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Colorado Court of Appeals Case No.: 2023CA73 Opinion by Hon. Timothy J. Schutz (Hon. Robert D. Hawthorne, concurring) Dissenting Opinion by Hon. Jerry N. Jones	
Petitioner: Matthew K. Hobbs, **v.** **Respondents:** City of Salida; Christy Doon, in her official capacity as City of Salida Administrator; and Giant Hornet LLC d/b/a HighSide! Bar and Grill.	▲COURT USE ONLY▲
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BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF SALIDA

CERTIFICATION

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

The amicus brief complies with the applicable word limit set forth in C.A.R. 29(d).

It contains 2,595 words (does not exceed 4,750 words).

The brief complies with the content and form requirements set forth in C.A.R. 29.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and C.A.R. 32.

/s/ Robert Sheesley
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The Colorado Municipal League ("CML") respectfully submits the following *amicus curiae* brief in support of the City of Salida ("Salida").

IDENTITY OF CML AND ITS INTEREST IN THE CASE

CML, formed in 1923, is a non-profit, voluntary association of 271 of the 273 cities and towns located throughout the state of Colorado, comprising nearly 99 percent of the total incorporated state population. CML's members include all 108 home rule municipalities, 162 of the 164 statutory municipalities, and the lone territorial charter city. This membership includes all municipalities with a population greater than 2,000. CML has regularly appeared in the courts as an *amicus curiae* to advocate on behalf of the interests of municipalities statewide.

CML's participation will provide the Court with an explanation of how statutory municipalities like Salida regulate noise and permit amplified noise in limited circumstances within the parameters of the Noise Abatement Act, C.R.S. §§ 25-12-101 *et seq*. ("Act"). Reversing the decision of the Court of Appeals would undermine reasonable local regulation that supports vibrant cities and towns and builds communities through cultural, entertainment, athletic, and patriotic events.

ARGUMENT

Noise pollution is not a new issue for municipalities. For decades, including nearly forty years since the amendment of the Act, Colorado's cities and towns have

regulated noise through permitting, zoning, nuisance ordinances, and municipal offenses. The plain language of the Act's exception at C.R.S. § 25-12-103(11) is open to only one reasonable interpretation that is consistent and harmonious with the remainder of the Act and traditional municipal authority elsewhere in statute. Petitioner's unreasonable construction adds language to the statute and requires a contortive reading of the statute to inappropriately allow selective legislative history to control the outcome. CML urges the Court to affirm the Division of the Court of Appeals in this matter ("*Hobbs* Division") and reject the interpretation by another Division of that court in *Freed v. Bonfire Entertainment, LLC*, 556 P.3d 817 (Colo. App. 2024) ("*Freed* Division").

I. Colorado's statutory municipalities traditionally regulate noise pollution and permit reasonable exceptions to create meaningful community events and places.

By CML's count, Salida is one of at least twenty-three statutory municipalities with a population over 1,000 (54 of Colorado's 164 statutory cities and towns) that directly regulate noise and have authorized some form of special permits or

exceptions for authorized events.[1] An index for noise regulations in statutory municipalities with populations over 1,000 is attached as Exhibit A. Concerns about exceptions from the Act based on local permitting are overstated.

The *Hobbs* Division's interpretation of C.R.S. § 25-12-103(11) is consistent not only with the remainder of the Act but with other statutes regarding municipal regulation of noise. As a general expression of municipal authority to regulate nuisances, C.R.S. § 31-15-401(1)(b) and (c) authorize municipalities to "do all acts and make all regulations which may be necessary or expedient for the promotion of health or the suppression of disease general "to declare what is a nuisance and abate the same." Municipalities are authorized to "prevent and suppress riots, routs, affrays, noises, disturbances, and disorderly assemblies." C.R.S. § 31-15-401(1)(e). Municipalities are authorized to "license, regulate, and tax, subject to any law of this state, any lawful occupation, business place, amusement, or place of amusements." C.R.S. § 31-15-501(1)(c). This is neither a "new power" or a path to "gut" noise protections, as Petitioner claims. Op. Br. 15.

