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| **COLORADO SUPREME COURT**<br>2 East 14th Avenue<br>Denver, CO 80203 | |
| On Certiorari to the Colorado Court of Appeals, 2016CA564<br><br>Opinion by Judge Fox; Judge Vogt, Jr., concurring; Judge Booras, dissenting<br><br>District Court, Denver County, 2014CV32637<br>The Honorable J. Eric Elliff | ▲ COURT USE ONLY ▲ |
| **Petitioner:**<br>Colorado Oil and Gas Conservation Commission,<br><br>and<br><br>**Intervenors-Petitioners:**<br>American Petroleum Institute and the Colorado Petroleum Association<br><br>v.<br>**Respondents:**<br>Xiuhtezcatl Martinez; Itzcuahtli 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. | Supreme Court Case No.:<br>2017SC297 |

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| **Attorneys for Respondents**:<br>Law Offices of Katherine Merlin (Atty. Reg. # 45672)<br>1823 Folsom Street, Suite 100<br>Boulder, CO 80302<br>Phone No: (720) 965-0854<br>Email: katelynnmerlin@gmail.com<br><br>Julia Olson (*pro hac vice*)<br>Wild Earth Advocates<br>1216 Lincoln St.<br>Eugene, OR 97401<br>Phone No: (415) 786-4826<br>Email: JuliaAOlson@gmail.com<br><br>James Daniel Leftwich (Atty. Reg. # 38510)<br>MindDrive Legal Services, LLC<br>1295 Wildwood Road<br>Boulder, CO 80305<br>Phone No: (720) 470-7831<br>Email: dan@minddrivelegal.com | |

**RESPONDENTS' MOTION TO VACATE THE DISSENTING OPINION OF JUDGE LAURIE BOORAS AND VACATE THIS COURT'S ORDERS IN *MARTINEZ,* OR AT A MINIMUM, RECONSIDER AND MODIFY THIS COURT'S OPINION IN LIGHT OF THE VACATED DISSENT**

Pursuant to Colorado Appellate Rule 27, Respondents respectfully request that this Court issue an order vacating the dissenting opinion of Judge Laurie Booras below in the matter of *Martinez v. Colorado Oil and Gas Conservation Commission,* 2017 COA 37 (Colo. App. Mar. 23, 2017) (Booras, J., dissenting), and then vacate this Court's orders in this case, including its January 29, 2018

order granting the Petition for Writ of Certiorari and its subsequent opinion, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan. 14, 2019), which relied in part on Judge Booras' dissent. Alternatively, and at a bare minimum, after vacating Judge Booras' dissenting opinion, Respondents respectfully request that this Court reconsider and modify this Court's opinion, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan. 14, 2019), without reliance on the vacated dissenting opinion or the content of any of Petitioners' (and *amici curiae* briefs in their support) citing to that dissenting opinion.

This Court did not disclose that the dissenting opinion of Judge Booras, on which it relies and cites in support of its conclusion that the statutory language at issue was ambiguous, was written by a judge who was unanimously found by the three Special Masters and the ten-member Colorado Commission on Judicial Discipline to have engaged in activities related to this matter that undermined her integrity, independence, and impartiality. Respondents submit an account of the extraordinary circumstances regarding judicial misconduct in this matter in the supporting Declaration of Julia A. Olson ("Olson Decl.") and the effect it has had

on the lead youth plaintiff, Xiuhtezcatl Martinez, a young Indigenous Mexican American, in the Declaration of Xiuhtezcatl Martinez ("Martinez Decl.").[1]

**Statement of Facts**

Two of the Respondents in this case are Indigenous Mexican American youth. Martinez Decl., ¶ 1. Xiuhtezcatl Martinez, now 18, has been working most of his young life to protect his rights, his community, his state, his nation and his planet, from the destruction of climate change and fracking. Martinez Decl., ¶¶ 5-7. His efforts in this matter have also been driven by his desire to protect marginalized communities, including Latino and immigrant communities, from the disproportionate impacts fracking has on those communities. Martinez Decl., ¶ 10.

