COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
COURT OF APPEALS, STATE OF COLORADO Case Number: 2016CA564 Opinion by Judge Fox; Judge Vogt, Jr., concurring; Judge Booras, dissenting	
DISTRICT COURT FOR CITY AND COUNTY OF DENVER Case Number: 2014CV32637 The Honorable J. Eric Elliff	▲COURT USE ONLY▲
Defendant/Petitioner: Colorado Oil and Gas Conservation Commission and **Defendant Intervenors/Petitioners:** American Petroleum Institute and the Colorado Petroleum Association v. **Plaintiffs/Respondents:** 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	Case No.: 2017SC297

Attorneys for Amicus Curiae the National Association of Manufacturers, the National Federation of Independent Business Small Business Legal Center, the Colorado Association of Commerce & Industry, and the Independent Petroleum Association of America:

Jennifer L. Biever, #35963
Dale Ratliff, #50141
HOGAN LOVELLS US LLP
1601 Wewatta Street, Suite 900
Denver, Colorado 80202
(303) 899-7300
(303) 899-7333 (fax)
jennifer.biever@hoganlovells.com
dale.ratliff@hoganlovells.com

BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE COLORADO ASSOCIATION OF COMMERCE & INDUSTRY, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Brief in Support of Petition for Writ of Certiorari complies with all the applicable requirements of C.A.R. 29, 28, and 32. Specifically, the undersigned certifies that this document (including headings and footnotes but excluding the caption, certificate of compliance, table of contents, table of authorities, signature blocks, and certificate of service) contains 1,896 words.

s/ Jennifer L. Biever

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I. INTEREST OF THE AMICUS CURIAE

The National Association of Manufacturers (NAM) is the nation's largest manufacturing association, representing small and large manufacturers in every industrial sector and in all fifty states. The NAM's members include leaders in the extractive industries, petroleum refiners, and petrochemical producers, as well as thousands of manufacturing companies that heavily rely on available, reasonably-priced energy.

The National Federation of Independent Business (NFIB) is the nation's leading small business association, representing members in all fifty state capitals. The NFIB Small Business Legal Center (NFIB Legal Center) is a nonprofit law firm established to provide legal resources and establish the voice for small businesses through representation on issues of public interest affecting small businesses.

The Colorado Association of Commerce & Industry (CACI) represents hundreds of businesses of all sizes across the state, as well as numerous trade associations, economic development organizations, and local chambers of commerce. CACI's members include many Colorado employers that extract oil and natural gas resources, as well as businesses that utilize those resources for their operations.

The Independent Petroleum Association of America (IPAA) represents thousands of independent oil and natural gas producers and service companies, including companies that support this production such as drilling contractors, service companies, and financial institutions.

Amici share concerns that the court of appeals' opinion will severely restrict oil and gas operations in Colorado, thereby threatening an important sector of Colorado's economy and the wide variety of businesses and manufacturers both within and outside the state that rely on reasonably-priced energy for the health of their businesses. Furthermore, Amici are concerned that the opinion conflicts with fundamental principles of statutory construction and administrative law essential to the effective regulation of industry within and outside Colorado.

II. REASONS FOR GRANTING THE PETITION

A. The Court of Appeals Relied on a Novel and Flawed Method of Statutory Interpretation that Ignores Bedrock Principles of Statutory Construction.

In the Colorado Oil and Gas Conservation Act, the General Assembly delegated to the Oil and Gas Conservation Commission the authority to regulate oil and gas operations "*to prevent and mitigate significant adverse environmental impacts* . . . 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." C.R.S. § 34-60-106(2)(d) (emphases added). The court of appeals, however, relied on just one phrase in the legislative declaration to hold that the Act *unambiguously* "mandates that the development of oil and gas in Colorado be regulated subject to the protection of public health, safety, and welfare, including protection of the environment and wildlife resources." *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 2017 COA 37, ¶ 30. Specifically, the court of appeals interpreted the General Assembly's statement that it is in the public interest to foster the development of oil and gas production "in a manner consistent with" the protection of public health and the environment to mean, not a "balancing test," but "a condition that must be fulfilled." *Martinez*, 2017 COA at ¶¶ 20–21 (citing C.R.S. § 34-60-102(1)(a)(I)). As dissenting Judge Booras correctly pointed out, the majority's opinion conflicts with fundamental principles of statutory construction and edits out the provisions of the Act that set the metes and bounds of the Commission's rulemaking authority, rendering them a dead letter. *See id.* at ¶ 37 (objecting to the majority's "reliance on a legislative declaration to find a mandatory duty"); *see also Bd. of Cty. Comm'rs of Cty. of Boulder v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1066 (Colo. 2009) ("Specific [statutory] provisions control over general provisions.").

