COLORADO SUPREME COURT 2 East 14th Avenue, Denver, CO 80203	
On Writ of Certiorari to the 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** ▲
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COLORADO OIL AND GAS CONSERVATION COMMISSION'S OPENING BRIEF	

Certificate of Compliance

I certify that this brief complies with all requirements of C.A.R. 28 and C.A.R. 32, including all formatting requirements set forth in those rules. Specifically, I certify that

- the brief complies with the word limits set forth in C.A.R. 28(g) because this is a principal brief and contains 9.484 words; and

- the brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) because it contains, under a separate heading before the discussion of the issue, a concise statement:

  (1) of the applicable standard of appellate review with citation to authority; and

  (2) whether the issue was preserved, and, if preserved, the precise location in the record where the issue was raised and where the court ruled.

I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28 or C.A.R. 32.

/s/ Frederick R. Yarger
FREDERICK R. YARGER
Solicitor General
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INTRODUCTION

The authority of the Colorado Oil and Gas Conservation Commission is defined by a detailed set of statutes known as the Oil and Gas Conservation Act (the "Act"). For years, the Commission has interpreted the Act to require a balance among various policy objectives, including both the development of oil and gas resources and protection of the environment. Below, the Commission was presented with a rulemaking request that sought a dramatic departure from this settled interpretation—the request, for example, urged the Commission to suspend the issuance of permits to drill oil and gas wells across the entire State of Colorado.

Administrative agencies like the Commission have broad discretion to decide whether to pursue rulemaking based on a request by a member of the public. The Commission thus could have denied the request summarily, as agencies in other States have done when presented with similar rulemaking requests. Instead, it engaged in a thorough public comment process, through which it heard from dozens

of stakeholders as well as some of the State's leading environmental experts. Based on the nearly 1,200-page record developed through that process—and pursuant to the Commission's longstanding interpretation of the Act—the Commission issued an order declining to engage in rulemaking.

The Court of Appeals overturned that order. In doing so, it held that the phrase "in a manner consistent with," which appears in one portion of the Act's legislative declaration, forecloses the Commission's longstanding interpretation of the Act. That is, the court held that the Commission's balanced regulatory approach, which has served as the backbone of the most extensive rulemaking proceedings in the Commission's history, is wrong.

Five words in a legislative declaration, however, cannot override the remainder of a carefully constructed, lengthy, and detailed legislative framework. Unless this Court wishes to upend the Commission's considered and longstanding interpretation of the Act,

and discard basic principles of statutory interpretation, it must reverse the Court of Appeals and affirm the Commission's order.

QUESTION PRESENTED FOR REVIEW

As framed by the Court, the question presented is:

> Whether the Court of Appeals erred in determining that the Colorado Oil and Gas Conservation Commission misinterpreted § 34-60-102(1)(a)(I), C.R.S., as requiring a balance between oil and gas development and public health, safety, and welfare.

STATEMENT OF THE CASE AND FACTS

I. The Act, as amended over the past 25 years, directs the Commission to consider a range of policy factors in regulating oil and gas activities.

Nearly 70 years ago, the General Assembly passed the Oil and Gas Conservation Act, designating the Commission as regulator of oil and gas operations in Colorado. The Act initially directed the Commission to pursue a narrow set of policies, including preventing "waste" and fostering the efficient, orderly development of the State's oil and gas resources. App. B at 651–52 (1951 COLO. SESS. LAWS, ch. 230, pp. 651–62 (H.B. 51-347)). Since then, the General Assembly has

adjusted the Commission's powers and duties through a number of statutory amendments, several of which expanded the range of policies the Commission is required to consider in its regulatory activities.

Two of the Act's significant amendments came in 1994 and 2007. The Commission implemented those amendments through extensive rulemakings, based on an interpretation of the Act that requires a balance among various policy considerations. The Commission has never understood the Act, including its recent amendments, to allow the pursuit of some of the General Assembly's stated policies without considering the rest.

The 1994 Amendments. When the 1994 amendments were enacted, the Act's legislative declaration stated, "it is … in the public interest to foster, encourage, and promote the development" of oil and gas resources. Senate Bill 94-177 added new language to the declaration: "in a manner consistent with protection of public health, safety, and welfare." App. C at 1978 (1994 COLO. SESS. LAWS, ch. 317, p. 1978–89 (S.B. 94-177)).

Revisions to the Act's substantive provisions explained how the Commission was to pursue this revised policy goal. Specifically, in Section 34-60-106(2)(d), the General Assembly authorized the Commission to "regulate oil and gas operations so as to prevent and mitigate *significant* adverse environmental impacts … taking into consideration *cost-effectiveness and technical feasibility*." App. C at 1980 (emphasis added). Thus, while protection of "public health, safety, and welfare" was a mandatory consideration under the 1994 legislation, it was not the only consideration, nor did it supplant the Act's objective of fostering oil and gas development.

The 2007 Amendments. In 2007, the General Assembly passed two bills that further adjusted the Commission's regulatory mission. These amendments added "protection of … wildlife resources" to the list of policies the Commission was to consider and further specified how the Commission was to address environmental, public health, and safety concerns. App. D (2007 COLO. SESS. LAWS, ch. 312, pp. 1328–

31 (H.B. 07-1298)); App. E (2007 COLO. SESS. LAWS, ch. 320, pp. 1357–61 (H.B. 07-1341)).

Each of these bills—like the 1994 legislation—revised the Act's legislative declaration. As a result, the declaration now reads, in part:[1]

> It is declared to be in the public interest to … [f]oster the *responsible, balanced* development, production, and utilization of the natural resources of oil and gas in the state of Colorado in a manner consistent with protection of public health, safety, and welfare, *including protection of the environment and wildlife resources*; … [and] [p]lan and manage oil and gas operations in a manner that *balances development with wildlife conservation*....
>
> 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 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 correlatives rights of … owners and producers….

§ 34-60-102, C.R.S. (emphasis added to indicate 2007 additions).

[1] Appendix A contains the full text of the Act's legislative declaration.

Each of these bills—again like the 1994 legislation—also amended the Act's substantive provisions, specifying how the Commission was to pursue the policies set forth in the revised legislative declaration. House Bill 07-1298 required the Commission to collaborate with the Parks and Wildlife Commission regarding decision-making and permitting; to implement "reasonably practical best management practices … to conserve wildlife resources"; and to promulgate new rules to address impacts to wildlife. App. D at 1330. House Bill 07-1341, meanwhile, changed the Commission's membership to (1) include as voting members the executive directors of the Department of Natural Resources and the Colorado Department of Public Health and Environment ("CDPHE") and (2) ensure that the Commission would include members with expertise in environmental or wildlife protection, soil conservation, and agriculture. App. E. at 1358. House Bill 07-1341 also required the Commission, in consultation with CDPHE, to promulgate new rules to address public health and safety, including

procedures to promote coordination between CDPHE and the Commission. *Id.* at 1359.

