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

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BRIEF OF AMICI 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 PETITIONER AND INTERVENORS/PETITIONERS

CERTIFICATE OF COMPLIANCE

I hereby certify that this Amicus Brief in Support of Petitioner and Intervenors/Petitioners 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 4,734 words.

/s/ *Ezekiel J. Williams*

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I. INTRODUCTION AND STATEMENT OF THE CASE

Amici curiae respectfully submit this brief in support of Petitioner Colorado Oil and Gas Conservation Commission ("Commission") and Intervenors/Petitioners Colorado Petroleum Association and American Petroleum Institute. Amici curiae request that the Court reverse the opinion of the court of appeals in Martinez v. Colorado Oil & Gas Conservation Commission, 2017 COA 37 (Colo. App. 2017) ("COA Op.").

The court of appeals' erroneous construction of the Oil and Gas Conservation Act (the "Act") upsets the statutory and regulatory framework under which the Commission authorizes oil and gas development while ensuring appropriate environmental regulation. That result flows from two fundamental errors in the court of appeals' opinion. First, the court of appeals recognized – but failed to apply or follow – the highly deferential standard under which a court reviews an agency's denial of a rulemaking petition. Second, the court of appeals mischaracterized the specific statutory question that the petition presented to justify its own flawed construction of the Act. Amici urge the court to correct the erroneous application of these fundamental administrative law principles of paramount importance to Colorado and regulated entities.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

A. Identity of Amici Curiae

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

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 represents thousands of independent oil and natural gas producers and service companies, including companies that support production such as drilling contractors, service companies, and financial institutions.

B. Interests of Amici Curiae

Colorado leads the United States in successfully balancing oil and gas development with environmental and public health and safety considerations. As of December 2017, Colorado was the 5th largest producer of natural gas and 7th largest producer of crude oil in the country.[1] The Wattenberg field is the 4th most productive crude oil field in the country. Annual Colorado crude oil production has tripled in recent years, from 29 million barrels in 2008 to over 115 million barrels estimated in 2018.[2]

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[1] U.S. ENERGY INFORMATION ADMINISTRATION, COLORADO STATE PROFILE (2017), available at https://www.eia.gov/state/?sid=CO (last visited March 21, 2018)

[2] UNIVERSITY OF COLORADO BOULDER LEEDS SCHOOL OF BUSINESS, FIFTY-THIRD ANNUAL COLORADO BUSINESS ECONOMIC OUTLOOK 24-25 (2018), available at https://www.colorado.edu/business/sites/default/files/attached-files/2018_colorado_business_economic_outlook.pdf (last visited March 21, 2018).

The Colorado oil and gas industry plays a significant and positive role in the state's economy, which is outperforming the rest of the United States. The Colorado oil and gas industry is not limited to oil and gas producers. Midstream gathering and pipeline companies transport natural gas, oil and liquids from Colorado wells to processing facilities, interstate pipelines, and refineries. A constellation of specialized service providers, engineering firms, drilling companies, geologic consultants, and other small and independent businesses make up the diverse and vibrant oil and gas industry in Colorado.

The dramatic growth in the Colorado economy and increase in oil and gas development over the last decade has not come at the expense of Colorado's treasured environment. Quite the contrary. Colorado is a state leader in environmental regulation of oil and gas development, including of air emissions from operations. Colorado was one of the first states to adopt comprehensive controls for methane emissions (a greenhouse gas) from oil and gas sources in 2014.[3] The Colorado Department of Health and Environment ("CDPHE") has deemed Colorado to have "the most rigorous oil and gas air quality program[] in the country." Petitioner's Appendix B at 9 (hereinafter "Trial Court Order"). This Court previously noted that "the Commission has promulgated an exhaustive set of

[3] See CDPHE, REVISIONS TO COLORADO AIR QUALITY CONTROL COMMISSION'S REGULATION NUMBERS 3, 6, AND 7 FACT SHEET (2014) available at https://www.colorado.gov/pacific/sites/default/files/AP_Regulation-3-6-7-FactSheet.pdf (last visited March 21, 2018).

rules and regulations 'to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare.'" City of Ft. Collins v. Colorado Oil, 369 P.3d 586, 593 (Colo. 2016) (citing Commission regulations).

