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SUPREME COURT
STATE OF COLORADO
2 East 14th Avenue
Denver, CO 80203

On Certiorari to the Colorado Court of Appeals
Court of Appeals Case No. 2019CA860
Denver District Court Case No. 2017CV32604

PETITIONER:
COLORADO DEPARTMENT OF PUBLIC HEALTH AND ENVIRONMENT

v.

RESPONDENT:
HEARTLAND BIOGAS, LLC

◆COURT USE ONLY ◆

Case No.2020SC770

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PETITION FOR WRIT OF CERTIORARI

CERTIFICATE OF COMPLIANCE

I hereby certify that this Petition complies with all requirements of C.A.R. 32 and C.A.R. 53, including all formatting requirements set forth in these rules. Specifically, the undersigned certifies that:

> This Petition contains 3,689 words, which does not exceed the word limit of 3,800 words.

I acknowledge that my petition may be stricken if it fails to comply with any of the requirements of C.A.R. 32 or C.A.R. 53.

s/Maritza Dominguez Braswell _
Signature of attorney

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ISSUES PRESENTED FOR REVIEW

Pursuant to the Colorado Governmental Immunity Act, §§ 24-10-101 to -120, C.R.S. (2020) ("CGIA"), the Colorado Department of Public Health and Environment ("CDPHE") moved to dismiss a $100 million regulatory taking claim brought by Heartland Biogas, LLC. The district court denied CDPHE's motion to dismiss. On appeal, CDPHE explained that the pleadings and undisputed evidence demonstrated that Heartland Biogas's claim was at most a tort claim barred by the CGIA, not a taking. But in a 2-1 decision, the Court of Appeals committed the same error the district court had committed, applying a C.R.C.P. 12(b)(5) *pleading* standard, even though the CGIA contemplates a jurisdictional defense that must be resolved under a C.R.C.P. 12(b)(1) *proof* standard.

The majority's decision was erroneous but is due, in part, to a lack of clear guidance from this Court. This Court has never applied its CGIA precedent to a regulatory taking case, and moreover, a line of Court of Appeals cases distorts the applicable standard. *See Casey v.*

Colo. Higher Educ. Ins. Benefits All. Tr., 310 P.3d 196, 199-200 (Colo. App. 2012); *Jorgenson v. City of Aurora*, 767 P.2d 756, 757 (Colo. App. 1989); *Srb v. Bd. of Cnty. Comm'rs*, 43 Colo. App. 14, 16, 601 P.2d 1082, 1083 (1979); *see also Desert Truck Sales, Inc. v. City & Cnty. of Denver*, 821 P.2d 860, 861-62 (Colo. App. 1991). In those cases, the Court of Appeals held plaintiffs to a pleading standard even though the jurisdictional challenge was governed by a Rule 12(b)(1) proof standard. And although this Court reversed one of those decisions, *see City & Cnty. of Denver v. Desert Truck Sales, Inc.*, 837 P.2d 759, 765 (Colo. 1992), the other three decisions — *Casey*, *Jorgenson*, and *Srb* — remain undisturbed.[1]

In this case, the majority acknowledged the Rule 12(b)(1) proof standard applies, yet ultimately followed in the flawed footsteps of *Casey*, *Jorgenson*, and *Srb*, applying nothing more than a pleading standard. And the majority created a new duty test that conflates a

[1] *Casey*, *Jorgenson*, and *Srb* are not directly on point for several reasons, including that they concern inverse condemnation rather than regulatory takings. Still, they cause confusion about the applicable standard in this case.

regulator's power with a regulator's duty. This test threatens to expose regulators to a new wave of litigation.

Because this Court has never addressed the CGIA's important procedural protections when a public entity raises sovereign immunity in response to an alleged regulatory taking claim, this case presents an issue not yet determined by this Court. Further, because *Casey*, *Jorgenson*, and *Srb*, cloud the applicable C.R.C.P. 12(b)(1) standard — and the majority has compounded that confusion with a novel duty test — this case presents an opportunity to clarify the standard before this confusion entraps other regulators in complex litigation on claims that are at most torts, not takings.