Neither of the bills altered the 1994 language requiring the Commission to account for "cost-effectiveness and technical feasibility" in its health, safety, environmental, and wildlife regulations. § 34-60-106(2)(d), C.R.S.

The Commission's Construction of the Act. As the courts have recognized, the 1994 and 2007 amendments "enlarged the [Commission's] focus from promoting oil and gas production to include consideration of environmental impact and public health, safety, and welfare." *Chase v. Colo. Oil & Gas Conservation Comm'n,* 2012 COA 94, ¶ 28. But these new policy considerations are not all-or-nothing requirements; they are "factors" for "the [Commission] to consider." *See id.* at ¶ 53. Nothing in the amended Act suggests that the Commission may pursue one set of policy goals to the exclusion of others.

The Commission has confirmed this understanding of the Act through rulemaking, and in particular its 2008 rulemaking, which was

mandated by the 2007 legislation and amounted to "the most extensive rulemaking hearing in the Commission's history." App. F at 5 (Statement of Basis and Purpose, 2008 Rulemaking). In carrying out that effort—which spanned a year of public hearings and included thousands of stakeholders and parties, *id.* at 3–6—the Commission considered both the legislative declaration of the Act and its substantive provisions. *E.g.*, *id.* at 2. Based on this holistic reading, the Commission proceeded "with the understanding that the continuation of oil and gas development is important to Colorado, as is the protection of Colorado's citizens and environment." *Id.* at 3. This understanding required the Commission to take into account the full range of policy considerations set forth in the Act and to "fine-tun[e] the balancing act between the development of the oil and gas resources and the protection of public health, safety, and welfare, including the environment and wildlife resources." *Id.* at 3.[2] This concept of regulatory balance has consistently

[2] The General Assembly could have "alter[ed] or repeal[ed]" any of the 2008 rules. § 34-60-106(11)(b), C.R.S. It did not do so.

governed the Commission's activities, including other rulemaking proceedings that followed the 2008 effort and likewise addressed public health, safety, and the environment.[3]

II. Respondents' rulemaking request, like related efforts in other States, was an attempt to make new law, not implement existing law.

In November 2013, Respondents, a group of youth activists working with an organization called Our Children's Trust, submitted to the Commission a "Request for Adoption of a Rule" (the "Request"). App. G at 3, 45 (Request for Rulemaking (Nov. 15, 2013)). The Request was part of the "Atmospheric Trust Litigation," a nationwide effort

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[3] *See, e.g.*, Statement of Basis and Purpose, *Statewide Water Sampling and Monitoring* at 1 (January 7, 2013), *available at* https://bit.ly/2pSUxPb (describing amendments to water sampling rules as protecting "public health, safety, and welfare, including the environment and wildlife resources" while intending "to foster the responsible and balanced development of oil and gas resources"); Statement of Basis and Purpose, *Reporting of Spills and Releases* at 5 (Dec. 17, 2013), *available at* https://bit.ly/2GF5YDQ (explaining that amendments to spill reporting rules "are one means by which the Commission balances development … with protection of the environment, public health, safety, and welfare, and wildlife resources").

organized by Our Children's Trust. *Id.* at 45. At the time, the effort had spawned rulemaking petitions in 38 States, all of which were rejected. A.R. 1077 (Tr. 7:20–8:24). That number has since grown; to date, Our Children's Trust appears to have submitted at least 46 requests for rulemaking with state agencies, 44 of which have been denied, one of which was withdrawn, and one of which remains pending.[4]

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[4] To compile these numbers, counsel for the Commission consulted the Our Children's Trust website, https://www.ourchildrenstrust.org/, and performed independent research.

State agencies typically deny Our Children's Trust rulemaking petitions—often in short summary orders—as contrary to state law or because the petitions fail to account for existing state regulations. *See e.g.*, App. K at 1 (Letter from Ill. Envtl. Prot. Agency) ("[T]he Illinois EPA does not possess the requisite legal authority … and therefore cannot formally act on your request at this time."); App. L at 3 (R.I. Dep't Envtl. Mgmt., Answer to Petition) ("[The agency] promulgated forty-eight (48) different sets of regulations that govern the use of the State's air resources. … [T]he Petitioner declares [the state's air resource] to be a public trust resource. However, there is no statute in Rhode Island that supports such a suggestion.").

Putting aside Colorado, in every State where judicial review was sought, the courts ultimately upheld the rulemaking denials. *See Filippone ex rel. Filippone v. Iowa Dep't of Nat. Res.*, No. 12–0444, 2013 WL 988627 (Iowa Ct. App. Mar. 13, 2013); *Texas Comm'n on Envtl. Quality v. Bonser-Lain*, 438 S.W.3d 887 (Tex. App. 2014); *Foster v.*

The Request called on the Commission to take "immediate and extraordinary action" with respect to the environment and climate change. App. G at 41. Specifically, Respondents urged the Commission to adopt a proposed rule that would deny "any permits for the drilling of a well" until "an independent, third-party organization" confirms that oil and gas activity may be conducted without having any effect on the environment, whether directly or "cumulatively with other actions." *Id.* at 47.

A portion of the Request focused on hydraulic fracturing, *see id.* at 7–12, a well stimulation technique that is currently used in nearly all well completions in Colorado. *See City of Longmont v. Colo. Oil & Gas Ass'n*, 2016 CO 29, ¶ 1. But the Request strayed beyond hydraulic

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Wash. Dep't of Ecology, No. 75374-6-I, 2017 WL 3868481 (Wash. App. Sept. 5, 2017).

Our Children's Trust has, however, obtained one court victory in a declaratory judgment action, in which the Massachusetts Supreme Judicial Court held that a state agency's existing regulations failed to comply with state law. *Kain v. Mass. Dep't Envtl. Prot.*, 49 N.E.3d 1124 (Mass. 2016). Other litigation involving the group remains pending.

fracturing and other oil and gas activities over which the Commission has jurisdiction. *See* § 34-60-103(6.5), C.R.S. (defining "oil and gas operations"). For example, it sought action with respect to the entire supply chain for fossil fuels—including "distribution and combustion"—urging the Commission to address how "all greenhouse emissions" from such activities "cumulatively affect[ ] climate change and global warming." App. G at 47, *see also id*. at 32–33, 42.

The Request justified this "extraordinary action" by relying on the "public trust doctrine," which was cited throughout Respondents' submission, including in the proposed rule and proposed statement of basis and purpose. *Id*. at 40–41, 47, 49. In Respondents' view, the public trust doctrine "imposes a legal obligation on the Commission" separate from the statutory obligations that govern the Commission's operations. *Id*. at 41, 49. Colorado courts, however, have rejected the public trust doctrine (both before and after the Request was submitted to the Commission), including in a 2011 case brought by one of the Respondents here and, more recently, in a decision of this Court.

