SUPREME COURT STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Certiorari to the Colorado Court of Appeals, Court of Appeals Case No. 2016CA2011 District Court, Denver County, 2015CV30902	
Petitioners: John Doe 1, John Doe 2, John Doe 3, John Doe 4, John Doe 5, John Doe 6, John Doe 7, John Doe 8, and John Doe 9, **v.** **Respondents:** Colorado Department of Public Health and Environment; Jill Hunsaker Ryan, in her official capacity as Executive Director of the Department of Public Health and Environment; and Natalie Riggins, in her official capacity as State Registrar and Director of the Medical Marijuana Registry; **and** Colorado Medical Board.	**▲ COURT USE ONLY ▲**
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BRIEF OF *AMICI CURIAE* COLORADO DEPARMENT OF LABOR AND EMPLOYMENT, COLORADO DEPARTMENT OF PERSONNEL AND ADMINISTRATION, COLORADO DEPARTMENT OF LOCAL AFFAIRS, COLORADO DEPARTMENT OF REGULATORY AGENCIES, COLORADO DEPARTMENT OF HEALTH CARE POLICY AND FINANCING, COLORADO DEPARTMENT OF NATURAL RESOURCES, COLORADO DEPARTMENT OF EDUCATION, COLORADO DEPARTMENT OF CORRECTIONS, COLORADO DEPARTMENT OF PUBLIC SAFETY, COLORADO DEPARTMENT OF AGRICULTURE, COLORADO DEPARTMENT OF HUMAN SERVICES, COLORADO DEPARTMENT OF THE TREASURY, COLORADO DEPARTMENT OF REVENUE, COLORADO DEPARTMENT OF MILITARY AND VETERANS AFFAIRS, COLORADO DEPARTMENT OF TRANSPORTATION, COLORADO DEPARTMENT OF HIGHER EDUCATION, COLORADO DEPARTMENT OF STATE, AND COLORADO MUNICIPAL LEAGUE IN SUPPORT OF THE RESPONDENT, COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

CERTIFICATE OF COMPLIANCE

I hereby 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 these rules. Specifically, the undersigned certifies that:

The brief complies with C.A.R. 28(g) and C.A.R. 29(d) because it contains 4,715 words (does not exceed 4,750 words).

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

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Seventeen agencies within the State of Colorado, together with the Colorado Municipal League, jointly submit this brief as *amici curiae* to emphasize the importance of the Open Meetings Law (OML) and Administrative Procedure Act (APA) to the effective and efficient performance of their duties.

INTRODUCTION

To decide in favor of the Petitioners would violate rules of statutory construction and place unreasonable restraints on state agencies. Petitioners argue CDPHE's referral of physicians to the Medical Board for an independent investigation should be subject to the OML and APA. But under the plain language of the OML, its requirements apply only to "state public bodies," and, under the OML's own terms, an entire agency is not a state public body. Likewise, APA review applies only to "final agency action." Referrals are not final agency actions because they do not affect individual rights or obligations and do not carry legal consequences.

Most troubling, under the Petitioners' interpretation, agencies and municipalities would no longer be able to develop internal operational

guidelines to carry out their legal duties, or hold administrative staff meetings without first giving the public advanced notice and inviting them to attend, as required by the OML. The APA's procedural requirements would govern many actions by administrative staff. Referrals or notifications would carry legal finality that would attach a full panoply of appeal rights leading to significant delays before any final decisions occurred. These outcomes would drastically affect a government entity's ability to function and fulfill its executive duties to the People of the State of Colorado.

In light of these high stakes that attach to Petitioner's reading of the OML and APA, seventeen state agencies, and the Colorado Municipal League, submit this brief of *amici curiae*.

STATEMENT OF THE ISSUES PRESENTED

Whether the court of appeals correctly held that an entire state agency—here, the Colorado Department of Public Health and Environment—cannot be a "state public body" under the Colorado Open Meetings Law.

Whether the court of appeals correctly held that the Department's referral of a physician to the Colorado Medical Board for possible investigation is not a "final agency action" subject to judicial review under the Colorado Administrative Procedure Act.

