COLORADO SUPREME COURT 2 East 14th Ave. Denver, CO 80203	
On Certiorari to the Colorado Court of Appeals, Case No. 2016CA564 District Court, Denver County 2014CV32637	
Petitioners: Colorado Oil and Gas Conservation Commission, Colorado Petroleum Association, and American Petroleum Institute v. **Respondent**: Xiuhtezcatl Martinez, Itzcuauhtli Roske-Martinez, Sonora Binkley, Aerielle Deering, Trinity Carter, 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.	
Attorney for *Amicus Curiae* Colorado Alliance of Mineral and Royalty Owners Cynthia L. Bargell, Atty Reg. 24690 Visani Bargell LLC PO Box 2377 Dillon, CO 80435-2377 Telephone: 970-262-9055 Facsimile: 303-379-7271 Cindy@VisaniBargell.com	CASE NO: 2017 SC 297

AMICUS CURIAE BRIEF OF THE COLORADO ALLIANCE MINERAL AND ROYALTY OWNERS IN SUPPORT OF THE PETITIONER COLORADO OIL AND GAS CONSERVATION COMMISSION AND PETITIONER/INTERVENOR AMERICAN PETROLEUM INSTITUTE AND THE COLORADO PETROLEUM ASSOCIATION

CERTIFICATE OF COMPLIANCE

I hereby certify that this Brief of *Amicus Curiae* Colorado Alliance of Mineral and Royalty Owners complies with all requirements of C.A.R. 28, 29, and 32 including all formatting requirements set forth in these rules.

It contains 3943 words.
☐ It does not exceed 6 pages.

I acknowledge that this Brief may be stricken if it fails to comply with any of the requirements of C.A.R. 28, 29 and 32.

/s/Cynthia L. Bargell
Cynthia L. Bargell

Attorney for Colorado Alliance of Mineral and Royalty Owners ("CAMRO")

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Pursuant to C.A.R. 29, the Colorado Alliance of Mineral and Royalty Owners, ("CAMRO") presents its *amicus curiae* brief in support of the Petitioners Colorado Oil and Gas Conservation Commission ("COGCC") and Petitioner-Intervenors American Petroleum Institute ("API") and Colorado Petroleum Association ("CPA").

I. INTEREST OF *AMICUS CURIAE* COLORADO ALLIANCE OF MINERAL AND ROYALTY OWNERS.

The Colorado Alliance of Mineral and Royalty Owners ("CAMRO") is a Colorado not for profit organization dedicated to representing the interests of mineral and royalty owners in our State. CAMRO engages in education, advocacy, and assistance to mineral interest owners, to governmental bodies, and to the public. CAMRO is the leading organization for mineral and royalty owners in Colorado, with over one hundred fifty families as members, representing over one-third of the producing wells in Colorado. CAMRO members comprise a unique segment of the population who own the real property interest in the mineral estate directly impacted by the oil and gas regulation. Members include individuals from all walks of life, from individual farmers and ranchers to family trusts and small operators. While the CAMRO name is relatively new, CAMRO leadership and its membership has long been involved in mineral owner issues through the National

Association of Royalty Owners ("*NARO")*.[1] In 2016, CAMRO leaders recognized the need for Colorado mineral owners to focus on Colorado oil and gas issues and changed the NARO Colorado name to CAMRO and shifted the organization's focus strictly to Colorado legislation, regulation and, as in this case, litigation.

CAMRO members often own both the mineral estate and the surface estate, and are perhaps citizens most intimately aware of the legitimate, albeit often competing, interests between surface and mineral ownership. Because the interpretation and application of the Act directly impacts CAMRO members, and their real property interests, CAMRO respectfully requests *amicus* status in connection with this appeal

II. ISSUE ON APPEAL

The issue on appeal, as framed by this Court is "[w]hether the court of appeals erred in determining that the Colorado Oil and Gas Commission misinterpreted section 34-60-102(1)(a)(I), C.R.S. as requiring a balance between oil and gas development and public health, safety, and welfare."

