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COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 2-1-106(3)(b), C.R.S. In re: Proposed Changes to Borders Between Congressional Districts	
Attorneys for the Colorado Secretary of State PHILIP J. WEISER, Attorney General LEEANN MORRILL, #38742 First Assistant Attorney General* PETER G. BAUMANN, #51620 Assistant Attorney General* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6152 FAX: (720) 508-6041 Email: leeann.morrill@coag.gov peter.baumann@coag.gov *Counsel of Record	▲ **COURT USE ONLY** ▲ Case No. 2022SA000027

THE SECRETARY OF STATE'S REPLY IN SUPPORT OF PETITION TO ADJUST BORDERS BETWEEN CONGRESSIONAL DISTRICTS

CERTIFICATE OF COMPLIANCE

In compliance with the Court's Order dated February 3, 2022, I certify that this brief complies with the requirements of C.A.R. 32.

I also hereby certify that this brief contains 6,630 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.

s/ Peter G. Baumann
PETER G. BAUMANN, #51620
Assistant Attorney General

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE(S)

Cases

Constitutions and Statutes

Other Authorities

INTRODUCTION

Since 2002, Colorado redistricting commissions have benefitted from a statutory provision by which this Court, at the request of state and local election officials, can remedy congressional district boundaries that split residential parcels. Now, two years after the General Assembly enacted such a provision for congressional districts, one year after admitting that the bill containing the provision is "consistent" with Amendment Y, and three months after other conceivable avenues for addressing split parcels have closed, the Colorado Independent Congressional Redistricting Commission ("Commission") asks this Court to invalidate the provision and deny the proposed adjustments.

But the provision in question, § 2-1-106(3), C.R.S. (2020), does not interfere with the Commission's work or its authority. Rather, it establishes a standalone procedure by which this Court can adjust the maps that it, not the Commission, approved for ultimate use. And does so in a way that enhances, not impairs, the purposes for which the people adopted Amendment Y.

Section 2-1-106(3) allows this Court, in its sole discretion, to approve adjustments. And it does so through a transparent, public procedure through which interested parties, including the Commission, can object to specific proposals. This process is far preferable to any of the Commission's proposed alternatives, which would either require election officials to address split residential parcels as they arise in dozens of proposed maps before the Commission, or unilaterally assign residents of split residential parcels to the district of their choice.

Even leaving 2021's unique challenges aside, the decennial redistricting process always is as challenging as it is significant. Section 2-1-106(3) authorizes the Court to approve micro adjustments to resolve split residential parcels during the Secretary of State's implementation of its final maps, rather than during their development. In doing so, it ensures that the Commission process will remain focused on the macro policy concerns identified by the people in adopting Amendment Y.

As for the Secretary's proposals themselves, adopting each would result in a population deviation of just 0.018%. And this miniscule

deviation is sufficiently justified by the state's interest in not splitting residential parcels while ensuring that this Court's final district map remains as faithful as possible to the equal population principle imposed by Amendment Y and the U.S. Constitution.

Elections do not occur in a vacuum. Borders on maps must be translated into actual precincts and polling booths. The Secretary's Petition, and the statute under which it arises, offer this Court the opportunity to adjust those boundaries in pursuit of fair and orderly elections. The Court should approve the proposed adjustments.

BACKGROUND

In 2018, Colorado voters adopted Amendment Y, which "removed congressional redistricting authority from the General Assembly and placed it, instead, in the hands of" the Commission. *In re Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73, ¶ 3. In establishing the Commission, the people "sought to limit the influence of partisan politics over redistricting and make the process more transparent and

inclusive." *In re Interrogatories on S.B. 21-247 Submitted by Colo. Gen. Assembly*, 2021 CO 37, ¶ 13.

Throughout the summer and fall of last year, the Commission held forty public hearings, received over 5,000 written comments, and considered 170 maps proposed by members of the public (in addition to its own proposals). *In re. Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73, ¶ 16. On September 28, 2021, "following lengthy debate," the Commission adopted a Final Plan for submission to this Court. *Id.*

Under Amendment Y, it is the Supreme Court that ultimately approves and adopts Colorado's final congressional map. Colo. Const. art. V, § 44.5(5). On November 1, 2021, the Court approved the Commission's proposed Final Plan and ordered the Commission to file the final district map with the Secretary. *In re. Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73, ¶ 91.

Meanwhile, as of September 28, 2021, and November 1, 2021, election officials and staff were in the middle of conducting the November 2, 2021, coordinated election. Ex. 1, Decl. of Dwight

Shellman ("Shellman Decl.") ¶ 7. That priority work was not fully completed until December 7, 2021. *Id.*

In early-December, the Secretary's staff advised counties to reconfigure their existing precinct boundaries to align with the new congressional and legislative district lines, and informed those counties that the Secretary would be collecting proposals for district boundary adjustments. *Id.* ¶ 6. That survey went out on December 14, 2021, and asked county election officials to identify all areas within their counties that would support a boundary adjustment under §§ 2-1-106 and 2-2-507, and then propose specific adjustments to address those anomalies. Shellman Decl. ¶¶ 6, 8.

Specifically, the Secretary asked County Clerks to identify: (1) areas excluded from a district under the final approved map, (2) areas included in more than one district of each type under the final approved map, and (3) places where the final approved map's boundaries split residential parcels in ways that caused genuine election administration difficulties. Shellman Decl. ¶ 6. No County Clerks identified either of

the first two issues, but over the course of three weeks, fourteen County Clerks identified nearly 250 specific split residential parcels for the Secretary's consideration. *Id.* ¶ 9.

Staff in the Secretary's Elections Division then independently verified the zoning and permissible uses of each identified parcel. *Id.* ¶ 10. This included eliminating proposals involving non-residential parcels, and working closely with local election staff to obtain sufficient GIS maps and data to clearly depict the split residential parcels and the exact manner in which to propose adjusting the district boundaries. *Id.* Ultimately, the Secretary determined that six instances concerning congressional boundaries and 62 instances concerning legislative boundaries warranted adjustment. *Id.* ¶ 11.

On January 31, 2022, The Secretary submitted the proposed congressional adjustments for this Court's consideration under § 2-1-106(3). The Petition under § 2-1-106(3) was first filed on the same docket established for the Court's consideration and approval of the Commission's maps so as to serve a copy on all parties entered in that

matter, including the Commission. At the Court's request, the Secretary initiated a new original action by refiling the same Petition on February 3, 2022. *See* The Sec'y of State's Pet. to Adjust Borders Between Cong. Dists. ("Pet.") (Feb. 3, 2022).

Alongside this matter, the Secretary has also proposed, and the Court is presently considering, sixty-two adjustments to borders between state legislative districts under § 2-2-507(2.5). *In re Proposed Changes to Borders Between State Legislative Dists.*, No. 2022SA28. In that case, the Congressional Independent Legislative Redistricting Commission filed a brief endorsing all but one of the Secretary's proposed adjustments, and did not challenge the constitutionality of § 2-2-507(2.5). *Id.*, Colo. Indep. Legislative Redistricting Comm'n's Br. in Resp. to Sec'y of State's Pet. to Adjust Borders Between State Legislative Dists. at 9–10 (Feb. 17, 2022). In Reply, the Secretary revised the proposal flagged by the Legislative Commission. *Id.*, The Sec'y of State's Reply in Support of Pet. to Adjust Borders Between State Legislative Dists. at 2 (Feb. 24, 2022).

On February 24, 2022, the Congressional Commission filed a response brief opposing the Secretary's Petition under § 2-1-106(3). Colo. Indep. Cong. Redistricting Comm'n's Resp. to the Sec'y of State's Pet. to Adjust Borders Between Cong. Dists. ("Resp. Br.") (Feb. 24, 2022). The Commission first argues that the Secretary's proposed adjustments must be rejected for failing to comply with Amendment Y's equal population principle. *Id.* at 17. Next, the Commission challenges the constitutionality of the statute authorizing the Court to address split residential parcels.[1] *Id.* at 27. Finally, the Commission says that if the Court does consider the Secretary's proposals, it should adopt only the proposal at Exhibit K, to protect voter anonymity, and those adjustments that would not cause population deviations. *Id.* at 34.

