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| SUPREME COURT, STATE OF COLORADO<br>2 East 14th Avenue, Denver, CO 80203 | |
| On Certiorari to Colorado Court of Appeals, Case No. 2016CA2564, Opinion by Fox, T., Vogt, Jr., concurring; Booras, L., dissenting | |
| **Intervenors/Petitioners:**<br>American Petroleum Institute and the Colorado Petroleum Association,<br>v.<br>**Respondent**:<br><br>Xiuhtezcatl Martinez, Itzcuauhtli Roske-Martinez, Sonora Binkley, Aerielle Deering, Trinity Carter, Jamirah DuHamel, and Emma Bray, minors appearing by and through their legal guardians Tamara Roske, Bindi Brinkley, Eleni Deering, Jasmine Jones, Robin Ruston, and Diana Bray. | ▲COURT USE ONLY▲ |
| Attorneys for Petitioners:<br>Richard C. Kaufman, #8343<br>Julie A. Rosen, #40406<br>Matthew K. Tieslau, #47483<br>RYLEY CARLOCK & APPLEWHITE<br>1700 Lincoln Street, Suite 3500<br>Denver, Colorado 80203<br>Telephone: (303) 863-7500<br>bclayton@rcalaw.com | Case No. 2017SC297 |
| **PETITION FOR WRIT OF CERTIORARI** | |

Intervenors the American Petroleum institute ("API") and the Colorado Petroleum Association ("CPA"), by and through their attorneys, Ryley Carlock & Applewhite (collectively, the "Intervenors"), respectfully submit this Petition for Writ of Certiorari.

## CERTIFICATE OF COMPLIANCE

I certify that this Petition for Certiorari complies with all applicable requirements of C.A.R. 28, 32, and 53. Specifically, I certify that this document contains 3352 words (including headings, quotations, and footnotes, but excluding the caption, Certificate of Compliance, Table of Contents, Table of Authorities, signature blocks, Certificate of Service and Appendix).

*s/Richard C. Kaufman*
Richard C. Kaufman

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## I. ISSUES PRESENTED FOR REVIEW

1. Whether the Court of Appeals erred in rejecting the Colorado Oil and Gas Conservation Commission's interpretation of its statutory authority, which requires a balance between oil and gas development and other considerations within the Oil and Gas Act.
2. Whether the Court of Appeals erred: in its interpretation of the plain language of the Act; by utilizing the legislative declaration of the Colorado Oil and Gas Act to interpret the substantive provisions of the same; and, by departing from precedent from other divisions of the Court of Appeals and the Colorado Supreme Court?

## II. REFERENCE TO OFFICIAL OPINION OF THE COURT OF APPEALS

The Colorado Court of Appeals' opinion will be published as *Martinez v. Col. Oil & Gas Conservation Comm.*, 16 CA 564, 2017 COA 37. App. A ("Ct. of Appeals Order").

## III. STATEMENT OF JURISDICTION

The Colorado Supreme Court has jurisdiction pursuant to C.A.R. 49 and 52. The Court of Appeals' decision was issued on March 23, 2017. *See* App. A. No petition for rehearing was filed. The Intervenors obtained an extension of time from this Court up until May 18, 2017 to file this Petition for Certiorari.

## IV. STATEMENT OF CASE

On November 15, 2013, Respondents filed a Petition for Rulemaking with the Colorado Oil and Gas Conservation Commission ("COGCC") pursuant to § 34-60-108(7), C.R.S and Rule 529(b) of the COGCC Rules of Practice and Procedure. App. B. ("Petition"). Respondents' Petition contained a proposed rule requesting that the COGCC:

> [N]ot issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, an independent, third party organization confirms, that drilling can occur in a manner that does not cumulatively, with other action, impair Colorado's atmosphere, water, and land resources, does not adversely impact human health and does not contribute to climate change.
>
> App. B at p. 47.

In accordance with Rule 510 of the COGCC Rules of Practice and Procedure, the COGCC held a public hearing where it received comments and testimony regarding Respondents' Petition. The COGCC also received legal advice on its statutory authority to promulgate Respondents' proposed rule from the Colorado Attorney General's Office, which advised that the COGCC lacked sufficient jurisdiction to adopt the proposed rule as written, and that there was no statutory basis to withhold drilling permits pending third party environmental reviews. *See* App. C.

