

<p>SUPREME COURT, STATE OF COLORADO</p> <p>Colorado State Judicial Building 2 East 14th Avenue, Suite 300 Denver, Colorado 80203</p>	
<p>Colorado Court of Appeals Case Number 16CA0564 Opinion by Judge Fox; Judge Vogt concurring; Judge Booras dissenting</p> <p>City and County of Denver District Court No. 14CV32637 Judgment by Judge J. Eric Elliff</p> <p>Petitioner/Appellee/Defendant: Colorado Oil and Gas Conservation Commission</p> <p>and</p> <p>Intervenors/Petitioners/Appellees American Petroleum Institute and Colorado Petroleum Association</p> <p>v.</p> <p>Respondents/Appellants: Xiuhtezcatl Martinez, Itzcuahтли Roske-Martinez, Sonora Brinkley, Aerielle Deering, Trinity Carter, and Emma Bray, minors appearing by and through their legal guardians Tamara Roske, Bindi Brinkley, Eleni Deering, Jasmine Jones, Robin Ruston, and Diana Bray.</p>	<p style="text-align: center;">▲ COURT USE ONLY ▲</p> <p style="text-align: center;">Case Number: 2017SC297</p>
<p>Attorney for <i>Amicus Curiae</i> Boulder County David Hughes, Deputy County Attorney, #24425 Katherine A. Burke, Assistant County Attorney, #35716 Catherine Ruhland, Assistant County Attorney, #42426 BOULDER COUNTY ATTORNEY P. O. Box 471, Boulder, CO 80306 Phone No.: 303-441-3190 Fax No.: 303-441-4794 Email: dhughes@bouldercounty.org kaburke@bouldercounty.org truhland@bouldercounty.org</p>	

Attorney for *Amicus Curiae* City of Boulder
Thomas A. Carr, #42170
City Attorney
P.O. Box 791
Boulder, CO 80306
Phone Number: (303) 441-3020
Fax Number: (303) 441-3859
E-mail: carrt@bouldercolorado.gov

Attorney for *Amicus Curiae* San Miguel County
Steven J. Zwick, #8556
P.O. Box 791
333 West Colorado Ave, 3rd Floor
Telluride, CO 81435
Phone Number: 970-728-3879
Fax Number: 970-728-3718
E-mail: stevez@sanmiguelcountyco.gov

Attorney for *Amicus Curiae* Gunnison County
David Baumgarten, #6050
County Attorney
Gunnison County
200 E. Virginia Avenue
Gunnison, Colorado 81230
Phone Number (970) 651-5300
Fax Number: (970) 641-7696
E-mail: DBaumgarten@gunnisoncounty.org

Attorney for *Amicus Curiae* NWCCOG
Torie Jarvis, #46848
Attorney for the Northwest Colorado
Council of Governments
P.O. Box 2308
Silverthorne, CO 80498
Phone Number: 970-596-5039
Fax Number: 970-468-1208
E-mail: qqwater@nwccog.org

Attorney for *Amicus Curiae* Town of Erie
Mark R. Shapiro, #6953
Town Attorney
1650 – 38th Street, Suite 103
Boulder, CO 80301
Phone Number: (303) 443-3234
E-mail: mark@mshapirolaw.com

Attorney for *Amicus Curiae* City of Lafayette
David S. Williamson, #8530
WILLIAMSON & HAYASHI, LLC
1650 38th Street, Ste. 103W
Boulder, CO 80301
Phone Number: (303) 443-3100
E-mail: dwilliamson@wandhlaw.com

[CORRECTED] AMICUS CURIAE BRIEF OF BOULDER COUNTY, SAN MIGUEL COUNTY, CITY OF BOULDER, GUNNISON COUNTY, NWCCOG, CITY OF LAFAYETTE, AND TOWN OF ERIE IN SUPPORT OF THE RESPONDENTS/APPELLANTS

Certificate of Compliance

I hereby certify that this brief complies with C.A.R. 29 and C.A.R. 32, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that the amicus brief complies with the applicable word limit set forth in C.A.R. 29(d) and contains 1,841 words. The amicus brief complies with the content and form requirements set forth in C.A.R. 29(c). I acknowledge that my brief may be stricken if it fails to comply with any of the requirements of C.A.R. 29 and 32.

