COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals, Case No. 2016CA564	
Petitioner: Colorado Oil and Gas Conservation Commission, and **Intervenors-Petitioners:** American Petroleum Institute and the Colorado Petroleum Association v. **Respondents:** Xiuhtezcatl Martinez; Itzcuahtli 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.	COURT USE ONLY
Attorneys for Respondents: Katherine Merlin (Atty. Reg. # 45672) 479 Arapahoe Ave. Boulder, CO 80302 Phone No: (720) 965-0854 Email: katelynnmerlin@gmail.com Julia Olson (applicant *pro hac vice*) Wild Earth Advocates 1216 Lincoln St. Eugene, OR 97401 Phone No: (415) 786-4826 Email: JuliaAOlson@gmail.com James Daniel Leftwich (Atty. Reg. # 38510) MindDrive Legal Services, LLC 1295 Wildwood Road Boulder, CO 80305 Phone No: (720) 212-0831 Email: dan@minddrivelegal.com	Case Number: 2017SC297
RESPONDENTS' CONSOLIDATED OPPOSITION BRIEF TO PETITIONERS' PETITIONS FOR WRIT OF CERTIORARI	

CERTITICATE OF COMPLIANCE

I certify that Respondents' Consolidated Opposition Brief to Petitioners' Petitions for Writ of Certiorari complies with the requirements of C.A.R. 28, 32, and 53. The brief complies with the word limit in C.A.R. 53(c). It contains 3,791 words.

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

/s/ *Katherine Merlin*
Katherine Merlin

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional Provisions

Statutes

Rules

Other Authorities

RESPONSE TO ISSUES PRESENTED

Petitioners' statements of the "Issues Presented" go to the merits of a potential appeal. The sole issue presented by the Petitions is:

Whether the Court of Appeals' statutory construction of the Oil and Gas Conservation Act resulted in a decision on a question of substance probably not in accord with applicable decisions of the Supreme Court, in conflict with another division of the Court of Appeals, or in a manner that presents a special and important basis for the Supreme Court to exercise review?

OPINION AT ISSUE

The Court of Appeals opinion at issue will be published as: *Martinez et al., v. Colo. Oil & Gas Conservation Comm'n*, 16 CA 0564, 2017 COA 37 ("COA Opinion").

STATEMENT OF JURISDICTION

Youth Respondents do not agree that Petitioners have demonstrated circumstances under C.A.R. 49 sufficient for this Court to exercise its discretion to grant their Petitions for Writ of Certiorari. Nevertheless, Youth Respondents agree the Court has jurisdiction to hear and decide these Petitions pursuant to C.A.R. 49 and 52. By order dated May 25, 2017, Youth Respondents received an extension to

and including June 29, 2017, to file their Opposition Brief to Petitioners' Petitions for Writ of Certiorari.

STATEMENT OF THE CASE

Beginning in 1915, the General Assembly mandated that oil and gas development in Colorado be regulated by creating the office of the State Oil Inspector. *See City of Longmont v. Colo. Oil & Gas Ass'n*., 369 P.3d 573, 581 (2016). In the past 102 years, oil and gas development in Colorado has increased exponentially and the technology used to extract oil and gas has evolved significantly. Today, hydraulic fracturing ("fracking") is standard for "virtually all" of Colorado's oil and gas wells. *Id.* The adverse impacts of Colorado's now pervasive oil and gas development on public health, safety, and welfare, and Colorado's environment and wildlife resources, have also grown exponentially over the decades, particularly as oil and gas wells and other infrastructure is being located in populated areas (Figure 1). *See* R. Administrative Record ("AR"), p. 00069-76, 00856-61; Colorado Oil & Gas Conservation Commission, *Weekly and Monthly Oil and Gas Statistics* at 11 (June 1, 2017), https://cogcc.state.co.us/documents/data/downloads/statistics/CoWklyMnthlyOGStats.pdf, (the number of oil and gas wells has increased from approximately 22,500 in 2002 to over 54,000 in 2017).