On February 21, 2017, Counsel Olson argued on behalf of the youth plaintiffs/appellants (now Respondents), in this matter before a panel of Judges Terry Fox, JoAnn Vogt, and Laurie Booras in the Colorado Court of Appeals. Olson Decl., ¶ 2. Judge Laurie Booras presided. *Id*. Among the youth plaintiffs with counsel in the courtroom that day were lead plaintiffs Xiuhtezcatl Martinez

[1] Counsel for Respondents conferred by telephone and email with counsel for Petitioners and Intervenor-Petitioners on this motion on January 23, 2019. Counsel for Intervenor-Petitioners indicated that Intervenor-Petitioners oppose this motion. Olson Decl., ¶ 18. At the time of this filing, Respondents have not received a response on the position of the Petitioners (the COGCC).

and Itzcuahtli Roske-Martinez, who are U.S. citizens of indigenous Aztec heritage, and Mexican American. *Id.*; Martinez Decl., ¶¶ 1, 3.

On February 22, 2017, one day after the Court of Appeals oral argument in this matter, Judge Laurie Booras sent an email to a third party, Mr. Sakowicz, where she referred to her colleague on the panel, Judge Terry Fox, who is Latina, as "the little Mexican" in the context of how the Court of Appeals would rule in this case while it was pending before Judges Fox, Vogt, and Booras. In that email, Judge Booras wrote:

> We had an oral argument yesterday re: fracking ban where there was standing room only and a hundred people in our overflow video room. The little Mexican is going to write in favor of the Plaintiffs and It looks like I am dissenting in favor of the Oil and Gas commission. You and Sid will be so disappointed.

Report of the Special Masters at 5, *In the Matter of the People of the State of Colorado and Laurie A. Booras,* No. 2018SA83, Commission Case 18-36, (Dec. 12, 2018) (Olson Decl., Exhibit 3) (hereinafter "Report of the Special Masters"). In a separate email to Mr. Sakowicz also sent on February 22, Judge Booras included an article about lead plaintiff Xiuhtezcatl Martinez that referred to him as an "indigenous hip hop artist." *Id.* at 6. Previously, on February 22, 2016 Judge Booras wrote another email in which she made a slur about a Native American woman, calling her "the squaw." *Id*.

On March 23, 2017, the Court of Appeals issued a 2-1 decision, authored by Judge Fox with Judge Vogt concurring, in favor of youth Respondents. Judge Booras wrote a dissenting opinion, as she told a third party she would one day after oral argument. *Martinez v. Colorado Oil and Gas Conservation Commission,* 2017 COA 37 (Colo. App. Mar. 23, 2017) (Booras, J., dissenting); Report of the Special Masters at 5.

On May 18, 2017, the Colorado Oil and Gas Conservation Commission ("COGCC") and Intervenors American Petroleum Institute and Colorado Petroleum Association ("Intervenors") filed petitions for writ of certiorari with this Court, over the objection of Governor Hickenlooper. Olson Decl., ¶ 7. The petitions for writ of certiorari cited to Judge Booras' dissenting opinion multiple times. *Id.*; Intervenors' Petition for Writ of Certiorari at 5, 8, 10, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan 14, 2019) (No. 2017SC297); COGCC Petition for Writ of Certiorari at 11-12, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan 14, 2019) (No. 2017SC297). Respondents filed their brief opposing the COGCC and Intervenors' petitions for writ of certiorari on June 29, 2017, arguing that the Court of Appeals' conclusion that "fostering balanced, nonwasteful development is in the public interest when that development is completed subject to the protection of public

health, safety, and welfare," is the correct reading of the plain language of the Act. This Court granted the petitions for writ of certiorari on January 29, 2018. *Colorado Oil and Gas Conservation Commission v. Martinez,* No. 2017SC297 (Colo. Jan. 29, 2018). The issue announced by the Court was:

> [REFRAMED] Whether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare.
>
> DENIED AS TO ALL OTHER ISSUES.

*Id.*

On March 29, 2018, in response to complaints of alleged judicial misconduct related to Judge Booras' emails, her disclosure of confidential privileged information to a third party, and other conduct, the Colorado Commission on Judicial Discipline filed a motion with this Court, requesting the temporary suspension of Judge Booras, with pay, pending resolution of the disciplinary proceedings. Motion for the Temporary Suspension Under Colo. RJD 34, *Colorado Commission on Judicial Discipline v. Laurie A. Booras,* No. 18SA83, (Colo. Mar. 29, 2018) (Olson Decl., Exhibit 1). The following day, on March 30, 2018, this Court granted the motion and suspended Judge Booras with pay pending resolution of the investigation. *In the Matter of Laurie A. Booras*, No. 2018SA83 (Colo. Mar. 30, 2018). This Court's order stated: "[P]roceedings shall remain

confidential unless and until a recommendation for sanctions or a recommendation for approval of a stipulated resolution filed with the Court under Colo. RJD 37." *Id.* at *1 (suspending Judge Booras temporarily and appointing three judges as "special masters in disciplinary proceedings").

