IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

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Case No. 89-1341

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COPARR, LTD., A COLORADO NONPROFIT CORPORATION, and VICTOR A. CARANCI;

Plaintiffs-Appellants,

v.

THE CITY OF BOULDER, COLORADO,

Defendant-Appellee.

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Appeal from the United States District Court
for the District of Colorado

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# BRIEF OF AMICUS CURIAE COLORADO MUNICIPAL LEAGUE

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## STATEMENT OF THE ISSUE

By enacting the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), did Congress clearly intend to preempt the State of Colorado from reserving to a home rule city the ability to require notification of pesticide use, where the local regulation does not conflict with federal law?

## STATEMENT OF INTEREST OF AMICUS CURIAE

The Colorado Municipal League is a nonprofit voluntary association which provides services and advocacy on behalf of Colorado municipalities. Among its members are virtually all of the cities and towns in the State of Colorado, and all of the home rule municipalities, including the City of Boulder which is the appellee in this case.

The Municipal League and its members have a direct and vital interest in this lawsuit. The issue presented in this case--the ability of a State to allocate its State's power to protect the health and welfare of its citizens--has great significance to all municipalities.

## STATEMENT OF THE CASE

In 1972, Congress enacted the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") making it unlawful to distribute or sell any pesticide that was not registered pursuant to the Act. See 7 U.S.C. § 136a (1988). Unmistakably, Congress

gave the States extensive authority over and responsibility for the implementation and enforcement of FIFRA.[1] This grant of authority did not confer on the States any new responsibility for pesticide regulation. The States traditionally have had the responsibility for pesticide regulation pursuant to their right to protect the health, safety and welfare of their citizens.

This case involves a challenge to the State of Colorado's power to reserve to its home rule cities its authority to protect the health, safety and welfare of its citizens. The challenge arises in the context of a dispute concerning an ordinance duly enacted by the home rule City of Boulder, Colorado. Ordinance No. 5129 requires notification before and after pesticide use in certain narrowly defined circumstances.

Challenging the State of Colorado's delegation of its police power are the Colorado Pesticide Applicators for Responsible Regulation ("COPARR"), a non-profit trade association of commercial pesticide applicators, and Victor Caranci, a manager of Boulder residential property who contracts for the commercial application of pesticides and who on occasion personally applies pesticides on the property he manages (COPARR

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[1] See, e.g., 7 U.S.C. § 136c(f) (EPA shall authorize any state to issue an experimental use permit for a pesticide); § 136g (state inspection of establishments to enforce FIFRA provisions); § 136i (clear intent by Congress to grant to the states primary role in certification of applicators); § 136t(b) (delegation and coordination between EPA and state agencies or state political subdivisions); § 136u (EPA may enter into cooperative agreements with states); § 136v (authority of the states); and § 136w (states given primary enforcement authority for pesticide use violations).

and Caranci are collectively referred to as "COPARR"). See Memorandum Opinion and Order at 1 (October 3, 1989) ("Trial Ct. Op.").

COPARR alleged that the Ordinance was void under the Supremacy Clause of the United States Constitution because in FIFRA Congress purportedly preempted Colorado's power to reserve to home rule cities the State's power to require notification of pesticide use. On October 3, 1989, in response to cross-motions for summary judgment, the trial court ruled that the provisions of the Ordinance were valid and enforceable. Trial Ct. Op. at 6-7. The court found that COPARR had failed to show any conflict between the notification requirements of the Ordinance and the requirements of FIFRA or the Colorado statutes regulating pesticides. Trial Ct. Op. at 6. COPARR appeals from that order.

## ARGUMENT

### I. Congress Did Not Intend Its Enactment of FIFRA to Preempt the State of Colorado's Home Rule System of Government.

#### A. Principles of Federalism Require that Absent Express Preemption the Operation of Colorado's Home Rule System of Government Should Not Be Subject to Federal Intrusion.

The essence of federalism is that the "States as States" have legitimate interests which the federal government is bound to respect. Garcia v. San Antonio Metropolitan Transit Authority, 469 U.S. 528, 581 (1985) (O'Connor, J. dissenting)

(emphasis in original). The most basic of those legitimate interests is "protecting the structure of State government from federal intrusion." L. Tribe, American Constitutional Law at 396 (2d ed. 1988). Indeed, "federal laws that restructure the basic institutional design of the system a State's people choose for governing themselves" are one of "[t]he most fundamental threats to state sovereignty." Id. at 397.

