SUPREME COURT, STATE OF COLORADO Colorado State Judicial Building 2 East 14th Avenue, Suite 300 Denver, Colorado 80203	
Colorado Court of Appeals Case Number 16CA0564 Opinion by Judge Fox; Judge Vogt concurring; Judge Booras dissenting City and County of Denver District Court No. 14CV32637 Judgment by Judge J. Eric Elliff **Petitioners**: Colorado Oil and Gas Conservation Commission and American Petroleum Institute and Colorado Petroleum Association v. **Respondents**: Xiuhtezcatl Martinez, Itzcuahtli Roske-Martinez, Sonora Brinkley, Aerielle Deering, Trinity Carter, 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 ▲**
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LOCAL GOVERNMENTS' *AMICUS CURIAE* BRIEF IN SUPPORT OF THE RESPONDENTS

Certificate of Compliance

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the amicus brief complies with the applicable word limit set forth in C.A.R. 29(d) and contains 2,173 words. The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and 32.

/s/ *Katherine A. Burke*
Katherine A. Burke

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INTERESTS OF THE AMICUS CURIAE PARTIES

The Board of County Commissioners of Boulder County, the City Council of the City of Boulder, the City Council of the City and County of Broomfield, the City Council of the City of Commerce City, the Board of County Commissioners of Eagle County, the Board of Trustees of the Town of Erie, the City Council of the City of Fort Collins, the Board of County Commissioners of Gunnison County, the City Council of the City of Lafayette, the City Council of the City of Longmont, the City Council of the City of Louisville, the Board of County Commissioners of Pitkin County, the Board of County Commissioners of San Miguel County, the Board of County Commissioners of Summit County, and the City Council of the City of Westminster are the governing bodies of Colorado counties, cities, and towns, all political subdivisions of the State of Colorado.

The counties, as local government entities, are charged with protecting the public health, safety, and welfare of their residents. *See* § 30-11-101(2), C.R.S.; *see also* § 29-20-104(1)(d) and (h), C.R.S.

The City and County of Broomfield is a county and municipal corporation, with all the powers and responsibilities applicable to municipalities and counties, and as such, Broomfield seeks to protect the health, safety, and welfare of its citizens. *See* Colo. Const. art. XX, § 10.

The cities of Boulder, Commerce City, Fort Collins, Lafayette, Longmont, Louisville, and Westminster are Colorado home-rule municipalities, with police power granted pursuant to the Colorado Constitution, article XX, to adopt regulations to protect the health, safety, and welfare of the public. *See, e.g., City & Cty. of Denver v. Qwest Corp.*, 18 P.3d 748, 755 (Colo. 2001) ("If there is a rational basis for legislating to protect the health, safety, or welfare of the citizens of a municipality, a home rule city may constitutionally do so.") (internal citation omitted). The home-rule cities want to ensure that COGCC properly fulfills its statutory duties in Colorado's mixed state and local regulation of oil and gas development.

The town of Erie is a statutory town charged with protecting the public health, safety, and welfare of its residents. *See* §§ 31-15-103, 31-15-401(b), 31-23-301, C.R.S. Erie's residents are concerned about the public health and environmental effects of oil and gas operations near their homes, schools, businesses, and recreation areas.[1]

Because oil and gas development is a mixed issue of state and local concern, *see City of Fort Collins v. Colo. Oil & Gas Ass'n.*, 2016 CO 28, ¶ 11, the amici

[1] The Town Council for the Town of Basalt, a statutory town, requested a note indicating its support for the positions and arguments contained in this amicus brief.

parties' land use and oil and gas permitting functions are affected by the manner in which the Colorado Oil and Gas Commission ("COGCC") carries out its statutory rule-making and permitting duties. Therefore, all amici parties have interests in this litigation.

STATEMENT OF THE CASE

Based on clear and unambiguous language in the Colorado Oil and Gas Conservation Act, Sections 34-60-101 to -130, C.R.S. (the "Act"), the court of appeals held that the COGCC has the authority to consider a proposed rule promoting public health and protecting the environment. This holding followed the well-settled legal principle that a primary function of state government is to protect public health, safety, and welfare. As shown below, this Court should affirm the appellate ruling because it is well-reasoned and neither changes existing law nor conflicts with prior decisions of other appellate divisions or this Court.