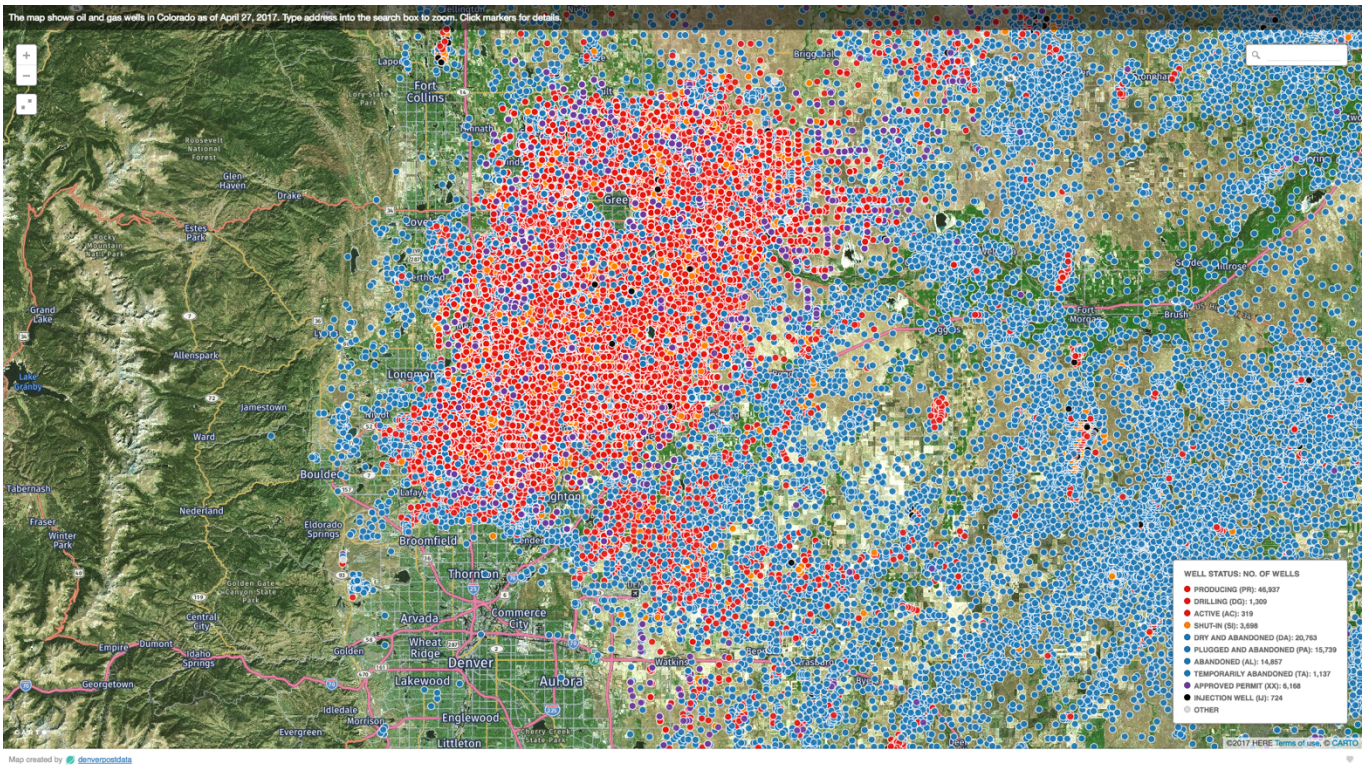

Figure 1: Oil and Gas Wells Along Colorado's Front Range[1]

In response to the increase in oil and gas development and its mounting impacts, the General Assembly has consistently shifted the Oil and Gas Conservation Act's ("Act") emphasis from promoting oil and gas development, to limiting development for the sake of public health, safety, and the environment, since the Act became law in 1951. Importantly, in 1994, in the midst of a dramatic spike in oil and gas drilling, the General Assembly amended the Act to require that