The issues presented for review are:

- Whether the Court of Appeals erred when it applied only a C.R.C.P. 12(b)(5) pleading standard rather than a C.R.C.P. 12(b)(1) proof standard, declining to examine the pleadings and undisputed evidence closely and instead accepting Heartland Biogas's allegations and theory of liability.

- Whether the Court of Appeals erred in failing to recognize that, after a close examination of the pleadings and undisputed evidence under C.R.C.P. 12(b)(1), CGIA immunity applies because Heartland Biogas did not satisfy its burden of proving subject matter jurisdiction by a preponderance of the evidence.
- Whether the Court of Appeals erred when it found within CDPHE's regulatory power under the Solid Wastes Disposal Sites and Facilities Act, §§ 30-20-101 to -123, C.R.S. (2020), an exclusive, nontortious duty CDPHE owed to Heartland Biogas, apparently as an alternative basis for rejecting CGIA immunity, despite Heartland Biogas's allegations implicating a general duty of care.

OPINION TO BE REVIEWED

Heartland Biogas, LLC v. Colo. Dept. of Pub. Health & Env't, 19CA0860 (Sept. 3, 2020) (attached as Appendix A).

STATEMENT OF JURISDICTION

This Court has jurisdiction under C.A.R. 49 and 51. On September 3, 2020, the Court of Appeals issued its opinion. The Petition for Writ of Certiorari is timely filed after one extension of time.

REFERENCE TO PENDING CASES

This Court has not granted a writ of certiorari on the issues raised here. *See* C.A.R. 53(a)(6).

STATEMENT OF THE CASE

From 2014 to early 2017, Heartland Biogas operated a solid waste facility in Weld County that converted cow manure, food waste, and other organic material into natural gas. CF, p. 2168. Heartland Biogas acquired the facility from Heartland Renewable Energy, an unrelated entity, in 2013. *Id.* at 2172. Three years earlier, under the Solid Wastes Disposal Sites and Facilities Act, Weld County — the local governing body with jurisdiction over the facility — approved Heartland Renewable Energy's application for an operating permit and issued it a certificate of designation, both required to operate a solid waste facility. *Id.* at 2275. But Heartland Biogas never applied for its own certificate

of designation. CF, p. 2172; *see also A-1 Organics, Inc. v. Heartland Biogas, LLC*, 2020 WL 5760458, *4 (D. Colo. Sept. 28, 2020).

Heartland Biogas sought to profit from the liquid wastewater created through the conversion process by selling it to local farmers as a "soil amendment." CF, pp. 2168, 2170. In an email and letter ("Wastewater Letters"), CDPHE advised Heartland Biogas it could distribute wastewater to third parties only if it first obtained a beneficial use determination from CDPHE — as contrasted with the permits Heartland Biogas may have obtained from the Department of Agriculture. CF, pp. 2129, 2439, 2472. This advice was appropriate and consistent with the regulatory framework in place from the time Heartland Biogas purchased the facility because the Department of Agriculture has no authority over wastewater. *See* § 35-1-104, C.R.S. (2020); § 30-20-101 *et seq*. Yet, despite never obtaining a beneficial use determination from CDPHE, CF, pp. 1635, 1652, 1655-58, 1674, Heartland Biogas took the position that it was entitled to distribute its wastewater to local farmers.

