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SUPREME COURT, STATE OF COLORADO 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to Article V, Section 48.3 of the Colorado Constitution	
In Re: **Petitioner:** Colorado Independent Congressional Redistricting Commission.	▲ **COURT USE ONLY** ▲
Attorney for Interested Party Douglas County Board of County Commissioners: Robert A. McGuire, III ROBERT MCGUIRE LAW FIRM 1624 Market Street, Suite 226 #86685 Denver, Colorado 80202-2523 Telephone: (720) 420-1395 Fax: (720) 420-1395 E-mail: ram@lawram.com Atty Reg. #: 37134	Supreme Court Case No.: 2021 SA 305

STATEMENT OF INTERESTED PARTY DOUGLAS COUNTY BOARD OF COUNTY COMMISSIONERS IN SUPPORT OF THE COLORADO INDEPENDENT LEGISLATIVE REDISTRICTING COMMISSION'S FINAL PLAN

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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 the Order of Court in this matter dated July 26, 2021.

> It contains **6,020** words in sections that count toward word limits under C.A.R. 28(g).

The brief complies with the standard of review requirements set forth in C.A.R. 28(a)(7)(A) and/or C.A.R. 28(b).

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

[Pursuant to Rule 121(c) § 1–26, the signed original is on file.]

s/ Robert A. McGuire
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Interested Party Douglas County Board of County Commissioners, by and through undersigned counsel, hereby submits this Statement Of Interested Party Douglas County Board Of County Commissioners In Support Of The Colorado Independent Legislative Redistricting Commission's Final Plan, pursuant to article V, section 48.3(1) of the Colorado Constitution and pursuant to the schedule established by the first bullet point of the Order of Court in this matter dated July 26, 2021.

STATEMENT REGARDING ORAL ARGUMENT

Interested Party Douglas County Board of County Commissioners does not request to participate in oral argument, but is prepared to participate if doing so would be helpful to the Court.

I. INTRODUCTION

The Douglas County Board of County Commissioners ("Douglas County Board") supports the final map adopted by the Colorado Independent Legislative Redistricting Commission (the "Commission").

The Douglas County Board is an Interested Party because Douglas County, with roughly 360,000 residents, is one of the most populous and fast-growing counties in the State of Colorado. As such, the county is geographical home to various cohesive communities of interest as well as several political subdivisions

that have a great stake in securing legislative representation that will be appropriately focused on and responsive to their shared public policy concerns. Ten years ago, this Court implicitly acknowledged Douglas County's legitimate claim, as a whole county, to be treated as a community of interest and kept whole when the Court rejected a legislative reapportionment plan that was "not sufficiently attentive to county boundaries," citing Douglas County's objections, among others. *In re Reapportionment of the Colo. Gen. Assembly*, 332 P.3d 108, 111 & n.4 (Colo. 2011).

The record before the Commission in this state legislative redistricting cycle contains significant input from the Douglas County Board and from others in Douglas County addressing the existence and character of numerous shared substantial interests that may be the subject of state legislative action. Douglas County's input was not completely accepted by the Commission or fully implemented in the formulation of the final house and senate legislative maps, but enough of Douglas County's key concerns were fairly accommodated to warrant the Douglas County Board's support of the final plan.

On August 18, 2021, the Douglas County Board sent the Commissioners a letter providing input on the Commission's preliminary house and senate legislative maps, which were released on June 23, 2021. Letter from Douglas

County Board to Independent Legislative Redistricting Commission (Aug. 18, 2021), *available at*, https://coleg.app.box.com/s/ypsqn7f0hzna76qkr41kqegd8oa1n6gi/file/848655370962 (last visited Oct. 20, 2021). The Douglas County Board's letter noted that the County's primary connection is to the Denver Metropolitan Area, both because the vast majority of Douglas County citizens work in the metro area and because the vast majority of the County's public works budget and projects are spent related to the primary urbanization area along the northernmost corridor of Douglas County where most of the County's citizens reside. *Id*. 1.[1]

With respect to the preliminary house districts map, the Douglas County Board's letter expressed satisfaction that the Commission had done a reasonable job dividing Douglas County into current communities of interest. The letter

[1] The letter's testimony about Douglas County's connections to the Denver Metropolitan Area echoed comments that the Commission had previously received during a public meeting held in Centennial on August 3, 2021, where members of the public urged the Commission to keep northern Douglas County's suburbanized communities together with other Denver metro communities for congressional and legislative districting. *See* Staff Summary of Meeting, Other Committee, Committee On Joint Independent Redistricting Commissions 1–3, (Aug. 3, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBb2NDIiwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--177b879c65edb4ae2fa4bcd66a569bd5a1aa0a0b/Centennial%2008032021.pdf (last visited Oct. 20, 2021).

recommended removing a split of the Windcrest retirement community and keeping that community intact with the suburbanized community of Highlands Ranch. *Id.* 1–2.

