunn (jdunn@bhfs.com)
Brownstein Hyatt Farber Schreck, LLP
410 Seventeenth Street, Suite 2200
Denver, CO 80202-4432

/s/ Mary Keyes
Mary Keyes
Sullivan Green Seavy LLC