Amici are concerned that the court of appeals decision disrupts the balance of interests mandated by the Colorado General Assembly in the Act and achieved by the Commission in its rules. The court of appeals decision, and the disruptive rulemaking petition it orders the Commission to re-open, has the potential to affect industries beyond oil and gas. The court of appeals suggested that the Commission—and by extension other Colorado state agencies—must satisfy a great, inchoate burden in denying a rulemaking petition. That is not the law, nor should it be. Amici have an interest in correcting the court of appeals' erroneous interpretation of the Act, and a broader interest in clarifying and confirming an agency's explanatory burden in resolving a rulemaking petition, thereby promoting consistency in regulation and avoiding needless litigation.

III. THIS COURT SHOULD VACATE THE COURT OF APPEALS' ERRONEOUS DECISION

Amici focus on three erroneous aspects of the court of appeals decision.

First, the court of appeals failed to apply the principles that an agency need only briefly explain its reasons for denying a rulemaking petition, and that the court gives the agency's rationale substantial deference. The court of appeals mischaracterized the first ground identified by the Commission, disregarded the

three remaining grounds for erroneous reasons, and ruled that the Commission had not provided a sufficient explanation for denying the Petition when, in fact, it did. The Commission's refusal to adopt a novel extension of the public trust doctrine to regulate climate change was itself a sufficient basis to deny the Petition.

Second, the court of appeals focused solely on whether the Petition would "have required the Commission to readjust the balance crafted by the General Assembly under Act." While amici support all the reasons identified by Petitioner and Petitioner/Intervenors for why the court of appeals erred in its construction of the Act, the court ignored the more precise question that the Commission identified and that the request for rulemaking presented. It thereby misapplied the standard applicable to judicial review of an agency's construction of its organic act. The court of appeals disregarded the specific (and reasonable) conclusion by the Commission that the Act does not authorize it to "condition[] new oil and gas drilling on a finding of no cumulative adverse impacts."

Last, the court of appeals disrupted Colorado's carefully constructed framework for regulating oil and gas development. The petition focused on air issues and would have upset the successful inter-agency framework administered by the Commission and CDPHE. The Commission reasonably deferred to CDPHE's existing air quality regulation and technical expertise. The court of

appeals wrongly rejected the Commission's well-reasoned explanation for denying the petition on that ground.

Any of the bases the Commission cited for denying the petition should result in this Court overturning the court of appeals decision. Cumulatively, they show clear error.

A. The Court of Appeals Ignored the Substantial Deference Owed to Agencies in Denial of Petitions for Rulemaking.

1. The Commission's Process for Considering the Petition Was Exhaustive and the District Court Recognized the Agency's Diligence and Discretion.

In November 2013, the non-profit organization Our Children's Trust filed a petition or "Request for Adoption of a Rule" with the Commission on behalf of 8 minor children. See Petitioner's Appendix C (hereinafter "Petition"). The same organization filed substantively identical petitions in all 50 states, each claiming that the "public trust doctrine" demands regulation of air emissions to mitigate climate change.[4]

The Commission held a public hearing and accepted testimony and evidence from stakeholders on the Petition. The Commission's Order cited four bases for rejecting the Petition: (i) the requested rule exceeds the Commission's authority under the Act because it would require it to "condition[] new oil and gas drilling on

[4] See OUR CHILDREN'S TRUST, OTHER PROCEEDINGS IN ALL 50 STATES, https://www.ourchildrenstrust.org/other-proceedings-in-all-50-states (last visited March 26, 2018).

a finding of no cumulative adverse impacts;" (ii) the Petition's proposal that the Commission submit its findings to third party review is a "non-delegable duty" under the Act; (iii) "Colorado Courts have expressly rejected the public trust doctrine;" and (iv) the CDPHE "is currently addressing many of the concerns in the Petition." See Petitioner's Appendix D (hereinafter "Commission Order"). The Commission determined that other "Commission priorities … must take precedence over the proposed rulemaking at this time." Commission Order at 4.