With respect to the preliminary senate map, the Douglas County Board's letter requested the Commission align the Town of Parker and Castle Rock within a single senate district based on cumulative population, a shared common interest in water issues, and common transportation connections. The letter noted that this change would allow the whole communities of Lone Tree, Highlands Ranch, Sterling Ranch, and Roxborough to form another single senate district with shared water, transportation, and economic development interests, while then permitting the more southerly and rural portions of the County to be combined with rural communities either to the east or west. *Id.* 2.

Also on August 18, 2021, the Commission held a public hearing in Highlands Ranch jointly with the Colorado Independent Legislative Redistricting Commission. *See* Staff Summary of Meeting, Other Committee, Committee On Joint Independent Redistricting Commissions (Aug. 18, 2021), *available at*, https://redistricting.colorado.gov/rails/active_storage/blobs/eyJfcmFpbHMiOnsibWVzc2FnZSI6IkJBaHBBdFlDIiwiZXhwIjpudWxsLCJwdXIiOiJibG9iX2lkIn19--cf35357b7fcaf5da085b386ec0fa3d2b6b3a3f83/Highlands%20Ranch%2008182021

.pdf (last visited Oct. 7, 2021). At the Highlands Ranch meeting, all three members of the Douglas County Board—George Teal, Lora Thomas, and Abe Laydon—testified. Board member Teal discussed how Castle Rock and Parker were part of a single community of interest and should be legislatively districted together. Board member Thomas urged the Commission to keep Douglas County paired with southern Jefferson County on similar grounds. Board member Laydon urged the Commission to keep the Town of Parker whole in a congressional district.

In the final house and senate plans approved by the Commission on October 11 and 12, 2021, the suburbanized communities of northern Douglas County were, for the most part, kept whole. In the final house map, district 39 encompasses whole Castle Pines, Larkspur, and Lone Tree; district 44 encompasses whole Parker; and district 45 encompasses whole Castle Rock. Contrary to the requests of the Douglas County Board and much testimony at the Commission's public meetings, Highlands Ranch was split in two, ending up in districts 39 and 43. In addition, Douglas County portions of Aurora were placed in district 61, rather than being kept with other parts of Douglas County. (Final Legislative Redistricting Plans (Oct. 15, 2021) ("Final Plans Submission") Ex. 4.) In the final senate map, district 2 encompasses whole Castle Rock and Parker; district 4 contains whole Larkspur; and district 30 encompasses whole Castle Pines, Lone Tree, Highlands

Ranch, and Roxborough Park. District 27 includes all of the Douglas County sections of Aurora.

Thus the Douglas County Board's concern about the County's political subdivisions and suburbanized communities being kept whole in single districts being split was largely, but not completely, addressed. The concern about keeping Douglas County's communities aligned with other Denver Metropolitan Area communities was not accommodated, except in the case of those portions of Douglas County that were kept whole with Aurora. Despite this imperfect result, the Douglas County Board is satisfied that the final house and senate legislative plans fairly accommodate most, if not all, of Douglas County's concerns.

Accordingly, the Douglas County Board, as Interested Party, supports the final house and senate plans submitted by the Commission and urges this Court to approve those plans. However, if a remand is necessary for reasons that are unrelated to Douglas County, then the Douglas County Board respectfully urges the Court to instruct the Commission, upon remand, to preserve the current treatment of Douglas County in any amended plans that the Commission may subsequently prepare.

II. STATEMENT OF ISSUES

A. Do the final state house and senate legislative plans comply with the substantive criteria listed in article V, section 48.1 of the Colorado Constitution?

B. In light of the record before the Commission, did the Commission properly exercise its discretion in applying or failing to apply the substantive criteria?

