COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
On Petition for Writ of Certiorari to the Colorado Court of Appeals | Case No. 2016 CA 564 Opinion by Fox, J.; Vogt, J., concurring; Booras, J., dissenting	
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.	▲ **COURT USE ONLY** ▲
Counsel for Petitioner Colorado Oil and Gas Conservation Commission: 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 Telephone: (720) 508-6000 fred.yarger@coag.gov jake.matter@coag.gov **Counsel of Record*	Case No.: 17 SC 297
COLORADO OIL AND GAS CONSERVATION COMMISSION'S PETITION FOR WRIT OF CERTIORARI	

CERTIFICATE OF COMPLIANCE

I certify that this Petition for a Writ of Certiorari complies with the requirements of C.A.R. 53, which incorporates C.A.R. 32 by reference. Specifically, I certify that:

> The brief complies with the word limit set forth in C.A.R. 53. It contains 3,785 words.

I acknowledge that this brief may be stricken if it fails to comply with the requirements of C.A.R. 53.

/s/Frederick R. Yarger
Frederick R. Yarger,
Solicitor General
Reg. No. 39479

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ISSUE PRESENTED

For decades, the Colorado Oil and Gas Conservation Commission has interpreted its organic statute, the Oil and Gas Conservation Act, to strike a balance between fostering the production of oil and gas resources and pursuing other competing policy objectives. Based on that understanding, the Commission has enacted comprehensive rules that make Colorado a nationwide leader in oil and gas regulation. Courts have confirmed that the Act requires the Commission to weigh various policy considerations as factors in its decision-making. Below, however, the court of appeals rejected the Commission's long-settled interpretation. In a published 2–1 decision, the court held that rather than balancing competing public policies, the Act prioritizes one policy at the expense of others. Under this view, the Commission is permitted to disregard the Act's directive to foster responsible oil and gas development and enact rules that would entirely prohibit oil and gas-related activity unless it can occur with zero direct or cumulative environmental impact. The question presented is as follows:

> When the Commission engages in rulemaking, is it permitted to disregard the Act's policy of fostering oil and gas development in Colorado?

OPINION BELOW, JURISDICTION, AND TIMELINESS

The Commission invokes this Court's discretionary jurisdiction under C.A.R. 49.

This petition is timely under C.A.R. 52(b)(3). The Court of Appeals issued its published opinion on March 23, 2017. App. A (*Martinez v. Colo. Oil & Gas Conservation Comm'n*, 16 CA 0564, 2017 COA 37). No party sought rehearing. By order dated April 27, 2017, the Commission received an extension of time until May 18, 2017, to file this petition.

STATEMENT OF THE CASE

I. The Colorado Oil and Gas Conservation Act balances responsible development of oil and gas resources with other policy objectives.

In 1951, the General Assembly enacted the Oil and Gas Conservation Act "to provide for the responsible development of the state's oil and gas resources." *Chase v. Colo. Oil & Gas Conservation Comm'n,* 2012 COA 94M ¶ 25, 284 P.3d 161, 165–66 (Colo. App. 2012). The Act established the Commission, directing it to focus on a narrow set of policies: for example, "increasing productivity" of the State's oil and gas reserves and preventing "waste." *Id.* ¶ 26; *see also* App. E (1951 COLO. SESS. LAWS, ch. 230, pp. 651–62 (H.B. 51-347)). In the intervening

decades, the Act has been amended several times, requiring the Commission to consider additional, sometimes competing, policy objectives. But the General Assembly has consistently preserved the Commission's original mission of fostering oil and gas development.

One of the Act's significant amendments came in 1994. The Act continued to direct the Commission to "foster, encourage, and promote the development" of oil and gas resources. App. F at 1978 (1994 COLO. SESS. LAWS, ch. 317, pp. 1978–89 (S.B. 94-177)). But in addition to this longstanding objective, the amendments required the Commission to regulate oil and gas development "in a manner consistent with protection of public health, safety, and welfare." *Id.*

With this change, the General Assembly "enlarged the COGCC's focus from promoting oil and gas production to include consideration of environmental impact and public health, safety, and welfare." *Chase* ¶ 26. Yet these new considerations were only "factors"; they were not rigid, all-or-nothing requirements. *See id.* ¶¶ 52–53 & n.16. For example, the Commission was required to address "*significant* adverse environmental impacts"—not *every* potentially adverse impact. App. F at 1980 (emphasis added). And the Commission was required to

consider "cost-effectiveness and technical feasibility," ensuring that the Commission would not, in pursuing public health, safety, and welfare, eschew the objective of fostering the development of oil and gas resources. *Id*.