1. The Court of Appeals' Opinion Could Affect the Interpretation of Statutes Within and Outside Colorado.

Importantly, the Act's legislative declaration language is not unique. In the enabling act for the Colorado Division of Reclamation, Mining, and Safety—the agency vested with authority to regulate mining operations—the General Assembly declared "that the efficient development of [mineral] resources provides jobs and generates revenues for state and local economies and that such development should be conducted in a manner which protects the health and safety of the miners and of the general public." C.R.S. § 34-20-101. The declaration's operative phrase, "that such development should be conducted in a manner which protects the health and safety of the miners and of the general public," does not materially differ from the phrase relied on by the court of appeals. Thus, under the court of appeals' statutory approach, the Division of Reclamation arguably could not authorize mining operations – *unless* it could show that those operations could occur without any potential impacts, no matter how slight the risk, to human health or safety. That clearly is not the case. As this Court has stated, "the state has a significant interest in both mineral development and in human health and environmental protection." *See Colorado Min. Ass'n v. Bd. of Cty. Comm'rs of Summit Cty.*, 199

P.3d 718, 730 (Colo. 2009) (acknowledging "common themes" between Colorado's Mined Land Reclamation Act and the Oil and Gas Conservation Act).

Other state statutes employ similar language. The Pennsylvania Oil and Gas Act declares its purpose is to "[p]ermit optimal development of oil and gas resources of this Commonwealth consistent with protection of the health, safety, environment and property of Pennsylvania citizens." 58 Pa. Stat. and Cons. Stat. § 3202(1). The West Virginia Horizontal Well Act states that "the establishment of a new regulatory scheme to address new and advanced natural gas development technologies and drilling practices is in the public interest and should be done in a manner that protects the environment and our economy for current and future generations." W. Va. Code § 22-6A-2(8)(b). No one can credibly contend that under these statutes, Pennsylvania may not develop oil and gas unless it ensures *zero* impacts on health, environment, and property; or that West Virginia cannot implement new development technologies unless those technologies have *zero* impact on "the environment and [its] economy."

Though the decision at issue does not bind other divisions of the court of appeals, or have any precedential effect beyond the state, it may be taken as persuasive authority and provide a basis for lawsuits brought under similar statutes

within and outside the state. Because the decision rests on plainly flawed legal grounds, this Court should prevent this unintended consequence.

B. The Court of Appeals' Opinion Conflicts with Principles of Administrative Law Crucial to the Effective Regulation of Industry.

1. The General Assembly Afforded the Commission Discretion to Weigh Competing Policy Interests Based on Its Technical Expertise.

The court of appeals' interpretation significantly intrudes on the basic principle of administrative law that an agency often has "greater familiarity with the ever-changing facts and circumstances surrounding the subjects regulated" and is thus best suited to promulgate regulations "in light of competing policy interests[.]" *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000); *City of Arlington, Tex. v. F.C.C.*, 133 S. Ct. 1863, 1873 (2013).

The Act expressly directs that the Commission regulate oil and gas operations to *mitigate* significant adverse environmental impacts, taking into account cost-effectiveness and technical feasibility. Inherent in the direction to consider costs and feasibility is an acknowledgment that overly prescriptive regulations may prove ineffective or may threaten the very existence of the industry being regulated. *See* Exec. Order No. 13563, Improving Regulation and Regulatory Review, 76 Fed. Reg. 3,821, 3,821 (Jan. 18, 2011) ("Our regulatory

system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."). Thus, the General Assembly's direction to consider cost and technical feasibility evinces a clear legislative intent to require the Commission to weigh competing policy interests. *See Martinez* 2017 COA at ¶ 45 (Booras, J., dissenting). In fact, the United States Supreme Court has held that cost is often "a centrally relevant factor" in deciding if and how to regulate. *See Michigan v. E.P.A.*, 135 S. Ct. 2699, 2707–08 (2015). The same Court also held that a legislative directive to consider "cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages *and* the disadvantages of agency decisions." *Id.*

The court of appeals' opinion, however, blatantly ignores the express direction contained in the statute to consider cost and technical feasibility, and the opinion eliminates the Commission's ability to appropriately utilize its expertise and discretion by requiring it to treat "public health and environmental considerations as . . . determinative." *Id.* at ¶ 44 (Booras, J., dissenting).