/s/ Katherine A. Burke

TABLE OF CONTENTS

	Page
INTERESTS OF THE AMICUS CURIAE PARTIES.....	1
STATEMENT OF THE CASE.....	2
ARGUMENT	3
<i>I. A requirement that government regulations protect public health and safety is not a change in Colorado law.....</i>	<i>3</i>
<i>II. The decision below is consistent with prior decisions of this Court and other divisions of the court of appeals.</i>	<i>5</i>
CONCLUSION	9

TABLE OF AUTHORITIES

Cases	Page(s)
<i>Chase v. Colo. Oil and Gas Conservation Comm’n</i> , 284 P.3d 161 (Colo. App. 2012)	7, 8, 9
<i>Fort Collins v. Colo. Oil and Gas Ass’n</i> , 369 P.3d 586 (Colo. 2016).....	1, 7
<i>Gerrity Oil & Gas Corp. v. Magness</i> , 946 P.2d 913 (Colo. 1997).....	6, 7, 9
<i>Home Bldg. & Loan Ass’n v. Blaisdell</i> , 290 U.S. 398 (1934)	5
<i>Longmont v. Colo. Oil and Gas Ass’n</i> , 369 P.3d 573 (Colo. 2016)	5, 6, 9
<i>Love v. Bell</i> , 465 P.2d 118 (Colo. 1970).....	4
<i>Martinez v. Colo. Oil and Gas Conservation Commn.</i> , 2017 COA 37	3, 6
<i>Town of Dillon v. Yacht Club Condominiums Homeowners Ass’n</i> , 325 P.3d 1032 (Colo. 2014)	4
<i>Town of Holyoke v. Smith</i> , 226 P. 158 (Colo. 1924)	4
<i>W. Colo. Power Co. v. Pub. Utils. Comm’n</i> , 411 P.2d 785 (Colo. 1966)	4
 Statutes	
§ 29-20-104(1)(d) and (h), C.R.S.....	1
§ 30-11-101(2), C.R.S.....	1
§ 31-15-103, C.R.S.	2
§ 31-15-401(b), C.R.S.....	2

§ 31-23-301, C.R.S.2
§ 34-60-102, C.R.S. (1995).....7
§§ 34-60-101 to -130, C.R.S. (2016)2

Other Authorities

2007 Colo. Legis. Serv. Ch. 312 (H.B. 07 –1298)(WEST).....7

Rules

C.A.R. 49.....9

INTERESTS OF THE AMICUS CURIAE PARTIES

The Board of County Commissioners of Boulder County, Colorado (“Boulder County”), the Board of County Commissioners of Gunnison County, Colorado (“Gunnison County”), and the Board of County Commissioners of San Miguel County, Colorado (“San Miguel County”) are the governing boards of Colorado counties, political subdivisions of the State of Colorado. The Counties, as local government entities, are charged with protecting the public health, safety, and welfare of their residents. See § 30-11-101(2), C.R.S. *see also* § 29-20-104(1)(d) and (h), C.R.S. Northwest Colorado Council of Governments (“NWCCOG”) is a voluntary association of county and municipal governments that serves 26 member jurisdictions in a six-county region of northwest Colorado. The NWCCOG region and the Counties are areas in which significant ongoing oil and gas leasing and associated drilling and production related activities have occurred. Because oil and gas development is a mixed issue of state and local concern, *Fort Collins v. Colo. Oil and Gas Ass’n*, 369 P.3d 586, 591 (Colo. 2016), the Counties’ land use and oil and gas permitting functions are affected by the manner in which the Colorado Oil and Gas Commission (“COGCC”) carries out its statutory rule-making and permitting duties.

The cities of Boulder and Lafayette are Colorado home-rule cities with a total population of 125,000. The cities' residents have expressed strong concern about the public health effects of oil and gas exploration. Accordingly, the cities are interested in this case because they want to ensure that COGCC properly fulfills its statutory duties in Colorado's mixed state and local regulation of oil and gas development.

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

STATEMENT OF THE CASE

Based on clear and unambiguous language in the Colorado Oil and Gas Conservation Act, §§ 34-60-101 to -130, C.R.S. (2016) (the "Act"), the court of appeals held that the COGCC has the authority to consider a rule proposed for the purpose promoting public health and protecting the environment. This holding did not change existing law; it simply echoed the well-settled legal principle that a

primary function of state government is to protect public health, safety, and welfare. The court of appeals “decision [did] not address the merits of whether the Commission should adopt Petitioners’ proposed rule.” *Martinez v. Colo. Oil and Gas Conservation Comm’n*, 2017 COA 37, ¶ 32. Instead, the court of appeals determined the COGCC should not reject the proposed rule based only on a question of statutory authority. *Id.* Accordingly, on remand, the COGCC must make a determination regarding the public health and safety impact of the proposed rule. As shown below, this Court should deny the petitions for certiorari because the appellate ruling is well-reasoned and neither changes existing law nor conflicts with prior decisions of other appellate divisions or this Court.

ARGUMENT

- I. *A requirement that government regulations protect public health and safety is not a change in Colorado law.*

The Petitioners describe the decision below as a radical and sweeping change in the law that will have drastic impacts. The Intervenors call the decision “novel.” Lost in this rhetoric is the fact that lawmaking for the purpose of protecting the public health, safety, and welfare is the foundation of the police power.