IDENTITY AND STATEMENTS OF INTEREST OF AMICI CURIAE

I. State Agencies

Amici Curiae Colorado Department of Labor and Employment, Colorado Department of Personnel and Administration, Colorado Department of Local Affairs, Colorado Department of Regulatory Agencies, Colorado Department of Health Care Policy and Financing, Colorado Department of Natural Resources, Colorado Department of Education, Colorado Department of Corrections, Colorado Department of Public Safety, Colorado Department of Agriculture, Colorado Department of Human Services, Colorado Department of the Treasury, Colorado Department of Revenue, Colorado Department of Military and Veterans Affairs, Colorado Department of Transportation, Colorado Department of Higher Education, and Colorado Department of State are all principal agencies created under the Colorado Constitution. *See*

Colo. Const. art. IV, § 22. Each agency is responsible for carrying out the functions of state government, in order to be responsive to the needs of the People of Colorado. *See* §§ 24-1-101, *et seq.*

All of the undersigned agencies believe the Petitioners' proposed expansion of the OML, §§ 24-6-401 to -402, C.R.S., and the APA, §§ 24-4-101, *et seq.* will place unreasonable burdens on the agencies, affecting their ability to carry out their statutorily assigned duties.

II. Colorado Municipal League

Amicus Curiae Colorado Municipal League is a non-profit, voluntary association of 270 of the 272 municipalities throughout Colorado, comprising nearly 99 percent of the total incorporated state population.

The Colorado Municipal League's interest in this case is the proper interpretation of the OML, which applies to "state public bodies" and "local public bodies." § 24-6-402, C.R.S. If this Court adopts the over-expansive interpretation advanced by the Petitioners, then courts will likely apply the same interpretation to "local public bodies."

STATEMENT OF THE CASE AND FACTS

The amici parties primarily adopt the statements of the case as set forth in CDPHE's answer brief, and CDPHE's brief below in the court of appeals.

The relevant facts of this case are largely undisputed and recounted in the court of appeals' published opinion. *See Doe 1 v. Colorado Dep't of Pub. Health & Env't*, 2018 COA 106, ¶ 2, *cert. granted*, No. 18SC621 (Colo. Jan. 14, 2019) (*Does I*).

The action originated from CDPHE's referral of the Petitioners (physicians) to the Colorado Medical Board (Medical Board) for the physicians' possible violations of medical practice standards in prescribing marijuana. *Does I,* at ¶ 7. CDPHE referred the physicians under a statutory mandate authorizing the referrals but did not determine whether the physicians violated any medical practice standards, as that determination is solely within the Medical Board's authority. *Does I,* at ¶ 7. Rather than submitting to the Medical Board's administrative process, however, the physicians sued CDPHE and the

Medical Board in Denver District Court, asserting that the referral policy violated the OML and APA. *Does I,* at ¶ 2.

The district court dismissed the Medical Board early from the suit because the referral policy was CDPHE's policy, not the Medical Board's. *Does I,* at ¶ 2. However, the district court granted summary judgment in favor of the physicians, finding (1) CDPHE's physician referrals to the Medical Board are final agency actions under the APA, and (2) CDPHE's creation of the physician referral criteria violated the OML. (CF, p 2317-20). *Does I,* at ¶¶ 2, 29.

CDPHE appealed the order, and the court of appeals unanimously reversed the district court's order. *Does I,* at ¶¶ 1, 30-39, 48-59.[1] Addressing the physicians' OML claim, the court of appeals reversed on two grounds, holding that, according to the plain language of the OML: (1) an entire agency is not a state public body, and (2) agency employees are not all members of a state public body. *Does I,* at ¶¶ 34-35, 38-39.

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[1] The physicians also appealed the district court's dismissal of the Medical Board. *Does I,* at ¶ 3. However, the court of appeals affirmed the dismissal of the Medical Board, and the issue is not before this Court on certiorari. *See Does I,* at ¶ 40.

The court of appeals also rejected the physicians' APA claim, holding: (1) CDPHE's referrals were not final agency actions because they were neither "actions" nor were they "final," (2) the referrals were not a proceeding under the APA, and (3) the referral policy was not subject to rulemaking requirements because the policy only established internal guidelines, and did not bind CDPHE in making referrals to the Medical Board. *Does I,* at ¶¶ 46-59.