In April 2016, a Weld County inspector identified an odor violation at the facility. *Id.* at 2173. In response, Weld County held a probable cause hearing and decided it had enough evidence for a show cause hearing on whether to revoke the facility's permit. *Id.* at 2175. Before the hearing, Weld County requested information from CDPHE about the status of Heartland Renewable Energy's certificate of designation, namely whether it had transferred to Heartland Biogas when Heartland Biogas purchased the facility. CDPHE sought an opinion from First Assistant Attorney General, David Kreutzer, who opined that the certificate of designation did not transfer to Heartland Biogas through the purchase because the regulations provide no mechanism for transfer between corporate entities. *Id.* at 2345-46 ("Kreutzer Letter"). And notably, a court in a separate but related matter has since come to the same conclusion. *See A-1 Organics*, 2020 WL 5760458, at *4. Mr. Kreutzer did not recommend Weld County suspend Heartland Renewable Energy's certificate of designation or take any other adverse action against Heartland Biogas. CF, pp. 2346-47.

Nearly two months later, Weld County independently issued an order directing Heartland Biogas to cease distributing the facility's wastewater. Weld County also suspended Heartland Renewable Energy's certificate of designation and required Heartland Biogas to cease operations until it obtained its own certificate of designation. *Id.* at 2132, 2135, 2379. Instead of applying for its own certificate of designation, Heartland Biogas chose to close the facility. *Id.* at 2135.

Heartland Biogas brought this action alleging a promissory estoppel claim against CDPHE based on the Kreutzer Letter and the Wastewater Letters. On CDPHE's motion to dismiss, the court concluded the CGIA barred the promissory estoppel claim because at best it was a tort. *Id.* at 359-66. Heartland Biogas then amended its complaint, repackaging the same factual allegations into a regulatory taking claim. It alleged CDPHE had "reneged" on its "commitments," arbitrarily changed positions about permits, and issued an erroneous legal opinion. *Id.* at 2166-84. CDPHE moved to dismiss, again arguing the allegations amounted to, at best, tort claims barred by the CGIA. Without taking any evidence, the district court concluded Heartland

Biogas's "factual allegations"— the same ones that supported the initial promissory estoppel claim — were "sufficient to state a plausible takings claim." *Id.* at 2781. On that basis, it denied CDPHE's motion.

CDPHE took an interlocutory appeal. In a split opinion, a division of the Court of Appeals affirmed the district court's order. *Heartland Biogas*, slip op., ¶ 3. The majority recognized that under *Colorado Department of Transportation v. Brown Group Retail, Inc.*, 182 P.3d 687, 690 (Colo. 2008), it had to analyze the nature of the liability and the source of the duty. Slip op., ¶¶ 22, 29. Yet, instead of deciding whether Heartland Biogas had met its burden to *prove* subject matter jurisdiction under C.R.C.P. 12(b)(1) by closely examining the pleadings and undisputed evidence, the majority accepted Heartland Biogas's theory of liability, viewing the allegations in the light most favorable to Heartland Biogas, *id.* at ¶¶ 6, 26, 31-32, 42. In doing so, the majority conducted only a Rule 12(b)(5) analysis.

The majority compounded this error by finding CDPHE owed Heartland Biogas an unspecified duty arising from the Solid Wastes Disposal Sites and Facilities Act. *Id.* at ¶ 29. This holding mistook

CDPHE's power to regulate for a duty CDPHE owed to Heartland Biogas. On this basis, the majority concluded that, because Heartland Biogas's claim could not lie in tort, CDPHE had no immunity. *Id.* at ¶ 32.

By contrast, the dissent properly applied the CGIA's procedural protections, closely examining the viability of Heartland Biogas's taking claim under a Rule 12(b)(1) standard. *Id.* at ¶¶ 59-71 (Richman, J., dissenting). The dissent reasoned that, because the Kreutzer Letter and the Wastewater Letters could not "fairly be characterized as a taking of private property for public purposes," Heartland Biogas's claim was not grounded in the just compensation clause. *Id.* at ¶¶ 60-61, 66. Instead, because the allegations described an improper use of CDPHE's police power, which could lie in tort, Judge Richman concluded that CGIA bars the claim. *Id.* at ¶¶ 67-68.

STANDARD OF REVIEW

The issues raised in this petition are questions of law reviewed de novo. *Robinson v. Colo. State Lottery Div.*, 179 P.3d 998, 1003 (Colo. 2008) (determinations regarding immunity are reviewed de novo); *Taco*

Bell, Inc. v. Lannon, 744 P.2d 43, 46 (Colo. 1987) (existence and scope of duty are questions of law).