The district court affirmed the Commission Order in a 12-page opinion applying the "extremely limited" and "highly deferential" standard of review a court gives to an agency's discretionary decision to deny a rulemaking petition. See Trial Court Order at 3 (quoting Massachusetts v. E.P.A., 549 U.S. 497, 527-28 (2007)).

2. The Court of Appeals Did Not Apply the Correct Test to Review the Commission's Denial of a Rulemaking Petition.

In overturning the Commission Order, the court of appeals focused entirely on the Commission's construction of its statutory authority and applied a de novo standard of review. COA Op. ¶ 14. While the court of appeal's construction of the Act was erroneous for the reasons discussed *infra*, and in briefs by Petitioner and Intervenors/Petitioners, the court's decision was independently flawed, and should be reversed, because it did not apply the "especially narrow" standard of review

under which a court reviews an agency's denial of a rulemaking petition. E.g., Gen. Motors Corp. v. Nat'l Highway Traffic Safety Admin., 898 F.2d 165, 169 (D.C. Cir. 1990).

Colorado's Administrative Procedure Act ("Colorado APA") grants "any interested person" "the right to petition for the issuance, amendment, or repeal of a rule." C.R.S. § 24-4-103(7). Under the Colorado APA, "[a]ction on such petition shall be within the *discretion* of the agency." C.R.S. § 24-4-103(7) (emphasis added).

The Colorado APA is based on the federal Administrative Procedure Act ("Federal APA"), which likewise gives "any interested person" the "right to petition" for "a rule." 5 U.S.C. § 553(e). The Federal APA provides that an agency need only provide "a brief statement of the grounds for denial" of a rulemaking petition. 5 U.S.C. § 555(e).

Colorado courts look to judicial precedent construing the Federal APA in reviewing agency action under the Colorado APA. Reg. Route Com. Carrier Conf. of Colorado Motor Carriers Ass'n v. Pub. Util. Comm'n of State of Colo., 761 P.2d 737, 748 (Colo. 1988). Numerous decisions confirm that "an agency's refusal to institute rulemaking proceedings is at the high end of the range of levels of

deference" a court "give[s] to agency action." Defenders of Wildlife v. Gutierrez, 532 F.3d 913, 919 (D.C. Cir. 2008) (citation omitted).[5]

The Commission's obligation to explain its grounds for denying the Petition was limited. It need only be "sufficient to advise the party of the general basis of the denial." Gardner v. F.C.C., 530 F.2d 1086, 1089 n. 12 (D.C. Cir. 1976). The D.C. Circuit recently emphasized, in affirming an agency's denial of a rulemaking petition about Colorado federal lands, that "the core requirement is that the agency explain why it chose to do what it did." Ark Initiative v. Tidwell, 749 F.3d 1071, 1076 (D.C. Cir. 2014). This is because "the decision to institute rulemaking is one that is largely committed to the discretion of the agency" rather than the judiciary; the agency exercises delegated legislative rulemaking authority, not the courts. WWHT, Inc. v. F.C.C., 656 F.2d 807, 809 (D.C. Cir. 1981). The Commission possesses that "discretion" here. C.R.S. § 24-4-103(7). An agency may "choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." Massachusetts v. E.P.A., 549 U.S. at 527-28; see also Defenders of Wildlife, 532 F.3d at 921 ("The agency made a policy decision to focus its

[5] Accord Compassion Over Killing v. U.S. Food & Drug Admin., 849 F.3d 849, 854 (9th Cir. 2017); Maier v. E.P.A., 114 F.3d 1032, 1039 (10th Cir. 1997) ("Substantial prudential concerns counsel particularly broad deference in the context of review of an agency refusal to initiate rulemaking."); Am. Horse Prot. Ass'n v. Lyng, 812 F.2d 1, 5 (D.C. Cir. 1987) ("Such refusal is to be overturned 'only in the rarest and most compelling of circumstances.'") (citation omitted).

resources … which in light of the information before the agency at the time, was reasoned and adequately supported by the record.").

The Commission explained why it denied the Petition. It listed four independent grounds. Commission's Order at 2-3. The court of appeals focused exclusively on one ground – the Commission's statutory authority under the Act – and summarily dismissed the other three grounds. The court of appeals refused to consider the additional grounds because it reasoned that the "administrative record does not contain sufficient findings of fact for us to affirm the Commission's decision on alternative grounds." COA Op. ¶ 31.