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[1] Statutory municipalities possess only those powers granted by the General Assembly, whereas home rule municipalities have freedom to legislate upon matters of local concern and, unless the local law conflicts with state law, on areas involving broader state interests. Resolving this matter in favor of Petitioner would leave open a question as to whether the Act preempts noise regulations and permits of home rule municipalities.

The *Hobbs* Division's holding correctly recognized that state regulation is not the only way to restrain noise pollution, whereas Petitioner and the *Freed* Division imagine statewide chaos. Amplified noise permits issued by municipalities are based on reasonable regulatory structures that mitigate any suggestion that the *Hobbs* Division's interpretation allows for disregard of the Act's purpose. Such permits will have other conditions. These may be expressly stated in ordinances that impose permit conditions. Alternatively, permits may include reasonable conditions tailored to a particular use or event, the property on which it occurs and that it affects, and other circumstances. *See*, *e.g.*, Palmer Lake Mun. Code, Sec. 9.36.070 (limiting permits for outdoor live or amplified sound events on private property to specific times and allowing conditions "to address the nature and location of the specific event"). The diversity of circumstances and nature of the communities among Colorado's municipalities is celebrated and enhanced by the Act's flexibility.

Consistent with the Act, Salida's code authorizes permits "to vary or temporarily waive the maximum allowable noise levels as specified in this Article . . . for special events or activities, including, without limitation, musical performances or other entertainment events, fireworks displays, parades and seasonal commercial activities." Salida Code 10-9-80(a). Salida's administrator, with input from zoning and police officials, must evaluate each permit request

against several factors, including "the nature and duration of the noise/activity sought to be permitted, the location of the proposed noise/activity, the anticipated impact of the proposed noise/activity on surrounding properties and neighborhoods, and whether the public health and safety will be injured or served by the issuance of the permit." Salida Code 10-9-80(b). Permits can include conditions "to minimize the adverse impacts the proposed noise/activity may have upon the community or surrounding neighborhood, including, but not limited to, the hours of operation, maximum decibels, the type of any sound amplification equipment and the type of sound that may be amplified." Salida Code 10-9-80(b).

Like Salida, population centers in more rural areas of the state grant exceptions to noise limits to provide for community and cultural events. The Towns of Estes Park and Firestone exempt "Town authorized or sponsored events including, but not limited to, parades, fireworks displays, concerts, and events" from local noise restrictions. Estes Park Mun. Code, Sec. 8.10.040(4); Firestone Mun. Code, Sec. 8.01.030(4). The Cities of Walsenburg and Florence use the language of C.R.S. § 25-12-103(11) to exempt activities from noise limits. Walsenburg Mun. Code, Sec. 10-10-10(d); Florence Mun. Code, Sec. 8.56.050 (G-H) (also exempting the use of property for authorized special events). The Town of Elizabeth limits amplified sound from being audible across a property line or within another dwelling overnight

but exempts public events with a special permit and events "sponsored by a governmental unit or others pursuant to the terms of a contract, lease or permit granted by the governmental unit." Elizabeth Mun. Code, Sec. 10-9-10(c)(2), (f). The Town of Fraser prohibits outdoor amplified noise from liquor-licensed premises without a special permit. Fraser Mun. Code, Sec. 10-2-20(c). The Town of Ordway specifically provides for the non-renewal of liquor licenses for excessive noise from licensed premises. Ordway Mun. Code, Sec. 5.12.020.

Municipalities like Salida use C.R.S. § 25-12-103(11) to further the purpose of the exception – "promoting, producing, or holding cultural, entertainment, athletic, or patriotic events, including, but not limited to, concerts, music festivals, and fireworks displays." C.R.S. § 25-12-103(11). The nature of an exception is to be inconsistent with a law's primary purpose. The *Hobbs* Division effectuated the exception's purpose by using its plain language without adding words or requirements. Petitioner's construction frustrates that purpose by preventing such events from being held on private property if amplified noise is involved.