III. STATEMENT OF THE CASE

The Commission's final house and senate plans must satisfy certain substantive criteria that are set out in the Colorado Constitution. Colo. Const. art. V, § 48.1. These criteria require, "among other things, that":

> the final maps represent "a good-faith effort" to achieve "population equality between districts," *id.* § 48.1(1)(a); preserve "communities of interest" as much as is reasonably possible, *id.* § 48.1(2)(a); maximize politically competitive districts, *id.* § 48.1(3)(a); not be drawn for the purpose of protecting any political party or candidate, *id.* § 48.1(4)(a); and not "dilut[e] the impact of [any] racial or language minority group's electoral influence," *id.* § 48.1(4)(b).

In re Interrogatories on Senate Bill 21-247 Submitted by the Colo. Gen. Assembly, 2021 CO 37, ¶ 14 (internal citations pertinent only to congressional redistricting omitted). The final house and senate plans submitted to this Court on October 15,

2021, represent the Commission's effort to produce legislative redistricting plans that satisfy these substantive criteria.

This Court is now charged with reviewing the Commission's submitted final house and senate plans to determine whether those plans comply with the criteria. Colo. Const. art. V, § 48.3(1). Even if the Commission did not perfectly apply all the criteria, this Court still must approve the Commission's submitted final plan unless the Court finds that the Commission "abused its discretion in applying or failing to apply the criteria, . . . in light of the record before the commission." *Id.* § 44.5(2); *see also In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 18.

IV. SUMMARY OF ARGUMENT

In terms of their respective treatments of Douglas County, the final house and senate plans submitted to this Court by the Commission comply with the substantive criteria listed in article V, section 48.1, for the reasons that are set out herein. But even if this Court finds that the Commission's compliance with the criteria was imperfect with respect to Douglas County, this Court still should still approve the final house and senate plans, insofar as they draw districts in Douglas County, because the Commission did not abuse its discretion in applying or failing to apply the criteria as to those districts, in light of the record before the Commission.

V. ARGUMENT

A. Standards of Review

Three standards govern the analysis that the Court must conduct to perform its review of the Commission's final house and senate plans.

1. Standard For Determining What The Criteria Listed In Article V, Section 48.1 Substantively Require

First, this Court must determine whether the Commission's final plan complies with the criteria set out in article V, section 48.1. Colo. Const. art. V, § 48.3(1). To do this, the Court must engage in statutory construction to ascertain exactly what it is that the substantive criteria actually require.

> When construing a constitutional amendment, we seek to determine and effectuate the will of the voters in adopting the measure. *In re Interrogatory on House Bill 21-1164*, ¶ 31. To accomplish this, we begin with the plain language of the provision, giving terms their ordinary meanings. *Id.* We may also "consider other relevant materials such as the 'Blue Book,' an analysis of ballot proposals prepared by the Legislative Council." *Lobato v. State*, 218 P.3d 358, 375 (Colo. 2009). We endeavor to avoid a "narrow or technical reading of language contained in an initiated constitutional amendment if to do such would defeat the intent of the people." *Zaner v. City of Brighton*, 917 P.2d 280, 283 (Colo. 1996). And whenever possible, we seek to avoid interpretations that would produce absurd or unreasonable results. *In re Interrogatory on House Bill 21-1164*, ¶ 31.

In re Interrogatories on Senate Bill 21-247, 2021 CO 37, ¶ 30.

2. Standard For Determining Whether The Final House and Senate Plans Comply With The Criteria

Second, in evaluating whether the Commission's final house and senate plans "comply" with the criteria, the Court must compare the final plan against the criteria to ascertain whether the final plan applies or fails to apply the criteria. In the past, i.e., prior to Amendment Z, this determination has entailed a "narrow" review of the plan before the Court to determine whether the plan satisfied a ranked list of constitutional criteria. *In re Reapportionment*, 332 P.3d at 110 ("Our role in this proceeding is a narrow one: we measure the Adopted Plan against the constitutional standards, according to the hierarchy of federal and state criteria we have previously identified."); *In re Reapportionment of the Colo. Gen. Assembly*, 45 P.3d 1237, 1247 (Colo. 2002) ("Our role in reviewing the Commission's reapportionment action is narrow. . . . We must determine whether the Commission followed the procedures and applied the criteria of federal and Colorado law in adopting its reapportionment plan.").