Seventeen state agencies and an association of 270 municipalities submit this brief of *amici curiae* because of the APA's and OML's widespread applicability. The amici parties, in order to fulfill their duties in serving the People of the State of Colorado, request that this Court reaffirm the established interpretations of the APA and OML and answer yes to both questions on certiorari.

SUMMARY OF ARGUMENT

An entire state agency, and specifically staff of an agency, is not a "state public body" under the OML. The OML explicitly designates numerous groups within state agencies as "state public bodies." Our general assembly went to great lengths to name the many groups that

constitute a “state public body,” but did not name entire agencies or administrative staff. Thus, under principles of statutory construction, entire agencies are not “state public bodies.” Moreover, subjecting entire state agencies to the OML requirements does not further the purpose of the OML, and places unreasonable burdens on state agencies.

Similarly, CDPHE’s referral of a physician to the Medical Board for possible investigation is not a “final agency action” subject to judicial review under the APA. The referrals are not final. They are neither consummations of a decision-making process nor actions that carry legal consequences. The referrals are akin to notifications. They carry no enforcement authority or deference, and were conducted through statutory authority that is not challenged in this case.

ARGUMENT

I. The court of appeals correctly held that an entire state agency cannot be a "state public body" under the OML.

A. The plain language of the OML excludes entire state agencies from the definition of "state public body."

The OML requires that "[a]ll meetings of two or more members of any *state public body* at which any public business is discussed or at which any formal action may be taken are declared to be public meetings open to the public at all times." § 24-6-402(2)(a), C.R.S. (emphasis added). The court of appeals held that the definition of "state public body" does not include an agency itself, including agency staff. The undersigned amici parties agree.

A "state public body" means:

> any board, committee, commission, or other advisory, policy-making, rule-making, decision-making, or *formally constituted body of any state agency*, state authority, governing board of a state institution of higher education. . ., or the general assembly, and any public or private entity to which the state, or an official thereof, has delegated a governmental decision-making function *but does not include persons on the administrative staff of the state public body*.

§ 24-6-402(1)(d)(I), C.R.S. (emphasis added).[2]

By the plain terms of the definition, a "state public body" includes, among other things, a board, committee, commission, an advisory body of a state agency, a policy-making body of a state agency, a rulemaking body of a state agency, a decision-making body of a state agency, or another formally constituted body of a state agency. § 24-6-402(1)(d)(I), C.R.S.

However, the plain terms of the definition do not include an entire state agency. In constructing the definition of "state public body," the general assembly went to great lengths to list specific groups *within* a state agency that are subject to the OML. If the general assembly had intended that an entire agency, including its administrative staff, qualify as a state public body, then it would have said so because "[u]nder the rule of interpretation *expressio unius exclusio alterius,* the inclusion of certain items implies the exclusion of others." *Cain v. People,* 327 P.3d 249, 253 (Colo. 2014); *Beeghly v. Mack,* 20 P.3d 610,

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[2] The OML similarly defines "local public body." § 24-6-402(1)(a)(I), C.R.S.

613 (Colo. 2001). Instead, the general assembly did the opposite when it explicitly decreed that a state public body "does not include persons on the administrative staff of the state public body." § 24-6-402(1)(d)(I), C.R.S.

Ignoring the distinctions made in the definition of "state public body" would render the statutory language superfluous. It is a "cardinal principle of statutory construction that a statute ought, upon the whole, to be construed that, if it can be prevented, no clause, sentence, or word shall be superfluous." *TRW Inc. v. Andrews,* 534 U.S. 19, 31 (2001); *Colo. Water Conservation Bd. v. Upper Gunnison River Water Conservancy Dist.,* 109 P.3d 585, 597, 599 (Colo. 2005). In the definition, the general assembly lists the types of bodies to which the OML applies, and expressly excludes administrative staff from that application. If an entire agency could be a state public body, the Petitioners' interpretation of the OML would render the specific enumerated excluded and included bodies superfluous. This clear intent of the general assembly must be followed. *See Young v. Brighton School District 27J,* 325 P.3d 571, 576 (Colo. 2014).