The COGCC ultimately and unanimously denied the Petition on April 28, 2014. App. D. In its order denying the Petition, the COGCC reasoned that (1) the proposed rule would require the COGCC to readjust the balance created by the General Assembly under the Oil and Gas Conservation Act (§§ 34-60-101 *et seq.*) ("Act") and was thus beyond the COGCC's limited statutory authority; (2) the COGCC's statutory duty to promulgate rules was not delegable to unidentified third party organizations; and (3) the Colorado courts have expressly rejected the public trust doctrine on which the original petition was based.[1] App. D at 2-3.

On July 3, 2014, Respondents filed a complaint in District Court for the City and County of Denver, seeking judicial review of the COGCC's order under § 24-4-106, C.R.S. and § 34-60-111, C.R.S., challenging the order as arbitrary and capricious, an abuse of discretion, and otherwise contrary to law. The American Petroleum Institute and the Colorado Petroleum Association were granted intervention in the district court on December 24, 2014. After briefing and oral argument on the issues, the district court entered an order on February 19, 2016 upholding the COGCC's order. App. E. The district court reasoned that the Act's language was clear and unambiguous, requiring a balance between the

[1] Respondents initially urged the COGCC to adopt a public trust doctrine, but dropped this argument on appeal. The Court of Appeals considered the argument abandoned and did not address it in its opinion. App. A at ¶7.

development of oil and gas resources and protecting public health and the environment. *Id.* at 7. The district court also concluded that the COGCC did not act arbitrarily or capriciously in relying on legal advice from the Attorney General's office and considering input from stakeholders who both supported and opposed the granting of the Petition. *Id.* at 8-10.

Respondents appealed the district court's order on April 4, 2016, arguing that the COGCC and the district court erroneously interpreted the Act. In briefing and oral argument before the Court of Appeals, Respondents argued that the language of the Act did not require the COGCC to balance oil and gas development with protecting the public health and the environment, but instead directed the COGCC to permit oil and gas development only when it could determine no injury to public health and the environment would result.

The Colorado Court of Appeals issued a judgment reversing the district court on March 23, 2017. App. A. The court concluded that the language of the Act was clear and unambiguous; that the plain meaning of the phrase "in a manner consistent with" indicated that oil and gas development was subordinate to, as opposed to coextensive with, considerations related to public health and the environment; and as such the Act did not forbid the COGCC from granting the

extraordinary relief sought by the Petition. *Id.* at ¶30. This decision was not unanimous, as evidenced by Judge Booras's dissenting opinion. *Id.* at ¶37.

Intervenors American Petroleum Institute and the Colorado Petroleum Association now ask this Court to correct the Court of Appeals' erroneous interpretation of the Act, which incorrectly concluded that the Act allows the COGCC to indefinitely suspend the permitting of oil and gas development.

## V. REASONS FOR GRANTING THE WRIT

### A. The Court of Appeals Ruling Implicates Important Legal and Policy Issues that Significantly Impact the Oil and Gas Industry.

The Court of Appeals Ruling, if not corrected, will radically change the COGCC's implementation of oil and gas law, and will have a drastic impact on the Colorado economy. Although the court claimed to premise its ruling on the plain language of the Act, the court went well beyond the text and made sweeping statements about the Act's underlying policy focus. If the plain language of the Act was truly clear and unambiguous, there was no need for the Court of Appeals to attempt to discern the underlying policy behind the Act or to focus on its legislative declaration. The Court of Appeals instead speculated on the intent of the General Assembly, as discerned from the legislative evolution of the Act, to make oil and gas development in Colorado subordinate in all events to any consideration related to public health, safety, and welfare. App. A at ¶28-30. This

is a drastic departure from the COGCC's longstanding interpretation of the Act, and if allowed to stand, the Court of Appeals ruling will have immediate negative impacts on the oil and gas industry in Colorado.

For example, existing COGCC rules and regulations, as well as any operations approved since the language in the legislative declaration was adopted, now have their validity thrown into doubt. It is likely that substantial state resources will need to be expended in adjudicatory proceedings and rulemaking to address the Court of Appeals' opinion, which will slow development of oil and gas resources in Colorado. According to a recent PriceWaterhouseCoopers study conducted in 2014, the Oil and Gas industry supports 213,100 jobs in Colorado, constituting 6.7% of the state's total employment, and contributes $25.8 billion to the economy, constituting 9% of the state's total economic activity. *See Oil and Natural Gas Stimulate Colorado Economic and Job Growth*, AMERICAN PETROLEUM INSTITUTE, http://www.api.org/~/media/Files/Policy/Jobs/Oil-Gas-Stimulate-Jobs-Economic-Growth/Map/Colorado.pdf (last visited May 18, 2017). Thus the Court of Appeals' opinion could have far reaching effects on Colorado's economy. Ironically, these proceedings will also divert COGCC resources from enforcing existing rules and advancing its current mission to protect human health and the environment.