[1] Kevin Hamm, *Here's a map of every oil and gas well in the state of Colorado*, The Denver Post (May 1, 2017), http://www.denverpost.com/2017/05/01/oil-gas-wells-colorado-map/.

oil and gas development be done "in a manner consistent with protection of public health, safety, and welfare." *Chase v. Colo. Oil & Gas Conservation Comm'n*, 284 P.3d 161, 166 (Colo. App. 2012). In 2007, the General Assembly completed the Act as it reads today by eliminating the mandate to "encourage, and promote" oil and gas development, and by including "protection of the environment and wildlife resources." 2007 Colo. Legis. Serv. Ch. 20 (H.B. 07-1341).

In an effort to address the public health, safety, and environmental impacts of fracking, on November 15, 2013, these Youth Respondents filed a Petition for Rulemaking to the Colorado Oil and Gas Conservation Commission ("Commission") pursuant to Commission Rule 529. R. AR, p. 00850–903. The Petition contained detailed factual evidence demonstrating current and threatened harms to public health, safety, and welfare, including serious and potentially irreversible impacts on the natural environment and climate system, on which the lives and futures of the youth Plaintiffs depend. R. AR, p. 00856–893, 00901–903. The Petition challenged the Commission's ongoing practice of authorizing new oil and gas development notwithstanding the evidence of the resulting extensive harm to public health and the environment in violation of the Act, as well as the Colorado Constitution, which secures essential and inalienable rights to life,

liberty, property, safety, and happiness, and other implicit natural rights. Colo. Const. Art. 2, §§ 3, 28.

Youth Respondents asked the Commission to promulgate a rule or rules to "protect the health and safety of Colorado's residents and the integrity of Colorado's atmospheric resource and climate system, water, soil, wildlife, other biological resources, upon which all Colorado citizens rely for their health, safety, sustenance, and security." R. AR, p. 00852. The Petition argued that, pursuant to the Act, the Commission had a statutory duty to protect the public's health, safety, and welfare, as well as protect the environment and wildlife resources, when regulating oil and gas development. R. AR, p. 00894, 00898–900.

The Commission interpreted the Act as not giving it authority to promulgate a rule responsive to the Youth and denied their Petition for Rulemaking.[2] In denying the Petition, the Commission did not consider, as the Act mandates, whether its existing rules are "consistent with the protection of public health, safety, and welfare, including the environment and wildlife resources," in light of the Petition's evidence of extensive ongoing harm. Subsequently, Youth Respondents appealed the Commission's order to Denver District Court on July 3,

[2] With little explanation, the Commission also said other agencies are addressing the concerns in the Petition and the Commission had other priorities. R. AR, p. 00005.

2014, challenging the Commission's construction of the Act. On February 19, 2016, Judge Elliff ruled that the plain meaning of the Act was unambiguous, that the Act requires the Commission to balance oil and gas development against the protection of public health, safety, and the environment and denied Youth Respondents' appeal of the Petition denial.

Youth Respondents appealed the District Court's order on April 4, 2016. The Court of Appeals issued its decision reversing the District Court's order on March 23, 2017. The Court of Appeals held that the Commission erroneously interpreted the Act, which "mandates that the development of oil and gas in Colorado be regulated subject to the protection of public health, safety, and welfare, including protection of the environment and wildlife resources," and remanded the case for further proceedings. COA Opinion ¶¶ 30, 36.