[1] The Commission's Response does not attack the constitutionality of the other subsections of § 2-1-106, or the constitutionality of all or part of § 2-2-507, but it is unclear what justification, if any, there could be for upholding the constitutionality of those provisions if § 2-1-106(3) is declared unconstitutional.

ARGUMENT

I. Having failed to timely challenge the constitutionality of § 2-1-106(3), the Commission should be estopped from belatedly pursuing that theory.

As explained in Part II, below, the Court should conclude that § 2-1-106(3) neither conflicts with Amendment Y nor interferes with the powers it vested in the Commission. Instead, the Court should hold that the statute constitutionally facilitates the implementation of the Court's final district map and furthers the purposes for which Amendment Y was enacted. But even if the Court were concerned with the constitutionality of § 2-1-106(3), which was enacted in 2020 as part of Amendment Y's implementing legislation, the Commission's challenge should be rejected as untimely.

Senate Bill 20-186, an Act "Concerning the Independent Redistricting Commissions in Colorado," not only included the statute in question today, but twenty-five other sections related to the Commissions. *See* 2020 Colo. Sess. Laws 1320, available at https://tinyurl.com/2p85vsfr. Among other things, SB 20-186

appropriated funds to the Commission, *id.* at 1329 (§(15)), and established the commissioners' per diem, *id.* at 1333–34 (§(24)). Less than a year ago, the Commission represented to this Court that SB 20-186 was "consistent with Amendment Y," and noted its unanimous passage during the 2020 legislative session. *In re Interrogatory on Senate Bill 21-247 Submitted by the Colo. Gen. Assembly*, Colo. Indep. Cong. Redistricting Comm'n's Br. in Resp. to Interrogatories, No. 2021SA146, at 15 (May 14, 2021) ("During the 2020 legislative session . . . the General Assembly passed legislation consistent with Amendment Y, which included necessary appropriations to fund the Commission's work.") (citing SB 20-186).

Following SB 20-186's unanimous passage, the Secretary of State and County Clerks relied on § 2-1-106(3) as providing a procedure for requesting this Court's approval of adjustments to resolve split residential parcels in its final, approved map. This reliance arose not only out of § 2-1-106(3)'s uncontroversial enactment and "presum[ptive] constitutional[ity]," *Rocky Mountain Gun Owners v. Polis*, 2020 CO 66,

¶ 30, but also out of the operation of virtually identical statutory provisions following the 2001 and 2011 legislative commission redistricting efforts. *See In re Proposed Changes to Borders Between State Senate and House Districts Due to Mapping Errors*, Order of Court, No. 2012SA251 (Sept. 6, 2012); *In re Proposed Changes to Borders Between Senate Districts 24 and 31 and House Districts 43 and 44 due to Divisions or Residential Parcels*, Order of Court, No. 02SA207 (July 5, 2002).

Under the doctrine of laches, a court may "deny relief to a party whose unconscionable delay in enforcing a right has prejudiced the adverse party." *In re Marriage of Kann & Kann*, 2017 COA 94, ¶ 39 (citing *Hickerson v. Vessels*, 2014 CO 2, ¶ 12). Laches may bar relief even in cases challenging a statute's constitutionality. *See, e.g.*, *Garcia v. Griswold*, No. 20-cv-1268-WJM, 2020 WL 4926051, at *3–4 (D. Colo. Aug. 21, 2020) (applying laches to bar constitutional challenge to Colorado's ballot-access statutes). Alternatively, the doctrine of equitable estoppel bars relief "where one party induces another to

detrimentally change position in reasonable reliance on that party's actions through words, conduct, or silence." *Santich v. VCG Holding Corp.*, 2019 CO 67, ¶ 7 (quotations omitted).

Under either doctrine, the Commission's failure to challenge the constitutionality of § 2-1-106(3) until after all other conceivable avenues to address residential parcel splits had closed should bar it from belatedly doing so here. Had election officials known that the Commission would seek to invalidate the statutory process for addressing split residential parcels, perhaps they would have raised the issue with the Commission. Or argued that such anomalies somehow constituted an abuse of the Commission's discretion before the Supreme Court. Instead, those officials justifiably relied on the statutory process afforded by § 2-1-106(3). A process enacted through a bill the Commission called "consistent" with Amendment Y, and a process that had been employed in each of the last two redistricting cycles.

Split residential parcels cause numerous issues for election administration. *See* Shellman Decl. ¶ 12. State and local election

officials should not be forced to endure these challenges because of the Commission's failure to timely object to a provision in its own implementing legislation.

II. The Constitution does not address the issue solved in § 2-1-106(3), and that solution is consistent with and complements the purposes of Amendment Y.

Apart from the Commission's delay, its arguments for why "the process contemplated by § 2-1-106(3) is unconstitutional" are without merit. *See* Resp. Br. at 29. Section 2-1-106(3), like all legislative enactments, is entitled to a presumption of constitutionality. *Rocky Mountain Gun Owners*, 2020 CO 66, ¶ 30. "This presumption . . . can be overcome only if it is shown that the enactment is unconstitutional beyond a reasonable doubt." *Id.*

"In examining the interaction between a challenged statute and a constitutional amendment, [the Court's] inquiry focuses on whether the two provisions necessarily conflict." *In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶ 32. "The test for the existence of a conflict is: Does one authorize what the other forbids or forbid what the other authorizes?"

In re Interrogatories on H.B. 1078, 536 P.2d 308, 313 (Colo. 1975). "Legislation that furthers the purpose of constitutional provisions or facilitates their enforcement is permissible," but "legislation which directly or indirectly impairs, limits or destroys rights granted by constitutional provisions is not permissible." *In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶ 32 (quoting *Zaner v. City of Brighton*, 917 P.2d 280, 286 (Colo. 1996)).

Section 2-1-106(3) addresses split residential parcels in the final district map, a function not even contemplated by Amendment Y, much less expressly or impliedly delegated to the Commission to perform. If the Court considers the merits of the Commission's challenge, then the Court should confirm the constitutionality of § 2-1-106(3).

A. Section 2-1-106(3) neither conflicts with Amendment Y, nor in any way impairs, limits, or destroys the Commission's independent authority.

The procedure created by § 2-1-106(3) is a separate, standalone process that may be utilized only *after* the redistricting process—and therefore the Commission's important work—has concluded. And the

procedure authorizes this Court to act as the ultimate arbiter of any proposed adjustments, thereby preserving Amendment Y's general purpose of excluding the General Assembly from the congressional map drawing process.

Orderly, fair, and constitutional elections are the product of countless state, local, and federal officials—not to mention thousands of volunteers—who tirelessly work to cultivate the democratic process. "Ballots and elections do not magically materialize. They require planning, preparation, and studious attention to detail[[.]" *Perry v. Judd*, 471 Fed. Appx. 219, 226 (4th Cir. 2012).

The decennial redistricting process is a critical cornerstone in the construction of constitutional and orderly elections. But it is just one part of a much broader foundation on which Colorado's democratic process rests. And alongside the redistricting cornerstone, § 2-1-106(3) lays another important brick in this foundation. The adjustment statute ensures that this Court—not the Secretary, as the Commission repeatedly suggests—can preserve the constitutionality of its final maps

and ensure those maps are actually administrable for local election officials and volunteers. Rather than conflicting with Amendment Y, the statute picks up where the Amendment leaves off.

