COLORADO SUPREME COURT 2 East 14th Avenue, Denver, Colorado 80203 On Certiorari to the Colorado Court of Appeals Court of Appeals Case No. 16CA564 **Petitioner:** Colorado Oil And Gas Conservation Commission, **Intervenors:** American Petroleum Institute and Colorado Petroleum Association, v. **Respondents:** Xiuhtezcatl Martinez, Itzcuauhtli Rosky-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 Chamber of Commerce of the United States of America* Daniel D. Domenico, Atty. Reg. # 32038 Michael Francisco, Atty. Reg. #39111 Kittredge LLC 3145D Tejon Street Denver, Colorado 80211 720-460-1432 | ddomenico@kittredgellc.com mfrancisco@kittredgellc.com	

AMICUS BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITIONER AND INTERVENORS

Certificate of Compliance

I hereby certify that this brief complies with all requirements of C.A.R. 28 or C.A.R. 28.1, C.A.R. 29, and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, I certifies that:

> The brief complies with the length specified in C.A.R. 29(d). It contains 1,571 words.

I acknowledge that this brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or 29.

____/s/____Michael Francisco____

TABLE OF CONTENTS

Page

Interest of Amicus Curiae 1

Argument 2

I. The court of appeals decision undermines reasonable expectations far beyond oil and gas regulation. 3

II. The court of appeals decision is contrary to established law and upends a settled regulatory system that already addresses environmental and public safety concerns. 5

Conclusion 8

TABLE OF AUTHORITIES

Page

CASES

Align Corp. Ltd. v. Boustred,
No. 16SC448 (Nov. 14, 2016) 1

City of Longmont v. Colorado Oil & Gas Ass'n,
369 P.3d 573 (Colo. 2016) 2, 7

J. McIntyre Mach., Ltd. v. Nicastro,
564 U.S. 873 (2011) 4

Magill v. Ford Motor Company,
2016 CO 57 (Sept. 12, 2016) 1

Martinez v. Colo. Oil & Gas Conservation Comm'n,
2017 COA 37 ..... 2, 7

Oasis Legal Finance Grp. v. Coffman,
2015 CO 63 (Nov. 16, 2015) 1

Reno v. Marks,
2015 CO 33 5

STATUTES

C.R.S. § 25-7-102 3

C.R.S. § 31-23-207 3

C.R.S. § 33-1-104(2) 3

C.R.S. § 34-60-101 2

C.R.S. § 34-60-102(1) 5

C.R.S. § 34-60-106(2)(d) 6

TABLE OF AUTHORITIES

Page

OTHER AUTHORITIES

Danny Rudloff and Michael Schultz, *How Oil and Gas Companies Gauge the Risks They Face*, 9/11/2016 (Oil & Gas Financial Journal) (Houston)..... 4

Interest of Amicus Curiae

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation, representing 300,000 direct members and indirectly three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. The Chamber advocates for the interests of the business community in courts across the nation by filing *amicus curiae* briefs in cases involving issues of concern, including before this Court. *See, e.g., Magill v. Ford Motor Company*, 2016 CO 57 (Sept. 12, 2016); *Oasis Legal Finance Grp. v. Coffman*, 2015 CO 63 (Nov. 16, 2015); *Align Corp. Ltd. v. Boustred*, No. 16SC448 (Nov. 14, 2016).

This case raises important questions regarding how Colorado courts will interpret and apply the Oil & Gas Conservation Act. The Court below adopted a theory that effectively prevents any oil and gas development by eliminating the statutorily-required balancing of environmental concerns with the benefits of oil and gas development. Similar petitions have been presented and rejected throughout the country. Even more importantly, in the decision below the judicial branch upends the settled business expectations regarding a major regulatory regime established by the legislative branch and administered by the executive branch. The Chamber has an interest in the case because of

the important implications for the Colorado oil and gas sector, as well as other highly-regulated industries subject to similar statutory interest-balancing regimes.