III. STATEMENT OF THE CASE

The Colorado Supreme Court has granted certiorari to review the Court of Appeals decision in *Martinez v. Colorado Oil and Gas Conservation Commission*,

[1] NARO filed a 510 Statement (Witness Statement) pursuant to the Rules and Regulations of the Colorado Oil and Gas Conservation Commission in connection with Respondent's original 2014 Application for Rulemaking (copy attached as Exhibit A). The Colorado NARO leadership involved in filing the 510 Statement continued their interest in this issue when NARO Colorado changed its name to CAMRO.

2017COA37, 16CA0564 (March 23, 2017). In *Martinez* the Court of Appeals analyzed and interpreted a single phrase contained in the Colorado Oil and Gas Conservation Act, § 34-60-101 to - 130, C.R.S. (the "Act") to overturn a Commission order denying an Application for Rulemaking filed by the Respondents. The Respondents appealed to the District Court, and the District Court affirmed the Commission's decision. *Martinez v. Colo. Oil & Gas Conservation Comm'n*, 14 CV 32637 (Den. D. Ct. Feb. 19, 2016). The Court of Appeals reversed, and this appeal ensued.

IV. SUMMARY OF THE ARGUMENT

CAMRO believes the Commission correctly interpreted its statutory authority to deny the rulemaking petition, appropriately taking into account the statutory language, including the articulated legislative purpose of the Act, as amended. The strained interpretation advanced by the Court of Appeals contravenes the Act's plain language, and if implemented would far exceed overturning a rulemaking decision, fundamentally shifting the direction of the Commission's administration of the Act. The potential for an abrupt, and unexpected, change in Commission regulatory focus has created significant uncertainty for all mineral interest owners in our State. Moreover, if the *Martinez* decision stands, implementation of the Act based on the Appeals' Court interpretation risks regulatory taking of CAMRO members' valuable real property

rights, an issue critically important to CAMRO that also could also have far reaching monetary impacts should such takings occur.

V. ARGUMENT

1. THE LABORED INTERPRETATION OF THE ACT ADOPTED BY THE COURT OF APPEALS SHOULD BE REJECTED IN FAVOR OF THE COLORADO OIL AND GAS CONSERVATION COMMISSION'S CONSISTENT AND REASONABLE INTERPRETATION.

A. The Commission's interpretation of the Act recognizes the balance crafted by the General Assembly to foster responsible resource development while taking into account public health, safety and welfare concerns as well as the environment and wildlife, consistent with the underlying purposes of the Act and its later amendments.

Mineral interest owners in Colorado have long relied upon the COGCC to administer rules, regulations and policies to effect the intent and underlying purpose of the Act, ensuring the responsible development of their resources. The original form of the Act was based on the Interstate Oil and Gas Compact Commission (IOGCC) Model Conservation Act that focused solely on resource conservation matters, proclaiming an outright prohibition on the waste of oil and gas resources. 1951 Colo. Sess. Laws, Ch. 230 pp. 651-62 (H.B. 51-347).[2] Good conservation practices ensured the historic "race" to produce did not result in

[2] The IOGCC is a multi-state government agency comprised of 30 member States , including Colorado, and several international affiliates that "promotes the conservation and efficient recovery of domestic oil and natural gas resources while protecting health, safety and the environment." INTERSTATE OIL AND GAS COMPACT COMM'N, http://iogcc.ok.gov (last visited April 2, 2018).

significant resource waste.[3] As explained by the IOGCC, "The state is a major beneficiary of the conservation of the oil and gas resources and the prevention of waste." IOGCC 1999 *Model Statute and Fieldwide Unitization* at 5, c*iting* B. Kramer and P. Martin, *The Law of Pooling and Unitization* (1998) §17.01-18.04; and P. Martin and B. Kramer, Williams and C. *Meyers Oil and Gas Law* § 912, at 95 (1998), http://iogcc.ok.gov/model-statutes (last visited April 2, 2018). "The state's interest in oil and gas development is expressed in the Oil and Gas Conservation Act and the regulations promulgated thereunder by the Commission." *City of Longmont v. Colo. Oil & Gas Assn'n,* 369 P.3d 573, 584 (Colo. 2016) (identifying the State's interest in oil and gas operations, and explaining the exhaustive set of COGCC technical rules applied to modern day hydraulic fracturing). The evolving nature of oil and gas operations requires Commission analysis of increasingly and often painstakingly technical conservation concepts necessary to ensure the responsible development of our State's resources.