ARGUMENT

I. State and local governments must exercise their regulatory power in a manner that protects public health and safety.

Petitioners describe the decision below as a radical and sweeping change in the law that will have drastic impacts. Intervenor/Petitioners call the decision "novel." Lost in this rhetoric is the fact that lawmaking with the express purpose of

protecting the public health, safety, and welfare is the foundation of the police power for state agencies, just as it is for local governments.

When it adopted the Act, including its subsequent amendments, the General Assembly exercised its police power. *See W. Colo. Power Co. v. Pub. Utils. Comm'n*, 411 P.2d 785, 794 (Colo. 1966) ("The power to regulate entities affected with a public interest is a function of the police power of the state . . . ."); *see also Town of Dillon v. Yacht Club Condos. Homeowners Ass'n*, 2014 CO 37, ¶ 36 (police power includes "the power to anticipate and prevent dangers"). "[T]he police power of the state, which is exercised in the public interest . . . is an attribute of sovereignty, governmental in character, but its use is restricted to matters which relate to the health, safety, or general welfare of the people." *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924); *see also Love v. Bell,* 465 P.2d 118, 121 (Colo. 1970) ("[T]he provisions of [a] statute must be reasonably related to the public health, safety, and welfare.")

Like the General Assembly, state regulatory agencies exercise the police power. Numerous legislative grants of authority to state agencies establish public health, safety, and welfare as the fundamental justification for the agencies' function, even if that function includes the very different goal of promoting an aspect of the state economy. *See, e.g.,* § 35-28-102(2)-(3), C.R.S. (declaring that

the regulation of the marketing of agricultural commodities "prevent[s] economic waste" and promotes equitable purchase power, all "for the purpose of protecting the health, peace, safety, and general welfare"); § 12-55.5-101, -103, C.R.S. (authorizing division of professions and occupations to register and regulate guides and outfitters to both promote outdoor sports and "safeguard[] the health, safety, welfare, and freedom from injury" of participants); § 37-95-102(1), C.R.S. (creating the Colorado water resources and power development authority to administer water conservation projects, create jobs and promote economic welfare "for the protection of the public health, safety, convenience, and welfare"); § 8-20-102, C.R.S. (authorizing director of division of oil and public safety to make rules regulating liquid and gas fuel products that are "reasonably necessary for the protection of the health, welfare, and safety of the public").

Like state agencies, local governments are required to exercise their regulatory power in a manner deemed necessary to provide for public health, safety, and welfare. *See* § 30-11-101(2), C.R.S. (granting counties the authority to adopt and enforce ordinances and resolutions "regarding health, safety, and welfare issues"); § 31-15-103, C.R.S. (granting municipalities the power "to make and publish ordinances . . . which are necessary and proper to provide for the safety, [and] preserve the health . . . of such municipality and the inhabitants thereof").

State agencies and local government successfully exercise their regulatory authority within the police power framework of protecting the public health, safety, and welfare without causing the kind of catastrophic disruptions of commerce or industry predicted by Petitioners. For example, counties and cities regulate the use of land within their jurisdictions. Land development continues to occur throughout the state despite the legislative requirement that zoning regulations protect the public health, safety, welfare, and the environment. *See City of Colorado Springs v. Securecare Self Storage, Inc.*, 10 P.3d 1244, 1255 (Colo. 2000) (zoning ordinances are generally valid regulatory exercise of police power to protect public health, safety, and welfare). The court of appeals decision in the instant case simply means that the COGCC should exercise its authority in the same way other Colorado regulatory entities do.

While the decision below might ultimately result in changes to existing COGCC rules or procedures that inadequately protect public health and safety, it will not result in a change in fundamentals of law related to the legislative process and rulemaking. If the COGCC has adopted rules and regulations that benefited private industry without protecting public health, safety, and welfare, it did so at its own risk. This Court should affirm the court of appeals ruling that clarifies the meaning of the Act in conformance with the legal mainstream.

II. The decision below is consistent with prior decisions of this Court and other divisions of the court of appeals.

The court of appeals decision does not conflict with decisions of this Court or the court of appeals. In their Petition for Writ of Certiorari, Petitioners argued that the decision below conflicts with three specific court rulings. However, careful reading demonstrates the decision is consistent with those opinions and existing, relevant case law and should not be overturned.