B. Including an entire state agency within the definition of "state public body" does not further the purpose of the OML, and would lead to absurd results.

Although the statute's plain language resolves the OML question posed, expanding the definition of a "state public body" to include an entire state agency would create a burdensome application of the OML without furthering its legislative goals.

The OML is "intended to 'afford the public access to a broad range of meetings at which public business is considered.'" *Bd. of Cty. Comm'rs v. Costilla Cty. Conservancy Dist.,* 88 P.3d 1188, 1193 (Colo. 2004) (*citing Benson v. McCormick,* 578 P.2d 651, 652 (Colo. 1978)). The purpose of the OML is to "further the legislative intent that citizens be given a greater opportunity to become fully informed on issues of public importance so that meaningful participation in the decision-making process may be achieved." *Bd. of Cty. Comm'rs,* 88 P.3d at 1193 (*citing Cole v. State,* 673 P.2d 345, 347 (Colo. 1983)). The OML requirements must be construed to further this legislative intent and to avoid absurd results. *State v. Nieto,* 993 P.2d 493, 501 (Colo. 2000).

Here, rules of statutory construction and the OML's purpose establish that the OML was not intended as a mechanism to cover *every* interaction or decision an agency makes, but to cover only those with lasting effects that address issues of state concern, and for which public participation can be meaningful. *Id.*

Every agency meeting or decision cannot, and does not, meet this standard. Agency staff meet and make operational decisions every day regarding the programs they administer. These meetings and decisions address the manner in which an agency carries out its executive authority. Importantly, however, when these meetings occur, the agency's authority has already been assigned by the general assembly or through formal rulemaking, and public participation during these meetings regarding the day-to-day interactions of administrative staff who are working to operationalize an agency's authority cannot change that authority. Rather, in keeping with the OML's purpose, the OML can provide citizens with meaningful participation during the initial process of assigning such executive authority.

CDPHE's referral policy and its application are examples of the types of day-to-day interactions of administrative staff that were never intended to be subject to the OML. CDPHE already has the authority to refer physicians to the Medical Board when it has "reasonable cause to believe that a physician has violated [the provision of the constitution applicable to medical marijuana prescriptions]." § 25-1.5-106(6), C.R.S. The Petitioners do not contest CDPHE's statutory authority to make referrals in this case. They do not even appear to take issue with the actual referral guidelines. Instead, Petitioners challenge the internal policy because it was developed and applied without a public meeting. But taking the position that all agency interactions or decisions that result in an internal operational policy should be public, merely for the sake of making them public, does not serve the purpose of the OML.

Internal operational policies like CDPHE's, are not unique to CDPHE and state agencies regularly apply them. These policies include: how to schedule hearings before administrative judges; how to decide the length of the setting or the number of hearings that should be set per day; how to search for employers who do not carry insurance

or who incorrectly classify workers to avoid paying overtime or insurance; how to conduct data searches to detect medical fraud; and internal document retention.

To hold an open meeting every time administrative staff meet to discuss implementation of an agency's programmatic function, besides being cumbersome as explained below, would serve no legal purpose. Agencies already have the authority to carry out these decisions. Accordingly, the interactions and operational decisions of agency staff are not subject to the OML.

C. Other statutory provisions beyond the definition of "state public body" demonstrate the OML does not cover entire state agencies.

A reasonable reading of the remaining OML provisions and the framework of Colorado's Administrative Organization Act further support excluding entire state agencies from the OML requirements.

The OML only applies to "meetings of two or more *members.*" § 24-6-402(2)(a), C.R.S. (emphasis added).[3] As the court of appeals held, had

[3] The same "members" limitation applies to meetings of local public bodies. § 24-6-402(2)(a), C.R.S.

the general assembly intended the OML to apply to all employees within a state agency, the OML statute would have so stated. *Cain,* 327 P.3d at 253.

