COLORADO SUPREME COURT 2 East 14th Ave. | Denver, Colorado | 80203	
On Petition for Writ of Certiorari to the Court of Appeals, Case No. 2024CA001889; Opinion by Berger, J.; Jones and Meirink, JJ., concurring	▲ **COURT USE ONLY** ▲
Petitioners: CONCORD ENERGY HOLDINGS, LLC, a Colorado Limited Liability Company, and CONCORD ENERGY, LLC, a Colorado Limited Liability Company, **v.** **Respondent:** J. CHRISTIAN ALLEN.	Case No. 2026SC165
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AMICI CURIAE BRIEF OF COLORADO CONCERN, DENVER METRO CHAMBER OF COMMERCE, AND NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER, INC.

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 brief of amicus curiae complies with the applicable word limit set forth in C.A.R. 29(d) and C.A.R. 53(g), as it contains 3,147 words (excluding the caption page, this certificate page, the table of contents, the table of authorities, and the signature block). Furthermore, 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 C.A.R. 32.

/s/ David B. Meschke
Signature of attorney or party

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Pursuant to C.A.R. 29 and 53(g), the entities listed below, through undersigned counsel, file this brief as amici curiae in support of the Petition for Writ of Certiorari ("Pet.") filed by Petitioners Concord Energy Holdings, LLC and Concord Energy, LLC (together, "Concord").

THE *AMICI CURIAE*

The following three organizations (collectively, "Amici") hereby participate as *amici curiae*. Amici represent numerous Colorado businesses and business leaders. The decision below, which makes substantial changes to Colorado's longstanding faithless servant doctrine, directly affects Amici and their members, many of whom are businesses with employees who have fiduciary responsibilities.

A. Colorado Concern is an alliance of top executives with a common interest in enhancing and protecting Colorado's business climate. Founded in 1986 by a dozen committed business leaders, membership now includes nearly 200 community, civic, and C-suite leaders from for-profit, non-profit and higher education organizations across Colorado.

B. Denver Metro Chamber of Commerce is a leading voice for over 1,200 Denver Metro area businesses and their more than 300,000

employees, providing advocacy for nearly 160 years at the federal, state and local levels and helping shape Colorado's economic and public policy landscape.

C. National Federation of Independent Business Small Business Legal Center, Inc. ("NFIB Legal Center") is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation's courts through representation on issues of public interest affecting small businesses. NFIB Legal Center is an affiliate of the National Federation of Independent Business, Inc. ("NFIB"), which is the nation's leading small business association. NFIB's mission is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB represents, in Washington, D.C., and all 50 state capitals, the interests of its members.

INTRODUCTION

Amici's members—Colorado businesses and business leaders—have been placed in an uncertain position because of the appellate division's decision in *Allen v. Concord Energy Holdings, LLC & Concord Energy, LLC*, 24CA1889 ("Op.").

The decision below addresses the responsibilities of a narrow, but important, segment of Colorado employees: those who owe fiduciary duties to their employers because they have high-level discretionary authority, access to confidential information, or the ability to act on a company's behalf, placing them in a position of trust. Such fiduciaries include those who handle large, commercial transactions on their employers' behalf, such as Mr. Allen, and are often highly compensated. But in exchange for generous compensation, fiduciary employees are expected to adhere to company and common law policies, including "'to act solely for the benefit of the principal in all matters connected to [their] agency.'" *Jet Courier Serv., Inc. v. Mulei*, 771 P.2d 486, 492 (Colo. 1989) (quoting Restatement (Second) of Agency § 387).

Until recently, Colorado businesses could protect themselves from fiduciaries' violations because the faithless servant doctrine applied to breaches of *any* fiduciary duty, resulting in forfeiture of compensation arising from a breach, and rendering ratification and waiver inapplicable. The division's opinion casts doubt on those longstanding rules, leaving the business community not only guessing as to the doctrine's future application but also placing businesses in the

unenviable position of having to choose, with time constraints, whether to void an action or risk paying compensation to the breaching employee.