### 1. The COGCC Properly Interpreted the Oil and Gas Act in Denying the Petition for Rulemaking.

This Court should grant certiorari because, contrary to the Court of Appeals ruling, the COGCC properly and reasonably interpreted the Act when it denied the petition for rulemaking.

The review of rulemaking decisions is governed by the Administrative Procedures Act ("APA"). §24-4-106(7), C.R.S.. Under the APA, an agency's interpretation of statutes is given great deference. *Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd.*, 919 P.2d 212, 217 (Colo. 1996). The standard for review of an agency rulemaking is whether the agency acted reasonably. *Id.* A party challenging an agency rulemaking decision has a heavy burden and must establish the invalidity of the agency's action by demonstrating the agency violated constitutional or statutory law, exceeded its authority, or lacked a basis in the record for its decision. *Colo. Oil & Gas Conservation Com. v. Grand Valley Citizens' Alliance*, 279 P.3d 646, 648 (Colo. 2012).

Where, as in this case, an agency denies a request for rulemaking, courts afford the agency even greater deference. *Mass. v. Environmental Protection Agency*, 549 U.S. 497, 527-28 (2007). Judicial review in in this case is "extremely limited and highly deferential." *Id.* Where an agency's statutes include competing considerations, an agency has the discretion how to address those competing

interests including a case where an agency denies a petition for rulemaking. *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 244 (5th Cir. 2015). Under Colorado precedent, deference is given to an agency's interpretation and application of its statutes. *Davison v. Industrial Claim Appeals Office of State*, 84 P.3d 1023, 1029 (Colo. 2004). Only where an agency's interpretation or application of its statutes is inconsistent with the clear language or legislative intent should a court overturn an agency's decision. *Douglas County Bd. of Equalization v. Clarke*, 921 P.2d 717, 721 (Colo. 1996). This longstanding deference to an agency's interpretation was not lost on the dissent in the Court of Appeals. *See* App A at ¶38.

The COGCC is tasked with balancing competing considerations when enacting rules and regulations to carry out the legislative intent of the Oil and Gas Act. On the one hand, the legislative declaration notes a general intent to "foster the responsible, balanced development . . . of oil and gas," while, on the other, the agency is given explicit statutory authority to regulate that development "to prevent and mitigate significant adverse impacts . . . to the extent necessary to protect health, safety, and welfare, including protection of the environment and wildlife resources, *taking into consideration cost-effectiveness and technical feasibility*." § 34-60-102(1)(a)(I), C.R.S.; § 34-60-106(2)(d), C.R.S. (emphasis

added). The legislative intent as expressed in the substantive statutes spelling out the COGCC's authority is clear. The COGCC has the duty to both promote oil and gas development and regulate the industry by preventing or mitigating adverse impacts development may have on public health, safety, and welfare, when doing so is cost effective and technically feasible. One set of the factors does not predominate the others. Under Supreme Court precedent, the COGCC denial of the petition for rulemaking was reasonable, and the Court of Appeals should have deferred to that interpretation. As such, this Court should grant certiorari. C.A.R. 49(a)(2).

**2. The Court of Appeals Erred in Its Interpretation of the Act.**

This Court should additionally grant certiorari because the Court of Appeals incorrectly interpreted the plain language of the Act, and in justifying its interpretation utilized one subsection of the legislative declaration found in § 34-60-102, C.R.S. to interpret and override the clear and unambiguous meaning of the Act.

**a. The Plain Language of the Act Does Not Condition Oil and Gas Development on the Absolute Protection of Public Health, Safety, and Welfare.**

In concluding that the plain language of the Act mandates that the COGCC condition oil and gas development on the protection of public health, safety, and

welfare, the Court of Appeals relied extensively on its determination that the phrase "in a manner consistent with" contained in § 34-60-102, C.R.S. is equivalent to stating "subject to," as opposed to indicating a balancing test. The Court of Appeals' conclusions are wrong for two reasons.

First, if the language in the Act was truly unambiguous, there was no reason for the Court of Appeals to look beyond the text of the Act to the legislative declaration.