Decisions concerning the structure (as opposed to the role) of State government are best made by the State, not Congress. If State sovereignty is to be more than a mere truism, states must have the power to determine for themselves whether they or their political subdivisions will exercise their authority to protect the health, safety and welfare of their citizens. See R. Stewart, Pyramids of Sacrifice? Problems of Federalism in Mandating State Implementation of National Environmental Policy, 86 Yale L. Rev. 1196, 1231-32 (1977).

The citizens of the State of Colorado have chosen the home rule system of government. The Colorado Constitution "vests" in "the people" the full right of self-government in both "local and municipal matters." Colo. Const. art. XX, § 6. State law interpreting the Colorado Constitution delineates the boundaries of local, state and mixed matters of concern. See e.g., National Advertising Co. v. Dept. of Highways of the State of Colorado, 751 P.2d 632, 634-35 (Colo. 1988).

COPARR's arguments to this Court seek to undermine the principles of federalism inherent in our republican form of

government. COPARR would have this Court deprive the States of their freedom to distribute their power to protect the health, safety and welfare of their citizens, reserved for the States under the Tenth Amendment, on the basis of Congressional discussion, not Congressional action. That is not and should not be the law. Preemption of the most basic of the States' legitimate interests, their structure of government, requires the embodiment of express preemptive language. But as discussed below, nothing in FIFRA expressly preempts local or municipal pesticide notification regulation.

COPARR places great reliance on the Supreme Court's decision in Community Communications Co., Inc. v. City of Boulder, Colorado, 455 U.S. 40 (1982). That case, however, actually demonstrates that Colorado's delegation of police powers to its home rule cities should be upheld absent a clear expression of Congressional intent to preempt local action. In Community Communications, the question before the Court was whether the State of Colorado could delegate to its political subdivisions its "state action" exemption from the federal antitrust laws. 455 U.S. at 43-60.

The Court held that the State could delegate its "state action" exemption, but only if the municipal action furthers or implements a clearly articulated affirmatively expressed State policy to replace competition with regulation. 455 U.S. at 52. In so holding, the Court implicitly found that the State of Colorado had the power to delegate regulatory responsibility to

home rule cities, provided that it did so clearly and affirmatively. Id.; see also 455 U.S. at 69 n.4 (Rehnquist, J. dissenting). Thus, Community Communications upholds the proposition that States may delegate to their political subdivisions their authority to regulate unless the power to regulate is clearly preempted by federal law. Id.

B. Courts Are to Presume that Congress Does Not Intend to Preempt State Regulation in the Field of Environmental Protection.

COPARR's arguments show a deep misunderstanding of the interaction between federal and state law in the field of environmental protection. States are not precluded from legislating on a particular environmental issue simply because federal legislation addresses the same issue. Under the United States Constitution, the authority of Congress is limited to those powers expressly granted to it by the Constitution. The inherent authority of the sovereign to protect the health, safety and welfare of its citizens, often referred to as the police power,[2] is not given to Congress but is reserved for the States. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." U.S. Const. amend. X.

When Congress does choose to legislate within an area traditionally occupied by the states in the exercise of their

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[2] See Barbier v. Connolly, 113 U.S. 27 (1885).

police powers, courts are very reluctant to infer an intent on the part of Congress to preempt state laws operating within the same field. Hillsborough County v. Automated Medical Laboratories, Inc., 471 U.S. 707, 715-16 (1985).[3] Absent clear evidence to the contrary, a court is to presume a Congressional intent that state and federal laws are to operate in tandem toward protecting the public health and safety. Id. at 716.

State environmental laws are rooted in this police power. They need not be authorized by legislation under the Commerce Clause or under any of the other enumerated powers of Congress. Unless affirmatively preempted, state environmental law operates of its own force, whether or not there is a federal "authorization" of a given state program or scheme of regulation.

C. Courts Are to Decline to Infer Preemption in the Face of Congressional Ambiguity.

This reluctance to infer federal preemption in fields traditionally occupied by the States is particularly appropriate in light of the Supreme Court's emphasis on the central role of Congress in protecting State sovereignty. In Garcia v. San

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[3] See also Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947) (courts are to "start with the assumption that the historic police powers of the States were not to be superseded by [a] Federal Act unless that was the clear and manifest purpose of Congress"); Ferebee v. Chevron Chemical Co., 736 F.2d 1529, 1542 (D.C. Cir. 1984) ("it is necessary to bear in mind ... the circumspect view courts must take of a claim that Congress has preempted states from exercising their traditional police powers on behalf of their citizens").