The division's new regime displaces, or at least severely restricts, this Court's opinions in *Moore & Co. v. T-A-L-L, Inc.*, 792 P.2d 794, 800 (Colo. 1990), and *Jet Courier*. Companies will now be forced to (1) make on-the-spot decisions about which exact fiduciary duty an employee breached; (2) monitor every email sent after the breach, in the off chance a single email somehow blesses the breach; and (3) wait for the market to determine whether a breaching employee is entitled to "compensation" from their own wrongdoing. The division's regime wrenches from companies' leadership the power to enforce their own company policies and incentivizes employees to take matters into their own hands and ignore employer dictates if they believe a breach can be financially beneficial.

This Court's review is needed to reassert that Colorado's faithless servant doctrine applies to breaches of *all* fiduciary duties, consistent with this Court's decisions in *Jet Courier* and *Moore*. At the very least, the Court should clarify the scope of the doctrine after the division muddied the waters.

Amici therefore respectfully request that the Court grant Concord's Petition for Writ of Certiorari.

ARGUMENT

I. The Court of Appeals' opinion upends businesses' longstanding understanding that fiduciaries are not financially rewarded for violating their duties.

As Concord outlines, this Court has explicitly applied the "foundational" faithless servant doctrine since 1989. Pet. at 1. Businesses across our State, including Amici's members, count on that "an agent who breaches a fiduciary duty forfeits the right to compensation arising from that breach." *Id.*

But Amici's members' reliance on that foundational doctrine dates back even further than *Moore* and *Jet Courier*. The faithless servant doctrine entered American law as early as 1886, with the seminal decision of the New York Court of Appeals in *Murray v. Beard*, 102 N.Y. 505 (N.Y. 1886); *see CBRE, Inc. v. Pace Gallery of N.Y., Inc.*, 2022 WL 683744, at *4 (S.D.N.Y. Mar. 8, 2022) (calling *Murray* a "longstanding . . . standard[]"). In *Murray*, the New York high court held: "An agent is held to *uberrima fides*," *i.e.*, the utmost good faith, "in his dealings with his principal, and if he acts adversely to his employer in any part of [a] transaction, . . . it amounts to such a fraud upon the principal, *as to forfeit*

any right to compensation for his services." 102 N.Y. at 508 (emphasis added). Only eleven years later, this Court adopted the *Murray* rule, holding: "The law requires the utmost good faith on the part of an agent when dealing with his principal . . . ." *Fisher v. Seymour*, 49 P. 30, 33 (Colo. 1897) (citing *Murray*, decisions from Missouri and New Jersey, and treatises).

Ever since, Colorado businesses have operated with the understanding that fiduciaries forfeit any compensation if they violate their duties. Until the decision below, Colorado courts and commentators have *not* restricted the forfeiture rule to the duty of loyalty. For example, Williston cites *Jet Courier* for the proposition that "an agent is entitled to no compensation for willful and deliberate conduct that is disobedient or a breach of the duty of loyalty even for properly performed services for which no compensation is apportioned." 19 Williston on Contracts § 54:50 (4th ed.) (citing *Jet Courier*). And "it has been held that, in an action for breach of fiduciary duty, an agent or employee may be required to forfeit the right to compensation even absent a showing of actual injury to the employer." *Id.* § 54:50 & n.21 (citing *Moore*). Williston thus understood that *Jet Courier* and *Moore* applied both to "disobedient" behavior "or a

breach of the duty of loyalty" and for "breach[es] of fiduciary dut[ies]" writ large. *Id.* § 54:50. A past decision from the Court of Appeals agreed. *See Hoff & Leigh, Inc. v. Byler*, 62 P.3d 1077, 1079 (Colo. App. 2002) (noting "[t]he principle requiring forfeiture . . . ha[d] no applicability" because the individual did "not owe fiduciary duties," while not analyzing only the duty of loyalty).

The division's decision thus upends Amici's members' understanding of the law and expectations by narrowing this Court's rulings in *Jet Courier* and *Moore* to have forfeiture apply only to the duty of *loyalty* and only if there is no ratification or waiver.