The framework of Colorado's Administrative Organization Act of 1968, sections 24-1-101, *et seq.* further supports this conclusion. Under the Act, the general assembly transferred boards and commissions to the principal departments. *See, e.g.,* §§ 24-1-115(2); 24-1-120(3); 24-1-128.5(3). The general assembly also specified that each agency shall contain officers and employees. *See* § 24-1-108(1), C.R.S.

In other words, the general assembly created state agencies to consist of both defined bodies (boards and commissions) and staff (officers and employees). *Id.* Having created this structure, the general assembly could have written the OML to apply to the employees of the agencies, not just to members. But it did not. *Cain,* 327 P.3d at 253. This omission is meaningful, and further supports the court of appeals' holding that a "state public body" subject to the requirements of the OML does not include an entire state agency.

D. The Petitioners' interpretation of "state public body" puts unreasonable burdens on state agencies.

In constructing its statutes, the general assembly has explained that it intends a "just and reasonable result" that is "feasible of execution." § 2-4-201(1)(c)-(d), C.R.S. To that end, the general assembly could not have intended that the OML would cover internal decisions made by agency staff. *Id.*

The OML imposes a number of procedural requirements. A covered "state public body" must provide "full and timely notice" before meetings. § 24-6-402(2)(c), C.R.S. The "secretary or clerk" must maintain a list of those who have requested notification of that body's meetings and provide "advance notification" of the body's meetings. *Id.* at (7). The state public body must take minutes of those meetings. *Id.* at (2)(d). Any executive session discussions must be electronically recorded. *Id.* at (2)(d.5)(I)(A). These are only some of OML's required procedures and constitute no small burden.

In addition, a covered "meeting" happens every time there is "any kind of gathering, convened to discuss public business, in person, by

telephone, electronically, or by other means of communication." *Id.* at (1)(b). For bodies like boards or commissions whose meetings may be monthly, bi-monthly or quarterly, the OML's procedures are feasible and complementary to their structure and function. These bodies have defined members, meeting times, and processes.

However, applying OML requirements to all agency staff would not be feasible. A covered meeting would occur every time two agency coworkers communicate about "public business" in-person, by email, or by telephone. Considering the size of a state agency and the countless programs administered by staff, thousands of such "meetings" would occur daily. Furthermore, application of the OML in this way would require that agencies provide "advance notice," for each of these meetings, be "open to the public at all times," and have minutes taken. This application is unreasonably burdensome.

State agencies must operate in a less formal way without open meetings, not as a way to make "policy in secret" or to avoid accountability, but instead, to efficiently administer and implement the decisions of the policy-making bodies. *See Colorado Assoc. of Public*

Employees v. Lamm, 677 P.2d 1350, 1355 (Colo. 1984) (the Board promulgates rules; the Director establishes administrative procedures to carry the rules into effect).

By way of example, the Workers' Compensation Premium Cost Containment Board, within the Colorado Department of Labor and Employment, conducts a program encouraging employers to adopt safe workplace practices, and offers a discount on workers' compensation insurance premiums for those employers who demonstrably do so. *See* § 8-14.5-104, *et seq*., C.R.S. Currently, there are more than 7,200 Colorado employers in the program. To meet certification requirements, the Department's staff meet daily to discuss and prepare recommendations for the Premium Cost Containment Board on whether employers meet program requirements. The staff makes hundreds of recommendations to the Premium Cost Containment Board each month on certification decisions, and the volunteer board meets once a month to weigh those decisions. This program would cease to function if the Colorado Department of Labor and Employment's staff were required to conduct its everyday work in conformance with the OML.

As another example, the Board of Real Estate Appraisers is a statutorily defined body within the Division of Real Estate. § 12-61-703(2)(a), C.R.S. This Board has bi-monthly meetings subject to OML and quorum requirements. During its open meetings, the Board of Real Estate Appraisers adopts rules, resolves disciplinary actions, and decides whether to issue licenses to applicants. The administrative and operational duties for executing this Board's function, however, falls to the Division of Real Estate staff.

Daily, Division staff work to implement the Board's legislative charge, including communicating with stakeholders on proposed rules, investigating and making recommendations on disciplinary complaints, and processing licensure applications. These daily operations include countless communications between and among staff. The Division of Real Estate staff could not effectively function if these communications became subject to the OML.