Second, even if it was necessary for the Court of Appeals to examine the legislative declaration, its interpretation ignores the common definition of "in a manner consistent with," and instead relies on the use of the phrase by courts in arcane, discrete, and unrelated instances. The phrase "in a manner consistent with" should be interpreted within the context of the Act and according to its plain meaning.

Merriam-Webster's Collegiate Dictionary defines 'consistent' as "possessing firmness or coherence" including "marked by harmony, regularity or steady continuity; compatible" and "marked by harmony . . . usually used with *with.*" Merriam-Webster's Collegiate Dictionary (10th ed. 1999). As noted in Judge Booras's dissent, these definitions signify something less than a requirement for a rigid adherence, but rather indicate a harmonious agreement. App. A at ¶40.

As the plain, ordinarily understood meaning of "consistent with" is clear and unambiguous, it was unnecessary and improper for the majority to review context-specific instances where courts have used "consistent with," such as when issuing opinions, to depart from the commonly understood meaning.

Given the plain meaning of the phrase "in a manner consistent with," and the context of the Act which expressly encourages oil and gas development, the COGCC's longstanding interpretation of the phrase as requiring a balance was the correct, reasonable interpretation. As such, this Court should grant certiorari to rectify the Court of Appeals' error.

### b. The Court of Appeals Ruling Inappropriately Relies on the Legislative Declaration to Drive Policy and Rulemaking.

In concluding the language in the Act was clear and unambiguous, and then relying on the legislative declaration in the Act instead of its text, the Court of Appeals failed to follow Supreme Court precedent for statutory interpretation. *See* C.A.R. 49(a)(2). Statutory construction is governed by §§ 2-4-101 *et. seq.,* C.R.S The goal of these statutes is to give meaning to laws enacted by the General Assembly. Statutes must be read and considered as a whole and interpreted to avoid absurd results. *People v. Richards*, 23 P.3d 1223, 1225 (Colo. 2000). While legislative declarations may be utilized to interpret an ambiguous statute, this

Court has held that such declarations are not binding on a court. *Walgreen Co. v. Charnes*, 819 P.2d 1039, (Colo. 1991); *see also* App. A at ¶41. Subsequent to *Charnes*, this Court held that even where a court considers the legislative declaration; it cannot override the substantive provisions of a statute. *Stamp v. Vail Corp.*, 172 P.3d 437, 444 (Colo. 2007).

In its order, the Court of Appeals held the legislative declaration found in § 34-60-102(1)(a)(I), C.R.S required the COGCC to consider factors affecting public health, safety, and welfare as paramount to any other factors found in the statutory scheme. The actual language of the substantive provisions of the Act found outside of the legislative declaration clearly and unambiguously require the COGCC to foster the development of oil and gas resources, and to balance that development in a manner consistent with the prevention and mitigation of significant adverse environmental impacts on any air, water, soil, or biological resource, "taking into consideration cost-effectiveness and technical feasibility." *See* § 34-60-106(2)(d), C.R.S. The decision by the Court of Appeals violates long-standing precedent from this Court that statutes must be read as a whole, and each word should be given its clear and normal meaning to avoid an absurd result. *State Highway Comm'n of Colo. v. Haase*, 537 P.2d 300, 305 (Colo. 1975).

The Court of Appeals decision reversed the normal logic of statutory construction by imposing an interpretation of the legislative declaration as binding on the substantive provisions of the Oil and Gas Act. Colorado Revised Statute § 34-60-106(2)(d), a section regarding the duties of the COGCC, specifically states:

> (2) The commission has the authority to regulate:
>
> > (d) Oil and gas operation so as to prevent and mitigate significant adverse environmental impacts on any air, water, soil, or biological resource resulting from oil and gas operations to the extent necessary to protect public health, safety, and welfare, including protection of the environment and wildlife resources, taking into consideration cost-effectiveness and technical feasibility.

This section imposes a duty upon the COGCC to balance the competing interests of oil and gas development with other concerns outlined in the substantive provisions of the Act. The Court of Appeals decision ignores precedent from this Court which interpreted similar legislative declarations which tasked agencies with considering environmental concerns. *See, e.g., Bd. of Cty. Com'rs of Douglas Cty. v. Bainbridge, Inc.*, 929 P.2d 691, 707 (Colo. 1996) (In examining the legislative declaration of the Local Government land Use Control Enabling Act, concluding that balancing "human needs with activities impacting the environment" was required. ).