On April 2, 2018, the COGCC and Intervenors filed their opening briefs with this Court. The COGCC's brief relied heavily on Judge Booras' dissent, which was cited ten times. Olson Decl., ¶ 7. The Intervenors also relied heavily on Judge Booras' dissenting opinion and cited her dissent seven times. *Id*. Neither brief acknowledged that Judge Booras had been suspended from the Court of Appeals. *Id*.

In Respondents' May 25, 2018 Answer Brief, Respondents informed this Court regarding Judge Booras' dissenting opinion that:

> Youth Respondents are informed and feel obligated to note that the Colorado Supreme Court suspended Judge Booras on March 30, 2018 from the Court of Appeals pending investigation by the Colorado Commission on Judicial Discipline, due to allegations that, among other things, she should have recused herself from an oil and gas case because her son is a consultant for the fracking industry. Kirk Mitchell, *Colorado Supreme Court suspends appellate judge following sexual harassment complaint*, Denv. Post, Mar. 30, 2018, https://www.denverpost.com/2018/03/30/colorado-appeals-court-judge-laurie-a- booras-suspended/.

Respondents' Answer Brief at 10, n.7, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan 14, 2019) (No. 2017SC297).

Neither the COGCC's nor the Intervenors' reply brief to this Court acknowledged that Judge Booras had been suspended from the Court of Appeals. Olson Decl., ¶ 7.

This Court held oral argument in this case on October 16, 2018. Xiuhtezcatl and Itzcuahtli Martinez were among the Respondents in the front row audience that day. Martinez Decl., ¶ 3.

On December 12, 2018, after an 8 ½-month investigation into Judge Booras' conduct as a judge, the Report of the Special Masters was filed with the Colorado Commission on Judicial Discipline. On December 17, 2018, the Colorado Commission on Judicial Discipline filed its recommendation with this Court, wherein the ten-member Commission unanimously adopted the factual findings and conclusions of law in the Report of the Special Masters. *In the Matter of Laurie A. Booras*, No. 2018SA83 (Colo. Dec. 17, 2018). The Commission recommended "to the Colorado Supreme Court that the Hon. Laurie A. Booras be removed from the Colorado Court of Appeals" and assessed costs incurred by the investigation. *Id.* at *1. According to Report of the Special Masters, which was adopted in whole by the Commission, "Judge Booras violated three Canons of the Colorado Code of Judicial Conduct by clear and convincing evidence; namely Canon 1, Rule 1.2 (Promoting Confidence in the Judiciary); Canon 3, Rule 3.1

(Extrajudicial Activities in General); and Canon 3, Rule 3.5 (Use of Nonpublic Information)." Report of the Special Masters at 24. The Report of the Special Masters further stated:

> Considering the full range of sanctions we might recommend in this case under Colo. RJD 36, which includes no sanction, diversion, private reprimand, public reprimand, suspension, retirement, or removal from office, we recommend that Judge Laurie Booras be removed from office as a judge of the Colorado Court of Appeals and that she be ordered to pay the costs and fees incurred by the Commission. She intentionally breached her duty not to disclose to any third party a confidential discussion the judges of the panel in *Martinez v. Colorado Oil and Gas Conservation Commission* had with each other during their deliberations. This breach of trust is fatal to an ongoing collegial relationship among the judges of the Court of Appeals, should Judge Booras remain on the court. Such a breach of trust is highly concerning on its own. But the fact that Judge Booras also included a racial epithet to refer to her Latina colleague, Judge Fox, about the *Martinez* case, which involved the lead plaintiff, Xiuhtezcatl Martinez, who is of Native American and Latino lineage, creates a double-barreled appearance of impropriety undermining the public's trust that she acted without racial bias when dissenting in the case. This appearance of bias is accentuated when considering her prior reference to a Native American woman as 'the squaw.' The appropriate sanction for Judge Booras' breaches of the Colorado Code of Judicial Conduct is removal from office both because of harm caused to the independence, integrity and impartiality of the judicial office she holds and because such a sanction carries with it the warranted value of deterrence.