REASONS TO GRANT CERTIORARI

I. This Court should clarify the applicable standard of review when a public entity challenges subject matter jurisdiction under the CGIA in a motion to dismiss a regulatory taking claim.

There is no dispute that CDPHE's CGIA challenge is governed by C.R.C.P. 12(b)(1). Slip op. ¶ 22. This rule provides important procedural protections. *Finnie v. Jefferson Cnty. School Dist. R-1*, 79 P.3d 1253, 1258-61 (Colo. 2003); *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 924-25 (Colo. 1993). And because Rule 12(b)(1) demands proof by a preponderance of the evidence, *Cash Adv. & Preferred Cash Loans v. State*, 242 P.3d 1099, 1113 (Colo. 2010), applying this standard ensures that a public entity will not be subjected to protracted litigation when it is, in fact, immune.[2]

[2] CGIA immunity is immunity from *suit*, not just immunity from liability. §§ 24-10-102, -106, -108; *see also City & Cnty. of Denver v. Dennis*, 418 P.3d 489, 494 (Colo. 2018) (immunity must be "dealt with at the earliest possible stage").

Even so, this Court has never described how a plaintiff must satisfy its burden of proving subject matter jurisdiction over an alleged regulatory taking.[3] Nor has it addressed a fundamental error in the handful of Court of Appeals cases that concern jurisdictional challenges to takings claims. *See Casey*, 310 P.3d 199-200; *Jorgenson*, 767 P.2d at 757; *Srb,* 43 Colo. App. at 16, 601 P.2d at 1083.

In *Casey*, *Jorgenson*, and *Srb,* the Court of Appeals held, without analysis, that because the CGIA does not apply to taking claims, a plaintiff need only *plead* a taking. But that line of cases traces back to *Board of Commissioners of Logan County v. Adler*, 69 Colo. 290, 194 P . 621 (1920),[4] a case decided well before the CGIA was enacted, and

[3] For example, does the plaintiff have to prove by a preponderance of the evidence that the regulatory taking claim could not lie in tort — because only then would the court have jurisdiction? Or does the plaintiff have to establish the taking, regardless of whether it could also be pled as a tort? In that event, exactly what does the plaintiff have to prove by a preponderance of the evidence — a prima facie taking, or something else?

[4] *Srb* — on which *Casey* and *Jorgenson* relied — cited only *Adler*, for the proposition that the just compensation clause creates a per se exception to governmental immunity. *Srb*, 43 Colo. App. at 18, 601 P.2d at 1085.

hence, well before the Rule 12(b)(1) CGIA proof standard sprung into being.[5] Post-CGIA, this Court has made clear that the Rule 12(b)(1) proof standard applies, even when a claim that could lie in tort is packaged as a taking. *See Desert Truck*, 837 P.2d at 765 (conducting a Rule 12(b)(1) CGIA analysis to determine whether the court had subject matter jurisdiction over the alleged taking claim).

Still, and despite recognizing that CDPHE's challenge was governed by Rule 12(b)(1), slip op., ¶ 22, the majority held Heartland Biogas to a mere pleading standard, thereby frustrating the purpose of the CGIA. Reasoning — erroneously — that its review on interlocutory

[5] In overruling *Adler*, this Court stated the legislature should define governmental immunity's boundaries and recognized that legislatively created governmental immunity differed from common law immunity. *Evans v. Bd. of Cnty. Comm'rs*, 482 P.2d 968, 972 (Colo. 1971). After *Evans*, reliance on *Adler* is misplaced, and courts should look to the standards and procedural protections afforded under the CGIA, which ensure public entities are immune from *suit*, not merely from liability, regardless of the type of action or form of relief chosen. *See* §§ 24-10-102, -106, -108. To effectuate this protection, this Court has held time and again that the inquiry designed to look past a claim's label is a jurisdictional inquiry governed by Rule 12(b)(1). *See, e.g.*, *Fogg v. Macaluso*, 892 P.2d 271, 276 (Colo. 1995).

appeal is limited, the majority refused to conduct any merits inquiry into Heartland Biogas's regulatory taking claim. Slip op., ¶¶ 42-44.