In *In re Interrogatories on S.B. 21-247 Submitted by Colorado General Assembly*, 2021 CO 37, ¶ 40, this Court held that the General Assembly "lacks the authority to direct the actions or operation of the redistricting commissions and their nonpartisan staff." In light of the independent nature of the redistricting commissions, "any power that the General Assembly asserts over a constitutionally created independent commission . . . must derive from the amendment that created that commission, not the constitution's general grant of legislative authority." *Id.* at ¶ 41.

But § 2-1-106(3) does not purport to assert any power over the Commission, or to direct its actions or operation. Instead, it establishes a post-redistricting procedure by which adjustments to this Court's final

district map may be proposed and approved.[2] And ultimately permits, but does not require, this Court to adjust the boundaries between congressional districts so that they do not split residential parcels. Just as this Court has the sole discretion to approve a final district map proposed to it by the Commission under Amendment Y, *see* Colo. Const. art. V, § 44.5, so too does it have the sole discretion to approve any adjustments proposed by the Secretary under § 2-1-106(3)(b).

Because § 2-1-106(3) does not authorize what Amendment Y forbids, no conflict between the two exists. *See In re Interrogatories on H.B. 1078*, 536 P.2d at 313. Indeed, Amendment Y neither dictates what should happen when local election officials discover split residential parcels in the Court's final district map, nor tasks the Commission with identifying and curing those splits during its

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[2] Upon discovering residential parcel splits, county clerks—at their sole discretion—can decide whether they would like to have the border moved. § 2-1-106(3)(a). "*If* the secretary of state believes that the border should be moved," she presents the proposed adjustment to this Court. *Id.* (emphasis added). Finally, "*if* the supreme court determines that the assignment[]" satisfies the statutory criteria, "it *may* approve" those assignments. § 2-1-106(3)(b) (emphasis added).

stewardship of the redistricting process. *See generally* Colo. Const. art. V, § 44.3. Rather, Amendment Y is silent on the subject of split residential parcels occurring in either the Commission's proposed Final Plan or the final district map approved by this Court. This silence is fatal to the Commission's claim that the procedure created by § 2-1-106(3) "directly or indirectly impairs, limits or destroys" its independent authority. *In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶ 32 (quoting *Zaner*, 917 P.2d at 286).

Section 2-1-106(3) merely establishes a standalone, post-redistricting procedure by which the Court may approve proposed adjustments to its final map to cure split residential parcels. Absent a conflict with Amendment Y, it is the General Assembly's prerogative to enact such a procedure and, once enacted, it is presumed constitutional until "unconstitutional beyond a reasonable doubt." *Rocky Mountain Gun Owners*, 2020 CO 66, ¶ 30. The Commission has failed to carry its burden of proving § 2-1-106(3) unconstitutional beyond such a doubt.

B. Section 2-1-106(3) furthers the purposes of Amendment Y and facilitates implementation of this Court's final map.

Not only is § 2-1-106(3) not in conflict with Amendment Y, the two provisions actually work in harmony. Under Amendment Y, the Commission must adhere to strict criteria in adopting a proposed congressional redistricting plan for this Court's final approval. *See* Colo. Const. art. V, § 44.3. Specifically, it must balance several often-competing criteria, including competitiveness, compactness, and communities of interest. *See id.* To do so, the Commission must look at districts and the state with a bird's-eye view towards macro trends.

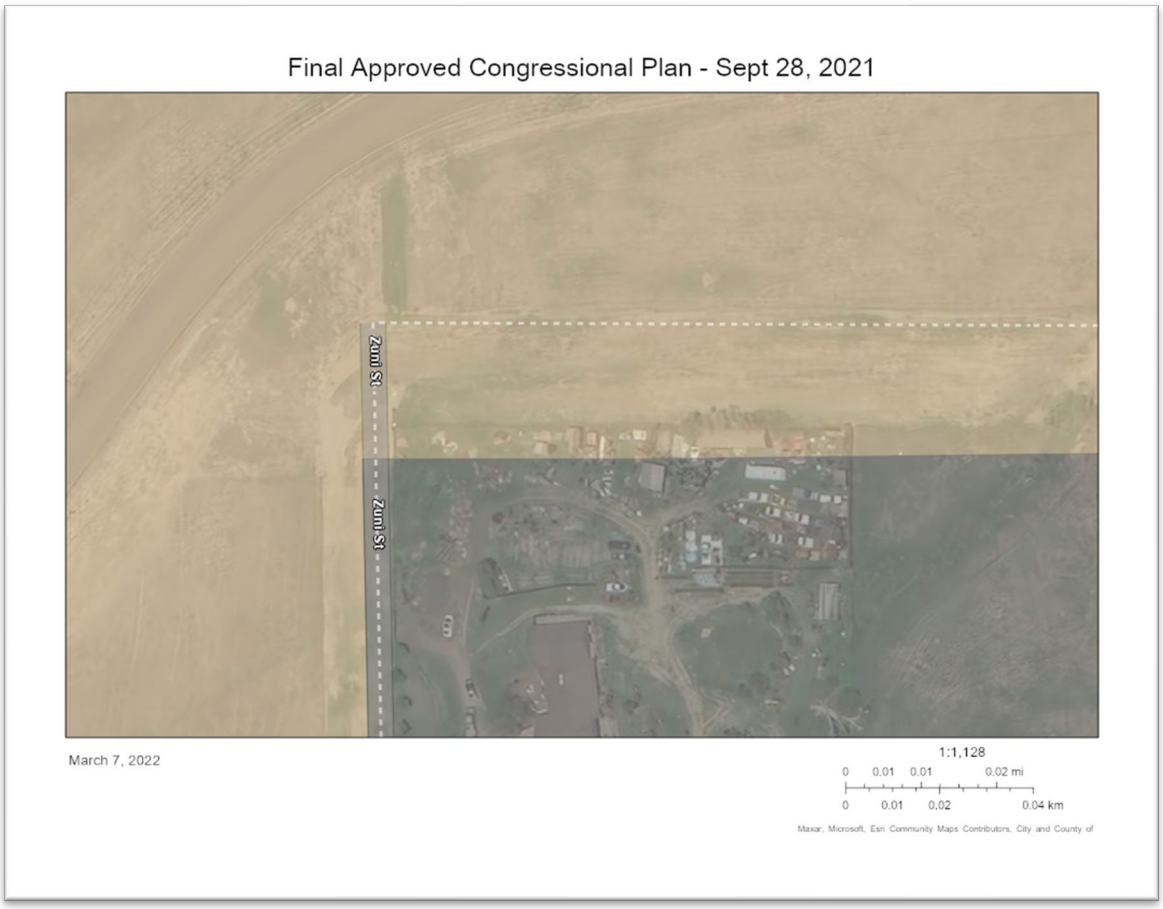
But after the Commission has successfully balanced the criteria in a proposed final plan, and after this Court has approved a final district map, the macro perspective of the Commission—which exists by design—gives way to the granular work of implementing the final map. And it is during this work that the need to request micro adjustments arises. It is only reasonable for the General Assembly to provide a procedure to authorize, but not require, such modifications. Not to

"reopen" or "alter" the maps, Resp. Br. at 17, but to actually facilitate their implementation in a manageable way.

That § 2-1-106(3) "furthers the purpose" of Amendment Y is clear from its face. *In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶ 32. First and foremost, it requires the Secretary to "minimize[] changes in distance from the redistricting plan approved" by this Court. § 2-1-106(3)(a)(V). It also expressly incorporates the equal population principle enshrined in Colo. Const. art. V, § 44.3(1)(a). § 2-1-106(3)(a)(III).

And among the possible ways to address split residential parcels, § 2-1-106(3) is the most faithful to the purposes and goals of Amendment Y. An example is instructive. In Adams County, the U.S. census blocks are slightly misaligned with several residential parcels. *See* Ex. A to Pet. at 1. Here, the Commission's intent was clear: the boundary between CD7 and CD8 should align with the edge of parcel 0157309001001, which also happens to be the border between Adams County and the City of Broomfield.