Similarly, the Petitioners' proposed interpretation would negatively affect the Board of Assessment Appeals, within the Department of Local Affairs. *See* § 39-2-123, C.R.S. The Board of

Assessment Appeals hears and decides property tax evaluation appeals for Colorado taxpayers on commercial and residential property. § 39-2-125, C.R.S. The Board's staff works everyday on hundreds of cases filed each year and assists the Board with recommendations on the proper handling of those real estate evaluation appeals. The Board of Assessment Appeals' work would be seriously hampered if the staff's recommendations and work were subject to OML requirements.

These examples, like the CDPHE referrals, demonstrate why the OML requirements do not apply to entire state agencies. Otherwise, the OMP would create outcomes that are neither "reasonable" nor "feasible of execution," and are far beyond the general assembly's intent. § 2-4-201(1)(c)-(d), C.R.S. For these reasons, this Court should not adopt the interpretation of the OML presented by the Petitioners.

II. The court of appeals correctly held that CDPHE's referral of a physician to the Medical Board for possible investigation is not a "final agency action" under the APA.

A. Referrals are notifications and do not determine rights or obligations, or result in legal consequences.

For similar reasons, CDPHE's referral policy and its application should not be subject to judicial review under the APA.

According to the plain language of the APA, only "final agency action" is subject to APA review.[4] § 24-4-106(2), C.R.S. A final action "must (1) mark the consummation of the agency's decision-making process and not be merely tentative or interlocutory in nature, and (2) constitute an action by which rights or obligations have been determined or from which legal consequences will flow." *Chittenden v. Colo. Bd. of Soc. Work Exam'rs*, 292 P.3d 1138, 1143 (Colo. App. 2012);

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[4] The court of appeals also rejected the physicians' argument that the referrals are subject to APA review because they are agency proceedings that propose action beyond the agency's constitutional or statutory jurisdiction. *Does I,* at ¶¶ 51-52. That holding, however, is not before this Court on certiorari. In any event, the undersigned state agencies assert that the court of appeals correctly rejected that argument. Referrals are not "proceedings," and the authority of CDPHE to make the referrals lies in statute. *See* § 25-1.5-106(6)(a), C.R.S.

see also MDC Holdings, Inc. v. Town of Parker, 223 P.3d 710, 720-21 (Colo. 2010).

Interagency referrals, like the one at issue in this case, are neither. They have no legal force because they simply alert a receiving agency of information potentially relevant to the receiving agency's regulatory function. Similarly, the referrals are not the consummation of an agency's decision-making process because no decision with legal consequence has been made when the referrals occur. *See MDC Holdings,* 223 P.3d at 720-21. The receiving agency has no obligation to assign deference to the information in a referral, and the receiving agency must conduct an independent investigation and afford due process before depriving an individual of any rights. *Id.*

Accordingly, similar to why CDPHE referrals should not be subject to OML requirements, they should not be subject to APA judicial review.

B. Treating interagency referrals as "final agency actions" would undermine an agency's ability to fully investigate an issue before making a permanent determination.

APA judicial review of a referral is also premature and inefficient. A referral is simply a notification of information, and not a formal determination that cannot be altered or undone. *MDC Holdings,* 223 P.3d at 720 ("Final" means "not to be altered or undone") (*citing Webster's Third New International Dictionary* 851 (1961)). Historically, Colorado courts have restricted the premature judicial review of agency conduct. *See, e.g. Colo. State Bd. of Medical Examiners v. Colo. Ct. of Appeals*, 920 P.2d 807, 810 (Colo. 1996); *Colo. Health Facilities Review Council v. Dist. Ct. of Denver*, 689 P.2d 617, 621 (Colo. 1984).

If courts engaged in premature judicial review of referrals, agencies would face barriers to protecting the public even though their conduct carries no final consequences. For instance, if referrals like the ones in this case are considered final agency actions, a referring agency, without the authority or benefit of a full investigation, would have to defend a referral based on incomplete information and investigate

further itself, rather than directing the concern to the agency experienced with the issue and equipped with the resources and procedures to make more reliable determinations. This outcome of placing burdens on both the referring and receiving agency before due process even occurs, surely was not the general assembly's intent.