The suggestion that municipalities would allow effectively endless violations of the Act and unremitting noise pollution is without support. The extent of local regulation shows that municipalities maintain similar concerns as expressed in the Act. These local ordinances have coexisted with the Act without conflict. Reversing

the *Hobbs* Division in this matter would invalidate these regulations and could terminate the events and activities that are important and meaningful to Coloradans.

II. Petitioner's construction of C.R.S. § 25-12-103(11) is unreasonable.

CML adopts the arguments made by Salida and *amicus curiae* Notes Live, Inc. regarding the *Hobbs* Division's correct reading of the plain language of C.R.S. § 25-12-103(11). Petitioner's strained reading of the statute, like that of the *Freed* Division, should be rejected. CML offers additional limited arguments for the Court's consideration.

A. The disjunctive "or" avoids linking "lessees, licensees, and permittees" to a clause modifying "entity not organized for profit."

Petitioner argues that the exception applies to three categories of users of property and then subcategories (lessees, licensees, and permittees) of users of the same property. Op. Br. 10-11; *Freed*, 556 P.3d at 826. That reading assigns undue significance to the second use of a disjunctive "or." Petitioner's reading also requires concluding, simply because of the second disjunctive "or," that the phrase "the use of property by" could be read to not apply equally to "lessees, licensees, and permittees." *See Freed*, 556 P.3d at 826 ("We believe the inclusion of a second disjunctive "or" and the use of the possessive "their" leave room for two interpretations."). Assigning such significance to the second "or" in the exception is unreasonable and elevates words selectively over the entire exception.

The General Assembly made no other effort to distinguish the alleged "categories" and "subcategories," like using semicolons or subsections. The only plausible understanding of the second "or" is that it ensures that "any of their lessees, licensees, or permittees" was not confused with or included in the qualifier of "entity not organized for profit" – "including, but not limited to, nonprofit corporations." Without the second disjunctive, the statute would suggest that only a nonprofit's "lessees, licensees, or permittees" were within the exception and would read: "This article is not applicable to the use of property by this state, any political subdivision of this state, or any other entity not organized for profit, including, but not limited to, nonprofit corporations, ~~or~~ any of their lessees, licensees, or permittees . . . ." An ambiguity should not be based on assigning such significant meaning to the word "or" when a plain reading of the statute is clearly discernable.

B. Requiring "co-use" by a political subdivision adds language to the statute that is inconsistent with the plain lack of an ownership requirement.

All parties agree, as did both divisions of the Court of Appeals, that that the exception contains no ownership requirement. *See* Op. Br. 10; *Freed*, 556 P.3d at 825; *Hobbs v. City of Salida*, 550 P.3d 193, 200 (Colo. App. 2024). Petitioner's reading, as other *amici* note, requires the "co-use" of the property by the primary user and the secondary user for the exemption to apply. Amicus Br. of Notes Live,

Inc. at 7-8; *see also Freed*, 556 P.3d at 827 (viewing the term "their" as requiring that the use of property be by the state, political subdivision, or nonprofit entity). The inconsistency between the plain lack of an ownership requirement and the existence of an unstated "co-use" requirement reveals the invalidity of Petitioner's reading of the exception. The *Freed* Division relegated this inconsistency to a footnote instead of acknowledging how it undermined the court's determination that an ambiguity existed. *See* 556 P.3d at 829, n.6 ("We recognize that a related question flows from our conclusion: What qualifies as a "use of property" within the meaning of section 25-12-103(11), C.R.S. 2023?"). That question could have been avoided by not inserting new language into the statute to create an ambiguity. "Use of property by" can only be read to apply to all of the entities or persons listed in the exception and not be artificially limited to only the state, political subdivisions, and nonprofit entities.