Antonio Metropolitan Transit Authority, 469 U.S. 528, 552 (1985), the Court held that State sovereignty was "more properly protected by procedural safeguards inherent in the structure of the federal system than by judicially created limitations on federal power." The Court will defer to a Congressional determination to regulate a field traditionally occupied by the States, but only so long as that determination is clearly attributable to Congress.

The Supreme Court's deference to federalism is furthered by requiring clear evidence of preemptive intent. "Congress must be prevented from resorting to ambiguity as a cloak for its failure to accommodate the competing interests bearing on the federal-state balance." L. Tribe, American Constitutional Law at 317 (2d ed. 1988). A reluctance to find preemption helps assure that preemption decisions will arise deliberately and expressly in a process in which state and local governments have a timely say. "[T]o give the state-displacing weight of federal law to mere congressional ambiguity would evade the very procedure for lawmaking on which Garcia relied to protect States' interests." Id. at 480 (emphasis in original).

With this background, FIFRA's "authorization" of State regulation in 7 U.S.C. § 136v(a) must be viewed as a reaffirmation of the traditional authority of the States to regulate in the field of environmental protection. FIFRA's silence on whether States can delegate that authority to local governments cannot be construed as preempting such delegation

given the duty of Congress to be explicit in restricting the States' exercise of the police power.

### D. FIFRA Does Not Preempt the State of Colorado's Delegation to Its Home Rule Cities of Its Authority to Require Notification of Pesticide Use.

COPARR has the burden of demonstrating that by enacting FIFRA Congress intended to preempt the operation of Article XX, Section 6 of the Colorado Constitution. In meeting that burden, COPARR must establish that Congress spoke with sufficient clarity to give FIFRA preemptive effect in light of the States' traditional authority in the exercise of their police power.[3]

COPARR's preemption claim rests solely on a finding that Colorado's reservation to home rule cities of its power to regulate pesticide notification conflicts with the "purposes and objectives of Congress" in enacting FIFRA. COPARR does not argue

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[3] The Supreme Court neatly summarized the test for preemption in Silkwood v. Kerr-McGee Corp.:

> [S]tate law can be pre-empted in either of two general ways. [First,] If Congress evidences an intent to occupy a given field, any state law falling within that field is pre-empted. [Second,] If Congress has not entirely displaced state regulation over the matter in question, state law is still pre-empted to the extent it actually conflicts with federal law, that is, when it is impossible to comply with both state and federal law, or where the state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

464 U.S. 238, 248 (1984) (citations omitted).

that notification requirements conflict with Congress's objective of protecting the public's health and welfare against the dangers inherent in the use of pesticides.[4] Nor does COPARR argue it is impossible to comply with both FIFRA and the Ordinance. Instead, COPARR argues only that the passage of the Ordinance (not its content) conflicts with the purported Congressional objective that local governments should have no role in regulating the use of pesticides. The conflict between FIFRA and the Ordinance as perceived by COPARR relates not to the "what" but rather to the "who" of pesticide regulation.[5]

Specifically, COPARR argues Congress intended to prohibit the States from delegating any aspect of their authority over pesticide use to local governments when it failed to mention local regulation in 7 U.S.C. § 136v(a). From this failure

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[4] On the contrary, it devotes four pages of its brief to a discussion of how neatly the content of the Ordinance dovetails with the purposes of FIFRA. See COPARR's Opening Brief at 12-16.

[5] While COPARR acknowledges the role of the States in regulating the use of pesticides, at one point in its brief it nevertheless argues that FIFRA is sufficiently "comprehensive" as to evidence a Congressional intent to "occupy the field" of pesticide regulation. COPARR's Opening Brief at 16.

But as COPARR recognizes elsewhere in its brief, FIFRA clearly contemplates a role for the States [and municipalities] in pesticide regulation. See. e.g., Opening Brief at 16, 18-19. Therefore, the significant body of case law devoted to weighing the possibility of an intent to occupy the field in the face of Congressional silence is irrelevant to this case. See also People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150, 1159 (1984).

expressly to authorize local regulation, COPARR would infer an intent to prohibit it. This argument must fail for two reasons. First, it does not address the duty of Congress to use explicit language when restricting the police power of the States. COPARR's invocation of Congressional silence is insufficient to overcome the presumption against the preemption of State sovereignty.[6]

Second, prohibition of local regulation was not clearly one of Congress's purposes in enacting FIFRA. COPARR claims that Congress acceded to the wishes of those who sought to prohibit local regulation when it adopted the current language of § 136v(a). COPARR's Opening Brief at 29-30. But COPARR's interpretation of the language and legislative history of FIFRA is simplistic. The inclusion of language authorizing local regulation in § 136v(a) would have unduly restricted the authority of the States to structure the role of local governments in a scheme of pesticide regulation. The failure of

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[6] COPARR relies heavily in its brief on Maryland Pest Control Association v. Montgomery County, 646 F. Supp. 109 (D. Md. 1986). The court in Montgomery County demonstrates the same misunderstanding of the principles of federalism as does COPARR's brief. The court states "[b]oth the House and Senate expressly considered the question whether local governments should be authorized to regulate pesticides and ... the legislation as finally enacted ... did not include the proposed language ... which would have authorized local pesticide regulation." Id. at 113 (emphasis added).