Instead, the undersigned agencies logically interpret APA review as a mechanism for challenges to occur *after* the appropriate agency has conducted a fair investigation and executed its regulatory function. Judicial review based on a mere referral, and before the appropriate agency reviews and investigates, would be the opposite.

C. Treating interagency referrals as "final agency actions" would interfere with the efficient administration of regulatory programs.

Allowing courts to review interagency referrals would also interfere with the executive function of all state agencies by obstructing the reasonable flow of information among and between agencies. Imposing a new impediment, like the one Petitioners propose, undermines our state's separation of powers doctrine. This Court has held that "interfere[nce] with ongoing agency proceedings," before

decisions are finalized, impermissibly "encroaches on the executive function." *Envirotest Sys. Corp. v. Colo. Dept. of Revenue*, 109 P.3d 142, 144 (Colo. 2005). Here, subjecting agencies to APA judicial review for the transfer of information, that carries no legal consequences, would significantly interfere with the agency's ability to react to information day-to-day, and to share it efficiently.

For example, Petitioners' proposed interpretation of the APA would negatively affect the Colorado Department of Public Safety. The Department refers complaints against individual providers who are on the approved provider lists of the Sex Offender Management Board and Domestic Violence Management Board so the Department of Regulatory Agencies can separately examine any licensing issues. The authority for these referrals are found in statute. §§ 16-11.7-106(7); 16-11.8-103(4)(b), C.R.S. Similar to CDPHE referrals to the Medical Board, these referrals do not carry legal force because the licensing determinations are made by the Department of Regulatory Agencies. If these referrals were subject to the APA, they could carry deference and judicial finality

before the Department of Regulatory Agencies even began an investigation.

Similarly, a local fire department may refer deficiencies found during fire code inspections to the Department of Public Safety for "evaluation or enforcement." § 24-33.5-1213.3(3), C.R.S. The Department of Public Safety may, if alternative methods of resolution fail, issue an enforcement order. Building owners subject to an enforcement order are entitled to due process under the APA but cannot avail themselves of an administrative hearing for merely having been referred. § 24-33.5-1213(3)(a), C.R.S. Due process only attaches when the Department of Public Safety has taken an adverse action by issuing an enforcement order. If building owners could appeal a referral by local fire departments, fire departments would be encumbered by administrative proceedings and the Department of Public Safety could be prevented from conducting its own investigations, in order to further its mission to protect Coloradoans.

Interagency referrals like the ones in this case commonly occur throughout our government and are not final agency actions. They are

not the consummation of agency action because they have no legal force, and treating them as final would negatively impact agencies and individuals.

CONCLUSION

The court of appeals correctly held that CDPHE's referral policy and subsequent referrals of physicians to the Medical Board are not subject to the requirements of the OML or the APA. The plain language of the OML and the APA supports the holding and is consistent with the operations and authorities of state agencies. Reversing the court of appeals would impact the normal functions of state departments and municipalities, including but not limited to the amici curiae who join this brief.

Respectfully submitted this 30th day of April, 2019.

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CERTIFICATE OF SERVICE

This is to certify that I have duly served the foregoing **Brief of Amici Curiae Colorado Department of Labor and Employment, Colorado Department of Personnel and Administration, Colorado Department of Local Affairs, Colorado Department of Regulatory Agencies, Colorado Department of Health Care Policy and Financing, Colorado Department of Natural Resources, Colorado Department of Education, Colorado Department of Corrections, Colorado Department of Public Safety, Colorado Department of Agriculture, Colorado Department of Human Services, Colorado Department of the Treasury, Colorado Department of Revenue, Colorado Department of Military and Veterans Affairs, Colorado Department of Transportation, Colorado Department of Higher Education, Colorado Department of State, and Colorado Municipal League in Support of the Respondent, the Colorado Department of Public Health and Environment** upon the following parties or their counsel electronically via Colorado Courts E-Filing and/or via U.S. first class mail at Denver, Colorado this 30th day of April, 2019 addressed as follows:

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