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| **COLORADO SUPREME COURT**<br>2 East 14th Avenue, Denver, Colorado 80203<br><br>On Certiorari to the Colorado Court of Appeals<br>Court of Appeals Case No. 16CA564<br><br>**Petitioner:** Colorado Oil And Gas Conservation Commission,<br><br>**Intervenors:** American Petroleum Institute and Colorado Petroleum Association,<br><br>v.<br><br>**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 |
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# 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 3,138 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___

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## 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) ; *Colo. Oil And Gas Conservation Comm'n v. Martinez*, 2017SC297 (May 18, 2017) (certiorari stage).

This case raises important questions about how Colorado courts will interpret and apply the legislative declaration and the substantive provisions of the Oil & Gas Conservation Act ("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 theories seeking targeted, industry-

killing regulations have been presented and rejected throughout the country.

Even more importantly, in the decision below the judicial branch upends longstanding rules of statutory interpretation and settled 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 ruling below marks an unprecedented change that threatens to destabilize the legislative regime established for oil and gas development in Colorado. The Act 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 turned 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's well-reasoned interpretation of its authority under the Act, including the lack of authority to issue the plaintiff's proposed regulation. The overall structure of the Act, as interpreted by the Commission, requires environmental impact, as well as wildlife and other conservation interests, to be considered among relevant factors in the regulation of oil and gas development. For example, the Act charges the Commission to consider the "cost-effectiveness and technical feasibility" in its health, safety, environmental, and wildlife regulations. C.R.S. § 34-60-106(2)(d).

The plaintiffs, however, asked the Commission to take "immediate and extraordinary action" to adopt a proposed rule that would deny "any permits for the drilling of a well" until a third party attested to the lack of any possible environmental burden from the activity. App. I at 47. The proposed rule, in other words, would shut down all oil and gas development because of potential environmental costs, without any consideration for the likely benefits of the activity as compared to the potential costs. The

Commission, consistent with traditional interpretation and application of the Act, concluded it did not have the authority to adopt the proposed rule.

The Court of Appeals reversed the Commission's interpretation of the statute by adopting a flawed interpretation of the Act that took disconnected clauses in the legislative declaration, C.R.S. § 34-60-102(1)(a)(I), out of context and then applied them to override the complex and detailed array of more specific provisions of the Act, *E.g.* C.R.S. § 34-60-106(2)(a)-(d). The lower court's decision was contrary to the plain meaning of the statute and conflicts with this Court's frequent admonition to treat legislative declarations as having limited utility. If, instead, legislative purpose statements are going to be construed to override the more specific statutory schemes, then, at minimum, the General Assembly will need fair notice of such a sweeping change.

Ultimately, the majority's interpretation of the Act below 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. As an economic and policy matter, affirming

the lower court would have profound negative consequences for the state.

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

If affirmed, this case will affect regulatory governance in areas far afield from the oil and gas sector. If a mere portion of a legislative declaration can be used to override the specific statutory sections of an act, then many legislative acts will be subject to unpredictable interpretations that have little connection to the specific provisions adopted by the General Assembly. The result may be a mass evisceration of statutory provisions that provide direct instruction or guidance to administrative agencies in favor of arguments that appeal to generalized statements of purpose. This Court should resist that temptation here.

### A. Balancing costs and benefits is a common statutory and regulatory requirement.

Laws frequently delegate authority to an administrative agency to allow for the costs and benefits of potential regulation to be studied and considered as regulations are adopted. Here, the Colorado Oil and Gas Conservation Commission ("Commission") is

tasked to balance various environmental and societal impacts of the regulated activity with the benefits to the public of that same activity. If this Court upholds the ruling below the consequences will be far-reaching. Not only would Colorado's economically important oil and gas regulations be upended, many other regulatory programs where costs and benefits are and have been balanced would be subject to legal challenges and arguments to tip the scales on one side of the regulatory balance.