[3] "Oil and gas conservation in its broadest sense means the use of the most efficient methods of discovery, development, and production to insure the greatest recovery of oil and gas from nature's reservoirs. Conservation is not hoarding. . . . The dual objectives of conservation are to increase the amount of oil ultimately recoverable by preventing waste of the reservoir energy and to protect the correlative rights of the diverse owners whose property overlies the common source of supply." Sullivan, Robert E., *The History and Purpose of Conservation Law,* 1985 ROCKY MTN. MIN. L. INST. ON OIL AND GAS CONSERVATION LAW AND PRACTICE at 1-1.

Through the years the General Assembly added to the Commission's charge, including an obligation to consider the impacts of oil and gas operations on public health, safety and welfare, the environment and wildlife. The clause "in a manner consistent with protection of public health, safety and welfare" was appended to the Commission's obligation "to foster, encourage, and promote the development of oil and gas within State" in 1994. 1994 Sess. Laws, Ch. 317, pp. 1978-89 (S.B. 94-177). The amendment language however did not supplant the basic purpose of the Act to foster development consistent with good conservation practices.

In 2007, the General Assembly again modified the Act's Legislative Declaration maintaining the Commission's obligation to foster resource development in a "responsible, balanced" manner. 2007 Colo. Sess. Laws, Ch. 320 pp. 1357-61 (HB 07-1341). The 2007 Amendments did not change nor speak to the 1994 language already included in this Section. Instead, the additional language was consistent with the ongoing rulemaking implemented by the Commission to balance its obligation to foster development and prevent waste with the obligation to consider impacts on public health, safety and welfare. *See Town of Frederick v. NARCO*, 60 P.3d 758, 763 (Colo. Ct. App. 2002)("Following the passage of S.B. 94-177, the COGCC promulgated extensive regulations dealing with oil and gas operations.") Through over twenty years of Act revisions, and the revamping of the Commission's regulatory scheme to take into account the impact

of operations on public health, safety and welfare, neither the General Assembly nor the Courts have stated the Commission's ongoing work to balance conservation concerns with the protection of public health, safety and welfare is misplaced. *See, e.g., City of Fort Collins v. the Colorado Oil and Gas Association,* 369 P.3d 586 (Colo. 2016) "[T]he Commission has promulgated an exhaustive set of rules and regulations to prevent waste and to conserve oil and gas in the State of Colorado while protecting public health, safety, and welfare. *citing* Dep't of Nat. Res. Reg. 201, 2 Colo. Code Regs. 404-1 (2015)." Mineral interest owners have relied upon the Commission's reasonable approach.

B. The Court of Appeals interpretation is riddled with analytical inconsistencies that cannot be upheld upon examination by this Court.

The Court of Appeals' majority first recognized several fundamental tenants of statutory construction, including the court's obligation to "read and consider the statutory scheme as a whole to give consistent, harmonious and sensible effect to all its parts." *Martinez* Opinion at ¶ 14. The Appeals Court also acknowledged the General Assembly "intends to give meaning to each part of the statute, and to avoid constructions that render any part meaningless." *Id.* Despite these acknowledgements, the majority then narrows its focus, honing in on the single phrase added to the Act's Legislative Declaration in 1994 as determinative,

"Critical here is the proper interpretation of the phrase 'in a manner consistent with.'" *Martinez* Opinion at ¶ 21.