In 2007, the General Assembly continued this policy trajectory with new amendments that more explicitly addressed environmental concerns. The 2007 amendments specified that the Commission was to include in its calculus "protection of the environment and wildlife resources." App. G at 1357 (2007 COLO. SESS. LAWS, ch. 320, pp. 1357–61 (H.B. 07-1341)). The amendments also required the Commission to "consult[ ] with the Department of Public Health and Environment" and grant the Department the "opportunity to provide comments during the Commission's decision-making process." *Id.* at 1359; *see also* App. H (2007 COLO. SESS. LAWS, ch. 312, pp. 1328–31 (H.B. 07-1298)) (requiring the Commission to "balance[ ] development with wildlife conservation").

Again, however, the amendments did not supplant the Commission's original mission. The Commission was still charged with "prevention of waste" and was still required to consider "cost-effectiveness and technical feasibility" of measures designed to protect

public health and the environment. *Id.* at 1357–58, 1359. The "intent and purpose" of the Act was still to "permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production." *Id.* at 1357. The goal, the amendments made clear, was not a wholesale change in state policy, but a more modest refinement that pursued "responsible, *balanced* development." *Id.* (emphasis added).

The 2007 amendments triggered "the most extensive rulemaking hearing in the Commission's history." App. I at 5 (Statement of Basis and Purpose, 2008 Rulemaking). Consistent with the plain text of the amended Act, the rules were "intended to foster the *responsible and balanced development* of oil and gas resources." *Id.* at 1 (emphasis added). Indeed, the word "balance" (or one of its variants) appears 43 times in the 2008 Statement of Basis and Purpose. *Id., passim.*

Today, based on its longstanding interpretation of the Act, the Commission "has promulgated an exhaustive set of rules and regulations to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare," reflecting the "state's interest in the efficient and responsible development of oil and gas resources." *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016

CO 28 ¶ 29, 369 P.3d 586, 593 (Colo. 2016) (internal quotation marks omitted).[1] Since at least 1994, the Commission has interpreted the Act to require a *balancing* of each of the potentially competing public policies that the Act codifies. It has not understood the Act to permit one policy concern to override all others.

II. Respondents filed a request for rulemaking that disregarded a key objective of the Act.

In November 2013, a group of youth activists opposed to oil and gas production ("Respondents") petitioned the Commission to engage in rulemaking. Their rulemaking request focused solely on a policy of environmental protection. It disregarded the Act's directive to "[f]oster the responsible, balanced development, production, and utilization of the natural resources of oil and gas in the state." § 34-60-102(1)(a)(I), C.R.S.

The request called on the Commission to "take immediate and extraordinary action" with respect to the environment and climate change. App. C at 41 (Petition for Rulemaking). It asserted that the

[1] For example, "Colorado has some of the most robust regulations in the country that apply to hydraulic fracturing." Stephen Del Percio & J. Cullen Howe, *The Legal and Regulatory Landscape of Hydraulic Fracturing* 33 (2014).

Commission is governed by the "public trust doctrine," which, according to Respondents, "holds the government responsible, as perpetual trustee, for the protection and preservation of the atmosphere for the benefit of both present and future generations." *Id.*

Respondents urged the Commission to adopt a rule that would halt all oil and gas production in Colorado. Production would resume only if a "third-party organization" decided that oil and gas activity may be conducted without any effect on the environment:

> The Commission shall not issue any permits for the drilling of a well for oil and gas unless the best available science demonstrates, and an independent, third-party organization confirms, that drilling can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change.

Id. at 47.

The Commission carefully considered the rule and held a public hearing. App. D at 1 (Comm'n Order). "[N]umerous interested persons" presented testimony and other information on the rulemaking proposal. *Id.* On the record, the Executive Director of the Colorado Department of Natural Resources explained that the State is already taking significant

steps, within the statutory authority of its relevant agencies, to responsibly address climate change, and the Chief Medical Officer of the Colorado Department of Public Health and Environment explained that the rulemaking petition should have been directed to his Department—which houses the Colorado Air Quality Control Division—and not the Commission. *Id.* at 3. The Commission also considered and adopted a legal memorandum by the Colorado Attorney General's Office, which concluded that, as a matter of law, the relief Respondents sought exceeded the Commission's statutory authority. *Id.* at 2.