*Id.* at 27-28.

On January 2, 2019, Judge Booras tendered her resignation letter to Chief Justice Coats, effective January 31, 2019. Olson Decl., ¶ 14.

On January 14, 2019, this Court issued its opinion in this matter, reversing the 2-1 decision of the Court of Appeals. *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan. 14, 2019). In its opinion, this Court repeatedly mentioned that there was a majority and dissenting opinion, referred to the Court of Appeals decision as "split," and specifically recounted and relied upon the dissenting opinion of Judge Booras. *Id.* at ¶¶ 4-5, 12-15, 25, 28-29, 36. This Court wrote:

> Judge Booras dissented. She began by noting that the language, "in a manner consistent with," appears in the Act's legislative declaration and that this language therefore could be used only to interpret an ambiguous statute; it could not override the Act's operative language. *Id.* at ¶ 41 (Booras, J., dissenting). She then explained that the "actual authority" of the Commission to regulate oil and gas is set out in section 34-60-106(2)(d), C.R.S. (2018), which provides that the Commission is authorized to regulate oil and gas operations
>
> > 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.
>
> *Id.* at ¶ 42. In Judge Booras's view, the fact that the Act instructs the Commission to consider cost-effectiveness and technical feasibility suggests that the protection of public health, safety, and welfare is not, by itself, a determinative consideration. *Id.* at ¶ 43.

*Id.* at ¶ 14. Further, in finding ambiguity in the statutory language, this Court explicitly relied upon Judge Booras' dissent:

> In our view, the above-quoted statutory language is reasonably susceptible of the interpretations proffered by both Petitioners and Respondents in this case, a conclusion that we believe to be supported by the fact that the district court and *Judge Booras agreed with Petitioners' interpretation* while the division majority below agreed with Respondents' interpretation.

*Id*. at ¶ 29 (emphasis added).

Ultimately, this Court went beyond the issue announced by the Court on January 29, 2018 and, turning to the "Act's statutory and legislative history," ruled that:

> the Commission is required (1) to foster the development of oil and gas resources, protecting and enforcing the rights of owners and producers, and (2) in doing so, to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, but only after taking into consideration cost-effectiveness and technical feasibility.

*Id.* at ¶¶ 30, 41. The Court did not address the Commission's obligation to protect public health, safety, and welfare from oil and gas development, separate from environmental impacts. *See, e.g.,* §§ 34-60-106(10)-(11), C.R.S.

Respondents learned for the first time on January 14, 2019 that the investigation into Judge Booras had been completed in December 2018 and that the Commission found unanimously that Judge Booras engaged in judicial misconduct that undermined her integrity, independence, and impartiality directly in relationship to this matter, and that as a result they recommended to this Court

that she be removed from office. Olson Decl., ¶¶ 10-11. Respondents also learned for the first time on January 14, 2019 that Judge Booras admitted sending the racist email regarding Judge Fox the day after Respondents' oral argument, in which she also disclosed only one day after oral argument to a third party outside of the Court of Appeals how Respondents' case would be decided. *Id*., ¶ 13. Respondents also learned for the first time on January 14, 2019 that Judge Booras admitted to sending an email that made a racist comment about a Native American person. *Id.*

On January 15, 2019, Respondents' counsel requested a copy of the December 17, 2018 recommendation for Judge Booras' removal from both the Colorado Commission on Judicial Discipline and this Court. On January 16, for the first time, Respondents' counsel received and read the Commission's recommendations to this Court and the Report of the Special Masters. *Id.,* ¶ 12. Respondents' counsel immediately began preparing this motion to rectify the injustice inflicted on these youth by Judge Booras, and the members of this Court in the opinion's disregard of Judge Booras' lack of independence, integrity and impartiality in deciding this case of significant public importance.

Xiuhtezcatl Martinez has been harmed by this judicial misconduct. *See* Martinez Decl. He writes in his declaration:

> I can't help but feel robbed by the justice system. To put this much time, energy and hope into this five-year legal battle only to find out

> that the unanimous decision from my seven Supreme Court Justices to overturn the Court of Appeals decision in our case was based at least partly on a preconceived, unjust dissenting ruling influenced by racial bias is crushing. Ignoring blatant racism and fairness that violates protocol and poses a threat to the integrity of a case this important is an act of racism in itself.