Worse, the division's decision forces legal counsel for Amici's members to assess which fiduciary duty is implicated, which is no small task. Although the division suggests it will not be difficult to distinguish between actions constituting breaches of the duty of loyalty and other fiduciary duties, *see* Op. ¶¶ 25–26, 29, that distinction is more complicated in practice, especially when companies must determine on an expedited basis whether a fiduciary employee breached a duty. This Court—citing *Jet Courier*—has "refer[red] to . . . claims for 'breach of fiduciary duty of loyalty' and claims for 'breach of fiduciary duty of due

care and loyalty' as 'breach of fiduciary duty' claims," thus consolidating the analysis of different types of duties. *Resol. Tr. Corp. v. Heiserman*, 898 P.2d 1049, 1053 n.4 (Colo. 1995) (citing *Jet Courier*, 771 P.2d at 492 n.10). Other courts agree that distinguishing among fiduciary duties is difficult.[1]

Unless this Court provides clarity, Amici's members will be forced to make rushed and uninformed decisions about which exact fiduciary duty an employee violated, a hasty decision-making process that could result in millions of dollars of losses to individual companies. At the very least, this Court's review is needed to provide a definitive answer as to whether the default rule—faithless servant doctrine applies to breaches of *all* fiduciary duties—is still the law in Colorado. Amici's members are now operating in a world with conflicting legal regimes, an untenable situation when deciding whether to fire a rogue fiduciary.

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[1] *E.g.*, *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 65 (Del. 2006) ("The conduct that is the subject of due care may overlap with the conduct that comes within the rubric of good faith in a psychological sense, but from a legal standpoint those duties are and must remain quite distinct." (footnote omitted)); *Zastrow v. J. Commc'ns, Inc.*, 718 N.W.2d 51, 59 (Wis. 2006) ("[C]learly defining the duties of a fiduciary in a particular situation is difficult."); *see also* Sean J. Griffith, *Good Faith Business Judgment: A Theory of Rhetoric in Corporate Law Jurisprudence*, 55 Duke L.J. 1, 41 (2005) (noting "overlap between care and loyalty").

II. The decision of the Court of Appeals creates uncertainty about how and when a company ratifies a fiduciary employee's violations of company policy.

The division's ruling on ratification compounds the uncertainty now faced by Amici's members and other Colorado businesses.

Under *Jet Courier* and *Moore*, there was no defense to the forfeiture rule. *See* Pet. at 12–15. If an employee breached their fiduciary duties, that employee could not recover compensation. Full stop. *See id.* at 13. The division's decision to apply ratification and waiver creates further uncertainty for businesses in two ways.

First, Colorado businesses will now be required to engage in a detailed legal analysis for each and every action taken in response to an employee's fiduciary breach. The jury found Concord "ratified" Allen's breach largely through conduct *unrelated to Allen's trade* (such as allowing execution of *other* trades). *See* Op. ¶ 50. And the *single* email alluding to Allen's trade only noted the company's profit, not that the company condoned Allen's violation. *See id.* The trial court *excluded* evidence that Concord did not approve Allen's fiduciary violation. *Id.* ¶ 39.

The division's decision that ratification and waiver nullify the faithless servant doctrine will require a company's employees, legal professionals, and others to determine whether each and every email they send could be considered ratification of a breach, even if the company leadership condemns such actions. A single innocuous email, *see* Op. ¶ 50, can become the basis for voiding application of the faithless servant doctrine and being liable for millions in damages. And companies will be forced into the position of deciding on a moment's notice (before anyone else manages to send an email) whether to void a transaction that profited the business, or whether to pay compensation to the employee. Smaller businesses, especially, lack the time, personnel, and resources to engage in this demanding inquiry.

Amici's members often have to make gametime decisions about whether a fiduciary's conduct violated their fiduciary duties. Clarification about whether ratification and waiver apply to the faithless servant doctrine, and what type of conduct constitutes ratification and waiver, will allow Colorado companies to understand actions they can (and cannot) take when a fiduciary violates company policy.