Argument

The Oil and Gas Conservation Act, C.R.S. § 34-60-101, *et seq.*, has been amended repeatedly, and this Court has described the Commission's rulemaking efforts under the Act as "exhaustive" and "pervasive." *City of Longmont v. Colorado Oil & Gas Ass'n*, 369 P.3d 573, 584 (Colo. 2016). In the decision below, a two-judge majority turns a few words in the Act's "Legislative declaration" into a condition precedent that supersedes all other statutory provisions and concerns. *See Martinez v. Colo. Oil & Gas Conservation Comm'n*, 2017 COA 37, ¶ 21-23. This divided opinion overruled the Commission and the district court and held that the Commission failed to accede to petitioner's demand that all oil and gas development be stopped "unless the best available science demonstrates, and an independent, third party organization confirms, that drilling can occur in a manner that does not" cause any environmental harms. 2017 COA 37, ¶ 5 (quoting petition). Essentially, the majority held that the Act does not permit Colorado oil and gas regulators to balance the benefits of oil and gas development against the

purported adverse impacts to health and safety. The consequences for the state are profound and warrant this Court's review.

I. The court of appeals decision undermines reasonable expectations far beyond oil and gas regulation.

This Court's review would be warranted even if the decision below had no effect beyond the oil and gas industry. But its impacts potentially extend beyond the oil and gas sector.

For example, the majority based its decision to upend an entire regulatory regime on a novel approach to the commonplace phrase "consistent with." A search of Colorado statutes containing the term "consistent with," turns up over 1500 results. Each of those is now potentially subject to reinterpretation via litigation. Given the potential implications for so many statutes which could now be the subject of new litigation, this Court's review is warranted to provide much-needed clarity regarding the lower court's novel approach.

Moreover, many statutes, including the Act, require the consideration of environmental and public health and safety concerns. For example, the state's Air Quality Program requires "the use of all available practical methods which are technologically feasible and economically reasonable so as to reduce, prevent, and control air pollution," C.R.S. § 25-7-102, and the Wildlife Commission "shall employ a multiple-use concept of management." C.R.S. § 33-1-104(2); *see also* C.R.S. § 31-23-207 (municipal planning commission

required to account for health and safety). Each of these statutes has thus far been understood as calling for a balanced consideration of factors—not a per se rule that, the moment a litigant invokes an environmental concern, the proposed activity, no matter how otherwise beneficial, may not proceed. The majority's rejection of settled the "balancing" approach injects further uncertainty into these and many other regulatory regimes beyond just oil and gas.

Such legal uncertainty is deeply problematic for the business community. destructive and should be avoided whenever possible. *See, e.g.*, *J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 885 (2011) (explaining the high costs of unpredictability imposed by unclear jurisdictional rules). For example, oil and gas sector executives have "cited regulatory change and scrutiny as the top risk that their organization faces." Danny Rudloff and Michael Schultz, *How Oil and Gas Companies Gauge the Risks They Face*, 9/11/2016 (Oil & Gas Financial Journal) (Houston), *available at* https://goo.gl/3QdJH5. If Colorado allows the centerpiece of its regulatory regime to be upended by the majority opinion below it could deter substantial investment in the State, and as explained above, this uncertainty may not necessarily be cabined to the oil and gas sector.

II. The court of appeals decision is contrary to established law and upends a settled regulatory system that already addresses environmental and public safety concerns.

The majority below agreed with Plaintiffs that the Commission's longstanding interpretation of the Act, which requires it to consider "protection of the environment" and "protection of public health, safety, and welfare," as part of its overall balancing of concerns surrounding oil and gas extraction, C.R.S. § 34-60-102(1)(a), was wrong. Instead, the majority adopted a new legal requirement that prohibits the Commission from considering any other public interest factors when it looks at environmental impacts. In other words, under the Plaintiff's approach, unless a third party can "prove the negative" that an activity will have no adverse effects on the environment (no matter how minimal), an oil and gas development project may not proceed. This interpretation is both a gravely flawed interpretation of the statute, and a remarkable shift from the well-established understanding of the statute's requirements.

Most fundamentally, the majority opinion over-reads half a sentence in the "Legislative declaration" of the Act to override the entire statutory scheme. The statutory scheme must be interpreted as a whole. *See Reno v. Marks*, 2015 CO 33, ¶ 20. Here, the legislative declaration itself states directly, "It is the intent and purpose of this article to permit each oil and gas pool in Colorado

to produce up to its maximum efficient rate of production, subject to ….” a number of factors, including environmental and public health concerns. C.R.S. § 34-60-102(1)(b). Additional provisions contemplate regulating development to “mitigate significant adverse impacts,” which would be superfluous if such concerns must be eliminated prior to any development. C.R.S. § 34-60-106(2)(d). These cannot be squared with the court of appeals’ interpretation that requires consideration of environmental concerns to the exclusion of all others.