In May 2014, the Commission unanimously denied the request for rulemaking. *Id.* at 1. The Commission found that the request sought to require the Commission to delegate its authority to "a third party organization," which would have been unlawful, and was based on the public trust doctrine, which "Colorado courts have expressly rejected." *Id.* at 3. The Commissioners also concluded that the request amounted to an *ultra vires* assertion of policymaking power. Specifically, the proposed rule "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." *Id.* at 2–3.

III. The district court affirmed the Commission's longstanding interpretation of the Act.

The district court affirmed the Commission's denial of the request for rulemaking, concluding, as the Commission did, that adopting the request would have been contrary to the Act. The court explained that the Act is unambiguous, requiring the Commission to strike a "balance between the development of oil and gas resources and protecting public health, the environment, and wildlife." App. B at 6 (D. Ct. Order). Respondents' reading of the Act, in contrast, would have disregarded the policy of developing oil and gas resources, making it "wholly subordinate to, and not balanced with," the Act's other policies. *Id.* at 7. "No Colorado courts have interpreted the statute in this way," the court observed, and "such a reading is contrary to the ordinary terms used in the statute." *Id.* at 6.

IV. The court of appeals adopted a novel interpretation of the Act, explicitly rejecting the Commission's balanced regulatory approach.

In a divided opinion, the court of appeals reversed the district court.

At the outset, the majority appeared to repudiate Respondents' understanding of the "public trust doctrine," recognizing that this Court has "rejected the adoption of the public trust doctrine in Colorado." App. A ¶ 7 n.2 (Ct. of Appeals Order). Yet the majority's interpretation of the Act, in substance, amounted to an endorsement of that doctrine.

The majority's statutory analysis fixated on one phrase within the Act's legislative declaration: "in a manner consistent with." § 34-60-102(1)(a)(I), C.R.S. In the majority's view, that phrase, which was added to the Act over two decades ago as part of the 1994 amendments, creates an inflexible, mandatory prerequisite that must be satisfied before the Commission may take regulatory action. It "does not indicate a balancing test but rather a condition that must be fulfilled." App. A ¶ 21.

The majority acknowledged that the Act contains a number of competing provisions. *Id* ¶ 27. It requires, for example, "protection of public health, safety, and welfare"; "balanced development"; "cost-effectiveness and technical feasibility"'; "prevention of waste," and "permit[ting] each oil and gas pool in Colorado to produce up to its maximum efficient rate of production." *Id.*; *see also* §§ 34-60-102(b),

128(3), C.R.S. Even so, the majority held, "the Act was not intended to require that a balancing test be applied." App. A ¶ 30. Thus, the Act's longstanding policy of fostering responsible development of oil and gas resources may, and indeed must, be disregarded, and pursued only "*subject to*" the environmental protection policies enumerated in the Act. *Id.* (emphasis added). The majority cited no other decision of the court of appeals or this Court suggesting that the Act may be read in this manner and did not distinguish *Chase*, which explicitly interpreted the Act to require a consideration of multiple policies as "factors" in decision-making.

Based on its analysis, the majority held that the Commission's rejection of Respondents' rulemaking request was "legally incorrect." *Id.* ¶ 32. It ordered the Commission to reconsider the rulemaking request—including the proposal to halt oil and gas production in Colorado—in light of its novel interpretation of the Act. *Id.* ¶ 36.

Judge Booras dissented. She concluded that the "actual authority" of the Commission is bounded by the mandatory consideration of many different factors. *Id.* ¶ 42. Consequently, the Commission cannot simply disregard one subset. For example, "[t]here

would be no reason to consider 'cost-effectiveness and technical feasibility' if protection of the public health, safety, and welfare was, by itself, a determinative consideration." *Id.* ¶ 43. Thus, "the Commission is required by statute to regulate oil and gas operations by *balancing the relevant considerations*," and cannot treat one particular policy objective "as being determinative." *Id.* ¶ 44 (emphasis added).

Consistent with this reasoning, the dissent would have explicitly rejected Respondents' public trust arguments. *Id.* ¶ 47.