Second, under the division's regime, ratification or waiver now depends, at least in part, on the financial outcome of the breach, including market outcomes or the impact on a small business's financials. According to the division, ratification and waiver were inapplicable in *Jet Courier* because "it would make no sense to say that Jet ratified the same conduct that essentially destroyed its business." Op. ¶ 33. As Concord notes, the rule from the Second Restatement—cited in *Jet Courier*—provides that even if the "speculative investment . . . 'turn[s] out well,'" it "may still 'justify the principal in discharging' the agent." Pet. at 13 (quoting Restatement (Second) of Agency § 416, cmt. d).

During the "unprecedented levels of market volatility," Op. ¶ 5, at which time Allen made his unauthorized trade, neither he nor Concord could know if the trade would make a profit or a loss. But the division blessed application of ratification because the trade made a profit based on market forces beyond Concord's control. The division's holding essentially leaves it to chance (and the whims of the market) as to whether a company can terminate an employee for breaching a fiduciary duty. That new legal doctrine incentivizes an employee to violate their employer's policies if the employee believes the violation will result in a

net profit for the employer. In other words, an employee can now disregard company rules and profit from their own wrongdoing.

That backward-looking analysis makes it impossible for Amici's members to know whether and when they can fire an employee for violating a fiduciary duty. If the unauthorized trade loses money in the first five minutes, can the company terminate the breaching employee? What if the trade makes a profit ten minutes later? The opinion below puts Colorado companies between a rock and a hard place. If the company voids the transaction, it will lose money from the transaction itself, but defeat a future ratification argument in the employee's eventual lawsuit. But if the company does *not* void the transaction, it could be proof of "ratification," requiring the company to compensate the breaching fiduciary.

This Court's intervention is needed to clarify that ratification and waiver are inapplicable regardless of whether the company makes a profit from the breach, or at least to clarify that the common law understanding has been turned on its head.

III. The decision of the Court of Appeals adds to increasingly hostile environment for businesses in Colorado, especially when compared to neighboring states.

The uncertainty created by the decision below adds to a growing problem for our State: Colorado is becoming less hospitable for businesses. The Colorado Chamber of Commerce notes that Colorado's rankings in business competitiveness have declined. Colorado is now ranked as the "sixth most regulated state in the nation."[2] A survey of Colorado business leaders found that those who believe the Colorado economy is on the wrong track increased from 53% in 2022 to 67% in 2024.[3] Forty-eight percent of those business leaders say regulations are their top concern, with the biggest regulatory concern as "[l]abor and employment-related requirements (such as paid leave)."[4]

Unsurprisingly, Colorado dropped from 16th in employment growth to 46th from 2023 to 2024.[5] And in 2025, Colorado lost jobs for the first

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[2] Colorado Chamber of Commerce, New Study Reveals Colorado as Sixth Most Regulated State; Colorado Chamber Calls for Reform (Dec. 10, 2024), https://cochamber.com/2024/12/10/new-study-reveals-colorado-as-sixth-most-regulated-state-colorado-chamber-calls-for-reform/.
[3] Colorado Chamber of Commerce & CHS & Associates, 2025 Colorado Business Leaders Survey, p.3 https://cochamber.com/wp-content/uploads/2025-Business-Survey.pdf.
[4] *Id.* at p.4–5.

time since the COVID-19 pandemic.[6] The increased regulation has convinced companies to leave. The Colorado Chamber Foundation's 2025 Relocation Tracker report notes that 98 companies have either left or bypassed Colorado for other states since 2019, resulting in 13,607 lost jobs.[7] The rate of relocations is only increasing, from around five in 2022 to 27 in 2025.[8]

Companies are begging for change. Recently, "a bipartisan coalition of Colorado tech and business leaders" signed an open letter to Governor Polis noting they "are deeply concerned that the direction we are heading threatens the long-term prosperity of the people who call Colorado

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[5] Metro Denver EDC, Toward a More Competitive Colorado (2026), p.4, https://www.flipsnack.com/denverchamber/2026-toward-a-more-competitive-colorado.