The court of appeals applied the wrong test. It confused rulemaking (which, depending on the rule adopted, may require factual findings)[6] with a denial of a rulemaking petition, which does not.[7] No provision of the Colorado APA (or the Federal APA) requires an agency to make findings of fact to deny a rulemaking petition. The court erred in suggesting that the Commission's statutory duty to support a newly adopted rule governed its denial of the Petition. See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Aut. Ins. Co., 463 U.S. 29, 41 (1983) (observing that an agency engaged in rulemaking "is obligated to supply a

[6] E.g., C.R.S. § 24-4-103(4)(a) ("The rule promulgated by the agency … shall consist of … any findings of fact"); Colorado Ground Water Comm'n v. Eagle Peak Farms, Ltd., 919 P.2d 212, 216 (Colo. 1996) (factual support is required if the "necessity for the rule … turn[s] on a discrete fact that is capable of demonstrative proof").

[7] E.g., Gardner, 530 F.2d at 1089; Ark Initiative, 749 F.3d at 1076.

reasoned analysis … beyond that which may be required when an agency does not act in the first instance" by denying a rulemaking petition). It compounded the error by refusing to give *any* weight to the three additional grounds that the Commission identified, thereby transforming a four-ground decision into a one-ground decision. This Court should reverse the court of appeals because the Commission easily satisfied the applicable standard: it explained "why it chose to do what it did." Ark Initiative, 749 F.3d at 1076.

3. The Commission Properly Denied the Petition Based on the Public Trust Doctrine.

The court of appeals did not give *any* weight to the Commission's specific denial of the Petition on the ground that it urged the agency to adopt the public trust doctrine, a principle which the Commission correctly determined Colorado courts had "expressly rejected." See Petition at 40-45; Commission Order at 3; City of Longmont v. Colorado Oil and Gas Assn., 369 P.3d 573, 586 (Colo. 2016) (ruling that Colorado does not recognize the public trust doctrine). The organization behind the Petition filed similar (unsuccessful) rulemaking petitions in all 50 states urging adoption of the same public trust basis for regulating air emissions.[8] Other state courts recognize that comprehensive state statutes and

[8] See OUR CHILDREN'S TRUST, OTHER PROCEEDINGS IN ALL 50 STATES, https://www.ourchildrenstrust.org/other-proceedings-in-all-50-states (last accessed March 21, 2018). State agencies denied the rulemaking petitions in all 50 states. A court ordered Massachusetts to propose a rule to reduce greenhouse gas

regulatory frameworks (like that administered by the Commission and CDPHE) "displace" the public trust doctrine. See, e.g., Sanders-Reed ex rel. Sanders-Reed v. Martinez, 350 P.3d 1221, 1226 (N.M. App. 2015) (citing cases); Texas Comm'n on Envtl. Quality v. Bonser-Lain, 438 S.W.3d 887, 890 (Tex. App.—Austin 2014, pet. denied).

The court of appeals reasoned that it need not consider the public trust doctrine because Respondents abandoned that component of their Petition on appeal. COA Op. ¶ 7 n.2. The court of appeals misapplied basic administrative law. Respondents' decision to abandon a litigation argument does not alter the rationale the Commission identified for rejecting the Petition. The decision the court of appeals cited – Giuliani v. Jefferson County Board of County Commissioners, 2012 COA 190 ¶ 52 – did not involve an agency's denial of a rulemaking petition. The court of appeals could and should have upheld the Commission's rejection of the Petition on the basis that Colorado courts do not recognize the public trust doctrine. That was a component of the Petition that Respondents urged the Commission to adopt. Their abandonment of it in litigation does not retroactively change their Petition, nor render that ground of the Commission's order irrelevant as the court of appeals wrongly assumed.

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emissions pursuant to a state statute, and litigation in Washington and Oregon over similar petitions is pending. Id.

