Court of Appeals
of the
State of New York

OTSEGO COUNTY CLERK'S INDEX NO.: 0930/11
APPELLATE DIVISION, THIRD DEPARTMENT DOCKET NO.: 515498

COOPERSTOWN HOLSTEIN CORPORATION,

Appellant,

– against –

TOWN OF MIDDLEFIELD,

Respondent.

TOMPKINS COUNTY CLERK'S INDEX NO.: 0902/11
APPELLATE DIVISION, THIRD DEPARTMENT DOCKET NO.: 515227

IN THE MATTER OF MARK S. WALLACH, AS CHAPTER 7 TRUSTEE FOR NORSE ENERGY CORP. USA,

Appellant,

– against –

TOWN OF DRYDEN and TOWN OF DRYDEN TOWN BOARD,

Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN PETROLEUM INSTITUTE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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APL-2013-00242, APL-2013-00245

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NOTICE OF MOTION OF THE AMERICAN PETROLEUM INSTITUTE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

PLEASE TAKE NOTICE, that upon the annexed Affirmation of Joshua J. Fougere, sworn to the 17th day of April, 2014, and the proposed brief attached as an exhibit thereto, the undersigned will move this Court at the New York State

Court of Appeals, Court of Appeals Hall, 20 Eagle Street, Albany, New York 11207, on April 28, 2014, for an Order pursuant to Rule of Practice 500.23 of this Court granting the American Petroleum Institute and the Chamber of Commerce of the United States of America leave to appear as *amici curiae* in the above-captioned actions for the purpose of supporting the appellants on the merits of the appeals, accepting the amicus brief attached hereto as **Exhibit A**, and granting such other and further relief as the Court may deem just and proper. This motion will be on submission.

PLEASE TAKE FURTHER NOTICE, that answering papers, if any, must be served and filed in the Clerk's Office of the Court of Appeals, with proof of service, on or before the return date of this motion pursuant to this Court's Rules of Practice 500.21(c).

Respectfully submitted,

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AFFIRMATION OF JOSHUA J. FOUGERE IN SUPPORT OF MOTION OF THE AMERICAN PETROLEUM INSTITUTE AND THE CHAMBER OF COMMERCE OF THE UNITED STATES FOR LEAVE TO APPEAR AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

JOSHUA J. FOUGERE, an attorney duly admitted to practice in the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an associate at the law firm of Sidley Austin LLP.

2. I am familiar with the facts and circumstances herein set forth and submit this affidavit in support of the motion of the American Petroleum Institute ("API") and the Chamber of Commerce of the United States of America (the "Chamber") as *amici curiae* in the above-captioned matters for the purpose of supporting the appellants on the merits of the appeals. API and the Chamber previously requested, and were granted, leave to file in this matter an *amici curiae* brief in support of the appellant's motion for leave to appeal to the Court of Appeals.

3. API and the Chamber have a significant interest in these cases, and in ensuring that the natural gas resources of the State of New York are developed safely and effectively. API is a national trade association representing more than 580 companies involved in all aspects of the oil and natural gas industry, including producers, processors, suppliers, pipeline operators, and service and supply companies. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, from every region of the country, and in every industry, including the oil and gas industry. Members of both API and the Chamber have made substantial financial investments in New York in order to develop the State's natural gas resources.

4. An important function of both API and the Chamber is to represent the interests of their members in matters before Congress, the Executive Branch, and the courts. To that end, API and the Chamber regularly file *amicus curiae* briefs in cases that raise issues of concern to the Nation's business community and oil and gas industries.

5. API and the Chamber seek leave to file the proposed *amici curiae* brief because the questions of law presented by the decision of the Appellate Division are of great importance to API, the Chamber, and their members, and the existing parties cannot fully and adequately present their interests to the Court. As explained in the proposed *amici curiae* brief, API, the Chamber, and their members have an interest in ensuring that New York State's Oil, Gas and Solution Mining Law (the "Oil and Gas Law") is properly interpreted to prohibit local zoning authorities from enacting laws that ban oil and gas development within their borders and, in particular, that the outright ban at issue in this appeal is held invalid. The proposed *amici curiae* brief, attached to the motion, explains how the decision below, which upholds that ban, is inconsistent with New York law and adversely affects the broader oil and gas industry. It also explains that bans of this type, if left in place, will impede access to critical subterranean resources, impair the correlative rights of surface and mineral owners, result in the waste of vital

natural resources, and leave important, highly technical regulatory matters to the judgment of local zoning authorities.

6. Given API's and the Chamber's substantial interest and expertise as described above and in the attached brief, API and the Chamber respectfully request the opportunity to file its brief in support of reversal of the decision below and judgment in favor of the appellants. Those issues are addressed in the brief, which is attached as **Exhibit A** to the Notice of Motion.

WHEREFORE, your deponent respectfully requests that the instant motion be granted in all respects and that the American Petroleum Institute and the Chamber of Commerce of the United States be given leave to appear as *amicus curiae* supporting the appellants on the merits of the appeals.

AFFIRMED: Washington, D.C.
April 17, 2014

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EXHIBIT A

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INTEREST OF *AMICI CURAIE*

The American Petroleum Institute ("API") and the Chamber of Commerce of the United States of America ("the Chamber") have a significant interest in this case, and in ensuring that the natural gas resources of the State of New York are developed safely and effectively. API is a national trade association representing more than 580 companies involved in all aspects of the oil and natural gas industry, including producers, processors, suppliers, pipeline operators, and service and supply companies. The Chamber is the world's largest business federation, representing 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, from every region of the country, and in every industry, including the oil and gas industry. Members of both API and the Chamber have made substantial financial investments in New York in order to develop the State's natural gas resources.

These investments are critical not only for API's and the Chamber's member companies, but for providing an affordable, reliable, and clean-burning source of energy. Natural gas represents a critical energy source for heating, power generation, and manufacturing across the State, and indeed across the Nation. It is the cleanest of the fossil fuels, emitting substantially lower amounts of greenhouse

gases and air pollutants than other fuels, including heating oil.[1] This translates into savings for businesses, consumers, and homeowners across New York and the country in the billions of dollars, raising incomes and improving standards of living statewide, as well as encouraging economic development in the State and the Nation.[2] Moreover, unlike many other resources, natural gas is available from domestic supplies in abundant amounts, and represents an essential part of a diverse energy portfolio, making the United States more economically and energy secure. Developing those supplies guarantees the availability of energy for the residents of this State and elsewhere for generations to come, and fuels continued economic development.[3] The natural gas industry creates hundreds of thousands

[1] API, *Hydraulic Fracturing: Unlocking America's Natural Gas Resources* 15 (Jan. 2014); API, *Shale Energy: 10 Points Everyone Should Know* 1 (Oct. 2013).