Furthermore, even if it had been appropriate for the Court of Appeals to rely on the legislative declaration after determining the Act was unambiguous, the Court of Appeals' decision ignores that the legislative declaration articulates multiple goals. In addition to the provision relied on by the Court of Appeals, the Act's legislative declaration declares that it is the intent of the Act "*to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production*, subject to the prevention of waste, consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources . . ." . § 34-60-102(1)(b), C.R.S. (emphasis added). Banning fracking, for example, would "materially impede[]" this clearly articulated goal. *See City of Fort Collins v. Colorado Oil & Gas Ass'n*, 369 P.3d 586, 592 (Colo. 2016) (citing Colo. Rev. Stat. § 34-60-102(1)(b).

The Court of Appeals ignores these decisions, which recognize the statutory balance and nuance required when permitting of oil and gas development, and interprets the protection of public health, safety, and welfare as the singular, overriding goal of the Act – such that one provision trumps the remainder of the legislative declaration *and* the multiple, specific provisions within the Act. This cannot be so. *See Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (U.S. 2000) ("[A] reviewing court should not confine itself to

examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context.").

**c. The Court of Appeals Ruling Departs from Other Divisions of the Court of Appeals and with Decisions from the Colorado Supreme Court.**

In addition, this Court should grant certiorari because another division of the Court of Appeals has taken a contrary opinion on the same issue of statutory construction. *See* C.A.R. 49(a)(3); *People in Interest of T.B.*, 14 CA 1142, 2016 COA 151M ("In this case, because the statute is unambiguous, we do not consider the legislative declaration.").

Furthermore, this Court has recognized on multiple occasions that the Act must be interpreted as a whole, and that the legislative declaration may not be read in isolation or elevated above other substantive portions of the Act. *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913, 925 (Colo. 1996) ("We recognize that the purposes of the Act are to *encourage the production* of oil and gas in a manner that protects public health and safety *and prevents waste*.") (emphasis added); *City of Longmont v. Colo. Oil & Gas Ass'n*, 369 P.3d 573, 580 (Colo. 2016) (In invalidating Longmont's fracking ban, this Court concluded that "the state's interest in the efficient and fair development of oil and gas resources in the state

suggests that Longmont's fracking ban implicates a matter of statewide concern.") (internal quotations omitted); *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 369 P.3d at593 (Colo. 2016) (In invalidating the City of Fort Collins' moratorium on fracking, this Court concluded that "the moratorium materially impedes the effectuation of the state's interest in the efficient and responsible development of oil and gas resources."). As the Court of Appeals departed from established Supreme Court precedent, certiorari should be granted. C.A.R. 49(a)(2).

For all of the above reasons, certiorari should be granted.

Respectfully submitted this 18th day of May, 2017.

RYLEY CARLOCK & APPLEWHITE

By: */s/Richard C. Kaufman*
Richard C. Kaufman
Julie Rosen
Matthew K. Tieslau

***Attorneys for American Petroleum Institute and Colorado Petroleum Association.***

## CERTIFICATE OF SERVICE

I certify that on the 18t$^{h}$ day of May, 2017, a true and correct copy of the foregoing **PETITION FOR WRIT OF CERTIORARI** was electronically filed and served via the Colorado Court's E-filing System or by U.S. Mail, postage prepaid, addressed as follows:

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|---|---|
| Katherine Merlin<br>479 Arapahoe Ave.<br>Boulder, CO 80302<br>COUNSEL FOR APPELLANTS | Julia Olson<br>Wild Earth Advocates<br>1216 Lincoln St.<br>Eugene, OR 97401<br>COUNSEL FOR APPELLANTS |
| James Daniel Leftwich<br>Mind Drive Legal Services, LLC<br>1295 Wildwood Road<br>Boulder, CO 80305<br>COUNSEL FOR APPELLANTS | Timothy Estep and Kevin Lynch<br>2255 E. Evans Ave., Suite 335<br>Denver, CO 80208<br>COUNSEL FOR AMICI CURIAE |
| Kyle Tisdel<br>Western Environmental Law Center<br>208 Paseo del Pueblo Sur, #602<br>Taos, New Mexico 87571<br>COUNSEL FOR AMICI CURIAE | Cynthia H. Coffman<br>John E. Matter, Jr.<br>Frederick R. Yarger<br>1300 Broadway, 10$^{th}$ Floor<br>Denver, CO 80203<br>COUNSEL FOR COLORADO OIL & GAS CONSERVATION COMMISISON |

*s/Ann I. Palius*