Instead, the majority accepted "Heartland's theory of liability," relied on what it "maintain[ed]" in its arguments, avoided closely examining the allegations, and did not even consider the evidence, primarily the voluminous attachments to Heartland Biogas's Third Amended Complaint. *Id.* at ¶¶ 31-34. The majority accepted Heartland Biogas's pleaded facts, declining to critically examine them, and deferring to Heartland Biogas's characterization of them.

As explained in the dissent, the majority's approach is contrary to the CGIA and the cases interpreting it:

> [T]he cases under the CGIA require the court to take a close look at the pleadings to determine if the claims sound in tort or could sound in tort. That requirement cannot simply be dismissed by asserting that it amounts to an evaluation of the 'viability' of Heartland's claims.
>
> [T]he immunity vested under the CGIA is immunity from "any action" — that includes litigation, not just immunity from an eventual judgment. As the supreme court noted in *City of Lakewood v. Brace*, CGIA immunity is "an *immunity from suit* rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." 919 P.2d 231, 238 (Colo. 1996) . . . . Thus, at the early stages of the case, it is incumbent on the

> court to decide if immunity attaches. Otherwise, immunity from litigation is defeated.

Slip op., ¶¶ 70-71.

II. If this Court grants CDPHE's petition, it will find a close examination of Heartland Biogas's allegations and the undisputed evidence shows the claim could lie in tort, cannot amount to a taking, and should be dismissed.

Heartland Biogas alleges CDPHE is liable because it acted unreasonably, misled Heartland Biogas, allowed CDPHE's lawyer to issue an erroneous legal opinion, and made false promises. CF, pp. 2166-84. As the dissent properly recognized, these allegations could form the basis for tort claims, slip op., ¶¶ 67-68, and for three reasons, all demonstrated by the evidence attached to Heartland Biogas's Third Amended Complaint, CDPHE's actions "cannot be fairly characterized as a taking of private property for public purposes." Slip op., ¶¶ 60, 66 (Richman, J., dissenting).

First, this Court has warned against confusing the ordinary exercise of police power with a taking. *Desert Truck*, 837 P.2d at 766-67. Despite this warning, the majority conflated the two when it found, with insufficient analysis, an alleged improper exercise of police power

under the Solid Wastes Disposal Sites and Facilities Act enough to support a regulatory taking claim.

Second, the Kreutzer Letter — a legal opinion only about the transferability of a certificate — is not final agency action nor any type of enforcement action, much less a taking. Nor did the Kreutzer Letter advocate any adverse action against Heartland Biogas or the facility. And the undisputed evidence shows Weld County's decision to suspend Heartland Biogas's permit — assuming the decision could amount to a regulatory taking — arose from Heartland Biogas's numerous permitting violations that had begun well before the Kreutzer Letter. *See* slip op., ¶¶ 59-61, (Richman, J., dissenting).

As Judge Richman also noted, the Wastewater Letters requiring Heartland Biogas to obtain a beneficial use determination could not be a taking because they did not constitute enforcement action. *Id.* at ¶ 65. Nor can they have gone "too far" when viewed through the lens of reasonable investment-backed expectations. Heartland Biogas operated in a highly regulated industry and had no reasonable expectation it

could avoid business interruptions while resolving regulatory issues. *See Dept. of Health v. The Mill*, 887 P.2d 993, 1000-02 (Colo. 1994).

And third, Heartland Biogas did not even allege, much less identify, any evidence showing that CDPHE was the "taker." The actions that purportedly effected a taking — suspending permits and shutting down operations — were, by Heartland Biogas's own admissions, Weld County's actions, not CDPHE's. CF, pp. 2180-81.