[2] *See, e.g.*, Xavier Sala-i-Martín, *On the Health-Poverty Trap, in Health And Economic Growth* 95 (López-Casasnovas et al. eds., 2005); *see also* Dora Costa & Richard H. Steckel, *Long-Term Trends in Health, Welfare, and Economic Growth in the United States, in Health and Welfare During Industrialization* 47, 47 (Steckel & Floud eds., 1997) ("economic growth enables people to purchase the nutrition, sanitation, shelter, and medical care that are so necessary to health"); Benjamin M. Friedman, *The Moral Consequences of Economic Growth* 81 (2005) ("People with more income typically enjoy not just a higher standard of living in terms of food, clothing and housing but also better health."). The availability of affordable energy is especially important for lower-income families, who must often devote a substantial percentage of their income to utility expenses. *E.g.*, Nat'l Energy Assistance Directors' Ass'n, *2011 National Energy Assistance Survey* 12 (Nov. 2011) (discussing difficulties experienced by lower-income households in meeting rising utility costs, and noting that these households often "went without utility service and sacrificed heating and cooling their home").

[3] *See, e.g.*, API, *Hydraulic Fracturing*, *supra* note 1, at 3-4.

of jobs directly, and supports millions more through community construction projects and by reducing business costs and expenses.[4]

New York is uniquely situated to benefit from the expansion of natural gas production. This State has one of the greatest reserves of natural gas in the Nation, with most of it contained in deposits within an extensive, underground layer of shale rock known as the Marcellus Shale.[5] Those reserves can be recovered safely and cost-effectively through techniques known as hydraulic fracturing and directional drilling. These technologies, which have been used successfully and safely in New York for decades,[6] involve drilling a deep vertical well, then extending the well bore directionally into the shale where the gas is located. After several layers of protective casing are cemented into the well, fluids and proppant (usually sand) are pumped into the well bore under pressure to create small fractures in the shale from which trapped gas can flow once the water is removed. Once a well is completed, rigs and other equipment are removed, leaving a structure about the size of a two-car garage to support production over the life of

[4] *See, e.g.*, *id.*; *see also* IHS Global, Inc., *Minority and Female Employment in the Oil & Gas and Petrochemical Industries* 2 (2014).

[5] *See* U.S. Energy Info. Admin., U.S. Dep't of Energy, *Assumptions to the Annual Energy Outlook 2013*, 123 tbl. 9.3 (May 2013).

[6] *See* N.Y. State Dep't of Envtl. Conservation, *Marcellus Shale*, http://www.dec.ny.gov/energy/46288.html (last viewed Apr. 15, 2014).

the well.[7] Through proper design of elements such as the depth, location, and casing of the well—under the supervision and with the permission of the expert state agency with authority over oil and gas drilling, the New York State Department of Environmental Conservation ("NYSDEC" or "the Department")—these techniques minimize surface impacts and, as recently confirmed by federal and state regulators, do not pose a threat to drinking water or other safety or health risks.[8] These technologies allow for New York to recover and benefit from the vast natural gas reserves within its borders, safely and efficiently.

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[7] *See id.*; *see also* EnergyFromShale.org, How Fracking Works, http://www.energyfromshale.org/what-is-fracking (last viewed Apr. 15, 2014); API, *The Facts about Hydraulic Fracturing and Seismic Activity*, *available at* http://www.api.org/~/media/Files/Policy/Hydraulic_Fracturing/Facts-HF-and-Seismic-Activity.pdf (last viewed Apr. 15, 2014).

[8] *See Challenges Facing Domestic Oil and Gas Development: Review of Bureau of Land Management/U.S. Forest Service Ban on Horizontal Drilling on Federal Lands: Joint Oversight Hearing before the Subcomm. on Energy and Mineral Resources of the H. Comm. on Natural Resources and the Subcomm. on Conservation, Energy and Forestry of the H. Comm. on Agriculture*, 112th Cong. 27 (July 8, 2011) (Bureau of Land Management "has never seen any evidence of impacts to groundwater … from the use of fracking technology on [approved] wells"; "based upon the track record so far, [hydraulic fracturing] is safe"); *Pain at the Pump: Policies that Suppress Domestic Production of Oil and Gas: Hearing Before the H. Comm. on Oversight & Gov't Reform*, 112th Cong. 87 (May 24, 2011) (there is no "proven case where the fracking process itself has affected water"); Energy in Depth, *Hydraulic Fracturing: Experience Shows Process is Fundamentally Safe*, *available at* http://energyindepth.org/wp-content/uploads/2013/04/EID_Nevada_fact_sheet-final.pdf (last viewed Apr. 16, 2014) (quoting EPA's Lisa Jackson: "in no case have we made a definitive determination that the fracking process has caused chemicals to enter groundwater"); *see also* API, *What They've Said About Hydraulic Fracturing* (2013) (statement of former Interior Secretary Ken Salazar) ("I would say to everybody that hydraulic fracking is safe."); *Energy Policy Act of 2005: Hearings Before the Subcomm. on Energy and Air Quality of the H. Comm. on Energy and Commerce*, 109th Cong. 115-16 (2005) (statement of Hon. Victor Carrillo, Chairman, Railroad Commission of Texas) (no instance of harm to drinking water had been found in over one million hydraulic fracturing operations nationwide).

The decision below would, however, eviscerate NYSDEC's established protections designed to ensure the reliability and safety of these systems. It holds that the NYSDEC no longer has exclusive authority to determine whether and where an oil or drilling operation may locate based on complex technical considerations designed to promote efficacy, safety, and environmental protection, but instead that local township and municipal officials may decide these issues for themselves—and indeed may ban entirely drilling operations within their borders. That holding is flatly inconsistent with the New York Oil, Gas and Solution Mining Law, ECL §§ 23-0101 *et seq*. (the "Oil and Gas Law"), which vests regulatory authority over drilling exclusively in NYSDEC, *e.g.*, ECL § 23-0501, and expressly preempts "*all* local laws or ordinances relating to the regulation of the oil, gas and solution mining industries," *id.* § 23-0303(2) (emphasis added). Allowing localities to regulate drilling operations, particularly through bans of the type at issue here, threatens to remove from our energy portfolio one of the most readily available and reliable sources of energy. It also raises significant concerns about NYSDEC's capacity to act in promoting safety and environmental protection, as it would commit highly technical issues concerning proper drilling placement to the judgment of local zoning authorities with little or no expertise or knowledge of such matters.

API and the Chamber share an interest—the same held by employers, job seekers, and other stakeholders across the State—in eliminating this impediment to economic development and ensuring a proper interpretation and application of this State's Oil and Gas Law. For these reasons, set forth in greater detail below, *amici* support reversal of the decision below and judgment in favor of the appellant.