As indicated, local pesticide regulation does not require congressional "authorization." Instead, Congress must affirmatively preempt such regulation should it intend to prohibit it. See sections I.B. and I.C. of this brief supra.

Congress to use such language in § 136v(a) can be construed as a decision on its part to defer to the States on the issue of local regulation.

Leaving aside Congress's failure to mention local regulation in § 136v(a), the statute demonstrates an intent not to prohibit local regulation. FIFRA contains a very specific enumeration of constraints on State authority. See 7 U.S.C. § 136v. Congress clearly and affirmatively declared that State authority in the field of pesticide regulation was to be preempted to the extent a State might attempt to permit any sale or use of pesticides prohibited by FIFRA.[7] When a federal statute contains a provision describing the statute's preemptive effect, that description should be presumed to be exclusive. See

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[7] 7 U.S.C. § 136v provides:

> (a) ... A State may regulate the sale or use of any federally registered pesticide or device in the State, but only if and to the extent the regulation does not permit any sale or use prohibited by this subchapter.
>
> (b) ... Such State shall not impose or continue in effect any requirements for labelling or packaging in addition to or different from those required under this subchapter.
>
> ...
>
> (c)(3) In no instance may a State issue a registration for a food or feed use unless there exists a tolerance or exemption under the Federal Food, Drug, and Cosmetic Act ... that permits the residues of the pesticides on the food or feed.

(Emphasis added.)

California Federal Savings & Loan Association v. Guerra, 107 S. Ct. 683, 697 (1987) (Scalia, J. concurring). The failure of Congress to exclude local regulation in the preemptive catch-all of § 136v is entitled to much more weight than is the absense of affirmative authorization of local regulation in § 136v(a).

Additionally, FIFRA contains numerous references to local government entities, implying some role for those entities in the statute's scheme of regulation.[8] And the definition of "state" contained in FIFRA 7 U.S.C. § 136(aa) is inconsequential; it is not so much of a definition as a provision ensuring the District of Columbia and territorial governments enjoy the same authority as the States in the regulation of pesticides. As indicated above, the failure of Congress to define "state" as including local entities is consistent with an intent to defer to State authority on the issue of local regulation.

The legislative history, relied on heavily by COPARR in support of its argument, is much too ambiguous to be given force.

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[8] See 7 U.S.C. § 136f(b) (officers and employees of EPA "or of any State or political subdivision" are entitled to inspect records); § 136r(b) (EPA to develop monitoring plan "in cooperation with other Federal, State or local agencies"); § 136t(b) (EPA to cooperate with "any appropriate agency of any State or any political subdivision thereof").

COPARR argues that § 136v(a), in contrast to the references discussed above, should be read to imply an intent on the part of Congress to prohibit local regulation. COPARR's Opening Brief at 18-19. As pointed out earlier, Congress's failure to refer to local entities in § 136v(a) merely demonstrates an intent that FIFRA should not tie the hands of the States in deciding how local entities should fit into a scheme of State pesticide regulation.

Congress had a duty to make an intention to prohibit local regulation explicitly clear. Congress failed to provide the required level of clarity in either the language of the statute or its legislative history.[9] As recently noted by Justice Scalia,

> one can hardly imagine an 'implication from legislative history' that is 'unmistakable'--i.e. that demonstrates agreement to a proposition by a majority of both Houses and the President--unless the proposition is embodied in statutory text to which those parties have given assent. . . . What is needed to oust the States of [authority] is Congressional action (i.e. a provision of law), not merely Congressional discussion.

Tafflin v. Levitt, 58 U.S.L.W. 4157, 4162 (U.S. January 22, 1990) (Scalia, J. concurring). Assuming an implication of preemptive intent could ever arise from the legislative history of a statute, the legislative history of FIFRA provides nothing of the sort.

In sum, no sound argument exists for interpreting FIFRA as intending to prohibit a State from delegating its authority over pesticide notification to a local government.