But that's not where the lines drawn by the Commission's proposed Final Plan or approved by this Court's final district map actually fell. In the figure below, taken from the Commission's website, the dotted line represents the border between Adams County and Broomfield. The lightly shaded area in the image is CD7, and the more darkly shaded portion is CD8. The boundary between the districts is misaligned with the border between Adams and Broomfield. And to compound the misalignment, the sliver in question contains structures that might now be, or someday could become, residential.



[3]

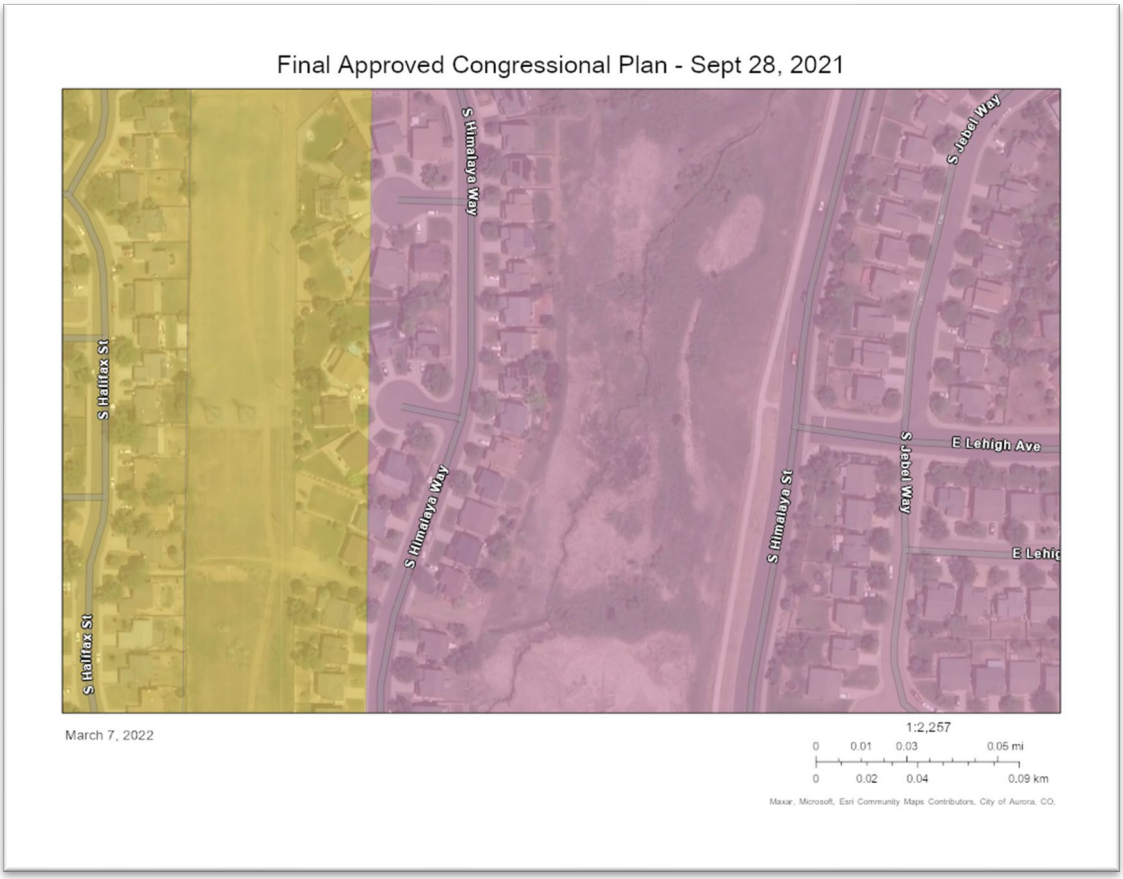
The Commission suggests that the Adams County Clerk and Recorder could just decide, unilaterally, which district to assign any person who might currently live in those structures. Resp. Br. at 30–31.

[3] This image captures the northwestern corner of the proposed adjustment found at Page 1 to Exhibit A to the Secretary's Petition. It is drawn from the interactive maps on the Commission's website, available at https://bit.ly/3ieQtnG%20.

And do the same for any person who might move into the misaligned sliver between now and 2031.

But the unilateral assignment of voters into districts by local elected officials behind closed doors is far more destructive to the purpose of Amendment Y than the open and transparent process established by § 2-1-106(3). *See* Colo. Const. art. V, §§ 44.2 & 44.4 (requiring robust public involvement, transparency, and hearings during the redistricting process). Instead of local elected officials making such decisions, § 2-1-106(3) ensures first that any adjustments occur in public, with opportunity for interested parties to object, and also that they are approved by this Court.

And although it may seem obvious in the example above that the boundary should align with the county border, not all split residential parcels are so clear. For example, the boundary between CD6 and CD4 goes straight through several homes in Arapahoe County. *See* Ex. C to Pet. In the figure below, the shaded area on the left of the image is CD6, and the shaded area on the right is CD4.

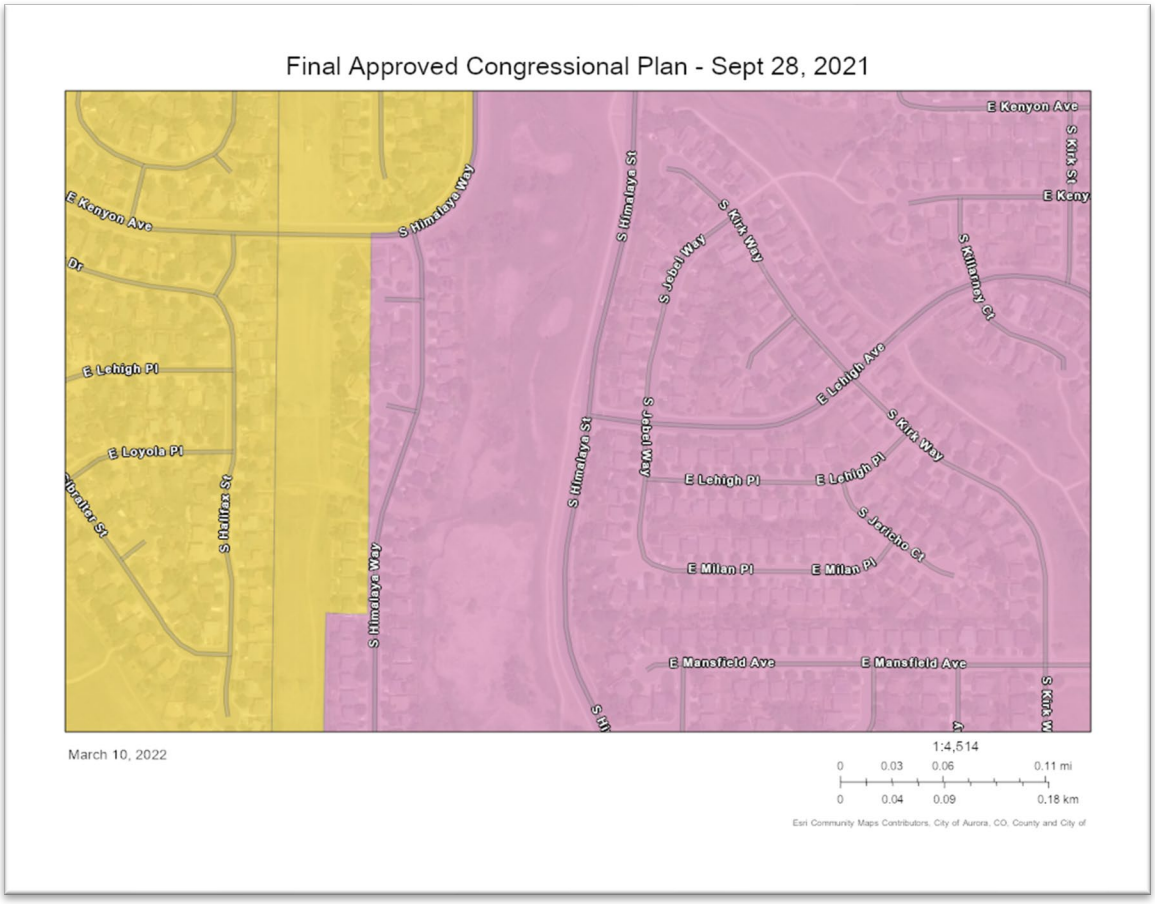


[4]