In making its compliance determination, the Court in older decisions expressly required only "substantial compliance" with constitutional criteria, rather than absolute compliance. *See In re Reapportionment of Colo. Gen. Assembly*, 647 P.2d 191, 197 (Colo. 1982) (approving county splits because "the Commission substantially complied with the constitutional requirements"); *In re Interrogatories*

by Gen. Assembly, etc., 178 Colo. 311, 313, 497 P.2d 1024, 1025 (1972) ("Thus, with regard to the districting accomplished under Senate Bill No. 22, we determine that substantial compliance was achieved with the constitutional benchmarks noted above.").

In more recent decades, however, the "substantial compliance" standard for measuring compliance with constitutional criteria appears to have fallen out of favor, being expressly mentioned only by dissents, *see In re Reapportionment*, 332 P.3d at 112, 115 (Bender and Rice, JJ., dissenting) ("Because the Commission made a good faith effort to apply the evidence . . . in light of the appropriate legal standards, I believe the Commission has substantially complied with federal and state constitutional standards."); *In re Reapportionment*, 45 P.3d at 1255 (Bender, Mullarkey, and Martinez, JJ., dissenting) ("I would approve the Proposed Plan because it substantially complies with the state constitutional requirements . . . .")

Nevertheless, the Court's more recent reapportionment rulings have given the appearance of utilizing a "substantial compliance" standard because they recognized that a reapportionment plan's compliance with state constitutional criteria involves "policy choices" that should be deferred to "if accompanied by an articulated reasonable rationale" accompanied by "an adequate factual demonstration." *In re Reapportionment*, 45 P.3d at 1254 (providing guidance for

drawing districts that comply with constitutional criteria on remand); *see also In re Reapportionment*, 332 P.3d at 112 ("The Commission shall determine how to formulate a plan that complies with article V, sections 46 and 47, in accordance with the guidance offered on remand in our 2002 opinion.").

The Court's recent preference for applying a standard for measuring compliance that appears to be "substantial compliance," even if it is not expressly described as such, is consistent with the Court's consistent recognition that redistricting commissions necessarily must have discretion to choose among lawful alternatives: "The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court." *In re Reapportionment*, 45 P.3d at 1247.

During this redistricting cycle, in the first case involving the new constitutional text, the Court contraposed the possibility of applying a "substantial compliance" standard to the Commission's compliance with non-substantive provisions of Amendments Y and Z against the express recognition that "an 'abuse of discretion' standard applies in our review as to whether the commission complied with the specified substantive criteria." *In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 54. The contraposition of the "substantial compliance" standard against the "abuse of discretion" standard suggests that the proper

standard for this Court to now apply to determining whether the Commission's final house and senate plans comply with the constitutional criteria should ask only whether the Commission's application of the criteria amounted to an abuse of discretion. Thus the determination of whether the final house and senate plans comply is really the same inquiry as the determination whether the Commission abused its discretion in applying or failing to apply the criteria, which is discussed next.

3. Standard For Determining Whether The Commission Abused Its Discretion In Applying Or Failing To Apply The Criteria

Third, the Constitution requires that the Court must approve the Commission's final house and senate plans unless the Commission "abused its discretion in applying or failing to apply" the specified criteria, "in light of the record before the commission." *Id.* § 48.3(2). In assessing whether the Commission abused its discretion, the Court "may consider any maps submitted to the commission." *Id*.

As previously noted, this Court recently acknowledged that these new constitutional provisions mean that the Court must apply an "abuse of discretion" standard (as opposed to a "substantial compliance" or some other standard) "in our review as to whether the commission complied with the specified substantive

criteria." *In re Interrogatories on Senate Bill 21-247*, 2021 CO 37, ¶ 54 (citing Colo. Const. art. V, § 48.3(2)–(3)).

An abuse of discretion occurs if the Commission makes "erroneous legal conclusions" in applying the criteria, *People v. Wadle*, 97 P.3d 932, 936 (Colo. 2004), or commits an "error of law in the circumstances," *Cook v. Dist. Court of Cty. of Weld*, 670 P.2d 758, 761 (Colo. 1983). Alternatively, an abuse of discretion occurs if the Commission's decisions with respect to how it applied the criteria are "manifestly arbitrary, unreasonable, or unfair." *People v. Muckle*, 107 P.3d 380, 382 (Colo. 2005); *see also Colo. Nat'l Bank v. Friedman*, 846 P.2d 159, 167 (Colo. 1993).