INTRODUCTION AND SUMMARY

The New York Oil and Gas Law vests exclusive regulatory authority over all statewide oil and gas drilling in the New York State Department of Environmental Conservation. ECL § 23-0501. The Law declares as its primary purpose to "regulate the development, production and utilization of natural resources of oil and gas in this state in such a manner as will prevent waste" and ensure "a greater ultimate recovery of oil and gas," *id.* § 23-0301; to that end, it directs the Department—an expert agency with decades of experience in these issues—to develop and implement standards and permitting requirements to allow it to decide on a case-by-case basis, with input from all relevant stakeholders, how and where drilling operations may occur within the State to maximize recovery and best protect the environment and public safety, *see id.* §§ 23-0301 to 23-0305. At no point does the Law allow for a particular locality or others to veto or alter decisions made by the Department concerning the approved location or methods for drilling. Quite the contrary, the Law expressly supersedes "all local laws or ordinances

relating to the regulation of the oil, gas and solution mining industries," with exceptions only for ordinances relating to "local roads or the rights of local governments under the real property tax law." *Id.* § 23-0303(2).

The decision below upends this regulatory structure, and fundamentally threatens the effectiveness of oil and gas drilling in New York. That decision holds that any locality in the State may through local zoning regulations ban any and all oil and gas drilling in that jurisdiction, without regard to whether drilling has been or could be approved by the Department for that location. *Norse Energy Corp. USA v. Town of Dryden*, 964 N.Y.S.2d 714 (App. Div. 2013). It would, in effect, reassign regulatory authority over oil and gas drilling operations within the State from NYSDEC to hundreds of municipal, county, and other local bodies.

The Appellate Division justified this result, so clearly at odds with both the purpose and structure of the Law and the plain language of the express preemption provision, on grounds that the preemptive effect of the Law should be construed to avoid interference with the traditional authority of local officials over zoning and land use. *Id.* at 721. To achieve this result, the panel held that, while the statute preempts local regulation of the "technical operational activities" associated with drilling facilities, it does not preclude municipal laws addressing the location of those facilities. *Id.*

This distinction, between the regulation of drilling "operations" and of drilling "location," appears nowhere in the statutory language and cannot be upheld as a permissible interpretation of the Law. The statute states broadly and unequivocally that "*all* local laws … *relating* to the regulation of the oil[and] gas … mining industries" are preempted, and it sets forth only two express exceptions, for ordinances addressing "local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2) (emphases added). Interpreting the Law to also allow for other forms of local regulation simply reads into the statutory language additional exemptions that do not exist and that would, in all events, be clearly inconsistent with the underlying structure and purpose of the Law—namely, to centralize regulation of the oil and gas industry statewide.

If allowed to stand, the decision below will have far-reaching adverse consequences throughout the State. It would relegate the State's regulatory authority over oil and drilling operation to a secondary role, effectively giving localities precedence in this field and precluding the NYSDEC from complying with its statutory mandate to ensure that drilling operations within the State are conducted in a manner that maximizes recovery while protecting the environment and the public. To ensure that the statute is administered properly and given its

full preemptive effect, as the Legislature intended, this Court should reverse the judgment below.

ARGUMENT

The ordinance at issue in this case, banning all oil and gas drilling operations within the locality, is invalid for a number of reasons. That ordinance is, first, expressly preempted by the New York Oil and Gas Law, which by its terms precludes any "local laws … relating to the regulation of the oil[and] gas … mining industries." *Infra* Part I. It also conflicts with the structure and purpose of the Law, as it would grant authority over drilling operations to local officials when the statute vests that authority exclusively in the New York State Department of Environmental Conservation; the ordinance is thus impliedly preempted. *Infra* Part II. That is particularly true because, if localities were allowed to enforce this type of ordinance, it could put at risk the efficacy of drilling across the State, fundamentally undermining the very goal the Law was enacted to advance. *Infra* Part III. On whatever basis this Court rules, it is clear that this ordinance, and the decision below upholding it, cannot stand.

I. ZONING REGULATIONS THAT BAN ALL DRILLING OPERATIONS IN AN AREA ARE EXPRESSLY PREEMPTED BY THE NEW YORK OIL AND GAS LAW.

The express preemption provision of the New York Oil and Gas Law, by its plain terms, preempts local ordinances banning drilling operations. *Infra* Part I.1.

The Appellate Division's contrary conclusion rests on a series of critical errors that cannot withstand scrutiny. *Infra* Part I.2-3.

1. The preemption provision of the Oil and Gas Law was enacted nearly 20 years after the Law was first passed, in order to address problems and conflicts resulting from local attempts to regulate oil and gas operations—operations that were, under the statute, subject to the regulation exclusively by NYSDEC. ECL § 23-0301. It declares that the Law "shall supersede *all* local laws or ordinances *relating to* the regulation of the oil, gas and solution mining industries." ECL § 23-0303(2) (emphases added). It contains only two narrow exceptions, stating that the Law (notwithstanding its facially broad reach) should not be deemed to "supersede local government jurisdiction over local roads or the rights of local governments under the real property tax law." *Id.* No other exceptions, and no other qualifying language, was included in the provision as adopted, and none has been added through subsequent amendments.

This provision, by its plain terms, precludes local laws banning drilling operations. Such laws undoubtedly "relat[e] to" the regulation of the oil and gas industries; indeed, they specifically bar the very operations—mining and drilling—on which those industries are based. *See id.* A law that restricts an activity in its entirety clearly constitutes a "regulation" of that activity under any accepted

general definition of the term, including in the legal context.[9] The United States Supreme Court has indeed recognized precisely this point in the preemption context, holding that a law that prohibits construction or operation of a particular type of industrial facility within a jurisdiction (there, nuclear plants) constitutes "regulation" of that industry. *E.g.*, *Pac. Gas & Elec. Co. v. State Energy Res. Conservation & Dev. Comm'n*, 461 U.S. 190, 205-12 (1983); *see also Cnty. of Suffolk v. Long Island Lighting Co.*, 728 F.2d 52, 58 (2d Cir. 1984). Insofar as the Oil and Gas Law preempts not only those laws that "regulate" oil and gas drilling, but even those that "relate to" such regulation, it necessarily precludes laws—such as the ordinance at issue here—that ban any and all drilling in an area. *See State v. Philip Morris Inc.*, 8 N.Y.3d 574, 580 (2007) (the phrase "relating to" must be given an "expansive" meaning); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 383 (1992) (the phrase "relating to," when used in a preemption provision, reflects a "broad pre-emptive purpose").