The boundary could be adjusted East to the road which fronts those homes, but based on the surrounding map, it seems the Commission intended the line to track the rear boundary of the split parcels. The figure below is the same portion of the Congressional map,

[4] This image captures the proposed adjustment found at Exhibit C to the Secretary's Petition. It is drawn from the interactive maps on the Commission's website, available at https://bit.ly/3ieQtnG%20.

slightly zoomed out, which appears to indicate an intent to keep the entire neighborhood to the east in CD4.



[5]

Does the Commission suggest that the Arapahoe County Clerk and Recorder just choose which district to assign those voters? And if a

[5] This image captures the proposed adjustment found at Exhibit C to the Secretary's Petition. It is drawn from the interactive maps on the Commission's website, available at https://bit.ly/3ieQtnG%20.

new Clerk is elected, can the new elected official change that assignment? Surely not. Instead, § 2-1-106(3) allows those officials, with the approval of the Secretary of State, to bring those splits to the Court's attention now, so that the adjustment is subject to public scrutiny, comment, and ultimately this Court's approval.

Notably, this process has already unfolded as intended in the context of the approved legislative boundaries. After the Secretary proposed sixty-two separate adjustments to legislative boundaries, the Colorado Independent Legislative Redistricting Commission objected to a single proposal. *See In re Proposed Changes to Borders Between State Legislative Dists.*, Colo. Indep. Legislative Redistricting Comm'n's Br. in Resp. to Sec'y of State's Pet. to Adjust Borders Between State Legislative Dists., No. 2022SA28, at 10 (Feb. 17, 2022). Specifically, the Legislative Commission objected to a proposal that would have orphaned a sliver of the City of Longmont in an adjacent Senate district. *Id.* at 11. After reviewing the Commission's objection, the

Secretary and the Weld County Clerk and Recorder were able to adjust their proposal to accommodate the Commission's objection.

The transparent, public procedure created by § 2-1-106(3) furthers the purpose of Amendment Y and therefore is "permissible." *In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶ 32 (quoting *Zaner*, 917 P.2d at 286). The Commission's challenge to it should be rejected.

C. Finding § 2-1-106(3) unconstitutional would deviate from settled law and lead to absurd results.

Amendment Y "must be presumed to have been framed and adopted in the light and understanding of prior and existing laws." *Krutka v. Spinuzzi*, 384 P.2d 928, 933 (Colo. 1963). In 2002, the General Assembly passed SB02-182, which established a process for addressing split residential parcels in maps approved by the then-operative legislative reapportionment commission. 2002 Colo. Sess. Laws Ch. 142, available at https://tinyurl.com/36ybyapw. In it, the General Assembly found that certain "census blocks . . . split real estate parcels established by counties and municipalities," but the commission "had to

draw . . . district lines in reliance upon the maps and lines supplied by the census bureau." *Id.* § 1(d), (c). It further found that "[b]ecause . . . district lines adopted by the reapportionment commission followed the census lines, in some cases the lines may split real estate parcels established by counties and municipalities," and declared that local election officials "need a procedure to assign those split parcels to one or another . . . district." *Id.* § 1(e), (f).

SB02-182 established the process for state legislative districts, which is presently codified at § 2-2-507(2.5). And once the voters established a Commission for congressional districts, a virtually identical provision—presently codified at § 2-1-106(3)—was added without protest. As in 2002, the General Assembly soundly concluded once again in 2020 that it was necessary to enact a procedure for addressing split residential parcels after the Commission's redistricting work has concluded.

Notwithstanding this history, the Commission contends that the proposed adjustments should have been raised, debated, and decided

during its public process. Resp. Br. at 29. But that is impractical. In response to the Secretary's request, it took fourteen County Clerks several weeks to identify and propose nearly 250 separate adjustments to congressional and legislative boundaries for the Secretary of State's consideration. Shellman Decl. ¶¶ 8–9. Then, over the course of several more weeks, the Secretary carefully reviewed and evaluated those proposals. *Id.* ¶ 10.

Quite simply, there was insufficient time to identify split residential parcels during the Commission's legislative process, let alone assess the burdens imposed by those specific splits. The Commission approved a plan to submit to this Court on September 28, 2021. As of that evening, there were 18 maps "eligible to become the final plan" at the Commission's vote on September 28. Plans Presented to the Colo. Indep. Cong. Redistricting Comm'n, available at: https://tinyurl.com/53as48c3. Half of which had been added on September 25, 2021. *Id.* It would be absurd to require election officials to review each of these proposals at the granular level required to

identify split residential parcels, let alone assess the challenges posed by each split and submit proposed adjustments to the Commission for its consideration and decision-making.

And even if County Clerks and the Secretary of State could somehow evaluate the numerous proposals before the Commission in time to provide meaningful feedback, such feedback would overwhelm the core considerations before the Commission. As it notes, the Commission "held 40 hearings," "considered over 5,000 comments," and reviewed "170 maps submitted by members of the public." Resp. Br. at 5–6. At these hearings and in these comments, the Commission heard from Coloradans with diverse viewpoints, each of whom offered meaningful opinions on the important macro issues facing the Commissions. It would be an absurd result to interrupt and hijack those vital conversations with the minutiae of what it takes for election officials to actually implement the final district maps.

Nor could the County Clerks and the Secretary of State raise split residential parcels before this Court. Under Amendment Y, this Court's

review of the proposed Final Plan was limited to whether the Commission "abused its discretion in applying or failing to apply the criteria" listed in Amendment Y. Colo. Const. art. V, § 44.5. Resolving split residential parcels does not fall into this Court's narrow grant of authority under Colo. Const. art. V, § 44.5.

Given these impracticalities, it would be an absurd result to conclude that County Clerks and the Secretary of State are powerless to request adjustments to address split residential parcels, even where congressional boundaries literally bisect multiple residences. *Cf. State v. Nieto*, 993 P.2d 493, 501 (Colo. 2000) (holding that in construing statutes, courts "must seek to avoid an interpretation that leads to an absurd result"); *see also* Ex. C to Pet. Nor would it be consistent with the purposes of Amendment Y to conclude that local elected officials may address those splits on their own, without public consultation or affirmation from this Court.

It is also conceivable a situation could arise in which an area is "omitted" from a redistricting plan, § 2-1-106(1), or "included in two or

more congressional districts," § 2-1-106(2). And there would likely be no way for election officials to raise and address those errors if the Court accepts the Commission's theory that § 2-1-106(2) is unconstitutional.

Finally, if § 2-1-106 is unconstitutional, then by analogy so is the identical provision arising in the legislative context. *See* § 2-2-507. And, of course, the likelihood that split residential parcels will arise in a map of Colorado's 100 legislative districts far outstrip those in the final congressional district map. Yet the Colorado Independent Legislative Redistricting Commission endorsed and approved of the vast majority of the Secretary's proposed adjustments, only flagging one that it felt deviated from the Commission's goals and intent.

Such an absurd result is plainly contrary to the purposes of Amendments Y and Z, not to mention unlawful. To avoid these absurd results, the Court should conclude that § 2-1-106(3) operates in harmony with Amendment Y.