The majority improperly relies on use of “consistent with” language in two outside contexts. Both court of appeals remand directives, 2017 COA 37, ¶ 24, and constitutional challenges, 2017 COA 37, ¶ 22 involve situations where the mandatory nature of the standard to be made consistent with is undeniably established outside the “consistent with” nomenclature. To wit, a lower court must comply with a reviewing court, or a constitutional requirement not because of the “consistent with” wording, but because of the mandatory nature of reviewing courts or constitutional rights.

The interpretive framework adopted by the Commission, by way of contrast, is faithful to the statutory language and expressed intent of the Act, as well as the history and tradition of the Commission’s interpretation of its duties and powers under the Act. Stating that development must be

"consistent with" safety concerns is far from stating that development can only take place if certain environmental concerns are treated as a precondition of development in the first instance. Being consistent with a public interest does not equate to a strict condition, as the majority reasoned. As the dissenting judge explained, common dictionary definitions of "consistent with" should be read to "signify a balancing process[,]" contrary to the majority's interpretation. 2017 COA 37, ¶ 40.

There is no question the Commission must consider the potential impact of oil and gas development on the environment and on public health, safety, and welfare. The majority opinion relies on the legislative amendments to the Act in 1994 and again in 2007 which added and emphasized these public interest concerns to the overall development of oil and gas regulation in Colorado. 2017 COA 37, ¶ 24 n.4. These legislative changes, however, supports the dissenting opinion's balancing interpretation of the Act, not the majority's. As a direct result of the 2007 amendments, the Commission undertook a substantial rulemaking process which resulted in what some considered to be the nation's most detailed regulation of oil and gas development. *See City of Longmont*, 369 P.3d at 584. The dissenting opinion correctly recognized that while giving a prominent role to consideration of environmental and safety concerns, the Act does not make those

considerations "determinative," 2017 COA 37, ¶ 43. The recent emphasis on those factors, including in the extensive Commission rulemaking in 2008, does not support the leap taken by the majority that those factors are exclusively determinative.

The majority decision below badly misreads the statute in question and adopts a novel interpretation that undermines years of stable interpretation by courts and the Commission of an Act critical to Colorado's economy.

Conclusion

The petition for certiorari should be granted.

Dated: May 18, 2017.

Kittredge LLC,

_____/s/_____

Daniel D. Domenico

_____/s/_____

Michael Francisco

CERTIFICATE OF SERVICE

This is to certify that I have duly served the forgoing amicus brief upon all parties through ICCES on May 18, 2017, addressed as follows:

Katherine Merlin
479 Arapahoe Ave.
Boulder, CO 80302
Julia Olson
Wild Earth Advocates
1216 Lincoln St.
Eugene, OR 97401
James Daniel Leftwich
Mind Drive Legal Services, LLC
1295 Wildwood Road
Boulder, CO 80305
COUNSEL FOR RESPONDENTS

Timothy Estep
Kevin Lynch
2255 E. Evans Ave., Suite 335
Denver, CO 80208
COUNSEL FOR AMICI CURIAE

Kyle Tisdel
Western Environmental Law Center
208 Paseo del Pueblo Sur, #602
Taos, New Mexico 87571
COUNSEL FOR AMICI CURIAE

Richard Kaufman
Julie A. Rosen
Matthew Kallop Tieslau
Ryley Carlock and Applewhite LLP
1700 Lincoln Street, Suite 3500
Denver, CO 80203
COUNSEL FOR INTERVENORS

CYNTHIA H. COFFMAN
Attorney General
FREDERICK R. YARGER*
Solicitor General, Reg. No. 39479
JOHN E. MATTER, JR.*
Senior Assistant Att'y General, Reg. No. 32155
1300 Broadway, 10th Floor
Denver, Colorado 80203
COUNSEL FOR PETITIONERS

/s / Michael Francisco