B. The Court of Appeals Mischaracterized the Commission's Order to Support its Flawed Interpretation of the Act.

Amici fully join the Briefs of Petitioners and Intervenors/Petitioners explaining that the court of appeals erred in adopting an unorthodox and flawed statutory interpretation of the Act with harmful consequences. Amici separately emphasize that the court of appeals erred because it ignored the specific statutory reason that the Commission identified for rejecting the Petition. That error led the court of appeals to misapply the Chevron test, and erroneously reject the Commission's reasonable conclusion that the Petition requested the agency to adopt a rule that conditions new drilling on a finding of no cumulative adverse impacts, a condition beyond its authority under the Act. See Chevron, U.S.A., Inc. v. Nat. Res. Defense Council, Inc. 467 U.S. 837, 844 (1984).[9]

The court of appeals correctly acknowledged that "[u]nder Chevron, the first step in reviewing an agency's interpretation of a statute involves using traditional tools of statutory construction to determine whether the language of the statute is clear and whether the legislature has spoken directly to the question at issue." COA Op. ¶ 14. The court determined that the statutory "question at issue" for purposes of the Chevron test was whether the Petition "would 'have required the Commission to readjust the balance'" between oil and gas development and public

[9] Colorado courts apply Chevron in reviewing an agency's interpretation of the statute it administers. E.g., Huber v. Kenna, 205 P.3d 1158, 1164 (Colo. 2009).

health, safety, and welfare under the Act. COA Op. ¶ 17. The court of appeals resolved that issue against the Commission. It ruled that the statutory text "indicates 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." COA Op. ¶ 25 (emphasis added).

But the court of appeals did not confront the question that the Petition presented, nor the specific issue that the Commission identified in rejecting it. The Petition urged the Commission to adopt a rule barring issuance of oil and gas drilling permits until "an independent third party organization confirms" that drilling does not "cumulatively, with other actions" result in adverse impacts to environmental resources. COA Op. ¶ 5 (quoting Petition at 47). The Colorado Attorney General's memo concluded that the Commission lacked authority to implement the cumulative adverse impacts component of the Petition. Commission Order at 2. The Commission incorporated the Attorney General's memo by reference. It explained the precise element of the Proposed Rule that it concluded exceeded its authority:

> The Proposed Rule, if adopted, would have required the Commission to readjust the balance crafted by the General Assembly under the Act, and is therefore beyond the Commission's limited grant of statutory authority. *More specifically, the Proposed Rule hinges on conditioning new oil and gas drilling on a finding of no cumulative adverse impacts, which is beyond the Commission's limited statutory authority*.

Commission Order at 2-3 (emphasis added).

The court of appeals did not properly apply the first step of the Chevron test because it did not identify the specific statutory interpretation question that the Petition presented. Under Chevron, the first question is whether the legislature "has directly spoken to the *precise question at issue*. If the intent of [the legislature] is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of [the legislature]." Chevron, 467 U.S. at 842-843 (emphasis added).

Applying that test to the "precise question at issue" presented by the Petition, no provision of the Act, much less the statutory text in C.R.S. § 34-60-102(1)(a)(I) that the court of appeals interpreted, directly speaks to the question whether the Commission may condition the issuance of drilling permits on a finding of no cumulative adverse impacts. See C.R.S. §§ 34-60-101 to 34-60-130.

Chevron instructs that "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." 467 U.S. at 843. The court of appeals did not reach the second step of the Chevron inquiry. COA Op. ¶¶ 19, 25. That was error. Instead, although the Act does not address the precise question whether the Commission may condition drilling permits on a finding of no cumulative adverse impacts, the court of appeals impermissibly chose to

"substitute its own construction" of the Act for that adopted by the Commission. See Chevron, 467 U.S. at 844. The court of appeals should have determined, as the district court properly determined, whether the Commission's resolution of the cumulative adverse impacts question was a "reasonable interpretation." Id. As was the case in Chevron, the Commission's rejection of the Petition "is a reasonable policy choice for the agency to make," and merits deference which the court of appeals wholly ignored. Id. at 845.

C. The Court of Appeals Decision Disrupts Colorado's Carefully Constructed Oil and Gas Regulatory Framework.

The Commission's decision to deny the Petition was reasonable (and the court of appeals' decision especially erroneous) when viewed in the context of agencies making an expert and technical determination of their priorities within the carefully constructed regulatory regime applicable to oil and gas sources in Colorado.