Despite the General Assembly's unambiguous intent to protect public health, safety, and the environment, as expressed by the plain language of the Act, the Commission is asking this Court to alter the plain language of the Act and read into it a balancing test that the General Assembly did not allow nor intend. The Petitioners' portrayal of the Court of Appeals' decision is based on false premises and mischaracterizations. For example, the Court of Appeals did not hold, nor insinuate, that the Commission can "disregard the Act's policy of fostering oil and

gas development in Colorado," that one policy is prioritized "at the expense of others," or that protecting public health and the environment are "rigid, all-or-nothing requirements." Comm'n Pet., at 1, 3. The Court of Appeals did not hold that oil and gas development may only be permitted when there is "zero direct or cumulative environmental impact." Comm'n Pet., at 1. All of the Petitioners' references to the public trust doctrine come from the 2013 Petition for Rulemaking; the Youth Respondents did not make any arguments about the public trust doctrine in the District Court or the Court of Appeals and the Court of Appeals did not rule on it.[3] Comm'n Pet., at 7-8. Furthermore, the precise language of Youth Respondents' proposed rule in their Petition for Rulemaking, including the reference to third-party verification, is not at issue and the Court of Appeals did not order the Commission to adopt any rule, let alone the Youth Respondents' exact proposed rule.

The Intervenor-Respondents' Petition explicitly asks the Court to substitute its judgment on public policy for the legislature's policy judgments as expressed in

[3] This case is not, and never has been, about the public trust doctrine. While Youth Respondents raised it in their original Petition for Rulemaking, they have not made arguments related to it in the court proceedings. The Court of Appeals decision expressly declined to address the public trust doctrine. COA Opinion ¶ 7, fn 2. It is hard to understand why the Commission continues to bring up the public trust doctrine, except as a "straw man." Comm'n Pet., at 10.

the clear language of the Act, based on some unsubstantiated potential impact on the Colorado economy. Intervenors' Pet., at 5. Petitioners' unsubstantiated arguments about the potential economic implications of the Court of Appeals decision are not relevant and should not be given any weight, nor should the argument that the Commission has been interpreting its duty under the Act incorrectly for two decades. Comm'n Pet., at 1, 6.

The issue before the Court of Appeals was a narrow one – the scope of authority and the obligation of the Commission to regulate oil and gas development in Colorado pursuant to the Act. COA Opinion ¶ 2. The Court of Appeals' conclusion 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," is the correct reading of the plain language of the Act.

ARGUMENT

I. Certiorari Is Not Warranted Because The Court Of Appeals Decision Does Not Conflict With Applicable Decisions Of The Colorado Supreme Court Or Another Division Of The Court Of Appeals

A. The Court Of Appeals' Interpretation Of The Act Is Consistent With Colorado Precedent Interpreting The Act

The Court of Appeals' decision is consistent with previous decisions by the Colorado Supreme Court and other divisions of the Court of Appeals interpreting

the Act. Petitioners claim, with scant explanation, that the Court of Appeals' decision is inconsistent with this Court's decisions in *City of Longmont v. Colorado Oil & Gas Association*, 369 P.3d 573 (2016), and *City of Fort Collins v. Colorado Oil & Gas Association*, 369 P.3d 586 (2016). However, nothing in the Court of Appeals decision in inconsistent with either of those cases, or any other case interpreting the Act.

The narrow legal question in *Longmont* and *Fort Collins* was whether local fracking bans and moratoria were preempted by the Act. 369 P.3d at 577; 369 P.3d at 589. In the initial preemption inquiry in *Longmont* and *Fort Collins* to determine whether the local regulations were a matter of purely local, statewide, or mixed state and local concern, this Court determined that, based on the statutory scheme and the Commissions' rules and regulations, there was a statewide interest in uniform oil and gas regulations and piecemeal bans by local governments would impede the application of state law and potentially render the Commission's regulations "superfluous." 369 P.3d at 585; 369 P.3d at 593. The *Longmont* and *Fort Collins* cases were about who regulates oil and gas development, not whether the Commission correctly interpreted its mandate. Any concerns about waste or infringement on correlative rights arose from the state's purported interest in avoiding a patchwork of oil and gas regulations, not statewide regulations that

protect public health, safety, and the environment. This Court certainly did not address the Commission's interpretation of its mandate under the Act, and whether it must demonstrate that its rules are "consistent with the protection of public health, safety, and welfare, including the environment and wildlife resources."