Longmont, ¶ 62; *Martinez v. Colorado*, No. 11CV4377, 2011 WL 11552495, at *2 (Colo. Dist. Ct., Denver Cnty., Nov. 7, 2011) ("[T]he Public Trust Doctrine has never been recognized by the Colorado courts. Plaintiffs have failed to point to a single case.").

The Request did not mention any of the Commission's existing regulations—including the hundreds of new or revised rules promulgated over the past decade to implement the General Assembly's directive to protect the environment, wildlife resources, and public health and safety. Nor did the Request mention any of the other numerous laws and regulations in Colorado that address greenhouse gas emissions and climate change.

III. After an extensive public comment process, the Commission declined to initiate rulemaking in response to the Request.

The Commission conducted a thorough review of the Request, accepted extensive written comments, and, on April 28, 2014, held a

public hearing. The result was a nearly 1,200-page administrative record. Based on this record, the Commission denied the Request.[5]

Comments from State Environmental Regulators. The record included information submitted by dozens of interested parties, including regulators with expertise in, and authority over, the State's efforts to address greenhouse gas emissions and climate change.

For example, the Deputy Director of the Air Pollution Control Division, the "lead air quality agency in Colorado," submitted comments to "discuss the overall contribution of oil and gas production to Colorado's greenhouse gas emissions, as well as Colorado's ongoing efforts to reduce the air quality impacts from the oil and gas sector." A.R. 15. As the Deputy Director explained, "emissions from electricity

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[5] Neither the Administrative Procedure Act nor the Commission's Rules of Practice and Procedure required a hearing before the Commission declined to engage in rulemaking. *See* § 24-4-103, C.R.S. (requiring a hearing only if the agency decides to engage in rulemaking); 2 Colo. Code Regs. § 404-1, 529(f) (requiring a "formal public hearing" only "before promulgating any rules or regulations"). The Commission nonetheless engaged in an extensive public comment and hearing process.

production, transportation, and … fuel usage"—not oil and gas production—are "the predominant [greenhouse gas] sources in Colorado." *Id.* at 16. Nonetheless, Colorado has one of "the most rigorous oil and gas air quality programs in the county." *Id.* This is due in part to a February 2014 rulemaking by the Air Quality Control Commission, which is estimated to eliminate between 60,000 and 113,000 tons of methane emissions and more than 92,000 tons of volatile organic compound emissions each year from oil and gas operations. *Id.* These and other regulatory efforts, the Deputy Director explained, "ensure that Colorado will lead the nation in the clean production of oil and natural gas." *Id.*

Another official from CDPHE, responsible for environmental epidemiology, commented on the scientific basis for various assertions made in the Request. A.R. 18. He explained that "the scientific literature does not support the claim" that "science unequivocally shows that hydraulic fracturing is adversely affecting human health." *Id.* (quoting the Request). Thus, while he agreed that "more robust studies"

should continue to be developed, he concluded that the Commission "should continue to permit oil and gas operations that use hydraulic fracturing techniques." *Id*.

The Memorandums from the Director and the Attorney General's Office. The record also included a memorandum from the Director of the Commission, which placed the Request in the broader regulatory context. A.R. 97–105. The memorandum explained the "high-level coordination" that is occurring in Colorado to facilitate a "cross-agency coordinated response" to greenhouse gas emissions and climate change. A.R. 98. The memorandum also explained the efforts the Commission itself had undertaken and would continue to undertake to "eliminate, minimize, or mitigate adverse impacts to public health and the environment." A.R. 98. These efforts included the extensive 2008 rulemaking, as well as six later rulemaking proceedings and policy initiatives that addressed "the transparency of hydraulic fracturing

operations," "groundwater quality," "environmental and nuisance impacts," and "emission control devices." A.R. 101–02.[6]

At the request of the Director, the Attorney General's office submitted a memorandum summarizing pertinent legal considerations. A.R. 8–13. The memorandum explained that the Commission had consistently understood the Act to require a "balance" of policy considerations, an interpretation that "was central to the Commission's 2008 rulemaking." *Id.* at 12. Because the Request sought to "condition[ ] new oil and gas drilling on a finding of no cumulative adverse impacts"—a condition found nowhere in statute—it amounted to an attempt to alter the policy balance set forth in statute. *Id.* at 11–12. The memorandum also explained that the Request sought "an improper delegation of the agency's authority" by conditioning oil and gas activities on "review by a third-party organization." *Id.* at 13. Finally,

[6] The Commission continues to address public health and safety, the environment, and wildlife. Since the Director submitted his memorandum to the Commission in April 2014, the Commission has undertaken nine rulemaking proceedings, resulting in more than 400 pages of new or revised regulations.

the memorandum explained that the public trust doctrine could not justify the Request because Colorado courts have rejected it. *Id*.

The Commission's Order. Based on this record, the Commission, in a written order, unanimously declined to initiate a rulemaking proceeding in response to the Request. App. H at 1 (Commission Order 1-187 (May 29, 2014)) (the "Order"). The Commission's Order emphasized both legal and practical impediments to pursuing the Request.

The Commission's legal concerns were threefold and echoed the concerns raised in the memorandum from the Attorney General's office. First, the Commission concluded that "conditioning new oil and gas drilling on a finding of no cumulative adverse impacts" would be "beyond the Commission's limited statutory authority," because the Commission is not authorized to "readjust the [policy] balance crafted by the General Assembly." *Id*. at 3. Second, the Commission concluded that its rulemaking authority is "a non-delegable duty"; it would therefore be "contrary to the Act" to assign that duty to a third-party

organization, as the Request urged. *Id.* Finally, the Commission concluded that "the public trust doctrine does not provide a basis … to initiate the proposed rulemaking." *Id.*

In addition to these legal concerns, the Commission set forth other, independent reasons for denying the Request. Citing the many legislative and regulatory efforts in Colorado to address "climate change issues, statewide emissions, and reduction proposals," the Commission concluded that "[i]t and other state agencies are currently addressing many of the concerns raised in the [Request]." *Id.* at 3–4. Further, given the broad scope of the Request (which urged the Commission to regulate activities beyond its jurisdiction, including the cumulative impact of activities such as the combustion of fossil fuels), the Order explained that "[m]ost, if not all of the relief sought in the [Request] related to air quality is within CDPHE's jurisdiction, and not COGCC's jurisdiction." *Id.* at 4. Finally, in light of the extensive rulemaking efforts the Commission had undertaken and would continue to undertake, the

Order concluded that "other … priorities … must take precedence over the proposed rulemaking at this time." *Id.*

IV. The district court affirmed the Commission's denial of the Request.

Respondents appealed to the district court, which affirmed the Commission's Order.