This conclusion is confirmed and compelled by the fact that the preemption provision includes express exceptions for certain local laws and ordinances—those governing local roads and property taxes—but no exception for local zoning and

[9] *See, e.g., Black's Law Dictionary* 1398 (9th ed. 2009) (defining "regulation" as "[t]he act or process of controlling by rule or restriction"); *Oxford English Dictionary* (3d ed. 2009) (defining "regulation" as "[a] rule or principle governing behavi[or] or practice" and "regulate" as "[t]o control, govern, or direct, esp. by means of regulations or restrictions"); *American Heritage Desk Dictionary* 796 (1981) (same).

land-use ordinances. ECL § 23-0303(2). The Legislature's decision to state only certain exceptions "'is generally considered to deny the existence of others not mentioned.'" *Jewish Home & Infirmary v. Comm'r. of N.Y. State Dep't of Health*, 84 N.Y.2d 252, 262 (1994). By not including zoning laws within the stated exceptions, therefore, the Legislature made clear that the "absence … is meaningful and intentional." *Commonwealth of N. Mariana Is. v. Canadian Imperial Bank of Commerce*, 21 N.Y.3d 55, 60 (2013).

Zoning laws of the type under review do not fall within either of the enumerated exceptions of the preemption provision. For that reason, these laws are superseded and invalid under the plain text of the Oil and Gas Law.

2. The panel below did not dispute that the preemption provision could reasonably be interpreted to supersede local zoning laws of this type, or even that the language would be best interpreted in that general manner in the legal context. Rather, it determined that the provision's preemptive scope should, as a matter of legislative intent and policy, be limited to those local laws that regulate by prescribing the "technical operational activities" of drilling facilities, and not those that regulate by barring facilities from particular locations. *Norse*, 964 N.Y.S.2d at 719-21. None of the reasons offered by the panel, however, supports this artificial restriction on the statutory text.

a. The panel suggested, first, that its reading of the preemption provision was consistent with the "ordinary and natural meaning" of the term "regulation." *Id.* at 719. It relied on a definition provided in an online dictionary, defining "regulation" as "'an authoritative rule dealing with details or procedure.'" *Id.* (quoting *Merriam–Webster On-line Dictionary*, http://www.merriam-webster.com/dictionary/regulation). That definition, according to the panel, meant that a rule would qualify as a "regulation" for purposes of the preemption provision only if it addressed the "technical operation[]" of a drilling facility. *Id.* at 721.

This analysis is wrong on several levels. To begin with, the circumscribed definition that the court plucked from one dictionary is *not* how "regulation" is "commonly defined." *Id.* at 719. Even that same (online) dictionary itself defines the term more broadly, stating that it may encompass not only a "rule dealing with details or procedure" but also any "a rule or order issued by an executive authority … and having the force of law." *Merriam–Webster On-line Dictionary* (2014), http://www.merriam-webster.com/dictionary/regulation. More importantly, other dictionaries—including legal dictionaries, which are of course of the most relevance in addressing the meaning of legal terms—also interpret the term more broadly, to include wholesale "restriction[s]" on particular activities, such as a ban on drilling operations. *Black's Law Dictionary*, *supra*, at 1398.

This broader reading of "regulation" is confirmed by the enumerated exceptions of the preemption provision. Those exceptions preserve laws that would otherwise be preempted—*i.e.*, that would otherwise qualify as laws "relating to the regulation of the oil[and gas] industries"—if they address "local roads or the rights of local governments under the real property tax law." ECL § 23-0303(2). Under the panel's interpretation, however, a law addressing "local roads" or "property tax law" would never qualify as a "regulation," as it would not govern the "'details or procedure'" of drill operation, and thus would never fall within the scope of the preemption provision in the first instance. *Norse*, 964 N.Y.S.2d at 719 The exceptions would, under this view, be wholly superfluous, contrary to the fundamental rule that "meaning and effect should be given to every word of a statute" such that each word has "'a distinct and separate meaning.'" *Leader v. Maroney, Ponzini & Spencer*, 97 N.Y.2d 95, 104 (2001). Only by reading "regulation" in accord with its full and generally accepted meaning, covering not only laws that address how drilling facilities must operate but also where they may operate, can these exceptions be given force and effect.[10]

[10] Indeed, the local ordinance at issue here "relat[es] to the regulation of the oil[and] gas … industries" even under the Appellate Division's cramped definition of "regulation." A local rule banning all oil and gas activities necessarily sweeps *more* broadly than a rule limited to operational "details or procedure," and thus leaves no room for any other "regulation" of the industry whatsoever. *Cf. DeTroia v. Schweitzer*, 87 N.Y.2d 338, 341 (1996) ("'a term of greater comprehension includes a lesser term'") (quoting McKinney's Cons. Laws of N.Y., Book 1, Statutes § 237, at 403).

b. The panel also asserted that its interpretation of the preemption provision was supported by the relevant legislative history. *Norse*, 964 N.Y.S.2d at 719-21. However, even assuming that these considerations could justify a reading of the statute contrary to its text (which they cannot), that history actually confirms the broader construction.

The principal purpose of the preemption provision, as stated in the supporting legislative report, was to centralize control over oil and gas operations exclusively in NYSDEC. Legislators were concerned that "[l]ocal government's diverse attempts to regulate the oil, gas and solution mining activities ... threaten[ed] the efficient development of these resources," and for that reason they sought to withdraw all local authority over the oil and gas industries. A.6928, Mem. in Support (1981), *available at* R.995, *Cooperstown Holstein Corp. v. Town of Middlefield*, No. 2012-1010 (3d Dept.); *see also id.* ("The comprehensive scheme envisioned by the law and the technical expertise required to administer and enforce it necessitates that this authority be reserved to the State."). At no point does the report indicate or even suggest that, notwithstanding the general bar on local "regulation," localities would nevertheless be allowed to enact restrictions on whether and where drilling facilities may operate.

The panel below concluded, from its review of this history, that the legislation was intended to "ensure uniform statewide standards and procedures

with respect to the technical operational activities of the oil, gas and mining industries." *Norse*, 964 N.Y.S.2d at 721. That is certainly true, but it does not mean—as the panel assumed—that the Legislature did not intend to prohibit other forms of local "regulation" that would inhibit or interfere with NYSDEC's authority, including the authority to determine whether and where drilling facilities may be located. *See* A.6928, Mem. in Support (1981); *see also infra* Part II.A (discussing conflicts between the Law and local ordinances banning drilling). Indeed, given that well location is chief among the technical issues that must be addressed to ensure efficiency and reduce waste, ECL § 23-0101(20)(c), it is entirely implausible that a Legislature concerned with ensuring comprehensive control by the State would have intended, without saying so, to exclude regulations governing location from the statute's preemptive scope. The far better reading of the legislative history is that the Legislature intended to preempt not only those local regulations addressing "technical" matters associated with drilling facilities but also those addressing whether and where the facilities may operate.

c. The panel below also asserted that the preemption provision should be interpreted narrowly, as not encompassing local regulations barring drilling operations, because the provision did not include "a clear expression of legislative intent to preempt local control over land use." *Norse*, 964 N.Y.S.2d at 721. This has the analysis entirely backwards.