*Id.*, ¶ 10.

> When the highest court in the state validates an opinion that comes from a prejudiced judge, it serves to normalize racism in our institutions.

*Id.*, ¶ 11.

This Court is expected to render a final decision regarding Judge Booras' formal removal from office by the end of this month.

**Argument**

Respondents, who include Colorado youth of indigenous and Latino heritage, are deeply concerned that Judge Booras' conduct in the *Martinez* case, which reflects racism, bias, and lack of impartiality, skewed her opinion in a case involving youth of Aztec and Mexican ancestry, where a fellow judge was also Latina, and ultimately tainted all subsequent decisions of this Court in granting the petitions for writ of certiorari and in deciding the matter. The youth's concerns were confirmed by the Colorado Commission on Judicial Discipline. *See, e.g.,* Report of the Special Masters at 28. Respondents also note that Judge Booras' email about their case only one day after the oral argument pre-judged the merits

of their appeal and locked in her position prior to further deliberations by the panel and the drafting of the opinions. *See, e.g., id.* Until the opinion is written, a potentially dissenting judge can always change her opinion. *Id.* at 9-13 (explaining the deliberative privilege that exists in the court and finding: "Only because the judges can trust one another to keep their deliberations private can the judges freely discuss their differences of opinion and even change their minds during the course of reaching a decision."). Judge Booras' email indicated that she foreclosed that possibility.

### A. The Court of Appeals Dissenting Opinion of Judge Booras Should be Vacated and this Court's Opinion, that Relies on Judge Booras' Dissent, Should Also Be Vacated

No litigant should be forced to litigate a case before a judge "bent of mind." *Johnson v. District Court In and For Jefferson County*, 674 P.2d 952, 956 (Colo. 1984); *Goebel v. Benton*, 830 P.2d 995, 998 (Colo. 1992); *Smith v. Dist. Court for Fourth Judicial Dist., State of Colo., Div. 6*, 629 P.2d 1055, 1057 (Colo. 1981) (prejudice includes a bias "which would in all probability interfere with fairness in judgment"). Ordinarily, if a party can show that "the judge's actions or comments have compromised the appearance of fairness and impartiality such that the parties or the public are left with a substantial doubt as to the ability of the judge to fairly and impartially resolve pending litigation," the judge should recuse herself or a

motion to recuse the judge can be filed. *Goebel,* 830 P.2d at 999; *see also* C.R.C.P 97.

Here, Judge Booras' actions and comments in relation to this matter reveal bias, partiality, and unfairness – in short, a judge with a "bent of mind" – and she should have recused herself from this case. *See, e.g.,* Report of the Special Masters at 28 (describing "a double-barreled appearance of impropriety"). However, because Respondents did not become aware of Judge Booras' actions and comments until well after the case was decided by the Court of Appeals, no motion for disqualification was, or could have been, filed. However, this Court still has authority to take corrective action: "An appellate court has power to set aside at any time a mandate that was procured by fraud *or act to prevent an injustice,* or to preserve the integrity of the judicial process." *Coleman v. Turpen*, 827 F.2d 667, 671 (10th Cir. 1987) (emphasis in original, citations omitted) (vacating prior order and remanding to district court for further proceedings). Appellate courts have "inherent power to recall their mandates" in extraordinary circumstances. *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). Moreover, it is appropriate to vacate a judges' order if that judge appeared to the parties or the public to be biased or prejudiced. *See, e.g., Johnson*, 674 P.2d at 956-57 (vacating an order issued by

respondent judge after finding that respondent judge should have disqualified himself from the case).

The circumstances here are truly exceptional. A unanimous panel of three Special Masters, and the ten-member Commission, also unanimously, have concluded that Judge Booras lacked integrity, independence, and impartiality and violated three canons of judicial conduct *in conjunction with her involvement in this case*. Therefore, to protect the integrity of the Colorado judicial branch, the process of judicial review, and the rights of these young Respondents, this Court should vacate the dissenting opinion of Judge Booras. There is no way to ensure that Judge Booras' dissent was not biased by racism or other improper interests, and thus, should be vacated. Of particular concern is the fact that Judge Booras demonstrated racism against people of both Latina/o and Indigenous heritage, in a case where two plaintiffs are of Aztec and Mexican heritage, are bilingual and Spanish-speaking, and whose last name is Martinez. *See* Report of Special Masters at 28. Both young Respondents were sitting in the front rows in the Court of Appeals during the oral argument in this case, over which Judge Booras presided. Martinez Decl., ¶ 3.