Colorado's laws routinely feature cost-benefit analysis balancing when there is a delegated authority to develop regulations. *E.g. DOT v. Amerco Real Estate Co.*, 380 P.3d 117, 121 (Colo. 2016) (describing cost benefit type analysis for transportation matters). This is hardly uncommon: as one leading scholar has declared, "the American regulatory state is becoming a cost-benefit state. By this I mean that government regulation is increasingly assessed by asking whether the benefits of regulation justify the costs of regulation." Cass R. Sunstein, *The Cost Benefit State*, p.1 (Coase-Sandor Institute for Law & Economics Working Paper No. 39, 1996), available at https://goo.gl/pPexWt. This approach is common because it is effective, efficient, and fair. As the Supreme Court of

the United States has observed, "[a]gencies have long treated cost as a centrally relevant factor when deciding whether to regulate. Consideration of cost reflects the understanding that reasonable regulation ordinarily requires paying attention to the advantages and the disadvantages of agency decisions." *Michigan v. Envtl. Prot. Agency*, 135 S. Ct. 2699, 2707 (2015); *see also*, *id.* (rejecting refusal of agency to engage in cost-benefit analysis because "[o]ne would not say that it is even rational, never mind 'appropriate,' to impose billions of dollars in economic costs in return for a few dollars in health or environmental benefits"); Sunstein *supra* at p.4.[1]

The consideration of economic impact in particular is a common feature of Colorado regulations. Many statutes, including the Act, require the consideration of economic impact alongside environmental and public health and safety concerns. For example,

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[1] Indeed, rather than trying to prohibit cost-benefit analysis, as the petition here seeks to do, the debate is nearly the opposite: whether it is appropriate for courts to determine that cost-benefit analysis is *mandatory*. *See*, *e.g.*, Michael Livermore, *Cost-Benefit Analysis and Agency Independence*, 81 U. Chi. L. Rev. 609, 613 (2014); Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 Harv. Env'l L. Rev. 1, 2-3 (2017).

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 the "balancing" approach injects further uncertainty into these and many other regulatory regimes beyond just oil and gas.

### B. The lower court's interpretation of the Act was erroneous.

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 essentially prohibits the Commission from considering any other public interest factors when it looks at environmental impacts. Under the Plaintiffs' approach, unless a third party can confirm a negative—that an activity will have no adverse effects on the environment (no matter how minimal)—the Commission cannot permit a project. 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 inflates 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 and exclusion of any others.

The majority goes astray by misinterpreting the phrase "consistent with" as it appears in the statute. The majority drew an analogy to the use of this phrase as it appears in court of appeals remand directives, *Martinez*, 2017 COA 37, ¶ 24, and constitutional challenges, *Id.* at ¶ 22. But 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 holding or constitutional rights. A court using such language is simply directing the lower court to apply the rest of the opinion. Where a reviewing court or a constitutional standard requires the lower court to engage in a *balancing* of competing factors, nobody would argue that the courts task on remand is to pursue only one of those factors to the exclusion of the other.

Accordingly, the majority below erred in elevating a single purpose of the Act above the other purposes explicitly recognized

and balanced by the General Assembly. The interpretive framework adopted by the Commission, by 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. *Martinez*, 2017 COA 37, ¶ 24 n.4. These legislative changes, however, support

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 comprehensive and 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," *Martinez*, 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 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.

The lower court's decision cannot be saved by speculating that allowing rulemaking to go forward, as requested by plaintiffs, could potentially produce a rule within the Commission's authority. Not so here where the plaintiff requested a rule that both halts oil and gas development indefinitely and is contrary to this Court's recent recognition that hydraulic fracturing is permitted under the Act and serves the state's interest in responsible and efficient development of Colorado's oil and gas resources. *See, e.g.*, *City of Longmont*, 369 P.3d 573, 584. The proposed rule also would have the Commission delegate it's authority over oil and gas regulation to an unnamed "third party organization," a clear violation of the Commission's grant of authority from the General Assembly. With so many requirements contrary to law, a remand for rulemaking would not be harmless, it would undermine existing case law and statutory authority about oil and gas regulation in Colorado. *See* C.R.S. § 34-60-105 (Powers of commission); § 106 (Additional powers of commission – rules).