The Commission relies on out of context phrases from *Longmont* to assert that the decisions conflict. Comm'n Pet., at 14. The "less than optimal recovery and a corresponding waste of oil and gas" referenced in *Longmont* was in the context of determining whether the local laws presented an irreconcilable conflict with a state interest, not whether regulations that are consistent with the protection of public health, safety and the environment are a mandatory condition that must be met. 369 P.3d at 580.

Further, nothing in the Court of Appeals' decision runs counter to the "state's interest in the efficient and fair development of oil and gas resources," and how that interest is effectuated by the Act. Comm'n Pet., at 14. As this Court said in *Fort Collins*, the state's goal is "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."

369 P.3d 586 at 593-94 (emphasis added).[4] The *Longmont* and *Fort Collins* decisions did not hold that oil and gas development should be balanced against public health and environmental protection, or anything else that conflicts with the Court of Appeals' decision.

Petitioners also argue the Court of Appeals' decision conflicts with *Gerrity Oil & Gas Corporation v. Magness*, 946 P.2d 913 (Colo. 1997), and *Chase v. Colorado Oil & Gas Conservation Commission*, 284 P.3d 161 (Colo. App. 2012), because those decisions reference the Act's multiple "purposes" or "factors." Comm'n Pet., at 11. However, the Court of Appeals opinion does not conclude that protecting public health and the environment is the single purpose of the Act or the sole factor for the Commission to consider. For example, the Court of Appeals also considered the General Assembly's intent to prevent waste and protect correlative rights. COA Opinion ¶ 20, fn 4. Just as in *Gerrity*, where the court's refusal to infer a private cause of action "does not frustrate" other purposes of the Act, the Court

[4] The Commission points to the language of this provision as containing the terms "subject to" and "consistent with" and contends that these terms must, therefore, have different meanings. Comm'n Pet., at 18. However, as the Court of Appeals decision points out, this Court has held in numerous cases, involving a variety of analogous statutory provisions, that the term "in a manner consistent with" means "subject to." COA Opinion ¶¶ 23-24. Thus, the Court of Appeals opinion does not conflict with this Court's decisions, and there is nothing "novel" about the Court of Appeals' statutory interpretation of the Act.

of Appeals' order does not frustrate, let alone disregard, other purposes of the Act. 946 P.2d at 925. Furthermore, just because a statutory scheme has multiple purposes, does not mean they are all equal. *See, e.g., Blaine v. Moffat Cty. Sch. Dist. Re No. 1*, 748 P.2d 1280, 1286 (Colo. 1988) (While the purposes of the Teacher Tenure Act "are several," one of the "*primary*" and "*basic*" purposes is "to protect the teacher against arbitrary action by a school board.") (emphasis added). There was nothing novel or improper about the Court of Appeals interpreting the Act as prioritizing one purpose over another, based on the clear language of the statute. *See Droste v. Bd. of Cnty. Com'rs of Cnty. of Pitkin*, 159 P.3d 601, 605-08 (Colo. 2007). Finally, *Chase* actually supports the Court of Appeals' decision by referring to the Act's "amendments *requiring* that the COGCC protect the public's health, safety, and welfare." 284 P.3d at 166 (emphasis added).

In addition to being consistent with other Colorado cases, the Court of Appeals' decision is consistent with the Commission's own interpretation of the Act. Accordingly, it is not clear why the Commission so vigorously objects to the Court of Appeals' decision on the one hand, while on the other hand, stated in its 2015 Enforcement Guidance and Penalty Policy that "the development of these [oil and gas] resources *must be* consistent with protection of public health, safety, and

welfare, including the environment and wildlife resources, *at all times*." Colorado Oil and Gas Conservation Commission Enforcement Guidance and Penalty Policy 1 (Jan. 2015), https://perma.cc/39RU-99MF (emphasis added); COA Opinion ¶ 30.