It is well-settled that the power of local governments to enact local laws and ordinances—whatever their subject matter—is always subject to the paramount legislative authority of the State Legislature. *E.g.*, *Kamhi v. Town of Yorktown*, 74 N.Y.2d 423, 430 (1989). This principle is set forth in the New York Constitution itself, which grants local governments the authority to enact laws and ordinances "relating to its property, affairs or government," but expressly limits that authority to laws and ordinances that are "not inconsistent" with "the provisions of this constitution or any general law." N.Y. Const. art. IX, § 2(c); *see* Mun. Home Rule Law § 10(1)(ii). Zoning laws are subject to these principles and therefore must (and often do) yield to state legislation "responding to problems of significant State concern." *Wambat Realty Corp. v. State*, 41 N.Y.2d 490, 497 (1977); *see also Kamhi v. Planning Bd. of Yorktown*, 59 N.Y.2d 385, 389 (1983) (local governments "have no inherent power to enact or enforce zoning or land use regulations").

The panel below cited this Court's decision in *Gernatt Asphalt Products, Inc. v. Town of Sardinia*, 87 N.Y.2d 668 (1996), as requiring that a preemption provision include a "clear expression" of preemptive intent. *Id.* at 682 (citing *Frew Run Gravel Prods., Inc. v. Town of Carroll*, 71 N.Y.2d 126 (1987)). *Gernatt*, however, neither adopts nor endorses any such requirement. Rather, the relevant language in *Gernatt* was discussing a situation in which "nothing in the plain

language, statutory scheme, or legislative purpose" of the applicable statute supported preemption of the ordinance at issue; in that circumstance, the Court held, preemption could be found only if there was another "clear expression of legislative intent to preempt local control over land use." *Id.* Here, by contrast, "the plain language, statutory scheme, [*and*] legislative purpose" of the preemption provision of the Oil and Gas Law all support—indeed, require—that local laws regulating drilling operations be deemed preempted. *Supra* pp. 6-16. No further "clear expression" of legislative intent is required, under *Gernatt* or any other decision of this Court.[11]

3. It is perhaps unsurprising that, with nothing in the statute or the panel's reasoning to support a narrow construction of the preemption provision, respondents and their *amici* resort to opinions from other jurisdictions. Those opinions, they argue, interpret other state preemption provisions as not

[11] The Appellate Division also explained that, in its view, its restrictive interpretation of the preemption provision of the Oil and Gas Law was required by the holdings of two of this Court's decisions, *Frew Run* and *Gernatt*—concluding that the Mined Land Reclamation Law, which includes a preemption provision similar to the Oil and Gas Law, does not preclude local zoning regulations. *Norse*, 964 N.Y.S.2d at 721-23 & nn.8-9. But this ignores that the Mined Land Reclamation Law includes a savings clause that expressly preserves "local zoning ordinances or laws," and that it was this language—*not* the preemption provision itself—on which this Court necessarily relied in holding the local ordinances at issues not preempted. *Gernatt*, 87 N.Y.2d at 682; *Frew Run*, 71 N.Y.2d at 129. Indeed, far from supporting the panel's conclusion, *Frew Run* and *Gernatt* confirm that preemption provisions of the sort at issue in this case, which preclude "all other state and local laws relating to the ... mining industry," ECL § 23-2703(2), must be read as encompassing local zoning regulations addressing such facilities, and as superseding those regulations unless they are expressly preserved elsewhere in the statute. While the Mined Land Reclamation Law included such a savings clause, the Oil and Gas Law does not.

encompassing local zoning regulations of the type at issue here. *See, e.g.*, Br. of Respondents Town of Dryden and Town of Dryden Town Bd., at 49-50; Br. for Respondent Town of Middlefield, at 79-84; Br. of Amici Curiae Town of Ulysses, et al., at 33-35; Amici Curiae Br. of Manhattan Borough President Scott M. Stringer and Elected Officials to Protect N.Y., at 14-17.

Even assuming those opinions were rightly decided (which is not the case), they simply do not apply here. They addressed statutory schemes and preemption provisions that were unique to those States, and in each case the court's holding was expressly premised on the particular language and history of the relevant statutes. None of them addressed, either directly or indirectly, the preemptive scope of the New York Oil and Gas Law, or an equivalent statute.

The respondents and at least one *amicus*, for example, rely on a Pennsylvania case, *Robinson Township*, in advocating for a limited construction of the preemption provision. Br. for Respondent Town of Middlefield, at 83-84; Br. of Amici Curiae Town of Ulysses, et al., at 33-35. *Robinson Township* did not, however, involve a challenge to the validity of a local regulation and did not even purport to interpret the preemptive reach of Pennsylvania's oil and gas law. *Robinson Twp. v. Commonwealth*, 83 A.3d 901, 913, 970 (Pa. 2013) Quite the opposite, all of the parties there agreed that the Pennsylvania law by its terms preempted local zoning ordinances, including those addressing the location of

drilling facilities. *Id.* The issue in *Robinson Township* was, rather, whether the Pennsylvania oil and gas law was itself valid under the Pennsylvania Constitution. *Id.* at 913. Following an analysis focused entirely on the Pennsylvania Constitution and Pennsylvania statutes, the Pennsylvania Supreme Court held that the law was unconstitutional in part, and remanded several issues for further proceedings, which are ongoing as of the date of this filing. *Id.*

That decision is clearly inapposite here. There is no dispute in this case that the New York Oil and Gas Law, including its preemption provision, are themselves valid and constitutional; indeed, no party has ever argued to the contrary. The reasoning of *Robinson Township* thus has no application by its terms. Moreover, even if the constitutionality of the New York Oil and Gas Law were at issue, the Pennsylvania Supreme Court emphasized throughout its opinion that its conclusion was premised on the unique language and history of the Pennsylvania Constitution, specifically the Pennsylvania "Environmental Rights Amendment." *Id.* at 959-63, 976-77. The court described that Amendment as "rare in American constitutional law"—and in fact explicitly distinguished it from the New York Constitution. *Id.* at 962 & n.50. In all events, given that the constitutionality of the New York Oil and Gas Law has never before been raised, and that any ruling interpreting or applying the New York Constitution would implicate a host of factors that have not been addressed and could have potentially

broad ramifications, possibly impacting every aspect of environmental regulation in the State, it need not and should not be addressed in this case. *See, e.g.*, *Misicki v. Caradonna*, 12 N.Y.3d 511, 519 (2009) (this Court is "not in the business of blindsiding litigants, who expect [it] to decide their appeals on rationales advanced by the parties, not arguments their adversaries never made"); *Pringle v. Wolfe*, 88 N.Y.2d 426, 429 n.1 (1996) (although "various constitutional challenges to the ... law [are] currently pending in the lower courts, we only have occasion to reach those issues squarely presented on this appeal").