The district court concluded, as did the Commission, that pursuing the Request would have been contrary to the Act. The district 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." CF, p. 572. Respondents' reading of the Act, in contrast, would have disregarded the policy interest favoring development of oil and gas resources, making that interest "wholly subordinate to, and not balanced with," the Act's other policies. *Id.* at 573. "No Colorado courts have interpreted the statute in this way," the district court observed, and "such a reading is contrary to the ordinary terms used in the statute." *Id.* at 572.

Separately, the district court concluded that the extensive administrative record justified the Commission's Order. "Comments from the CDPHE's Air Pollution Control Division, the CDPHE's Disease Control and Environmental Epidemiology Division, the Colorado Water Conservation Board … all support Defendant's Order," the district court concluded. CF, p. 576. "By following the required procedures for public comment, then using the substantial quantity of evidence collected to guide its deliberations, [the Commission] used reasonable diligence and care to arrive at [its] decision." *Id.*

V. The Court of Appeals reversed, adopting a novel interpretation of the Act and rejecting the Commission's longstanding regulatory approach.

In a divided opinion, the Court of Appeals reversed the district court. *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 2017 COA 37.

The majority opinion. The majority's statutory analysis relied almost entirely on the Act's legislative declaration—or, more specifically, one single phrase within that declaration: "in a manner consistent with." § 34-60-102(1)(a)(I), C.R.S. In the majority's view, that

phrase, added to the Act over two decades ago as part of the 1994 amendments, forecloses any balancing of competing policy interests. It "does not indicate a balancing test but rather a condition that must be fulfilled." *Martinez*, ¶ 21. "[T]he Act," the majority held, "was not intended to require that a balancing test be applied." *Id.* at ¶ 30.

The majority discussed the Act's substantive provisions in only a single paragraph in its analysis. *Id.* at ¶ 27. While the majority acknowledged that one substantive provision, Section 34-60-106(2)(d), requires the Commission to consider "cost-effectiveness and technical feasibility" in addition to environmental and other concerns, the majority dismissed that language, concluding that it "in no way conflicts with our interpretation of [the legislative declaration]." *Martinez*, ¶ 27.

The majority never discussed the fact that the Commission has consistently interpreted the Act to require a balance of various interests, including through its extensive 2008 rulemaking and other rulemaking efforts. According to the majority, that interpretation is wrong: the Act's longstanding policy of fostering responsible

development of oil and gas resources may be disregarded, pursued only "subject to" the environmental protection policies enumerated in the Act. *Id* at ¶ 22. The majority cited no other decision of the court of appeals or this Court suggesting that the Act may be read in this manner.

Finally, the majority refused to consider any other reason supporting the Commission's Order. It declined to address the public trust doctrine—an explicit legal basis for the Request. *Id*. at ¶¶ 34–35. And although the majority recognized that "judicial review of denials of rulemaking petitions is limited and deferential," it asserted that "[t]he [nearly 1,200-page] administrative record does not contain sufficient findings of fact for us to affirm the Commission's decision on alternative grounds." *Id*. at ¶¶ 31, 33.

The dissent. The dissent rejected the majority's statutory analysis, "disagree[ing] with the majority's interpretation of the phrase 'in a manner consistent with' and its reliance on a legislative declaration to find a mandatory duty." *Id.* at ¶ 37 (Booras, J.,

dissenting). The dissent concluded that the "actual authority" of the Commission—defined by the Act as a whole and not the legislative declaration alone—is bounded by the mandatory consideration of many different factors. *Id.* at ¶¶ 41–42. 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.* at ¶ 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.* at ¶ 44.

The dissent noted that "the Commission has consistently recognized its duty to balance health and environmental concerns with the promotion of oil and gas development." *Id.* at ¶ 46. And it acknowledged that the Commission's interpretation of the Act has been codified in "an exhaustive set of rules and regulations." *Id.* at ¶ 46 (quoting *City of Fort Collins v. Colo. Oil & Gas Ass'n*, 2016 CO 28, ¶ 29).

Finally, the dissent explicitly addressed the public trust doctrine. Because this Court "declined to apply the public trust doctrine in *City of Longmont*," the dissent would have held that the doctrine is an improper basis for rulemaking. *Id.* at ¶ 47.

SUMMARY OF THE ARGUMENT

I. Under well-established rules of statutory interpretation, the Act unambiguously supports the Commission's Order and confirms the Commission's longstanding regulatory approach.

A. The Act must be read as a whole, and each of its provisions must be given effect. The majority below violated this principle, focusing on a single phrase in the Act's legislative declaration while all but ignoring the Act's substantive provisions. Considered in its entirety, the Act requires the Commission to balance a number of different policy goals, including fostering the responsible and efficient development of Colorado's oil and gas resources. The Commission may not override this stated policy of the General Assembly in pursuing the Act's other objectives.

B. The one statutory phrase that captured the majority's attention confirms, rather than rebuts, the Commission's balanced regulatory approach. According to common usage, that phrase—"in a manner consistent with"—requires that the development of oil and gas resources be "harmonized" with, and "coexist" with, the Act's other objectives, including environmental protection. This is precisely what the Commission's existing rules accomplish.

C. The phrase "in a manner consistent with" must also be read in context. It appears in the Act's legislative declaration, not its substantive provisions. Thus, while the phrase may be used to understand the Act's overall policy goals, and to help resolve statutory ambiguity, it may not be read to supersede the many provisions of the Act that explain precisely how the Commission must pursue its regulatory mission.

II. Even assuming the Act is ambiguous, the Commission reasonably applied it here. The Commission's longstanding interpretation of the Act to require regulatory balancing has been

formalized through a series of rulemakings. That interpretation is therefore entitled to substantial deference.

The relevant legislative history confirms the Commission's formal interpretation of the Act. In 2007, when the General Assembly last revisited the Commission's authority to pursue environmental protection, testimony by a legislative sponsor made clear that the goal of the Act is to create a "balanced" regulatory structure that pursues the benefits of oil and gas production while at the same time considering other important values such as environmental protection.

Case law from the court of appeals and this Court likewise confirms the Commission's interpretation of the Act, explaining that the Commission must consider various "factors" in its regulatory activities, while pursuing the State's interest in the development of oil and gas resources.

III. Finally, the Commission's Order was based on reasons independent of the proper interpretation of the Act, and the Court may affirm the Order on those reasons alone.

First, the Request was based on the public trust doctrine. But that doctrine has been rejected in Colorado and therefore cannot form the basis for a Commission rulemaking.

Second, the nearly 1,200-page administrative record demonstrates that the environmental concerns raised in the Request are being addressed by a coordinated, cross-agency effort, and that the Commission is diligently pursing its regulatory mission. Denying the Request was therefore well within the Commission's discretion.