B. The Way The Court Of Appeals' Interpreted The Act Is Consistent With Colorado Precedent On Statutory Construction

The Court of Appeals followed the standard and well-accepted rules of statutory construction in interpreting the Act. When a statute is unambiguous, which all parties and the Court of Appeals agree is the case here, courts look to the plain and ordinary meaning of the statute. *Stamp v. Vail Corp.*, 172 P.3d 437, 442–43 (Colo. 2007). This is exactly what the Court of Appeals did. COA Opinion ¶¶ 19-25. The Court of Appeals interpreted the plain meaning of section 34-60-102(1)(a)(I) and the phrases "in a manner consistent with" and "balanced," consistent with other decisions by the Supreme Court and Court of Appeals, as well as other Colorado statutes. COA Opinion ¶¶ 20-24. After considering the Act's plain language, the Court of Appeals stated: "We therefore *conclude* that the Commission erred," the "plain meaning of the statutory language 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 Opinion ¶ 25 (emphasis added).

The fact that the Court of Appeals went on to also read the statute as a whole, bolsters the analysis and follows standard principles of statutory interpretation. Courts read statutory schemes as a whole and give meaning to all parts. *Robinson v. Legro*, 325 P.3d 1053, 1057 (Colo. 2014). When reading the Act as a whole, the Court of Appeals did not, as the Commission contends, find that the Act contains "competing provisions." Comm'n Pet., at 10. Rather, the Court of Appeals did what it is supposed to do, read the Act as a whole to ensure that its interpretation of section 34-60-102(1)(a)(I) did not conflict with other provisions of the Act. COA Opinion ¶¶ 26-27. After reviewing other provisions of the Act, including section 34-60-106(2)(d), the Court of Appeals determined that section 34-60-106(2)(d) "in no way conflicts with our interpretation." COA Opinion ¶ 27.

Intervenors-Petitioners argue that the Court of Appeals improperly relied on the legislative declaration of the Act to interpret the statute. Intervenors' Pet., at 11. However, the statutory language largely at issue in this case *was* the legislative declaration, so logically the Court of Appeals' (and the District Court's) analysis revolved around interpreting section 34-60-102(1)(a)(I), as did the Commission's own analysis in the court proceedings.[5] As long as the decision was in its favor, the

[5] *See* State Answer Brief in the District Court at 17: "The Commission's statutory mandate includes '[f]oster[ing] the responsible, *balanced* development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a

Commission had no argument against interpreting 34-60-102(1)(a)(I). The Court of Appeals correctly interpreted the statute as a whole, looking to both the legislative declaration and substantive provisions of the Act. COA Opinion ¶ 27 ("[S]ection 34-60-106(2)(d) *supports* the conclusion that the Commission has authority to promulgate rules regulating oil and gas development in the interest of protecting public health, safety, and welfare.") (emphasis added).

Furthermore, courts do use legislative declarations to inform their interpretation of other provisions of a statute, especially when that legislative declaration has been codified. For example, just as the Court of Appeals relied on the legislative declaration and amendments to interpret the Act, in *Stamp*, this Court relied on the legislative declaration (in that case, one that was not codified) and statutory amendments to interpret a substantive provision of the Ski Safety Act. 172 P.3d at 444-45; *see also Portofino Corp. v. Bd. of Assessment Appeals*, 820 P.2d 1157 (Colo. App. 1991) (using a legislative declaration to interpret a substantive provision of an unambiguous statute). Also, while courts need not resort to a legislative declaration when a statute is unambiguous, where such a declaration "seeks to clarify a statutory amendment, [the court] may resort to such

---

manner *consistent* with protection of public health, safety, and welfare, including protection of the environment and wildlife resources.' § 34-60-102(1)(a)(I), CRS (emphasis added)."

interpretive analysis to fulfill the General Assembly's intent." *Lester v. Career*, 338 P.3d 1054, 1060 (Colo. App. 2014) (examining the legislative declaration even after concluding that the statute at issue was unambiguous). That is the case here, as the legislative declaration codified in section 34-60-102(1)(a)(I) was changed to clarify each of the 1994 and 2007 statutory amendments.