[6] Bernadette Berdychowski, *Colorado saw job losses for the first time since pandemic*, ColoradoPolitics (Apr. 13, 2026), https://www.coloradopolitics.com/2026/04/13/colorado-saw-job-losses-for-the-first-time-since-pandemic/?utm_medium=email&utm_campaign=COPO%20Morning%20USE%20415&utm_content=COPO%20Morning%20USE%20415+CID_acbce1ef2c298c948fe3f5557dce941b&utm_source=campaign_monitor_email&utm_term=Colorado%20saw%20job%20losses%20for%20the%20first%20time%20since%20pandemic.

[7] Colorado Chamber Fondation, 2025 Relocation Tracker: Colorado's Lost Corporate Opportunities & Competitiveness Assessment, p.6, https://cochamber.com/wp-content/uploads/2025-Relocations-Tracker.pdf.

[8] *Id.*

home."[9] Over 230 business leaders[10] wrote: "Colorado is increasingly viewed as a less predictable and less competitive environment for building and scaling technology companies, other growth-oriented businesses, and traditional corporations alike."[11] "Other states are actively and successfully courting and enticing Colorado companies and entrepreneurs to relocate, expand, or redirect investment elsewhere by offering clearer policy signals, faster regulatory pathways, and stronger alignment between government and growth."[12] Specifically, the bipartisan group requested the state government "remove barriers and reestablish Colorado as a preferred geography for technology investment, company formation, business expansion, and long-term capital deployment."[13]

The decision below moves Colorado further in the wrong direction. It creates a "less predictable environment" by upending decades-old

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[9] Ensuring Colorado's Innovation Future, Open Letter, https://ensuringcolorado.com/#letter.

[10] Tamara Chuang, *What's Working: "Enough is enough!" Local tech and business leaders feel Colorado is losing its competitive edge*, The Colorado Sun (Apr. 11, 2026), https://coloradosun.com/2026/04/11/business-tech-colorado-lost-competitive-edge/.

[11] Ensuring Colorado's Innovation Future, *supra* n.9.

[12] *Id.*

[13] *Id.*

faithless servant doctrine precedent. And it puts Colorado companies at a competitive disadvantage compared to other states. Hostile court decisions have already caused business to flee other jurisdictions. For example, "controversial judicial decisions" are in part to blame for "Delaware's 'monopoly' over corporate incorporation . . . showing early signs of collapse," with companies fleeing to other states.[14] The decision below puts Colorado on the same path towards losing businesses and jobs.

The risk of losing business is real. Multiple nearby states apply the faithless servant doctrine to breaches of *all* fiduciary duties:

- **Arizona**: If "any . . . person acting as agent or in a fiduciary capacity . . . betrays his principal, such misconduct and breach of duty results in the agent's losing his right to compensation for services to which he would otherwise be entitled." *Haymes v. Rogers*, 222 P.2d 789, 790 (Ariz. 1950).
- **Kansas**: "An agent is entitled to no compensation for conduct which is disobedient or which is a breach of his duty of loyalty." *Bessman v. Bessman*, 520 P.2d 1210, 1219 (Kan. 1974) (quotation marks omitted).
- **Nebraska**: "[A]n agent who engages in activities that breach the agent's fiduciary duties to the principal is not entitled to and must

[14] Steffany Acevedo, Delaware's Corporate Crack-Up: The "Great" Business Exodus and Its Legal Fallout, Fordham Journal of Corporate & Financial Law (Mar. 31, 2025), https://news.law.fordham.edu/jcfl/2025/03/31/delawares-corporate-crack-up-the-great-business-exodus-and-its-legal-fallout/.

> forfeit any compensation." *Dick v. Koski Pro. Grp., P.C.*, 950 N.W.2d 321, 375 (Neb. 2020).

The Court should grant certiorari to realign Colorado's faithless servant doctrine with surrounding states and the national consensus, or at least provide an answer as to whether the division's holding represents the current state of the law in Colorado.

CONCLUSION

For the foregoing reasons, the Court should grant Concord's Petition for Writ of Certiorari.

Respectfully submitted this 20th day of April, 2026.

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