REASONS FOR GRANTING THE WRIT

Certiorari is warranted under C.A.R. 49(a)(1), (2), and (3). Below, the majority "decided a question of substance not heretofore determined by this court." C.A.R. 49(a)(1). Namely, it held that the Commission must construe the Act to subjugate one longstanding policy objective—fostering oil and gas development—to the Act's other objectives. That novel interpretation of the Act, contrary to two decades of agency practice, is both "not in accord with applicable decisions of the Supreme Court" and "in conflict with the decision of another division of [the court of appeals]." C.A.R. 49(a)(2)–(3). Indeed, no other reported decision from

any Colorado court has suggested that the interpretation of the Act adopted below is correct.

Certiorari is also warranted for additional "special and important reasons." C.A.R. 49(a). The decision below creates serious uncertainty in Colorado oil and gas law. This Court's review is necessary to ensure that the Commission, as well as the public and regulated parties, understands what the Act means and how it should be interpreted.

I. The novel interpretation of the Act endorsed by the majority below conflicts with decisions of this Court and other decisions of the court of appeals.

The statutory phrase "in a manner consistent with"—which the majority below deemed "critical" to its decision, App. A ¶ 21—has been part of the Act for over 20 years. App. F at 1978. During that time, no court has suggested that the phrase, as used in the Act, "create[s] a mandatory condition." App. A ¶ 27 n.6. To the contrary, both this Court and the court of appeals have rejected the majority's approach of "elevat[ing] the importance of" some of the Act's policies at the expense of others and making "the development of oil and gas in Colorado … *subject to*" the Act's other objectives. *Id.* ¶¶ 27, 30 (emphasis added).

Just last year, this Court examined the scope and purposes of the Act in two cases, *City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, 369 P.3d 573 (Colo. 2016), and *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, 369 P.3d 586 (Colo. 2016). Both involved local bans on hydraulic fracturing, or "fracking." Fracking opponents allege that the practice poses "health risks and [causes] damage to the environment." *Longmont* ¶ 2.

Despite those concerns, the Court invalidated the local bans, observing that "banning fracking would result in less than optimal recovery and a corresponding waste of oil and gas," contrary to "the state's interest in the efficient and fair development of oil and gas resources in the state," which the Act embodies. *Id.* ¶ 23–24; *see also id.* ¶ 53. Thus, *even assuming* that fracking cannot "be done safely," the local ban "would remain a material impediment to the effectuation of state law." *Id.* ¶ 55. This reasoning is impossible to reconcile with the decision below, which determined that environmental concerns create "a mandatory condition rather than a factor in a general balancing inquiry." App. A ¶ 27 n.6.

Another example is *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997), where this Court declined to elevate some of the Act's purposes above others. Citing the same portion of the Act that the majority invoked below, the Court noted that the Act pursues multiple policies, not just one. It "recognize[d] that the *purposes of the Act are* to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste." *Id.* at 925 (emphasis added) (citing § 34-60-102(1), C.R.S. (1995)). Illustrating the balance that must be struck among the Act's multiple purposes, the Court refused to "abolish the longstanding [common-law] rule of reasonable surface use." *Id.* at 931. Although doing so would further the interests of surface owners, *see* § 34-60-106(3.5), C.R.S. (recognizing the rights of surface owners), it would deter conduct that is "reasonably necessary to the *development of the mineral estate*." *Gerrity Oil & Gas Corp.*, 946 P.2d at 931 (emphasis added).

Other decisions from the court of appeals likewise recognize that the Act cannot be read to elevate some policy objectives above others. In *Chase*, for example, the court recognized that protecting public health is only one of the "various factors" that the Commission must consider in

its decision-making. *Chase* ¶¶ 51–53 & n.16. *Chase* never suggested that policies favoring public health and the environment are a "mandatory condition," App. A ¶ 27 n.6, that must be satisfied prior to oil and gas development. *Cf. also Town of Frederick v. N. Am. Resources Co.*, 60 P.3d 758, 761, 766–67 (Colo. App. 2002) (holding that local governments may not enact laws that "conflict with the state's interest in efficient production and development").