III. This Court is authorized and qualified to assess justifications for deviations from precise mathematical population equality, and the Secretary's proposals are justified.

A. The Secretary's proposed adjustments satisfy the equal population requirement.

Amendment Y's equal population requirement, enshrined at Article V, § 44.3(1)(a), reflects and incorporates the U.S. Constitution's one-person, one-vote standard. As interpreted by the U.S. Supreme Court, that standard requires "that 'as nearly as practicable one man's vote in a congressional election is to be worth as much as another's.'" *Tennant v. Jefferson Cty. Comm'n*, 567 U.S. 758, 759 (2012) (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7–8 (1964)). It expressly "does not require that congressional districts be drawn with 'precise mathematical equality,' but instead that the State justify population differences between districts that could have been avoided by a good-faith effort to achieve absolute equality.'" *Tennant*, 567 U.S. at 759 (quoting *Karcher v. Daggett*, 462 U.S. 725, 730 (1983)).

This inquiry sets up a two-step process. First, courts ask whether a congressional map's population deviations "could practically be avoided." *Karcher*, 462 U.S. at 734. Here, the maps finally approved by this Court, established that such deviations could be avoided.

Thus, the inquiry shifts to *Karcher*'s second step, which asks whether the State can "'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Tennant*, 567 U.S. at 760 (quoting *Karcher*, 462 U.S. at 741, 740). This inquiry is a "'flexible' one, which 'depends on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely.'" *Tennant*, 567 U.S. at 760 (quoting *Karcher*, 462 U.S. 741). The Secretary's proposals, which result in a .018% deviation between the largest and smallest districts, satisfy this standard.

First, the proposed adjustments are necessary to achieve a legitimate interest: congressional boundaries that do not bisect residential parcels and, in some instances, residences themselves.

Congressional elections do not occur in courtrooms, boardrooms, or GIS databases. They are managed on the ground by dedicated election officials and civil servants who must translate maps drawn by software into manageable precincts. *See* Shellman Decl. ¶ 16. Following the Commission's admirable but chaotic rush to establish congressional maps last year, those officials identified nearly 250 instances of congressional and legislative boundaries that split residential parcels in ways that would challenge successful election administration. Working with the Secretary, those officials whittled that list down to just six instances in the congressional maps that merited this Court's attention.

Second, although the Commission repeatedly claims that the proposed adjustments would "alter" its final proposal, the Secretary's Petition actually—and importantly—preserves the overall structure of

the map approved by the Commission. And that preservation, while still avoiding split residential parcels, further justifies the minor deviation.

In Amendment Y, Colorado voters expressed a clear preference that their congressional maps be drawn by an independent commission. *See In re Interrogatories on S.B. 21-247*, 2021 CO 37, ¶¶ 42–49. And the maps proposed by the Commission reflect its independent and careful consideration of the relevant redistricting criteria.

Once that consideration coalesces into a map that is approved by this Court, state and local election officials begin the work of implementing it in their respective districts. As they do, challenges arise, like split residential parcels. The Petition tries to address those challenges without disruption to the intent and structure of the adopted map. Thus, if the Court were to approve the Secretary's proposals, the "plan, as a whole," *Karcher*, 462 U.S. 741, would reflect the State's simultaneous interests in independent commissions and intact residential parcels. It would therefore pass muster, in light of its de minimis population deviations, under *Karcher*'s "flexible" standard.

B. The Commission's counterarguments are unavailing.

The Commission's reasons why the Petition does not pass statutory or constitutional muster are without merit.

First, the Commission contends that it and it alone is responsible for assessing justifications from precise mathematical population equality between districts. Resp. Br. at 20. In the Commission's view, neither the Secretary, nor this Court, may consider any justifications for deviations from population equality that the Commission did not expressly identify.

On its face, § 2-1-106(3) not only authorizes, but requires the Secretary to determine if an adjustment "would result in a violation" of the equal population principle. § 2-1-106(3)(a)(III). If the Secretary believes that it does, the Secretary may not propose that adjustment.

If the Secretary concludes that the proposal satisfies the equal population principle, and submits it to this Court, this Court is again required to conduct its own independent assessment. § 2-1-106(3)(b). It must determine whether the suggested assignments "satisfy the criteria

established in subsection (3)(a)," including whether a proposal would "result in a violation" of the equal population principle. *Id.*

If, as the Commission argues, it "alone has authority to consider" population deviations, Resp. Br. at 20, both of these statutory steps are superfluous. *But see Elder v. Williams*, 2020 CO 88, ¶ 18 ("[W]e avoid constructions that would render any words or phrases superfluous or that would lead to illogical or absurd results.").

Contrary to the Commission's interpretation, § 2-1-106(3) authorizes both the Secretary and the Court to independently assess any justifications for deviations from precise mathematical population equality. Thus, this argument merges with the Commission's broader attack on § 2-1-106(3)'s constitutionality.

Second, the Commission suggests that the Secretary's requests are expressly prohibited by § 2-1-106(3)(a)(III) because the statutory text establishes that "equal population is given higher priority than avoiding parcel splits." Resp. Br. at 22. But that's incorrect. Under § 2-1-106, the equal population *principle*—defined as a "good-faith effort to

achieve precise mathematical population equality . . . justifying each variance as required by the constitution of the United States"—is given a higher priority than avoiding parcel splits. *See* § 2-1-106(3)(a)(III); Colo. Const. art. V, § 44.3(1)(a). That's different than precise mathematical equality itself being given such priority.

To be sure, the Commission chose to achieve precise mathematical population equality between districts. *See* Resp. Br. at 20 n.2. And it was willing to draw lines directly through residences in order to do so. *See, e.g.*, Ex. C to Pet.

But neither the Colorado nor U.S. Constitution required that decision. In fact, the U.S. Constitution explicitly "does *not* require that congressional districts be drawn with 'precise mathematical equality[.]'" *Tennant*, 567 U.S. at 759. It only requires that states "justify population differences between districts that could have been avoided by 'a good-faith effort to achieve absolute equality.'" *Id.* (quoting *Karcher*, 462 U.S. at 730).

Amendment Y, and through it § 2-1-106, adopted and incorporated this framework. It requires a "good-faith" effort to achieve precise population equality. Colo. Const. art. V, § 44.3(1)(a). But it goes on to assume there would be instances where such equality was impractical or unwise, and required that such deviations be justified "as required by the constitution of the United States." *Id.*

Under § 2-1-106(3)(a)(III), the Secretary's proposal must not "result in a *violation* of section 44.3(1)(a) of article V of the state constitution based upon the last national census." (emphasis added). A "violation" of that section would require there to be no justification for any proposed variance. As explained above, the State's simultaneous interests in independent commissions and intact residential parcels justify the minor deviation proposed in the Secretary's Petition.

Of course, this Court may disagree. If it does, it shall deny the proposed adjustments. § 2-1-106(3)(b). But there is nothing in § 2-1-106 that suggests split residential parcels do not justify populations deviations. *Contra* Resp. Br. at 22. Instead, the statute tasks the

Secretary, and ultimately the Court, with determining whether population deviations that result from addressing split residential parcels are justified.

IV. The Court's inherent authority allows it to make common-sense adjustments to the maps it previously approved.

In addition to the express authority conferred under § 2-1-106(3)(b), the Court is also vested with inherent authority to "make its lawful actions effective," and to exercise "the powers reasonably required to act as an efficient court." *Laleh v. Johnson*, 2017 CO 93, ¶ 21 (quotations omitted). "The absence of a statute or constitutional provision which specifically . . . spells out standards for a decision will not preclude exercise of a court's jurisdiction." *Marks v. Gessler*, 2013 COA 115, ¶ 71 (quoting *In re A.W.*, 637 P.2d 366, 373 (Colo. 1981)).