C. The Court Of Appeals Applied The Proper Standard Of Review

Colorado courts review questions of statutory construction *de novo*. *Robinson*, 325 P.3d at 1056. While deference is afforded to agencies making policy determinations in rulemaking proceedings, "that deference 'does not extend to questions of law.'" *Simpson v. Cotton Creek, LLC*, 181 P.3d 252, 261 (Colo. 2008), *citing Alamosa-La Jara v. Gould*, 674 P.2d 914, 929 (Colo. 1984). Because the Commission denied the Petition for Rulemaking primarily on legal grounds, the Court of Appeals correctly reviewed the statutory interpretation issue *de novo*. For any policy decisions the Commission did make, the Court of Appeals correctly determined that the administrative record does not contain sufficient information to affirm the Commission's decision on other grounds. COA Opinion ¶ 31; *Chase*, 284 P.3d at 170-72.

II. The Appropriate Next Step Is For The Commission To Follow The Court Of Appeals' Order On Remand

The Youth Respondents' Petition for Rulemaking seeking to protect public health, safety, and the environment from oil and gas development was filed over three and a half years ago. As recent events in Colorado have illustrated, fracking can be extremely hazardous to public health, safety, and welfare. *See, e.g.,* Aliso Barba, *Back-To-Back Oil & Gas Explosions Rattle Colorado Communities,* Inside Energy (May 25, 2017) (there have been 126 explosions related to energy development in Colorado since 2006, including two deadly explosions this spring). What is urgently needed now is for the Commission to initiate a rulemaking under the correct legal standard to protect public health and the environment statewide. Through this regulatory process, any alleged "uncertainty in Colorado oil and gas law," can be resolved. Comm'n Pet., at 13; Intervenors Pet., at 6. The Court of Appeals decided a narrow legal question on the scope of authority and obligation of the Commission under the Act and remanded the case for further proceedings. COA Opinion ¶ 36. This ordinary remedy should move forward, and indeed, the Commission has not sought a stay of the decision.

CONCLUSION

The Court of Appeals did not address what levels of environmental impacts are acceptable under the Act, whether the Commission is adequately protecting public health, safety, and the environment with existing regulations, or order the

Commission to promulgate a specific rule. The Court of Appeals did correctly interpret the plain language of the Act consistent with cases from the Colorado Supreme Court and the Court of Appeals. Therefore, this Court should decline to grant the Petitions for Writ of Certiorari and allow the Commission to follow the General Assembly's unambiguous mandate to protect public health, safety, and the environment through its rulemaking process.

Respectfully submitted this 29th day of June, 2017.

/s/ Katherine Merlin
Katherine Merlin
Dan Leftwich
Julia Olson (applicant *pro hac vice*)

Attorneys for Youth Respondents

CERTIFICATE OF SERVICE

I certify that on the 29th day of June, 2017, I served a true and correct copy of Respondents Consolidated Opposition Brief to Petitioners' Petitions for Writ of Certiorari on the following by Electronic Service by the Integrated Colorado Courts E-filing System (ICCES):

Cynthia H. Coffman
John E. Matter
Frederick R. Yarger
Counsel for Petitioners

Richard C. Kaufman
Julie A. Rosen
Matthew K. Tieslau
Counsel for Intervenors

Timothy Estep
Kevin Lynch
Counsel for Amici Curiae

Kyle Tisdel
Counsel for Amici Curiae

/s/ Katherine Merlin
Katherine Merlin