In the absence of committing an error of law or acting arbitrarily, unreasonably, or unfairly, the Commission's discretion "means that it has the power to choose between two or more courses of action and is therefore not bound in all cases to select one over the other." *Friedman*, 846 P.2d at 166. In summary, then, as long as the Commission's actions neither violate the law nor are manifestly arbitrary, unreasonable, or unfair, then the Commission is free to choose from among different ways that it might properly apply the criteria without any risk of being found to have committed an abuse of discretion.

B. The Plan Should Be Approved, With Respect to Douglas County, Because The Commission's Final Plan Complies With The Substantive Criteria Of Article V, Section 48.1

The substantive criteria that the Commission must apply in adopting final house and senate legislative redistricting plans are set out in article V, section 48.1 of the Colorado Constitution. The Commission properly applied these criteria with respect to the districts drawn in Douglas County, as will be shown next. Accordingly, this Court should determine that the final plans comply with the criteria, at least in their treatment of Douglas County, and the Court should approve the Commission's final plans pursuant to article V, section 48.3(1) of the Colorado Constitution. If either map is remanded for reasons that are not related to Douglas County, then the Court should provide instructions to the Commission on remand that the Douglas County districts currently drawn in the final house and senate plans should be preserved in any amended submissions made by the Commission.

1. Section 48.1(1)(a)—Mathematical Population Equality Within A Five Percent Deviation

Section 48.1(1)(a) of article V requires the Commission to:

> Make a good-faith effort to achieve mathematical population equality between districts, as required by the constitution of the United States, but in no event shall there be more than five percent deviation between the most populous and the least populous district in each house.

> Districts must be composed of contiguous geographic areas.

The five-percent-deviation language existed in the pre-Amendment Z constitutional language and has previously been construed by this Court to mean that,

> the sum of the percent by which the largest district's population exceeds that of the ideal district and the percent by which the smallest district population falls short of the population of the ideal district must be less than five percent.

In re Reapportionment of Colo. Gen. Assembly, 647 P.2d at 193 n.4.

The Final Legislative Redistricting Plans filed with this Court by the Commission on October 15, 2021, shows that this criterion is satisfied. (Final Plans Submission at 9–10 & Ex. 7 (corrected).) The ideal house district population is 88,826.[2] The final house plan has districts ranging from 86,485 (2.63% below ideal) to 90,864 people (2.29% above ideal). (Final Plans Submission at 9–10 & Ex. 7 (corrected).) The ideal senate district is likewise 164,963 people. (See id. Ex. 7 (corrected), at 2.) The final senate plan has districts ranging from 160,874 (2.48% below ideal) to 169,103 people (2.50% above ideal). (Final Plans Submission at 9–10 & Ex. 7 (corrected).) These districts satisfy the population

[2] Total population of 5,773,714 divided by 65 house districts equals 88,826 people per house district as the ideal. (Final Plans Submission Ex. 7 (corrected), at 6.)

equality requirement within the five-percent tolerance set out in Section 48.1(1)(a).

2. Section 48.1(1)(b)—Voting Rights Act Compliance

Section 48.1(1)(b) requires the Commission to "Comply with the federal 'Voting Rights Act of 1965', 52 U.S.C. [§ 10301 et seq.], as amended." As the Final Plans Submission explains, the Commission's efforts at VRA compliance were guided by the Supreme Court's decision in *Thornburgh v. Gingles*, 478 U.S. 30 (1968). (Final Plans Submission 10–11 & Ex. 8.) The Commission itself conducted a first-prong *Gingles* analysis and engaged a VRA expert to conduct second- and third-prong *Gingles* analyses. (Id. Ex. 8, at 2–3.)

The final senate plan draws all or part of four senate districts in Douglas County—senate districts 2, 4, 27, and 30. (Id. Ex. 1 (original), at 2; Ex. 5.) The final house plan draws all or part of five house districts in Douglas County—house districts 39, 43, 44, 45, and 61. (Id. Ex 1, at 13; Ex. 5.) Out of both maps, house district 61 was the only Douglas County district with a population that implicated the VRA at all, and the Commission's analysis showed that "minority preferred candidates could reasonably be predicted to be elected" in house district 61. (Id. Ex. 8, at 5 (house); at 6 (senate).) Thus, with respect to all the districts drawn in

Douglas County, the Commission's final house and senate legislative plans comply with Section 48.1(1)(b).