The majority also acknowledged any analysis of legislative intent must start with the "plain meaning of the [statutory] language" Opinion at ¶ 14; *see also Weld County School Dist. RE-12 v. Bymer*, 955 P.2d 550, 554 (Colo. 1998) (". . . a court should *first* look to the statutory language and afford the words their plain and ordinary meaning")(emphasis supplied). The Appeals Court majority however skipped an analysis of the plain meaning of these words, and jumped instead to the conclusion that over twenty years ago the General Assembly intended the phrase "in a manner consistent with" to mean "subject to."

The Court overlooked the fact that when the General Assembly modified the Act in both 1994 and 2007 the Act's legislative intent already used the words "subject to" in the legislation in connection with the historic dual purposes of conservation – (i) to prevent waste and (ii) for the enforcement and protection correlative rights. *See, infra*, n.3. The 2007 Act amendments modified the stated intent and purpose of the Act as follows:

> "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 ~~prohibition~~ 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 correlative rights of the owners and producers of a common source of

oil and gas . . .” (italicized emphasis provided).

Had the General Assembly intended the term “consistent with” to mean “subject to” this intent could have been accomplished by using the same term, but it was not. Moreover, substituting the Court of Appeals’ interpretation of the phrase “consistent with” to mean “subject to” in the later portion of the legislative intent results in confused and muddled phrasing, creating a nonsensical result. *Johnson v. School District No. 1 In County of Denver*, 2018 CO 17, ¶ 19 citing *Frazier v. People*, 90 P.3d 807, 811 (Colo. 2004) ("A statutory interpretation leading to an illogical or absurd result will not be followed.").

The majority also fails to take that first critical first step in defining the term “consistent with.” As pointed out in Judge Booras’ dissent, *Webster’s Third New International Dictionary* defines “consistent with” to mean “to be consistent, harmonious or in accordance” with. *Martinez* Opinion at ¶40. The words consistent with, when considered in light of their plain meaning, are in harmony with the Commission’s balanced approach to fostering development, taking into account public health, safety and welfare.

Finally, the Appeals Court’s conclusion is flawed because it renders essentially meaningless the basic conservation purposes of the Act. “When interpreting a comprehensive legislative scheme, we construe each provision to further the overarching legislative intent.” *A.S. v. People*, 312 P.3d 168, 171

(Colo. 2013) (citations omitted). The substitution and elevation of the additional language related to public health, safety and welfare to create a condition requiring satisfaction prior to implementing any conservation rules or regulations effectively negates the overarching conservation purposes that are the touchstone of the Act.

Accordingly, from CAMRO's perspective the Court of Appeals' 2017 examination of the 1994 Amendment to divine the legislative intent of the single phrase "consistent with" to create a hierarchy of interests for Commission administrative functions is neither logical nor supported by record, and should be overturned. The addition of the terms "balanced and responsible" in 2007 should not trigger such a significant change in priorities, and give new meaning to the 1994 phrase. *See State v. Nieto*, 993 P.2d 493, n.6 (Colo. 2000) ("We cannot infer the intent of an earlier legislature from the views of a subsequent one.") Instead, the statutory language should be considered according to its commonly understood meaning, recognizing its overarching purpose and the Commission's determination to regulate in a balanced and responsible manner.

2. THE COURT OF APPEALS INTERPRETATION IF IMPLEMENTED WILL IMPACT MINERAL OWNERS ACROSS THE STATE, POTENTIALLY INVITING REGULATORY TAKINGS CLAIMS.

CAMRO acknowledges there are individuals, including the Respondents, who would prefer Colorado's valuable mineral resources go undeveloped. *See* Respondent's Consolidated Opposition Brief to Petitioners' Petitions for Writ of

Certiorari, filed June 29, 2017 at 4. CAMRO too recognizes a fear exists that the extractive industries have no concern for the safety of our citizens and the environment. *Id.* The existence of extreme positions on the issue of resource development is precisely why it remains critically important to respect the COGCC's unique obligation to consider the competing concerns and to appropriately balance the important interests at stake.