The phrase "use of property by" is not rendered meaningless if the Court does not manufacture the tiers of users that he and the *Freed* Division suggest. The Act applies to unspecified activities and regulates noise "radiating from a property line. *See* C.R.S. § 25-12-103(1) ("Every activity to which this article is applicable . . ."). It is natural for exceptions to refer to the "use of property" because it generally refers to both activities conducted on a property and relates the physical place from which

sound emanates and is measured. Other exceptions to the Act that use similar language. *See* C.R.S. § 25-12-103(7) ("This article is not applicable to the use of property for the purpose of conducting speed or endurance events" involving vehicles); C.R.S. § 25-12-103(10) (("This article is not applicable to the use of property for the purpose of manufacturing, maintaining, or grooming machine-made snow"). The General Assembly could have omitted "use of property for the purpose of" and simply exempted the activities but chose not to. The regulation of nuisance typically refers to the use of property. *See*, *e.g.*, C.R.S. § 16-3-304 (defining class 2 public nuisances including "any public or private place used for" specified purposes). While the phrase "use of property by" has meaning, it is not the meaning assigned to it by Petitioner and is not rendered meaningless by the *Hobbs* Division.

C. Petitioner's reading is inconsistent with the preservation of local authority in C.R.S. § 25-12-103(11).

Petitioner's view of the exception is inconsistent with the mandate that the subsection "shall not be construed to preempt or limit the authority of any political subdivision having jurisdiction to regulate noise abatement." C.R.S. § 25-12-103(11). A reading of the exception that adds requirements that the "permittee" use the same property as a local government is not reasonable because it is inconsistent with the rest of the subsection. In contrast, Salida's reading effectuates the authority to regulate noise abatement. The *Hobbs* Division correctly recognized the rational

connection between C.R.S. § 25-12-103(11) and this traditional regulatory authority. *See Hobbs*, 550 P.3d at 202-03.

D. The *Hobbs* Division's holding is consistent with the Act and other Colorado statutes regarding municipal noise regulation.

Perhaps most importantly, the *Hobbs* Division's reading of the statute is consistent with the remainder of the Act and other statutes discussed above. The exception allows local governments to assume their traditional role of permitting and, as with other exceptions, retain local jurisdiction to authorize specified activities and regulate certain aspects of related noise. *See* C.R.S. § 25-12-103(7) (speed or endurance events involving vehicles); C.R.S. § 25-12-103(10) (manufacturing, maintaining, or grooming machine-made snow).

Salida's reading is not inconsistent with C.R.S. § 25-12-108 ("Except as provided in sections 25-12-103(12) and 25-12-110, this article shall not be construed to preempt or limit the authority of any municipality or county to adopt standards that are no less restrictive than the provisions of this article."). First, the use of an express exemption is not "less restrictive"; otherwise, the exemption would have no meaning. The general provision must defer to the more specific exception. Second, this section addresses generally applicable standards and has no bearing on the permitting processes of a local government. C.R.S. § 25-12-108's language does not

mandate a construction that the exception at C.R.S. § 25-12-103(11) must also be at least as restrictive as the Act.

For these reasons and those presented by Salida and other supporting *amici*, CML urges the Court to affirm the *Hobbs* Division in finding that C.R.S. § 25-12-103(11) can be read in only one way.

CONCLUSION

In conclusion, Colorado's municipalities rely on the plain and unambiguous language of C.R.S. § 25-12-103(11) to build vibrant communities and successful economies through cultural, entertainment, athletic, and patriotic events. This authority is neither unrestrained nor used irresponsibly. Petitioner's alternative construction of C.R.S. § 25-12-103(11) is unreasonable and inconsistent with the purpose of the exception and the Act and Colorado's statutes taken as a whole. CML respectfully urges the Court to affirm the *Hobbs* Division and reject the alternative holding in *Freed*.

Dated January 28, 2025.

By: /s/ *Robert Sheesley*

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CERTIFICATE OF SERVICE

I hereby certify that on this January 28, 2025, I filed the foregoing **BRIEF OF *AMICUS CURIAE* COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE CITY OF SALIDA** via Colorado Courts E-Filing, which will send a true and correct copy to the following:

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