STANDARD OF REVIEW AND ISSUE PRESERVATION

This is an appeal of final agency action under the Administrative Procedure Act. Whether the Commission properly interpreted the Act, and whether it abused its discretion in declining to grant the Request based on the administrative record, has been preserved. *See, e.g.*, State Ans. Br. at 11–35, No. 2016 CA 564 (filed Sept. 29, 2016).

The standard of review is de novo, but judicial review of the Commission's Order is "limited." *Rocky Mountain Retail v. City of*

Northglenn, 2017 CO 33, ¶ 29. The Order must be upheld unless it is, for example, arbitrary, an abuse of discretion, or legally erroneous. *Id.* (quoting § 24-4-106(7), C.R.S.). In this context, "review [of] the proper construction of statutes [is] de novo" but the Court "accord[s] deference to the agency's interpretation of its statute." *Lobato v. Indus. Claim Appeals Office*, 105 P.3d 220, 223 (Colo. 2005).

Additionally, because this case arises from the denial of a rulemaking request, rather than a rulemaking proceeding, judicial review is "extremely limited and highly deferential." *Massachusetts v. U.S. Envtl. Prot. Agency*, 549 U.S. 497, 527–28 (2007); *see also Martinez*, ¶ 33; *WildEarth Guardians v. U.S. Envtl. Prot. Agency*, 751 F.3d 649, 653 (D.C. Cir. 2014) ("[R]eview of an agency's denial of a petition for rulemaking is very narrow ….").

ARGUMENT

I. The unambiguous meaning of the Act requires the Commission to pursue balanced regulation of oil and gas operations.

Respondent's Request—and the "immediate and extraordinary action" it urged the Commission to take—sought to drastically change the regulatory framework governing oil and gas activities in the State of Colorado. *See, e.g.*, App. H at 4 (describing the Request as "revolutionary"). The majority below nonetheless determined that the Request fell within the Commission's statutory authority, based on what the majority described as the "clear and unambiguous" language of the Act. *Martinez*, ¶ 19. The Commission agrees that the Act is unambiguous. But the Court of Appeals majority arrived at its construction of the Act through fundamental errors of statutory interpretation.

First, the majority did not consider the Act as a whole. It relied on a single phrase in the Act's legislative declaration—the phrase "in a manner consistent with"—and largely ignored the Act's substantive provisions. Interpreted properly and read in its entirety, the Act

forecloses the Commission from promulgating rules based on the Request.

Second, the majority misinterpreted the phrase "in a manner consistent with," which, based on common usage, does not prohibit the kind of balancing inquiry the Commission has long undertaken. To the contrary, the phrase supports the Commission's balanced regulatory approach.

Finally, the majority failed to accord proper interpretive treatment to the legislative declaration. While the legislative declaration sheds light on the General Assembly's overall policy goals and can help resolve textual ambiguities, it cannot override the Act's substantive provisions.

A. Read as a whole, the Act requires a balanced regulatory approach and rejects the approach urged by the Request.

Statutory interpretation requires a court to "giv[e] consistent, harmonious, and sensible effect to *all* of the statute's parts." *St. Vrain Valley Sch. Dist. v. ARL*, 2014 CO 33, ¶ 10 (emphasis added). The

majority opinion below did not heed this principle. It focused on what it considered to be the Act's "key phrase"—"in manner consistent with"—which is found in Section 34-60-102(1)(a)(I), a portion of the Act's legislative declaration. *Martinez*, ¶ 19. To the majority, "the proper interpretation of that phrase" was "critical" to its holding. *Id.* at ¶ 21.

By focusing narrowly on this one phrase in one portion of the Act's legislative declaration, and reading that "phrase[ ] in isolation," *Lewis v. Taylor,* 2016 CO 48, ¶ 20, the majority failed to develop an accurate "picture" of the General Assembly's intent. *Bd. of Cty. Comm'rs v. Costilla Cty. Conservancy Dist.*, 88 P.3d 1188, 1193 (Colo. 2004). "Read … in context and in a manner that gives effect to the statute as a whole," *Lewis*, ¶ 20, the Act's language supports the Commission's understanding that the General Assembly intended a "balancing act between the development of the oil and gas resources and the protection of public health, safety, and welfare, including the environment and wildlife resources." App. F at 3.

The legislative declaration itself sets forth numerous different policy concerns. According to one provision within that declaration, it is in the public interest to "foster the responsible, balanced development, production, and utilization" of oil and gas resources "in a manner consistent with the protection of public health, safety, and welfare, including protection of the environment and wildlife resources." § 34-60-102(1)(a)(I), C.R.S. In parallel provisions, the General Assembly declared that it is equally in the public interest to "protect … against waste in the production and utilization of oil and gas" and to "[s]afeguard, protect, and enforce the coequal and correlative rights of owners and producers … [so they] may obtain a just and equitable share of production." § 34-60-102(1)(a)(II)–(III), C.R.S. More generally, the declaration states that the "intent and purpose of [the Act is] to permit each oil and gas pool in Colorado to produce up to its maximum efficient rate of production," while taking into account the other policy goals identified above. § 34-60-102(1)(b), C.R.S.

The substantive provisions of the Act echo this range of policy concerns, making clear that although production, development, and utilization of oil and gas resources is not the only public policy goal, it remains a primary one.

A key substantive provision is Section 34-60-106(2)(d),[7] where the General Assembly codified "the actual authority of the Commission to regulate oil and gas." *Martinez*, ¶ 42 (Booras, J., dissenting). This authorization contains two pertinent limiting phrases. First, the authority of the Commission to impose regulations protecting the environment, wildlife, and public health, safety, and welfare is confined to "*significant adverse* environmental impacts," not "any" impact. § 34-60-106(2)(d), C.R.S. (emphasis added). Second, the provision mandates that the Commission "tak[e] into consideration cost-effectiveness and technical feasibility" in its regulations. *Id*. If the majority were correct that one phrase in the legislative declaration of the Act entirely foreclosed a regulatory "balancing test," *Martinez*, ¶ 30, "[t]here would

[7] The full text of that provision is set forth in Appendix A.

be no reason [for the Commission] to consider cost-effectiveness and technical feasibility" in promulgating environmental regulations. *Id.* at ¶ 43 (Booras, J., dissenting).

Other substantive provisions of the Act likewise make clear that the General Assembly intended for the Commission to simultaneously pursue a number of different policy goals:

- **Definition of "correlative rights"**: "each owner and producer in a common pool … *shall have an equal opportunity to obtain* and produce his *just and equitable share of … oil and gas*." § 34-60-103(4), C.R.S. (emphasis added).