1. The Court of Appeals' Construction of the Act Intrudes on the Commission's Authority to Determine If and When It Adopts Regulations.

The court of appeals' interpretation intrudes on the principle that an agency 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); WWHT, 656 F.2d at 818 ("[a]n agency's discretionary decision not to regulate a given activity is inevitably based, in large measure, on factors not inherently susceptible to judicial resolution e. g., internal management considerations as to budget and personnel; evaluations of its own competence; weighing of competing policies within a broad statutory framework.").

The General Assembly's direction to the Commission to consider cost and technical feasibility in regulating oil and gas development evinces legislative intent to require the Commission to weigh competing policy interests. C.R.S. § 34-60-106(2)(d). Implicit in the direction to consider costs and technical 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 (Jan. 18, 2011) ("Our regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation."). The United States Supreme Court has observed 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 (2015). The same Court 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 Commission followed its legislative mandate here. After deliberation informed by public comment and testimony, the Commission determined that other priorities take precedence over the Petition, and that much of the relief requested in the Petition lies within CDPHE's jurisdiction, not the Commission's jurisdiction. See Commission Order at 3-4. These determinations are within the Commission's authority to set its regulatory agenda and did not require further elaboration. See Gardner, 530 F.2d at 1089.

2. The Court of Appeals' Decision Upends the Statutory and Regulatory Framework for Regulating Oil and Gas Sources.

The court of appeals' opinion ignores the General Assembly's intent that the Commission and CDPHE exercise distinct roles in regulating oil and gas development. See C.R.S. 34-60-106(11)(a)(II) (requiring Commission and CDPHE to consult on regulation of oil and gas operations). Colorado delegates authority to regulate oil and gas development to the Commission (via the Act) while the Colorado Air Pollution Control Act vests the CDPHE's Air Quality Control Commission ("AQCC") with authority to regulate air quality. Each agency's jurisdiction is coordinated under a comprehensive statutory and

regulatory framework. The court of appeals decision runs roughshod over this delicate balance.

More particularly, the Air Pollution Control Act grants the AQCC 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). Because oil and natural gas operations represent a potential significant source of air pollutants, the AQCC has "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 promulgated regulations that govern air emissions from 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. The Commission separately requires that oil and gas operations operate in compliance with AQCC's regulations. See 2 Colo. Code Regs. § 404-1:805(b)(1).

Because the proposed rule in the Petition would have required the Commission to "suspend" all future oil and gas development unless the proposed development would not result in cumulative adverse impacts to the atmosphere and

would not contribute to climate change, the Commission emphasized CDPHE's jurisdiction over air emissions in its Order denying the Petition. See Commission Order at 4 ("Most, if not all, of the relief sought in the Petition related to air quality is within CDPHE's jurisdiction, and not COGCC's jurisdiction."). Even if the Commission possesses general statutory authority to regulate environmental impacts from oil and gas operations under the Act, the Commission reasonably declined to commence a rulemaking outside its jurisdiction and area of technical expertise. The court of appeals seized on a single phrase in the legislative declaration of one agency's enabling act to the detriment of the state's carefully tailored regulatory framework. The failure to give appropriate discretion to the agency not only intrudes on this delicate regulatory balance, it undermines effective inter-agency coordination and the decisions agencies make every day to manage their regulatory priorities. This Court should reject the court of appeals' usurpation of the Commission's regulatory role.

IV. CONCLUSION

The court of appeals decision conflicts with bedrock principles of administrative law. If left to stand, the decision will increase the burden on agencies responding to petitions for rulemaking and undermine the substantial discretion granted to agencies to prioritize their regulatory agendas. For all the

reasons explained herein, Amici respectfully request this Court to reverse the court of appeals decision.

Respectfully submitted this 2nd day of April, 2018.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 2nd day of April 2018, a true and correct copy of the foregoing Amicus Brief in Support of Petitioner and Petitioners/Intervenors was served via the Colorado Courts E-Filing System on all counsel who have consented to electronic service in this case.

s/ *Meghan M. Campbell*