In November, this Court approved the Commission's proposed Final Plan and directed the Commission to file the final district maps with the Secretary. *In re Colo. Indep. Cong. Redistricting Comm'n*, 2021 CO 73, ¶ 91. Having done so, the Court now has the inherent authority

to make technical adjustments to its final district maps in the pursuit of justice. *See People v. Mollaun*, 194 P.3d 411, 416 (Colo. App. 2008) ("A court has inherent authority to use all powers reasonably required to protect its ability to function efficiently and to administer justice.").

In 2012, the district court that adopted a congressional map apparently used this authority to address split residential parcels even absent authorizing legislation. *See Moreno v. Gessler*, Order, Case No. 11CV3461 (Oct. 9, 2012). Here, the Court should do the same not only to address split residential parcels, but also the voter secrecy concerns raised by Boulder County. Particularly given that no party has objected to the proposed adjustment in Exhibit K, the Court should exercise its inherent authority to protect voter secrecy and anonymity by approving the proposal. *See* Resp. Br. at 34.

CONCLUSION

The Secretary respectfully requests that the Court approve the proposed adjustments included in the Secretary's Petition.

Respectfully submitted on this 10th day of March 2022.

PHILIP J. WEISER
Attorney General

/s/ Peter G. Baumann
LEEANN MORRILL, 38742*
First Assistant Attorney General
PETER G. BAUMANN, 51620*
Assistant Attorney General
Public Officials Unit
State Services Section
Attorneys for Jena Griswold, Colorado Secretary of State
*Counsel of Record

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 10th day of March 2022, a true and correct copy of the forgoing **THE SECRETARY OF STATE'S REPLY IN SUPPORT OF PETITION TO ADJUST BORDERS BETWEEN CONGRESSIONAL DISTRICTS** was served via the Court Electronic Filing System, upon all counsel who have entered an appearance at the time of the filing.

s/Peter G. Baumann

DATE FILED: March 10, 2022 10:45 PM

COLORADO SUPREME COURT 2 East 14th Avenue Denver, CO 80203	
Original Proceeding Pursuant to § 2-1-106(3)(b), C.R.S. In re: Proposed Changes to Borders Between Congressional Districts	
Attorneys for the Colorado Secretary of State PHILIP J. WEISER, Attorney General LEEANN MORRILL, 38742 First Assistant Attorney General* PETER G. BAUMANN, 51620 Campaign Finance Enforcement Fellow* Ralph L. Carr Colorado Judicial Center 1300 Broadway, 6th Floor Denver, CO 80203 Telephone: (720) 508-6152 FAX: (720) 508-6041 E-Mail: leeann.morrill@coag.gov peter.baumann@coag.gov *Counsel of Record	▲ **COURT USE ONLY** ▲ Case No. 2022SA27

DECLARTION OF DWIGHT SHELLMAN

I, Dwight Shellman, declare as follows:

1. I am the County Regulation and Support Manager of the Elections Division of the Colorado Department of State.

2. In my role, I oversee and support the activities and operations of the county clerks and election staff members of Colorado's

sixty-four counties, as they plan and prepare for and conduct elections in compliance with state and federal laws. Before joining the Secretary of State's office in 2013, I served as the Elections Manager of Pitkin County from 2010–2013. In that role I was primarily responsible for conducting all county elections in compliance with federal and state statutes, and performing the work necessary to complete the redistricting process at the county level following the 2010 decennial census.

3. The statements in this declaration are based on my own personal knowledge, including information gathered by employees of the Secretary of State's Office.

4. I or a member of my team host weekly County Support Calls with all county clerks and election staff who want to participate. The purpose of the weekly calls is to update counties on recent developments in election administration (such as forthcoming administrative rules or revisions, legislation enacted during the legislative session, etc.) and often to review a substantive topic in detail (such as clerk and recorder

responsibilities in coordinated elections, ballot access requirements for candidates for county office, ballot layout, etc.).

5. On the December 6, 2021 weekly call, I advised all counties that had not already done so to download the shapefiles for the new congressional and state legislative districts under the finally approved plans of redistricting, and to work with their GIS professionals to re-configure their precinct boundaries to conform to the new district boundaries and other statutory requirements, so that they could propose and obtain approval of modified precincts to and from their boards of county commissioners by the statutory deadline of January 30, 2022.

6. Also on the December 6th County Support Call, I identified by name and informed the 21 counties that contained more than one district of each type under the finally approved plans that my team would send a survey requesting their proposals for technical district boundary adjustments based on the three types of anomalies specified in §§ 2-1-106 and 2-2-507 C.R.S. (2021): (a) areas of the county entirely omitted from one or more of the three types of districts ("omitted

areas"); areas of the county included in more than one district of the same type ("duplicated areas"); and (c) congressional and state legislative district boundaries that bisected residential parcels ("split parcels"). I also advised the 21 counties of the types of district boundary adjustments that § 2-1-106 authorized the Secretary of State to include in a Supreme Court petition, and the statutory limitations and restrictions that applied to district boundary adjustments.

7. I did not include this topic in an earlier weekly call because county election staff and staff members of the Election Division of the Secretary of State's Office were conducting, auditing, canvassing, and in some cases recounting, the November 2, 2021 Coordinated Election, until approximately December 7, 2021 (the deadline for counties to complete automatic recounts).

8. On December 14, 2021, I sent the survey by email to the clerk and recorder and principal election deputy of all 64 counties, with instructions on how to complete the survey and the information they needed to provide.

9. Although most of the affected counties fully responded to the survey by December 31, 2021, several submitted proposals into the second week of January 2022. Overall, 14 counties submitted a total of 242 proposed district boundary adjustments, all of which involved split residential parcels. No county submitted a boundary adjustment proposal based on omitted or duplicated areas.

10. I and two members of my team assigned each separate proposal an internal tracking number and name, and then independently evaluated or verified the following items:

a. First, we verified from county assessor records whether each boundary adjustment proposal involved a residential parcel of real property. We eliminated from further consideration any proposal involving a parcel that was not residential in nature.

b. Second, we assessed whether each proposal strictly or substantially complied with the statutory requirements for district detachments and assignments set forth in §§ 2-1-106 and 2-2-507. We called to our supervisor's

attention proposals that did not strictly comply but in our view substantially complied with all applicable legal requirements.

c. Third, I evaluated each proposal to determine if the county clerk could nevertheless assign voters who resided on the split parcels to the proper precinct and districts, notwithstanding the fact that the district line bisected the parcel. This third assessment was based on my training and experience in performing that work at the county level in the statewide voter registration database.

11. Based on the analysis and recommendations of my team, the Secretary ultimately directed the Attorney General's Office to include in the appropriate petition six proposed congressional boundary adjustments, and 62 legislative boundary adjustments.

12. District boundaries that split residential parcels present serious election administration problems for several reasons, all of which stem from a district line bisecting a residential parcel in manner

that makes it difficult or impossible for county clerks to assign the parcel's street address to the correct precinct and districts:

a. First, after each redistricting cycle, county clerks must propose new precinct boundaries for approval and adoption by the boards of county commissioners. A precinct may contain one and only one congressional, senate and house district. §§ 1-5-101(1), 1-5-101.5, C.R.S. Therefore, precinct boundaries cannot overlap another district boundary.

b. Second, in establishing or adjusting precinct boundaries, county clerks must consider the statutory factors listed in §§ 1-5-101(5), C.R.S. The two critical factors are a) precinct boundaries cannot overlap congressional and legislative district boundaries, and b) no precinct may contain more than 1,500 active voters, or 2,000 active voters with board of county commissioner approval.

c. A district boundary that splits a residential parcel often makes it difficult or impossible for the county clerk to

assign the street address associated with the residential parcel to the correct precinct, and ultimately to the correct congressional and legislative districts. If a county clerk unwittingly assigns a residence address to the incorrect precinct and districts, the voter registered at the address will receive the incorrect ballot style, which creates numerous downstream threats to the integrity of any election:

i. An incorrect ballot style will either omit races and issues the voter is eligible to vote, or include ballot contests the voter is not eligible to vote.