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[9] The district court held that the legislative history of FIFRA is too ambiguous on the issue of local regulation. Trial Ct. Op. at 4-5 (citing People ex rel. Deukmejian v. County of Mendocino, 36 Cal. 3d 476, 204 Cal. Rptr. 897, 683 P.2d 1150, 1161 (1984) (the legislative history "does not manifest a clear congressional intent to preclude states from authorizing local government entities to adopt restrictive regulations of pesticides")).

## II. The Ordinance Is a Legitimate Exercise of Authority Delegated to Home Rule Cities in the State Constitution of Colorado.

### A. Notification of Pesticide Use Within a Home Rule City Is a Matter of Local Concern.

Pesticide use within home rule cities affects the health and welfare of the inhabitants in those cities. "Most pesticide uses are in fact local in scope: registration for such uses is based on the type of local pest which is the target of the pesticide program, local soil and plant types, and local weather conditions." E. Strohbehn, Jr., The Basis for Federal/State Relationships in Environmental Law, reprinted in 12 Environmental Law Reporter 15074, 15078-79 (December 1982). In enacting Ordinance No. 5084, the predecessor to Ordinance No. 5129, the Boulder City Council found that "the unique wind conditions in the city cause drift to occur during airborne applications of pesticides and absent preapplication notification, airborne applications of pesticides constitute a nuisance." Boulder Ordinance No. 5084 at 1. Thus, notification of pesticide use is one aspect of pesticide regulation which depends to a large degree on the consideration of inherently local factors.

COPARR argues that pesticide regulation is not a local matter because "the comprehensive, nationwide provisions of FIFRA establish that the use of pesticides is a federal and state matter." COPARR's Opening Brief at 20 (emphasis in original). But the district court concluded, as a matter of state, not

federal law, the requirement of notification of pesticide use "is a matter for local concern." See Trial Ct. Op. at 5. That Congress has enacted a statute regulating some aspects of pesticide use is irrelevant to this question of state law. Indeed, COPARR does not and cannot argue that notification of pesticide use is an aspect of pesticide regulation which Congress covered in FIFRA. Federal law (i.e., FIFRA) is only relevant if it preempts the State of Colorado's delegation to its home rule cities of its undisputed power to require notification of pesticide use.

COPARR also argues that Colorado state court decisions "suggest" that pesticide regulation is not a local concern. See COPARR's Opening Brief at 22 n.13. The Municipal League agrees that some aspects of pesticide regulation, such as registration requirements and applicator certification, need uniformity of regulation and these areas are properly governed by state statute. See C.R.S. § 35-9-101 et seq. and § 35-10-101 et seq. (1973 and 1989 Supp.). But notification requirements have not been addressed by the State of Colorado and are proper subjects of local concern unless they conflict with existing State law.

### B. The Notification Requirements of the Ordinance Do Not Conflict with the State of Colorado's Pesticide Laws.

Notification requirements are "a matter for local concern," Trial Ct. Op. at 5, and they may also be a matter of State concern. But local regulation is appropriate unless the

municipal ordinance conflicts with State law. And the Boulder notification requirements do not conflict with either the Colorado Pesticide Act or the Colorado Pesticide Applicators Act.

The Colorado Pesticide Act is the enforcement vehicle for pesticide use violations in the State of Colorado. C.R.S. § 35-9-101 et seq. (1973 & 1989 Supp.). The Colorado Pesticide Applicators Act is the certification procedure for pesticide applicators in the State of Colorado. C.R.S. § 35-10-101 et seq. (1973 & 1989 Supp.). Both statutes regulate certain aspects of pesticide use pursuant to the State's police power. But neither the Colorado Pesticide Act nor the Colorado Pesticide Applicators Act address any aspect of notification of pesticide use. Moreover, the Boulder Ordinance imposes notification requirements on users and the contracting parties, but exempts commercial applicators (like the members of COPARR), who are regulated by the Colorado Pesticide Applicators Act. Consequently, the Ordinance is a proper exercise of the powers delegated to home rule cities under State law.

III. Conclusion.

The City of Boulder's enactment of Ordinance No. 5129 is a legitimate exercise of the authority the State of Colorado has reserved to home rule cities under its State Constitution. COPARR has failed to meet its burden of demonstrating that

Congress intended by enacting FIFRA to preempt the operation of Colorado's home rule system of government.

Dated February 20, 1990.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 1990, I mailed a true and correct copy of the foregoing BRIEF OF AMICUS CURIAE by placing a copy thereof in the United States mail, postage prepaid, addressed to the following:

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