After vacating Judge Booras' dissenting opinion, this Court should vacate its order granting the COGCC and Intervenors' petitions for certiorari, *Colorado Oil*

*and Gas Conservation Commission v. Martinez,* No. 2017SC297 (Colo. Jan. 29, 2018) and this Court's order on the merits, *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3 (Colo. Jan. 14, 2019). Judge Booras' dissent was the gravamen of the COGCC and Intervenors' arguments before this Court, a dissent that once vacated, they could not rely upon. Additionally, this Court relied on Judge Booras' dissent for a critical determination, a determination that the pertinent provisions of the Colorado Oil and Gas Conservation Act ("Act"), that this Court was asked to interpret, are ambiguous. *Id.* at ¶ 16. The import of finding the Act ambiguous cannot be underestimated as it colored the Court's entire statutory construction analysis and process. As this Court noted, when "the statutory language is clear, we apply it as written and need not resort to other rules of statutory construction." *Id.* at ¶ 19 (citation omitted). If a statute is unambiguous courts do not turn to other rules of statutory construction. *Johnson v. People*, 379 P.3d 323, 326 (Colo. 2016). If a statute is ambiguous, courts may turn to the legislative history. *State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000).

If a unanimous panel of Court of Appeals judges found the Act to be unambiguous and ruled in favor of Respondents, it is possible that the petitions for writ of certiorari might not have been granted, or would at least have been viewed differently.

Upon review, because this Court found the Act to be ambiguous, it did not interpret the plain language of the Act and apply the statute as written, but rather focused its analysis on the legislative history of the Act, including the testimony of representatives. *Colorado Oil and Gas Conservation Commission v. Martinez*, 2019 CO 3, ¶¶ 30-40 (Colo. Jan. 14, 2019). If a unanimous panel of Court of Appeals judges found the Act to be unambiguous and ruled in favor of Respondents, as the majority did, this Court would not have been able to point to Judge Booras' dissent to support its conclusion that the Act was ambiguous and may have reached a different conclusion about whether or not the Act was ambiguous. If this Court had found that the Act was unambiguous, its entire analysis would have been different as it would have focused on the plain language of the Act, and not the legislative history and testimony, and it may have affirmed the Court of Appeals interpretation of the Act.

Having relied upon Judge Booras' opinion that the statute is ambiguous, the Court also cited to "Judge Booras' view" of how "the fact that the Act instructs the Commission to consider cost-effectiveness and technical feasibility suggests that the protection of public health, safety, and welfare is not, by itself, a determinative consideration." *Id.* at ¶ 14. This was a critical issue (whether the Commission is *required* to consider "cost effectiveness, and technical feasibility" in its regulatory

decisions, or whether it merely has the *authority* to consider those factors, so long as the public health, safety, and welfare are protected). Had Judge Booras' dissenting opinion been vacated, this Court may not have granted review or ruled consistently with Judge Booras' view on that critical issue. *Id*. at ¶ 5 (Commission is "to prevent and mitigate significant adverse environmental impacts to the extent necessary to protect public health, safety, and welfare, *but only after taking into consideration cost-effectiveness and technical feasibility*." (emphasis added)).

It is, of course, impossible to go back in time and fully undo what has transpired. However, in order to restore and enhance the public's trust and confidence in the Colorado judicial system, and more importantly, to ensure that youth Respondents received a fair hearing and decision from an independent, fair, and impartial judiciary, this Court should do everything it can to rectify this extraordinary situation before it. As this Court has stated:

> Basic to our system of justice is the precept that a judge must be free of all taint of bias and partiality. 'The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgment of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals.' *State ex rel. Barnard v. Board of Education*, 19 Wash. 8, 52 P. 317, 320—21 (1898). . . . Courts must meticulously avoid any appearance of partiality, not merely to secure the confidence of the litigants immediately involved, but 'to retain public respect and secure

> willing and ready obedience to their judgments.' *Nordloh v. Packard*, 45 Colo. 515, 521, 101 P. 787, 790 (1909).