* * *

There is, in short, no basis to deny the preemption provision of the New York Oil and Gas Law its full force and effect. That provision expressly preempts any and all local laws "relating to the regulation of the oil[and gas] industries," ECL § 23-0303(2), which by its terms includes local laws, of the type at issue here, prohibiting oil and gas drilling operations in a particular jurisdiction. Nothing in the language, structure, or history of the statute—and nothing in any prior decision of this Court (or any other court, for that matter)—supports a different result. This Court should therefore hold that the local law under review is preempted and invalid, and reverse the contrary judgment of the panel below.

II. ZONING REGULATIONS THAT BAN ALL DRILLING OPERATIONS IN AN AREA ARE IMPLIEDLY PREEMPTED BY THE NEW YORK OIL AND GAS LAW.

The ordinance at issue would be invalid, even absent the express preemption provision of the Oil and Gas Law, under settled principles of implied preemption. *See, e.g., Consol. Edison Co. of N.Y. v. Town of Red Hook*, 60 N.Y.2d 99, 108 (1983) (implied preemption applies even when a statue includes an express preemption provision); *see also, e.g., Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000) (same). Those principles, which flow directly from the constitutional requirement that local laws be "not inconsistent" with "any general law," N.Y. Const. art. IX, § 2(c), preclude any local regulation if either (i) it addresses a subject matter or field that the Legislature has fully occupied or (ii) it conflicts with either the methods or standards established by a state statute. *Red Hook*, 60 N.Y.2d at 104-05. Regulations barring all drilling operations in a jurisdiction are preempted under both doctrines.

A. Regulations Barring Drilling Operations Are Invalid Under The Doctrine of Field Preemption.

A local enactment is invalid under the doctrine of field preemption if the Legislature has demonstrated an intent to "occupy the entire field so as to prohibit additional regulation by local authorities in the same area." *Robin v. Inc. Vill. of Hempstead*, 30 N.Y.2d 347, 350 (1972). Such intent can be inferred from, among other things, "a declaration of State policy by the Legislature" or "the fact that the

Legislature has enacted a comprehensive and detailed regulatory scheme in a particular area." *Red Hook*, 60 N.Y.2d at 105; *accord Inc. Vill. of Nyack v. Daytop Vill., Inc.*, 78 N.Y.2d 500, 505 (1991). In this case, these considerations leave no room to doubt that the Legislature intended that the Oil and Gas Law would occupy the field of oil and gas drilling operations, precluding localities from enacting local laws addressing either the way in which those operations must be conducted or where there may be located.

The principal purpose of the Oil and Gas Law, as stated explicitly in a statutory declaration of policy, is to allow the *State* to "regulate the development, production and utilization of natural resources of oil and gas … in such a manner as will prevent waste" and ensure "a greater ultimate recovery of oil and gas." ECL § 23-0301. This Court has recognized from the Law's inception that the Legislature intended to vest authority over oil and gas drilling across the State within a single executive agency, now NYSDEC. *E.g., Sylvania Corp. v. Kilborne*, 28 N.Y.2d 427 (1971). And for more than 40 years state officials have consistently understood and interpreted the statute in light of that intent. *See, e.g.*, 6 NYCRR § 550.1 (eff. 1972) (the Law "entrust[s NYSDEC] with … responsibility for administering to and regulating activities relative to the natural resources of oil and gas within the State").

Local regulation of drilling activities would be flatly inconsistent with this purpose, and would fundamentally undermine the law's stated goal of ensuring a "greater ultimate recovery of oil and gas." ECL § 23-0301. For instance, if all local governments in the State were allowed to prohibit mining operations in their jurisdictions—as the decision below would allow—the State would in effect be barred from allowing oil or gas drilling *anywhere* in the State. Nothing would be so directly inconsistent with the statute's principal purpose of centralizing regulatory authority within NYSDEC, ensuring effective use of the State's oil and gas resources, and preventing waste of those resources.

That the Legislature intended to occupy the field of oil and gas drilling, including the location of drilling facilities, is confirmed by the regulatory scheme it adopted to govern these issues. This Court has itself described the Law as a "*comprehensive* scheme" for the "'operation and development of oil and gas properties [in the State],'" *Sylvania*, 28 N.Y.2d at 432 (emphasis added), and the statute's extensive and detailed regulatory requirements and procedures amply support this description. It directs NYSDEC to develop and implement standards and permitting requirements to allow the agency to decide on a case-by-case basis, with input from all relevant stakeholders and an opportunity for public review and comment, whether and where drilling operations may occur within the State. *See, e.g.*, ECL § 23-0501. The agency must ensure, among myriad other things, that

drilling operations are "locat[ed]" and properly "spac[ed]" so as to maximize recovery and prevent waste. *Id.* § 23-0101(20)(c). The Law also specifies the limited role of local governments in the review and approval process: for example, after a drilling permit is approved, but before drilling commences, any affected local government or landowner must be given notice of the permit, so that the government or individual may present an application for relief to the agency, which would then be resolved pursuant to the hearing provisions of the Law. *Id.* §§ 23-0305(6), (13), 23-0503(3).

The statute, in short, governs every aspect of the application, review, approval, and supervision process for all oil and gas drilling in the State. It leaves no room for any parallel regulation—whether concerning how drilling facilities should operate, or where they can be located—by localities.

While the statute itself makes clear that it occupies the field of oil and gas drilling regulation, the rules issued by NYSDEC pursuant to its statutory directives further demonstrate the comprehensive nature of the regulatory regime. The agency has, for instance, issued regulations that prohibit wells from being located within certain distances of private dwellings, certain public buildings, traveled roads, bodies of water, lease boundary lines, oil and gas wells in the same pool, or the Pennsylvania border. 6 NYCRR part 553. It has also issued regulations that authorize it to permit exceptions to any of these prohibitions "[w]here in its

opinion there exists good and sufficient reason," *id.* § 553.4, or to issue orders further regulating the location of wells within a lease, taking into account all relevant information, *id.* § 553.3. In addition, NYSDEC has proposed new regulations that relate specifically to operations associated with high-volume hydraulic fracturing. *See* N.Y. State Dep't of Envtl. Conservation, *Revised Proposed Express Terms 6 NYCRR Parts 550 through 556 and 560*, http://www.dec.ny.gov/regulations/87420.html (last viewed Apr. 15, 2014) (proposing new requirements with respect to, among other things, permit applications, *id.* § 560.3; the construction and operation of wells, *id.* § 560.6; and the location of wells with respect to various water supplies, *id.* § 560.4).[12] These regulations, moreover, provide ample room for consideration of local interests, including the interests of individual landowners as well as those of a town's zoning board. *See, e.g.*, 6 NYCRR § 553.3.