- **Definition of "waste"**: waste includes regulating or operating well sites "in a manner which causes or tends to cause reduction in *quantity of oil or gas ultimately recoverable …* under *prudent and proper operations*." § 34-60-103(13)(b), C.R.S. (emphasis added).

- **Directive to prevent waste**: the Commission "shall" regulate gas production to "protect *the reasonable use of* [an oil pool's] energy *for oil production*." § 34-60-117(3), C.R.S. (emphasis added).

- **Cooperative agreements**: the Commission "shall make an order" to enable cooperative development if "[s]uch operation is reasonably necessary to *increase the ultimate recovery of oil or gas*." § 34-60-118(3)(a), C.R.S. (emphasis added).

- **Prorating production**: the Commission "*shall never*" order proration of production "by requiring restriction of production

… to an amount *less than the well or pool can produce without waste*." § 34-60-119, C.R.S. (emphasis added).

- **Wildlife stewardship**: practices to conserve wildlife resources must be "reasonable" and "reasonably practicable," and must "[t]ake into consideration cost-effectiveness and technical feasibility." §§ 34-60-103(5.5), 128(3)(c), C.R.S.

As this Court has observed, the Act's provisions codify a state interest "in the efficient and responsible development of oil and gas resources." *Longmont*, ¶ 53; *Fort Collins*, ¶ 29. Attempts to halt oil and gas production—even based on environmental or public health and safety concerns—"materially impede[ ] the effectuation of" this interest. *Fort Collins*, ¶ 30. Respondents' Request thus contravened the overall framework of the Act, as well as various specific requirements found in the Act's substantive provisions. For example:

- The Request sought "promulgation of a rule to suspend the issuance of permits that allow hydraulic fracturing" or to more generally halt *all* drilling, App. G at 3, 47, which *Longmont* and *Fort Collins* held would contravene the State's interest in the development of oil and gas resources.

- The Request was explicitly based on the public trust doctrine, App. G at 40–41, 47, 49, which has been rejected in Colorado and is found nowhere in the Act.

- The Request sought to require the Commission to consider not just "significant adverse environmental impacts," but "cumulative" impacts from the entire fossil-fuel supply chain, including "distribution and combustion." *Id.* at 47; *see also id.* at 32–33. This is contrary to specific limitations found in the Act. § 34-60-106(2)(d), C.R.S. (authorizing the Commission to regulate to prevent and mitigate "significant adverse environmental impacts"); § 34-60-103(6.5), C.R.S. (defining "oil and gas operations" subject to Commission authority, but excluding combustion and distribution of fossil fuels).

- The Request sought to condition oil and gas development in Colorado on the opinion of an unnamed "independent, third-party organization," App. G at 47, although the General Assembly granted the Commission alone the authority to regulate oil and gas operations. § 34-60-106(d)(2), C.R.S.; § 34-60-105(1), C.R.S. ("unqualifiedly conferr[ing] upon the commission" the authority to regulate oil and gas operations).

The majority opinion below discussed none of these conflicts between the Request and the Act because it focused entirely on a single phrase in the Act's legislative declaration and declined to analyze the Act in its entirety. This violated the basic principle that "particular statutory language" must be examined "in the context of the statute as a whole" to "give effect to the intent of the General Assembly." *People v. Graves*, 2016 CO 15, ¶ 27. When this principle is honored, it is clear the Act not only supports but compels the Commission's conclusion that

"[t]he relief sought in the [Request] is beyond the Commission's authority." App. H at 2.

B. The Commission's balanced regulatory approach correctly implements the phrase "in a manner consistent with" in Section 34-60-102(1)(a)(I).

The plain meaning of the phrase "in a manner consistent with" does not, as the majority below concluded, foreclose "a balancing test." *Martinez*, ¶ 30. The opposite is true.

Specifically, the word "manner" is commonly defined as "the mode or method in which something *is done or happens*." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE UNABRIDGED ("WEBSTER'S") 1376 (emphasis added); *see* § 2-4-101, C.R.S. (requiring statutes to be "construed according to the rules of … common usage"). Meanwhile, "consistent" means "marked by harmony" and "coexisting and showing no noteworthy opposing, conflicting, inharmonious, or contradictory qualities or trends." WEBSTER'S 484. Applied here, "in a manner consistent with protection of … the environment" therefore means that (1) "the method in which [oil and

gas production] [will be] done or [will] happen[ ]" (2) must be "harmonized" with and must "coexist" with protection of the environment. In other words, a balancing process must occur. As the dissent below explained, "[c]ontrary to the majority's supposition, these definitions signify a balancing process." *Martinez*, ¶ 40 (Booras, J., dissenting).

In the majority's view, however, the phrase "in a manner consistent with" means something else entirely: "subject to." *Martinez*, ¶¶ 22–23. But the Act uses that very phrase—"subject to"—elsewhere in the legislative declaration, where it explains that the public interest requires "the prevention of waste" and "enforcement and protection of the coequal and correlative rights of … owners and producers." § 34-60-102(1)(b), C.R.S. The majority's interpretation of "in a manner consistent with" would thus rewrite that portion of the legislative declaration 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 ….

§ 34-60-102(1)(b), C.R.S. (emphasis added). Yet it is "not [the courts'] province to rewrite [a] statute." *Dove Valley Bus. Park Assocs. v. Bd. of Cty. Comm'rs of Arapahoe Cty.*, 945 P.2d 395, 403 (Colo. 1997). And here, the Court of Appeals' revision of the statute violates a "basic principle[ ]" of statutory interpretation: courts "must assume that the General Assembly ma[kes] intentional distinctions in the language [it uses in] related provisions." *Hall v. Walter*, 969 P.2d 224, 231 (Colo. 1998).[8]

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[8] The majority opinion below cited various court decisions to support the premise that "in a manner consistent with" means "subject to." *Martinez,* ¶¶ 22, 23. But neither the meaning nor the application of the phrase "in a manner consistent with" was at issue in those cases. *E.g.*, *Droste v. Bd. of Cty. Comm'rs*, 159 P.3d 601 (Colo. 2007) (commenting, in dicta, on the meaning of a statute that included the phrase). Nor were any of the cases decided under the Act. Indeed, in another case decided under the Act, this Court suggested that the phrase "in a

C. One isolated phrase in a legislative declaration cannot override the remainder of a statute's provisions.

In addition to focusing on one statutory phrase to the exclusion of the Act as a whole, and misconstruing that phrase, the majority below also failed to consider the location of the phrase in the overall statutory framework. Here, the "key phrase" the majority focused on is located in the legislative declaration, not the Act's substantive provisions. *Martinez*, ¶ 19.