The majority decision below did not explain how its interpretation of the Act can be squared with cases like *Longmont*, *Gerrity*, and *Chase*. This Court should grant certiorari to determine whether the decision below conforms to existing case law and the longstanding interpretation of the Act embodied by it.[2]

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[2] Because the Commission is not the only agency required to balance potentially conflicting policies, the decision below has implications beyond the present dispute. The Colorado Parks and Wildlife Board, for example, "is tasked with balancing competing interests—namely, promoting the parks while still protecting wildlife, vegetation, and park ecosystems." *Rags Over Ark. River v. Parks & Wildlife Bd.*, 2015 COA 11M, ¶ 57, 360 P.3d 186, 196 (Colo. App. 2015), ¶57 (citing §§ 33-10-101, 106, C.R.S.). The Colorado Air Pollution Prevention and Control Act—using language similar to that which governs the Commission—requires the State to employ "all available *practical* methods which are *technologically feasible and economically reasonable* so as to reduce, prevent, and control air pollution." §§ 25-7-101, 102, C.R.S. (emphasis added). In the view of the court below,

II. The decision below injected significant uncertainty into current law by re-writing the Act and, in substance, adopting the public trust doctrine.

Special and important reasons justify certiorari. Below, the court of appeals held that the Commission's longstanding interpretation of the Act, upon which it has built its "exhaustive set of rules and regulations," *Fort Collins* ¶ 29, was "legally incorrect." App. A ¶ 32. The decision thus creates serious uncertainty in the law governing the Commission. It does so in two ways.

First, the decision below effectively rewrote the Act. Specifically, the court of appeals concluded that

> [T]he Commission erred in interpreting [the Act] as requiring a balance between development and public health, safety, and welfare. The plain meaning of the statutory language indicates that … development is in the public interest when that development is completed *subject to* the protection of public health, safety, and welfare.

App. A ¶ 25 (emphasis added). This analysis is irreconcilable with the Act's actual language.

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because these statutes do not use the word "balance" to modify those particular policy considerations, they foreclose a regulatory approach that balances competing interests, and they must be read to mandate pursuing one set of policies at the expense of others. App. A ¶ 25 n.5.

Section 102(1)(b) of the Act, which the majority failed to analyze, uses the phrase "subject to" *twice*, while also using the different phrase "consistent with" to describe the Commission's obligations relating to public health and the environment. § 34-60-102(1)(b), C.R.S. The court below, however, read that different phrase to mean the same thing: "subject to." App. A ¶ 22. The majority's central holding thus rewrites Section 102(1)(b) as follows:

> (b) … 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 the prevention of waste, ~~**consistent with**~~ **SUBJECT TO** the protection of public health, safety, and welfare, including protection of the environment and wildlife resources, and subject further to the enforcement and protection of the coequal and correlative rights of the owners and producers of a common source of oil and gas ….

If the court of appeals is correct, then the Act means something different from what its language suggests. *Contra Bd. of Cnty. Comm'rs v. City of Woodland Park*, 333 P.3d 55, 58 (Colo. 2014) ("[U]se of different terms signals … different meanings …."). This Court's review is necessary to explain precisely what the Act does mean and how it should be interpreted.

The second way the decision below creates serious legal uncertainty is in its implicit endorsement of the public trust doctrine. That doctrine was the basis for the rulemaking request. The proposed rule attached to the request claimed that the Commission is a "trustee" of various "trust assets" and must ban oil and gas development until it "can occur in a manner that does not cumulatively, with other actions, impair Colorado's atmosphere, water, wildlife, and land resources, does not adversely impact human health, and does not contribute to climate change." App. C at 47.

The decision below purported not to address the public trust doctrine. App. A ¶ 7 n.2. Yet it held that the rulemaking request—which, again, was based on that doctrine—was within the Commission's statutory authority. App. A ¶ 31. In other words, while the court below did not explicitly endorse the public trust doctrine, it suggested that it is an implicit part of the Act. That conclusion is contrary to *Longmont*, in which this Court found "no applicable Colorado case law adopting the public trust doctrine in this state." *Longmont,* ¶ 62.

CONCLUSION

The Court should grant certiorari to review the decision below.

Respectfully submitted,

CYNTHIA H. COFFMAN
Attorney General

/s/ Frederick R. Yarger
FREDERICK R. YARGER*
Solicitor General,
Reg. No. 39479

JOHN E. MATTER, JR.*
Senior Assistant Att'y General,
Reg. No. 32155

Attorneys for Petitioner Colorado Oil and Gas Conservation Commission

*Counsel of Record

CERTIFICATE OF SERVICE

I certify that I served this **COLORADO OIL AND GAS CONSERVATION COMMISSION'S PETITION FOR WRIT OF CERTIORARI** and its Appendices on 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

/s/Amy Holston
Paralegal