3. Section 48.1(2)(a)—Whole Communities of Interest and Whole Political Subdivisions

Section 48.1(2)(a) of article V requires the Commission to, "As much as is reasonably possible, . . . preserve whole communities of interest and whole political subdivisions, such as counties, cities, and towns." Unlike the analogous constitutional criterion used in the congressional redistricting process, Section 48.1(2)(a) mandates that the Commission "shall presume" that a "county, city, city and county, or town should be wholly contained within a district" where the population of the political subdivision "is less than a district's permitted population." The only exception made for this requirement allows a division of these political subdivisions "where, based on a preponderance of evidence in the record, a community of interest's legislative issues are more essential to the fair effective representation of residents of the district." *Id.*

The introductory qualifier for this particular criterion—"as much as reasonably possible"—recognizes what this Court has noted in the past, namely that, "some county and city splits" are inevitable. *In re Reapportionment*, 45 P.3d at 1254 ("We are aware that, in designing the Denver metropolitan area districts and complying with the constitutional criteria as set forth in this opinion, the

Commission must make additional adjustments and determinations that most probably will involve some county and city splits.").

In the case of Douglas County, the suburbanized communities of northern Douglas County were, for the most part, kept whole in both the house and senate final maps. In the final house map, district 39 encompasses whole Castle Pines, Larkspur, and Lone Tree; district 44 encompasses whole Parker; and district 45 encompasses whole Castle Rock. Highlands Ranch was split in two, ending up in districts 39 and 43, and Douglas County portions of Aurora were placed in district 61. (Final Plans Submission Ex. 4.) In the final senate map, district 2 encompasses whole Castle Rock and Parker; district 4 contains whole Larkspur; and district 30 encompasses whole Castle Pines, Lone Tree, Highlands Ranch, and Roxborough Park. District 27 includes all of the Douglas County sections of Aurora.

Given the task before it, and given that the Commission's choices are "accompanied by an articulated reasonable rationale" and by "an adequate factual demonstration," *In re Reapportionment*, 45 P.3d at 1254, in the Final Plans Submission at 11–12, it is clear that the Commission's final plan minimized splits as much "as is reasonably possible" and thus complies with Section 48.1(2)(a).

4. Section 48.1(2)(b)—Compactness

Section 48.1(2)(b) of article V requires the Commission to ensure that "Districts must be as compact as is reasonably possible." The Commission's report on compactness shows that the Commission employed multiple quantitative measures of compactness in its effort to satisfy this criterion and did so very well with respect to Douglas County's proposed house districts (39, 43, 44, 45, and 61) and sufficiently with respect to Douglas County's proposed senate districts (2, 4, 27, and 30). (Final Plans Submission Ex. 12, at 4 (house); at 5–6 (senate).) Accordingly, the Commission's final house and senate legislative plans comply with Section 48.1(2)(b), at least with respect to how the plans draw districts within Douglas County.

5. Section 48.1(3)(a)—Politically Competitive Districts

Section 48.1(3)(a) of article V requires that the Commission "Thereafter . . . shall, to the extent possible, maximize the number of politically competitive districts." The Constitution's use of the term "thereafter" connotes that political competitiveness is a criterion that is subordinated to the criteria that came before. Thus, what is "possible," in terms of maximizing competitiveness, is required to take a back seat to the considerations that have already been discussed.

The Commission's seventeen-page report on political competitiveness shows that the Commission solicited evidence relevant to the competitiveness of elections in Colorado, including expert testimony, and ultimately decided to use eight actual past election results, rather than party registration, for analyzing competitiveness. (Final Plans Submission Ex. 13.) The Commission then determined how competitive its proposed districts would be based on actual voting in eight identified historical races. The result of this process shows that the final plans produced two competitive Douglas County house districts (43 and 61) out of five total house districts, (id. Ex. 13, at 5–6); and one competitive Douglas County senate district (27) out of four total senate districts, (id. Ex. 13, at 10.)

Based on the Commission's "adequate factual demonstration" of the competitiveness evidence, together with the Commission's "articulated reasonable rationale" for making the choices that it did, *In re Reapportionment*, 45 P.3d at 1254, the Commission's final plan complies with Section 48.1(3)(a) by maximizing political competitiveness, at least with respect to the legislative districts drawn in Douglas County.