Legislative declarations announce what legislation is "about," "indicat[ing] the problem the General Assembly is trying to address." *Lester v. Career Bldg. Acad.*, 2014 COA 88, ¶ 27 (quoting Colo. Office of Legis. Legal Servs., *Colorado Legislative Drafting Manual* 2-40 (Feb. 2014)). They are not the endpoint of statutory interpretation, nor do

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manner consistent with" indicates harmonization. *Voss v. Lunvall Bros., Inc.*, 830 P.2d 1061, 1069 (Colo. 1992) (explaining that local regulation of oil and gas activities can occur if the local regulation "can *be harmonized with* the development and production of oil and gas *in a manner consistent with* the stated goals of the Oil and Gas Conservation Act" (emphasis added)).

they typically set forth specific duties or powers. *See id.* at ¶ 27. Consequently, they cannot override a statute's substantive provisions. They are instead relevant primarily "if a statute is ambiguous." § 2-4-203(1)(g), C.R.S; *see also People v. Enea*, 665 P.2d 1026, 1029 (Colo. 1983) (explaining that "a statement of legislative purpose … does not alter the elements of the crime").

This is particularly true when a question of statutory interpretation concerns the powers of an administrative agency. "[S]tate agencies are creatures of statute and have *only those powers expressly conferred* by the legislature." *Pawnee Well Users, Inc. v. Wolfe*, 2013 CO 67, ¶ 19 (emphasis added) (internal quotation marks omitted).

Here, the Act's legislative declaration states that it is "in the public interest" to pursue "protection of the environment." § 34-60-102(1)(a)(I), C.R.S. But that is not the only policy declared to be in the public interest. *See* Part I.A. of the Argument, *above*. "[G]iven the multiple goals expressed in the Act's legislative declaration," the one "individual sentence" the majority relied upon below cannot "sufficiently

demonstrate[e] … a legislative intent to override established principles of Colorado statutory interpretation and the structure of the [statute]." *Planned Parenthood of Rocky Mountains Servs. Corp. v. Owens*, 287 F.3d 910, 926 n.17 (10th Cir. 2002).

The language of the legislative declaration makes clear that the Act's substantive provisions must be consulted to understand the scope of the Commission's powers and duties. The relevant portion of the declaration uses the phrase "it is declared to be in the public interest" rather than duty-creating or rights-creating language such as "the Commission shall" or "the Commission has authority to." *See* § 34-60-106(2), C.R.S.; *Huber v. Colorado Mining Ass'n*, 264 P.3d 884, 893 (Colo. 2011) (explaining that "shall" indicates a mandatory duty). Indeed, the relevant portions of the legislative declaration do not even mention the Commission. § 34-60-102(1)(a)–(b), C.R.S.

Thus, the Commission must rely on the substantive provisions of the Act to explain precisely *how* it is to pursue the policy of environmental protection set forth in the legislative declaration. For

example, the 2007 amendments pursued the goal of environmental protection by reconstituting the Commission to include state environmental regulators as voting members and at least one member with "substantial experience in environmental or wildlife protection." § 34-60-104(2)(a)(I), C.R.S. The Commission now must also consult with both CDPHE and the Parks and Wildlife Commission during its decision-making. §§ 34-60-106(11)(a)(II), -128(3)(a), C.R.S. And, as has been true since 1994, the Commission is authorized to promulgate rules that address environmental concerns, "taking into consideration cost-effectiveness and technical feasibility," § 34-60-106(2)(d), C.R.S., which the Commission has done repeatedly over the past ten years. A.R. 100–02.

None of the Act's provisions, however, state or suggest that the Commission has authority to pursue some policies to the exclusion of others, or to halt oil and gas production in Colorado, as Respondents urge. *See Longmont*, ¶ 54; *Fort Collins*, ¶ 30. The majority, in coming to the contrary conclusion, relied on the Act's legislative declaration alone,

disregarding the remainder of the Act. This was contrary to basic principles of statutory interpretation.

II. The Commission reasonably applied the Act in accordance with its own longstanding practices, the Act's legislative history, and case law.

As explained above, the Act unambiguously supports the Commission's Order denying the Request and, more broadly, supports the Commission's understanding of its regulatory mission. But even assuming the Act is ambiguous, the Commission reasonably applied it to deny the Request. This is true for three reasons.

First, the Commission has interpreted and applied the Act through formal rulemaking over an extended period of time, consistently hewing to the balanced regulatory approach upon which the Order at issue here is based. *See* A.R. 100–02 (summarizing some of the Commission's rulemaking proceedings).

For example, during the 2008 rulemaking, the Commission "re-evaluate[d] its regulatory scheme" in light of the two 2007 bills that amended the Act. App. F at 2. After considering that legislation and the

Act as a whole, the Commission engaged in a massive public comment effort. *Id.* at 5. That effort included "twenty-two days of hearings" and testimony by hundreds of members of the public. *Id.* The Commission also entertained "more than thirty legal motions." *Id.* Ultimately, those proceedings led the Commission to codify its understanding that the Act requires regulatory balancing. *Id.* at 3. This interpretation was thoroughly considered and vetted and is entitled to substantial deference. *See Colorado Dep't of Revenue v. Woodmen of the World*, 919 P.2d 806, 817 (Colo. 1996) (deferring to a formal agency interpretation that was "reasonably supported by the agency's reasoning and the record").

Second, the Commission's interpretation of the Act to require regulatory balancing is supported by the Act's legislative history.

In 2007, the General Assembly revisited the regulatory mission of the Commission with the passage of House Bill 07-1341. That bill revised the legislative declaration, the portion of the Act the majority below relied upon to hold that the Act "was not intended to require that

a balancing test be applied." *Martinez*, ¶ 30. Testimony by one of the bill's sponsors directly refutes this conclusion and supports the Commission's reading of the Act. *See Hyland Hills Park & Recreation Dist. v. Denver & Rio Grande W. R. Co.*, 864 P.2d 569, 574 n.7 (Colo. 1993) ("Contemporaneous statements of individual legislators made on committee hearings are relevant as an indication of legislative intent.").

Testifying in the House Agricultural Committee, the sponsor explained that the bill "is responding to the concerns of the citizens" who "depend on the state of Colorado to regulate this industry in a manner that *balances* production with other important values." App. I at 3:23–4:2 (Tr., Mar. 14, 2007, *Hearing on H.B. 1341 Before the H. Agric. Comm.* (statement of Rep. Kathleen Curry)) (emphasis added). She also emphasized that development of oil and gas resources "clearly benefits the state of Colorado" and "can be done *hand in hand*" with the pursuit of other goals, such as environmental protection. *Id.* at 6:16–23 (emphasis added). "It does not have to be a zero-sum game," she explained, and House Bill 07-1341 created "a regulatory framework …

that will provide a mechanism for *considering these other impacts*, *both positive and negative*." *Id*. at 7:4–8 (emphasis added).