CAMRO members in particular are at risk if the Commission is required to subjugate its conservation functions based the Appeals' Court analysis. While oil and gas companies can strategically choose to develop in different states or locales that better match their operational parameters, Colorado mineral owners' interests are dictated by where their minerals have been inherited, reserved or acquired. Because mineral owners voices often are muted when elected officials regulate surface development, it is up to the Commission, and the Courts, to both recognize the value of the private property and public interests at stake, and to fairly administer rules and regulations in a balanced fashion.

i. **Minerals interests are real property.**

Colorado Courts recognize mineral rights as separate real property interests. "We have long recognized that a conveyance which severs a mineral interest from the surface estate creates a separate and distinct estate. (Citations omitted)." *Notch Mountain Corp. v. Elliott*, 898 P.2d 550, 556 (Colo. 1995). In *Gerrity v. Magness*

this Court further explained "[s]evered mineral rights lack value unless they can be developed. For this reason, the owner of a severed mineral estate or lessee is privileged to access the surface and 'use that portion of the surface estate that is reasonably necessary to develop the severed mineral interest.'" *Gerrity v. Magness*, 946 P.2d 913, 926 (Colo. 1997).

ii. **The Court of Appeals' elevation of the public concerns implicates potential takings of mineral owner interests.**

The Takings Clause of the Fifth Amendment of the United States Constitution protects private property rights, stating private property shall not "be taken for public use, without just compensation." U.S. Const. amend. V. Similarly, Article II, section 15 of the Colorado Constitution provides that "[p]rivate property shall not be taken or damaged, for public or private use, without just compensation." Colo. Const. art. II, §15.[4]

The Constitutional jurisprudence surrounding takings claims continues to evolve. The concept of takings historically has expanded from an actual physical taking to include government action that "denies an owner economically viable use of his land." *See Animas Valley Sand and Gravel, Inc. v. Board of County Com'rs*

[4] Colorado courts have examined the additional protection afforded property owners under the Colorado Constitution based on the inclusion of the word "damaged" in the Colorado takings clause. *Animas Valley Sand and Gravel, Inc. v. Board of County Com'rs of County of La Plata*, 38 P.3d 59, 63 (Colo. 2001). This distinction, while relevant to minerals, is beyond the scope of this appeal.

of County of La Plata, 38 P.3d 59, 64 (Colo. 2001), *citing Lucas v. South Carolina Coastal Council,* 505 U.S. 1003, 1016, (1992).

The recent Supreme Court holding in *Murr v. Wisconsin*, 137 S. Ct. 1933 (2017), decided last summer, included additional factors to incorporate into any takings analysis. The *Murr* Court first affirms the concept of regulatory takings, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking. *Id*. at 1942, citing *Pennsylvania Coal. Co. v. Mahon*, 43 S.Ct. 158 (1922). Each takings case presents a myriad of factual issues set against a complex legal backdrop to determine if a property right is taken. *Id.* at 1943. Even though takings jurisprudence is flexible, Justice Kennedy twice points out in *Murr*, "[i]n all instances, the analysis must be driven by the purpose of the Takings Clause, which is to prevent the government from 'forcing some people to alone bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'" *Id.* at 1943 and 1950.

Takings analysis requires a comparison of the value of the property that has been taken with the value that *"remains* in the Property." *Id.* at 1943 *(*emphasis supplied). Courts continue to struggle with the "denominator" question, and whether the property taken is "all, or only a portion of, the parcel in question." *Id.* The *Murr* court outlined a three prong test to help identify the denominator

property.[5] The first test not unexpectedly tracks existing takings analysis, relying on treatment of the property under State law, including the reasonable expectation of the owner related to the property ownership. *Id.* at 1945. The Court then identified the physical characteristics of the property as a factor for consideration. *Id.* Finally, and perhaps most interesting for mineral interest owners, the Court explained special attention must be given "to the effect of burdened land on the value of other holdings." *Id.* at 1946. If there is no relationship between the properties, that is, if the burdened property derives no benefit from the taking then "the absence of a special relationship between holdings may counsel against consideration of all the holdings as a single parcel, making the restrictive law susceptible to a takings challenge." *Id.* While denominator test identified in *Murr* does not tidily apply to severed mineral interests it sheds light on takings analysis.