[12] The importance of location to effective regulation of the oil and gas industry is also reflected in industry guidance and technical standards, which provide a framework based on proven engineering practices for safe and reliable natural gas production. These documents make clear that proper site selection and layout are essential to the success of hydraulic fracturing operations, and contain detailed recommendations to ensure that the relevant considerations are taken into account. *See, e.g.*, API, Guidance Document HF3, *Practices for Mitigating Surface Impacts Associated With Hydraulic Fracturing* (1st ed. Jan. 2011) (explaining the importance of site selection and layout and discussing relevant considerations); API, Recommended Practice 51R, *Environmental Protection for Onshore Oil and Gas Production Operations and Lease* (1st ed. July 2009); *id.* § 1 (Scope); *id.* § 6 (explaining detailed considerations for the planning and placement of wells); *id.* § 7 (explaining detailed considerations for the planning and placement of lease gathering and system lines).

Taken together, the Oil and Gas Law and NYSDEC regulations make plain that this is not a system in which decisions about where natural gas recovery may occur were meant to be left to the discretion of local authorities. Instead, they outline a system in which those decisions are left to the State in the first instance, which may take local considerations into account as appropriate. Under that regime, ordinances that ban all drilling within a jurisdiction, such as that at issue here, are clearly preempted.

The panel below nevertheless suggested that local prohibitions on drilling would not intrude into the same field as the Oil and Gas Law because, in its view, the Law addresses "the details and procedures of well spacing by drilling operators" but not "traditional land use considerations, such as proximity to nonindustrial districts, compatibility with neighboring land uses, and noise and air pollution." *Norse*, 964 N.Y.S.2d at 723. This reflects, as an initial matter, a simple misreading of the statute. The Law expressly directs NYSDEC to take into account, when addressing a permit application, comments from local stakeholders and any relevant demographic or environmental concerns, ECL §§ 23-0305, -0501, -0503—which would include "traditional land use considerations" of the sort identified by the panel. More generally, however, the panel's argument ignores the broader purpose of the law: to centralize authority for approval of proposed drilling operations—including the location of those operations—exclusively in

NYSDEC. *Id.* That purpose, and the comprehensive regulatory system crafted to advance it, quite plainly reflects the Legislature's intent to preempt local regulation in this the field. While localities may participate in the permitting and approval process as allowed by the statute, they cannot operate outside it to bar drilling operations subject to NYSDEC's supervision.

B. Regulations Barring Drilling Operations Are Invalid Under The Doctrine of Conflict Preemption.

Local regulations barring drilling operations are also preempted because, beyond intruding into a field reserved by the Legislature to the State, they directly conflict with numerous provisions of the Oil and Gas Law. A local law is invalid under the doctrine of conflict preemption if it "prohibit[s] what would be permissible under State law," "impose[s] prerequisite additional restrictions on rights under State law," or otherwise "inhibit[s] the operation of the State's general laws." *Red Hook*, 60 N.Y.2d at 108 (internal quotation marks omitted). Laws prohibiting oil and gas drilling clearly have these effects.

The conflict is perhaps most evident on consideration of the permitting provisions of the Law. Those provisions direct that NYSDEC "shall" issue a permit for a drilling operation when the statutory and regulatory prerequisites are met; once issued, a permit entitles the owner to conduct drilling operations in the stated location in accordance with the permit conditions and incorporated NYSDEC rules. ECL § 23-0503. Local laws prohibiting drilling would, however,

deny to permit holders the right they have been expressly granted under State law, precluding them from drilling at all and effectively nullifying NYSDEC's decision to approve the permit. The conflict could hardly be more stark. Because such local laws "prohibit[ ] what would be permissible under State law," they are preempted. *Red Hook*, 60 N.Y.2d at 108.

That is not the only conflict, however. The Oil and Gas Law sets out particular notice and hearing procedures that must be followed in considering an application for drilling operations; those procedures are designed to ensure that any and all interested parties may review and comment on the application, and that NYSDEC will be able to make an informed decision, in light of its expertise, on whether the proposed location and operation are consistent with the most efficient utilization of oil and gas resources and the public safety. ECL §§ 23-0305(6), (13), 23-0503(3). This detailed and clearly delineated process could be entirely short-circuited if localities were allowed at any time to prohibit drilling within their jurisdiction. No longer would local officials need to participate in the process set out by the Law, or indeed offer any public explanation or reason for their views on a particular permit. Rather, at any stage of the process—including *after* a permit issues—they could simply enact an ordinance precluding its enforcement.

Merely allowing localities such authority would itself fundamentally distort the regulatory process. Agency officials and others considering any permit

application would understand that, at any time, the relevant municipality could exercise effectively unreviewable veto power, simply by enacting a prohibitory ordinance. They would, for that reason, be required as a practical matter to defer to any demands a locality might make, potentially including with respect to operational standards. In effect, by threatening to prohibit a drilling operation in its entirety—as the decision below would allow—a locality could gain the authority to dictate "technical operational activities" of drilling operations, even though all agree that localities are absolutely precluded under the Law from regulating those activities directly. *Norse*, 964 N.Y.S.2d at 719-23.

Relatedly, and more generally, local laws of this type would directly undermine the fundamental purpose of the law—*i.e.*, to encourage utilization of the State's oil and gas resources, ECL § 23-0301—by discouraging applicants from seeking permits that might otherwise be granted. It would make little commercial sense for a company, including members of these *amici*, to make the substantial financial investments necessary to apply for and acquire a drilling permits from the NYSDEC if that permit could be immediately invalidated on a whim by a local body of government anywhere in the State. Allowing these laws to stand would thus not only "inhibit[ ] the operation" of the Oil and Gas Law, *Red Hook*, 60 N.Y.2d at 108, but could render it essentially inoperative.

The panel nevertheless concluded that local prohibitions on drilling operations were not necessarily inconsistent with the Law because the Law "does not … require oil and gas drilling operations to occur in each and every location where such resource is present, regardless of the land uses existing in that locale." *Norse*, 964 N.Y.S.2d at 723-24. To be sure, the Law does not itself require approval of any and all drilling permits; however, it undoubtedly does vest in NYSDEC the exclusive authority to approve or disapprove of permits, and sets forth a detailed and comprehensive procedure for application and issuance. *E.g.*, ECL §§ 23-0501, -0503. And it is that process with which local laws of this sort are clearly in conflict. Whether or not a drilling permit may or should be approved is a decision committed by the Law to NYSDEC, and NYSDEC alone. *Id.* Localities may participate in the application process, and indeed may seek judicial review of NYSDEC's decision as allowed by state law, but they may not entirely circumvent and undercut that process by deciding on their own to prohibit drilling operations within a jurisdiction. The irreconcilable conflict between such local laws and the Oil and Gas Law requires finding that those laws are impliedly preempted.