III. The majority created a novel test that will generate greater confusion and threaten the important protections of the CGIA.

In attempting to satisfy the Rule 12(b)(1) standard with a mere pleading review, the majority created a new duty test that circumvents CGIA immunity. It held Heartland Biogas's claim could not lie in tort because CDPHE owed Heartland Biogas a nontortious statutory duty arising from the Solid Wastes Disposal Sites and Facilities Act. Slip op., ¶¶ 29, 33-34 (citing *Bd. of Cnty. Comm'rs of Cnty. of La Plata v. Dept. of*

Pub. Health & Env't, 2020COA50, ¶¶ 36-37, *cert. granted* 20SC365 (Sept. 28, 2020)). This holding is flawed in three ways.

First, it misconceives the source of a regulator's *power* as the source of a regulator's *duty*. The Solid Wastes Disposal Sites and Facilities Act authorizes CDPHE to act, but it does not create some independent CDPHE duty to Heartland Biogas that would form the basis of any claim (much less a regulatory taking claim, the basis of which is the constitution, not the Act). Regulators always draw their power from some statute or regulation. If a claimant can avoid the CGIA by merely referencing the regulator's statutory or regulatory power, the risk of exposing regulators to suit looms large.[6]

Second, and to the extent CDPHE may have some duty under the Act, the duty is to regulate for the benefit of the public; it is not a duty owed to a regulated party, individually. Even if the Act could create a duty owed to regulated parties, Heartland Biogas failed to allege, and

[6] Looming almost as large is the specter that recognizing such a duty would eliminate normal abuse of discretion review under the APA. If a regulatory taking is alleged, is whether the regulator abused its discretion even relevant? Or must the regulator simply pay for any harm resulting from its regulatory activity?

the majority failed to identify, any specific Solid Wastes Disposal Sites and Facilities Act provision or duty that CDPHE allegedly violated.

Third, the majority's application of this new test assumes that identifying some nontortious duty ends the CGIA inquiry and immunity is lost. However, even if a regulator has a nontortious duty — and that duty is owed to a regulated party — the regulator's conduct might still breach duties of care that lie in tort.[7]

CONCLUSION

The General Assembly anticipated plaintiffs would repackage tort claims to avoid CGIA immunity at the pleading stage of a case. It sought to protect against this strategy by making clear that public entities are immune not just from *liability*, but from *suit*. It made equally clear that immunity would apply regardless of the type of action pleaded or form of relief chosen.

These protections require courts to conduct a fact-based inquiry whenever a public entity *raises* the issue of sovereign immunity. § 24-

[7] Notably, the tension that arises when a claim is both a tort *and* a taking, was forecasted but not resolved, in *City of Northglenn v. Grynberg*, 846 P.2d 175, 184 (Colo. 1993).

10-108. Courts interpreting that requirement conduct that inquiry under a 12(b)(1) proof standard. Reviewing the merits of a claim at the onset of a suit may pose challenges, but the General Assembly intended precisely that scrutiny when a government entity raises an immunity defense.

Still, without clarification from this Court, lower courts reviewing regulatory taking claims are likely to continue giving the Rule 12(b)(1) proof standard mere lip service, while holding plaintiffs only to the lower pleading standard under Rule 12(b)(5). Alternatively, courts may do what the majority did here — fashion new duty tests that threaten to further confuse the standard and erode the CGIA's protections.

By granting CDPHE's petition, this Court can extend *Desert Truck* to regulatory taking claims, clarify that the Rule 12(b)(1) standard applies to such claims, and protect regulators from protracted litigation when the proper scrutiny shows an exercise of police power subject to APA review, not a regulatory taking claim.

For these reasons, CDPHE respectfully requests the Court grant certiorari.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of November, 2020, a true and correct copy of the foregoing **Petition for Writ of Certiorari** was duly served via the Colorado Courts E-Filing System/CCES upon the following counsel of record:

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