When it adopted the Act, including its subsequent amendments, the General Assembly exercised its police power. *See W. Colo. Power Co. v. Pub. Utils. Comm'n*, 411 P.2d 785, 794 (Colo. 1966) (“The power to regulate entities affected with a public interest is a function of the police power of the state.”); *see also Town of Dillon v. Yacht Club Condominiums Homeowners Ass’n*, 325 P.3d 1032, 1041-42 (Colo. 2014) (police power includes “the power to anticipate and prevent dangers”). “[T]he police power of the state, which is exercised in the public interest . . . is an attribute of sovereignty, governmental in character, but its use is restricted to matters which relate to the health, safety, or general welfare of the people.” *Town of Holyoke v. Smith*, 226 P. 158, 161 (Colo. 1924). Accordingly, for a statute to fall within the police power of the state, “the provisions of the statute must be reasonably related to the public health, safety, and welfare.” *Love v. Bell*, 465 P.2d 118, 121 (Colo. 1970).

While the decision below might ultimately result in changes to COGCC rules or procedures that inadequately protect public health and safety, it will not result in a change in fundamentals of law related to the legislative process and rulemaking. The parade of horrors presented by Petitioners COGCC and API/CPA is baseless. The state and state agencies have long been on notice that they must exercise their power for the benefit of public health and safety. In fact,

Governor Hickenlooper said in a May 18, 2017 press release, that “we believe the court of appeals decision [in the instant case] does not represent a significant departure from the commission's current approach.” If the COGCC adopted rules and regulations that benefited private industry without protecting public health, safety, and welfare, it did so at its own risk. “The Legislature cannot ‘bargain away the public health or the public morals.’” *Home Bldg. & Loan Ass’n v. Blaisdell*, 290 U.S. 398, 436 (1934). This Court need not weigh in on a case that brings the legislative actions of a state agency within the legal mainstream.

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

Contrary to the Petitioners’ assertions, the court of appeals decision does not conflict with decisions of this Court or the court of appeals. In *Longmont v. Colo. Oil and Gas Ass’n*, 369 P.3d 573 (Colo. 2016), the Court undertook a preemption analysis with the underlying assumption that the COGCC enacted valid rules within its authority under the Act. In particular, the Court observed that the COGCC enacted fracking rules “to prevent waste and to conserve oil and gas in the State of Colorado *while protecting* public health, safety, and welfare.” *Longmont*, 369 P.3d at 584 (emphasis added). The Court did not decide whether the COGCC’s

fracking rules comported with the Act by actually protecting public health, safety, and welfare. In fact, the Court specifically declined to address the issue:

[T]he virtues and vices of fracking are hotly contested. Proponents tout the economic advantages of extracting previously inaccessible oil, gas, and other hydrocarbons, while opponents warn of the health risks and damage to the environment. We fully respect these competing views . . . This case, however, does not require us to weigh in on these differences of opinion, much less to try to resolve them. Rather, we must confront a far narrower . . . legal question. . . .

Id. at 576-77. Because this Court did not examine the underlying validity of the COGCC’s fracking rules or address the public safety issues related to fracking in *Longmont*, the *Martinez* ruling raises no inconsistencies with that decision.

Like *Longmont*, *Gerrity Oil & Gas Corp. v. Magness*, 946 P.2d 913 (Colo. 1997), addresses an issue unrelated to the decision below and does not contradict the court of appeals decision. The Court in *Gerrity* determined that the Act did not give rise to a private cause of action. In discussing the Act, the Court stated “[w]e recognize that the purposes of the Act are to encourage the production of oil and gas in a manner that protects public health and safety and prevents waste. *See* § 34-

60-102(1), 14 C.R.S. (1995).” *Gerrity*, 946 P.2d at 925.¹ The Petitioners argue that by using the plural “purposes” rather than the singular “purpose” the Court interpreted section 34-60-102, C.R.S. (1995), to mean that oil and gas production and protecting public health and safety were separate purposes. However, the *Gerrity* Court never specified which “purposes” it was referring to. Moreover, the Court was summarizing the Act—not interpreting it. At best, the language is *dicta*.

More recently, the Court characterized oil and gas production as a single goal. “This...materially impedes the state's *goal* of permitting each oil and gas pool in Colorado to produce up to its maximum efficient rate of production, subject to the prevention of waste and consistent with the protection of public health, safety, and welfare. *See* § 34–60–102(1)(b), C.R.S.” *Fort Collins*, 369 P.3d 586, 593 (Colo. 2016) (emphasis added). Thus, even if *Gerrity* raised questions by using the word “purposes,” *Fort Collins* subsequently clarified the issue by referring to production as a single “goal” that must be pursued consistently with the protection of public health, safety, and welfare.