### C. Stability in regulatory interpretation promotes sound policy.

Such legal uncertainty is deeply problematic for the business community. *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 limited to the oil and gas sector.

## II. Longstanding rules of statutory interpretation do not allow a legislative declaration to overrule more specific statutes.

The rule that more specific statutes control more general statutes is black-letter law. A particular manifestation of this rule is that legislative declarations, by nature general, shall not contravene the carefully crafted substantive provisions of the Act.

Application of these longstanding and uncontroversial rules requires reversal here. And any contrary result would dangerously undermine the heretofore unquestioned strength of these rules.

First, this Court has long followed the rule that a more specific statute governs a more general statute. At least as far back as 1936, the Court pronounced in general "the rule that particular statutes prevail over general" without so much as needing to cite authority for the rule. *Burton v. Denver*, 99 Colo. 207, 211 (Colo. 1936). This guidance has routinely been reaffirmed. *E.g. Bd. of Cnty. Comm'rs v. Hygiene Fire Prot. Dist.*, 221 P.3d 1063, 1066 (Colo. 2009) ("Specific provisions control over general provisions."). The lower court failed to heed this rule when it allowed a strained interpretation of the general legislative declaration to control over the more specific provision that followed.

Second, a special case of this canon is that legislative declarations are generally not considered when the meaning of the substantive provisions are clear. *See, e.g.*, *Portofino Corp. v. Bd. of Assessment App.*, 820 P.2d 1157, 1159 (Colo. App. 1991). This makes sense, particularly when the specific governing provision is unambiguous. *See Lester v. Career Bldg. Acad.*, 2014 COA 88, ¶ 23;

*Stamp v. Vail Corp.*, 172 P.3d 437, 443 (Colo. 2007). Likewise, this Court has noted that a general statement of legislative intent does not create an enforceable duty or right. *See, e.g.*, *Goebel v. Colo. Dep't of Insts.*, 764 P.2d 785, 802 (Colo. 1988) (declining to enforce statute which was legislative encouragement, not substantive requirement). Contrary to this guidance, the lower court interpreted the general legislative declaration in a way making the more specific governing statute void.

The implications of adopting a binding interpretation of a legislative declaration are stark: more than 500 reported cases in Colorado discuss a "legislative declaration." And legislative declarations are notoriously vague and broad; providing little predicative guidance to the parties if shorn of the connection to the specified governing provision of the law. Interpreted in a vacuum, such broad pronouncements of policy will challenge courts with acting as a quasi-legislature in applying the general values or aspirations to specific facts of litigation.

By way of example, the legislative declaration of the Colorado Administrative Procedure Act discusses regulation in broad terms that provide little guidance for judicial imposition of standards.

C.R.S. § 24-4-101.5 ("Legislative Declaration") ("The general assembly finds that an agency should not regulate … unless it finds, after a full consideration of the effects of the agency action, that the action would benefit the public interest and encourage the benefits of a free enterprise system for the citizens of the state."). Likewise, the preamble of the Colorado Constitution, an analog to modern legislative declarations, details ideas so abstract and grand that any attempted judicial enforcement of the generic language would be suspect. See Colo. Const. preamble ("We, the people of Colorado, with profound reverence for the Supreme Ruler of the Universe, in order to form a more independent and perfect government; establish justice; insure tranquility; provide for the common defense; promote the general welfare and secure the blessings of liberty to ourselves and our posterity, do ordain and establish this constitution for the 'State of Colorado.'"). Just as the preamble has not been used by courts to override specific provisions of the Constitution, so too should the legislative declaration in the not be used to limit the application of balancing of costs and benefits as provided for in the more specific provisions of law.

* * *

The decision below badly misread the Act and adopted a novel interpretation that will undermine years of stable interpretation by courts and the Commission of legislation critical to Colorado's economy.

## Conclusion

The decision below should be reversed.

Dated: April 2, 2018.

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 April 2, 2018, addressed as follows:

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