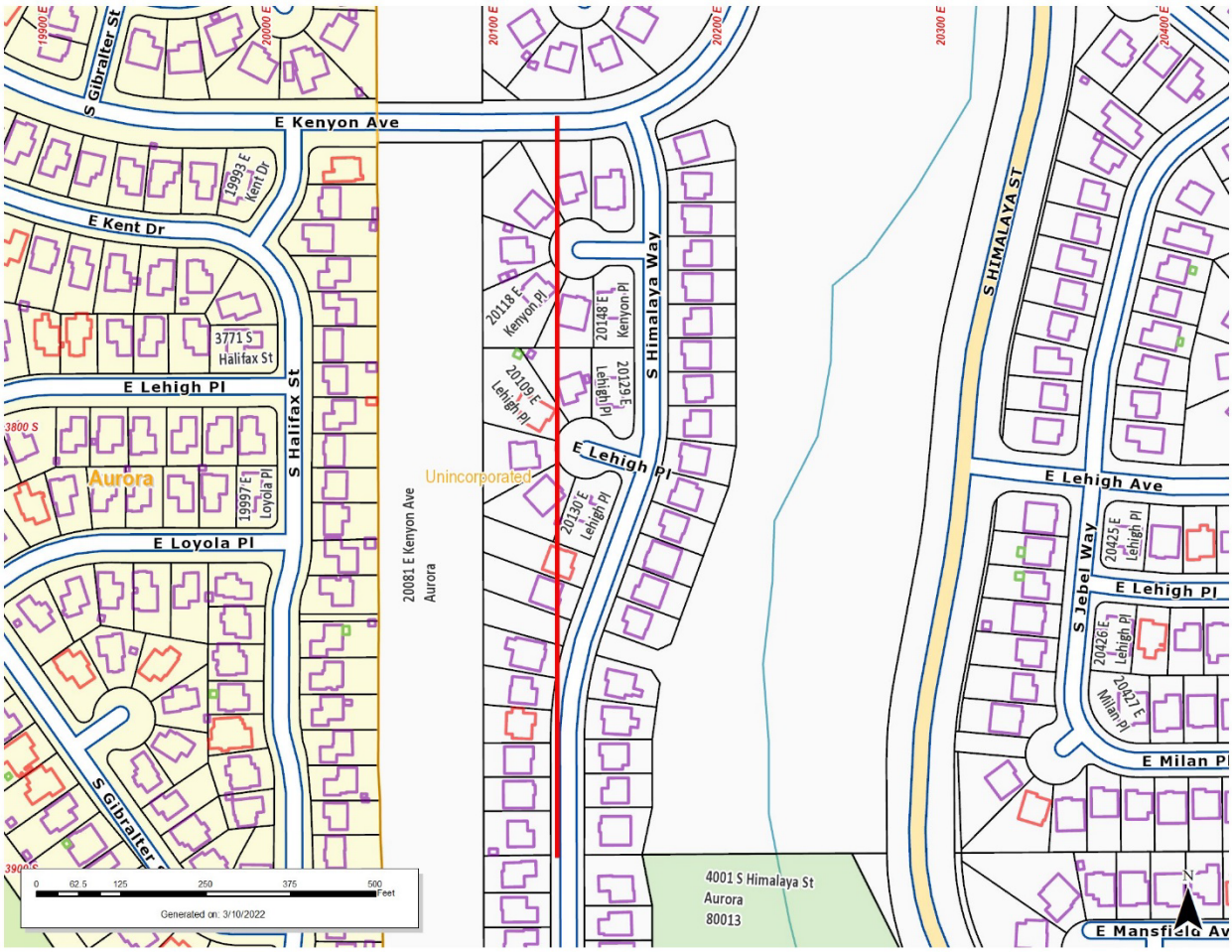
ii. If voters cast ballots on incorrect precinct ballot styles, the votes on those ballots will be reported in precincts other than the one in which they reside and are eligible to vote. By definition, they also will be voting in at least one incorrect congressional or state legislative races, and possibly all three.

d. Candidates for state legislative offices must reside in their districts for at least one year before their election. If a county clerk assigns an address associated with a split parcel to the incorrect precinct and districts, the Secretary of State may unwittingly certify individuals who are not legally eligible to hold the offices they seek as candidates for the ballot. For ballot certification purposes, the Secretary of State must rely on the precinct and district assignments made by county clerks and recorders.

13. At a minimum, a county clerk must empirically determine which side of a district boundary a residence is located on. This is a very binary inquiry – the answer must be 0 or 1, not "maybe."

14. Exhibit C to the Secretary's Petition depicts a situation in which that fundamental determination cannot be made, by the county clerk or any other state or local executive branch agency. In Exhibit C, the finally approved CD4-6 boundary Arapahoe County not only splits a number of contiguous residential parcels, it literally splits residences situated on several of those parcels. This image overlays the county

GIS department's structures layer onto the GIS map attached to the Secretary's Petition as Exhibit C:



15. Exhibits GG and HH to the legislative district Petition in 2022SA28 depict the same situation in the case of a legislative district boundary. The HD54-55 boundary in Mesa County splits the homes of registered voters.

16. The examples above are extreme cases, and § 2-1-106 obviously does not require a showing that a district boundary splits both the parcel and the residence. But these district boundary anomalies arise because the independent commissions and county clerks rely on different data sets to discharge their very different duties. The independent commissions work with census block geographies and population data published by the United States Census Bureau. First, like any other data compiled and created by human beings, census block geographies are imperfect and frequently wrong. For example, census block boundaries are supposed to align exactly with county, municipal and school district boundaries. The exhibits submitted in support of the petitions contain numerous examples of district boundaries that split residential parcels precisely because the census block boundary does not follow one or more of those political subdivision boundaries. Second, county clerks must deal with registered voters (a subset of total population) who reside at residential street addresses, because the location of their residence determines their eligibility to vote on particular ballot contests, and to run as candidates for most elective

offices. The statewide voter registration system does not now and has never supported geo-functional capabilities. In order to identify all residence addresses within a particular census block, county GIS departments must first geolocate every residential address in the county and create street address shapefile or layer for use in their GIS databases. Street addresses and ranges are not embedded in the census block geography files issued by the Census Bureau and used by independent commission staff and members, and are in fact created by county GIS departments.

17. No Colorado law authorizes county clerks, the Secretary of State, or any other state or local executive branch agency, to make binding determinations of the districts that particular residences are located in. The Supreme Court is the only institution authorized to adjust a district line in way that allows county clerks to do their jobs. Only the Supreme Court has the authority to make that determination.

18. County clerks did not have any meaningful opportunity to raise these issues during the commission's public meetings or deliberations. The work counties put in to identify split residential

parcels is extremely granular, and requires substantial time and support of the county's GIS specialists. The GIS specialists must load into the county's GIS databases the census block and district boundary shapefiles, and overlay them with precinct, street address and assessor parcel shapefiles or layers, to find the district boundaries the bisect residential parcels. That work can only be done when the lines are finally established, and not during the commission's final meeting in which numerous different congressional maps were reviewed and considered until the meeting concluded in the wee hours of the next morning. The Secretary of State received 242 proposed boundary adjustments when the lines were finally established. It is simply not reasonable or feasible for county clerks to do the work necessary to identify district boundary anomalies for 10 or 20 alternative hypothetical plans of redistricting on a real-time basis during the commission's final meeting.

I declare under penalty of perjury under the law of Colorado that the foregoing is true and correct.

Executed on this 10 day of March, 2022 in Denver, Colorado.

Dwight Shellman