Before the full House of Representatives, the sponsor reiterated that the goal of House Bill 07-1341 was to implement a balanced approach to regulation:

> We are at the beginning of what promises to be a productive and profitable period of oil and gas development. … So this is the right time, members, to think about whether the regulatory structure is … *balanced*, whether we are able to consider other values *at the same time we consider development of the resource*.

App. J at 6:9–18 (Tr., Mar. 22, 2007, *Hearing on H.B. 1341 Before the House of Representatives* (statement of Rep. Kathleen Curry)) (emphasis added).

This testimony illustrates that when the General Assembly amended the Act to require the Commission to pursue environmental protection and other factors, it did not foreclose—but rather directed—the Commission to engage in regulatory balancing.

Third, case law supports the Commission's interpretation of the Act. In *Chase*, for example, the court recognized that protecting public health is one of the "various factors" that the Commission must consider in its decision-making. *Chase* ¶¶ 51–53 & n.16. *Chase* never suggested that the Commission may pursue some policies to the exclusion of others. *Id*. And in *Longmont* and *Fort Collins*, this Court confirmed that the State has a significant interest in the development of oil and gas resources, such that halting or banning oil and gas development would "substantially disrupt[ ]" the regulatory "status quo." *Fort Collins*, ¶ 34; *see also Longmont*, ¶¶ 53–54. These cases lend further support to the Commission's balanced regulatory approach and its conclusion that it lacked authority to pursue the Request.

III. Independent reasons, beyond the proper interpretation of the Act, support the Commission's denial of the Request.

While the decision below focused exclusively on the meaning of the Act, the Commission's decision to decline the Request was based on

reasons apart from statutory interpretation. Those reasons, in light of the extensive record, are independently sufficient to affirm the Order.

The Public Trust Doctrine. The legal foundation for the Request was the public trust doctrine, which was cited throughout the Request, including in the "statement of reasons," as well as in the proposed rule and the proposed statement of basis and purpose. App. G at 40–41, 47, 49. Additionally, Our Children's Trust—which "partner[ed]" with Respondents in this proceeding, *id.* at 45—submitted a lengthy memorandum to the Commission explaining the doctrine and the Commission's purported "legal obligations under [it]." A.R. 89–96.

The public trust doctrine, however, does not apply in Colorado. In *Longmont*, this Court could not locate "any applicable Colorado case law adopting the public trust doctrine in this state." *Longmont*, ¶ 62. The case law that does exist has rejected the doctrine. *Martinez*, 2011 WL 11552495, at *2; *see also People v. Emmert*, 597 P.2d 1025, 1027 (Colo. 1979) (rejecting the public trust doctrine as to non-navigable waterways); *cf. Sierra Club v. Block*, 622 F. Supp. 842, 866 (D. Colo.

1985) (explaining with respect to federal law that the legislature alone defines the scope of the public trust doctrine exclusively through statute).[9] Consequently, the Commission denied the Request because "the public trust doctrine does not provide a basis for the Commission to initiate the proposed rulemaking." App. H at 3.

An administrative agency, if it engages in rulemaking, must ensure that "[t]he proper statutory authority exists for the regulation." § 24-4-103(4)(b)(II), C.R.S. The Commission thus acted well within its substantial discretion to deny the Request in light of its explicit and extensive reliance on a legal doctrine that Colorado courts have rejected.

Pragmatic and Policy Considerations. Apart from purely legal considerations, the Commission also rested its Order on pragmatic and policy concerns. Specifically, the Order concluded that (1) the Commission itself, as well as "other state agencies," are "currently

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[9] Proposed constitutional amendments to codify the public trust doctrine in Colorado have failed. *See In re Title, Ballot Title & Submission Clause for 2015–2016 #63*, 2016 CO 34.

addressing many of the concerns raised in the [Request]"; (2) "[m]ost, if not all of the relief sought in the Petition related to air quality is within CDPHE's jurisdiction"; and (3) "other Commission priorities … must take precedence over the proposed rulemaking." App. H at 4. These reasons were an appropriate basis for the denial of the Request. An agency "has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities." *Flyers Rights Education Fund v. Fed. Aviation Admin.*, 864 F.3d 738, 743 (D.C. Cir. 2017) (internal citations and quotation marks omitted). As long as an agency is "diligently implementing" its statutory responsibilities, it may "prioritize [its] regulatory actions." *WildEarth Guardians*, 751 F.3d at 656.

Here, the extensive administrative record supports the Commission's denial of the Request based on the pragmatic and policy concerns set forth in the Order. As the district court held, the Commission denied the request "only after considering the inputs from stakeholders on both sides." CF, p. 576. The record included statements

from various state regulators that detailed the comprehensive, cross-agency efforts to address emissions and climate change in Colorado and explained that the air quality issues raised in the Request were more properly within the authority of CDPHE's Air Pollution Control Division. *Id.* at 575–76.

The record also disclosed that the Commission is "diligently implementing" the Act. *WildEarth Guardians*, 751 F.3d at 656. The memorandum from the Director summarized the Commission's major rulemaking activity and included as an attachment a seven-page table summarizing its "major rule changes" from 2006 through 2014. A.R. 110–16. The memorandum explained that the Commission would "continue to regulate the public health and environmental impacts from oil and gas development," *id.* at 100, and the Commission's rulemaking docket since denying the Request bears this out. Every year since 2014, the Commission has engaged in major rulemaking efforts, including those that:

- toughened penalties for violations of its rules, Commission Order 1R-123, *available at* https://bit.ly/2J4o2Wt*; see also* https://bit.ly/2uBhPhA;

- imposed new requirements on operators with facilities located in floodplains to prevent adverse environmental impacts during flood events, Commission Order 1R-124, *available at* https://bit.ly/2IkW1IL;

- increased participation of local governments in planning and siting oil and gas operations to address public health, safety, and environmental concerns, as a result of the Governor's Oil and Gas Task Force, Commission Order 1R-126, *available at* https://bit.ly/2E9UYsL; and

- expanded oversight of flowlines and related infrastructure to strengthen requirements for design, installation, maintenance, integrity testing, tracking, and abandonment, Commission Order 1R-128, *available at* https://bit.ly/2GLa5OE.

In light of this record, the Commission's denial of the Request based on pragmatic and policy concerns was not arbitrary or capricious. § 24-4-106(7), C.R.S. Under "the extremely limited and highly deferential standard that governs … review of an agency's denial of a rulemaking petition," *WildEarth Guardians*, 751 F.3d at 656, the Commission's Order should be affirmed.

CONCLUSION

The Court should vacate the decision of the Court of Appeals and affirm the Commission's Order.

Respectfully submitted on April 2, 2018.

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Certificate of Service

I certify that I served this **COLORADO OIL AND GAS CONSERVATION COMMISSION'S OPENING BRIEF** on all parties through ICCES on April 2, 2018, addressed as follows:

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