6. Section 48.1(3)(b)—Solicitation of Competitiveness Evidence

Section 48.1(3)(b) of article V requires the Commission to, "In its hearings in various locations in the state, . . . solicit evidence relevant to competitiveness of

elections in Colorado and . . . assess such evidence in evaluating proposed maps." The standard for measuring political competitiveness is provided in article V, section 48.1(3)(d). As explained in the previous section, the Commission solicited and assessed evidence on political competitiveness, which satisfies this criterion. Thus the Commission's final house and senate legislative plans comply with Section 48.1(3)(b).

7. Section 48.1(3)(c)—Explanation of Competitiveness

Section 48.1(3)(c) of article V requires the Commission, upon approval of a plan, to prepare and make publicly available "a report to demonstrate how the plan reflects the evidence presented to, and the findings concerning, the extent to which competitiveness in district elections is fostered consistent with the other criteria." As explained in the previous section IV.B.5, the Commission satisfied this criterion by including the required report as Exhibit 13 to its Final Plans Submission. Thus the Commission's final house and senate plans comply with Section 48.1(3)(c).

8. Section 48.1(4)(a)—No Purpose of Incumbency Protection

Section 48.1(4)(a) of article V prohibits the Commission from approving, and this Court from giving effect to, any map if the map "has been drawn for the purpose of protecting one or more incumbent members, or one or more declared

candidates, of the senate or house of representatives, or any political party." The Commission and its non-partisan staff has affirmed that the final plans "were not drawn for the purpose of protecting any incumbent members of the Colorado Senate or House of Representatives, any declared candidates, or any political party," (Final Plans Submission at 13–14), and there is no reason apparent from the record to believe otherwise. Thus the Commission's final house and senate plans comply with Section 48.1(4)(a), and nothing in Section 48.1(4)(a) bars this Court from approving the final plans.

9. Section 48.1(4)(b)—No Racial or Language Group Dilution

Section 48.1(4)(b) of article V likewise prohibits the Commission from approving, and this Court from giving effect to, any map if the map "has been drawn for the purpose of or results in the denial or abridgement of the right of any citizen to vote on account of that person's race or membership in a language minority group, including diluting the impact of that racial or language minority group's electoral influence." Again, the Commission has stated that the final house and senate plans were not drawn for this prohibited purpose and do not have the prohibited result, and there is no reason apparent from the record to believe otherwise. Thus, based on their treatment of Douglas County, the Commission's final plans comply with Section 48.1(4)(b), and nothing in Section 48.1(4)(b)

should bar the Court from approving the final house and senate plans, at least with respect to the districts drawn in Douglas County.

10. The Plan Should Be Approved Because It Complies With The Substantive Criteria Of Article V, Section 48.1

Article V, section 48.3(1) provides that this Court must review the submitted plan "and determine whether the plan complies with the criteria listed in section 48.1 of this article V." The next subsection, article V, section 48.3(2), provides that "The supreme court shall approve the plans submitted unless it finds that the commission . . . abused its discretion in applying or failing to apply the criteria listed in section 48.1 of this article V, in light of the record before the commission."

For all the reasons set out above, the Commission properly applied each of the constitutional criteria that it was required to follow in the course of performing its task of devising legislative redistricting plans for the state senate and house. If the Court agrees, as it should, that the criteria have been properly applied, then nothing further is required for the Court to do, other than to approve the final plans pursuant to article V, section 48.3(1) of the Colorado Constitution.

C. In Any Event, The Final House and Senate Plans Should Be Approved As To The Districts Drawn In Douglas County Because The Commission Did Not Abuse Its Discretion In Applying Or Failing To Apply The Criteria, With Respect To Any Douglas County Districts, In Light Of The Record Before The Commission

However, if this Court disagrees with the foregoing arguments and concludes for some reason that the Commission improperly applied, or failed to apply, any of the substantive criteria, then the Court must still "approve the plans submitted unless [the Court] finds that the commission . . . abused its discretion in applying or failing to apply the criteria . . . in light of the record before the commission." Colo. Const. art. V, § 48.3(2). Applying the "abuse of discretion" standard to the Commission's actions, this Court should not find that the Commission abused its discretion, at least with respect to any of the districts drawn in Douglas County. The Commission neither committed an error of law nor applied the constitutional criteria in an arbitrary, unreasonable, or unfair manner, in light of the record before it. Accordingly, this Court should approve the Commission's final house and senate plans pursuant to article V, section 48.3(2) of the Colorado Constitution.