First, in *City of Longmont v. Colo. Oil & Gas Ass'n.*, 2016 CO 29, the Court undertook a preemption analysis with the underlying assumption that the COGCC enacted valid rules within its authority under the Act. In particular, the Court observed that the COGCC enacted fracking rules "to prevent waste and to conserve oil and gas in the State of Colorado *while protecting* public health, safety, and welfare." *Longmont*, ¶ 52. (emphasis added). The remainder of the opinion focused on the narrower issue of state preemption over the city's ordinances. Thus, to the limited extent the *Longmont* opinion addressed issues relevant to this case, it supports the court of appeals opinion that public health, safety, and welfare are paramount in the context of COGCC rulemaking.

Like *Longmont*, the holding in *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997), addresses an issue unrelated to the decision below and does not conflict with the court of appeals decision at issue here. The Court in *Gerrity*

determined that the Act did not give rise to a private cause of action. In discussing the Act, the Court stated "[w]e recognize 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." 946 P.2d at 925. The Petitioners argued that by using the plural "purposes" rather than the singular "purpose," the *Gerrity* Court interpreted Section 34-60-102, C.R.S. (1995) [2], to mean that oil and gas production and protecting public health and safety were separate purposes. However, the *Gerrity* Court never specified the "purposes" to which it was referring. Moreover, the Court was summarizing the Act, not interpreting it. At best, the language is *dicta*.

More recently, this Court characterized oil and gas production as a single goal. "This…materially impedes the state's *goal* of permitting each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste *and consistent with* the protection of public health, safety, and welfare." *City of Fort Collins*, ¶ 33 (emphasis added). Thus, even if *Gerrity* raised questions by using the word "purposes," *Fort Collins* subsequently clarified

[2] The Court in *Gerrity* referenced a prior version of the statute at issue. The General Assembly amended section 34-60-102 in 2007. *See* 2007 Colo. Legis. Serv. Ch. 312 (H.B. 07 –1298) (WEST).

the issue by referring to production as a single "goal" that must be pursued consistently with the protection of public health, safety, and welfare.

Finally, *Chase v. Colo. Oil & Gas Conservation Comm'n*, 2012 COA 94, supports, rather than conflicts with, the decision below. A division of the court of appeals in *Chase* recognized that "[t]he 1994 amendments to the Conservation Act enlarged the COGCC's focus . . . to include consideration of environmental impact and public health, safety, and welfare." *Id.* at ¶ 28. The *Chase* division characterized protecting public health, safety, and welfare as an "expanded charge" to the COGCC. *Id.* Further, the court did not describe the COGCC's rules as achieving balance between fostering development and protecting public health and safety, but rather stated "the COGCC's rules protect the health, safety, and welfare of the general public during the drilling, completion, and operation of oil and gas wells and producing facilities." *Id.* at ¶ 29; *see also* ¶ 53 n.16 (quoting COGCC Rule 601 to note that COGCC safety rules were "promulgated to protect the health, safety and welfare of the general public").

The issue on appeal in *Chase* was whether the COGCC could consider any "factors other than occupancy in determining whether land should be categorized as a Designated Outdoor Activity Area, or DOAA." *Chase*, ¶ 52. The division concluded that the COGCC had the power to consider public safety in making a

DOAA determination. *Id*. at ¶ 53. However, it did not state that any factor was more important than public health, safety, and welfare and it did not consider the opposite question — whether the COGCC could ignore public health and safety in reaching its decision. Thus, nothing in *Chase* conflicts with the decision below.

As shown above, the decision below does not conflict with *Longmont*, *Gerrity*, or *Chase*.

CONCLUSION

Like other state agencies and local governments throughout Colorado, the primary duty of the COGCC is to protect the public health, safety, and welfare, not to "balance" it against the desires of for-profit corporations. For the reasons stated above, the amici parties respectfully assert that the Court should affirm the ruling below.

Respectfully submitted this 25th day of May 2018.

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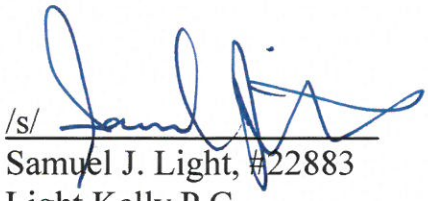

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of May 2018, the foregoing **LOCAL GOVERNMENTS' *AMICUS CURIAE* BRIEF IN SUPPORT OF THE RESPONDENTS** was served via Colorado Courts E-Filing on all counsel who have consented to electronic service in this case.

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