2. The Court of Appeals' Opinion Upsets Colorado's Carefully Crafted Regulatory Structure.

The court of appeals' opinion suffers from another fundamental flaw; it entirely ignores the General Assembly's intent that the Commission and the

Colorado Department of Public Health and the Environment (CDPHE) exercise interrelated but distinct roles in the regulation of oil and gas development. By way of example, the Colorado Air Pollution Control Act vests the CDPHE's Air Quality Control Commission (AQCC) with the authority to "promulgate . . . emission control regulations which require the use of *effective practical air pollution controls*: (I) For each significant source or category of significant sources of air pollutants; [and] (II) For each type of facility, process, or activity which produces or might produce significant emissions of air pollutants." C.R.S. § 25-7-109(1)(a)(I)–(II) (emphasis added). Because oil and natural gas operations represent a potential significant source of air pollutants, the AQCC has consistently interpreted its statutory mandate to provide it with "broad authority" to regulate all aspects of oil and natural gas operations. *See* 5 Colo. Code Regs. § 1001-9:XX.N.

Pursuant to this authority, the AQCC has promulgated regulations that govern all aspects of the oil and natural gas industry, including permitting, technology-based performance standards, and enforcement. *See id.* §§ 1001-5, *et seq.*; *id.* §§ 1001-9, *et seq.* Consistent with the General Assembly's intent that air pollution control measures "bear a reasonable relationship to the economic, environmental, and energy impacts and other costs of such measures[,]" the AQCC's regulations generally require that emissions from oil and natural gas

production are minimized to the extent practicable – but they do not impose a blanket prohibition on the emission of air pollutants, including greenhouse gases. *See* C.R.S. § 25-7-102. Instead, the AQCC's regulations allow for emissions where necessary and appropriate.

The Commission's regulations require that oil and gas operations operate in compliance with the AQCC's regulations. *See* 2 Colo. Code Regs. § 404-1:805(b)(1). Respondent's proposed rule, however, could require the Commission to prevent future oil and natural gas development, *unless* the proposed development would not adversely impact Colorado's atmosphere and would "not contribute to climate change" even if in compliance with the AQCC's regulations. *See Martinez*, 2017 COA at ¶ 5. Such an interpretation is in direct conflict with the AQCC's carefully crafted regulatory scheme regulating emissions from industrial sources.

The court of appeals thus relied on a single phrase in the legislative declaration of one agency's enabling act to the detriment of the state's carefully tailored administrative structure. Because the effective functioning of the administrative state often relies on this type of inter-agency coordination, the court's ill-conceived decision has the potential to affect a myriad of industries well

beyond the oil and natural gas industry that serves as the subject matter of this litigation.

III. CONCLUSION

For the foregoing reasons, Amici respectfully request this Court grant certiorari and clarify the Commission's authority consistent with the arguments above.

Respectfully submitted this 18th day of May, 2017.

HOGAN LOVELLS US LLP

s/ Jennifer L. Biever
Jennifer L. Biever, #35963
Dale Ratliff, #50141
1601 Wewatta Street, Suite 900
Denver, Colorado 80202
(303) 899-7300
(303) 899-7333 (fax)
jennifer.biever@hoganlovells.com
dale.ratliff@hoganlovells.com

Attorneys for Amicus Curiae:
the National Association of Manufacturers,
the National Federation of Independent Business Small Business Legal Center,
the Colorado Association of Commerce & Industry, and
the Independent Petroleum Association of America

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 18th day of May, 2017, the foregoing **BRIEF OF AMICUS CURIAE THE NATIONAL ASSOCIATION OF MANUFACTURERS, THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, THE COLORADO ASSOCIATION OF COMMERCE & INDUSTRY, AND THE INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI** was served via Colorado Courts E-Filing on all counsel who have consented to electronic service in this case.

s/ D J McKune