*People v. Dist. Court In & For Third Judicial Dist.*, 192 Colo. 503, 507-08 (1977) (fn omitted); *S.S. v. Wakefield*, 764 P.2d 70, 73 (Colo. 1988) ("It is this appearance of bias or prejudice which undermines not only a litigant's confidence in the fairness of the proceeding but also public confidence in the integrity and impartiality of the judicial system.").

This Court should vacate Judge Booras' dissent and, because of the critical role that her dissent played in the subsequent proceedings before this Court, vacate its decision to review the Court of Appeals decision and its January 14, 2019 order on the merits. Without Judge Booras' dissent, the COGCC and Intervenors should reconsider whether they would seek review from this Court of the Court of Appeals opinion, which would then be unanimous. If Petitioners did decide to seek review by this Court, and this Court, without relying on or considering Judge Booras' dissent granted review, the case should be re-briefed and re-argued before this Court without any reliance on Judge Booras' dissent. This is as close to turning back the clocks as is possible at this point.

Importantly, in considering Respondents' motion, this Court should consider that it found that the pertinent section of the Act is "reasonably susceptible of the interpretation proffered by both Petitioners and Respondents . . . ." *Colorado Oil*

*and Gas Conservation Commission v. Martinez*, 2019 CO 3, ¶ 29 (Colo. Jan. 14, 2019). Therefore, if this Court vacated its orders and Petitioners did not seek review of the Court of Appeals decision, the Court of Appeals' interpretation of the Act, which this Court has ruled is a viable reading of the Act, would be the law of the land in Colorado and no injustice would result. A decision not to vacate the dissenting opinion or this Court's opinion relying upon it allows the taint of bias and prejudice to "undermine[] not only a litigant's confidence in the fairness of the proceeding but also public confidence in the integrity and impartiality of the judicial system." *S.S. v. Wakefield*, 764 P.2d at 73; Martinez Decl., ¶¶ 2-11.

### B. Alternatively, This Court Should Vacate the Dissenting Opinion of Judge Booras and this Court's Opinion Should be Withdrawn, Reconsidered, and Modified as a Result.

Given the extraordinary circumstance present here, at a minimum, this Court should, for the reasons explained above, vacate Judge Booras' dissenting opinion and withdraw its January 14, 2019 opinion, and then reconsider the case, without relying on or citing to Judge Booras' dissenting opinion, the briefing of Petitioners below, which relied on the dissent, and modify its opinion accordingly. *See, e.g., People v. McAfee*, 160 P.3d 277, 280 (Colo. App. 2007), as modified on denial of reh'g (Mar. 1, 2007) (finding that "exceptional circumstances exist to warrant revisiting our earlier decision at this late stage of the case. Consequently, we

withdraw our earlier opinion and issue this one in its stead."). This alternative, would not address the youth litigants' confidence in the fairness of their proceedings or fully repair the public confidence in the integrity and impartiality of the judicial system in Colorado, but it would at minimum acknowledge that an injustice occurred and was recognized by this honorable body.

Respectfully submitted this 24th day of January, 2019.

/s Julia A. Olson

Julia Olson (*pro hac vice*)
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
Phone No: (415) 786-4826
Email: JuliaAOlson@gmail.com

James Daniel Leftwich (# 38510)
MindDrive Legal Services, LLC
1295 Wildwood Road
Boulder, CO 80305
Phone No: (720) 470-7831
Email: dan@minddrivelegal.com

Katherine Merlin (# 45672)
479 Arapahoe Ave.
Boulder, CO 80302
Phone No: (720) 965-0854
Email: katelynnmerlin@gmail.com

*Attorneys for Respondents*

## CERTIFICATE OF SERVICE

I hereby certify that on this 24th of January, 2019, I served a true and correct copy of Respondents' Motion to Vacate the Dissenting Opinion of Judge Laurie Booras and Vacate this Court's Orders in *Martinez*, or at a Minimum, Reconsider and Modify this Court's Opinion in Light of that Vacated Dissent by Electronic Service by the Integrated Colorado Courts E-filing System to all who have consented to electronic service in this case, and by first class mail to all who have not consented.

/s Julia A. Olson
Julia A. Olson