III. LOCAL ZONING REGULATIONS THAT BAN ALL DRILLING OPERATIONS IN AN AREA UNDERMINE THE AUTHORITY AND EXPERTISE OF THE NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION IN CONSIDERING THE SAFETY AND EFFECTIVENESS OF OIL AND GAS DRILLING AND HYDRAULIC FRACTURING THROUGHOUT NEW YORK.

Local laws prohibiting all drilling operations in an area are, as discussed above, preempted by not only the express language of the Oil and Gas Law but also its purpose and structure. Those laws must, for that reason, be declared invalid. But there is another, in some respects more fundamental, reason for striking such laws—they put at serious risk both the efficacy of oil and gas operations across the State.

Interpreting the Oil and Gas Law to grant municipalities—not NYSDEC—the authority to regulate where drilling occurs would do great damage to the State's effort to develop and implement uniform technical standards for oil and gas drilling and hydraulic fracturing. The location of wells is not an ancillary issue that has only an incidental effect on the recovery of natural resources. Rather, determining where to drill requires significant technical expertise and has important implications for the effectiveness of the well that is constructed. *See supra* note 12 (describing API guidance regarding the need to properly locate leases, wells, and system lines to ensure effective operations). Local governments simply do not have the expertise or access to information necessary to undertake the required analysis. NYSDEC does.

The impacts of one municipality's unilateral decision to prohibit recovery within its borders would, moreover, not be limited to that locality. Because gas formations do not conform to local jurisdictional borders, one municipality's prohibition will reduce the recovery from a single gas formation or field that is shared by multiple jurisdictions. *See supra* pp. 3-4, 7, 24. Superimposing a patchwork of restrictions on a single formation will result in sub-optimal and wasteful recovery, with the potential to affect the feasibility of development in neighboring municipalities that *do* wish to permit it.

Of greater concern, such a patchwork could undermine NYSDEC's ability to address safety and environmental concerns relevant to drilling decisions. One of the principal considerations informing NYSDEC's determination of where drilling operations may be located is, of course, the potential impact on the environment and public health and welfare. *See*, *e.g.*, *Practices for Mitigating Surface Impacts Associated With Hydraulic Fracturing*, *supra* note 12, at 15; *Environmental Protection for Onshore Oil and Gas Production Operations and Lease*, *supra* note 12, §§ 6-8. For any particular oil or gas deposit, there may be one location that would be most protective of the environment and public welfare. If this location falls within a jurisdiction that has prohibited all drilling operations through local ordinance, however, NYSDEC would not be able to select it as the proper site for drilling. Its only option in this circumstance, if the oil and gas deposit is to be

developed (as the Law directs), may be to select a location that is offers less optimal protections for the public and the environment.

These cross-border issues demand statewide attention. When decisions are made by a single statewide authority, as the Legislature intended, conflicts can be addressed by an agency with both the expertise and the jurisdiction to balance competing local interests, rather than allowing multiple municipalities to control development of a shared resource outside their territorial and jurisdictional boundaries. The regulation at issue in this case is, notably, not the only effort by a municipality to prohibit hydraulic fracturing or other oil and gas recovery. Over two dozen municipalities at least have enacted laws that prohibit or regulate oil and gas drilling and hydraulic fracturing within their borders, *see* Joseph De Avila, *"Fracking" Goes Local*, Wall St. J., Aug. 29, 2012, at A17, with mixed results before the courts. *Compare Cooperstown Holstein Corp. v. Town of Middlefield*, 943 N.Y.S.2d 722 (Sup. Ct. 2012), *aff'd*, 964 N.Y.S.2d 431 (App. Div. 2013), *with Jeffrey v. Ryan*, 961 N.Y.S.2d 358 (Sup. Ct. 2012) (striking down temporary moratorium as exceeding local police power). Thirty years ago, the Legislature recognized the substantial risks that accompany the continued spread of this hodgepodge of regulation around the State and sought to eliminate—rather than bless—it through the Oil and Gas Law.

Finally, if local governments are able to close large portions of New York's lands to hydraulic fracturing or other oil and gas activities, the effects on New York's energy production and economic activity will be significant, especially as new development of the Marcellus Shale formation is expected to continue in New York under the regulatory authority of NYSDEC. The use of hydraulic fracturing and directional drilling enables the recovery of oil and natural gas that otherwise could not be commercially developed. To put the importance of these technologies in perspective, it is estimated that, without them, the Nation would lose 45 percent of domestic natural gas production within 5 years.[13] According to the most recent U.S. Department of Energy estimate, the Marcellus Shale alone holds more than 140 trillion cubic feet of recoverable natural gas, enough to meet New York's energy needs for many decades to come.[14] Development of these resources is predicted to produce enormous economic benefits: shale gas development supported 600,000 jobs in 2010, *Shale Answers*, *supra* note 13, at 4, and one study estimates that the oil, natural gas, and petrochemicals industry will add another 1.3 million jobs by 2030, a significant number of which are projected for minorities

[13] *See* API, *Shale Answers* 3 (June 2014).

[14] *See* U.S. Energy Info. Admin., *Assumptions to the Annual Energy Outlook 2013*, *supra* note 5, at 123 tbl. 9.3; U.S. Energy Info. Admin. (Mar. 31, 2014), *Natural Gas Consumption by End Use*, http://www.eia.gov/dnav/ng/ng_cons_sum_dcu_SNY_a.htm.

and women.[15] Indeed, just in New York, it has been estimated that developing the Marcellus Shale could generate $1.2 billion in economic activity *every year*.[16]

Local prohibitions that place large portions of New York's gas resources out of reach of development place all of these economic benefits at risk, and constitute precisely the sort of "waste" that the Oil and Gas Law was designed to prevent through comprehensive statewide regulation. Leaving the issue to state control, as the statute requires, eliminates that risk and incentivizes significant benefits for New York and its residents.

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[15] *See* IHS Global, Inc., *Minority and Female Employment in the Oil & Gas and Petrochemical Industries*, *supra* note 4, at 2; *see also* Barry Poulson, *Fracking and Colorado's Urban-Rural Conflict*, Greeley Trib., Feb. 14, 2014.

[16] *See* N.Y. State Dep't of Envtl. Conservation, *Revised Draft Supplemental Generic Environmental Impact Statement On The Oil, Gas and Solution Mining Regulatory Program, Executive Summary* 17 (Sept. 2011). Another estimate for the development puts the total benefits at $11 billion in economic output and 15,000 to 18,000 new jobs in New York's Western and Southern Tiers. Timothy J. Considine et al., Manhattan Inst., *The Economic Opportunities of Shale Energy Development*, (June 2011).

CONCLUSION

For the foregoing reasons, the judgment of the Appellate Division should be reversed.

Respectfully submitted,

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