In Colorado, after decades of jurisprudence where minerals have been separately identified and valued as real property interests, it does not seem far-fetched for mineral owners have a reasonable expectation of value associated with their property. In addition, the benefit to the mineral owner if development is banned arguably has no special relationship to the balance of the property interests remaining, particularly if the minerals are severed. Finally, if mineral development

[5] The *Murr* Court examined contiguous surface parcels of land, and grappled with the identification of the property as a whole. Arguably, the analysis of a severed mineral estate and how the denominator should be identified will raise a host of additional issues.

is called to a halt as requested by Respondents, the underlying takings principle of barring the Government from forcing some people alone to bear the public burden will require consideration in the mineral context.

When the Commission exercises its regulatory authority in a balanced manner, carefully considering the various interests at stake to ensure efficient and safe resource development, takings questions seem less likely to arise. If however the Commission must change focus based on the Appeals Court's interpretation, and mineral development is stopped as the Respondents suggested in their original rulemaking proceeding, takings questions will come to the fore. As Justice Courlis explained in her special concurrence in the *Animas* Case, "It is not the cumulative number of sticks in the bundle of property rights that should affect the question of whether one right has been wholly or partially taken. Rather, it is the question of whether the right that is taken results in real economic damage--not blue sky speculative damage." *Animas*, 38 P.3d 59, 74 (2001).

Considering the cost of halting development through government action was weighed by NARO – Rockies (now CAMRO) in connection with Boulder County's fracking moratorium enacted in 2014. NARO commissioned a study by Netherland Sewell, a highly regarded engineering firm, to examine the economic impact the moratorium, if extended to a ban, on the value of the undeveloped mineral estate. Attached as Exhibit B is the Netherland Sewell study that

established potential ranges of lost mineral owner revenue if development was banned, identifying a value loss to mineral owner ranging from $2 million dollars to $60 million dollars – for the mineral owners interest in a *single* productive section.[6] Not only do the Netherland Sewell numbers represent the staggering value that could be taken from mineral interest owners, they also represent funds taken from tax coffers that are critical to State funding for everything from schools to local infrastructure. From CAMRO's perspective, the value of minerals to property owners should be appropriately considered before the Commission's focus is radically shifted away from the COGCC's balanced approach to the Court of Appeals' interpretation. The Court of Appeals decision to override the Commission's regulatory expertise and balanced regulatory approach requires reversal.

VI. CONCLUSION

The Commission is uniquely positioned to understand how increasingly complex operations beneath the surface impact public health, safety, welfare and the environment. Subsurface and surface interests can be, and often are, at odds with each other. That has never before meant one set of concerns should be

[6] CAMRO recognizes the estimated commodity price is higher than current prices. In the interim however technology also has advanced to allow greater recoveries. Accordingly, the study represents a snap shot in time, but nonetheless demonstrates the significant values at stake, particularly when production volumes are considered across producing basins.

abandoned in favor of another, but instead that all of the impacts must be considered as a whole to find the appropriate balance. The Court of Appeals analysis of the Act in the *Martinez* decision abandons the concepts of balance, and if allowed to stand, mandates elevation of one set of concerns above the other, potentially stripping the mineral estate of any value. Relying on a post hoc interpretation of a single legislative phrase as determinative of the course for our State's future mineral development will have far-reaching consequences including a significant impact mineral owners, and on the overall economic health of our State.

Dated: April 2, 2018.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 2, 2018, a true and correct copy of the foregoing ***Amicus Curiae*** **Brief of the Colorado Alliance of Mineral and Royalty Owners in Support of the Petitioners** was Electronically Served via the Integrated Colorado Courts E-Filing System (ICCES) on all counsel of record.

s/ Cynthia L. Bargell
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