Finally, *Chase v. Colo. Oil and Gas Conservation Comm’n*, 284 P.3d 161 (Colo. App. 2012), supports, rather than conflicts with, the decision below. A

¹ The Court in *Gerrity* referenced a prior version of the statute at issue. The General Assembly amended section 34-60-102, C.R.S. in 2007. *See* 2007 Colo. Legis. Serv. Ch. 312 (H.B. 07 –1298)(WEST).

division of the court of appeals in *Chase* recognized that “[t]he 1994 amendments to the Conservation Act enlarged the COGCC’s focus . . . to include consideration of environmental impact and public health, safety, and welfare.” 284 P.3d at 166. The *Chase* division characterized protecting public health, safety, and welfare as an “expanded charge” to the COGCC. *Id.* Further, the court did not describe the COGCC’s rules as achieving balance between fostering development and protecting public health and safety, but rather stated “the COGCC’s rules protect the health, safety, and welfare of the general public during the drilling, completion, and operation of oil and gas wells and producing facilities.” *Id.*; *and see Id.* at n.16.

The Petitioners argue that *Chase* concludes that public health and safety is merely a “factor” under the Act that the COGCC must consider. Petr’s Pet. for Writ of Cert. 3. However, the issue on appeal in *Chase* was whether the COGCC could consider “factors other than occupancy in determining whether land should be categorized as a Designated Outdoor Activity Area, or DOAA. *Chase*, 284 P.3d at 170. The division concluded that the COGCC had the power to consider public safety in making a DOAA determination. *Id.* However, it did not consider the opposite question—whether the COGCC could ignore public health and safety in reaching its decision. Thus, nothing in *Chase* conflicts with the decision below.

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

CONCLUSION

The court of appeals' opinion in this case does not raise any of the primary reasons this Court generally exercises its certiorari review. *See* C.A.R. 49. For reasons stated above, the *Amici* parties respectfully assert that the Court should deny the Petitions for Certiorari and allow the court of appeals decision to stand.

Respectfully submitted this 6th day of July 2017.

BOULDER COUNTY ATTORNEY

/s/ Katherine A. Burke

Katherine A. Burke, #35716

David Hughes, #24425

Catherine Ruhland, #42426

BOULDER COUNTY ATTORNEY

P. O. Box 471, Boulder, CO 80306

Phone No.: 303-441-3190

Fax No.: 303-441-4794

dhughes@bouldercounty.org

kaburke@bouldercounty.org

truhland@bouldercounty.org

*Attorneys for Amicus Curiae Boulder
County*

/s/ Thomas A. Carr
Thomas A. Carr, #42170
City Attorney
P.O. Box 791
Boulder, CO 80306
Phone Number: (303) 441-3020
Fax Number: (303) 441-3859
carrt@bouldercolorado.gov

Attorney for Amicus Curiae City of Boulder

/s/ David Baumgarten
David Baumgarten, #6050
County Attorney
Gunnison County
200 E. Virginia Avenue
Gunnison, Colorado 81230
Phone Number (970) 651-5300
Fax Number: (970) 641-7696
DBaumgarten@gunnisoncounty.org

*Attorney for Amicus Curiae Gunnison
County*

/s/ Torie Jarvis
Torie Jarvis, #46848
Attorney for the Northwest Colorado
Council of Governments
P.O. Box 2308
Silverthorne, CO 80498
Phone Number: 970-596-5039
Fax Number: 970-468-1208
qqwater@nwccog.org

Attorney for Amicus Curiae NWCCOG

/s/ Mark R. Shapiro

Mark R. Shapiro, #6953

Town Attorney

1650 – 38th Street, Suite 103

Boulder, CO 80301

Phone Number: (303) 443-3234

mark@mshapirolaw.com

Attorney for Amicus Curiae Town of Erie

/s/ David S. Williamson

David S. Williamson, #8530

WILLIAMSON & HAYASHI, LLC

1650 38th Street, Ste. 103W

Boulder, CO 80301

Tel: 303-443-3100

dwilliamson@wandhlaw.com

Attorney for Amicus Curiae Town of Erie

/s/ Steven J. Zwick

Steven J. Zwick, #8556

P.O. Box 791

333 West Colorado Ave, 3rd Floor

Telluride, CO 81435

Tel: 970-728-3879

E-mail: stevez@sanmiguelcountyco.gov

*Attorney for Amicus Curiae San Miguel
County*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 6th day of July 2017, the foregoing [CORRECTED] **AMICUS CURIAE BRIEF OF BOULDER COUNTY, SAN MIGUEL COUNTY, CITY OF BOULDER, GUNNISON COUNTY, NWCCOG, CITY OF LAFAYETTE, AND TOWN OF ERIE IN SUPPORT OF THE RESPONDENTS/APPELLANTS** was served via Colorado Courts E-Filing on all counsel who have consented to electronic service in this case.

/s/ Cathy Peterson
Cathy Peterson