1. The Commission Did Not Abuse Its Discretion Because It Did Not Commit An Error Of Law, In Light of the Record Before It

First, nothing in the record suggests that the Commission erred as a matter of law in applying or failing to apply any of the constitutional criteria, at least with respect to the districts drawn in Douglas County. The work of the Commission, as summarized in the Final Plans Submission, clearly shows that the Commission was aware of and attempted in good faith to apply all the constitutional criteria that it was required to follow pursuant to article V, section 48.1. The Commission's Final Plans Submission explains how the Commission worked in good faith to apply each of these criteria. (Final Plans Submission at 9–14.) The discussion in the foregoing sections of this brief shows that the Commission succeeded in crafting legislative redistricting plans that comply with all the criteria, at least with respect to the districts drawn in Douglas County. Thus any suggestion of legal error by the Commission with respect to Douglas County's districts is simply not sustainable. The Commission did not abuse its discretion by virtue of committing any error of law.

2. The Commission Did Not Abuse Its Discretion Because It Did Not Apply The Criteria In an Arbitrary, Unreasonable Or Unfair Manner, In Light of the Record Before It

Second, nothing in the record suggests that the Commission applied or failed to apply any of the criteria in an arbitrary, unreasonable, or unfair manner. "[A]n agency action **is** arbitrary when the agency offer[s] insufficient reasons for treating similar situations differently." *Cty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999). A choice by the Commission can only justifiably be called "unreasonable" if there is nothing that supports that choice in the record. The Commission's otherwise lawful choices made in the course of applying any of the constitutional criteria can only be characterized as "unfair" if the Commission unduly and consistently favored some interests over others. But there is no evidence of this in the record, at least with respect to the districts drawn in Douglas County. As this Court has long recognized outside the context of legislative reapportionment, discretion means that a decisionmaker with "the power to choose between two or more [lawful] courses of action" is "not bound in all cases to select one over the other." *Friedman*, 846 P.2d at 166. As a result, "The choice among alternative plans, each consistent with constitutional requirements, is for the Commission and not the Court." *In re Reapportionment*, 45 P.3d at 1247.

The Commission, in its Final Plans Submission, is careful to explain the choices that were made to simultaneously satisfy the criteria of article V, section 48.1 to the greatest extent possible. The reasons for the Commission's choices are well documented, and in all cases of choices that affected Douglas County, the Final Plans Submission and its supporting materials make clear that the Commission did not act in an arbitrary, unreasonable, or unfair manner. Thus the Commission did not abuse its discretion, at least with respect to those final house and senate districts that were drawn in Douglas County.

3. The Final Legislative Plans Should Be Approved Because The Commission Did Not Abuse Its Discretion

For all the foregoing reasons, the Court should find that the Commission did not abuse its discretion in applying or failing to apply the constitutional criteria set out in article V, section 48.1, at least with respect to the districts drawn in Douglas County. Accordingly, the Court should approve the final plans, particularly with with respect to their treatment of Douglas County, pursuant to article V, section 48.3(2).

VI. CONCLUSION

This Court should determine that the final house and senate legislative redistricting plans submitted by the Colorado Independent Legislative Redistricting Commission comply with the substantive criteria listed in section 48.1 of article V

of the Colorado Constitution, pursuant to article V, section 48.3(1) of the Colorado Constitution. At the very least, the Commission did not engage in any abuse of discretion prohibited by article V, section 48.3(2), with respect to any of the legislative districts drawn in Douglas County. Accordingly, with respect to all Douglas County legislative districts, the Court should APPROVE the final house and senate plans.

In the alternative, if this Court finds that the Commission abused its discretion in drawing house or senate districts elsewhere than in Douglas County, then Court, if it remands either or both of the final plans, should provide guidance to the Commission upon such remand to preserve the current treatment of Douglas County in any new plans that the Commission may subsequently resubmit.

Dated this 22nd day of October, 2021.

THE ROBERT MCGUIRE LAW FIRM

[Pursuant to Rule 121(c) § 1–26, the signed original is on file.]

s/ Robert A. McGuire, III
ROBERT A. McGUIRE, III, Reg. No. 37134

Attorney for Interested Party Douglas County Board of County Commissioners

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of October, 2021, I served a true and correct copy of the foregoing, together with all exhibits and attachments referenced therein, to all counsel of record who have active appearances by ICCES.

Person Served:	**Address:**	**Method:**
All counsel of record	Email addresses as shown on record with the ICCES system	ICCES

S/ Robert A. McGuire, III
Robert A. McGuire, III